

Title:

# **On Power Check (China)**

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## **ABSTRACT**

The central idea of this study is to establish a principle of Power Check. It identifies a need to reject the form of power totality in a socialist state like China, and affirms a necessity to keep state power checked by the means of law. To this end, the Constitution of the People's Republic of China [PRC] should play a major role in providing both the principle and the legal framework for imposing limits and mutual checks on the state apparatus as public power. However, due to the current totality of power structure, the law lacks the independence and authority required for this task. There is therefore a need for a structural change through the Constitution.

This study takes a position that there is no justification for such a power totality in Marx's vision, and argues that contrary to some common beliefs, it is in fact a serious abuse of Marxist basic democratic values and the principle of people's sovereign over any political parties. It is therefore a betrayal of the purpose and the principle of a Marxist revolution to legitimize such a power totality, having been rejected by Marx and Engels as feudal power politicalization. The consequence of this was a total submission of the people to an absolute power above them, which had total control over every aspect of society, from law-making, law keeping to controlling the very lives and thoughts of the citizens as individuals. Yet at the same time, the power holders were immune from the force and justice of the law, with a type of legal privilege that is traditionally associated with an arbitrary feudal power structure.

The study then argues that this problem of total power structure has persisted even after the adoption of the Rule of Law as a national policy. In fact, law has become supplementary, without any authority of its own. This situation must change if China is to have inherent stability, to give people greater protection, some choice in the state officials who are their representatives and greater scrutiny over officials' abuse of public posts.

This position is based on the belief that no state power should be free of constraints – to rule by the virtue of its own authority without check. Such a path leads to arbitrary ruling and inherent instability because such power cannot correct its own corruption without a system of multi-leveled checks and balances. This historic advancement in power check from the previous feudal system should apply to all political ideologies and classes, with socialism being no exception. Law, as a legal forum, should have an important role to play in this power check process.

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The study then examines the Constitution of the PRC itself, to see how it can be used to implement this principle and finally it will make some proposals to combat the problem of power abuse.

This paper is divided into four parts with a summary at the end of each part.

Part One identifies the problem of power totality and its relationship with law and with the people. It first identifies that it is a problem because it contradicts the basic values in Marx's ideology and his vision for a civil society after a revolution. Marx rejects the total power structure and affirms a principle of state power being under the people's authority and the law. It recognizes that the problem is also based on cultural values and other factors beyond the law.

Part Two examines how the legitimacy of this power totality has been developed in some socialist theories, in the name of socialist legality; and how some of Marx's basic concepts were abused as a means to justify this power totality. The reality of mass movements has confirmed, rather than rejecting, this feudal power structure. This problem has persisted to the present day, in spite of the official adoption of the Rule of Law in China.

Part Three will examine the role that law can play in this challenge. It is based on the legal philosophy that power must be checked as a fundamental principle in a civil society. Law can facilitate the checks and balances of state power in due process. China should establish this principle of power check in the belief that public power should be under public scrutiny and that no political power should be left unchecked or above the law. To this end, an independent judiciary is essential for the task – to keep the power in check and to protect the people.

Part Four examines the Constitution as a framework for such a power check mechanism. It argues that the Constitution in China has an important role to play. It should endorse the power check in principle and provide structural changes to enhance the public supervision of state agencies and public officials. Finally it proposes to expose corrupt officials and power abuse by an independent and legally binding office, directly under the Constitution and open to the public as the first step in breaking this totality. As stated earlier, the process is gradual but the principle should not be compromised.

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**This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no materials previously published or written by another person except where due reference is made in the thesis itself.**



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This study is dedicated to the pioneers of modern revolution in China who have sacrificed their lives to the revolutionary ideals and the spirit of humanity.

[illegible]

## INTRODUCTION

This chapter is concerned with the question of state power, how it should be used in theory, and how it has been used in reality. The problem is raised because it is widely acknowledged that power can be easily abused when it is not constrained by law, and is concentrated in the hands of a few as individuals or as the leaders of a ruling party. It is a concern because this power, with its claimed legitimacy, is not constrained as a principle, and is not checked or sanctioned by law when it is abused. In other words, the problem identified here is a power held by men who are unaccountable to the rule of law and the legitimacy of ordaining authority by virtue of one's own power as a ruler. This problem of power concentration is not new. It was officially recognized by Chinese leaders such as Deng, who said: 'First of all, it is not good to have an over-concentration of power. It hinders the practice of socialist democracy and of the Party's democratic centralism... Over-concentration of power is liable to give rise to arbitrary rule by individuals at the expense of collective leadership, and it is an important cause of bureaucracy under the present circumstances' (Deng, 1980, p. 303).

This power was further consolidated by virtue of its own authority without being subjected to the will of the people, thus gaining an unquestionable supremacy which could not co-exist with contrary ideas or organizations. It has the power to imprison its opponents, as it has the privilege of being the sole truth holder and cannot be challenged. The problem with this kind of authority is that it places itself above the society and above the law and converts any opposition to its own views through means of persuasion – often involving criminal offences. In this situation people's basic rights and their livelihood are seriously threatened or violated. As a result it leaves no room for alternative views and is a serious violation of the people's general rights to freedom.

People need protection against arbitrary power, and they need it by an authority such as the law that overrules the arbitrary power when necessary. However, the problem identified in Part One shows that law itself has no such authority under the spell of a totalized power structure. Kant once said that 'law is the totality of the conditions under which the arbitrary will of one can co-exist with the arbitrary preference of another according to the general law of freedom', yet a state under a power totality suggests that contrary to Kant's 'general law of freedom', there is another kind of monopoly of the conditions, which justifies a totality of power structure (Curzon, 1979, p. 75).

To many, this can be justified by the theory of Marxism, which is still the main doctrine of the People's Republic of China. However, as will be discussed in the next chapter, Marx never envisioned a workers' state with an unconstrained power monopoly. His theory of dictatorship of the proletariat, although being used as a justification for the power monopoly, was never intended to endorse a power dictated state without legal limitation by the people's will expressed in the Constitution. In other words, Marx's theory in this regard has been seriously abused, and his belief in power limited by law and allowing free expression, was largely discarded in favour of a total control by the ruling party.

Some see that the power monopoly suppressed or sidelined the role in which it casts the law in relation to the state and the protection of individuals. Even today, the principle of the rule of law does not impose any restraints on the rulers (Potter, 1991). Others see law deriving its 'validity' from its cultural uniqueness in order to reject other views. For example, Tumanov, writing in 1969, believed that Soviet jurisprudence had a unique character with nothing in common with western legal philosophy and that Marxist ideology cannot coexist with western legal philosophy (Curzon, op. cit., p. 179). The current Chinese slogan of 'Socialism with Chinese characteristics' echoed this concept of legal validity. However, this concept of unique characteristics fails to explain why ordinary people are left unprotected and why people must be content with fewer basic rights in a socialist state. On the other hand, a socialist state is supposedly, as Vyshinsky claimed, 'the most advanced class' of all, which would include the concept of law being defined as a right for all. In Kant's words, 'law carries with it the right to coerce him who seeks to interfere with it' (ibid, p. 75). This should include a person's liberty and freedom, which must be protected.

The problem is that power monopoly, by its nature, is opposed to people's basic rights and is unable to protect these rights. The purpose of identifying the problem of power monopoly is to prevent the accumulation of power in a few hands with the authority of man unrestricted by law. The fact that many political scientists and lawyers in China have been removed from their posts due to their endorsement of Western liberalism (Peerenboom 2002, p. 64) raises the question: Must a person's freedom as a constitutional right be the price to pay for the rule of the state? Does the state or a leadership have the power to contravene the basic rights of the citizens without being sanctioned by law?

This concern for the state power in China in particular, has risen from a historic event of the Great Proletarian Cultural Revolution in China in the 1960s and 1970s; and beyond that, from the more recent debates about the rule by law and the rule of law by Chinese jurists (ibid, p. 64). State power was then concentrated in the hands of a few executives, without any conditions or constraints by law or by the will of the people. This concentrated power was supported by its political network, as seen in the case of the 'Gang of Four', and by a political structure that totalized this power.

This study originated as a reflection on the Cultural Revolution in China in the 1960s, following the author's personal experience of it, and has developed into a search for the cause and a solution for this historic episode that occurred some forty years ago. As a result of this search, the central theme that emerged is a concern with the use of the state power. Questions like: 'Who gave the authority of this power?' and 'Can this ruling power be checked or limited by itself?' have widened the search in terms of the principle of power monopoly, and power separation; the structure and management of state officials; and the consequences of a total power state.

Firstly, at a principle level, this study is of the view that the authority of ordaining power should rest with the people through their representatives and not in the hands of any individuals or groups. This principle of power check should be part of the Constitution, which has supremacy over the dominance of any political parties.

Secondly, at a structural level, this study argues that a power totality as a form of monopoly should be rejected. This is because it is dangerous and repressive in denying people's basic rights expressed in the Constitution; and it is regressive in maintaining a feudal style of ruling. After a study of the history of this power monopoly within the framework of Marxist theories, I argue that this power totality cannot be justified. I will instead point out that the practice of this power totality is in fact a gross abuse of the original intent and basic values of Marxism. This is because the power totality has stripped off the essential elements of Marx's vision for a new civil and democratic state of working people, in which people must uphold their authority over the state executives; and be entitled to the democratic values and opinions by law. In other words, it is the will of people that has the ordaining power and not the ruling party or the government.

This power structure entails another problem, the state officialdom. How these executives should be appointed and managed is a clear indicator of how the state power is used or abused. This study takes the position that these public officials should be appointed by representatives of the people, but not by the ruling class. The state officialdom has yet another dimension of cultural inheritance. It manifested itself negatively in a form of legal privilege and political networking and has resulted in a tradition of mutual protection with or without the norms of law. As a product of the power totality, these state officials are both lawmakers and law-breakers, without legal consequences. The use of thugs in persecutions is but one example of the kind of criminal activities that the society has tolerated up to the present day, because of this legal culture of power monopoly. This feudalistic legacy has presented enormous problems and challenges to law and beyond law.

Thirdly, at a consequential level, the study will demonstrate that both in the past and at the present, people's basic livelihood, work choices, freedom of movement, opinions and every other aspects of life were ruthlessly crushed by those power careerists who took the law into their own hands without any legal penalties. This experience indicated that unless we reject the power totality in principle and in the structure, ordinary people will have no real legal protection and may be persecuted under any political ideology as the power holders see fit. Moreover, there would be no legal forum on which people can challenge this arbitrary power and voice their demands without being condemned or imprisoned. The obvious imbalance of having too much power at the disposal of the ruling elite and not having enough power for one's basic rights such as the right for a voice to be heard, or for a fair hearing or appeal, is a striking indicator of how far a state power can betray its people and change its 'colours' from what it claimed to be. It also shows that power cannot correct itself without an independent and separate mechanism of law.

## **BACKGROUND TO THIS STUDY**

This study is based on the personal observations and experience of the event of the Cultural Revolution, which the Chinese experienced in the 1960s. This period has become the focus of this study, for the impact on the people was extremely painful, and yet the official account of it is extremely brief and its memoirs have been largely suppressed in the media, even forty years on. But more importantly, it raises many questions such as the

legitimate use of state power when it turns into arbitrary power to suppress ordinary people and the question of the abuse of Marxist theories. To my knowledge this has not been systematically investigated or publicly debated in China. Four decades is an instant in history but a long time in a person's life. For those who experienced it, the so-called the Great Proletarian Cultural Revolution in the 1960s and 1970s, weighs heavily in the memory. Citizens and families were profoundly and irreversibly affected by this occurrence, regardless of their social and political rankings, their normal status in the society, in the ruling party, or in the armed forces. To write about the event is to recall the lost lives of thousands of people in every corner of China, as one of the most dramatic and massive persecutions in the last century, and a most significant episode in China.

There has been a steady and substantial growth in legal studies in Europe and in China, in the role of state and law, from a perspective of Marxist theories and practice. The instrumental role of law is widely acknowledged in assisting state dominance, regardless of which political system it may be. There are also critical views of law in both capitalist and socialist states. What makes the rule of law debatable in a country like China, is the fact that it has a dual legality of the state: one role is for the ruling party, and the other serves the law.

'Dual legality' said Amire Arjomand's 'Law, political reconstruction and constitutional politics' marked an 'ideological constitution-making of the intervening era' (2003, pp.7-32). Following the collapse of Communism in 1989 in Soviet and other former communist states in Europe, the article put the constitutional reconstruction in an historical perspective. The 'new constitutionalism' is considered the novel feature of the post-1989 transition to democracy, as contrasted with the old constitutionalism and the classic idea of rule of law. The role of constitutional courts as the typical institution of the new constitutionalism is highlighted. The concept of 'constitutional politics' is developed to focus on the process of political reconstruction, and the variation in its interface with the law is considered ranging from the 'judicialization of politics' to the 'politicization of the judiciary'. It considers the extent to which the powers of the state executives enjoy a situation of 'dual legality' and the contribution of the legal institutions in the transition to democracy. In the case of China, the similarity is apparent in the 'dual legality' of the party leadership over the state on one hand, and the judiciary and the rule of law on the other. The difference is that a constitutional court is yet to become a reality in the Chinese legal

system, and the Chinese judiciary is not independent enough to keep the state power balanced by legal and structural supervision and public scrutiny.

## **THEORETICAL BASIS OF THE RESEARCH**

There has been a steady and substantial growth in legal studies in Europe and in China, in the role of state and law, but few from a perspective of Marxist theories and practice. The instrumental role of law is widely acknowledged in assisting state dominance, regardless of which political system it may be. There are critical views of law in both capitalist and socialist states. What makes the rule of law debatable in a country like China, is the fact that it has a dual legality of the state: one rule is for the ruling party, and the other serves the law.

The main theoretical basis of this study is Marx's theory of class dictatorship, which Lenin developed into a state theory with power concentrated in one party. Law has played a secondary role in supporting and justifying this monopoly of power up to the collapse of the former communist nations in the late 1980s and the official adoption of the rule of law in China. The need to abandon this monopoly of power, with the use of the law, can be argued from many aspects. Law now plays a new role in reconstructing the power balance within the legal framework of the Constitution. Although law has existed in China since ancient times, the notion of governance by law over men with power, is still a relative rarity today. This study sees that, in the case of China, the theory of law is relevant only to the point that the law, in its formation and implementation, can effectively serve to protect people and withstand the power vested in men. In the struggle for law, the rule of law thus entails a change of legal culture and a notion of civil protection. This is a change that goes beyond the legal norms and institutions. It has become a challenge to the power that vetoes the law. Because of this, and because of Chinese history and culture of the rule of man, law as in the 'pure' sense of law in the western legal tradition, has not been given a top priority in this study; instead, it is obliged to challenge the power that hinders the due process of the law, which is more pressing. This study argues that a power totality has abandoned the essence of Marx's theory and that his theory of class struggle and dictatorship has also been abused in reality. It should be made clear that it is the power concentration and power abuse that need to be checked and rejected; but not the Marxist basis.

Apart from Marx's theory of law, other theoretical works include the natural law of human reasoning (T. Aquinas); the rule of law in England (Thomas); the separation of power (Locke and de Montesquieu); constitutional studies (Pan); and constitutional supervision (Lin Feng); Critical legal studies, (Hunter) and Weber's sociology of Law (P Beirne). These are chosen to argue from several aspects that a power totality should be replaced by a principle of power check, regardless of social and political orientations.

## **SIGNIFICANACE OF THIS STUDY**

The significance of this study primarily lies in its focus on the state and the extent to which this power can be misused and justified. It claims, in the context of Marxism and the theory of state by Lenin, that power concentration is legitimate for the interests of the people. It is against a contradictory reality that the claim is examined and rejected. This study rejects the legality of the state and the logicity of power concentration. This study has the potential to clarify the original intent in Marx's vision, and to restore the vision by rejecting its critics in the west and its distortion in China. This has significant implications for state ideology as a form of power abuse within a socialist framework. More importantly, it brings the question of historic stages to light as to whether a feudal power structure can be replaced by economic advancement by means of law; and whether this transition of power by the forum of law is part of a gradual but inevitable process of social and political transformation.

Secondly, it intends to re-orient a study of law in the context of social experience. The purpose of this study is not for the pure pleasure of academic argument; instead, it calls for social responsibility and relevance of the law for the suffering of millions of people over decades in China. It pioneers a comprehensive investigation of an historic event in China, as an example of the loss of this responsibility, and seeks a legal remedy that has practical values for improvement in reality.

Thirdly, this study warns against the dogmatic reading of Marxist theory on revolution and power, which provides the radicals, extremists and the powerful states with visions or aspirations to justify their anti-humanistic actions. The study rejects this arbitrary legality as a criteria for wars.

It is difficult to destroy an old order, but it is even more difficult to create a new and better one in the name of law. This requires a complete break away from the old and arbitrary values. We need to reconstruct the logicity without losing sight of the original intent in Marx's vision. It is clear that the true Marxist vision has never endorsed a power concentration unconstrained by law and the people.

The social context of this study is also significant. Readers of western legal philosophy may easily take it as commonsense to an independent judiciary or a legally bound government with a minimum degree of liberty granted to the members of a civil society. It still presents a serious challenge in a largely rural economy with a vast, less educated population; and it also signifies a fundamental shift of power in a culturally autocratic society like China.

## LIMITATIONS OF THE STUDY

There are several limitations of this study. Firstly, the evaluation of Mao's personal effect on China and on the Cultural Revolution is a topic on its own, and deserves a separate study. Although there are books on Mao, such as *Mao – an untold story* by Jung, it merits little academic interest in this study. Secondly, the study of Chinese Constitutional law is both current and topical, and yet this study covers only the aspect of power monopoly and its relation to the law. Although the thesis offers its proposals, it serves to invite a wider public debate on the constitutional issues, rather than giving legal advice. Thirdly, the discussion on the system of government is limited to the concept and method of power constraint by law without investigating further in any detail other parliamentary systems and their possible application to China. Although this study discusses the issue of authority and class privilege, it does not go beyond this scope to other areas such as the disparity of personal income and wealth between the rich and the poor, and the extent of the privilege and benefits which are unaccountable as personal income. Fourthly, this study is explorative due to limited Marxist theories on socialist law after a revolution in USSR. Most literature on Marxism and law is, from various perspectives, written for the capitalist society. Marx himself (although proposed in an outline of future debate on the state structure and law) never fully elaborated his revision and prognosis of law. This is supported by Cain's notation as follows:

Little has been written about Marx' and Engels' approach to law. This is largely because Marx never fully developed his theory of the State although, as Sweezy points out, his original intention as stated in the Preface to the Critique of Political Economy was to discuss 'state, foreign trade, world market' at some length. He died before he could do this. Thus in piecing together 'Marx on law' one is forced to treat sections from different works as additive, as if their central concerns were the same.

Although I cannot claim to know what Marx and Engels really meant, I hope to show at least that their theory of law was highly sophisticated and that it is still useful not only in analyzing and comprehending present day society but also in sparking off ideas dialectically with contemporary theory and in guiding one to fruitful areas of research (Cain, 'The main themes of Marx's and Engels' sociology of law', in Beirne and Quinney, 1982, p. 63).

## ORGANIZATION OF THE STUDY

This paper will be divided into four parts.

Part One will identify power totality as the central issue, and explain why it is a problem. Part Two examines how this problem developed and how Marxist concepts were abused. Part Three examines the role of law in the power check and the need for law as a remedy to the problem. It examines the conditions required for law to be effective, that is, the authority of law by means of an independent judiciary; and points out the nature of change and the need for this structural change based on theories of legal philosophy. Law, as shown in *Magna Carta*, can be positively instrumental in giving people a voice and raising their concerns on one hand, and bringing the highest state ruler, the King, under the law on the other. Both of these essential aspects were achieved by the means of law, a means China clearly needs, to reach the ultimate end of common good and reason.

Part Four explores the legal measures of this challenge within the framework of the Constitution. It examines its current form and problems, and also proposes a new model for further discussion.

## SOURCES

### Primary sources:

The original works of Marx and Engels, Lenin, Mao, and Deng's speech in English and also translations from Chinese and Russian sources. Other extracts of Marx and Engels' work are quoted from Draper's *The State and Revolution*, and Tucker's *The Marx and Engels Reader*. It also includes the original documents of Chinese Constitutions, and archival footage in the documentary video *Morning Sun*, by Ronin Films.

### Secondary sources:

Marx & Engels, Lenin, Stalin and Mao's theory of law and state

Dual legality – constitutional reconstruction (Europe)

Instrumentalist and domination-based (hegemonic view of law)

Autonomous law (the rule of law – Thompson)

Critical Legal Studies

Natural law (Summa theological by Thomas Aquinas)

Weber's sociology of law and power and his observation of oriental society

Constitutional Supervision study (Lin Feng, Li Buyun & He)

Personal accounts include *A Decade of 100 Personalities* – a tape recording compiled by Feng Jicai, a well-known writer in China, a collection of transcripts of the interviews, selected from over 4000 participants of the Cultural Revolution;

Biographic accounts including books by the relatives of the victims such as *The Past is not Gone like Smoke and 24 hours Search for Mother's Suicide Place*; *The Dragon's Pearl* by Phathanothai.

Archival materials include Histories and anecdotes from a record book *The Death Archive of the Cultural Revolution*, and a documentary video, *The Morning Sun* (DVD) from the Archive in the PRC; A comprehensive rural investigation titled *Report of Farmers in China*; a documentary book *The Tiananmen Papers*; personal memoirs; and *The Northern Desert (Beidahuang) Won't Forget This*.

Online sources include SBS TV interviews.

### Case studies:

The nine cases articles are selected from a series published in the *New York Times*, examining the struggle in China over the creation of a modern legal system. They examined flaws in the system, the lack of legal protections in criminal and civil cases, and pressures faced by judges and lawyers who question the system. These articles are available at [nytimes.com/asia](http://nytimes.com/asia). The author Jim Yardley is a leading lawyer in an American law firm in China.

Articles as primary sources on the Cultural Revolution are rather limited, even on its 40<sup>th</sup> anniversary due to restrictions on the media. To this day, Fang's *A Decade of 100 Personalities* still stands as the most substantial and comprehensive compilation of the life stories of that period. Hinton's documentary film *Morning Sun* is included in this study. Other non-Chinese sources such as BBC's documentary on the topic are rare in Australia.

## PART ONE IDENTIFY THE PROBLEM

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## **PART ONE: IDENTIFY THE PROBLEM**

### **Introduction to Part One:**

Part One sets out to identify the main issue of this study. The issue in question is the use of state power – how it should be used in theory, and how it was used in reality. This question is raised, to a large extent, as a review of an historic event in China that saw incredible suffering endured by the people under a state power that claimed to be the servant of people, but enjoyed a monopoly that is ‘with’ and ‘above’ the law. This phenomenon is referred to as ‘Power Totality’ in this study, the definition of which will be given in Chapter 1 of this section. Power totality is a problem for several reasons. There are many theoretical criteria we can use to indicate that a form of power totality is problematic. The first such criterion is Marx’s vision in Marxist theory, which clearly challenges a state power without constraints. The second criterion used in this argument is man’s right to reason and protection. The lack of such protection leads to the next question of law: can law or should law protect people in a socialist state? It is argued that law became a part of the problem rather than the solution, because it lacked the authority required under the system of power totality. There were other factors besides the law which contributed to the debate of power monopoly as an historic under-development of power check and man’s rights, as a cultural concept of authority in a feudal tradition, and as an economic necessity for a centralized government.

Chapter 1 will establish Marx’s vision as the first criterion to rebuke the power totality, because it contradicts the basic democratic values and the objectives of the revolution that Marx envisioned for a post-industrial society. Chapter 2 explains why power totality is a problem, based on man’s reason and dignity. Chapter 3 shows how people suffered under the unlimited power as a result of the problem. Chapter 4 shows how the lack of authority of law becomes part of the problem. Chapter 5 indicates that the problem is beyond the law in a wider and holistic context.

## Chapter 1 What is the Problem?

To explore the issue of power check we first need to examine Marx's position in regard to power check in a civil society after a Marxist revolution. Marxism, as one of the four cardinal principles in China, is important to China both in theory and in practice; and the issue of power check is at the heart of the power use or abuse, envisioned by Marx and Engels for a socialist state after a Marxist revolution. This study will demonstrate that Marx's vision confirms the principle of power check rather than rejecting it. The vision also confirms people's democratic rights and the positive role the law plays in rejecting a feudal style of power structure where power is totalized or concentrated in the hands of a few as rulers or party elites. In this section, the principle of power check will be examined in the light of Marx's vision, and the absence of this check of power is problematic in the use of state power.

### 1.1 Vision – power check as principle

There are three elements in Marx's vision, namely 1) that man should be respected and protected by law; 2) that we need a radical break away from a feudal structure of power – a total power in man; and 3) that state power is to be restricted by the means of law and the constitution of the new state.

Before proceeding to Marx's vision of civil society, we need to clarify the position of law in Marx's theory. Contrary to his many critics, Marx believed that law was needed in society. Even though Marx was an uncompromising critic of existing bourgeois society and law, he insisted, nonetheless, that law is indispensable. As a trained lawyer, Marx engaged in and took the law seriously, especially issues such as parliamentary democracy, voting and elections, suffrage, trials, human right declarations and concepts of rights. He argued political questions also from a 'legal' perspective, as revealed in one of his scripts, an outline for an unpublished book on political questions. It shows an interest in law and the state, which still concerns us today. Marx's original outline for this unpublished work was as follows:

(The italics are used in the original quotation, 1845-)

#### *1. The genetic history of the modern state or the French Revolution*

- The overweening presumptuousness of the political sphere – confusion with the state of antiquity.

Relationship of revolutionaries to civil society.

Duplication of all elements in the domain of civil society and of the state

2. *The Proclamation of the rights of man and the constitution of the state*

- Freedom, equality, and unity.

The sovereignty of the people

3. *The state and civil society.*

4. *The representative state and the Charter*

[program of the British Chartists]

The constitutional representative state,

The democratic representative state.

5. *The separation of powers*

- Legislative and executive power.

6. *The legislative power and the legislative bodies.*

Political clubs

7. *The executive power*

Centralization and hierarchy

Centralization of political civilization

- Federal system and industrialism

State *administration* and local *administration*

8 (a) *Judicial power and law*

8 (b) *Nationality and the people*

9(a) *Political parties.*

9 (b) *Suffrage,*

The struggle for the *abolition* of the state and civil society.

(Draper, 1977, vol.1, p. 187f)

Such an outline speaks to, and arises from what might be called Marx's 'legal imagination' – his jurisprudential vision. I want to, as my first task, explore Marx's vision, addressing the democratic values in it.

Marx sees the people as the legislative body. He wrote of: 'the voters, that is, the people who make the legislative body' (ibid., p. 294). Later, Marx pointed to the Paris Commune's system as a triumph of democratic achievement. This is because the Paris Commune minimized and thoroughly subordinated executive power, placing, for example, the control of the courts, as well as the army in the people. Marx was, however, against the

separation of power, and was in favour of unity of power, with executive and legislative combined (ibid., p. 316).

The danger of power is omnipresent in all systems, whatever kind they may be – political, religious, and legal. Marx realized this danger and dismissed the mere overthrow of rulership by another: ‘The mere overthrow of an oppressive rulership by its (untransformed) victims does not necessarily “transform circumstances” at all’ (Marx and Engels 1891, in *Selected work of Marx and Engels*, 1966, p.426). On the contrary, a common historical pattern has been that of the ‘servant become[ing] master’. One may be even more obnoxious than the traditional ruler – as Marx noted in another connection. Others before Marx had called it ‘the slave on the throne’.

Freedom of expression and in particular a free press is, in Marx’s words, the ‘heart of one concerned with civil society’, and ‘a citizen concerned with the state’ (Marx, cited in Draper op. cit., p. 65). So rights – especially a right to free speech – stood at the core of Marx’s understanding of the law. Freedom of expression is not the only right; there is the right of the people to ‘give themselves a new constitution unconditionally’, ‘for the constitution becomes an illusion as soon as it ceases to be the real expression of the will of the people’ (ibid., p. 92). This was the real meaning of political emancipation (from the old feudal relations) and from the political restraints imposed by a feudal state on man.

Marx never fully discussed his vision of civil society as a specific topic or separate theory as such; but he mentioned it in many places in his writings, such as, *Critique of Hegel’s Philosophy of Right*. Civil society was inaugurated, for Marx, by the French Revolution, which ‘abolished the political character ... it unchained the political spirit. Political emancipation was at the same time the emancipation of civil society from politics ... Feudal society was dissolved into its foundation, into *man*’ (ibid., p. 118-9). A picture or view of civil society begins to emerge here. What does civil society look like?

First, civil society is a ‘rational’ state, involving a just and ethical relationship of harmony among the sectors of society. It is an *ideal* against which existing states are to be measured. ‘The extent to which it “really” is a state depends on its closeness to the ideal.’ It is the ‘great organism in which juridical, ethical, and political freedom has to achieve realization’ (ibid., p. 32). So the law is fundamental to civil society. But what role does this law take? In a worker’s state, Marx expected to see:

The constitution should limit the executive's power;  
The People's Assembly (or Congress) is the sovereign of the people;  
The society has the legal means to protect civic realm;  
The people must have the knowledge and understanding of this equal relationship;  
The people possess the democratic values and protected freedom.  
(Marx 1859, in Draper, vol.1, p. 301)

The second element is to reject the total power structure based on class or party supremacy. After the revolution, the proletariat becomes the ruling class and abolishes the condition for class distinctions, therefore abolishing its own supremacy. This is the principle that all are the same, regardless of class origin as Engels has stated: 'The revolution which modern socialism strives to achieve is, briefly, the victory of the proletariat over the bourgeoisie, and the establishment of a new organization of society by the destruction of all class distinction' (Engels, *On social relations in Russia*, in Tucker, 1978, p.665 ).

Marx noted that in terms of power and state, Feudalism differed from capitalism, in its **totality over people** and the society as a whole. It was marked by a *politicalization* of all aspects of civil society. The French revolution 'abolished the political character ... it unchained the political spirit ... Political emancipation was at the same time the emancipation of civil society from politics. ... Feudal society was dissolved into its foundation, into *man*' (Draper, op. cit., p.118-9).

Marx's point is that by virtue of its ownership, the landowning aristocracy is also the political ruling class *automatically*. This fusion of law, politics and economics under feudalism renders power as the basis of law, and the basis of 'rule of man'. As Draper noted: 'the baron *is* the state, for all in his demesne; the state is not some juridical independent executive committee, which acts on his behalf. *L'etat c'est Lui*. Economic power is political power directly' (ibid., p.118) This is Marx's notion of *politicalization*, which covered all aspects of civil society under feudalism:

The old civil society had a *political* character in a *direct* sense; that is, the elements of civil life, such as ownership or the family or the kind and mode of labour, for example, were elevated into elements in the life of the state, in the form of the manorial system, social estates, and corporations. In this form they determined the relation of the single individual to the *state as a*

*whole*, that is, his *political* relationship, that is, his relationship of separation and exclusion from the other components of society.

(Marx, *On the Jewish Question*, in Tucker, 1978, p.44)

This politicalization also witnessed the disappearance of the divide of one's civil life and political life. So individuals sank into a state of insignificance.

The process of transformation from a feudal society to a modern one involves a change in people's attitudes to authority, and to law. This process needs to eliminate the old servile mentality, a residue of the feudal society. The so-called 'Sheep and Saviours' mentality was opposed to the free will of modern man. People were divided between those whose leaders posed as messiahs and saviours and those who were engaged in seeking a messiah-saviour. 'Marx was especially sensitive to the German pattern that he labeled *obrigkeitliche Sinn*, the mentality submissive to authority on high'. He commented: 'For the German working class the most necessary thing of all is for it to cease conducting its agitation under the by-your-leave of higher authority. Such a bureaucratically schooled race must go through a complete course in "self-help"'. His passing remark is: 'Germans are by nature very submissive, excessively obedient and deferential' (Marx, cited in Draper, op. cit., p. 156).

The same could be said of 20<sup>th</sup> century Chinese. But with a difference – for there, submission to authority is not residual, it is their very mode of being, precisely because they inhabit a sphere that is doubly politicized – as both feudal and socialist. To differentiate this feudal socialism from a modern democratic state, the old power structure will have to be changed by means of a power check that subjects the ruling state organs and executives to the rule of law.

It is clear that the violation of man's dignity and lack of protection for the people are the corollary and the result of a total and totalising power structure, cloaked in the 'legitimacy' of state ideology. This is an abuse of the Marxist theory of dictatorship of the proletariat, as well as an abuse of Lenin's theory of the party as a 'vanguard of the proletariat'. Instead of acting on behalf of the proletariat, the power of 'vanguard' when divorced from the people it claims to protect, ultimately betrays its original purpose for the revolution. This monopoly of power is unable to eliminate its own legal privileges within the law; or to prevent those careerists who seek and maintain their personal power without any commitment to Marxism or to the people. This is a departure from Marx's vision and

the socialist principle of power repositioning with the proletariat. I will argue, therefore, that a counter-measure must be put in place outside of, and in opposition to, the ruling party's own system. This task falls on the Constitution, in spite of some problems with the Constitution itself, in regard to the total power structure, which will be examined in Part Four of this study.

The third element – to limit the power of the state executive – is closely related to the second element, the power structure. History shows that certain levels of state executive are untouchable by law, as contrasted to heavy measures placed on ordinary people. What has emerged here is a 'new' class using their public posts as 'capital' to their benefit, for control over the public resources.

To Marx, it is vitally important to limit executive power. For example, in 1853 he analyzed the provisions in the new Draft Constitutions for Schleswig and Holstein. There he saw the Constitution as a means to curb power abuse, and he believed that one of the major functions of the Constitution was to reduce the state executive's power to a minimum. He advocated every possible means of minimizing the autonomous power of the executive. In 1859, he wrote an analysis of the Hessian Constitution of 1831, which he praised as 'the most liberal fundamental law ever proclaimed in Europe', except for its undemocratic method of electing representatives. The reason for this? 'There is no other Constitution which restrains the powers of the executive within limits so narrow, makes the Administration more dependent on the Legislature, and confides such a supreme control to the judicial benches' (Marx in Draper, op. cit., p. 301).

To Marx and Engels, the role of executives in a modern state is mainly managerial rather than dictatorial. Engels once stated that 'it is the executive which forms the "managing committee" while other state agencies are its arms' and 'the modern state-power is but a committee which manages the common affairs of the whole bourgeois class' (ibid., p. 318). In the *Communist Manifesto*, it is stated that 'the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie' (Tucker, 1978, p. 469).

There will be a process of transformation in the new worker's state after the revolution, in their view, with two conditions: one is that all public posts are elected by universal suffrage, and people have the right to recall these posts and executives at any

time; and the other condition is that all officials are to be paid the same as other workers without privileges. This is to banish careerism and to bind executives to delegates of representative bodies. Marx expressed this view in *The Civil War in France* in these words:

Against this transformation of the state and the organs of the state from servants of society into masters of society – an inevitable transformation in all previous states – the Commune made use of two infallible means. In the first place, it filled all posts – administrative, judicial and educational – by election on the basis of universal suffrage of all concerned, subject to the right of recall at any time by the same electors. And, in the second place, all officials, high or low, were paid only the wages received by other workers. The highest salary paid by the Commune to anyone was 6,000 francs. In this way an effective barrier to place-hunting and careerism was set up, even apart from the binding mandates to delegates to representative bodies which were added besides (ibid., p.628).

However, in China, these two conditions are not met due to the current structure of the state power under a single ruling party. Under this structure there is a lack of power check, which means that the state officials are not subject to recall by the people and state officials also enjoy privileges that are only available as a result of this power totality. The issue of state officialdom has a long tradition, especially in China, and a widespread social network with power ‘fused’ into their personal syndicates. The inseparable network of lawmaker, law-keeper and the courts makes it a ‘haven’ for this power network, and ineffective to limit the power of state executive. It can be even more devastating when all are united against the citizens. Law, in this sense, is powerless to protect people, unless a separate legal entity is set up to deal with this corrupt state officialdom, such as a special administrative court, which is independent and has power equal to its opponents, directly under the Constitution.

## **1.2 Definition of power totality**

The definition of power totality used in this study is a power structure with its totality over the people, the laws and the society as a whole. It is a form of power monopoly in a structure of power totalized in a few hands without legal limitation. Marx noted that this power totality was marked by a *politicalization* of all aspects of civil society, in his words, ‘the vital functions and vital conditions of civil society always remains political, even though they were political in the feudalistic sense’. This is also the point where

feudalism differed from capitalism in its political character, whereas the latter abolished this feudal political character and freed the society from such political totality (Draper, op. cit., pp. 118-9). A characteristic of feudalism is the *politicalization* of society with the power structure, both political and military, in the hands of feudal lords. This structure vested power in man not in law. In fact, this was the basis of law in a feudal society.

## **Chapter 2 Why it is a problem**

Power totality is a problem for three reasons: it is against man's reasoning in the natural law; it offers no protection to common people; and its power is limitless without accountability. Firstly, the power totality rejects equality to reason. Secondly, it rejects basic rights as protection for people, and thirdly, it is derived from its own authority without check or limit. These three reasons are explained as follows.

### **2.1 It denies equality to reason**

Reason is one of the most important principles in the Theory of Natural Law. Human laws are not valid at all if they conflict with those principles, which are morally binding. The Roman orator Cicero summarized classical natural law doctrine as follows:

True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions ... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. Senate or People cannot free us from its obligations, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times ... (Cicero, quoted in Hunter, 1995, p. 51).

The Dutch philosopher, Spinoza, sees that reason is a part of man's actual nature. He believes that reason is of great importance in man's life, that only the man who lives in accordance with reason is truly free. Accordingly, a society is most free when its laws are based on reason. So the idea of democracy, to Spinoza, is 'the most natural of all forms of government' (Curzon, op. cit., p. 67).

Wolff, a German philosopher, also believes in the power of reason as against the approaches by the senses alone. He sees that all phenomena, including the law, have

adequate and knowable reasons for their occurrence. To him, law exists on the basis of moral obligation. There exist innate human rights and they are the same for all men, therefore they are equal because they are the very consequences of human nature. Furthermore, men are only free under conditions of security and peace (ibid., p. 69). His limitation on this point, however, is his equation of natural law to the ruler and the idea of liberty resulting from obedience to the ruler as if to the natural law.

Others see reason as an important ingredient of human happiness, as the end to the common good itself. Aquinas, for example, takes this view that 'the rule and measure of human acts is the reason, which is the first principle of human acts, for it belongs to the reason to direct to the end' (Aquinas in *Summa Theologica*, 1984, p. 205). Aquinas added:

The law is not always directed to the common goods as to its end'... But reason is the foundation not only of what is ordered to the common good, but also of that which is directed to private good. Therefore the law is not only directed to the good of all, but also to the private good of an individual ... The first principle in practical matters, which are the object of the practical reason, is the last end; and the last end of human life is happiness (ibid., p. 225 A4).

More importantly, in this law of reason, Aquinas emphasized that there is equality in all men by reason. In his words: 'It is a universal right for all men that all their inclinations should be directed according to reason', and that, 'it must directed all other powers to reason' (ibid., p. 224). Plato, following this, sees happiness as the basis for legal justice and legal reasoning. In his words, 'We call these legal matters just which are adapted to produce and preserve happiness and its parts for the body politics' (Plato, n.d., 1129b 17).

However, in a society where total power is concentrated in the hands of a few individuals, this equality to reason as a means to man's happiness is not possible. This is because the view of the ruler is made indisputable and the contrary views are discouraged. More importantly, the media, under such a structure, would be under the tight control of the state. As examples of this kind of control, only a few articles were published in Hong Kong at the fortieth anniversary of the Cultural Revolution in 2006, due to the controversial nature of the debate over this historical event. The Tiananmen Incident, even among the local Beijing residents, was hardly mentioned as recently as early 2005 and was referred to only as the 'revolt period' in conversations with the writer. The fact remains that many political scientists, like Liu (Peerenboom, op. cit., p. 64), and many lawyers in China have

been reprimanded or removed from their posts due to their views being different or contrary to the official standard. This suggests that power totality works directly against the law of reason; and it has denied access to, and equality in, the reasoning of the public.

This equality to reason is not merely a matter of one's opinion, but a matter of power dominion of one over another, as Locke sees it. He stated:

...for no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever any one shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society' (Locke, 1690, p. 117).

Equality to reason, in Hobbes' term, became a fundamental right to self-preservation. To him, this right is a very important natural right of man. He sees that all men are equal in a state of nature, but no rules exist in a state of conflict with 'everyman against every man'. To end these conditions, a measure of liberty is necessary, in that if a man should accept a measure of liberty against other men, he would allow them the same liberty against himself, bound by legal agreements entered into as a social contract. According to Hobbes' theory of social contract, a sovereign cannot act 'unjustly' because his rule is 'authorized' as a result of the covenant, and is constituted by the exercise of power on behalf of his subjects who cannot act unjustly towards themselves. He believes that the greatest liberty of subjects is not contrary to the will of the sovereign, and is with the silence of the law. Although the subject has the liberty to demand the hearing of his case, according to the law, in fact there is no action of law. This is because 'for all that is done by him in virtue of his power, is done by the authority of every subject, and consequently he that brings an action against the sovereign, brings it against himself'. 'On the other hand, if a monarch, or sovereign assembly, grant a liberty to all, or any of his subjects, and he does not provide for their safety, then the grant is void, unless he renounces or transfers the sovereignty to another' (Hobbes, 1996, p. 146).

Hobbes believed in the powers of sovereignty and sees that the sovereignty is the soul of the commonwealth. At the same time he believes that men have the right by nature to protect themselves in the covenant they made with the ruler. Although sovereignty is meant to be immortal, in its own nature, it is subject to violence, ignorance and passions of men.

Hobbes' concept of equation of sovereignty as the will of subjects, to the will of the ruling class is problematic, for when the monarch or the ruling body departs from the will of the people, or fails to grant the liberty to the people, the power of the sovereignty of the people may be void in its role to override the monarch or the ruling group.

It is necessary at this point to differentiate a total power structure from a general will as expressed in law. Rousseau explained how this concept of general will was made legitimate in a process from a natural form of freedom and equality, to the natural rights granted by the society in the form of civil liberties. This general will is the will of a wider community as its sovereignty. Individuals are subject not to any other single person, but to the 'general will' of this community. Rousseau sees that this sovereignty of the community's general will is absolute and inalienable, which may overthrow government and laws. To him, legal norms bind only when people voluntarily participate in the law-making process, and those lawmakers will be bound by those norms. Thus the general will entails a sense of authority that is not vested in the hands of a few leaders, but in the wider community. In Rousseau's view, the natural law does not create individual rights, but it confers on the people as a whole an absolute and inalienable authority (Curzon, *op.cit.*, p. 70). This is the people's general will, which is different from the will of a few individuals, who have total power over the majority of the people. The general will, in this sense, is more than the mere sum of individual wills, it is unalterable and constant wills of the majority of the community.

## **2.2 It denies people's rights**

The protection of man's liberty is directly related to a power structure that is against reason in the natural law, and is itself separated from the general will of the people. The structure of a power totality means that an individual's life, with all its aspects included, would be subject to a special group who had the power of the state, and who had an exclusive power to interpret what constitutes the definition of people and their basic rights, and who have the right to determine who deserves protection of their rights. Under this kind of arrangement, individuals' work units, their residential registration, their organization managers and local committee members and police, all of which are under the dominance of a single organization and its leaders, lock the movement and activities of the individuals.

This structure leaves people with no means to protect themselves and their families. The experience of life under such a power totality in China during the Cultural Revolution, was both horrific and slavish without any protection for a person's freedom or basic rights. The details of this period will be found in the next chapter of this study, as an example of total power structure supported by the state ideology. The fact that millions of ordinary people, seen in the stories of many lives recorded in Zhang's collection (in Chapter 3) had to suffer incredible ordeals, losing respect and normality, as well as control of their lives, in all aspects (including their careers, education, even livelihood and personal security) suggests that the system had failed to protect people and their basic rights. The fact that people lost their personal dignity and family life, suggests a fundamental flaw in the nature of this power structure, and questions the legality of such a power structure as an obstacle to be abandoned.

The reason for this challenge is that such a power has betrayed the trust the people had given to the ruling body, and by the sovereignty of the people such a trust can be forfeited and withdrawn. Locke believed that such a supreme power should remain in the hands of the people to remove or alter the legislative or the ruling class. He sees that all power is given with trust for achieving an end and being limited by that end. Whenever that end is 'manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security'. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, ... to lay and carry on designs against the liberties and properties of the subject' (Locke, *op. cit.*, p. 116).

### **2.3 It derives from its own authority without check or limit**

Montesquieu sees law as 'the necessary relations arising from the nature of things' (Curzon, *op.cit.*, p. 69). Law is in general human reason and is oriented to justice and should be judged by it. To him, the true purpose of political association is to prevent the power accumulation in a few hands. To achieve this, it is essential to have measures of checks and balances against the concentration of power, especially to the lawmakers who should be bound by the legal norms. Power should not be concentrated in a few hands, but should be defined and checked separately. This is to maintain a people's liberty.

On the other hand, a power totality suggests that it is not bound by legal restrictions because the power has control of law making and law enforcement without being subject to or limited by those legal measures. Such a power is limitless and cannot be challenged or removed by legal means without its own consent; for it is this ruling power that has the supreme power of legislation, not the law.

Accountability here is defined as responsibility with a clear boundary, subject to the specific rule of law in question. This includes the executives who are responsible to their posts and subject to the law relevant to them. The danger of a power totality is that the persons who are both law makers and law enforcers may suit the law to their own personal interest opposed to that of the rest of the community and contrary to the common good of the society. Locke sees this danger and calls for the lawmakers to be subject to the laws they have made. In his words,

For the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore, the legislative power is put into the hands of divers persons ... a power to make laws, which when they have done, being separated again, they are themselves subject to the law they have made (Locke, op. cit., p.115).

A power derived from its own authority is a ruling made without subjecting it to the will and interest of the people. The necessity of having a higher authority to restrain such a power is to ensure that the wishes of the people, as expressed in the laws, are carried out faithfully.

### **Chapter 3 People unprotected – Consequence of a power totality**

The Cultural Revolution in China in the 1960s, as examined here, is a good example of the consequences of a power totality and of life under a system of an ideological state. It happened when state power was totalised in the hands of a few leaders; where people were left unprotected and had no legal means to challenge the abuse of power. It was a revival of some old feudalistic characteristics of Chinese society which had not changed in terms of

power structure. Although in theory it was called a revolution, in reality it was more like a regression in history in terms of people being unprotected and losing their basic rights.

Historians estimate that of the more than 700,000 people who were persecuted during the revolution, about 35,000 were killed. Thousands more committed suicide after being harassed by Red Guards (*Current Events*, 2005, p. A2).

Montesquieu once made a comparison of features among republics, monarchies and despotic governments and said that 'In republican governments, men are all equal; equal they are also in despotic governments: in the former, because they are everything; in the latter, because they are nothing' (Montesquieu, 1731, Bk VI, Ch. 2). Liberty is a term of luxury – in his words, 'Luxury is therefore absolutely necessary in monarchies as it is also in despotic states. In the former, it is the use of liberty, in the latter, it is the abuse of servitude... Hence arrives a very natural reflection. Republics end with luxury; monarchies with poverty' (ibid., Bk. VII, Ch. 4). Yet the true spirit of equality is as distant from that of extreme equality (of dictatorship or lawless society) as heaven is from earth. To reach this true spirit of equality we need law. In his words, 'In a true state of nature, indeed, all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of laws' (ibid., Bk.VIII, Ch. 3). His concept of the government is based on whether it governs by law. Unlike Aristotle who based it on the virtue of sovereign, Montesquieu based his on the concept of law. Therefore, the distinction between monarchy and despotism depends not on the virtue of the monarch, but on whether or not he governs 'by fixed and established laws' (ibid., Bk II, Ch 1). Each form of government has a principle, a set of 'human passions which set it in motion' (ibid., Bk III, Ch. 1) and each can be corrupted if its principle is undermined or destroyed. In this light, the principle of the Cultural Revolution which, in theory, was to give the people a say in the government was, in practice, utterly undermined and destroyed by the ruler's concept of power over man's liberty, and power politics over the spirit of humanity.

### **3.1 The Rationale for the Cultural Revolution**

There are many theories on the motives and reasons why Mao, as the state leader, launched the Cultural Revolution. From some of Mao's unpublished speeches, which were circulated in the capital city at the time, and from articles in the official state magazine *Red*

*Flag* and the newspaper *The People's Daily* (1966) it was about the impurity of the party and how its power should be applied or corrected. Mao was concerned that the real danger for the nation lay inside the party, and this could make or break the country in the long term. This concern is valid even today. However, as to the question of how to eliminate this internal danger from the Party, and prevent it from 'changing its colour', that is, changing its destined course of ideological direction, the views vary. Mao's view was to encourage young people to act under his command. His official line was:

The heart of the Cultural Revolution has indeed been a struggle for power, a struggle over the control of state power ... but it has not been a struggle over power for power's sake ... It has been a class struggle to determine whether individuals representing the working class or individuals representing the bourgeoisie will hold state power. It has been a struggle to determine whether China will continue to take the socialist road and carry the socialist revolution through to the end, or whether China will abandon the socialist road for the capitalist road (Hinton 1972, pp. 16-17, cited in Pugh 2005, pp. 33-43).

On the surface, some observed,

At the start of the revolution, Mao urged thousands of students, who came to be known as Red Guards, to destroy China's 'four olds – old customs, habits, culture, and thinking'. Red Guards raided homes, destroying remnants of traditional Chinese society, including books and artwork. They took over schools and offices, humiliating and torturing teachers, scientists, and anyone else they suspected of not being a true communist ... (*Current Events*, 2005).

At a deeper level, however, the definition of a '*socialist roader*' or a '*capitalist roader*' has never been clarified. This caused confusion and the situation became chaotic when people took the law into their own hands. For under Mao as the leader, the society as a whole believed that people had the right to condemn and to punish each other, or whomever they saw fit by their own version of 'targeted enemy' – those they perceived as belonging to the wrong class background. Thus the country quickly sank into a lawless state.

Apart from this official rationale, there was another version of it, which saw the Cultural Revolution as the result of an internal power struggle Mao was having within the Party. Many of Mao's personal staff saw it as nothing more than a testing ground for a

personal dominance of power within the ruling party, for Mao himself. This view was based on a historic fact that bears special importance for Mao at the time, in 1956. It is undeniable that Khrushchev's attack against Stalin could threaten to undermine Mao's rule and call China's own leadership into question. What Stalin was to the Soviet Union is what Mao was to China, so for Mao to agree to the attack against Stalin, was to admit that it was permissible for him to be attacked as well. This 'Mao could never allow' (Li, 1994, p. 114). According to his staff, Mao was constantly alert to attempts to undermine his rule. He did not want any of his underlings becoming a 'Chinese Khrushchev', writing condemning reports attacking him after his death.

If Mao's idea of an internal cleansing process was based on the assumption that the party is always above the people, it was then not made subject to the people's will, or limited by the people and the law. This view poses problems of unlimited power and with the relationship between the party and the people. As a result, people would lose their authority and claim over the party as their agent or delegation, but not as their master. Thus Mao's view did not solve the problem of power concentration, or the issue of people's authority over the ruling agent, and without the authority and sovereignty of the people, a people's state is illusive.

New public ownership: Evidence in this section will show that this power totality was both regressive and oppressive against humanity. In theory, the country's feudal characteristics should have been superseded by a fairer distribution of state power by the collective will of the community. This would stem from new productive relationships, advancement of the economy, and an increased notion of citizen's rights and responsibilities in a new civil society with the rule of law. Under this new public ownership of state power, any public powers should be subject to public scrutiny and to the limitations set by law. People and their delegations should make decisions without the dominance of any organization. In the process law should be a mechanism in this public ownership of power and provide a legal forum for protecting public will and voices against any form of power monopoly.

Original purpose: It is therefore argued that to determine how to apply the state power appropriately in a workers' state, we should set the limit on the state power in any form. The limit and the task of checking should be set by the people's assembly or congress, but not by the ruling party itself. This should be what the *original purpose* of the Cultural

Revolution was set to achieve, but it was completely missed in this historic event. Instead, it became a war against ordinary people who had no legal access to defend themselves from unexpected attacks of verbal and physical violence, political condemnation, and personal and social discrimination.

This section will show the consequences of a state in total control and with unlimited power. Firstly, people's basic rights were seriously eroded and many lives were destroyed by a state power. People were ruled under a totality of power and every aspect of their lives and thoughts were thus dictated or condemned by the state. Secondly, there was a lack of the notion of basic rights of personal freedom in a modern and civil society, and thirdly, there was no limit to this power abuse; and those in power faced no legal constraints for their use of power; and were not subject to any scrutiny from a higher order. Law, under such circumstances, had no authority and was powerless to protect people.

### **3.2 Revival of feudal value of man – dogmatism of mind**

As mentioned earlier, a characteristic of feudalism is the *politicalization* of society with power, political as well as military, in the hands of feudal lords. This structure vested power in man not in law and was the basis of law in a feudal society. Man had no values other than as the property of the masters or lords, for man could be killed or sold as the master wished – and that control was total. The feudal practice revealed itself in the Cultural Revolution, mainly in these aspects as the events which unfolded between 1966 and 1976. The widespread violence among the masses revealed the lawless nature of the society; the apathy of the cadres who cared only about pleasing their superior masters demonstrated the instinct of political animals in man, as a by-product of this feudal power structure; and the factional fights which were flamed by the top level leaders with an invisible hand (as in the case of the Gang of Four) as a political strategy in the game. (See Appendix 1) The point to be made in this part is that either as a state or as people in this state, China has remained feudal in its outlook and in its action. Its modernity was found only in its revolutionary rhetoric and in its exercise of political power, which perhaps exceeded even its feudal past, in terms of total control of an individual's movement, property and private life. More dangerously, it denied individuality totally and dictated one's thoughts to such a degree that one would accept a total self-denial or even take one's own life as a result of the mental abuse and torment. Yet the extent of the abuse is such that

no one questioned the very nature of this power practice. The state had unlimited power to suppress any of its citizens in a most inhumane fashion – not being accountable for the consequences on one hand, and with ordinary people having no rights other than having to conform with the state ideology to avoid prosecution. Free thinking was prohibited.

One example of this mind control was in the suppression of the media. During the Cultural Revolution in the late 1960s, the country was in a state of virtual anarchy with many heads of state being physically attacked and governmental agencies and schools temporarily paralyzed. For a short period, there were some independent newspapers in press and unsourced leaflets were spread in millions of copies. One of these free newspapers was *The Newspaper of Cultural Revolution in High Schools* (May 1967) which published a famous article 'On Family Background' calling for equality for young people from accused 'class backgrounds' in the participation of society, and their equal rights to the revolutionary movement. The author of this article, Mr Yu L K, had studied Montesquieu's *Persian Letters*, and noted in his diary (May 1966) that 'Montesquieu stated that "in order to love and confirm to one's religion, it is not necessary to hate and persecute those who do not confirm to it"'. Here the word 'religion' could be 'thought' or 'Marxism'. His diary, unfortunately, was seized in a raid and Yu was arrested on 5 January 1968 on suspicion of writing the news articles and holding dangerous ideas. Not only him, but all staff of the *Newspaper for High Schools* were questioned. (The news articles published at the time were of the highest scholarly quality among the other hundreds of free publications. The author of this thesis read them at the time.) Later the family was told that Yu had been shot and his father burst into tears on receiving the news. The response demonstrated nothing short of barbaric cruelty: 'You are supposed to draw a clear line between yourself and your son, why do you cry?' (Hinton, 2003, Video, Ch.10)

This inhumane indifference regarding losing human lives was quite a common standard of the time, as anyone could be accused and lives were destroyed like animals. Even the President of the PRC, Liu Shaoqi, was beaten and assaulted repeatedly while trying to talk with a copy of the Constitution of the PRC in his hand. He died later of illness, alone in a rural village, without any medical care and without any clothes on him. His whole family were also treated like animals. Liu, the elected president of the nation, thus died in the most destitute circumstance, without being given any human care or dignity. The masses did not care exactly which political debate or class theory should have

applied to these tragic cases. Many enjoyed the sense of liberation and the power they had for the first time to be able to challenge the privileges of the state leaders. At the same time, the state leaders and the masses did not have any concept of humanity. The mob became animals like themselves and took the law into their own hands. In this situation, no one was immune from the sudden attacks of others without any legal protection. There were no other rights for ordinary citizens. The only right available for them was the right to join in this massive persecution.

This dogmatism of mind was accompanied by physical violence and crimes inherited from the previous barbaric and feudal system of punishment. Public display of the accused had been a standard feudal practice for centuries – the pointed white hats, with the names written on them in black ink and with a huge red cross struck through each name to indicate a death sentence were all too familiar to the Chinese mind. Nothing had changed although it was now under the communist ideology. This practice is a deliberate humiliation in public, and by the public, and an inhumane treatment of the captives, innocent or not. It manifested itself only too vividly in our modern times. This culture of violence turned middle class young girls, for example, into thugs and murderers, who delighted in beating other unknown human beings until the torturers themselves were exhausted. The only thing that had changed was the modern terminology used in the slogans to persecute people. Feng's book contains much detail of this kind of persecution, including graphic photographs (Feng 2004 p. 142) as does Hinton's archival footage (Hinton, 2003).

The use of thugs and rapists in prisons to torture political prisoners was common at the time, as seen in Zhang's case. Zhang was a young party member who cared to criticize the party leaders and its policies during the Cultural Revolution. She was put in prison and the authorities deliberately used other prisoners to rape her for extra credit points, in order to break her spirit. They tormented her in every possible way, blindfolding her to the killing fields while others were being shot around her. Even on her prosecution day, they resorted to a knife to slash her throat to cause maximum pain and to stop her from uttering her last words aloud (Jin 1993). (Details of Zhang's story in the Appendix 2) The darkness of this repressive society could not be better manifested than in Zhang's case, and all her 'crime' was, was to criticize the party authority. She was left at the mercy of criminals and social thugs, under the very party that purported to be the vanguard of the people. In reality, the party was behind the criminal activities, including mass murders, and they regularly

employed the thugs of society to cause physical harm and threats, as they still do today. In Part Three of this study, more recent cases are included to show how this barbaric practice was applied by the local government officials and law-keeping agencies.

Big Brother is watching you: The power of the state was strengthened by the fact that the records of individuals were systematically kept by the state authority – a record that the state officials could use whenever they saw fit, for their purposes. In the case of Li Cunxin, for example, when Li married and stayed in the United States of America, some officials went to his native village and visited his family only two days after he made the decision. ‘Do you know what your son has *done*?’ one of the officials howled at Li’s mother. ‘Your son has defected from his motherland for the filthy America! You, as his mother, should be ashamed, to bring up such a bastard!’ Consequently, his parents have lived in constant fear and despair even since then. They had been prepared to go to prison and lose everything they had to defend his honour. Subsequently, his academy school officials burnt all Li’s personal belongings while he was absent. Some of his relatives and friends had distanced themselves from Li’s family, for fear of being implicated in the matter. Again when Li returned to China nearly a decade later, the Chinese secret police were waiting to see him, they wanted to know if anyone was involved or behind his defection. This was the epitome of what many people had to bear in life, largely beyond their personal control.

The abused were in a hopeless and powerless position in most aspects. Their personal or private files, which they never saw or knew themselves, were kept in secret units in the government, accessible only by the ones in charge at the time. These files could be added to, deleted, relocated or reopened without the knowledge of the individual in question. The individual’s fate could be determined overnight by the spirit of the moment in the mind of those in power. The individual could then be locked up indefinitely without further questions. In the name of revolution or any idealist jargons, the feudal practice of the master having control over his slaves was developed into its modern version of power play in its totality, covering both physical and mental abuse, as well as family ties and all other aspects of the individual’s life.

In addition, there was no legal framework or legal protection for the targeted or captured individuals, so they were at the total mercy of these power holders who believed they had such a political, if not legal, right to control other human beings – to determine

whether they should live or die, where they should go, and what they should say and do, for the rest of their lives.

### **3.3 The terror of the total political state (as Marx rejected)**

Marx, commenting on the Paris Commune, noted that in terms of power and state, feudalism differed from capitalism, in its totality over people and the society as a whole. It was marked by a *politicalization* of all aspects of civil society. The French Revolution abolished this political totality and freed the spirit of people. As a result, the control of this political state over the people was total in all aspects of personal life and society.

During the Cultural Revolution, China became an ideological state in which people were ruled by the terror of political totality. This meant that they lived a life that was dictated by the will of a few individuals with unlimited power over others, in every aspect of their lives. In this state, ordinary people lost control of their own livelihood, including their jobs, families or destination. Political purges continued and doubled the misery of those who had already being 'doomed' as 'rightists' earlier. Also included were those doomed during all previous political verifications in the cities, and political classification in the rural regions – including their children and relatives. The real life stories selected from thousands of autobiographical accounts in Feng's book are evidence of the terror that ruled people's lives and thoughts (Feng, 2004). The country began a descent into turmoil and local fighting broke out everywhere as a result. The entire nation with its millions of people were directly involved in this top-down struggle against the country's invisible class enemy, once so eloquently described by the state media, and millions of lives were affected profoundly by the unprecedented scale of political prosecutions without the protection of civil rights.

Several characteristics of this political state emerged during this period of turmoil.

Firstly, there was a form of power concentration in the hands of a few without any constraints. To maintain this power the leaders were praised and worshipped to the extent that could only be matched by worship of the Divinity. The Party leader Chairman Mao, for example, was worshipped with frantic fever and his image was widely used by local leaders as a means to intimidate and control the masses, to the extent that one's life was determined by the image of Mao, seen for example, in a peasant's story (Appendix 3). The terror was widespread, and there were many incidents where the unfortunate individuals who

unintentionally damaged the picture of Mao were put to death unconditionally, inducing irrational and mixed feelings of fear and awe into the minds of millions.

Secondly, there was apathy as a product of power totality. Special social circumstances produce a special breed of people. This was true during the period when everything a man did and said or thought would be closely interpreted and scrutinized. This became a by-product of the political climate in a society where year after year there had been campaign after campaign. Certain talents developed in many individuals who were trained in this climate to be able to not only survive but to grow in power as individuals, just as the henchman achieved and maintained power in the feudal times. They became bullies under the protection of their powerful masters. They were skilful in creating lies to please their superiors. They were specialized in the political movements to target innocent people and seek victims for persecution. In so doing they would meet the requirements of a set quota for catching political 'class enemies' as 'criminals' and thus be promoted or at least praised. They were talented in ingratiating themselves with the boss at the top and gained merits by capitalizing on the misfortune of others. 'In China, the first to be observant and sensitive to others' moods are the political cadres not writers' (Feng, op. cit., p. 142). The prison superintendent in T's case is another example of apathy where no human compassion existed in him. He never questioned a society in which so many people were imprisoned unlawfully, and he wished these unhappy people would commit suicide so that his job would be easier (See Appendix 4, T's Story).

The apathy manifested itself in the prison situation and the treatment of prisoners, where torture, violence and personal tragedies were prevalent as a result of this apathy to humanity at the local level. This suggested that a slave mentality existed – of serving one's master, regardless of who they are, or however evil and bereft of compassion or conscience they may be.

Thirdly, there was no such a thing as a 'private matter' in China then. For example, in T's case, there is rhetoric used in one of the private letters, in which the prisoners were forced to use the 'standard language' in order to pass the political censorship of the superintendent of the prison. It should be noted that this kind of play with jargons was prevalent during that period. The letter started with the salute 'long lived, and Long, Long, Long lived Chairman Mao!' followed by normal greetings. It is noted that a translation is needed to decode what the prisoner meant in the letter. He was arrested and imprisoned for

ten years without any legal process, and yet he could not tell his family that he was in jail. To decode his letter, the sentences should be read like this: to say 'I am imprisoned' he wrote that 'the revolutionary masses rescued me and put me into the Bureau to study there'; to say 'I was watched closely', he wrote that 'everyday I studied under the army supervision personally'; to say 'I won't give in', he wrote that 'I will be reformed to be a new person again'. And he had to repeat the study class before he could ask for some personal items to be brought to the prison.

Fourthly, humanity was the price to pay in this power politics. Man's conscience and honesty, as part of his soul, were no longer valued. In this highly pressured political climate, fear turned people into liars and hypocrites – a phenomenon that prevailed much during the Cultural Revolution. It had become second nature in man as a survival strategy. To 'sell the soul', as Mao's personal doctor Li observed, after seeing the dramatic turmoil of lives of all staff who worked around Mao, 'to help friends meant to be called anti-party myself. For my survival and my family, I had to lie' (Li, 1994, p. 63). No one, for example, cared to criticize Mao and the party during the anti-rightists campaign. The party dared people to attack the innocent. This required people to pledge public support for policies with which they did not agree. 'Life depended on constantly betraying one's conscience' (Li, 1994, p. 65). As the final words of his book, Li wrote:

I write this book in great sorrow for Lilian and for everyone who cherished freedom. I want it to serve as a remainder of the terrible human consequences of Mao's dictatorship and of how good and talented people living under his regime were forced to violate their consciences and sacrifice their ideals in order to survive (Li, 1994, p. 638).

Humanity entails the spiritual nature of man manifested in his vision and faith. Marx recognized this spirituality in a dual nature of man. People as individuals have two roles – that of the *citizen*, egalitarian, community-oriented, and equal; and that of the private individual in so-called *civil life*' (Marx, 1843, *On the Jewish Question*, in Tucker, 1978, p.34). He called for a *political* emancipation for the people – the ability to officially participate in the government, to vote, to run for office etc. in a long chain of social development into a modern and civil society. The deepest tragedy of the Cultural Revolution is rooted from a notion of faith, the faith that people had in the party – a party which turned against the people. In the

process, however, the essence of humanity and dignity of life itself was lost. In this sense, the masses became blind believers and also god makers.

It is clearly shown that the faith and devotion of the masses was abused by the power-holders. This can be seen in the similarity between the devotion shown by the millions of people during the Cultural Revolution and a religious practice. The worship nationwide involved an absolute devotion and religious commitment of each soul: the divine and untouchable image of Mao like that of perfect God; the harassment and persecution of not holding Mao's little red book or not swearing to Mao's image; (like holding the Bible in church); the self-criticism style confessions to the group leaders (like the Father or priests); the mutual fear and mutual surveillance; and the use of group pressure and massive numbers of people as a proof of truth. The effect of all this was to put the leader on a pedestal like a God – who would never fail us, never do people harm and never tell lies and who is absolutely and always in the right and cannot be doubted. This absoluteness of religious practice is in fact a betrayal of man's right to reason and a tool to maintain one's power dominance and authority. This obviously had nothing in common with the divinity of God, or with Marx's original vision.

This monopoly of the truth ensured the privilege of the chosen few. They had all the power to determine the fate of men, leaving the others with no rights at all. The leaders who possessed state power in their hands, manipulated the vision of the masses, to their own advantage. The abuse of a humanistic vision was thus linked with the spiritual nature of man, and mixed with revolutionary theories as inspiration – without a real understanding of man's value and rights.

The abuse of this inspiration is based on a cognitive confusion between the idealized vision on one hand, and the interpretation of the reality on the other. Many young people were convinced by the empty rhetoric in the media and official justifications that were prevalent in the state propaganda; but more important was their conviction that their leaders would never let them down; that the leaders were morally truthful and honest and were true believers like the youths themselves and would not lie to the masses. Little did they know the complexity of the power struggle at the top level of the party machine at the time; so the 'great leader' and vice president Lin Biao's air crash and his conspiracy to overthrow Mao came as a profound shock to many (Hinton, op. cit., video). As Montesquieu predicted, a natural reflection is that republics end with liberty and despotic states with poverty and loss

of equality. Society could recover it only by the protection of laws and tolerance (Montesquieu, 1748, *The Spirit of Laws*, BK.VIII, Ch.3).

### **3.4 Power abusers faced no legal sanction or accountability**

It is undisputable that the Cultural Revolution was manipulated from the central office of the ruling party where the state was concentrated in the hands of a few individuals. The official media pronounced otherwise – that the mass movement was initiated from the grass-roots and the people. In theory China is a republic, but in reality, the personal power of the ruler, as in the case of Mao, was easily transferred to his wife Jiang Qing, like a new dowager empress. She not only believed in her personal power as in the olden days, but also made sure she employed fully this feudal power. And with her feudal position as Mao's wife, the empress demanded total loyalty and obedience from all those who worked for her. In this sense, China operated according to its traditional rule of the imperial court at the time.

In the prison situation, cases indicate that the prison guards were violating the laws they were supposed to be guarding, with some even committing crimes such as rape or torture without being charged or even questioned. Many of those who broke the law were even promoted. In T's case, both the chairwoman of the revolutionary committee and the military representative in the factory, who abused their public power in various ways (including a coerced divorce and causing physical harm) were again in the new leadership group as heads of the factory soon after. The fact that this situation has recurred in some more recent cases indicates that the problem of lacking accountability in applying public powers has persisted well after the Cultural Revolution. This is the great concern that the law faces today. Those beneficiaries of the political turmoil, inflicting great suffering on others, and with a mastery of political rhetoric, showed contempt for human lives and the basic rights of others. This happened despite the fact that the policy and the law had been changed at the top level of the government, after the Cultural Revolution.

One may ask: how was law implemented then?

There were policies regarding the people who were wrongly accused of political crimes which they did not commit. The policies or directives were from the top level of the state. However, to issue a policy does not assure a corresponding implementation at the

local level. Often it met with strong resistance from the local authorities and those beneficiaries who held the deciding power. For example, in T's case, T was released because of the change of policy that was meant to free those wrongly accused and imprisoned. However, T still had many obstacles to overcome and a long wait before the benefit of the law reached him. When T went to the Housing management office for his accommodation, the office staff lied, saying he was not the person responsible for T's problem when in fact he was. This issue of housing T faced has remained unresolved to this day some twenty years later (Appendix 1, T's story).

The fact that no matter how well intentioned the law is, it could be denied so easily by a local officer is alarming. This local officer may not have a high position in society, and may not be highly paid for his job, and yet he had all the authority within his power to manipulate and to abuse. He had no difficulty in denying his responsibility and dared to challenge the policy or law for so long, as if he possessed some God-given right to deny the rights of others, and to deny the interests of those individuals for whom the law is intended to protect. It reveals a fundamental problem of how state policy and law should be implemented. The evidence in this study shows that for the ordinary people, the power of the law seemed ineffective.

## **Chapter 4 Law lacks authority**

### **4.1 The authority of law**

The authority of law is important to the rule of law, but the source of this authority is perhaps more important as a power of ordaining the law. But where does this authority come from? I will argue that the source of this ordaining power should come from a single source as authority of law: humanity. According to Kant, each one of us has an absolute worth, a *practical imperative* of acting: 'to treat humanity, whether in your own person or in that of any other, in every case as an end withal, never as a means only'. To Kant, there is only one natural right – the independence of a person from the arbitrary will and coercion of another. This right belongs to each man by reason of his humanity (Curzon, op. cit., pp. 75-76).

The authority of law can come either from a partial interest, such as the power of a few individuals, or from a common good which one may call humanity. The source of the ordaining power should not be by virtue of one's own authority, but from the will of the collective or Common Good. The Cultural Revolution shows that under the power totality, law had no authority to protect people or the Common Good. In fact, law was virtually abandoned as a state institution, as the state power fell further into the hands of a few political opportunists and careerists who took the law into their own hands.

The lack of authority in law means that the law is unable to limit the power of the state. Locke argues that it is important to limit the power of the state. For example, the state power, although supreme, should be limited in its powers in these ways: 1) it cannot rule in an arbitrary way. 'It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave or designedly to impoverish the subjects'. 2) It cannot transfer the power of making laws to any other persons. 3) It cannot deprive a man of his property without his consent. 4) It is bound 'to dispense justice and decide the rights of the subject by promulgating standing laws' (ibid., p. 68). Needless to say that to limit the power of the state, we need the authority of law. The Chinese experience during the Cultural Revolution, on the other hand, proved that without the authority of law and without humanity as the source of the law, we couldn't expect to limit the arbitrary power of the state.

This lack of law as authority has its roots deep in the Chinese history of a total power structure. From Pan's study of the history of Chinese Constitutions, it is apparent that the power totality has been the force undermining the authority of law of the Constitutions.

#### **4.2 Lack of law as authority in the history of Chinese Constitutions**

Although Dr Sun Yat-sen, the first president of the Republic of China, believed in the people's sovereignty and in the obligations of the administrative powers of the government, his vision of state power ruled under a proposed Bill of Right, was never realized – in spite of the fact that there had been several Chinese constitutions in the past – due to a lack of law as authority. Dr Sun's vision of people's rights to monitor state power by the law remains a vision still. Pan's study of the history of Chinese constitutions, shows

that the previous constitutions had provisions for the legal scope of responsibilities of state agencies such as procurators and the courts (Pan, 1945). In reality, however, these constitutions meant little to ordinary people as the authority of interpreting and executing these laws lay in the hands of a few powerful individuals or military rulers. This is the case that China's own critics witnessed as they saw incidences of law and man's constitutional rights being stripped in reality. For example, in Hu's account,

In the Criminal Code of the Republic of China, of course, there is a clause making it a crime to interfere with the freedom of others, but all the illegal actions of which we complain, are committed in the name of the Government or the Party. So the people have no guarantee at all.

Under present conditions, if a man is accused by a Party or Governmental organ of being a reactionary, counter-revolutionary or Communist, personal rights are denied to him, his body is assaulted, and he is deprived of his freedom, while his property may be sequestered. Are these not illegal actions? Books and publications, which are suspected of being reactionary, are subject to prohibition. Is this not a menace to freedom? ... schools run by Chinese citizens which are accused of being academically cliques or reactionary, are liable to be closed up and sealed. Do these actions not also menace freedom? In all these matters, what kind of guarantee do we have?' (Hu Shih, 1945, p. 24).

I have another example. The principal of Anhui University had delivered some speeches, which aroused the anger of Mr. Chiang Kai-Shih (the top ruler). So he was put in prison for some time. He was finally released, but it was impossible, of course, to bring in a suit for illegal detention against Mr. Chiang Kai-Shih in any court of law. This government by caprice, not government by law. (ibid., p. 25)

Another example of illegal detention and torture of Mr. Yang in April 1929, in the Ta Kung Pao, and in Yang's words, 'I have not an inch of skin left that is without a wound'. All this happened exactly one week after the mandate guaranteeing the rights of man was issued by the Government. (ibid., p. 26)

When Dr Sun Yat-sen advocated the *San Min Chu I* (the three doctrines of the People: People's Sovereignty, People's Livelihood and People's Rights) he made democracy the final aim. If a people cannot look after their own interests, manage their own public affairs, and take an active part in the government, they cannot build up a strong nation. The most powerful and at the same time stable nations in the world are founded on the will of the people, and the interests and policies of the government are identical with those of the people' (Pan, op. cit., p. 142). The object of Dr Sun's Principle of the People's Sovereignty is to create a nation in which the government is 'of the people, by the people,

and for the people'. However this people's right will not be protected if the law lacks the authority to check the state power.

Dr Sun Yat-sen had always wanted a period of rule under the Bill of Rights as a transitional stage in which 'the rights and obligations of the people as well as the administrative powers of the Revolutionary Government' are defined (Hu Shih, op. cit., p. 31). Economic prosperity was to lead people's rights in its time. To pave the way for this transition from a power totality to a rule of law that can check the power by the people, it requires an authority of law that is both independent and capable of sanctioning power abuse in its own right.

So, if the law has no authority to check the power, who has this authority then? Hu believed that it was the ruling party who had this authority in his time (ibid.,p.31). A similarity may be drawn between the power holders in the past and at the present time in relation to the inability of the law to provide a power check mechanism in its own right.

#### **4.3 The party's role in law – lack of independence in law**

It is argued that the ruling party of China dominates the legal institutions, which makes it impossible to check the party as an independent legal authority. This is due to the fact that almost all the judges are party members; and that only the party and the party-controlled government issue the lawyers' licenses in China. This factor has given people the impression that state officials and the court staff can and will work together to protect each other (SBS, *China's Court*). The general perception is that the people have little faith in the legal system because they know that state power is in the hands of the party in all aspects of their lives.

The evidence of a ruling party transcending over the law may be found as early as 1929, when the delegate of the Kuo-Min Tang (the Nationalist Party of China), Mr Chen Te-cheng, proposed to censure the judicial courts 'for being over-conscientious about obtaining clear proof when persons are charged' (Hu Shih, op. cit.,p. 24). By Chen's proposal, any one found guilty of being a counter-revolutionary by the Party should be sentenced by the judicial court, or a similar legal organization, in conformity with the charge preferred against him by Party Headquarters. If the accused were not satisfied with the judgment he could appeal against it before a higher court, but the higher court in

question must reject the appeal on receiving written evidence from the Headquarters of the Central Party. Hu wrote in an article: 'That means that the court need not hold a trial in such a case and can find a person guilty merely on the strength of a scrap of paper produced by the Party. Is this not a fundamental denial of government by law?' (Hu's articles on Chen's proposal were subsequently censored and suppressed from publication.) Hu then asked the question: 'Now, why is a citizen not qualified or permitted to be responsible for the publication of a discussion of problems bearing on his own country? Is such an action not an arbitrary interference?' (ibid., pp. 24-25).

Similar evidence may also be found in the current state structure where the ruling party is in charge of the judicial decision-making process at the expense of the independence of the law, which contributes to the problem of power being unchecked or unsanctioned by law.

The Communist Party of China's involvement in legal cases can be decisive and positive, but can also prevent the independence of the law. The party has control of both the government and the judicial process, with a function as the 'judge of the judges', in many conflicts between the courts and the procuratorates or the local governments. Peerenboom's study shows that the Central Organization Department has records of the appointment of all judges and that the People's Congress appoints judges after the party's approval (Peerenboom, *op. cit.*, p. 305-306). The party's involvement in court is significant in 'politically sensitive cases', which may have a big impact on economics. The government officials have two hats: government and the party, and it is impossible to tell which is which. There is influence upon the judges from either the party or government and personal influence is through individual party members (ibid., p. 308).

Clearly, this kind of total control by a single party over both the government and the judiciary is both undesirable and dangerous. This contributes to the problem of the dependent nature of the law, which must be addressed. Part Four of this study will discuss this point in more detail.

Some critics see such a legal system as equating to no law at all. Lubman, for example claimed that China does not even have a legal system. He sees that China suffers a considerable fragmentation of authority, lacking a unifying concept of law. And more seriously, the fact that law must serve the party/state contradicts the principle of the law and

the claim that China must be governed by law and aim to attain the rule of law. Furthermore, China's institutions and the judiciary remain weak. In his words,

The weak differentiation of the courts from the rest of the Chinese bureaucracy, organizational methods in the courts, and a cast of mind among judges that distinguish the courts little from the rest of the bureaucracy. Structural weakness, ideology, rigidity, entrenched interests, localism, and corruption limit the functions and autonomy of the courts and undermine their legitimacy ... the difficulties of the courts in applying Chinese law and enforcing their judgments raise an issue of the very capacity of the Chinese state (Lubman 1999, p. 565).

Others see the meaning of law as a challenge to political legitimacy and a choice to rule either by power or by law. Potter, for example, in his study of law in relation to the Party's role in China, stated:

By relying on the socialist legal system as a source of legitimacy, the regime also strengthens its ability to justify specific actions by reference to law. (Potter, op. cit, p. 325).

The regime has attempted to ensure that the legal system remains subservient to the political needs of the Party by aggressively disseminating its version of socialist legality and repudiating alternative versions. It has tried to make certain that popular notions about law do not overreach its own view that law should be merely an instrument of rule rather than a set of generally applicable principles that regulate the state as well as the people it governs (ibid., p. 325-6).

#### **4.4 Legal privilege of officialdom**

Officialdom is both the basis and a product of this power structure. There is a 'power culture', as being argued in this study, which is inherited from a feudal mode of social structure and serfdom. It operates in the personal interest of certain state officials, who operate by a rule of status, as it was in the feudal society, and manipulate the law to their advantages, as seen in the case of Xie in Part Three (Chapter 13) of this study. Xie's final call is not for justice alone, but for the reputation of his family associated with a sense of shame, typical of the culture. In the study of oriental despotism, many have observed one phenomenon of bureaucratic despots – that the 'tyranny' of the top bureaucrats is even stronger than the sovereign power, and that the 'reins of government' are often in the hands of viziers while the emperor remains 'profoundly ignorant of the domestic and political condition of his empire' (Bernier, 1853, in Draper, op. cit., p. 643). Quesnay has argued

that so often in the history of oriental despotism, the absolute power of the emperor is really tempered by the de facto power of officialdom (Quesnay, 1767, in Draper, op. cit., p. 643).

A feature of this type of despotism, is the dependence of subjects on the state, given that all are equal under the power of the state. It aims to destroy all forces of countervailing influence other than the central state power, and to reduce all elements of the population to fragments of individuals dependent on the benefit of the bureaucratic state. The function of the state is, moreover, not only one of ruling the nation, but also that of remodeling the minds of the people, and reshaping the mentality of the population, by a predetermined model. As Tocqueville sees it, 'In short, they set no limit to its rights and powers; its duty was not merely to reform but to transform the French nation – a task of which the central power alone was capable'. The state makes men exactly what it wishes them to be (Draper, op. cit., p. 645).

Hegel also noted this equality under despotism. In his lectures on *The Philosophy of the Spirit*, Hegel supported the right on which the state power is based and the subordination of the authorities to law. In his words, 'it is necessarily true in China that the difference between slavery and freedom is not great, since all are equal before the emperor, that is, all are equally degraded'. Hegel distinguished despotism from a sovereign power in that the latter wields force but itself is not merely a matter of force; whereas the former denotes in general the condition of lawlessness where the particular will of some counts as law, not counts instead of law (ibid., p. 647-8). In this 'patriarchal despotism', Hegel writes, in his *History of Philosophy*, where the emperor runs everything in a 'fatherly' way, even the upper-class subjects are legally minors, and 'No independent categories or classes have interests to protect for themselves, as in India, for everything is managed and superintended from above'. Thus 'in China the people are dependent on the laws and moral will of the emperor without distinction of classes', and 'this very equality is not a triumphant testimonial to a person's inner worth but to a low level of self-esteem that has not yet attained to recognizing distinctions' (Hegel, in Draper, op. cit., p. 649). To Hegel, equality minus freedom equals despotism, and law is through the hands of officials. He says 'the government proceeds exclusively from the emperor, who carries it on as a hierarchy of officials or mandarins' and its members, varieties, gradations, classifications, and checks. After pages of detailed description of the bureaucracy, he concluded that 'the

whole of this administration is thus covered with a network of officials lacking all autonomy with respect to the One Power above' (ibid., p. 651).

The result of this legal culture of officialdom is official corruption. A famous Chinese writer Hu Shi once noted:

In corruption, China certainly leads the world. Not only is there an open and organized sale of offices in the State, not only has there been for twenty-five years no system of examination for government posts, but there is also the universal habit of bribery in every branch of Chinese society.... Which in polite language is called 'dipping one's fingers', and in the common language 'rubbing oil'. Military officials take a percentage of their soldiers' rations; local officials scrape the skin off their community; whilst, in business, compradors add to their commissions.

I remember that the semi-official weekly, the *China Critic* of Shanghai, once wrote a leader, the thesis of which is that China has always respected honest officials, as evidenced by the vogue of presenting a *pien* or erecting a monument in honour of an official who has rendered meritorious services. But in civilized countries, an official is expected to be honest, so there is no need for special recognition. **Corrupt officials should be sent to jail** (Hu Shih, op. cit., p. 15).

Law, as an expression of human perceptions, is something that is invariably balancing between the norms of the rules and the corrupt nature of power in man. This has been noted in Chinese culture as well. For example, there is a Chinese saying (source unknown) describing the illegal gains of corrupt officials and judges as liquid water and law as an iron gate to bar the undesirables: 'The gate of the court is made of iron, but the magister is fluid as water' (SBS, HK News, 2007).

On the other hand, this administration and judiciary were irrational from a capitalist point of view, Weber argued, as modern development and industrial investment would not allow such uncertainty in operation. Capitalism lacked political prerequisites, as he sees it, whereas the feud was not lacking. On the contrary, **'the whole of Chinese history is replete with great and small feuds...there has been no rational warfare and...no armed peace during which several competing autonomous states constantly prepare for war.** Capitalist phenomena thus conditioned through war loans and commissions for war purposes did not appear'. 'As in the Roman Empire, political competition for capital disappeared following the unification of the Chinese Empire' (p. 103). Thus Weber concluded that 'rational entrepreneurial capitalism, which in the Occident found its specific locus in industry, has been handicapped not only by the lack of a formally guaranteed law,

a rational administration and judiciary, and by the ramifications of a system of pretends, but also, basically, by the lack of a particular mentality. Above all it has been handicapped by the attitude rooted in the Chinese 'ethos' and peculiar to a stratum of officials and aspirants to office' (Weber, 1951, p. 104). (Words in bold by the author of this study.)

## **Chapter 5 Other contributing factors (why not import democracy?)**

### **5.1 Importance of culture in law study**

Many argue that law is part of culture and should be examined in a local cultural context. The importance of a culture in law study is expressed in the reflective nature of the law about the society we live in, without which any philosophy of law would be irrelevant to the needs of the people.

Gramsci, for example, believed that Marxism should be applied into local and historic contexts. He was concerned that the revolution in fact lent new life to the ancient, redeeming the old interests (it had to dance between fascism and Stalinism) and that 'state' as a form was abandoned or was controlled in the hand of a few. State is not a single entity but many forms of organizations. In Narin's study, he observed that 'Any political theory is written in a specific historical context; and with writers like Machiavelli, Lenin and Gramsci who focus on a national reality in order to change it, this context becomes particularly important. Gramsci, referring to the experiences of the Bolsheviks and the Russian Revolution, maintained that any political theory developed in one set of circumstances had to be 'translated' for a new situation. It could never simply be applied (Gramsci, in Sassoon, 1982, pp.168-170).

Gramsci also rejects the idea that revolution has to contradict almost every rational expectation and liberty, and has to succeed by sweeping everything before it. He studied various types of consolidation of ruling class hegemony after 1917 as well as the role of state and the expansion of social strata in the context of the general extension of state activities. He questioned the relationship between state and civil society, and between democracy and the building of socialism. This is a question that is being posed widely today, both by critics of socialism who reject it altogether and by socialist critics of traditional 'left' organizations. The idea of democracy is opposed to the concept of power monopoly, which means any ruling class that moulds a society. And this ruling class has to

represent more than its own power interests: 'This is true of both the bourgeoisie and the proletariat' (ibid., p.10). Gramsci once used Edmond Burke's expression of 'passive revolution' to argue that society had to change in order to stay the same – that is, to preserve its most essential features. In this sense, the historical changes were often initiated from 'high above'. He used the notion to describe a style of politics, which preserves control by a relatively small group of leaders while at the same time instituting economic, social, political and ideological changes. To Gramsci, revolution must be understood as a process of social transformation. It is not a dramatic break after which the new society begins to develop from scratch, but is a process that begins within the old society and continues after moments of dramatic change. An old society will be destroyed in all its aspects only insofar as a new one is built and consolidated. In other words, a revolutionary movement, such as the establishment of his Italian nation-state, will be able to destroy the old only by building qualitatively new social values; and this notion of construction/destruction must be made by the mass of the population, not by a small elite.

## **5.2 Law in the historical context**

As any political theory is written in a specific historical context, Marxist theory is no exception. Marx's view is, as discussed earlier, a result of a rich German tradition of philosophy; a product of 19<sup>th</sup> century industrial revolution and free trade economy; a well-established parliamentary system and a history of a liberal school of thought. The battle against feudalism in those industrialized economies was won, bringing about the end of rule by feudal lords. Thus, many features of modern democracy were achieved or granted by the laws in those countries – such as free speech and press, elections, petitions and public debates. These are the fruits of previous social and political struggles and are the more progressive reforms in historical development.

It is therefore expected that the later state in history, in Marxist term, namely the socialist state, should inherit these social benefits and greater liberties than when the state was in a feudal and uncivilized stage. To reject this heritage as part of progressive consequence and a result of human struggle, and to dismiss the basic liberty and greater freedom of the people as 'bourgeois law', is a dogmatic reading of Marxism, and a denial of basic democratic values and freedom in the Marxist vision. Moreover, to claim that, without these values in the society, the state represented the proletariats who were the 'most

advanced class in the world', as Stalin's theorists did, is a 'socialism' without substance, and a self deception. This is because democratic values are still being denied, and in China, the battle over a 'feudalist lord' style mentality is still to be won. It is by no means a natural progression suggested in some of the socialist theories. The possibility of a regression, on the other hand, is never far from reality, as evidenced in the Cultural Revolution.

### *Historic Evolution of legal thought (Western)*

As Gramsci suggested, any social transformation from a previous society, such as a feudal power structure, to the rule of law, is a fundamental but gradual process which will evolve over a long period of time. The legal tradition of the West was strongly influenced by Roman law, which began to develop in the new Europe in the Tenth Century. What concerns us here is not those legal rules developed in Roman times, but the original concept of law and state as institutions. Although highly complex and abstract, the philosophy of law has evolved as principles guiding societies in a wide range of social and state relationships over a long period of time. The source of authority has thus shifted from personal will of the monarch of the day, to an independent philosophy of law. Contrary to a power totality system, this autonomy in legal structure and development, produced, as early as Ancient Roman times, an independent role in the development of society as a whole (Samuel, 1994, p. 33).

The fact that the history of Roman law did not cease with the fall of Rome but continued to be developed by Romanists and modern jurists and scholars working in European universities from the 11<sup>th</sup> Century, demonstrated that the substance of Roman law has continued as part of a western legal tradition. It is therefore expected that with the rule of law, China as an ancient nation, should be able to continue to develop even after the fall of the different rulers and ruling agents. This is due to the fact that legal philosophy rests its sovereign power in the common will of the people, and that a monarch or a king is bound by the constitution and law, and not by his personal rule, or party rule, for that matter. It is also due to the highly respected status of law as a binding force to keep the state power in check, without which the law would be ineffective.

A good example of this is in the text of the *Magna Carta* of 1215. It was the product of much bargaining and the work of many jurists as advocates of this legal philosophy. Scope for abuse in the feudal system at the time was great and had been the subject of

complaint long before King John came to the throne. Moreover, abuses were aggravated by the difficulty of obtaining redress for them. In the *Magna Carta* the provision of the means for obtaining a fair hearing of complaints, not only against the king and his agents but also against lesser feudal lords, achieved corresponding importance. About two-third of the clauses of the *Magna Carta* were concerned with matters such as these, and with the misuse of their powers by royal officials. The significance of the *Magna Carta* lies in the fact that these complaints of people were addressed and the King was forced to make concessions – and both of these two goals were achieved by means of law.

The significant role that law played in the *Magna Carta* as a legal forum can never be overemphasized. Although most of its clauses deal with specific grievances rather than with general principles of law, *Magna Carta* signified the subjection of the King to law, for law had such an authority. What is lacking in the case of China, on the other hand, is the strong bargaining power of those Barons, and the authority of law that can withstand the King's power against the modern 'feudal lords' and 'royal' state officials.

The similarities in the matter of complaints at the time of *Magna Carta*, and in China today are apparent. China too, needs such a legal forum to redress the complaints against corrupt officials. Another example of this redress can be found in the *Habeas Corpus Act*. Responding to the abusive detention of persons without legal authority, public pressure on the English Parliament caused the government of the time to adopt the *Habeas Corpus Act* in 1679. The significance of the *Habeas Corpus Act* has been to reconfirm the authority of law in the governance of the country. Although the key issue of the Act was specific (on detention), the general concept of a critical right was established as a legal consequence of this Act, which was later written into the Constitution for the United States (Online source: *Habeas Corpus Act 1679*).

The evolution of any legal philosophy lies in the fact that any change in the concept of power, and the idea of humanity in terms of life and value of man will also need a long period of time to evolve, as noted here by Walter Bagehot:

It took a long, long time after the art of printing had been perfected before we learned the priceless value, the sovereign dignity and usefulness of a free press.

But these lessons have been taught and learned; taught for the most part by the prophets of our race, men living in advance of their age, and understood only by the succeeding generations. But you have the inheritance.

Custom is the first check on tyranny; that fixed routine of social life at which modern innovations have, and by which modern improvement is impeded, is the primitive check on base power. The perception of political expediency has then hardly begun; the sense of abstract justice is weak and vague; and a rigid adherence to the fixed mould of transmitted usage is essential to an unmarred, unspoiled, unbroken life (Walter Bagehot in Landry, pp. 229-30).

The preservation of existing laws as represented by traditions and cultural rules, to early man, at least, was of greater concern than putting up with bad laws. Change was what men feared – change and its social upheaval was what brought on suffering and death. I quote again from Bagehot's work:

In early societies it matters much more that the law should be fixed than that it should be good. Any law which the people of ignorant times enact is sure to involve many misconceptions, and to cause many evils. Perfection in legislation is not to be looked for, and is not, indeed, much wanted in a rude, painful, confined life. But such an age covets fixity. That men should enjoy the fruits of their labour, that the law of property should be known, that the law of marriage should be known, that the whole course of life should be kept in a calculable track, is the summum bonum of early ages, the first desire of semi-civilized mankind. In that age men do not want to have their laws adapted, but to have their laws steady. The passions are so powerful, force so eager, the social bond so weak, that the august spectacle of an all but unalterable law is necessary to preserve society. In the early stages of human society all change is thought an evil. And most change is an evil. The conditions of life are so simple and so unvarying that any decent sort of rules suffice, so long as men know what they are. Custom is the first check on tyranny; that fixed routine of social life at which modern innovations have, and by which modern improvement is impeded, is the primitive check on base power. The perception of political expediency has then hardly begun; the sense of abstract justice is weak and vague; and a rigid adherence to the fixed mould of transmitted usage is essential to an unmarred, unspoiled, unbroken life (ibid., pp. 229-30).

### **5.3 Economic factors – Geographic size and poverty (China)**

There are many economic factors that we need to consider when we discuss state power in China. These factors show a great degree of complexity in the state administration, and affirm a necessity for a strong leadership for the unity and stability of the nation. These factors show a need for economic prosperity as the country's main priority and this has often obscured the issue of power abuse and been used to justify the power totality of the leadership. The issue of leadership will be discussed in Part Two of this study.

China is still an agrarian society with many living below the poverty line. According to a CCTV report in May 2007, there are hundred of millions of Chinese still living below the poverty line (CCTV, on SBS, May 2007). The economic needs of these people as a priority is undeniable, and has been the primary concern for the Chinese government. Without any doubt, this economic factor is of great importance when we consider any issues concerning China. This country has a huge population (1.3 billion); a geographic scale and physical size (9,600 million square metres) that is vast and extremely diverse, and with a distinct culture that has continued for thousands of years. This presents a real probability of unrest at any local level, due to the sheer size of the population and the geographic distances. In addition, there is a large population of mobile farm workers flowing in and out of the major cities daily. It is estimated that there are 150 millions of this workforce in the urban cities moving from rural areas in China today (CCTV, *SBS News*, 23 January 2008). In addition, the literacy rate has been low and uneven across the country.

To the majority of those who are struggling on the poverty line, it is understandable that the idea of personal liberty and freedom is not a high priority. This is perhaps one of the reasons why the Tiananmen Square incident did not arouse a wider response outside the intellectual circles in the cities, or induce the nation to another civil war of 'revolution' for democracy.

China has undergone several stages of economic development. Prior and during the Cultural Revolution, over 80% - 90% of the population in China lived in the countryside and life for them had been a constant struggle against poverty and poor living conditions, as witnessed by the author of this study, in a remote village in Shanxi province. The political cliché of the day, that we lived in a near paradise world, as compared with our past of a dark world of suffering, hid a much harsher and unimproved reality with a metaphoric misperception that if the reality was to be perceived differently, then the reality would be different or much better than what it really was. Li's descriptions of life in his village made this reality evident (Li, 2003, p. 225).

To provide a decent living for thirteen billion people is in itself a remarkable achievement. In terms of democracy, it has fulfilled or in the process of fulfilling the goal of providing for the basic needs of the majority of the population. Political freedom, the Chinese government argues, is not what the Chinese people need. This view, however, does not explain why people in China deserve fewer constitutional rights and less freedom; and

why a socialist government must oppose these rights – in particular, the right to supervise and determine how state power should be exercised.

Indeed the economic factors, the geographic size and population, argue strongly for a centralized government, but this state power still needs to be limited by a collective check system. These are two separate issues that should not be considered as identical. A central power does not have to be arbitrary and dictatorial. The economic factors cannot justify a repressive state that can only rule by silencing the views of the people and which offers people no legal protection to redress their concerns or grievances against corrupt officials.

#### **5.4 Cultural factors: a belief in the harmony of state and man (China)**

Undoubtedly, culture has played a decisive role as part of law, via a concept of authority vested in the ruler, not in the law – for the ruler was above all the laws, as indicated in the Chinese old culture through its officialdom with their legal privileges.

There are many cultural differences between Eastern and Western social philosophy. For example, a concept of unity in the Chinese culture is more salient than its counterpart in the West. It emphasizes an ideal stage of harmony between the ruler and the ruled within the framework of natural law and justice of Chinese philosophy.

Chinese scholars noted that traditionally classical teaching has not focused on power vested in individuals. Instead it emphasized harmony in popular sovereignty that is non-confrontational and with a faith in universal justice. In Pan's words,

Popular sovereignty has always been the traditional belief and teaching of the Chinese people. The works of Confucius, Mencius, Lao Tzu-Mo tzu and numerous other political writers and philosophers and the Chinese Classics often reflected the thoughts of the Chinese people...Mencius says: 'The people are the most important element in the nation' (Pan, op. cit., p. 134).

This saying has in time become a proverb with the Chinese people. Another old Chinese saying that the 'King is the boat, the common people the water; the water can support the boat or capsize it', depicts this relationship between the ruler and the ruled – tyrannical emperor and the people. This was also expressed in the words of the Chinese philosopher Mencius, thus:

He who outrages the benevolence proper to his nature is called a robber; he who outrages righteousness is called a ruffian. The robber and ruffian we call a mere fellow. I have heard of the cutting off of the fellow Chau the name of a tyrannical emperor, but I have not heard of the putting a sovereign to death, in his case (James Legge tr. *The Chinese Classics*, in Pan, p.135).

Pan too noted a family-like style between the ruler and the ruled:

Traditionally, the emperor and his people were considered as composing one large family and the happiness and prosperity of the people were the criteria by which the emperor was to be judged. Should the emperor not administer for the common good of the people, he would be considered to have lost the mandate of heaven and cease to be emperor. As a result of this abuse of power, the emperor would be subject to removal or else the people would have the right to revolt against him. Thus, keeping up with this belief throughout all the Constitutions thus far proclaimed, the people are placed in the foremost chapters and their sovereignty recognized (*ibid.*, p. 135).

Thus, traditionally the Chinese people do not believe in class distinction, inheritance of class superiority, which was adequately expressed by Confucius: 'Yu Chiao wu lei', meaning 'with education there is no class'. Thus, throughout the centuries there has grown up a deep-rooted tradition that officials are not born of any special class. This, as time went by, developed into the competitive examination system in civil service, open to rich and poor, and the censorial control of the government for centuries (*ibid.*, p.136).

As Yen remarked:

China has no constitution, if by a constitution one means a written instrument ordained and established by the people as that of the United States of America, or one granted nominally by a king as that of Prussia; but if by a constitution one means a body of customs, traditions, precedents, as that of England, China has one. As the Christians cherish the Scriptures; the English, Magna Carta; and the Americans, the Constitution; so the Chinese cherish the Confucian Classics (*ibid.*, p. 136).

This belief in harmony between the ruler and ruled coincides with the principle of natural law, which is based on human reasoning and ultimate justice. This view suggests a non-individualistic approach to the common needs of people, and a non-hostile standing toward the state. This position, however, should not be interpreted as consensual to any tyrannical or arbitrary ruling including a power in totality. On the contrary, the view of harmony has a universal characteristic in humanity. In its view of the world, and regardless

of differences in any political or ideological systems – capitalist or socialist state – a total power domination by one party's own authority without limit or check, is not endorsed.

But how do we restrict this power? The traditional Chinese belief did not specify, and it did not rest the case on law either. Even legal reforms, such as those introduced during the rule of the first emperor of China (221BC) could not occur without the approval of the emperor. This shows a lack of legal means in restricting the ruling power in Chinese history, due to the social and political structure at the time; and therefore poses a great barrier to legal reform today in the process of power check.

These differences in the cultures indicate also that the change will not only be gradual, it will require a social and cultural change beyond the legal norms. This will involve a change in a transition of power from the dominance of one single holder to a process of several holders; and a power descending to the hands of the people by greater public scrutiny and exposure, as people are a part of this process. The problem identified in this section shows that at present, people are not part of this process, as they are not protected to exercise this duty by law.

It also argues, on the same grounds that a wholesale importation of the western notion of liberty to an ancient state like China is, on the current scale of population, inappropriate. This is because the idea of liberty, as so eloquently elaborated by Hayek, is based on the freedom of individuals – the idea that separates the citizens as individuals from the state as an alienated entity. This cultural difference in the two traditions would make a direct import of the idea of individualistic liberty unworkable, unless the state leaders and the people are committed to it as an essential value of their lives. Some surveys show that individual liberty is not a priority for many in China who still struggle for a better livelihood and education (Peerenboom, 2004, see footnotes p.137). Montesquieu also pointed out that democracy can be corrupted by the spirit of inequality, which arises when citizens no longer identify their interests with the interests of their country, and therefore seek both to advance their own private interests at the expense of their fellow citizens, and to acquire political power over them (Montesquieu, *ibid.*, Ch.8). Historically, it will therefore be a gradual and slow process of thinking and value adjustment in China.

On the other hand, this concept of harmony between the ruler and the ruled does not entail the acceptance of tyrannical rulers, nor does it endorse despotism that is structured by

a power totality. What is absent in this Chinese cultural concept, whereas it has been greatly developed and adopted in the western mode of the state and government, is an independent legal philosophy which provides not only the idea of legal check on state power as a principle, but also provides a legal forum and structure that is independent, to enable people to challenge and monitor the state power. Therefore, a socialist or Marxist revolution, as claimed, is not a simple matter of overthrowing one form of government and replacing it by another, but a matter of all powers of the state, irrespective of their ideological claims, being mutually regulated by the rule of law under public scrutiny, by means of constitutional supervision with independent legal authorities.

### **Summary of Part One**

In this section we have identified a form of power totality as the problem to be dealt in the study. This power was established by virtue of its own authority without being subjected to the will of the people or to the law. It has an unquestionable supremacy and is without limit. This has undermined the authority of law. It is a problem because it contradicts the vision it claimed to follow by denying people's basic rights. It is a problem because it rules by its own power without the authority of people. This form of power is a regression to the feudal past on the basis of totalized power in the hands of a few, without constraints. It is a problem because it failed to give the protection people need and made law irrelevant to grant such protection. The result of this power totality is a continuation of a feudal style of officialdom with a legal privilege that is enjoyed only by the club of power holders. As a result of this, people have suffered and been unprotected. They cannot hold the offenders accountable for a lack of such a legal forum. Despite the laws made through the history of China, the power totality has the final ruling. Taking other non-legal factors into consideration, the challenge to this power totality will be a gradual process and its impact will go far beyond the law. The study of the cultural aspect of law is also important in the concept of authority and indicates a traditional lack of legal authority as a barrier to power check today.

In this part we have identified the problem of power totality as the central issue of this study. We have given the form, the reasons and the consequences of such a problem. Law is seen as a part of the problem, and as one of many factors contributing to the complexity of the problem. But these factors are not the main reason the power totality has

developed and been justified. In the following chapters in Part Two, I will argue from a theoretical aspect that Marxist theories have been grossly abused to justify this power totality that provided a legitimacy by virtue of its own power, both in the past and present.

## Chapter 6 Marxist theory

To understand what has become abuse in the context of power monopoly, it is necessary to introduce some basic concepts of Marxism, namely Marx's view of history, and of the economy as the basic structure. His theory of dictatorship of the proletariat resulted in a class struggle and his denial of the capitalist legal system is affirmation of law as a power check against a totality of power structure after the revolution.

Here are some basic concepts in Marxism:

### 6.1 View of History

The greatest influence on Marx was Hegel's philosophy of history, and its notion of historical change. The idea of historical change is based on the dialectical: that is, of conflicts and struggle of opposites within one entity. Despite these forces of change, Hegel, paradoxically, insisted that there is an unchanging supreme law, or the 'Idea of the Absolute', which, independently of human will, governs nature, society and human beings. Hegel sees that the mental things (ideas and concepts) are fundamental to the world, not matter, and that material things are merely expressions of ideas, in particular, of an underlying 'Universal Spirit', or 'Absolute Idea'.

Marx, to the contrary, argues that matter is fundamental, and that ideas are but expressions of material necessity. In his words, 'revolution needs a material foundation. The degree to which a theory is realized in a nation, depends on the extent this theory is capable of meeting the nation's needs' (Marx, 1844, p. 9).

With this materialist conception of history, Marx sees the world as something separate from human activity, and therefore 'objective' – meaning that which is independent of human will and consciousness. This formed what Engels called the 'scientific' basis of Marxist theory (Engels, 1892, p. 425).

From this point of view, history is seen as a continuous process in stages. It develops with various transitions, for example, from feudalism through a number of intermediate stages to capitalism. In this view, history is perceived not as an isolated event, but a process gradually moving towards a higher stage of human civilization. The final stage is one in which man's ultimate freedom is fully realized in a communist society. According

to Marx, communism is a stage in which men will live at a higher stage of realization of true freedom with other men and with the society as a whole. The transitional periods between the feudal stage and the socialist stage (perceived as an initial step towards communism) have not been elaborated in Marx's writing, as he expected the procession of history would evolve naturally from the most industrially developed nations in principle. However, as we will discover later, that missing link between an undeveloped economy and capitalist economy is very important in terms of how law is perceived and applied in the name of Marxism.

According to the theory of historical materialism, the reason behind the evolution of societies is the conflict between the forces of production and the relations of production, which brings revolutionary ideas. Marx explained this conflict in the Preface to the essay 'A Contribution to the Critique of Political Economy' (Marx, in Tucker, 1978, p.4). There, he sees material circumstances as vital to sustain even the most elementary forms of social life. Men satisfy their needs for the development of the human species through the use of the available technologies and natural resources.

## **6.2 Base and superstructure**

The conceptual division of 'base and superstructure' brings relevance to law as we see it today. The base structure is the economic foundation in a given society – its mode of production and economic relationship of production, which forms the basis of that society. The economic relations are determined by the mode of production in which the factors of production such as land, labour and capital, are organized. On the other hand, based on this economic foundation, is the 'superstructure', which includes ideas, ideologies, theories, philosophies, religion, ethics, art, etc. As part of this superstructure, legal rules and institutions, are referred to as 'the law'. The bases of a system of law, its purposes and manifestations, would have to be comprehended in terms of their relationships with this mode of production and its economic relationships. This means that legal ideas and structure can have no meaning or significance outside a materialistic framework of analysis. Legal thought has to be interpreted in relation to the social fabric within which it was conceived and nurtured. There is no separate theory or discussion about the growth of theories of natural law or common law, but there was detailed discussion about the concept of right in the context of German philosophy and Hegel's philosophy of law by Marx. To

Marx, it is the relationships embedded in the society's economy that determine the nature of legal ideology.

### 6.3 Class struggle and proletarian dictatorship

In *Das Kapital*, Marx argued that the struggle between the proletarian class and the bourgeois class was inevitable. The struggle was clear cut, 'for one class to represent the whole of society, another class must concentrate in itself all the evils of society...for one class to be the liberating class par excellence, it is necessary that another class should be openly the oppressing class' (Marx, 1844, op. cit., p. 63). The result of this opposition has proved catastrophic. In his words, 'the antagonism between the proletariat and the bourgeoisie is a struggle of class against class, a struggle which carried to its highest expression is a total revolution' (Tucker, op. cit., p. 219). This leads to the concept of the ownership of working people:

Communism deprives no man of the power to appropriate the products of society; all that it does is to deprive him of the power to subjugate the labour of others by means of such appropriation (ibid., p. 486).

The society will become a new form of association, in which the free development of each individual is the condition for the free development of all, by means of new mode of production. The ownership of property will always be Marx's leading concern which is expressed in the last paragraphs of the *Manifesto*: 'In all these movements they bring to the front, as the leading question in each, the property question, no matter what its degree of development at the time' (ibid., p. 500).

Marx sees that the leading class, in the process of *universal human emancipation*, should identify itself with the rest of society as the *general representative* of this society. 'Its aims and interests must genuinely be the aims and interests of society itself, of which it becomes in reality the social head and heart. It is only in the name of general interests that a particular class can claim general supremacy'. To be the 'head and heart' of the movement and to attain this liberating position, the leading class must be part of the society at large. It is because 'no class in civil society can play this part unless it can arouse, in itself and in the masses, a moment of enthusiasm in which it associates and mingles with society at large' (Tucker, op. cit., p. 62).

That leadership, however, will cease to function once the transition to the classless society has been completed. In his words,

And now as to myself, no credit is due to me for discovering the existence of classes in modern society or the struggle between them. Long before me bourgeois historians had described the historical development of this class struggle and bourgeois economists the economic anatomy of the classes.

What I did that was new was to prove: 1) that the *existence of classes* is only bound up with *particular historical phases in the development of production*, 2) that the class struggle necessarily leads to the *dictatorship of the proletariat*, 3) that this dictatorship itself only constitutes the transition to the *abolition of all classes* and to a *classless society* (Tucker, op. cit., p. 220).

#### 6.4 Marx's view of law and revolution

Marx was very critical of the bourgeois society and law as its superstructure, to the point of total abolition of the existing system by a radical form of revolution. This view is based on his theory of base and super structures of the society. This total denial of existing legal systems has provided some theoretical excuses for the later development of socialist legality of power monopoly.

##### *Law a class instrument*

Law, seen by Marx as a part of a social and political system which was oppressive to the working people, should be abandoned as abstract superstructure. Although it was the bourgeois class that he called to overthrow, he included all its superstructures on the revolution list as well. This idea of overthrowing an old system because of its oppressive nature is not new or unique to Marxism, but unique problems arose when a revolutionary force took over power and became itself oppressive. Abuse occurred when working people, not necessarily the proletarian class, were oppressed by a new state in the name of 'people's revolution' against oppression.

For Marx, from a 'Ruthless Criticism of Everything Existing' (Marx to Arnold Ruge, 1844, in Tucker, op. cit., p. 12) standpoint, law as a part of superstructure, is expected to be thrown out completely by the storm of the revolution. As it is stated in the *Manifesto of the Communist Party*, 'The proletariat, the lowest stratum of our present society, cannot stir, cannot raise itself up, without the whole superincumbent strata of official society being sprung into the air' (Marx 1844, op. cit., p. 250).

The notion of 'class instrumentalism' which had significant influence on many European jurists of the 20<sup>th</sup> century, derived from this idea of superstructure and the concept of struggle. Ideas relating to the law – its content, theoretical basis, principles of legal institutions – are viewed in the context of the class interests jurists serve. Law, according to Marx, is an instrument of class domination, enabling the ruling class to control and suppress those groups, which challenge its power. Behind the apparent legal system of 'justice' or 'reason', is the veiled purpose of the *protection and preservation of class interests*. Jurisprudential ideas may be viewed not as independent or disinterested ideas in themselves, but as a rationale for certain schools of ideologies and it is used as a weapon to safeguard those who hold power.

What is open to abuse, apart from the class suppression, is the idea of the old society being abandoned completely by the new working people's state, and this includes the idea of law. It is stated in the *Manifesto* that someone would argue that 'religion, moral, philosophical and juridical ideas have been modified in the course of historical development. But religion, morality, philosophy, political science, and law, constantly survived this change'. The answer to this is that 'there are, besides, eternal truths, such as Freedom, Justice, etc., that are common to all states of society. But communism abolishes eternal truths, it abolishes all religion, and all morality, instead of constituting them on a new basis; it therefore acts in contradiction to all past historical experience'. It is because 'the communist revolution is the most radical rupture with traditional property relations; no wonder that its development involves the most radical rupture with traditional ideas' (Tucker, op. cit., p. 489).

### ***Law and State***

Marx's theory of Base and Superstructure also leads to his concept of state and law. Law, in a sense, is perceived as 'super' law, which is beyond the normal scale of legal institutions. The state, its apparatus and ideology are perceived as a part of the general superstructure of society, reflecting its economic base. Marx's view of state started with an examination of the relation of state and law to property. He traced back the history of property development and saw a parallel function of state evolving with the process, from the early stage of State property when the tribes lived together in one town, and the tribal property appeared as State property, in which the right of the individual to it was as a mere 'possession'; to the modern pure private property of big business where the State was cut

out from any influence on the development of property. Modern private property has fallen entirely into the hands of big private owners. Through this movement private property has freed itself from the community, and the State has become a separate entity, beside and outside civil society (Marx 'The German Ideology' in Tucker, op. cit., p. 160).

The function of the state, in Marx's view, is nothing more than the form of organization which the bourgeoisie necessarily adopt both for the mutual guarantee of their property and interests. There can be no independent State unless it is a country where the estates have not developed into classes, and where the estates still have a part to play – a state in which no one section of the population can achieve dominance over the others. State, in this sense, is seen as a group of individuals of a ruling class asserting their common interests, and mediating in the formation of all common institutions and so the institutions thus receive a political form. In his words, 'the bourgeoisie has at last, since the establishment of Modern Industry and of the world-market, conquered for itself, in the modern representative State, exclusive political sway. The executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie' (Tucker, op. cit., p. 475).

Marx believes that it is an illusion that law is based on the will in its dealings, because the will is in fact divorced from its real *free* basis. Similarly, justice is in its turn reduced to the actual laws. Marx's logic is that this is because they are the laws of the private interest holders, whose interest is contradictory to the common and public interest. Marx sees that 'civil law developed simultaneously with private property out of the disintegration of the natural community' (Tucker, op. cit., p. 187). 'Modern industrial labour, modern subjection to capital ... has stripped him of every trace of national character. Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests' (ibid., p. 482).

Marx sees that the old civil society as a whole should be abolished because its basic foundation was wrong, and his resolution was a radical and complete destruction of the old society. In his words, 'In the formation of a class with *radical chains*, a class of civil society which is not a class of civil society, an estate which is the dissolution of all estates, a sphere which has a universal character by its universal suffering and claims no *particular right* because no *particular wrong* but *wrong generally* is perpetrated against it' (Marx 1844, p.13).

His denial of existing political and legal systems was clearly demonstrated in one of his speeches: 'the immense and unresisted encroachments of that barbarous power, whose head is at St Petersburg, and whose hands are in every cabinet of Europe, have taught the working classes the duty to master themselves the mysteries of international politics; to watch the diplomatic acts of their respective Governments; to counteract them, if necessary, by all means in their power; when unable to prevent, to combine in simultaneous denunciations, and to vindicate the simple laws of morals and justice, which ought to govern the relations of private individuals, as the rules paramount in the intercourse of nations' (Marx, in Tucker, op. cit., p. 519). Again he stressed this denial of existing systems in the last paragraphs of the *Manifesto*: 'In short, the Communist everywhere supports every revolutionary movement against the existing social and political order of things' (ibid., p. 500).

How to achieve this abolition of the old society? The answer Marx gave is that 'the first step in the revolution by the working class, is to raise the proletariat to the position of ruling class, to win the battle of democracy', and then use this political supremacy to wrest all capital from the bourgeoisie and to centralize all instruments of production in the hands of the State, that is, of the proletariat organized as the ruling class; and to increase the total of productive forces as rapidly as possible (ibid., p. 490).

## **6.5 What became Abuse in Marxist Theory**

There are three areas of Marxist theory which can be open to abuse – namely the contracted democratic values and diminished humanity; the class struggle to justify power oligarchy and class superiority; and the dictatorship theory to justify power monopoly.

Marxist theories have been subject to various critiques as theories of totalitarianism opposed to democracy. To clarify where abuse relevant to this study has occurred, we need to identify two aspects of the theory – namely, class and dictatorship; and the totality of power structure. As discussed in this chapter, Marx's vision is based on and not opposed to democratic values. However, his class and class dictatorship theory has been used by many as consolidating rather than destroying the class distinctions and class superiorities. In practice, the ruling class used its power to trash other human beings, and the old feudal value of man as a worthless and disposable being, also persisted without challenge. This is

a direct result of an abuse of his class and dictatorship theory in a modern sense – without a change in its substance. Marx's call for a total change and total destruction of the existing order, by a radical means of revolution, has contributed to the sense of total denial of any progress in the previous social evolution and in the rule of law including the principle of curbing the arbitrary power vested in the state or party officials. In this sense, law and state power cannot be simply classified as proletarian or bourgeois, to replace one by another; for power has no class boundary and should not be sanctioned in any society without legal privilege.

### *Democratic Values*

Marx expressed his democratic values in his writing about the future workers' state. First, this state is a civil society with a just and ethical relationship of harmony among the sectors of society. It is the 'great organism in which juridical, ethical, and political freedom has to achieve realization' (ibid., p. 32). He sees that the state, after the revolution, is part of law; but not above law, and no individuals or political parties are granted immunity above the law, or a legitimacy for a power monopoly. Instead Marx sees that the state is the 'agent of the people' – its executives at the direction of the people. Marx wrote:

The right of the democratic mass of the people to exert a moral influence on the attitude of the constituent assembly is an old revolutionary right of the people which, since the English and French revolution, could not be dispensed with in any period of stormy action. It is to this right that history owes almost all energetic steps taken by such assemblies (Marx, in Draper, op. cit., p. 290).

However, many see the idea of communism as either utopian or repressive. People such as Colin Wilson maintain that communist regimes always seem to end in oppression and totalitarianism. In his words,

Since those early days, the west has had the chance to see communism in practice in many countries in the world, and to observe that it always seems to result in oppression and totalitarianism. From the Stalin purges to the Vietnam boat people and the takeover of Cambodia, the face of Communism seems invariably brutal.

(C. Wilson, in Love, *Dogmas & Dreams*, 1998, p.13)

Wilson questions revolutionary socialism, which to him, all degenerates into tyranny.

He said:

Is Marxism a sound theory that is betrayed by its practitioners? Would it actually work if human beings were less imperfect? In *The Open Society and Its Enemies*, Karl Popper argued that oppression was inherent in the whole socialist theory from the moment Plato decided that poets were too dangerous to live in his ideal Republic...Others argued that terror is an inevitable consequence of revolutionary socialism, and that all such revolutions are bound to degenerate into tyranny.

Marx was wrong about many central issues, and that some of his most important prophecies – like the increasing alienation of the workers, the polarization of the social classes, and the ‘withering away of the State’ – were simply unrealistic guesses (Ibid., p. 14).

Others see Marxist theory as the political enemy, which should be crushed because it directly challenges the foundation of a market economy and capitalism. This view has been expressed no better than by former British Prime Minister Margaret Thatcher, who said:

It was not simply Stalin who was an evil man, but that communism, in practice, is an evil system, which gave birth to Stalin...

We must add deterrence and defence to détente, for unless we do, we in the West will find ourselves constantly accommodating ourselves to Marxist values, instead of making the world safe for our own. We must build a world in which freedom is on the offensive. No single Western state not even USA, can stand alone against the power of Russia, nor alone can stem the spread of Communist influence around the world.

For fifty years or more we have been led to believe that decisions made by the State on behalf of the people are in some way both more moral and more efficient than by the individual himself. It is not true. On the contrary, the more you take away from the individual his own powers of decision, the more you increase the risks of tyranny.

The easy liberal education left the belief that Utopia was soon to be achieved, that with the welfare state, all ills would soon vanish and, with the UN, all tyrannies would soon crumble. That has proved an illusion.

(Margaret Thatcher in Wilson, pp. 270-272).

F. Hayek, on the other hand, claims that socialism has nothing to do with liberalism. He sees that democratic socialism as the great utopia of the last few generations, is not only unachievable, but even to strive for it would produce something so utterly different that few would be prepared to accept the consequences. In his view, most socialists still believe

profoundly in the liberal ideal of freedom but few realize that their program would mean the destruction of freedom. They are irreconcilable ideals, and yet one still hears the terms as 'individualist socialism'. W. H. Chamberlain, who in twelve years in Russia as an American correspondent had seen all his ideals shattered, summed up the conclusions of his studies there and in Germany and Italy, thus: 'Socialism is certain to prove, in the beginning at least, the road NOT to freedom, but to dictatorship and counter-dictatorships, to civil war of the fiercest kind. Socialism achieved and maintained by democratic means seems definitely to belong to the world of utopias' (Chamberlain, in Love 1998, p. 49).

This criticism was based on a general perception that law as a tool of enforcement ideology in Russia, often failed in many areas – such as detention without trial; trials not held in public but before selected onlookers; the refusal to allow the defendant to be represented by a lawyer of his choice (particularly in the case of political dissidents). Others observed that so-called socialist law and order often threaten to endanger the strict observance of the rule of law (Lloyd, 1985, p. 996).

In George Orwell's review of Hayek's *The Road to Serfdom* he said,

Professor Hayek's thesis is that Socialism inevitably leads to despotism by bringing the whole of life under the control of the State, Socialism necessarily gives power to an inner ring of bureaucrats, who in almost every case will be men who want power for its own sake and will stick at nothing in order to retain it.

Between them these two books sum up our present predicament. Capitalism leads to dole queues, the scramble for markets, and war. Collectivism leads to concentration camps, leader worship, and war. There is no way out of this unless a planned economy can be somehow combined with freedom of the intellect, which can only happen if the concept of right and wrong is restored to politics (Orwell, in Love, op. cit., p. 44).

Yet, as Djilas correctly pointed out, the vision in Marx's original theory was not to destroy what existed in the highly developed countries but to surpass it in terms of the freedom of man. In his words, 'According to Marx's hypothesis and his conclusions on the subject, the revolution would occur first of all in the highly developed capitalist countries. Marx believed that the results of the revolution – that is, the new socialist society – would lead to a new and higher level of freedom than that prevalent in the existing society, in so-called liberal capitalism (Djilas, p. 22).

In Marx's vision, a better form, not only a higher economic and social form, but also a higher form of human freedom, should replace capitalism. It is a yearning for the lost values of communal spirit, for unity between man and nature, and for a direct communication among human beings, but also the belief that man's empirical life can and should be reconciled with this true essence. On the other hand, Marx was not in favour of one class over another, or for the creation of new privileges for a new elite in power. He was not in favour of one nation, one race, one ideology or religion over other ones. His was a vision for humanity. In practice, however, this vision is blurred or even deliberately misused for various purposes. Stalin's purges and massacres, are often used as a perfect example of Marxist ill intentions, and were not identified with the basic democratic values in the original vision. This is a distorted picture of abuse of the original Marxist message. State, in Marx's sense, is the intermediary between man and human liberty whereas Stalin abused the state power as his personal property and to maintain his political dominance. He could only achieve this with the structure of power monopoly as a dictator. The public power was abused brutally in this way without any constraints.

#### *Class struggle - Class superiority*

Marx sees that the leading class, in the process of *universal human emancipation*, should identify itself with the rest of the society as the *general representative* of this society. He maintained that the leading party must have the same interests as society itself. It is in the interests of the people that one class can claim general supremacy. On the contrary, the privilege that the party as a particular class has today is contradictory to this general interest.

This also eliminates the condition of ruling class supremacy. In Marx and Engels' words, 'If, by means of a revolution it [the proletariat] makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms and of classes generally, and will thereby have abolished its own supremacy as a class (*The Communist Manifesto*, ME: CW 6:505). To elaborate this point further, Engels refers back to this passage some thirty-five years later emphasizing that there is no question of counterposing one class against the other; rather, it is the principle that all are the same, regardless of class origin: 'The revolution which modern socialism strives to achieve is,

briefly, the victory of the proletariat over the bourgeoisie, and the establishment of a new organization of society by the destruction of all class distinction' (Engels, *ibid.*, p.665).

Class theory is perhaps the most abused area in Marxist theory. It stemmed from the fact that most societies are classed entities. However, to make it a Marxist proposition, that each individual has a class label hanging on his/her neck as a permanent imprint to be readily condemned and even executed, is a new form of abuse of the original theory of the proletariat class as opposite to the bourgeois class. Marx used this class analysis only when he based his argument on the capitalist means of production, and his view that everyone in society reflects his social relations. He had no common ground with those who wanted to bring other human beings to disgrace so that they could feel secure in their own social standing, without any reference to capital or economic analysis, or with any evidence of social attitude or behaviour that was unacceptable to the community. This can only be explained by the power play in the name of class struggle in Marxist terms. In both Russia and China, many innocent people were put in gaols or exiled as 'class enemies' without trial or for no reason, in the despotic system which arose in those regimes. Marx's class struggle theory was degraded to such a degree that it could be treated almost like a joke, if not for the tragedy for the people involved. The question is: Who gave those abusers such a power to abuse others? and Where did they get the idea that they had the 'right' to mistreat others in this way? It definitely did not come from the original proletariat class in Marxist theory. The new state of public ownership obviously did not change people's attitudes or remedy social inequality for that matter.

What Marx did not specify is the fact that power is 'classless' in its arbitrary use. The socialist legality of power concentration opened the opportunities for power careerists in any political system, for power has no class boundaries. It is not Marx's original intention to create one master as the replacement for another, in the name of class supremacy. On the contrary, it is 'only in the name of general interests that a particular class can claim general supremacy' (Marx 1844, in Tucker 1978 p. 62).

### ***Dictatorship – power monopoly***

This concept of class superiority has been used to justify the dictatorship theory and social discrimination against all other sectors of the society. However, class supremacy is also against the Marxist position in a civil society after the revolution. This view is

expressed in *The Communist Manifesto*: 'if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms and of classes generally, and will thereby have abolished its own supremacy as a class' (Marx, 1844, in Tucker, 1978, p.491). To elaborate this point further, some thirty-five years later, Engels made a reference back to this passage, in terms of proletarian power, to emphasize that there is no question of counter-posing one class over the other, it is the principle that is the same: 'The revolution which modern socialism strives to achieve is, briefly, the victory of the proletariat over the bourgeoisie, and the establishment of a new organization of society by the destruction of all class distinction' (Engels, op. cit., 2:387). Nowhere in all their writings, did either Marx or Engels ever endorse a regime whereby total power is concentrated in one group or class perpetually without a democratic process or expression of the people, to have a choice or say in the leadership process.

The purpose of the revolution is not for a small group of people to seize power and become the new rulers, but to solve the fundamental contradiction of economic relations between the mode of production and the force of production. These are the conditions which Marx specified for the revolution: that the economic conditions must be met, and that the economic relations must be in contradiction with the force of production in the economy. Social relations have to reach a certain stage of development before the revolution can happen. Here Marx's prediction was a rather hasty one: to gain control of the mode of production so that the state would be in the hands of the working people. Marx seems to have given the green light to a certain group of people in society to seize state power as leaders of the revolution, and to crush the bourgeois enemy along with the rest of society. It also opens the door for any revolutionaries to seize power in that way under the banner of Marxism.

The danger lies in the potential that the theory of proletarian dictatorship can be easily used to justify dictatorship of all kinds, military or political, for any social group claiming power and dominance in the society. Although Marx gave us the warning that the revolution is not a power game for pure political gains of any groups, the reality is that it has attracted ideas of all kinds, and has become a synonym for any social change by violent and radical means. This is particularly true in developing countries whose economies are weak, and the demand for change by political means is strong.

### *Totality – a concept of Dogmatic application*

Dogmatism is the most important feature in executing the abuse. It is associated with the notion of truth, and furthermore, the seeming monopoly of the truth. Truth here is an absolute concept: there is only one truth, and only 'I' hold it and no one else. The pressure increases as this logic goes: you are either with me or against me, either black or white; as I represent truth, whoever is against me, is against the truth, for my logic cannot be refuted.

This logic, however absurd it may appear, is in fact very realistic and powerful in the argument. We have ample examples of this even today, in regard to the 'war against terrorism'. This dogmatism can be found in many ideological schools and is not confined to either economic or political convictions. The reason this issue is raised here is that in the process of mass control and education, this trend often prevails, with a tendency to develop into radical and extremist thought, leading to fundamentalism. The danger of this dogmatism should never be overlooked, and it is often found in the practice of turning Marxism into a dogma to fit the political agenda of the time.

Arendt believed that the right to citizenship, the right of a *plurality* of people 'to act together concerning things that are of equal concern to each', is not only denied by totalitarianism, as it is also by every despot, but stands opposed to the principle that guides the acts of destruction that characterize totalitarian systems (Arendt, 1973 p. 478). That principle is an *ideology* explaining the entire course of human affairs by determining every historical event and all past, present, and future deeds as functions of a universal process. Looking deeper into the phenomenon of totalitarianism Arendt saw that the 'idea' – the content of the ideology – matters less than its 'inherent logicity', which was discovered separately and prized by both Hitler and Stalin. In broad outline ideological logicity operates like a practical syllogism: from the premise of a supposed law of nature that certain races are unfit to live, it follows that those races must be eliminated, and from the premise of a supposed law of history that certain classes are on their way to extinction, it follows that those classes must be liquidated. Arendt's point is that the untruth of this ideological premise is without consequence: the premise will become self-evidently true in the fictitious world created by the murderous acts that flow from them in logical consistency.

In both Russia and China, the law, though unwritten, was painfully clear, that the party had unlimited legal power to do anything to an individual, but the individual could not defy or even disagree with the party. This obvious violation of the state's role went unchallenged, because the individual was either overwhelmed by the state power in every sense, or had no other legal access to argue one's case. The apparatus of the state was such that the notion of protection for the individuals was simply non-existent – as were the legal institutions. This was the seed for totalitarianism, which is another form of abuse in reality. The myth was created that man as individual owed the state and the party everything. In the official rhetoric it is the state that raises the nation, educates the masses, and maintains employment etc. and yet the party/state owes him/her nothing. The truth is, in terms of power relations, that the state had the monopoly of power, which meant everything, including law, and the individual had none. This is another violation of Marxist teaching that power comes from the people who gave the authority to the party and the state to represent them.

#### **6.6 State ownership – protection of people**

The concept of people needs further clarification. 'People' can be everybody and nobody. Often this term is used to mean 'I want it', or the 'party wants it'. It is then used as a justification on the basis of the abstractness of the term. Russian people were persecuted under the name of the 'people's cause', 'in the interest of the people', or 'the party represents the people'.

Russia's experience shows that public ownership did not make all equal and that state-controlled capital does not mean that people own the mode of production at all. So we need to spell out what people own and how to prove that they are actually benefiting from owning this mode of production, in terms of the factory where they work or the business they participate in. When the state owns the mode of production, and is in charge of major national resources and capital, how would the profit come down to the people and the workers who directly contributed to the output of the product? These questions are worthy of examination in a separate study.

Djilas linked the rise and fall of Marxism to the political and economic progress where the working class can play a greater role in society. He sees that in undeveloped

economies the ties with Marx were strong, or at least in outward appearance, whereas in developed economies, the ties were weak. In countries where economic progress was slow and where the working class played an insignificant role in society, there was a tendency to make a system out of Marxist teaching that was unrelated to this economic need, although Marx was always cited as the basis for its ideas.

In countries where economic forces and social relations were not yet ripe for industrial change, as in Russia and later in China, the adoption and dogmatisation of the revolutionary elements of Marxist teaching was more rapid and complete. A revolutionary trend emerged in the working-class movements; Marxism grew stronger. With the victory of the revolutionary party, it became the dominant ideology. In countries such as Germany, where the degree of political and economic progress made revolution unnecessary, the democratic and reformist aspects of Marxist teaching, rather than the revolutionary ones, dominated. The anti-dogmatic ideological and political tendencies generated an emphasis on *reform* by the working-class movement (Djilas, p. 23).

## **Chapter 7 Socialist Legality – how power monopoly developed**

### **7.1 Theory of state developed by Lenin**

Marxist theory of class and the notion of the dictatorship of the proletariat was further developed to justify the power monopoly in the hands of a single political party and its leaders.

#### ***Dictatorship theory***

Lenin wrote his famous *The State and Revolution* in August 1917, on the eve of the Russian October Revolution, which he led, to establish the first socialist state in the world. In this essay he elaborated Marx and Engel's theory of state and drew up his own conclusion that Russia could not wait for evolution to take its own course, and that a violent revolution was necessary to replace the existing bourgeois state in Russia, although it did not fit into Marx's capital-based analysis or his prediction that revolutions would take place first in the advanced industrial economies. Lenin affirmed Marx's dictatorship theory, and applied it in the context of Russia's own experiences of the revolution. Moreover, he further reaffirmed the necessity of the proletarian state in two stages, and the revolution theory, which he believed could only be understood as a whole as a link in a process – a

chain of socialist proletarian revolutions being caused by the imperialist war and the extremely harsh conditions of civil wars. Similarly in China, Mao seized the chain of social resistances caused by the Imperial Japanese armies, some two decades later.

Lenin's theory on proletarian leadership was developed in the era of the Russian Revolution in 1902, as a result of social circumstances that led to the failure of that attempt. In his pamphlet *What is to be done?* Lenin argued that workers needed their political right, and that the debate by the economists was very restricted and insufficient as a fundamental resolution to social problems. At the time he anticipated that a bourgeois class was too ready to surrender to the autocracy on the one hand, and a proletariat class was too disorganized to resist it. The masses, he argued, could not win but only riot. It required therefore a leadership of a party of professional revolutionaries to lead genuine revolutions to victory. This theory of proletarian leadership with a political organization was later developed as a major feature in the Marxist theories of state power, which were adopted by many undeveloped nations, including China, with wide implications (Wilson 1998, p. 299).

#### *Law is a class rule*

In *The State and Revolution* Lenin saw the state first perceived as a product of irreconcilable class antagonisms. 'The state arises where, when and insofar as class antagonisms objectively *cannot* be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable'. Nor was the state an organ for *the reconciliation* of classes. According to Marx, Lenin argued, 'the state could neither have arisen nor maintain itself had it been possible to reconcile classes. The state is an organ of class *rule*, an organ for the oppression of one class by another; it is the creation of "order", which legalizes and perpetuates this oppression by moderating the conflict between classes' (Lenin 1917 p.16).

To Lenin, this force, as Engels said, had another role to play in history – that is the revolutionary role to bring about a new society. Lenin sees that the old state as an instrument for the exploitation of the oppressed class would be abolished by such a force. From this Lenin drew the basic characteristics of state: the concept of 'public power' which Lenin called 'the state', is a power which arose from society but places itself above it and alienated itself more and more from it. It is a self-acting, armed organization of the population, with complexity and highly technical levels. It signified the split of society into

antagonistic classes in a civilized society. He argued that such an organization would still be possible in any classed society. By destroying the state apparatus, we not only see the naked class struggle, and how the ruling class strives to restore the special bodies of armed men which serve it, but also how the oppressed class strives to create a new organization of this kind, capable of serving the exploited instead of the exploiters.

### ***Representative state***

Before the state can be put away 'in the museum' or 'wither away', there are certain conditions to qualify. First, Engels says, that in seizing state power, the proletariat thereby 'abolishes the state as state'... The state was the official representative of society as a whole, but it was this only insofar as it was the state of that class which represented itself for its own time. It is only unwanted when at last it becomes the real representative of the whole of society – it then renders itself unnecessary. Lenin argued, therefore, that the theory of Marx and Engels of the inevitability of a violent revolution refers to the bourgeois state. The latter *cannot* be superseded by the proletarian state through a process of 'withering away' but only through a violent revolution as a general rule. He believed that this was in accordance with Marx's open proclamation in *The Communist Manifesto*, of the inevitability of a violent revolution, which he sees lying at the root of the *entire* theory of Marx and Engels. He concluded that 'the suppression of the bourgeois state by the proletarian state is impossible without a violent revolution' (ibid, p. 27).

Furthermore, in response to Marx's idea that what was new was not the anatomy of the classes, but to prove that first, the classes are only bound up with particular historical phases in the development of production. Secondly, that the class struggle necessarily leads to the *dictatorship of the proletariat*, and thirdly that this dictatorship itself only constitutes the transition to the *abolition of all classes* and to a *classless society*. Lenin drew the conclusion that bourgeois states are inevitably a *dictatorship of the bourgeoisie* and that the transition from capitalism to communism is certainly bound to yield a tremendous abundance and variety of political forms. However, the essence will inevitably be the same: *the dictatorship of the proletariat* (ibid., p. 37). This is what he had in mind to replace the 'smashed state machine'. Thus the theory of the proletarian dictatorship was firmly established in practice by Lenin.

Marx did not lay down specifically the political forms of a future stage in which the transition from state to non-state would take place, but Lenin believed that the smashed state machine can and must be *replaced*. And the transitional form before the state disappearance would be the 'proletariat organized as the ruling class' in this transition from state to non-state (ibid, p. 52).

Korsch, for one, believed that the dictatorship of proletariat doctrine was invented independently of the class struggle and was used as an instrument of ideological dictatorship over science and art. He sees that the theory has become a tool for despotism: the view of so-called 'scientific with objective truth' loses its ground when it became independent of the workers' movement. In this sense the doctrine became a despotic ideology enabling the party apparatus to exercise a dictatorship over the proletariat (Kolakowski 1978, p. 322).

## **7.2 Theory of state developed by Stalin – Socialist Legality in Soviet law**

Pashukanis, a Bolshevik, who was unjustly condemned for sabotage, and who was a leading author of legal theory in Russia (which still endorsed Vyshinsky's negative standpoint on Pushukanis' work) sees the state as a power broker in class conflicts in bourgeois society. He maintains that 'class society is not only a market where autonomous owners of commodities meet, but is at the same time the battle field of a bitter class war, where the machinery of state represents a very powerful weapon'. On this battlefield, relations do not appear to be in the least in the spirit of Kant's definition of law as a minimal limitation of the freedom of the personality indispensable to human coexistence. Using Gumpłowicz's words he argued that this kind of law never existed – that the state was a power factor and that the nature of this state power as the organized power of one class over the other was under the cover of the bourgeoisie and their theory and practice of a 'constitutional state'. He is quoted:

The measure of some people's 'freedom' is solely dependent on the measure of their domination by others. The norm is determined, not by the possibility of coexistence, but by the domination of some by others.

(Pashukanis 1924, p. 150)

On the other hand, Vyshinsky, departing from this economic relations analysis, elaborated the concept of state further as a new form of organization of the proletariat – the Soviets. This new state targeted the bourgeoisie as its primary enemy, on all grounds, and

justified the suppression of this class, ideologically, and physically, with a new concept of socialist legality. As for its people, at least in theory, it distinguished the law's dual role: one for the enemy and one for the people. Here Vyshinsky quoted Lenin's words, 'a State which must inevitably be democratic *in a new way* (for the proletarians and the dispossessed generally) and dictatorial *in a new way* (against the bourgeoisie)' (Vyshinsky, 1948, p. 55).

However, he was not so clear on the question of how to achieve this aim without a legal system, which was not only to crush the bourgeois attack, but also to protect ordinary citizens of the state. Secondly, the party was set as state leader. The party was 'the highest form of class association of the proletariat' (Lenin) and 'the main guiding force in the system of the dictatorship of the proletariat', among other forms such as the trade unions, Soviets, the co-operatives, the League of Youth etc. (ibid., p. 66). 'This was the heart of the matter' (ibid., p. 55). Thirdly, the new state must be democratic to its people, as Lenin sees it, by the means of wider participation of ordinary working people in the state decision-making process, in the name of liberty. In his words,

The dictatorship of the proletariat means supremacy over the bourgeoisie with the help of force. It is a method of State management combining compulsion and training in discipline. The dictatorship of the proletariat performs this task with the help of Soviet power, which is its own special form of State. The particular feature of Soviet power, as the State form of dictatorship of the proletariat, is that it embraces millions of the masses of working people, drawing them into constant, essential and what is more decisive (in Lenin's words) participation in the management of the State. (Lenin, 1947, p. 61).

Loffe and Shargorodskii, in their study of law (1963) cited in Lloyd, (1985) promoted the concept of socialist legality as scientific cognition of the objective laws of development of socialist society. Law, in this sense, is not only punitive but positive as well (Lloyd, 1985, p. 1082). They see that in a capitalist society, as in the exploitative socio-economic societies preceding capitalism, law as a whole is directed toward reinforcing and sanctifying the existing social relationships of dominance and subordination, and its basic task consists of protecting the existing system. Therefore it is the prohibitive (coercive) aspect of law sanctions, punishment, and their objective properties that comes to the

forefront. However, in socialist society, law is directed for the first time not only to changing the existing social relationships but also to transforming them.

In reality, however, Lenin's idea of democracy for the masses in handing over to the working people all the resources without which it is actually impossible to make real use of liberty and civic rights (freedom of the press, freedom of speech, freedom of assembly, etc.) did not eventuate as he predicted. Not only the 'hand over' lacked a concrete mechanism by law to empower the people, but also the individuals in USSR under Stalin lost their basic rights to live, to think, and the right to personal protection by the state.

***Product of Power totality: Dictatorial purges in Stalin's Regime***

**Stalin's State Ideology**

The Soviet Union became a totalitarian socialist state in the 1930s when Stalin was at the height of his power. At this time he was constantly dissatisfied with the unattainable production targets. He closed down almost all economic and statistical journals, and began the purge throughout the Soviet regime leading up to the 1932-3 famine in which millions perished. Starving peasants were sentenced to concentration camps for stealing a handful of grain from the collective farms. The resistance of the masses, proletariat, peasantry, and intelligentsia was suppressed by the state leader, and all forms of social life were crushed. Any opposition within the party was eliminated under this single despot, with the final purge aimed at the party itself. The destruction of the party was achieved during the years 1935-9 along with a huge increase in conflict between the Soviet regime and its own subjects.

Mass executions took place in larger cities throughout the country following 'witch-hunts' which were aimed at former oppositionists, as well as Stalin's faithful supporters and servants. The 'great purge' started in 1937 following the major show trials in which the accused in the public trials confessed to imaginary crimes and were executed out of hand. The legal system was a major casualty under Stalin's single fist. Millions were arrested, hundreds of thousands executed. Torture, which had ceased to be a part of Russian judicial procedure in the 18<sup>th</sup> Century, was now widely used and became routine, with cruel methods of extracting false confessions. There was no law to protect ordinary citizens, as investigators were free to inflict any manner of physical and mental suffering to induce people to admit to crimes against their conscience, which the persecutors knew to be false.

The inhumane abuse reached its peak when those few who did not succumb to such measures generally broke down when told that their wives and children would be killed if they refused to confess.

The whole country was in fear of this madness at the whim of a single ruler. Quotas of arrests and executions were ordered and assigned to areas by the party authorities and if the police did not fulfil these they themselves were liable to be executed. Those who performed the task badly might be shot for sabotage and those who did it too well might be suspected of showing zeal to cover up their real disaffection. Not only Russians, but foreign communists from Poland, Hungary, Yugoslavia, Bulgaria and Germany were also persecuted. The concentration camps were full. The indefinite imprisonment and death, people knew, had nothing to do with whether a man's work was good or bad, whether he did or did not belong to any kind of opposition, or whether he did or did not love Stalin. The majority of the party delegates were purged, a whole series of eminent artists and over a third of all Soviet writers perished. The climate of atrocity was such an unreal paranoia and unimaginable frenzy before an astonished world, that one must ask why such a mass slaughter? Who gave the state such a power over human lives? By the cult of one's personality?

The answers, as discussed here, must be attributed to the power concentration within the party, which was the head of the state and acted seemingly above the discipline of the law, in the name of a proletariat dictatorship. It was a display of power relations, not economic or any other class relations stated in Marxist theory.

Stalin's state, justified by its socialist legality, carried out a regime of state ideology – a political power display in Russia, where the state power was in the hand of a few party leaders. Based on the dictatorship theory, with the concentration of the power within the party machine, Stalin made himself a true dictator of the people against Marx's original claims. The result was a totalitarian regime notorious for its cruelty and power abuse. This highlighted the shortcomings of the theory for any dictatorship that without a mechanism for power check and corrective measures that are effective, any state, even in the name of a working people's state, is not immune from power abuse.

What could be the reason for such destruction when the state interest had already been fatally weakened by war and many senior technicians killed? There was no real threat

to Stalin or the regime, and every possible source of revolt within the party could easily have been destroyed without bloodshed. Some suggest that a dictator will want total power for himself, abandoning the party as an instrument. Others believed that Stalin needed to crush any possible rival who might threaten his personal power within the party (Kolakowski, 1978, vol.3, p. 84).

The role of law in this case, is the law that justified the illegality and suppression of ordinary people. It is a law of state power and personal power, under which no freedom or liberty for man as an individual was tolerated. Law as a tool was intensified as an ideological weapon, for a political game of mass control. This power relation between Stalin representing the state, and the Russian people as its subjects had these features:

Firstly, it is a distortion of the faith and vision set by Marx's original idea. It is also a matter of loyalty which was abused by the Stalin regime. As Kolakowski suggested, it served to destroy any loyalty to any cause other than to the state and its leader, including the belief and faith in Communist ideology. This helps us to understand how a totalitarian system came to destroy all kinds of communal life not imposed or closely controlled by the state. The position of man in this circumstance was made extremely vulnerable, because individuals were now isolated from one another, and were totally alienated from the political state, and thus became mere instruments in the hands of the state (ibid., p. 86).

Following this distorted faith, it is a question of logic in the system. Why did no-one challenge the violation of the revolution principle and of man's rights? The entire population who had previously dedicated their entire lives to the cause, and had courageously fought for the nation, seemed non-resistant and put up no fight against the tyrant. The reason for this may lie in the ideology itself. The citizen belongs to the state and must have no other loyalty. All forms of revolt against the ruling party is against the ideology and labelled as 'deviations', 'revisionism' etc. On the other hand, it was personal greed for power that betrayed the common interest set by Lenin. This was because members of the party and legal institutions were no longer linked by a common faith and shared values, and the leaders of the government who shifted their interest or principle from public to private gains.

Secondly, it is a question of party ideology. The party and the ideology are inseparable – as in the Middle Ages when no unauthorized persons were allowed to

comment on the Scriptures, and the Bible itself was at the time *liber haereticorum*, and the law made both legal. Marxism, thus became an untouchable dogma – the Scripture – used purely for power control of the people and believers. In Kolakowski's words, 'The party was essentially an ideological body'. Abuse occurs when the ideologies are turned into a party institution, and faith became vague enough to allow the changes and to justify that there was no 'real' change of doctrine.

Thirdly, it is the dogmatic approach that destroys man's capacity to reason. There were those who took the faith in idealism and humanity seriously and would want to interpret the doctrine for themselves and to judge whether this change was in accordance with the communist vision of Marxism/Leninism. But these potential critics were not allowed under Stalin. The purge was then a message to the party members that their loyalty was in the leader and not in communist idealism. They could be liquidated to a powerless, disintegrated mass, just as liberal thinking, membership of other minor parties, the independent Press, cultural institutions, religion, art, and finally even factions within the party itself were liquidated. The purges served to eradicate any deviated faith other than in the ruler. Human thought was suppressed and reduced to such a degree that the masses were neither desirous nor capable of making any independent thoughts. In Kolakowski's words, 'The paralysis of the individual was complete' (ibid., p. 86).

Fourthly, there was an overall violation of man's liberty, with arrests, executions, exile in massive numbers, false confessions and false signatures kept in police files, the secret police on a mission of assassinating potential ideological opponents, etc. The fact that the police insisted on people signing their own confessions, ensured that the victims then became accessories to the crimes committed against themselves and participants in the overall falsification. Here torture was used not for obtaining true information, but for the universal fiction in an unreal dogmatic world. This is the abuse by which political lies and hypocritical fiction took on the guise of truth, when both the torturers and their victims knew perfectly well that the information was false but insisted on the fiction. The logic was that everyone participated in the official 'reality' fiction, which would make the spurious a reality.

It seems fair to argue that what made the state so powerful in its totality is not just the legal means to make the state legitimate, but also the fact that the state apparatus itself is in question – its ability to control the individual to such an extent that goes way beyond the

law as we see it. Individuals, on the other hand, became the victims of class theory and had no legal means or political will to fight for their independence in the matter. The power of the state must be challenged and put back in its original perspective, as servant of the people, if the battle for man's protection is to be won.

The law of the state, though unwritten, was painfully clear, that the party had unlimited legal power to do anything to an individual, but the individual could not defy or even disagree with the party. This obvious violation of the state's role had gone unchallenged, because the individual was either overwhelmed by the state power in every sense, or had no other legal access to argue one's case. The apparatus of the state was such that the notion of protection for the individuals was simply non-existent, as were the legal institutions. This was the seed for totalitarianism, which is another form of abuse in reality. The myth was created that man as individual owed the state and the party everything. In the official rhetoric, it is the state that raises the nation, educates the masses, and maintains employment etc. and yet the party/state owes him/her nothing. The truth is, in terms of power relations, that the state had the monopoly of power, which meant everything, including law, and the individual had none. This is another violation of Marxist teaching that power comes from people who gave the authority to the party and the state to represent them.

Arendt once criticized the logic of this kind of total control. In her concept of logicity the original ideal is devoured in a process of ideological politics. She described the process of how an 'idea' is devoured:

What distinguished these new totalitarian ideologist from their predecessors was that it is no longer primarily the 'idea' of the ideology – the struggle of classes and the exploitation of the workers or the struggle of races and the care for Germanic peoples – which appealed to them, but the logical process which could be developed from it. To Stalin, it was this irresistible force of logic that overpowered the audience (Arendt, 1973, p. 472).

Arendt noted that it was not the idea or the oratory that moved people but the force of logic that was dangerous. This was a significant shift from the 'idea' of an ideology itself and signifies the danger and power that this logic may bring to believers. In her words, 'The power, which Marx thought was born when the idea seized the masses, was discovered to reside, not in the idea itself, but in its logical process which 'like a mighty tentacle seizes

you on all sides as in a vice and from whose grip you are powerless to tear yourself away; you must either surrender or make up your mind to utter defeat'. (Stalin's speech of January 28, 1924, in Lenin 1947, vol.1, p. 33). In Arendt's words,

In the process or realization, the original substance upon which the ideologies based themselves as long as they had to appeal to the masses – the exploitation of the workers or the national aspirations of Germany – is gradually lost, devoured as it were by the process itself: in perfect accordance with 'ice cold reasoning' and the 'irresistible force of logic'... It is in the nature of ideological politics – and is not simply a betrayal committed for the sake of self-interest or lust for power – that the real content of the ideology (the working class or the Germanic peoples) which originally had brought about the 'idea' (the struggle of classes as the law of history or the struggle of races as the law of nature) is devoured by the logic with which the 'idea' is carried out (Arendt, op. cit., p. 472).

### 7.3 Theory of state developed by Mao – to strengthen Power Monopoly

#### *Contradiction as basis of Law*

Mao was indebted a great deal to Engels' and Lenin's teaching on the concept of contradiction, and he further developed his view of law in dealing with social classes primarily based on this concept. The influence of Engels and Lenin on Mao is demonstrated in these words:

Engels said, 'Motion itself is a contradiction'. Lenin defined the law of the unity of opposites as 'the recognition (discovery) of the contradictory, *mutually exclusive*, opposite tendencies in *all* phenomena and processes of nature (*including* mind and society)'... Contradiction is the basis of the simple forms of motion ...and still more so of the complex forms of motion (Mao, 1937, p. 31).

Mao quoted Engels' words on the universality of contradiction and Lenin's example of the class struggle in social science (ibid., p. 32).

The law of contradiction is things, that is, the law of the unity of opposites, is the basic law of materialist dialectics. Lenin said, 'Dialectics in the proper sense is the study of contradiction *in the very essence of objects*'. Lenin often called this law the essence of dialectics; he also called it the kernel of dialectics' (ibid., p. 23).

(Mao, 1937, *On Contradiction*)

According to materialist dialectics, changes in nature are due chiefly to the development of the internal contradictions in nature. Changes in society are

due chiefly to the development of the internal contradictions in society, that is, the contradiction between the productive forces and the relations of production, the contradiction between classes and the contradiction between the old and the new; it is the development of these contradictions that pushes society forward and gives the impetus for the suppression of the old society by the new' (ibid., p. 28).

Mao's view of contradiction is a system of many concepts. He divided contradiction into two groups, the universality and particularity of contradiction, and two philosophical outlooks of the matters, which are metaphysical and dialectical conceptions. He then seeks the principal aspect of contradiction and the antagonism in contradiction. Mao uses this division of types of contradiction to classify the population of China and deals with each type with due measures accordingly, as if they were legal classifications or codes to follow in each case. It provided legitimacy to discriminate against certain social sector or groups according to their political classifications determined by the state and the Party leaders.

Contradiction, to Mao, is a very important and positive concept. In fact, he welcomes the notion and extended its application to a wider society in its social matters and conflicts. Mao used a metaphorical example to liken contradiction to war – such as opposite forces of offence and defence, advance and retreat, victory and defeat – all being mutually contradictory phenomena. He sees this as a fact that one side cannot exist without the other. The two aspects are in conflict and at the same time in interdependence, and this constitutes the totality of a war, pushes its development forward and solves its problems.

Similarly, in Mao's view, this was also true for the party he led. In his words, 'Opposition and struggle between ideas of different kinds constantly occur within the Party; this is a reflection within the Party of contradictions between classes and between the new and the old in society. If there were no contradictions in the Party and no ideological struggles to resolve them, the Party's life would come to an end' (ibid., p.32). The antagonism, to Mao, is the struggle of opposites, and is also the class struggle. He said,

In human history, antagonism between classes exists as a particular manifestation of the struggle of opposites. Consider the contradiction between the exploiting and the exploited classes. Such contradictory classes coexist for a long time in the same society, be it slave society, feudal society or capitalist society, and they struggle with each other; but it is not until the contradiction between the two classes develops to a certain stage that it assumes the form of open antagonism and develops into revolution. The

same holds for the transformation of peace into war in class society (ibid., p. 69).

Mao did not refer to law explicitly in dealing with people of different background and attitudes, but he did refer specifically to different types of contradictions. This includes the one presumably between his party members, which is referred as 'ourselves', and the 'enemy'; and the other refers to contradictions among the people with measures of less severity. The two are totally different in their nature. There is a further division of antagonistic and non-antagonistic contradictions.

However, the definition of people and enemy, as well as the non-antagonistic and antagonistic aspects which Mao applied to the same group of 'exploited and the exploiting classes', is not clear. Moreover, the definition of all groups is based on vague political terms rather than their relations of production, such as working class, peasantry, intelligentsia and the national bourgeoisie. Even within the working class, there are working class and other sections of the working people, and contradictions within the national bourgeoisie, and so on (ibid., p. 81).

The definition of people, on the other hand, is even more obscure and circumstantial, but was invariably politically phrased. In Mao's words,

The concept of 'the people' varies in content in different countries and in different periods of history in the same country... For example, during the War of Resistance Against Japan, all those classes, strata and social groups opposing Japanese aggression came within the category of the people, while the Japanese imperialists, the Chinese traitors and the pro-Japanese elements were all enemies of the people. During the War of Liberation, the U.S. imperialists and their running dogs – the bureaucrat-capitalists, the landlords and the Kuomintang reactionaries who represented these two classes – were the enemies of the people, while the other classes, strata and social groups, which opposed these enemies, all came within the category of the people. At the present stage, the period of building socialism, the classes, strata and social groups which favour, support and work for the cause of socialist construction all come within the category of the people, while the social forces and groups which resist the socialist revolution and are hostile to or sabotage socialist construction are enemies of the people' (ibid., pp. 80-81).

In Mao's view, the contradictions between people and the enemy are antagonistic contradictions whereas within the ranks of people, the contradictions among the working

people are non-antagonistic. Those between the exploited and the exploiting classes have a non-antagonistic aspect in addition to an antagonistic aspect. The contradiction between the national bourgeoisie and the working class is one between the exploiter and the exploited, and is therefore antagonistic in nature, but in China, this antagonistic class contradiction can, if properly handled, be transformed into a non-antagonistic one and be resolved by peaceful methods. It can change into a contradiction between ourselves and the enemy if we do not handle it properly.

He added, 'since they are different in nature, the contradictions between ourselves and the enemy and the contradictions among the people must be resolved by different methods. To put it briefly, the former is a matter of drawing a clear distinction between ourselves and the enemy, and the latter a matter of drawing a clear distinction between right and wrong' (ibid., p. 82).

### ***State power & Dictatorship***

Mao made it very clear, as early as in 1957 that the dictatorship of the working class was here to stay in China. Its main functions are twofold: to suppress internal class enemies who are hostile towards the new state, and secondly to maintain public order to ensure the nation's unity. Mao even elaborated on his idea of democracy and democratic centralism. He further confirmed the leadership of the working class (the Party) as the state head.

Our state is a people's democratic dictatorship led by the working class and based on the worker-peasant alliance. What is this dictatorship for? Its first function is to suppress the reactionary classes and elements and those exploiters in our country who range themselves against the socialist revolution, to suppress all those who try to wreck our socialist construction, or in other words, to resolve the internal contradictions between ourselves and the enemy. For instance, to arrest, try and sentence certain counter-revolutionaries, and to deprive landlords and bureaucrat-capitalists of their right to vote and their freedom of speech for a specified period of time – all this comes within the scope of our dictatorship. To maintain public order and safeguard the interests of the people, it is likewise necessary to exercise dictatorship over embezzlers, swindlers, arsonists, murderers, criminal gangs and other scoundrels who seriously disrupt public order. The second function of this dictatorship is to protect our country from subversion and possible aggression by external enemies. In that event, it is the task of this dictatorship to resolve the external contradiction between the enemy and us. The aim of this dictatorship is to protect all our people so that they can devote themselves to peaceful labour and build China into a socialist country with a modern industry, agriculture, science and culture. Who is to exercise this dictatorship? Naturally, it is the working class and the entire people

under its leadership. Dictatorship does not apply within the ranks of the people. The people cannot exercise dictatorship over themselves, nor must one section of the people oppress another. Law-breaking elements among the people will be punished according to law, but this is different in principle from the exercise of dictatorship to suppress enemies of the people. What applies among the people is democratic centralism. Our Constitution lays it down that citizens of the People's Republic of China enjoy freedom of speech, of the press, assembly, association, procession, demonstration, religious belief, and so on. Our Constitution also provides that the organs of state must practise democratic centralism, that they must rely on the masses and that their personnel must serve the people. Our socialist democracy is democracy in the broadest sense such as is not to be found in any capitalist country. Our dictatorship is the people's democratic dictatorship led by the working class and based on the worker-peasant alliance. That is to say, democracy operates within the ranks of the people, while the working class, uniting with all others enjoying civil rights, and in the first place with the peasantry, enforces dictatorship over the reactionary classes and elements and all those who resist socialist transformation and oppose socialist construction. By civil rights, we mean, politically, the rights of freedom and democracy.

But this freedom is freedom with leadership and this democracy is democracy under centralized guidance, not anarchy. Anarchy does not accord with the interests or wishes of the people (ibid., pp. 83-84).

Even in the concept of dictatorship Mao divided it into a two-class based definition, with two approaches to Marxism, namely dogmatism and revisionism. Written in 1957 in one of his most famous speeches, he continued his 'two lines' style of thinking between the proletariat and the bourgeoisie, in name at least, as no details of his definition are found in the same work. In his attack on bourgeois ideology as a response to public criticism, Mao attributed revisionism, as any undesirable notion, to a value notion of bourgeois ideology without further analysis, and once more justified the notion of dictatorship as legitimate. He said:

Both dogmatism and revisionism run counter to Marxism... It is dogmatism to approach Marxism from a metaphysical point of view and to regard it as something rigid. It is revisionism to negate the basic principles of Marxism and to negate its universal truth. Revisionism is no form of bourgeois ideology. The revisionists deny the differences between socialism and capitalism, between the dictatorship of the proletariat and the dictatorship of the bourgeoisie. What they advocate is in fact not the socialist line but the capitalist line. In present circumstances, revisionism is more pernicious than dogmatism. One of our current important tasks on the ideological front is to unfold criticism of revisionism (Mao, speech, 1957, pp. 152-153).

It is noted, however, that these definitions of revisionism or dogmatism, like many other such terms, were rarely debated or challenged. They often appeared in the media at the time as authoritative statements rather than themes to be questioned. This two-line style of thinking, simplistic and clear-cut in fashion, later led to a real dogmatism in the treatment of ordinary citizens as bourgeois enemies using Marxist class theory.

This concept of dictatorship was further elaborated by Mao through a Directive of the Party Central Committee (16 May, 1966) on the eve of the Great Proletarian Cultural Revolution, published in *The People's Daily* of the same period. The news article named '5.16 Announcement' (*Tong zhi*, in Chinese) was to be read by all in the nation, in which it stated that the struggle between proletariat and bourgeois classes, and the dictatorship of the proletariat placed upon the bourgeoisie, including those within the Party, had no room for so-called equality or any other relationships between the classes, as those reactionaries never offered their sense of equality in the battle. Therefore the struggle had to be a life and death one, a matter of suppression of one class by the other (Mao, 1969, p. 27). The primary question to the State, and to Mao, was the question of Enemy and Friend, which he sees as the most important issue for the revolution and for the Cultural Revolution as well. This was spelt out in the *Decision on the Proletarian Cultural Revolution by CCP, August 1966*, (ibid., p. 39). There were no other functions of state in protecting people's livelihood and needs considered by the state in this period.

### *Class brand*

Mao believed that every individual belongs to a particular class and every form of thinking is an imprint of that class. As the vast population in China took his teaching seriously, this expanded concept of 'class brand' had a profound impact on the minds of the people as a basis for their judgment on each other's character reference. This also gave a false legitimacy to treat certain groups in the society discriminatorily, in terms of job promotion, work conditions and educational opportunity. All these inequalities were disguised under the name of class struggle, ignoring its true meaning in Marxist terms. Moreover, in this class nature and all theory of dialectical materialism which is Mao's basic tool for analysis, the truth is to serve the proletariat. In Mao's words,

Of these other types of social practice, class struggle in particular, in all its various forms, exerts a profound influence on the development of man's knowledge. In class society everyone lives as a member of a particular class, and every kind of thinking, without exception, is stamped with the brand of a class (Mao, 1937, op.cit., pp. 2-3).

Marxists hold that man's social practice alone is the criterion of the truth of his knowledge of the external world.... The dialectical-materialist theory of knowledge places practice in the primary position, holding that human knowledge can in no way be separated from practice and repudiating all the erroneous theories which deny the importance of practice or separate knowledge from practice... The Marxist philosophy of dialectical materialism has two outstanding characteristics. One is its class nature: it openly avows that dialectical materialism is in the service of the proletariat. The other is its practicality: it emphasizes the dependence of theory on practice, emphasizes that theory is based on practice and in turn serves practice. The truth of any knowledge or theory is determined not by subjective feelings, but by objective results in social practice (ibid., pp. 3-4).

The dialectical-materialist movement of cognition has two stages – the perceptual stage of cognition and the stage of conception and rational knowledge, which refers to man's use of concepts to form judgments and inferences. This second stage of conception, judgment and inference is the more important stage in the entire process of knowledge. Mao gave an example of these stages as follows:

In its knowledge of capitalist society, the proletariat was only in the perceptual stage of cognition in the first period of its practice, the period of machine-smashing and spontaneous struggle; it knew only some of the aspects and the external relations of the phenomena of capitalism. The proletariat was then still a 'class-in-itself'. But when it reached the second period of its practice, the period of conscious and organized economic and political struggles, the proletariat was able to comprehend the essence of capitalist society, the relations of exploitation between social classes and its own historical task; and it was able to do so because of its own practice and because of its experience of prolonged struggle, which Marx and Engels scientifically summed up in all its variety to create the theory of Marxism for the education of the proletariat. It was then that the proletariat became a 'class-for-itself' (ibid., pp. 9-10).

In a revolutionary period the situation changes very rapidly; if the knowledge of revolutionaries does not change rapidly in accordance with the changed situation, they will be unable to lead the revolution to victory (ibid., p. 17).

Mao also sees that the transitional period for China is going to be a long road. As early as in 1950s he openly admitted that 'In China the struggle to consolidate the socialist system, the struggle to decide whether socialism or capitalism will prevail, will still take a long historical period. But we should all realize that the new system of socialism will unquestionably be consolidated' (Mao, 1957 p. 135). Not only did Mao believe that the

class struggle was the central weapon for his theory which 'works wonders' in his own words, and that 'the philosophy of the communist party is the philosophy of struggling; he was also famous for his slogan 'to rebel is legal' (or is reasonable). Based on this logic, the suppressed would defy, rebel and strike, for the goal of socialism (Mao, 1969, p. 43). The idea of revolution was based on the absoluteness of the dictatorship which was expressed in these words: 'our relationship to them is absolutely not one of equal standing, but the suppression of one class to the other, that is, the dictatorship of proletariat class to the bourgeois class. It is not, and cannot be any other relationships, such as equal relationships, peaceful coexistence relationships, philanthropic or moral relationships etc. between the exploited and exploiting classes' (ibid., p. 27).

#### **7.4 Deng's theory of socialist principles**

As mentioned earlier, Deng is perhaps the first communist leader who talked openly and in great length about the issue of power concentration of the party leadership in the state apparatus in modern times. In his speech *On the Reform of the system of Party and State Leadership* (18 August 1980), Deng recognized the problem of power concentration of the party in the state leadership, and called for a change of this situation. In his words,

It is not good to have an over-concentration of power. It hinders the practice of socialist democracy and of the Party's democratic centralism, impedes the progress of socialist construction and prevents us from taking full advantage of collective wisdom. Over-concentration of power is liable to give rise to arbitrary rule by individuals at the expense of collective leadership, and it is an important cause of bureaucracy under the present circumstances (Deng, 1984, p. 303).

He elaborated this idea further and linked this phenomenon of power concentration with the Chinese age-old tradition of officialdom when he said:

Over-concentration of power means inappropriate and indiscriminate concentration of all power in Party committees in the name of strengthening centralized Party leadership. Moreover, the power of the Party committees themselves is often in the hands of a few secretaries, especially the first secretaries, who direct and decide everything. Thus 'centralized Party Leadership' often turns into leadership by individuals. This problem exists, in varying degrees, in leading bodies at all levels throughout the country. Over-concentration of power in the hands of an individual or of a few people

means that most functionaries have no decision-making power at all, while the few who do are overburdened (ibid., p. 311).

This phenomenon is connected to the influence of feudal autocracy in China's own history and also to the tradition of a high degree of concentration of power in the hands of individual leaders of the Communist Parties of various countries at the time of the Communist International. Historically, we ourselves have repeatedly placed too much emphasis on ensuring centralism and unification by the Party, and on combating decentralism and any assertion of independence. And we have placed too little emphasis on ensuring the necessary degree of decentralization, delegating necessary decision-making power to the lower organizations and opposing the over-concentration of power in the hands of individuals (ibid., p. 311).

Bureaucracy is an age-old and complex historical phenomenon. In addition to sharing some common characteristics with past types of bureaucracy, Chinese bureaucracy in its present form has characteristics of its own. This is, it differs from both the bureaucracy of old China and that prevailing in the capitalist countries. It is closely connected with our highly centralized management in the economic, political, cultural and social fields, which we have long regarded as essential for the socialist system and for planning (ibid., p. 310).

This issue is still with us today. As I will discuss it in the Part Three of this study, the problem of power concentration has persisted and is embedded within the current Constitution and Chinese legal institutions, which makes the task of reducing this power totality extremely difficult. Deng shows his resolution to deal with this problem. He said 'The long-standing failure to understand this adequately was one important cause of the "Cultural Revolution", and we paid a heavy price for it. There should be no further delay in finding a solution to this problem' (ibid., p. 312). Besides this, Deng sees that the traditional patriarchal custom also contributed to the problem. It placed individuals above the organization, which then becomes a tool in their hands. Patriarchal tradition is an antiquated social phenomenon which has existed from ancient times and 'has had a very damaging influence on the Party' (ibid., p. 312). His vision for China's future is to further strengthen Party leadership and discipline, but not to weaken or relax them. In his words,

In a big country like ours, it is inconceivable that unity of thinking could be achieved among our several hundred million people or that their efforts could be pooled to build socialism in the absence of a Party whose members have a spirit of sacrifice and a high level of political awareness and discipline, a Party that truly represents and unites the masses of people and exercises unified leadership. Without such a Party, our country would split

up and accomplish nothing...The unity of the people, social stability, the promotion of democracy and the reunification of our country all depend on Party leadership. The core of the four cardinal principles is to uphold leadership by the Party. The point is that the Party must provide good leadership; only through constant improvement can its leadership be strengthened (ibid., p. 324).

## **Chapter 8 On the four principles – Power totality is not justifiable**

According to Deng, the four cardinal principles for the modernisation of China are: the socialist system; the Party's leadership; the people's Democratic Dictatorship; and Marxism, Leninism and Mao's Thought (Article 1, *Constitution of PRC*, 1982). In practice, however, the crackdown on the people in June 1989 has negatively tested Deng's vision of representing the people and promoting democracy, and the Party's democratic leadership. The incident made it clear that the Party leadership may also face the sanction of the law, not just make the laws, by virtue of this leadership. It should be made clear that such a leadership must also respect the constitutional rights of people, and be held accountable under the rule of the law, without impunity or privilege. For how power is used on its people is the ultimate testimony of the true nature of a ruling party of a socialist state. The legality of the party as state power is not only claimed by law, but is also to be proven by its actions.

Here, it is necessary to discuss each of these principles in more detail.

### **8.1 The socialist road**

The socialist principle is, as proclaimed by the Constitution, based on the principle that all power of the state belongs to the people; and that the basic rights of citizens must be protected by law and the state. This is written in the Constitution that 'All power in the People's Republic of China belongs to the people'. 'The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law' (ibid., Article 2).

There are many rights and duties included in the Constitution of the PRC (2004) the most important of which is equality before the law: (Article 33)

- 1) Right to vote – regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence (Article 34);
- 2) Right to supervise (Article 27) to criticise, complain, charge against and expose any state organ for violation of the law (Article 41);
- 3) Right to democratic management of enterprises/organizations (Article 17).

Freedom:

- 1) Freedom of speech, of the press, of assembly, of association, of procession and of demonstration (Article 35);
- 2) Freedom of religious belief (Article 36);
- 3) Freedom and privacy of correspondence (Article 40);
- 4) Freedom of marriage (Article 49);
- 5) Freedom to research, literary and artistic and other cultural pursuits (Article 47).

Freedom of the person:

- 1) To preserve life – no bodily harm or torture;
- 2) No arrest without approval, prohibit unlawful detention, deprivation or restriction of freedom of the person (Article 37);
- 3) Residence is inviolable (Article 39);
- 4) Personal dignity is inviolable, no insult, libel, false accusation or incrimination (Article 38) (Li Buyun, 1986, pp. 50-88).

The importance of these rights is recognized by the Constitution as it states, in its third paragraph of Article 33, that 'The state respects and safeguards human rights'. Chapter Two of the Constitution deals specifically with the fundamental rights and duties of citizens. For example, in Article 33-36, it grants that all citizens are equal before the law, and every citizen is entitled to the rights and duties prescribed by the law. Citizens have the right to vote regardless of their ethnic status, race, family background or religious belief. They are granted the freedom of speech, of the press, of assembly, of association, of procession and of demonstration (Article 35) and freedom of religious belief (Article 36).

Under a system of power totality, however, these rights are not protected by law, because the law is interpreted and administrated by the rules of the state executives who are

answerable only to the ruling party's call. A socialist state without these basic rights, is like an empty shell without substance. It goes further to say that a ruler must resort to the suppression of these basic rights or that ruler has put himself in opposition to the 'socialist road'. At the worst political moments in China when all was being subsumed by some proclaimed political principle, ideology became a convenient tool to reject these rights. In the words of a former Premier of China Zhou Enlai, 'Principles without humanity are a mere formality' when he commented on those radicals chanting Marxist slogans during the Cultural Revolution (Phathanothai, 1995, p. 212).

A revolutionary party, once in power, will either renew itself by returning power to where it is originated – the people; or face its own self-destruction if it reigns without the people's will. Some see that the original intent of the Party has been lost, that instead of fighting for the betterment of people in the past, it now demands people to close their mouth and obey its own rules as a new master, in the name of 'socialism'. In Zhang's words, 'The Chinese Communist Party has long since ceased to be a traditional Communist party. It is now a mélange of factions with diverse goals and differing ideologies'; and 'although the June Fourth democracy movement in Tiananmen Square ended in tragedy, it left an important legacy' (Nathan and Link ed., 1991, Preface, p. xiii).

## **8.2 The people's democratic dictatorship**

The objective of the revolution is to grant the legality of people's power, which means power belongs to the people. Without this concept of civil rights of the citizens, and the protection of people against power abuse of the state, a system of socialism as it claims would be as hollow as a fantasy. 'All power in the People's Republic of China belongs to the people...The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law' (Article 2, Constitution of PRC, 1982)

There has been a suggestion that the word 'dictatorship' be omitted from the Constitution (*Law Yearbook of China* 1993, p. 856) as it reflects a feudal denotation of absolute power in operation. However, it remains in the Constitution of the PRC (2004) as 'democratic dictatorship'. The issue should be of on-going interest to be debated, as it appears to be contradictory and confusing as a concept. What is the dictatorship and who

will be dictated to? In Marx' vision, in a people's state, people cannot be dictated to by the state, but they should control the state through their representatives. Whereas criminals are a separate matter, as they are dealt with by the Criminal Law. What is contentious here in the relationship between the state and the people, as some argue, is that the people become the target of the dictatorship, as has happened in the past (The Tiananmen Incident in 1987, see *The Papers*) and lose their rightful position with the state. The state and the people's relationship is further eroded when the power of the state determines what constitutes a 'thought' crime, and who should be punished. For example, the concept of 'counter-revolution' or the 'class enemy' is of a political nature, and is often used in legal cases as criteria for crimes. It is the state, not the people, who has the power to determine the criteria for this kind of 'thought' crime, which is justified in the name of 'public interest'. This contradicts the very meaning of democracy and people's sovereignty. It suggests that people have lost this power of sovereignty, and become the subject of state power.

Another example of lack of democratic values is Lin Xilin's case. Lin, a true believer of democracy as a young journalist, openly criticized the party and the leaders, and was persecuted as the most notorious 'Rightist' in the 1950s. She was imprisoned and lost all her personal freedom. Yet, thirty years later and even after the fall of the Gang of Four, the authorities still refused to exonerate her. In a long and open letter to Deng she asked to clear her name with no success (Lin, 1983). She has suffered a great deal both in and out of prison and lives in poverty outside China at the time of publishing her letter in 1983. Although the word 'counter-revolutionary' was taken out of the Constitution in its amendments, the underlying power of the state to determine what constitutes crime of one's mind, is undeniable and detrimental in the implementation of the laws.

### **8.3 The party leadership**

Although keeping public power in check is an essential part of law by mutual regulations, some Chinese leaders, such as Deng, rejected the idea of separation of power and refused to share the power of the party in any form. In defence of the four cardinal principles, Deng sees that the party's leadership would be jeopardized by the challenge of law as a higher authority. In his words,

These people want to abandon the road of socialism, break away from Party leadership and promote bourgeois liberalization...some persons are not on

the right track ideologically... It is also connected with corrosion by bourgeois ideology from abroad.

The essence of the four cardinal principles is to uphold Communist Party leadership. Without Party leadership there definitely will be nationwide disorder and China would fall apart. History has shown us this. Chiang Kai-shek was never able to unify China. The keystone of bourgeois liberalization is opposition to Party leadership. But without Party leadership there will be no socialist system.

If we don't do a good job in this respect, contradictions may intensify and result in major disruptions. In a word, we must uphold Party leadership and the socialist system. They must be improved, but that doesn't mean we can have bourgeois liberalization or anarchy ('Problems on the Ideological Front', in Deng, 1981 p. 369).

We have discussed what constitutes the socialist road and how inadequate it is if we attribute the issue of power abuse to a single analysis of class ideology. To defend the principle of power check, moreover, we need to put state power of all kinds under the rule of law. This is to argue that any form of power can change its nature and can betray the people it claimed to protect, if it is in total control of all state power agencies and is left unchecked. This is not stated as a prediction as it has happened in the past as a fact. In this sense, no state leadership should be immune from legal sanction if it breaches the regulations that challenge its supremacy in the power structure and restricts its rulings under the rule of law.

Power monopoly is still justified in the name of being anti-bourgeois today. Here the notion of Party leadership needs further clarification. If this view is interpreted as a rejection of power being checked by law, it will be inconsistent with the constitution that 'all political parties ... must abide by the Constitution and the law' (Article 5). This means that the Party is subordinate to the Constitution. The supremacy of the law and the Constitution means that the law has the power to check the party's operation and sanction the misuse of its power. This also means that a status of leadership does not grant immunity in law, or a legality of monopoly of power, especially when the power is not elected by any community or people nor is it subject to removal or objection by the people. To simply reject the call for public power to be checked as a bourgeois idea, is therefore not convincing. The authority of the state is expected to be subject to the authority of the people under the rule of law, and the authority of the party transferred to the people through their Congress. In this sense it is the party that is subject to the people's will rather than the

people being subjected to the rule of the party. Even in the matter of leadership, this position of authority and delegation of power should not be altered to justify the structure of power monopoly or power totality. To justify it is to abandon the people's sovereign rights, and the principle of power check by the people and by the law.

#### **8.4 Marxist-Leninist-Mao Zedong Thought**

To be true to Marxism is to keep his vision in sight as how the power should be limited by law. For Marx, the state, after the revolution, is part of the law; but not above the law, and no privilege is given to the state executive. Indeed the state is the agent of the people, the executives at the direction of the people. Marx wrote:

The right of the democratic mass of the people to exert a moral influence on the attitude of the constituent assembly is an old revolutionary right of the people which, since the English and French revolution, could not be dispensed with in any period of stormy action. It is to this right that history owes almost all energetic steps taken by such assemblies (Marx in Draper, *op. cit.*, p. 290).

To Marx, as stated earlier in this study, it is vitally important to limit executive power and to use the constitution as a means to curb power abuse. One of the major functions of the constitution was to reduce the state executive's power. Marx advocated every possible means of minimizing the autonomous power of the executive. He believed in a constitution which restrains the powers of the executive and makes the administration more dependent on the Legislature and places it under Supreme Court control (*ibid.*, p. 301).

What restrains this executive is nothing less than the law. He writes: 'The Courts of law, empowered to decide definitively upon all the acts of the Executive, were rendered omnipotent'. The courts also have the final say 'in all equations of bureaucratic discipline'. Courts can remove any minister declared guilty of misinterpreting its resolutions; the Prince's 'right of grace' is shorn, and so is his control over members of the administration. 'The Representative Chamber selects out of its members a permanent committee, forming a sort of Areopagus, watching and controlling the Government, and impeaching the officials for violation of the Constitution, no exception being granted on behalf of orders received by subalterns from their superiors in rank. In this way, the members of the bureaucracy were emancipated from the Crown' (*ibid.*, p. 302).

Marx sees the people as the legislative body. He writes: 'the voters, that is, the people who make the legislative body' (ibid., p. 294). Later, Marx pointed to the Paris Commune's system as a triumph of democratic achievement. This is because the Paris Commune minimized and thoroughly subordinated executive power, placing, for example, the control of the courts, as well as the army in the hands of the people (ibid., p. 316).

As discussed earlier, Marx and Engels never endorsed a form of power totality in the new government after the revolution. On the contrary, they promoted a people's assembly to keep the power in check by the rule of law under the Constitution. Marx, in particular, has rejected the total structure of power in the feudal system where civil life was politicized in every aspect and subjected people to its tyranny. The theory of dictatorship was never meant to justify a dictatorship ruled by a few individuals over the majority of the people, but was meant to act on behalf of the people to reject the privileged few. It is hardly applicable in a society where the bourgeoisie is not yet fully identified or developed as a social or political class on an economic basis. What is more tangible to be dealt with was the ideology to subjectively determine and condemn people's thoughts, according to their 'political classifications' made by the power holders, and ordained by their own authority. It is, therefore, a gross abuse of Marxist class theory and of Lenin's theory of dictatorship. It is nothing more than a revival of the feudal relationship between the lord and his servants who had no freedom to select or determine this ruler – except to obey or praise the master. To be true to Marx's vision of the workers' state, this feudal style of power structure must give way to the choice of the people through their representatives and delegates in the government. It is in this regard, that even the condemned bourgeois society had its merits: it gave people a greater control over how power is used and limited by the platform of law, and not by the power of a party as the sole authority. To deny this merit as a significant achievement in modern legal philosophy and in the theory of representative government is to deny the development in terms of Marxist historical materialism. It would be a futile effort to turn the wheels of history back to its previous stage when power was left in the hands of a few, unconstrained by the society.

Another position put forward by the Marxist state leaders is a concept of law, which derived its validity from its own perception of its cultural uniqueness. Tumanov, for example, writing in 1969, stressed that Soviet jurisprudence had a unique character that had nothing in common with western legal philosophy. From this Curzon concluded that

‘Marxism rejected peaceful coexistence in the area of philosophy and ideology’ (Curzon, op. cit., p.179). This ‘uniqueness’ is later echoed by the Chinese leaders to term the current reforms in China as ‘socialism with Chinese characteristics’, meaning to maintain the power monopoly by the party while expanding the state’s market economy. If the concept of power is based on the nature of human desires, then there is nothing unique about this ‘human nature power’ and its justification as a weapon to defeat its ‘class’ enemies. But if it is derived from the nature of human reasoning, on the other hand, power is only a means to serve humanity, never an end in itself. This is a *practical imperative* in Kant’s terms, ‘so as to treat humanity, whether in your own person or in that of any other, in every case as an end withal, never as a means only’ (ibid., p.75). Therefore, to keep a party in power is never an end in itself, but only a means of serving humanity, to be judged and altered by humanity as it sees fit. In this sense, power totality can never be made perpetual, as it cannot serve ‘the end’ in its best interests.

## Chapter 9 On Stability

Stability, or public order is used frequently by the Chinese government and the Party for the obvious reason of preventing social disorder and regional or factional conflicts that may become out of control. In a vast land like China with over fifty different ethnic minorities and various religions and cultures, the probability is real. Moreover, there are large scale areas where hundreds of millions of people still live below the poverty line – in spite of the fact that China has enjoyed an unprecedented economic growth and has accumulated great wealth by both the state and private citizens (*CCTV News*, on SBS, May 2007). The geographic size and the disparity of wealth in its great population, present a real danger of social and regional unrest.

Hence this stability is of vital political importance. It also highlights the government’s priority to be in control of this public order based on the ‘comprehensive management’ and the law. The importance of stability was once expressed by the former president of the PRC, Jiang Zemin in his comment on 26 December 2000:

Doing a good job in public order is a major social issue, and a major political issue as well. It has a bearing on the fundamental interests of the masses of the people, the prolonged political stability of the state, the governing status of our party, and the implementation of our party’s basic line. If our public

order is poor, the people's lives and property cannot be guaranteed. This will affect not only the image of the party and the government in the people's eyes but also the overall interests of reform, development and stability (Keith, op. cit., p. 184).

Unfortunately, under the system of power totality, the notion of stability and public order has also been used as the justification for more severe and swift punishment by the state throughout China in several political campaigns, with revised codes of the criminal law of China. This is the area where the authority of the government prefers a severe measure to crack down on criminal activities, as well as the political dissidents in the name of 'anti-subversion', at the cost of free expression. This is also a question of criminal justice and human rights, under the rule of law. The criminal law has a direct bearing on both the legitimacy of the state and the well-being of the people, and is a basic law that safeguards millions of households.

Given China's rapidly changing social and economic environment, and its marked influence from the west, China's jurists and legislators have undertaken unprecedented studies of the international standards of criminal justice, and engaged in a selective and conscious adaptation of international norms to local conditions. At the time of the newly revised criminal law (hence CL97), there was optimism that the new emphasis on judicial justice and the protection of rights would be enhanced by its comprehensive stipulation. In the deepening of market reform, the CL97 dropped the special provision on counter-revolutionary crime and added 'new economic crime' as more important than the Cultural Revolutionary issues of class enemy and class struggle. The new law also provided the state with a new front for public order and social stability. During the mid-1980s and 1990s, there was a growing interest in the legal definition and the protection of newly emerged 'rights and interests' concepts. At the same time there was a new national debate about the need to establish 'the rule of law' to protect human rights. In 1996 Party and jurist debate resulted in a new constitutional law formulation of '*ruling the country relying on law and establishing a socialist legal system country*', which was subsequently included in the 1999 Constitution.

At the same time, procedural justice grew in importance. Under the 1997-1997 reforms, the revised procedural law was supposed to balance judicial justice and human rights protection, and it enjoyed a status equal to that of the criminal law, as part of public

order balanced with human rights protection, so as to facilitate social stability. This served to reject the exclusive emphasis on the punitive function of criminal law, for explicit correction. As Keith noted that 'The substantive importance of procedural protection in criminal justice was highlighted for the first time in a self-conscious challenge to a criminal law tradition that had so rigorously supported severe criminal punishment as the means by which to achieve social control' (ibid., p. 15).

The primary purpose of criminal law is seen as providing social control, although the prevention of 'social harm' caused by 'criminal action' is often the reason for the state authorities to 'crack down' on criminals claiming to have responded to the feelings of the masses who suffered social harm. This is a political decision and has resulted in constant 'cracking down' and 'striking hard' campaigns. The state's arbitrary power of severe punishment has been subjected to jurist debates in recent years. A senior criminal law expert, Gao, for example, calls for the CL97's subscription to 'punishment must fit the crime', to rebuke the harmful nature of neo-traditional 'heavy penalty-ism' as 'feudal criminal law' persisting even in the minds of judges (ibid., p. 21).

The 'heavy penalty' is the main purpose of the game, resulting in heavy casualties. The 2001 'strike hard' campaign in Jinan city, for example, produced a case of 'sort things out' – a public gathering with twenty suspects involves in 112 cases; of whom ten were dealt with sternly for going head-on, 'while the other ten were dealt with leniently and not held accountable because they had turned themselves in and made a clean breast of things' (ibid., p. 148). The 'scientific' treatment of the facts and legality gave away to the importance of psychological effects on the masses, and 'accuracy' was not a priority. Based on a State Council report for the year 2003, public security agencies handled 2.341 million criminal cases, of this total, 57,505 cases related to activity jeopardizing public security; 184,018 cases involved the violation of the personal and democratic rights of citizens; and 278,969 cases involved property crime. In the newly recognized area of 'extended detention', the cases involved 25,736 people, with 259 cases of illegal detention, 29 cases involving illegal search, 52 cases concerning confession under torture, and 32 relating to the abuse of prisoners or detainees (ibid. p. 143). But why such heavy penalties? It is in the name of social order and stability, for social control. The 1999 national plan, for example, calls for a 'comprehensive management of public order' directed to pre-empt and fight crime. It was organized by an extensive network connecting families, public security

agencies, educational institutions, and street committees, etc. to form a social force as a public security 'system', to manage public order (ibid., p. 14).

The question of criminal law is in fact, not so much for the criminals as such, but rather, a question of how to categorize the criminals and the crime; and where the power lies to determine who is to be punished by means of criminal law. As mentioned earlier in this chapter, the policy of 'strike hard' has been a persistent feature of the criminal justice system since 1983 (Deng 1984, pp. 238-39). The question now is not whether to continue the 'Strike' or not, but who to strike, and to limit the strike to the most heinous and serious crimes. It is estimated that the number of executions in China could drop by 30 per cent as a result of a recent review of all death sentences by the Supreme Peoples' Court (SPC) (Trevaskes, 2007, p.2). Based on Trevaskes' study, since early 2007, a fascinating debate about the death penalty has been unfolding at the highest levels of politics in China and is currently being played out in the state print media and on Internet news. It is a debate instigated by Chief Justice Xiao Yang, president of the SPC, aimed at limiting the death penalty to all but the most heinous criminals by emphasizing the principle of leniency as an alternative to the more politically popular principle of severity. In 1983, provincial courts were delegated the responsibility for reviewing and approving death sentences handed down by interior courts. This decision, coupled with the overzealous use of the policy of a 'severity and swiftness' against serious crime, is the leading reason for the continually high number of executions in China.

The recent decision to return the authority to review and approve of all death sentences to the SPC from 1 January 2007 has given human rights and China law specialists reason for optimism. The number of executions should drop as a consequence, and the National People's Congress (NPC) called the decision the most important reform of capital punishment in China in more than two decades. However, this decision has not changed the official 'strike hard' policy, as manifested by the Communist Party's leading politico-legal bureaucrat, Luo Gan, who made it clear in December 2006 and again in February 2007, that the CCP would continue to maintain the policy. This illustrates the challenge under the total power structure.

## **Chapter 10    Unchecked power – source of instability**

### **10.1    Power totality as an eternal instability**

Stability has been used to justify the structure of power totality, however, it is clear that real stability lies in an independent power check mechanism. On the other hand, power totality presents a real instability in the long-term interest of the people and the nation. This is because the real instability lies in the fundamental contradiction of power concentration in the structure, so therefore, the state officials at all the levels should abandon their power 'above the law', otherwise there can be no real reform or long-term stability.

Today, in the name of stability, people have been unfairly punished on the one hand, and state power strengthened on the other. The real cause, however, is the inseparable structure of law and politics that undermines the authority of law. It is the legal privilege and inseparable power structure, not the people, that present the greatest instability to the country's long-term interest and development. It would be undesirable if the stability debate becomes yet another excuse to preserve the old power structure. The lesson learnt from the Cultural Revolution is that power concentration caused the greatest instability to the country. The more total the political control, the more unpredictable the state of affairs becomes, leaving less protection for people and less alternatives to rectify.

For example, when a new category of 'economic crime' emerged following social unrest in 1984-85, vice rings began to develop in the cities of the eastern seaboard, and the murder and crime rates rose sharply between 1982-85. It invariably involved party and state officials who abused their positions of authority to profit from the economic crimes. These and other developments suggested that Chinese society was becoming increasingly corrupt and amoral, importing many of the evils traditionally associated with the capitalist West (Derbyshire, op.cit., p. 56).

Must people sacrifice their basic rights for this stability? What is the basis for this contradiction of values? This study has argued that the real instability lies in the fundamental contradiction of power concentration in the power structure; and therefore we should subject the state officials at all levels to the people's choice under the rule of law, otherwise there can be no real reform or long-term stability for the country. Therefore our focus should be on the power abuse of the officials, not a 'witch hunt' of the people, as happened during the Cultural Revolution.

Furthermore, it is important that people must have a claim on the ruling party as their sovereign through the authority of law. The Constitution of the PRC grants the Chinese people this authority of sovereign power. This means that people should have the legal protection to choose their leaders and representatives in the government. They should have the legal immunity to criticize the ruling organization as they see fit, not as the rulers see fit; and have the authority to grant or forfeit the legality of the state administrators and the ruling individuals or parties. However, in reality, this concept of legitimacy, if used under a system of power totality, would mean stripping off this authority of the people and even making it illegal to exercise this authority of the people, as Potter's article suggested.

## **10.2 Power needs check outside its own authority**

It is clear that the rules derived from a ruler's own authority are insufficient to curb the problem of power abuse, for the reason that any power needs mutual regulation by separate authorities. This view can be supported by the fact that one is limited in one's own capacity for self-rectification of power abuse. Here are some examples of this limitation.

### ***Top leaders cannot rectify the power abuse***

It is apparent that even Mao could not stop the power abuse by the Gang of Four – a product of the system of total power concentration. It was recorded that six months after the trial of the Gang of Four: 'on 29 July 1981, the CPC Central Committee published an authoritative official verdict on Mao Zedong and the last twenty years of his life – the "Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic". In this document, Mao's contribution to the building of the CPC and PLA, to victory in the liberation war and the consequent creation of the People's Republic, and the safeguarding of the nation's independence, unity and security was recognized and praised. He was, however, criticized for becoming tyrannical and obsessed with a misguided leftist line during the last twenty years of his life, culminating in the disastrous "Cultural Revolution". Mao was thus "de-deified" and slavish worship of his thought and writings was now frowned upon. Instead Mao's was seen to be just one of the many contributions to the creation and development of Chinese communist thinking, in what became a new vogue for eclecticism and collectivism' (ibid., p. 48). 'The historic trial opened on 20 November 1980 with the 'Gang' members being charged with plotting to overthrow the party and state leadership and of framing and persecuting over 700,000

officials and leaders, 34,800 of whom subsequently died' (ibid., p. 47). (Western estimates put the true figure of 'Gang'-induced deaths at close to 400,000 (ibid., p. 47).

Although Deng resolved to create a new collective form of party leadership which would share the workload, a greater separation between the party, state and military spheres of government, following their convergence during the 'Cultural Revolution', and to provide the series of checks and balances which would prevent the concentration of power in the hands of any single body or person, his departure from 'democratic centralism' was complete when he forced the CPC's General-Secretary Hu Yaobang to resign for his liberal views, together with a number of other freethinkers in the party. In his words, 'If you are a member of the Chinese Communist Party, you have to accept party orders'. Deng's role in the massacre at the Tiananmen Incident was indisputable. It is therefore evident that the concentration of power in the hands of any single body or person cannot be rectified by the very same entity, and that series of checks and balances independent of the power and the party are needed to prevent the power abuse.

### *Party Corruption*

In the campaign against 'economic crime' it was found that corruption among the party and government officials was widespread. It is stated that 'by December 1985 a government investigation had found that more than 67,000 party and government officials had been involved in illegal businesses and corrupt practices. The most spectacular included a £53,000,000 smuggling operation in Fujian province and a \$1.5 billion import-export embezzlement racket set up by party officials in the free-trade zone of Hainan Island between January 1984 and May 1985' (ibid., footnote, p. 56).

'Particularly notorious in this respect were the families of the veteran Politburo members Marshal Ye Jianying and Peng Zhen, whose daughter was under suspicion for 'economic crimes'. However, even Deng Xiaoping and Prime Minister Zhao Ziyang have been known to have used their influence to advance the careers of their children and close relatives, arranging scholarships abroad and supporting their rapid promotion to high academic and State administration posts. Such favouritism towards family or clan members formed an essential part of the Chinese mandarin tradition' (Derbyshire, op.cit., p. 60).

### 10.3 Corruption and economic crime

This involved party and state personnel who became involved in vast black-marketeering, fraud and embezzlement rings as they began to use their positions of authority and their ability to grant or withhold licences to line their own pockets and to keep ahead of artisan and peasant farming neighbours in China's great new economic race (ibid., footnote, p. 56).

The objective of this power check is to limit power abuse by structural changes in the Constitution and to allow an independent check authority under the Constitution. These power check measures must be independent and binding. This is because power can betray the purpose it is set to achieve, in other word, to 'change its colour' and therefore lose its legality to rule.

There are several reasons why a power can change its original purpose to betray the people it claims to protect as evident in this section of the study even after the Cultural Revolution. People are still persecuted for their views and have even lost their lives without due process of the law, as indicated in Keith's study (Keith, 2007, pp.142-168)

There are no grounds for a Marxist state to contradict democratic values and oppose its people. However, a power above the law, such as veto power over elections, media control and arbitrary dismissals and arrests, has positioned itself on the other side of the law, and thus loses its mandate and legality to rule. The four cardinal principles become meaningless in reality, if this problem is not rectified. The power to veto the result of an election is an example of arbitrary conduct violating democratic values and constitutional rights of the party members and the masses. In a study, it was found that 'Although the new party members, with a slow shift to more democratic and secret balloting systems for leadership posts, served to break up old patronage networks, the party retains the power to veto the elections'. 'Shaanxi province pioneered the switch to more open party electoral systems when, in November 1984, the new provincial first Party Secretary was chosen from a list of thirteen and elected by a secret ballot of three hundred county and provincial party officials. The CPC Central Committee retained, however, the power of veto during this election. In Jiangxi, the first ever female provincial first Party Secretary, Wan Shaofen (53), was also appointed during this period' (Derbyshire, op. cit., footnote, p. 55).

How can we determine if the power is abused or monopolized? There are some indicators of misuse of power as a sign of betrayal of what has been claimed. These signs of

power ‘*change of colour*’ from ‘For’ people to ‘Against’ people may be indicated in the following circumstances:

1. When opinions and criticism are systematically suppressed;
2. When the idea of democratic values is feared and not accepted;
3. When people’s grievances are unresolved and complaints ignored;
4. When people are neglected in decision-making;
5. When the ‘two faces’ of the law revealed the inequality before the law;
6. When equal treatment before the law is not in practice, i.e. harsh penalty to people, and light punishment to the executives’ corruption;
7. When the rhetoric is unable to match the reality to protect people by law;
8. When there are ‘two bosses’ in law, and the rule of men prevails;
9. When the legal system is financially and politically controlled by the ruling interest;
10. When the rulers have the privilege above the law, their personal interests undetected.

In many cases, the word ‘democracy’ is as bad as ‘bourgeois liberalism’ (Deng 1980, op. cit., p. 55). An attitude of ‘black and white’ in judgment persists, especially, in the middle level of the state local officials. Xue explains: ‘They have hardly been educated or have not seen any overseas or developed countries. So it could be difficult for me if they thought, “Oh, this is against China”. They are very black and white.’ (SBS, *interview with Xue*, May 30, 2007). There are also those ‘who are hostile to democracy and regard it as a great scourge that must be fiercely suppressed’ (He, op. cit., *Interview*). This happened as a result of a campaign against western ‘spiritual pollution’, equating democratic values to that of decadent bourgeois ideologies. This only confirms that without power check, state power under a single authority can easily deny people’s right to select, criticize and oppose the state officials who are supposed to represent the people’s interest for the common good.

It is clear that corruption is seen both as the end-product of the structure of power totality that shelters the corrupt officials from legal sanctions and as a main source of the state’s instability and public discontent. Surveys suggested that people see power corruption as a top priority of the nation. There are data published by China’s state owned media, showing that a widespread violation of basic rights in criminal law, and many crackdowns are justified in the name of the stability of the state. According to a survey on

one of China's largest news websites, asking, 'What issues in the upcoming NPC and CPPCC sessions attract you most?' the overwhelming concern of the public is the issue of anti-corruption. 'Anti-corruption is the top concern for some 83 per cent of those who took part in the survey' (*The Beijing Times*, 2004).

The most challenge comes from the local Chinese state officials and government who resisted the laws established by the Constitution, for the benefit and power they enjoyed outside the law (Peerenboom, op. cit., pp. 280-342). Examples of this illegal practice as law keeper at local levels are plentiful. This is a picture of rule of law without the real power change, and without the notion of civil right in the power holder. The power of man makes the law meaningless in many cases, and shows that there is a contradiction between the interest of the power holder as state official, and the interest of the local people – a contradiction that has not been resolved by the existing laws.

Often it is the government officials who determine who should be charged with criminal offences, who undermine the state security and who are engaged in terrorist activity (ibid., pp. 280-342). It is the authority of these state officials not the authority of the law that is the final judge. These state officials who violate the law must be challenged expeditiously; otherwise their power will inevitably erode the very foundation of the socialist state. Therefore the laws are important as legal norms, but the legal authority and binding measures to remove these corrupt officials is more important, for as long as these careerists are in power, the law would be toothless, or become even more undesirable and dangerous to the very people it claims to protect. It is the matter of whose hands the law falls into, that ultimately decides the final verdict.

#### **10.4 Corrupt public officials erode public ownership**

Although Article 12 of the PRC Constitution (2004) under the heading of 'Protection of Socialist Public Property' states that 1) Socialist public property is sacred and inviolable; and 2) The state protects socialist public property. Appropriation or damage of state or collective property by any organization or individual by whatever means is prohibited. However, the evidence (people suing the state) shows the danger of state officials, by virtue of their public office, who control and have profited from the sale of public property, thus violating the principle of public ownership in the Constitution. They acted as if the land was their private property, and were able to make commercial transactions as the owner of

the property, without the community's consent, which no individuals or state officials in any capitalist state could do so freely. This happened in a socialist system because the decision-making power was concentrated in the state official's hands, not in the law. The concept of public ownership is no longer relevant in this case.

Djilas once warned us that the New Class of socialist regime emerging from state executives who possess 'legally' both public and private properties is more powerful than the private ownership in the capitalist society, for the control over the state asset is boundless and total, with the maximum benefit for the 'elite' class in such a system. He observed that the ruling party elite enjoyed privileges over the masses in the former communist countries – alienating the worker and peasant classes from the owning 'privilegentsia in the press of the country' (Djilas 1966, p. 9).

This political privilege spilled over into the economic field as well. As Marx had written 'the bureaucracy possesses the state as private property', and this was extended to the State-owned production. In this way, public ownership is eroded by the rule of man. The new class, with its power over public property, is more dangerous than if it was placed in a free market economy, for the benefit this official position can bring, in the name of 'the people', is limitless. It can access and possess commodities that one would not be able to obtain normally in the market economy.

Jones and Mill once noted that 'in Oriental society the officials enjoyed advantages of income which in the West accrued to the private owners of land and capital' (Draper, op. cit., Vol.1, p. 636). If a ruling class is classified as the main beneficiary of economic privilege, as a result of the corresponding political privilege of one's official office, this ruling class must be challenged by the rule of law.

*Legitimacy cannot justify power totality: Potter argues that monopoly of power means that a regime can use the law for its legitimacy and at the same time its power is not limited by such adherence. He sees that by relying on the socialist legal system as a source of legitimacy, the Chinese regime strengthens its ability to justify specific actions by reference to law. However, the use of law as legal symbolism alone has also challenged the Party's monopoly on political power, as illustrated during the 1989 Tiananmen crisis, and presented dangers to the regime. In his words,*

In order to avoid having its authority challenged by means of the very principles from which it seeks to derive legitimacy, the regime has attempted

to ensure that the legal system remains subservient to the political needs of the Party...It has tried to make certain that popular notion about law do not overreach its own view that law should be merely an instrument of rule rather than a set of generally applicable principles that regulate the state as well as the people it governs ... the regime can claim legitimacy based on its adherence to the rule of law without its power being limited by such adherence (Potter, op. cit., p. 325).

Potter sees that there is no law at all, if there is no equality before the law. He compared the official and popular ideas about legal relationships, as part of Chinese legal culture, and found that the regime's claim on legal formalism 'ignores substantive aspects of justice in the context of political conflict', that the prosecutions of former Red Guards demonstrated the injustice of these proceedings despite their reliance on formal criminal procedure, 'because often the circumstances of the accused differ from those of the accuser by little more than serendipity'. He used a well known case of Wei Jingsheng, who was a dissident jailed for his criticism of the regime, to illustrate this point that injustice was done although the case relied on formal criminal procedures; because Wei was denied an effective opportunity to defend himself. 'Similarly, the declaration of martial law in Beijing in 1989 was widely criticized as unjust because the procedure used precluded opposition either to the declaration or to its enforcement' (ibid., p. 357).

Potter's article highlighted the continuing contradiction between the doctrine of legal equality and the regime's political inequality, and the continuing monopoly of political authority that this entails. This has become a major concern in the legal reforms. This argument calls for a substantive fairness in the law, between the accuser and accused and between the state doctrines on legal reform and substantive legal equality. This casts doubt on the extent of legal reform, and limits the popular support for the state.

## **Summary of Part Two**

In Part Two, we have examined some basic concepts of Marxism and demonstrated how these concepts have been abused by various legality theories to justify the power totality. However, it has also been shown clearly that it is an abuse of the theory, for the purpose of the abuse of power. For Marx had never endorsed the form of power totality at the expense of people's liberty and democratic values. It is in fact a betrayal of the original intent of the Marxist revolution, and an unbroken continuation of the old feudal power

structure. Evidence shows that people are still unprotected, that power corrupts beyond class-based ideology – it corrupts as a result of power totality within the ruling party.

The rule of law in recent years has not seriously challenged this power totality, due to lack of independence or a legal binding authority. This should change, and change must be through the form of law. But why should we consider law as part of solution? The next section, Part Three, will address this question, and provide rationales for using law and legal philosophy to tackle the problem of power totality by establishing a power check as a counter-measure in principle.

## **PART THREE      LAW IS PART OF SOLUTION**

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## **Introduction to Part Three**

In the previous sections (Part One and Part Two) we have established the fact that a power totality is problematic and undesirable; and it is a serious abuse of Marx's original vision for a worker's state. It is therefore necessary to reject this form of power, and reconfirm some of the basic principles in the use of state power as a public property, rather than an exclusive right of a few who stand outside and above the law. There are several grounds to argue why law can be part of a remedy for curbing power abuse. Firstly, it is to recognize that power should be checked as a principle. Secondly, the law has an instrumental role in the power check. Thirdly, as legal history shows, the law has provided the vital forum for rejecting power totality and bringing the monarch under the law (as with Magna Carta). The importance of the authority of law is again raised, so is the independence of the judiciary. This discussion leads to the prospects of separating the judiciary from the government, and separating the government from the party. This change will no doubt require the commitment and the willingness of the ruling party to the principle of power check on one hand, and the legal protection of people's rights on the other. The limit of law will depend on this commitment to the power check principles, and also on the changing concept of authority as the power is to be transferred from one exclusive group to the people through their representatives. The Law should facilitate this transition of power through the Constitution.

In Part Three, Chapter 11 will establish power check in principle, followed by a rejection of power totality by law in the legal history in Chapter 12. Chapter 13 discusses the importance of the authority of law by means of an independent judiciary and Chapter 14 explains the necessity to gain this independence of jurisdiction by separating it from the state power and government. Chapter 15 sees that law is desirable and can function in different state models.

### ***Progress***

China has made remarkable progress in recent years. In terms of economic growth, China is meeting or exceeding expectations on most measures – given the high correlation between wealth and income as an indicator of human well-being. 'China outperforms the average country in its income class on most major indicators of human right and well-being, with the exception of civil and political rights' (Peerenboom, 2006, p.192). China

has also made impressive progress in improving its legal system in a short time, having restarted from scratch in 1978. 'As of 2002, China's legal system ranked in the 51<sup>st</sup> percentile on the World Bank's rule of law index, having risen from the 32<sup>nd</sup> percentile in 1996' (Peerenboom, op. cit., p. 195). Progress is being made on other fronts as well. In the anti-corruption front, for example, it was recorded in *The Beijing Times*, that 'The central government's determination to fight against corruption can be seen in the punishment of thirteen ministerial-level officials for corruption, including the former Vice-Governor of Anhui Province, Wang Huaizhong, and the former Minister of Land and Resources, Tian Fengshan, throughout 2003. Professor Wu Jiang from the National School of Administration said the central authorities have done 'efficient and effective' work over the past year, for example, in fighting SARS, making efforts to curb unemployment, increasing farmers' income and realizing an annual economic growth rate of 9.1 per cent (*The Beijing Times*, May, 2004).

### **Problems**

There are problems, however, which put the legal reforms in serious jeopardy. The problems cover the three elements discussed in Part One of this study, namely the protection of people; the persistence of total power structure (as a feudal legacy); and limited power checks on state officials. There are relevant laws with regard to these issues in the Chinese legislature, such as *The Law of the PRC on Public Security Administration Punishments* (2005); *Land Administration Law of PRC* (2004); *The Organic Law of the People's Courts of the PRC* (2006); and *Decision of the Standing Committee of the NPC on ratifying the UN Convention Against Corruption* (2005). However, these laws do not reflect the reality in many ways. The contradiction between the proclaimed principles and the reality has been obvious. The problems are also interrelated. The failure to protect people is a result of the existing total power structure, in which corrupt officials had a firm control over all legal matters. In this situation, law has no authority over the power holders, and the corrupt state officials remain free outside the law. Furthermore, these officials, mostly in the lower-middle ranks of the local government offices, are still in a position to manipulate the law to their own advantage, as they did during the Cultural Revolution, but in a different form. So the old power structure has persisted and in most cases succeeded. It is also noted that police and procurator, as part of law keeper force, played an arbitrary role in many cases. The arbitrary use of thugs and torture to abuse vulnerable targets and the

abusive attitudes and threats in their public posts, are all too familiar in the old feudal society as part of its legal culture. The tactics have changed somehow. Instead of dismissing the law, as in the 1960s, the power holders and lawbreakers are now behind the law with 'strings' and use law against law and against innocent people. Even those lawyers who are advocates for people's legal rights cannot escape unlawful prosecution.

## **Chapter 11      Power check as principle**

Power check as a principle is based on two basic concepts: one is the doctrine of power separation under public scrutiny, and the other is the mutual and systematic constraints on all public power by law. These two concepts will be explained below.

### **11.1    Doctrine of power separation**

The concept of Separation of Powers dates back as far as ancient Greece. The concepts were refined by contemporaries of the Framers, and those refinements influenced the establishment of the three branches in the Constitution. Aristotle favored a mixed government composed of monarchy, aristocracy, and democracy, seeing none as ideal, but a mix of the three useful by combining the best aspects of each. In his (1656) *Oceana*, James Harrington brought these ideas up-to-date and proposed systems based on the separation of power. John Locke, in his (1690) *Civil Government*, second treatise, separated the powers into an executive and a legislature. Montesquieu's (1748) *Spirit of the Laws* expanded on Locke, adding a judiciary.

The doctrine of separation of power resulted from some extreme cases of feudal despotism that sparked the Paris Commune uprising to end the French monarchy and its total power structure. The French Revolution was a response of the populous to the extreme case of an absolute monarch who combined unlimited power in all three domains – namely, the power to make laws, the authority to exercise them at his pleasure, and a state constitution that granted him this unlimited power. In such a case, the power holder is not legally answerable for the legality or morality of his decrees, nor is he bound by procedures, or any other kinds of limitations or requirements in exercising his powers. In this sense, whatever he decrees is constitutionally valid. The Constitution aims to rule out this extreme case of power monopoly, by adopting not only separation of those powers but making rules that impose limits on those powers. Often these limitations are in the form of

individual and group rights against government – rights such as free expression, free association, equality and due process of law. Based on the principle of power separation, the law can check the power by determining the scope of authority, the mechanisms used in exercising the relevant power (such as procedural requirements governing the manner or form of legislation) and civil rights. In the feudalist model where power is concentrated in one entity, there is no ‘legality’ because the rules defining the ruler’s authority impose no such limits. By limiting the authority to legislate, to implement, or to adjudicate, on the basis of law, which exceeds the scope of his legislative power, the law thus limits the total power or power monopoly in one entity. Locke sees that a political power is

...a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good (Locke 1690, in W.S. Carpenter, ed., 1924, p. 118).

Clearly, if such a political power is concentrated in one authority, with the right of making laws and execution of such laws, and with the control of all penalties at the expense of preserving private properties and civil rights, the power will not be checked effectively by the rule of law.

Locke (1632-1704) noted the temptations to corruption that exist where ‘... the same persons who have the powers of making laws to have also in their hands the power to execute them’. Locke’s views were part of a growing English radical tradition, but it was French philosopher, Baron de Montesquieu (1689-1755) who articulated the fundamentals of the separation doctrine as a result of visiting England in 1729-31.

## **11.2 Mutual and institutional power check**

Montesquieu, whose influence with the American founders was great, believed that state power must be checked by a separate judiciary as principle. In his words,

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and

liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression (Montesquieu, 1748 in Rosen and Wolff, op. cit., p. 117).

In his *The Spirit of Laws* (1748) Montesquieu considered that English liberty was preserved by its institutional arrangements. He saw not only the separation of power between the three main branches of English government, but within them also – the decision-sharing power of judges with juries, or the separation of the monarch and parliament within the legislative process. Locke and Montesquieu's ideas found a practical expression in the American Revolution in the 1780s. Motivated by a desire to make impossible the abuses of power they saw as emerging from the England of George III, the framers of the Constitution of the United States adopted and expanded the separation of powers doctrine. To help ensure the preservation of liberty, the three branches of government were both separated and balanced. Each had separate personnel and there were separate elections for the executive and legislature. Each had specific powers and some form of veto over the other. The power of one branch to intervene in another through veto, ratification of appointments, impeachment, judicial review of legislation by the Supreme Court (its ability to strike down legislation or regulations deemed unconstitutional) and so forth, strengthened the separation of powers concept, though inevitably involved each branch in the affairs of another and to some extent actually giving some of the powers of one branch to another (Online source: Spindler, 2000).

### **11.3 Instrumental role of law**

Law, many argue, is an instrument of domination, rather than an instrument to challenge this domination of power. In this instrumentalist view, the Critical Legal scholars (CLS) argue that law in the capitalist societies is neither neutral nor autonomous, as it appeared to be. This is because the interest of dominant classes are better protected and supported by the legal system, which put the powerless in a disadvantaged position in legal disputes (Hunter, op. cit., p. 47). Furthermore, the definition of the Rule of Law entails many concepts. The standard comparison is 'between the rule of law and the rule of men, between the supposedly stable, impartial, general, measured and ordered nature of the former, and the idiosyncratic, arbitrary or capricious nature of the latter' (ibid., p. 46).

CLS offers three interpretations of the 'rule of law': law and order, the 'inner morality' of law, and formal equality before the law. It also compared this definition with an American one. The US legal philosopher Lon Fuller's view of the rule of law, for example, is in terms of the *obligations* of lawmakers and law enforcers, rather than their *powers* to ensure social order.

Others see law as an instrument of justification, for example, in the case of the Negro slaves, where legal documentation was used in the court to justify the legitimacy of the slave trade. As Genovese argues, without denying an ethical dimension to state power in all its normal managerial functions, state power represents an attempt to monopolize and legitimize this domination in its quest to maintain its power. In this process, law has itself become a social force, with its undeniable influence in shaping the class relations of which it is an instrument of domination. The legal order, ideas and institutions influence the wider social order and system of state rule. Moreover, law is used to present the state as the expression of the people, that 'the fashionable relegation of law to the rank of a super-structural and derivative phenomenon obscures the degree of autonomy it creates for itself' and 'for no class in the modern Western world could rule for long without some ability to present itself as the guardian of the interests and sentiments of those being ruled' (Genovese, in Beirne and Quinney, 1982, p. 279).

Foucault, on the other hand, sees law from a different perspective, as the exercise of power within modern societies, thus equating law with violence. His view may be summarized as this: 1) law will always go together with the exercise of violence and physical repression, so to say that law is against terror is false; 2) in modern societies, the exercise of power is based much less on overt violence and repression than on subtler mechanisms with violence; and 3) the new methods of power rest not on right but on technique; not on law but on normalization; not on punishment but on control. Following Foucault, power is defined by Castel in these words: 'the exercise of power involves a passage from authority-coercion to manipulation-persuasion'. The role of the state is seen as a repressive apparatus (army, police, judicial system etc.) as the means of exercising physical violence. This negative view of state and law, elaborated on by Poulantzas, means an ideological-symbolic manipulation, the organization of consent, and the internalization of repression (ibid., p.189).

#### 11.4 Power check and the role of law

The State can transgress law-rules of its own making by acting without reference to the law, but also by acting directly against it. Poulantzas argues, that each juridical system allows the Power-State to disregard its own laws, in the name of *higher interests of the State* – that ‘state illegality is always inscribed in the legality which it institutes. Thus, Stalinism and the totalitarian aspects of power in the East are not principally due to violations of socialist legality’. Therefore, ‘it is a question here not merely of oversights or blind-spots arising out of the ideological operation of concealment underlying the legal order, but of express devices that allow the law to be breached’. He is correct in pointing out the fact that a state violates that its own law, is no less part of the structural functioning of the state, because the state-institutional structure is always organized in such a way that both the State and the dominant classes operate at once in accordance with the law and against the law. However, law is not all purely negative, because law is something other than law. And even in its repressive role, law involves a positive aspect: it dictates positive obligations (Poulantzas, 1978, pp. 76-92). It is this positive obligation that we shall focus on when discussing the need for power check by law later in this study.

E. P. Thompson, on the other hand, has greater faith in the rule of law. He once hailed governance by law as a human great achievement, beside court cases and legal rules. In his words, ‘what is remarkable is not that the laws were bent but the fact that there was, anywhere in the eighteenth century, a rule of law at all’ (Thompson, 1975, pp. 258-269). He even concedes that the origin of rights and wrongs of law may have coexisted between the rule of law and Marxism, through different perspectives. To him, law is an instrument of the ruling class and its power. His acknowledgement is in these words,

The same conclusion may be reached through a different adjustment of perspective, which may coexist with some of the same arguments. This flourishes in the form of a sophisticated, but (ultimately) highly schematic Marxism, which, to our surprise, seems to spring up in the footsteps of those of us in an older Marxist tradition. From his standpoint the law is, perhaps more clearly than any other cultural or institutional artifact, by definition a part of a ‘superstructure’ adopting itself to the necessities of an infrastructure of productive forces and productive relations. As such, it is clearly an instrument of the de facto ruling class: it both defines and defends these rulers’ claims upon resources and labour-power... Hence the rule of law is only another mask of the rule of a class. The revolutionary can have no interest in law, unless as a phenomenon of ruling-class power and hypocrisy.

(Thompson, in Beirne and Quinney, op. cit., p. 130).

While Thompson confirms the class-bound nature and function of the law, he rejects Marxist ulterior reductionism and tries to modify its typology of superior and base structures. He argues that the law when considered as institution (the courts, procedures etc.) and as personnel (the judges, the lawyers, etc.) may easily be assimilated to those of the ruling class. But these institutions are not all that the law is about. The law may also be seen as ideology, or human relationships, or sanctioning actions to social norms. Law is a necessity: 'it is not possible to conceive of any complex society without law', and has its own logic, rules and procedures (Thompson, op. cit., pp. 258-269).

What law provides, Thompson argues, is a forum where the ruled can actually fight for their rights by means of law. In his view, law is diverse enough to impose class power, and does not subordinate itself to the functional requirements of socio-economic interest groups. Law is more substantial than that. To extend Thompson's view, it may lead us to perceive that law is not only necessary in any complex society, but may also be used for human relationships and rights. It may sanction power abuse and limit the extent of monopoly of power by individuals or organizations. This concept of law as a forum is an important one, for without it the King's concessions would not have been formalized in the case of *Magna Carta*.

How does class power fit into this law? The answer is a complex and contradictory one. Thompson sees that on the one hand, law does mediate class relations to the advantage of the rulers and it became a superb instrument by which rulers imposed new laws to their even greater economical advantage. On the other hand, the law can inhibit the actions of the rulers and their arbitrary and extra-legal power (such as direct unmediated force, arbitrary imprisonment, the use of troops against the crowd, torture etc.). On very limited occasions though, did the Government itself retire from the courts defeated. These occasions served to bring power further within constitutional controls. Law can be mystifying to the people, and may disguise the true realities of power, but at the same time, it may curb that power and check its intrusions (ibid., pp. 258-269).

## Chapter 12      Law rejects power totality (English legal history)

There are historic factors in limiting power as a result of rejecting power totality. This may be seen, for example, in the legal history of England. The main factors were the opposition of the King's total power, challenged by those at the middle level of society between the King and the commoners, who had both economic and military means for the challenge; and the independent judiciary tradition which provided a legal forum to achieve this.

### 12.1    The end of power totality

The *Magna Carta* of 1215 signifies the end of power totality headed by the King of England. Although most of its clauses deal with specific grievances rather than with general principles of law, it manifests the concessions the King was forced to make, and importantly, to subject the King to the law, as a result of the growing opposition of Barons through their representatives in the Parliament. Scope for abuse in the feudal system at the time was great and had been the subject of complaint long before King John came to the throne. Abuses were aggravated by the difficulty of obtaining redress for them. Not surprisingly in the *Magna Carta*, about two-third of the clauses are concerned with matters such as these, and with the misuse of power by royal officials. The provision of the means for obtaining a fair hearing of complaints achieved corresponding importance, not only against the King and his agents but also against lesser feudal lords. On the contrary, the Emperors in China were not subjected to such laws and there was no formidable opposition with a legal forum to challenge the power totalised in the ruler.

The judiciary tradition also saw the English Parliament responding to public pressure to adopt new laws, as in the case the *Habeas Corpus Act*. The significance of *Habeas Corpus* (1679) may be seen to reconfirm the authority of law in the governance of the country. Although the key issue the Act dealt with was specific (on detention) the general concept of a critical right was established as a legal consequence of this Act, which was later written into the Constitution for the United States (*Habeas Corpus Act 1679*).

The legal history of England during the early 17<sup>th</sup> century was a good example of the parliament challenging the total power of the King at the time. In 1628 the Third Parliament met and presented a petition to King Charles I, which he accepted. The terms included that no person should be compelled to pay a loan or tax levied without the consent of Parliament; that no subject should be imprisoned without shown cause; and no person should be tried by martial law. When Charles exercised his arbitrary power to raise money illegally, and refused to surrender to the Commons the command of the militia, the Civil War (1642-48) broke out. The Parliamentary forces defeated the Royalist forces. As Charles refused to recognize the authority of the court by which he was brought to trial, the King was executed. 'The absolutist rule of James and Charles had bred militant opposition which passed over into civil war. There was to follow a unique interregnum in which a new type of government committed itself to an intensive programme of constitutional and legal reform' (Curzon, 1979, p. 41). This challenge was made possible by the fact that the opposition to the King's total power had both economic and military means as the propertied classes with their representatives in Parliament had considerable bargaining power and skills.

## 12.2 Law as a forum for power check

The evolution of the 'Black Act' shows the ascendancy of a Whig oligarchy that created new laws and bent old legal forms, in order to legitimize its own property and status. The law was thus originated with property-rights. Even if people cannot continue the fight at law, men still felt it is a *legal wrong*, that the propertied had obtained their power by *illegitimate* means (Thompson, op. cit., pp. 258-269).

The judiciary tradition: In the 18<sup>th</sup> century the law enjoyed unusual pre-eminence in England, the rhetoric of the time is filled with the notion of law. Royal absolutism was placed behind the norms of law, and immense efforts were made to project the image of a ruling class which was itself subject to the rule of law, and whose legitimacy rested upon the equity and universality of those legal forms. The rulers played the games of power according to rules, which suited them, but they could not break those rules or the whole game would be thrown away. Thompson argued that not only were the rulers inhibited by their own rules of law against the arbitrary actions, but they also believed enough in these rules and in the accompanying legal rhetoric, to allow the law itself to be a genuine forum

within which certain kinds of conflict are decided. The ruled took the law also, as their rights and equality before the law. (ibid., pp. 258-269).

## **Chapter 13            The problem persists today – evidence**

Although law can be a forum for power check, leading to an end of the total power structure, in reality however, the tradition of the old power structure still prevails without being challenged by the judiciary or an independent authority. Evidence shows that the problem, identified in Part One of this study, has persisted. It persisted after the Cultural Revolution and after the official confirmation of the rule of law as a state policy. It shows firstly that people's basic rights are not protected; and secondly, that we need structural changes to limit the executives' power. The following cases are cited from studies undertaken by others. Here the relevant facts are presented, followed by a comment on the issues.

### **13.1    People's basic rights not protected**

#### *Case 1*

##### *Fact:*

A migrant worker named Wang Binyu was quickly executed for murders, for unpaid wages, which his bosses withheld for two years while his father urgently needed surgery for a leg fracture. Wang was also barred from entering his dormitory to sleep. (The factory boss relented and paid the 2004 salary but only after making large deductions for fees and boarding expenses. He then refused to pay the 2005 wages until next year.) On October 19, Wang was executed quickly and quietly, and it took weeks for the word to fully trickle out that he was dead.

There was a media and public outcry: For three weeks, Wang's anguished account of his wasted life rippled across China on the Internet and in Chinese newspapers against the brutal treatment he had endured as a migrant worker. Public opinion shouted for mercy. But all this was suddenly silenced when online discussion was censored and news media coverage was banned.

*Comment:*

It is noted that a lack of protection of citizens' basic rights coincided with a lack of authority of law and a low standard of the court official's conduct as a part of the power structure. This can be demonstrated in several aspects as follows:

Legal procedures eroded: Wang's final appeal was rushed to court, his father was never notified, and his lawyer was forbidden from participating. 'All of you are on the same side', Wang (28) shouted during the hearing, 'If you want to kill me, just kill me'.

Court officials lied: Before the appeal, the Wang family signed a power of attorney to Mr Wu. But Wu said court officials had initially lied, telling him the appeal was over. Then they refused to let him enter the case. Instead, a lawyer approved by the court represented Wang. Meanwhile, the same judges who heard the appeal also concurrently handled a mandatory final review of the case. It meant that judges were reviewing their own ruling – a practice that legal experts said is not uncommon, and *provided little real check and balance on the use of the death penalty*. 'An unjust procedure will undoubtedly lead to unjust results' said Mr Wu.

The courts and the police took a tough line in the execution process, and hard-liners in the party and the governments are loath to restrict the power of the police and the courts in this matter. In October 2005, 'The People's Supreme Court announced that it would reverse a decision from the early 1980's that ceded the final review on many death penalty cases to provincial high courts.' 'This shift meant that provincial courts could often operate without any oversight.' It was said that Deng Xiaoping ordered this move as he considered that courts were moving too slowly to crack down on crime. Under the new policy, the PSC will reclaim responsibility for reviewing all capital cases. As a result the executions rate could drop by as much as 30 percent, according to the state news media, a 30 percent serious flaw within the current court system that could save thousands of lives. One solution Prof Y at Tsinghua University Law School offered is to require 'Unanimous consent among judicial panels making final reviews.' Prof He, on the other hand, argued that 'only deeper constitutional reform to establish a more independent judiciary, could remove the political pressures that can seep into many high-profile death cases' (Yardley 2005).

Official's motive/role in the case: The factory boss violated the law by refusing to pay the wages years overdue, withholding them for another year; and deducting large sums from the wage as fees, without any legal penalty. The local officials were eager to execute Wang, because a reversal of the death penalty could harm their careers.

The court officials in Ninxia lied to Wang's father in a crucial point. They told him to come and collect his son's unpaid salary, and after a long journey across two provinces, he found that it was a lie. The lure of wages to get him there was to sign his son's death warrant. Illiterate, 'the father could only smudge the paper with his thumb' (ibid.).

Excessive execution and no protection for the defendants: Wang's case indicated 'how a system built for convictions has few safeguards or protections for a defendant facing death'. In Wang's father's words, 'It was wrong of him to kill people, but there was a cause'. His anger and disdain from his bosses signified a deep public disgust and resentment with corruption and inequality in the criminal law. They perceive the legal system as favouring the wealthy and well-connected and harsh on the poor. One wrote at a Chinese Web site, 'Wang was forced to fight against those who exploit and tread on the poor, Why is the law always tough on the poor?' (ibid.)

The number of executions is a state secret due to the sensitivity of the issue globally. But a high-level delegate to the National People's Congress in 2004 publicly estimated that it was 'nearly 10,000'. In 2004, Amnesty International documented at least 3,400 executions – of the 3797 worldwide that year, the real number was probably much higher. 'Outside scholars have put the annual number as high as 15,000'.

'There is widespread suspicion, even within the government, that too many innocent people are sentenced to death.' This included wrongful convictions that had led to death sentences and the execution of an innocent man in another well-publicized case (ibid.).

## *Case 2*

### *Fact:*

A desperate father wanted to sell his eyes for his son's legal defence. The son is wrongly accused and sentenced to life in prison. For more than a year, Xie had two trials and two appeals. The Anhui Province High Court overruled the guilty verdict, citing 'insufficient evidence' and 'certain unclear facts'. In reality, the case was returned to Chaohu Intermediate Court for a new trial, which lasted only a few hours and resulted in another guilty verdict, regardless of the new discovery of flaws in the evidence. The High Court upheld the conviction. Xie met the High Court officials, in a petition, without success (ibid.).

Legal procedures eroded: flawed evidence was a questionable shoeprint – victims never identified the attacker. The ruling did not mean the case was over. ‘Appellate courts in China rarely release defendants, even if ruling in their favour’. Instead, the case was returned to Chaohu Intermediate Court for a new trial.

Evidence flawed: Xie’s lawyer discovered that the digital photo of the shoeprint from the crime scene was dated a month after the attack.

*Comment:*

Again a lack of authority of law failed to protect people under the current power structure where the judiciary has no independent standing to challenge the corrupt officials and power agents such as police and procurators, who are traditionally the tool of the powerful and repressive regimes in the eye of the ordinary people. It is also noted the indifference of the Judge: ‘The High Court judge even joked: ‘There’s no hurry, after all, it’s a life sentence’. He advised Xie to visit his son in prison regularly ‘really get to know him, make sure you are convinced he is innocent’ (ibid.).

This total power structure can be demonstrated in several aspects as follows:

Court’s limited power: ‘Chinese law does not allow judges to throw out evidence or overturn convictions on the basis of police misconduct’. More significant, the High Court was reluctant to overturn any conviction because that might damage its relationships with prosecutors and police, as well as with Communist Party leaders eager to be seen as cracking down on crime’. One of the provincial officials listed on the ruling said, ‘In China, the rules sometimes do not matter.’ ‘If you go after legal justice, it might cause more harm to social stability’ (ibid.).

Lawyers’ limited power: The court also restricted Xie’s lawyer. ‘The judge intervened every time the lawyer was trying to say something important, he would just say, ‘hurry up and make it simple’. ‘They didn’t put in rules of evidence. They didn’t put in requirements that witnesses appear at trial. Lawyers weren’t given the ability to really prepare a case. They kind of created the shell of an adversarial process, but they didn’t create the guts of it’ said J. Hecht, deputy director of the China Law Centre at Yale University (ibid.)

The police misconduct was blatant. Two days after the attack, the police approached Xie, the father, and told him he was a suspect, and then demanded that Xie ‘prove that he is

innocent'. At the police station, investigators took Xie's fingerprints and pushed him into a bare cell, later his son too. In the interrogation room, a detective had slammed a pistol on a table and threatened the son: 'If you don't confess, we will skin you alive'. The police had coerced the witnesses to give a false confession, and Xie recorded their testimony and handed the tape to the judge. The police also coerced the son's confessions, by beating him 'with sticks and kept him awake for seven days'. He confessed to end the torment. Xie tried to hire a private firm in Shanghai for an independent analysis, but was told that it only works with the government. No witnesses were called and the judge did not give Xie's lawyer a chance to question the testimony. 'Chinese law requires that evidence be subjected to cross-examination, but legal analysts say this requirement is regularly overlooked' (ibid).

Court in fear of police and prosecutors: The case was in the mid of unease about crime that was rippling across China. A murder spree by a university student in western China had set off a nationwide manhunt and stoked public fears. In Xie's town, investigators must 'devote all their energy to solving the case, ease people's worries and maintain social security and stability', said the head of the public security bureau, on the local *Chaohu Daily* newspaper(ibid.).

The High Court was reluctant to overturn any conviction because that might damage its relationships with prosecutors and police, as well as with Communist Party leaders: 'Chinese law does not allow judges to throw out evidence or overturn convictions on the basis of police misconduct'.

Under such circumstances, it is very difficult for a criminal defendant to get a fair trial. Law fails to replace a system that guarantees convictions, with one that guarantees the rights of the accused. Law is believed by the power holders not to enhance the power but to erode it. In Xie's case, no one helped him. In his words: 'There must be one person in the Communist Party who is honest and who believes in justice', Mr Xie said, 'If I can't even find one, then the party is not going to last long'. Law reforms in 1996 expanded a criminal defendant's right to counsel and sought to create a more impartial judiciary. And yet the vast majority of whose adjudicated ended in convictions, like Xie's son. (99.7 percent of 770,947 adjudicated in 2004, ended in conviction) (ibid.).

### 13.2 Structural change is needed

The following cases show that under the total power structure, the judge and the court are powerless to implement the laws that are detrimental to the interest of the government officials. In this sense, the written laws often serve the powerful government and the police but not the people.

#### *Case 3:*

##### *Fact*

Judge Li, faced with a conflict between national and provincial law, ruled the provincial law invalid, on a mundane case about seed prices. Despite the fact that Judge Li had submitted a draft ruling to the court director, who in turn forwarded it to a trial committee, and that everyone had signed off. Both parties were informed in June 2003, and this stirred up the Province People's Congress, the provincial legislature, a national debate and made legal history. Li was put under great pressure to undertake self-criticism – her job was in jeopardy. In 2004, Henan's High Court reheard the seed case. It ruled exactly as Judge Li had, with one exception: it criticized her for invalidating the provincial law (ibid.).

The case indicated a rising influence of legal reformers. Scholars and lawyers rallied to Judge Li's defense and see her ruling as a test case for a more autonomous court system. A member of the Beijing Lawyers Association, Xiao Taifu, for example, who petitioned the central government on Judge Li's behalf, said that 'For the first time, a judge announced a local law or regulation was void. It was historic. For the legal process in China, it was a first, and it carried deep meaning'. The reaction to the ruling on the seed case proves how political influence remained deeply embedded in the legal system (ibid.).

##### *Comment:*

The interference of the provincial Congress is not only unreasonable but also serious as an intrusion to the court's integrity and independence, which should be granted unequivocally by the Constitution in such a way that this kind of obstacle would not happen again. Mr He, the constitutional scholar, rose to Judge Li's defense in an open article. He sees the seed case as one of the most important in the legal evolution of China because of the attention it focused on judicial independence. 'It may not be *Marbury v. Madison*,' Mr He said, 'but it is a very important case.' This case is chosen here in this thesis because it has highlighted the importance of the independence of the judiciary. Without this

independence, any legal reform will not achieve the task it is set. Judge Li had, as it turned out, stumbled upon a fundamental issue of the rule of law over the rule of man. If judges were supposed to refer conflicts in law for review by the Standing Committee of the National People's Congress, or the various political-legal committees, the local governments and police plus procurators, what legal power would be left for the law? If the judges are then expected to follow the decision made by all these sub-political and legal bureaucracies and their agencies and networks, why do we bother to have the thing called the rule of law? (ibid.)

This is about judicial independence that can or cannot curb government power in the existing system. Often the courts are the tools to reinforce the state power. In the legal reforms, often the central requirement in fulfilling the rule of law is unresolved: will the governing party allow an independent judiciary?

In many countries, a judge over-ruling a lower-level law would scarcely attract any attention. But in China, 'the government, not a court, is the final arbiter of law'. The provincial legislators considered this a judicial revolt, and tried to crush it. 'An order by those in power has forced local leaders, none of whom dared to stand on principle, to sacrifice me', wrote Judge Li. This is not just about Judge Li, but is about the inseparable force of resistance to the rule of law that does not endorse the local interest or serve the power of local 'lords'. The position of the judges and the court in China are peculiar, in the sense that they lost their legal ruling as soon as they lost their independence (ibid.).

There are other indicators that obstacles of law stem from the total power structure in these ways:

Inseparable power at work: First, the political pressure infused the legal process, 'the parochial interests of two local companies fighting over thousands of dollars'. A city official sent a letter from one company to Li's supervisor, with a warning instruction for the court: 'please pay attention'. 'I felt they were making assumptions that I was already taking sides', said Judge Li. Secondly, a representative from one of the companies approached the office of the director of the Luoyang court', and the director invited Li to meet the man. 'I considered this very inappropriate, but I couldn't say so because of the director'. So she told the man to come to her office, and pretended to be stuck on a long telephone call till the man left.

The combined power resistance included the People's Congress also. Although the local congress itself is the provincial legislature, for some possible reasons of ignorance and political motivation, it saw Judge Li's ruling 'as a naked challenge to the lawmaking authority of the People's Congress'. Provincial officials publicly described the ruling as 'a serious breach of law'. In an interview, the head of the legal office, Mr Mao said that 'The authority of the National People's Congress system is not to be challenged'. 'Courts have no right in a verdict to say which law is invalid.' This reaction really stunned Judge Li, for she had studied Chinese law and top leaders' speeches. It is clearly stated in China's Law on Legislation, that local laws that conflict with national laws should be abolished. She thought including this point in her opinion was within her judicial purview. Her director or anyone on the trial committee did not realize the significance of this ruling at the time either, nor did they intend to challenge the political system (ibid.).

But it was Judge Li alone, not the court officials or the director who had also approved the decision, who faced the possibility of serious punishment. 'I felt persecuted. Everyone I talked to told me what I had done was wrong', she recalled. She had to fight back to restore her reputation. So she left for Beijing to seek help. She wrote a long letter in which she promised to 'undergo criticism and education' if she had erred. 'But if I'm right, I will protect my integrity and defend the integrity of the law, even if it means being like a moth that flies into a flame.' The news reached the Supreme Court and then attracted the attention of the Chinese news media and of scholars and lawyers pushing for legal reform.

Scholars organized a legal conference at an elite university in Beijing to debate the seed case and other issues about judicial autonomy. Perhaps this public attention, and the possible intervention on her behalf by the People's Supreme Court, saved Judge Li's job. As for the conflicting laws, in summer 2004, the Standing Committee of the central government announced a new review panel to mediate conflicts of law. Some hailed the panel as the equivalent of a constitutional court; whilst others believe that the responsibility should be left to the courts. But the inseparable structure of the power system has remained largely intact. The local bureaucratic network, as shown in this case, involving the legal office, the director, the congress, and government officials, has remained the same – ready to bite its next victim (ibid.).

The status of the court: The political pressure on judges is routine, as part of the state bureaucracy. This subservient status of the court system is apparent in this case. By

comparison, the police under the ministry of Public Security enjoy much higher status in the state structure. For example, nationally, the chief judge of the People's Supreme Court is not even a member of the central decision-making entity of the party – the Politburo, whereas the head of the Ministry of Public Security is.

Judge under pressure: 'I'm just an ordinary person, a female judge who tried to protect the law. Who is going to protect my rights?' wrote Judge Li. 'Judges often must answer to government officials as much as to the law. Political pressure is common, and private trial committees often dictate rulings.' The dispute over the seed case indicated that 'being a judge involved far more than simply interpreting laws', any judge who acts on conscience does so at a risk, reflected Judge Li. 'When I look back on the cases I dealt with, I have no regrets'. She also learnt that reality is quite different from what her legal education taught her; it is 'more like legal theory' – how things should be, 'but it did not teach us how it really worked in China'. Her idealistic belief that judges ruled independently was quickly dispelled. She still believes in the rule of law, but is more realistic about judges who are often put in a confusing position. 'It is not that they do not know how to do cases professionally. It is just all these relationships to coordinate. And they also have to weigh consequences', said Judge Li (ibid.).

The reality is that cases are heard by panels of judges, whose rulings were often reviewed by supervisors and in major cases, by private trial committees of court officials. Although judges are responsible for rulings that carried their names, the decisions are actually made by others in the court. In the case of government officials or influential citizens complaining about a ruling, a judge could be punished, fined or even fired. As a result, some judges try to reduce the potential mistakes by taking on fewer cases, so that – 'the fewer mistakes you make' (ibid).

The 'string' behind the law: Judges are appointed by the local people's congresses at their respective levels. However, the courts receive their budget from local governments. Moreover, the Party branches 'operate committees that can apply pressure and exert influence on a court behind the scenes'. For example, a presiding judge in the northeastern city of Harbin told *The Workers' Daily*, that government officials had overruled three different innocent verdicts and ordered the courts to convict a local businessman of fraud. The judge was later censured for publicizing the case (ibid).

On the other hand, the system also makes it easy for corrupt court officials to exploit their positions. For example, 'in April 2004, two vice directors of the Middle Court in Wuhan were sentenced to prison for selling verdicts in exchange for \$500,000 in bribes. The directors paid judges to participate in the scheme' (ibid.).

Many believe that the court system must become more autonomous to eliminate corruption in the legal system. On the other hand, the public may be skeptical about judicial independence, given the poor quality of judges and judgments, and the perception that too many judges are corrupt or unqualified. The point here, however, is to make clear who made a decision and where to draw the line of accountability. The current system of inseparable power structure has certainly failed for this demarcation in responsibility. As Prof. He argued: 'if you want accountability, you can only have accountability if you have independence. Otherwise, it is never clear who made a decision' (ibid.).

As for judge's training, the National Judges College as the primary educational arm of the Supreme Court, receives roughly 10,000 judges every year for a month's professional training. The emphasis, however, has been shifted from political qualities to impartial rulings. In the past, judges were taught to serve the interests of the Communist Party, but now 'we train them with a modern theory of law: that the courts are impartial; on the need for legal justice and of innocence until proven guilty', said the president of the college, Huai Xiaofeng, 'We stress that during a trial, you cannot favour the government or the National People's Congress. In the past, they told them to emphasize the political qualities. Now, we tell them to emphasize the law and the facts' (ibid.).

The following two cases are further examples of law lacking its authority to protect people's interests, and serving only the interest of the state and the police as its agent, where the power resides. The Rule of Law had little effect to address people's concerns as seen in Case 4. The violation of people's basic rights by treating them as criminals, as seen in Case 5, indicates that the problem of power abuse has persisted and people are not protected by law as claimed in the Constitution. Moreover, the use of thugs to subdue ordinary people as seen in both the cases below shows the corrupt nature of such a total power structure.

#### *Case 4*

*Fact:*

The peasants in ShiQiao, Hebei Province badgered the court clerk to accept their application to sue the officials who had seized their prime farmland. For two years they tried everything under the law, to have the case ruled on their request. Even a written rejection would have been a positive thing, enabling them to appeal to a higher court. But their legal papers were soon returned in a plain envelope, unmarked, unprocessed and officially ignored. They met obstacles at every turn. 'The only party that used the courts successfully was the state-linked construction company. It won an injunction in March declaring the peasants' protests illegal.' This is despite the fact that the right to demonstrate and protest is written in the Constitution (Kahn, 2005).

Courts often refuse to issue any verdict at all when people sue the government; or even fail to acknowledge that some bothersome legal complaints exist. The procedure of 'register a case' (*li-an* in Chinese) is 'so fraught with official meddling that for many with complaints against the government, the judicial system is closed for business' (ibid.).

In 2004, the National People's Congress, (NPC) the state's highest level of legislature, passed China's first property rights law, which was heralded as the government's commitment to Rule of Law. This encouraged the peasants in Shiqiao. They filmed a short documentary to praise their ancient right to the soil and recited the government policies to prevent the loss of farmland. But later the peasants discovered that the court and law worked for the powerful construction company and the government, which benefited from the company. The villagers were outraged that the court acted so quickly to protect the company, after suppressing their own suit. Mr Li, the defendant, said '*I discovered that the law is what they say, what they practise is power*' – a contradiction between the written law and reality (ibid.).

'The number of people wanting to sue the government is large and growing, but the number of people who succeed in filing cases against the government is miniscule. So you could say there is a gap between theory and practice' says Xiao Jianguo, a legal scholar at the People's University in Beijing who has studied the issue. Protests around the country over land seizures, pollution, corruption and abuse of power, are erupting, with 74,000 officially recorded incidents of mass unrest in 2004. This is the very core of the democratic nature of the rule of law, which faces its greatest challenge in the court procedures, and more importantly, in the independence of the court (ibid.).

It was a battle all along the road to Court for the people in Shiqiao:

Firstly: the heavy fee charge. The court clerk, after consulting with his boss behind the scene, said that the court would take the case, only if they paid a filing fee of \$2300, several times a farmer's annual per capita income. Eleven families put the money in, and the case was established (ibid.).

Secondly: the deliberate delay. Months passed with no trial date. They demanded explanations, and were finally granted a meeting with the top local court official Ms Chen.

Thirdly: court has no power. Ms Chen indicated that 'the court would like to see the case go to trial, but the matter was unfortunately too sensitive'. In peasants' words, 'She told us *the court did not have the power to challenge the government*. It might be better for everyone if we withdrew the case. She said if we did, she would refund the fee' (ibid.).

Mr Li, one of the leaders of the peasants, declined to withdraw and told her that 'the law is either a tool that can be used by the people, or it isn't. You can't offer it and then take it away'. Ms Chen quickly left the meeting room without notice. Meanwhile the new road was paved on farmers' vegetable plots, and high-rise buildings sprouted. The construction company did not wait on the courts (ibid.).

Fourthly: physical confrontation. The peasants' leaders were so frustrated by the court setback, they 'planted themselves in front of bulldozers, harassed workers and generally disrupted construction'. This protest later developed into a tense standoff and a riot when *the local authority dispatched the local police and paramilitary troops to stop the interference*. The police confiscated cameras, and an elderly man was trampled. Villagers turned unruly and began smashing windows and trying to overturn police cars. Fifteen local residents went to jail; three remained behind bars nine months later (ibid.).

Court on the powerful side: The Binhai Construction Company filed its own civil lawsuit seeking an injunction against Li (the leader's) interference. This time the court acted promptly. 'Four days later, the court issued a peremptory ruling without trial. Li Yonglu's actions were declared illegal'. The Local officials distributed copies of the ruling to everyone in the district, and the local party boss read the text of the ruling over the village's loudspeakers. This suggests that the court acted in the interest of the local government.

Fifthly: the peasant leaders gave the law another try. This time they found a prominent lawyer Zhou, who often pursues difficult cases against the authorities. Although Zhou is of

the view that the Binhai protest violated national land laws, which require State Council's approval to develop prime farmland, and they could sue Hebei Province for allowing the project to proceed. However, he did not expect it to happen. *'China's administrative law stipulates that cases against a local government must be filed first in its jurisdiction, where local party bosses hold sway. It can be appealed, but only after the local court rules or rejects the case.'* It is the party bosses, not the law, who make the ruling (ibid.).

Finally, the procedural flaw and delay is obviously a strategy the court uses to avoid appeals. 'Courts legally must issue written rejection notices if they choose not to take the case. But to avoid appeals, court clerks often decline to take possession of legal papers. *No rejection notice is needed if the case does not, in China's political-legal cosmos, formally exist.*' So after all these struggles, in Shiqiao's land case, the disregarded and returned application was *the only verdict the court could offer to the people of Shiqiao*. It is no wonder that people have no faith in the judicial process if there is a 'string' behind the law (ibid.).

*Comment:*

It is evident that the legal procedures play a crucial role in implementing the legal rights proclaimed in the laws. The court procedures, for example, are the necessary forum for unsettled disputes, the area where the court often failed to protect people, but protected the government instead. 'It is not clear how many protests follow failed attempts to settle disputes in court. But lawyers say the judicial system bars its doors to so many contentious cases that it effectively forces people to take to the streets' (ibid.).

Inseparable power corruption network: The District Government Construction Bureau is linked to the Binhai Construction Company, which was to build a road and housing on the farmland and instructed peasants to stay off their land. 'The controls actually provide a perverse incentive for local officials to seize and develop as much farmland as possible. Farmers need only be compensated for lost farm income, generally far below soaring real estate market values. *Government-linked middlemen can make a fortune.*' The district government offered a pitiful compensation, from \$2,500 to \$5,000 a mu, (a sixth of an acre) but the market value exceeded \$35,000 a mu. *'Government agents were pocketing the difference'* – a magnitude of seven times in profit for the corrupt public officials.

However, this corruption was hidden in the official rhetoric which promised to 'raise the city's status', and in official documents and city propaganda posters, it was said that the development of Shiqiao's land 'met all local and national requirements and that peasants were compensated fairly'. The motive and role of the district officials were that of robbery, by means of law. Later the court ruled against the peasants, it was the local government officials and party boss that distributed the copies of the court ruling to everyone in town, and read the text of the decision over the village's loudspeakers. They worked as a team (ibid.).

Authority hired the thugs: A government effort to quell a land protest in a nearby city, Dingzhou, captured attention all over China, shortly after the Shiqiao protest. 'Hundreds of hired thugs armed with hunting rifles and clubs forced villagers to give up land for a power station. Six farmers died and dozens were injured in a bloody crackdown captured by a farmer's video camera.' The result: 'The Communist Party boss in Dingzhou and 26 others went on trial for the killings in early December'. The hire of the thugs by local authorities and the police is a serious criminal offence but they remain untouched by law. This is a common practice in many parts of China (ibid.).

When China's top judge, Xiao Yang inspected Hebei's courts following the Dingzhou incident, he told the state newspaper that 'the courts too often treated important cases as "hot potatoes" better left untouched, marginalizing the judicial system. "If the courts bow to the government every time, the people will have no faith in the judicial process", he warned' (ibid.).

### *Case 5*

#### *Facts:*

A steel mill worker Mr Qin in Henan Province gave false confession to a rape and murder under torture, and was sentenced to death. His life was spared because the real killer turned himself in later. The authorities, however, had a final push to have him executed to save their own face (ibid.).

Issue: The excessive power of the police over people, and law serves only the police.

Officials do not serve the law, but laws serve the officials. It is rule by law not rule of law.

The police acted like thugs, without any concept of law or basic human rights. As a law enforcement entity, this raises a fundamental question of legal integrity. How can the state

clear up such a disgrace in the police force? How can anyone trust the police as a law agent while they act like criminals? They 'wrenched Qin's arms high above his back, jammed his knees into a sharp metal frame, and kicked his gut whenever he fell asleep' for days (ibid.).

They took Qin away for questioning at midnight from the steel plant where he worked. The police would not tell him why he was being detained. (They only relied on some children who recalled seeing him on the day of the murder.) After initial questioning, Qin was handcuffed and shackled, still unaware of the cause. 'I kept asking them what this was all about, no-one would tell me.' Then the detective, Shen, lied to Qin that they were investigating the theft of an alarm clock and Qin's fingerprints matched those found on the clock. But Qin did not steal it. The pressure intensified. The senior detective Shen organized 'four teams of two policemen each'. The teams interrogated Mr Qin in consecutive six-hour shifts, day and night, for three days. The questioning quickly turned to torture. 'It would take a superman to resist', Qin recalled. Shen told Qin that the theft of the alarm clock proved that Qin had killed Ms Jia. And Qin had to confess a complete false story with every detail of the crime designed by the police (ibid.).

In the eight months between his arrest and his trial, Qin urged his family to disregard the charges in his anguished letters. 'Every word of the confession is a joke. To this day, I have no idea what the victim looks like, and I certainly didn't know the colour of her pants' (ibid.).

'In prison, Mr Qin tutored himself in criminal law. His letters cited passages that he felt would aid his defense. Article 38 of the Chinese Constitution forbids extracting confessions by torture and "frame-ups." Article 46 of the 1996 Revised Criminal Procedure Law declares that "oral confessions" are not sufficient grounds for conviction. Article 12 mandates that suspects must be presumed innocent until proven guilty'(ibid.).

But detective Shen had the power: 'I stake my 20 years of leadership experience as a guarantee,' Shen said to Qin's brother, 'If your brother did not commit this crime, then I will accept punishment.' (He still remains free till this day. Why didn't the party catch him?) (ibid.)

Flawed procedure: When the trial opened in April 1999, fifty relatives and villagers went to Anyang to testify on Qin's behalf. But the three-judge panel ordered the trial closed and excluded them from the courtroom. The prosecution brought no witnesses, and the judges

prevented Qin from contesting his coerced confession, Qin's lawyer argued that the prosecution's case, which depended wholly on the confession, was invalid. However, the trial was soon over before lunch. The verdict came six months later. Qin was guilty of rape and murder, and would be executed. Two years on death row, among the fifteen people in his cell, he saw a dozen cellmates escorted away in the early morning hours and executed with a bullet to the back of the head. He was spared that fate not by his appeals, or by new DNA evidence, but by fate itself. The court and the police failed to protect his rights and his innocence. (A retired soldier Yuan walked into another police station and told the officer on duty that he had raped, robbed and strangled eighteen women, including Ms Jia and had stolen the clock.) (ibid.)

*Comment:*

There are several aspects of this case that call for a greater protection of people's basic rights to be heard, to have a fair trial and appeal; but most importantly, people need a legal forum that can grant these rights by the authority of the law. This authority is not possible under the current structure. The change, therefore, is not only indispensable but also inevitable to keep the state power checked. Without this change, the nation would sink further into arbitrary and corrupt rule of man, and not the rule of law as claimed in the Constitution. Case 5 indicates several points that are important to the argument of power check as follows.

Nature of corruption: Under the current inseparable structure of power, and also a top-down political system, the police, prosecutors and judges respond mostly to sentiments and policies from above, as Mr Li said, 'they pay a much higher price for failing to maintain the appearance of social order than for torturing suspects'. 'The judicial system is set up to protect the authority of the government, it is not set up to protect the rights of suspects.'

On death row he wrote to his family claiming 'Our public security system is the product of a dictatorship. Police use dictatorial measures on anyone who resists them. Ordinary people have no way to defend themselves' (ibid.).

Inseparable power structure and motive make law a terror to people: The Qin's case showed how political motives and collusion among police, prosecutors and the courts could make the law a source of terror for people who lack the power or money to defend themselves.

After the coerced confession, the court then gave a death sentence. 'A panel of judges then convicted him and sentenced him to death' – without due legal processes (ibid.).

Proven innocent but not free to save face: Qin's life is nothing compared with the career and reputation of the officials, the police detective and the court, once the wrongful arrest, prosecution and conviction were made public. So the officials' response was to continue the arbitrary conduct, suppress the new information, and keep Qin on death row!

The power 'haven' must be exposed: the power holders, the authorities in Linzhou, who were handling the case of criminal Yuan, and those in Anyang, responsible for Qin's incarceration, had a secret deal among themselves; agreeing to keep the crucial part of Yuan's confession secret. Yuan would be prosecuted for 17 of 18 murders, leaving Qin's conviction intact. *'Their attitude was that if my brother was released, 20 officials would suffer,'* said Qin's elder brother, *'but if he was executed, only one person would suffer'* (ibid.).

This agreement held for more than a year while Qin continued to be on death row. 'It came to light only after an official in Linzhou joked about the matter to a reporter for a national legal affairs publication. Although the reporter did not publish an article on the subject, he did alert authorities in the capital, who ordered an inquiry.' Human lives, it indicated, mean so little to these officials, like a joke to be laughed about, how do we expect such thugs to run our lives in the uniform of police? How can such a 'work mistake' (as in Qin's arrest) ever be tolerated in the rule of law! The result of Qin's case is disheartening and yet predictable: Mr Qin has never been declared innocent of murder, because the authorities had refused to fully exonerate him. He was restricted from talking about the matter with the news media or to petition higher authorities, and Shen had been promoted to a higher position in the police. 'They hope they can just make this disappear with no hard feelings and no problems for anyone involved', Qin said. Clearly, we must correct this situation by a tougher mechanism that targets those like Shen, unworthy of the position and trust people place in them, and weed them out of the service as thoroughly as possible (ibid.).

How dangerous it can be to let criminals run the business of the police like this! Police, as law enforcement agency, openly committed the very crime it is to set up to fight!

It seems a 'haven' for the criminal-minded personnel like Shen to use his tyranny at will, without ever being caught by law, because he is part of that law. And the party even promoted him afterwards for his work.

Criminals made the Chinese way: 'The police and courts still rely mainly on pretrial confessions and perfunctory court proceedings to solve criminal cases instead of the Western tradition of analyzing forensic evidence and determining guilt through contentious court trials.' Court documents do not make clear whether physical evidence – fingerprints, blood, semen, traces of clothing – could have identified the killer. 'If there were such forensic leads, they were not followed' (ibid.).

Contradiction between law and reality: In 1996 the government overhauled criminal law procedures. It toughened an existing ban on forced confessions, while declaring that suspects were entitled to a presumption of innocence. However, in reality, as in China's long history, 'a confession amounted to a submission to authority, while a plea of innocence was viewed as a form of rebellion'. The idea of law is not an objective code that everyone follows; it is the extension of the power of the authority, which determines if one is to live, or to die. The thugs in the police force fulfill this task cruelly, in the name of public 'stability', at the cost of human lives. Obviously this idea of law is not the rule of law, but the rule of man – rule of power (ibid.).

'Justice in China is swift but not sure. Criminal investigations nearly always end in guilty pleas. Prosecutors almost never lose cases brought to trial. But recent disclosures of wrongful convictions like Mr Qin's have exposed deep flaws in a judicial system that often answers more to political leaders than the law' (ibid.).

Torture is widespread: 'China's criminal laws forbid torture and require judges to weigh evidence beyond a suspect's confession. But lawyers and legal scholars say forced confessions remain endemic in a judicial system that faces pressure to maintain 'social stability' at all costs.' This includes taking human lives (ibid.).

Legal privilege and protected class: 'Beijing draws the line at legal challenges to senior officials or important government agencies. The courts rarely, if ever, rule in favour of political protesters. Even in business cases, political influence often proves decisive' (ibid.).

These examples show that under the current system of power structure, people are not protected, and the power has become arbitrary and abused without legal constraints. These cases indicate the seriousness of the problem and its undesirable consequences; they also indicate a continuation of some feudal practices such as the use of thugs and torture. These cases also indicate an excessive power of the police over people, and law often serves to protect the police in question, rather than the people. These are the cases where the officials do not follow the law, but laws serve the officials.

This raises the question of law keepers breaking the law and not being sanctioned by the law; and argues for a check on the power by a higher authority of law that expresses the concern and interest of the people. The source of this higher authority, as will be argued in the next chapter, comes from the belief that any state power must be checked and limited; and that we must subject such a power to the will of people, not vice versa. This is a principle that is yet to be realized or accepted in China today.

## **Chapter 14      Nature and Objective of the check**

### **14.1    The nature of the check**

The nature of power check is, therefore, to subject power, be it the party authority or state executives, to the people's right to recall them from their public posts, by the virtue of the authority of law but not their own authorities. This is to establish the authority of law as a remedy for the power abuse in the past. It is also a rejection of the structure of total power in a single authority, and a legal privilege and immunity that are both causal and consequential within this power culture.

When the state campaigned against crime as a response to Deng's critics in the 1980s, it is noted that the harsh measures were applied to commoners and lower levels of the state and party officials, but not the top leaders. 'Resort to the death penalty increased during these years, with more than 10,000 being executed for criminal and economic offences between August 1983 and December 1985. However, most of those punished were drawn either from outside or from the lower and middle rungs of the State and party bureaucracies. The Deng administration proved less willing to take firm action against top level offenders for fear of antagonizing an elite which had grown accustomed to its *te-quan*

special privileges and reliance on the *guanxi* old-boy network' (Derbyshire, op. cit., p. 57-8).

The media is another area that can keep the state power and party officials in check by public scrutiny. Not surprisingly, this is the area that has been prohibited for a long time till now. There are topics forbidden by the state on radio and TV media, and a recent media law has extended this restriction to non-Chinese companies as well. A new draft law concerning the media covers not only Chinese media but all foreign media in China as well, with heavy penalties if one reports the 'wrong' thing. The law calls for fines of up to \$12,500 if news media produce 'unauthorized reports on outbreaks of disease, natural disasters, social disturbance or other so-called sudden incidents that officials determine to be false or harmful to China's social order. Wang Yongqing, vice minister of the legislative affairs office of China's State Council, or cabinet, said at a news conference that the law should apply to all news organizations, including foreign newspapers, magazines and broadcast outlets that usually operate under different rules from the local Chinese media. Wang's briefing was aimed at reassuring the news media that the proposed law aims mainly to punish government officials who do a poor job of managing sudden incidents, like health emergencies or coal mine accidents. The clause pertaining to the media, Wang said, is intended only to prevent malicious behaviour by news media that wilfully mislead the public (Kahn, op. cit.).

Freedom of speech is one of the most important values in a civil society. Banning a writer like David Irving from entering Australia, for example, was seen as a threat to freedom of speech and could lead to wider censorship, by the Queensland Civil Liberties Council (QCLC p. 36). This is because, while one disagrees with the views of others, it is necessary that the views be heard. Yet, the press freedom and the right of the community to have access to information is not a problem faced by China alone. Prof. David Flint, the chairman of the Australian Press Council, once warned that the freedom to inform was 'more under threat than ever' with journalists regularly being jailed for contempt of court through withholding sources, and that there was a need to instil the value of 'our fundamental liberties', such as press freedom ('A free press vital to constitutional debate', *The Australian*, July 1993). Up to 1997, in China, for example, there were four kinds of human needs the state authority never allowed people to talk about on radio stations,

namely 'religion, independent legal system, sexual topics, and freedom of the press'. They were banned (Xue, interview).

#### **14.2 The objective of the check**

The objective of the power check is to establish a mechanism for the check of state power, which must be independent and binding. This mechanism would entail a structural change in the current Constitution; and allow an independent legal authority for the power check task under the Constitution. To achieve these, however, the authority of law must first be established. The reality often indicates that such an authority of law is not in place, and that state officials are not subject to any penalties when they violate the law. The challenge to the power check is, therefore, the legal privilege and political dominance of the state officials who are often in control of the legal outcomes.

This will determine how law is applied and whether the state power abides by law, or law serves men in power. The legal privilege and inequality before the law is directly related to the authority of law as the authority above all other ruling bodies. It is one of the fundamental contradictions that hinders the application of law, because economic growth demands legal certainty and political predictability, which the rule of men is unable to provide. This legal privilege is vested in the way the law is applied, as seen in the uneven measures when law is applied to commoners, as compared to the officials.

### **Chapter 15 Source and model of power check**

There are three sources to keep state power in check, namely 1) the Constitution that sets up the principle and the legal framework for power check; 2) an independent legal authority that interprets the Constitution with binary power; and 3) the legal philosophy derived from the Common Law and the People's sovereign power over state leaders and leading organizations. These three sources are explained here, as well as the desirability of having such authority of law as a power check device.

#### **15.1 The Constitution**

The source of the power check should, first, come from the Constitution. John Rawls' concept of constitution has two properties: the principle of majority rule and the

ideal procedure that forms a part of his theory of justice. In his words, 'A just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the two principles of justice... When we criticize laws and policies we try to show that they would not be chosen under this ideal procedure' (Rawls, 1972, p. 356). This coincides with Mill's idea of a sovereign state and a perfect government that has a full participation of the people. In his words,

The only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate... and that nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state... It follows that the ideal type of a perfect government must be representative (Mills, 1861, in Acton, 1972, p. 216).

Mill's idea of people's representative government is, however, incorporated with the rule of law. As Aristotle once warned us that a demagogue arises where the laws are not sovereign. This is because several individual rulers, not ruled by law, seek to act like the sole ruler and thus it becomes despotic. Aristotle argues against this kind of constitution in these words:

When Homer says that to have many chiefs is not good, it is obscure whether he means this kind of constitution, or that where there are several individual rules. Anyhow, this kind of demos, not being ruled by law, seeks to act like the sole ruler that it is. It becomes despotic; and flatterers are held in honour. Such a demos is the analogue of tyranny among the monarchies. They both have the same character. They are both despotic towards the better persons. The demagogue and the flatterer are the same and analogous. Each attain their greatest power with each, the flatterers with the tyrants and the demagogues with this kind of demos. (Aristotle, in Rosen & Wolff, 1999, p.106)

A constitution can act as a monitor to constrain the power of government agencies. A constitutional system of separated powers and checks and balances is designed to achieve this end. It can create a system of mutual regulation in which each agency depends on one or more of the others to accomplish anything. This system assumes that certain other legal rules will not be transgressed – namely those rules that define the relative competences of the various departments. As Kay noted: 'Checks and balances assume the agencies will observe those definitional rules that deprive them of the powers for lack of which they must depend on the other agencies' (Kay, in Alexander, 1998, p. 41). Thus the foundation of

constitutionalism is based on the idea that public power should be controlled by a superior law. The formal promulgation of rules by legitimate authorities will result in texts that exert a normative force on the state officials to whom the rules are addressed. In this sense, to understand constitution is to understand the operation of that force.

## 15.2 Independent judiciary

The source of the power check should, secondly, come from the authority to interpret the Constitution by an independent jurisdiction. Joseph Raz analyzed seven features of constitution (Raz, 1998, p.153) and argued that 'legal interpretation is much more than a method of establishing what the law is', taking for granted that the courts have the authority to interpret the laws including the constitution. Moreover, it is part of the practice of legal interpretation as it is in many countries that courts are not bound to follow past interpretive techniques... This is the case, for example, in all common-law jurisdictions' (ibid., p.177).

Obviously, the authority to interpret the Constitution as an independent legal entity is a prerequisite in this interpretation exercise. Moreover, this authority to interpret the Constitution is important, because it is a challenge to decide how to achieve the value embodied as the heart of the legal norm. As Perry noted:

A specification of a principle for a specific class or case is not a deduction from it, nor a discovery of some implicit meaning; it is the act of setting a more concrete and categorical requirement in the spirit of the principle, and guided both by a sense of what is practically realizable (or enforceable), and by a recognition of the risk of conflict with other principles or values... The challenge of specifying an indeterminate constitutional norm, then, is the challenge of deciding how best to achieve, how best to 'instantiate' in the context of a particular conflict, the political-moral value (or values) at the heart of the norm, it is the challenge of discerning what way of achieving that value, what way of embodying it...' (Perry, in Alexander, op. cit., p.113).

L. Alexander discussed the function of authorities and authoritative decisions as related to ultimate political/moral principles that justify particular actions in more detail, which is on the premise that such an authority to interpret the constitutional norms is granted to the courts and the judges. In China, however, it is this authority as an independent legal entity, to interpret the Constitution that needs to be established first, without political interference and expediency.

### 15.3 Legal process and public scrutiny

The source of the power check should come from the legal process in law and public scrutiny. Power check is a historic process, as seen in the development of Common Law. The law works against tyrants, for tyrants can only work in a central system, where the rules issue from a single authority. In the case of *Magna Carta (1215)*, for example, this single authority of the King was successfully challenged by the due process of the law and was a product of legal bargaining and the work of many hands. It is due to this legal process that the provision of the means for obtaining a fairer hearing of complaints against the king, his agents, those feudal lords and royal officials, achieved corresponding importance. About two-third of these clauses are concerned with matters that were related to mass grievances against the misuse of state power. The significance of this historic document can never be overestimated. It signified the subordinate position of the king as a ruler to the rule of law, and thus subjecting his authority to that of law. This legacy of Common Law has broken the tradition of power totality in the hands of a single ruler or a ruling body.

Moreover, some argue that common law would only work if participants in the law-making process are working on behalf of all people in the community, rather than rules issued by a single authority. This process of public participation is the basis of the system of common law. It requires a structural change in the due process and is expressed in these words:

Tyrants can only get a hold of a central system where the rules issue from a single authority (government); tyrants cannot get a hold of a system which depends on a spontaneous participation in the law-making process on the part of each and all of the inhabitants of a country, viz., a system of common law (P. Landry, 2004, p.2).

### 15.4 Desirability of law

There is a strong argument to suggest that public power should be regulated by mutual checks, and that there are grounds for the preference of law as a higher authority. This has been done without jeopardizing the central role of government under the rule of law in many countries. These grounds are examined in terms of the desirability of law as follows.

*a) It is vital to economic growth*

It is argued that legal reform factors are vital in shaping China's current economic development. 'Without sound legal institutions, positive social and economic development cannot be achieved... Without common law and law of equity, there would have been no effective legal framework for the growth of the market economy... Without sound laws and regulations, there is no way of establishing a market system' (He 2004 ).The legal system has played a great role in economic growth and is likely to play an even greater role in the future, which is consistent with the experiences of other countries in Asia and elsewhere (Peerenboom op. cit., pp. 450-512).

*b) It is vital for public confidence*

State leaders capture public support by way of responding to 'public feelings', which is an important rationale to the state ruling. Jaing Zemin, the former CCP leader, for example, acknowledged that the survival of the Party is linked with 'public feeling'. He said:

Whether the people are for or against is the basic factor deciding the rise and fall of a political party and a political power. An honest style of government has always been an important factor for popular support, good government, and the stability and prosperity of the society. This is an important lesson of the law of the rise and fall. The collapse of every dynasty in Chinese history and ... the loss of power in contemporary world of the political parties which had been in power for a long time were all closely connected with the trend of public feeling (Keith, 2006, p. 7).

*c) It is vital to the political predictability*

As demonstrated earlier in this study, the fate of the state was extremely unpredictable when the power fell into the hands of political careerists; their right to one's life and death was limitless; and the effect of any written laws was determined by the will power of a few individuals. Law was easily transcended and there was no legal certainty for anyone. Deng, the leader of the Chinese Communist Party, recognized this issue of political unpredictability in the leadership and danger of power concentration in the early 1980s. In his words, 'As far as the leadership and cadre systems of our Party and state are concerned, the major problems are bureaucracy, over-concentration of power, patriarchal methods, life tenure in leading posts and privileges of various kinds' (Deng, 1980, p. 309).

Consequently, the nation was tossed over by the internal struggles within the powerful party machine, and no one was spared in this power struggle, not even at the very top level of the state leadership. The trial of the Gang of Four was one example of this kind. (For details of the trial, see Ian Derbyshire, 1987, *Politics in China – From Mao to Deng*, Chambers, Cambridge, UK, p. 47)

**d) *It is vital to the government's credibility***

It is argued that people will place more trust in the government if their affairs are dealt with, with legal certainty (He, op. cit., 2004). When people can lodge their concerns and grievances through legal channels, on a rational basis with evidence-based procedures, instead of with dogmatic and political threats, they will be more willing to place trust in the government's authority. The summary of 223 cases of media litigation discussed in this thesis, for example, illustrated that people began to use the media and litigation for the first time under the new laws and regulations, to test the government's credibility. It is significant that such grievances and complaints from the masses are resolved satisfactorily by means of law.

### **15.5 Other state models and debates on power check**

Models of state type suggested by legal scholars vary to a great degree, but the consensus is that law must check the state power, and to hold the party and the government accountable to the people.

In the Australian model of Power Separation, executive power is sometimes viewed as raw power. It exists in its purest form in the case of the absolute ruler or tyrant. It is central to the idea of the rule of law, that executive power should exist only if it has a firm legal basis, in a constitution, legislation, judicial decisions or some combination of these. An alternative and more limited view of executive power sees it as the administrative and bureaucratic power to apply and enforce rules, instead of the legislative power to make rules.

The separation of executive and legislative power requires an institutional separation between the executive and the legislature. It is the power of the executive that pre-eminently needs to be checked and balanced. The checks and balances on the power of the legislature may be:

- Constraints to maintain the representative nature of the legislature by elections,
- Call of rights restraints to protect the infringement of individual and minority rights,
- Federal restraints to protect the legislative power of legislatures at one level from encroachment by the other.

The checks and balances are imposed on the executive by the doctrine of responsible government. Executive and legislative – their boundary is often blurred as the law-making body, and is problematic. Judicial power is usually described as the power to adjudicate disputes according to the pre-existing legal rights of the parties concerned. It is inevitable that courts are required to interpret legal rules.

This is the model of responsible government under the Westminster system:

The executive is responsible to the legislature, which in turn is responsible to the electorate. It is based on a two-house parliamentary system, with elections to elect both houses. The government is formed from the party having a majority of seats in the lower house. Government ministers are responsible to parliament for their portfolios. The members of Parliament call on ministers with questions. The government is collectively responsible to parliament and is required to have the confidence of the lower house. Otherwise it is obliged to resign. The legislature has the function to control the executive (Hunter, op. cit. p. 53-55).

There are other theories and debates on the nature of law, and the aim of legal reform in China. Some argued that the law should not be used for the ruling class to retain its arbitrary power; that law has a duty to challenge this power by upholding the principle of basic democratic rights and greater equity before the law. But most importantly, the law must have the authority over the state executives and the ruling party, as the rule of law and Constitution claims. Otherwise it will be just another tool for the rulers – call it the rule by law. The debate on this point is summarized here:

There are debates on Rule by law or of law:

It is clear, based on Potter's article, that under the structure of power totality where all power agencies are under a single authority, the rule of law will have to be a rule by law for that authority. This change of one word will have a profound impact on the state power and how it is used by law. Some Chinese scholars view this with more emphasis on moral

grounds. Pan Wei, for example, believed that law should be based on 'general-accepted moral principles of the time', to be accepted as just by the public, as a criterion of law. Similarly others believe that rule of law must entail justice for all, not just the norms to be followed. Some go even further to distinguish rule of law from ruling with law, as Deng argued, that ruling a country in accordance with law has the supremacy of the law (Peerenboom, op. cit. p. 70). The two phrases look similar and yet there is a fundamental difference in the meaning they entail, based on the power they represent.

The main difference between the two is that rule **by** law refers to law as a form of instrumentalism where law is a tool to be used by the state to control others without conferring restraints on itself. In such a way, law is not supreme, and there is little separation between law and politics. In essence, it is the will of the state – the dictates and policies of the rulers dominate laws. On the other hand, rule **of** law requires that law imposes meaningful restraints on the state and its rulers, as well as on the populace. Clearly the difference is whether law can hold the state officials accountable for their actions, and they are dealt with in due course without privileges before the law. It is equally clear that the central ingredient in this debate is about the power of the state and its leaders, versus the power of law to constrain the state. In other words, the rule by law means to use law to rule and hence implies a more instrumental rule by law. Whereas rule of law means to rule in accordance with law, and imply that law also binds the government. Naturally the latter is more closely related to the original purpose of rule of law.

There are so called 'thick' and 'thin' theories, currently in debate among the jurists working with China. The 'thin' theories of rule of law see that a general agreement with rule of law, which requires that the law impose meaningful limits on state actors (seen in the government of laws in China) and it recognizes the supremacy of the law, and the equality of all before the law. Moreover, to be a rule-of-law, there are certain standards to be met as a minimum requirement. These elements of a 'thin' theory are in addition to meaningful restraints on state actors, and are a due process of law in nature. They reflect Hart's concept of secondary law and criteria of law as norms. These elements, as Peerenboom listed here, in fact, highlight the areas in which much improvement is needed in China. In summary they are:

- There must be procedural rules for law-making and to be valid, laws must be made by an entity with the authority to make laws in accordance with such rules;

- Transparency: laws must be made public and readily accessible;
- Law must be generally applicable: that is, law must not be aimed at a particular person and must treat similarly situated people equally;
- Laws must be relatively clear;
- Laws must generally be prospective rather than retroactive;
- Laws must be consistent on the whole;
- Laws must be relatively stable;
- Laws must be fairly applied;
- Laws must be enforced: the gap between the law on the books and law in practice should be narrow;
- Laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws (Peerenboom, op. cit., p. 65).

The 'thick' theory is a broad concept of social and political philosophy that addresses a range of issues beyond those legal norms and legal system. This broader social and political notion presents a more comprehensive general philosophy or worldview including religious beliefs, metaphysics and aesthetics etc. The view of this thesis is standing between the 'thick' and 'thin' theories, in the sense that it is 'thin' because it recognizes the enforceability and openness in the rules of law in order to protect individual civil rights; while at the same time, it is 'thick' because law is taken as the symbol of power that is designed to challenge and curb another power – the power of the state – which is in theory subordinate to the will of the people, but in reality is the dominant force.

Types of state: there are discussions about the type of state preferable in a developing economy like China. Four types of models have emerged as a result of a wide variety of beliefs and conceptions of a just socio-political state, during the debate. The Chinese views on this can be divided into four groups:

#### 1. *Liberal Democratic*

- Independence and autonomy of law are valued highly.
- Freely elected legislature (not appointed by the party).
- The judiciary and judges are independent like in the west.
- Judges can be removed only for limited reasons and by strict procedures.
- The appointment process of judges is non-politicized.

- There are various mechanisms to control administrative discretion.
- The legal system is capable of holding even top-level government officials accountable. The legal profession is independent and often self-governing.

## 2. *Communitarians*

- A moderate to high degree of separation between law and politics.
- Freely elected legislature.
- Strong public participation of rule-making, interpretation and implementation
- Corrupt government can be thrown out.
- Administrative law system strong enough to hold even top-level officials accountable.
- Protects individual rights and efficient government.
- Autonomous judiciary, life tenure for judges and apolitical processes for appointing and removing judges.
- Rejects the liberal notion of a neutral state, prefer a moral agenda by the ruling elite.
- Court and judges focus on harmony, stability and community interests over individual interests and economic interests (whereas Neoauthoritarians and Statist Socialists place more emphasis on economic development, and upholding the authority of the state).

## 3. *Neoauthoritarians*

- Favour a moderate separation between law and politics.
- The legislature is not elected.
- Greater judicial independence.
- Limit the independence of the courts and individual judges in various ways by the National People's Congress (NPC)'s supremacy and supervision over the courts.
- Professional and honest civil service.
- Administrative law system capable of combating government officials' corruption.
- Greater public participation.
- More expansive yet limited freedom of association, speech and the press so that the public can play a greater role in the monitoring of government officials.

- Rational and efficient governance as purpose of administrative law, not the protection of individual rights.
- The elite corps of civil servants are to be given great flexibility in policy formulating and implementing rules, the main form of legislation in day-to-day governance.
- The legal profession would be granted limited independence and be subject to supervision by the Ministry of Justice, albeit a cleaner and more professional one. Lawyers would seek clientele's ties to the Justice Dept. due to its control over licensing for special forms of business and other commercial reasons.

#### *1. Statist Socialists*

- Moderate to low level of separation between law and politics.
- Party policies once substituted for or trumped up laws, now are transformed into laws.
- Laws are made according to the stipulated procedures for law-making.
- The legislature is not freely elected.
- The party ensures its policy become law when it is united and willing to spend the political capital to do so.
- More limited judicial independence.
- Courts have a functional independence, and government branches are not to interfere in specific cases. Courts may decide cases without Party approval of the judgment. But the courts may still be subject to macro supervision by the NPC, the procuracy and Party organs. The court upholds the four cardinal principles. (a position not supported by either Neoauthoritarians or Communitarians).
- Individual judges' autonomy and independence is more restricted. Accordingly, most cases are decided by a panel of judges, and a special adjudicative supervision committee within the court has the right to review particular decisions in case of manifest error.
- The legal profession is granted a similar partial independence, lawyers must meet political correctness standards to practice law and pass the annual inspection test.
- MOJ (Justice Dept.) retains most of the authority in supervising the legal profession, including the power to punish lawyers. In part because of such

political reasons, but mainly due to corruption and rent seeking by the MOJ and its local affiliates, lawyers try to forge close clientele relations with the MOJ.

- In the administrative law area, government officials are granted considerable discretion, in part so that they may be more responsive to shifts in Party policy, but mainly for other reasons, including the need to respond quickly and flexibly to a rapidly changing economic environment.
- Limits on civil society, freedom of the press, and public participation in the law-making, interpretation and implementation processes make it difficult for the public to monitor government officials.
- The lack of elections eliminates whatever leverage the public might have over officials resulting from the possibility of voting the current government out of office (Peerenboom, *op. cit.*, p. 84).

These four types of views are the product of the present realities of China from one end of the spectrum to the other. The implications these models provide, from varying degrees and aspects, are:

- 1) The law has a positive role to play to restrict the state power that must be limited;
- 2) The law should be given a greater degree of power and authority in checking public powers;
- 3) The independence of the judiciary should be strengthened as a separate entity for power check.

The central contention among these four groups, however, is the power of the state officials as against the independence of the legal system and in particular, the judiciary power. The unwarranted contradiction between the state and the people thus becomes a reality, in which the state officials are desperately holding onto their posts and privileges by limited elections; and limited law as a separate entity (embodying the law and politics as one entity) control over the court by committees; control lawyers by tests; and suppress free speech and public participation in law making; but at the same time, grant great discretionary power to state officials, and resist court orders.

The line is thus clearly drawn between the state officials' power, and the power of the legal entity. Care must be taken, or the legal reform, in the name of the rule of law, may

easily be substituted by rule by law, and the whole purpose of limiting the state executive's power would be lost. The role that the Constitution will play will depend, to a certain extent, on which version of rule of law prevails. It is predicted that the Constitution will play an important role if a Neoauthoritarian or Communitarian form of rule of law is adopted. 'Although the tension between strengthening and limiting the state would still be manifest in constitutional law, at minimum there would be greater emphasis on individual rights. As a result, 'the Constitution would probably become directly justifiable. It might also be subject to less change' (Peerenboom, op. cit., p. 89).

### **Summary of Part Three**

Part Three answers the question why we need law in the power check. It gives several reasons why we need the power check as principle and why law is important in the implementation of this principle to challenge the power totality history. It is argued that in order to take the challenge, law must have its own authority and independence without the order from the ruling interest. The law is desirable for several reasons such as stability, predictability and continuity; but more importantly, it can provide a forum where people are protected to exercise their right to check power. It can also provide a structure where public power is to be checked mutually by several agencies within one system.

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## **PART FOUR        HOW LAW CHECKS POWER**

### **Introduction to Part Four**

In the previous chapters, we have established the fact that law is part of the solution in the battle against power totality. In this final section, we will discuss some of the legal measures in the process of power check. How can law help remedy the abuse in the past? It is argued that the Constitution has an important role to play in the power check. There are several steps to take to reach the goal. We need first of all establish the principle of power check in the Constitution; and grant the independence of the legal institutions. Furthermore, we need a structural change with a mechanism for power supervision. And finally, based on other models, I will propose a model of a Constitution Office and an Administrative Court to sanction corrupt state officials and power agencies (including law enforcement agencies). In this Part Four, Chapter 16 will establish the principle of power check in the Constitution. Chapter 17 calls for the independence of legal institutions, and Chapter 18 discusses the necessity of a structural change of power arrangement within the state apparatus. Chapter 19 will provide and explain a new model of power check under the Constitution. The final chapter (Chapter 20) will discuss the implication of this study, in the light of ideology versus humanity and to reposition Marx's original vision.

This is a rejection of the feudal structure of power totality and its power-based ideology, a misleading justification without the essence of humanity and basic rights for people.

### **Chapter 16        Power check as a principle in the Constitution**

#### **16.1    The original objective of Constitution (to limit the power of the Congress)**

The debates about what constitutes constitutionality have been continuing among Chinese constitutional law scholars since 1981. The controversy over China's Constitutional supervision mechanism, and supervision over the NPC and NPCSC is also generating heated debates and deep concerns (see Lin, 2000, pp. 287-296). Under both the 1954 and 1978 Constitutions, the NPC and NPCSC had the authority to conduct constitutional supervision. When the 1982 Constitution was drafted, different views were

put forward on the subject of what form of constitutional supervision mechanism China should have. The drafting committee of the 1982 Constitution was in favour of the establishment of a Constitutional Committee (Chen Yunsheng, 1988, p. 257). The idea was abandoned due to the fact that it was difficult to define the legal status and the authority of such a committee; and also due to a lack of experience required in this respect (Liu Lansheng, 1981, vol. 3, see also Hu Jinguang, 1998, no. 2, p. 200). In my opinion such a committee must be established soon. The reason for this has been stated earlier, that is, the expediency and importance of this matter is beyond any doubt. China needs power check by a separate and independent entity, to be placed directly under the Constitution – and China needs it now.

## **16.2 The three aspects of power check in the new structure**

There are three aspects of power concentration, which should be addressed, namely the Party and the government; and government and law, and the independence of the judiciary. As part of the power check mechanism, these aspects are important as conditions for any proposed models.

### ***The first aspect is the separation of the Party and Government:***

The need to separate the party from the state was highlighted by the Chinese leader Deng in his objectives for reform. In his words, ‘firstly, to create a new collective form of party leadership which would share the workload and provide continuity after his death; secondly, to effect a greater separation between the party, state and military spheres of government, following their convergence during the “Cultural Revolution”; thirdly, to provide the series of checks and balances which would prevent the concentration of power in the hands of any single body or person; and lastly, to define more clearly areas of responsibility and establish proper lines of accountability within a political system which would still be dominated from above by the CPC’ (Derbyshire, op. cit., p.45).

Many scholars acknowledge the necessity to separate the CPC organs from state organs. For example, the decisions on the five-year national plan etc. should be made by the NPC or the NPCSC (Cai Dingjian, n.15, p. 338). This has been argued by the scholars like Liao Guangsheng, in his article titled ‘The Constitution of the Party, the Constitution of the State and the Relationship between the Party and the Government’ (in Wen Songran ed.,

1987, pp. 67-70); and He Huahui, in his study of the People's Congress system in China (He, ed. 1992, pp.158-160, 262-275).

There are three major differences in law-making capacity between the party and the congress, which should be taken into consideration in this process:

1. CPC has a guiding role and the congress follows it in its decision-making.
2. For the CPC, the lower party organ should abide by the decision of the higher. But for the congress, it follows legal procedure to exercise its power of decision-making, which is democratic. (Procedure)
3. The CPC's decision is only binding on its members, but the congress's decision has legal effect binding upon all the people within the jurisdiction of the congress, and can be enforced by state force. (Consequences and legal effects) (ibid., p. 159, n.8).

*The second aspect of the new structure is to place the Government under the law instead of under the Party*

The nature of the People's Procuratorate is defined as the state organ for legal supervision (Article, 129 of the 1982 Constitution, also Article 1 of the 1983 Organic Law of the People's Procuratorate). This shows a different legal status from that of other state enforcement organs, such as the public security and the courts. The procuratorate has the authority to ensure the implementation of the Constitution and laws. Its supervision is conducted by judicial functions over other state organs, such as the public security organs, state security organs, people's courts, prisons, detention centres, labour reform organs and labour re-education organs. Its function is limited in certain administrative activities by the relevant judicial organs, and does not extend to other areas. Unlike the people's congresses, the procuratorate has no power to repeal any inappropriate administrative rules and regulations. Its supervision over personnel or ordinary citizens is limited to the committing of crime leading to criminal liability.

From the cases cited in Part Three of this study, it is clear that this state organ can be severe in persecuting or prosecuting people, acting as arms of the police and adding another chain of law and order over ordinary citizens. It is also clear that the procuratorates can be extremely powerful, and can even overpower the courts and influence the judiciary process. It has acted vigorously during the anti-crime campaigns for the state government and the

party, with heavy death penalties. It seems unconvincing that such an organ in reality really protects people's basic rights. In the power check, the power of investigating corrupt state or party officials would be more relevant to the area of law and justice.

But it is not the case. The people's procuratorates in fact leave the party and state executives free. 'The people's procuratorates do not have jurisdiction over the ordinary violation of discipline of the Communist Party of China or administrative rules that are not classed as violations of criminal law' (Lin, 2000, p. 235). In a sense, it has functions similar to that of police in criminal cases. It is responsible for the people's congresses, as well as other governmental organs. Its origin came from Lenin who believed that the procuratorates should not only conduct public prosecution but also comprehensive supervision of the implementation of law by governmental organs and their personnel. This is an important arm of the state to protect, rather than to curb power abuse.

This fact seems to have been acknowledged by the state legislature. The 1979 Organic Law of the People's Procuratorates limited the functions of it to investigation, prosecution and supervision of other judicial organs. With the amendment of the Criminal Procedural Law in 1996, the scope of cases, which may be directly investigated by the procuratorates, has been further clarified and limited. Article 18 of the amended Criminal Procedural Law provides that 'Crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, and crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen's democratic rights – committed by State functionaries by taking advantage of their functions and powers – shall be placed on file for investigation by the people's procuratorates' (ibid., p. 241).

This article locates three main areas for legal investigation, namely 1) crimes of embezzlement and bribery; 2) crimes of dereliction of duty; and 3) crimes of citizens' personal and democratic rights. For cases involving serious crimes where state functionaries have taken advantage of their functions and power, the People's Procuratorates may also conduct direct investigation. Such a decision has to be made by the procuratorates at the provincial level or above (Article 18 (2) of the 1979 Criminal Procedural Law amended in 1996).

### *The third aspect of the power check is the Independent judiciary with binding power*

It is recommended that The Judicial Committee and the Politics and Law Committees be abandoned; and that the structure of the courts be simplified. There are redundant functions within the court system, and redundant hierarchic structure and personnel, such as the heads of the divisions and bureaucrats within the court system, which should be reduced. A single vertical line of supervision by the courts and for the courts should be established, without other interference. The basic courts deserve most support and funding, as 'over 90% of cases in China are tried by the basic courts, so the proper operation of the basic people's courts is crucial to the implementation of the rule of law principle in China' (Lin, op. cit., p.219). This may be explained in terms of courts and judges:

#### *1. Courts*

One proposal put by the Chinese legal scholars is that judicial authority should be subject not only to supervision but direct order. It is suggested that the people's courts should be subject to vertical leadership from the courts at higher levels and abolish the horizontal leadership of the courts by the people's congress at the corresponding level. Nor should the court be subject to the leadership of the party organ or the executive branch of the government at the same level. Many such recommendations have been made for judicial reform in China (Lin, 2000, p. 234). In fact, the courts should not be subject to the government executives, People's Congresses, and the party organs at ANY level, for that matter. Otherwise it is not the rule of law in a practical sense. And it contravenes Article 125 of the 1982 Constitution, 'exercise judicial power independently, in accordance with the provisions of the law'.

#### *2. Judges*

Scholars have proposed that the judiciary should be neutral and impartial. Two conditions for this have been put forward. One is independence of judges, so that judges will no longer be accountable to any other governmental organ, only to law (Wang and Yao, 1998, p. 9). 'This is consistent with Marxism as Marx once said that "judges have no other bosses except law"' (Lin, op.cit., p.233).

#### *3. Lawyers*

Lawyers, as a part of this change, should gain a considerable degree of independence. At the same time they are expected to obtain a high level of proficiency.

They need to be equipped with not only the techniques and the knowledge of the law, but also the philosophy and the moral obligation for the protection of the public against the power abuse. They are the vanguard for the principle of keeping the power in check by defending the constitutional rights of the citizens. They have a mission, which was expressed in these words by a Chinese legal scholar:

Jurists also need to be aware of their own mission. In *The last Lawyer*, Tony Kronman, the former dean of Yale Law School, argues that today's lawyers resemble less and less their predecessors from the early years of the American republic. In those days, a lawyer was also a politician. Today, on the other hand, lawyers show less concern for politics, because all they care about is making money. Lawyers no longer aim to reform politics and improve society.

Historically, lawyers are very influential in politics. 'Most of the American founding Fathers were either lawyers or had a legal background, and as a result, the American political class came to be led by people with legal backgrounds, More than half of America's presidents have had a legal background.' It's good for a country to be governed by people with a legal background.

Law is a discipline that is particularly concerned with society. Society is the laboratory where all our theories are put to the test. I believe that if your theory has no connection to society, and if you fail to criticize and expose corrupt social practices and violations of the law, you lack social concern. Such scholars fall short (He Weifang, 2004, Interview).

## **Chapter 17            Independence of legal institutions by the Constitution**

### **17.1    Current Constitution of PRC – its achievement and problems**

#### ***Achievement***

The most significant achievement of the Constitution of the PRC (amended in 2004) is its confirmation of citizens' Basic Rights, and its commitment to the Rule of Law. There are two most important principles in the Constitution, first, the basic rights of citizens and the acknowledgement that all the powers belong to the people; and second, the authority of the Constitution and the authority of the law.

As discussed previously in Chapter 9 of this study, the protection of people's basic rights should be the priority of the new structure. This protection should be legally binding as it is endorsed by the Constitution of PRC. These principles are repeated here as the objective of the power check.

### *Constitutional Principle 1 – Basic rights Protection*

There are many rights and duties included in the Constitution PRC (2004). The most important rights are equality before the law (Article 33);

- Right to vote - regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence (Article 34);
- Right to supervise (Article 27) to criticise, complain, charge against and expose any state organ for violation of the law (Article 41);
- Right to democratic management of enterprises/organizations (Article 17).

#### Freedom:

- Freedom of speech, of the press, of assembly, of association of procession and of demonstration (Article 35);
- Freedom of religious belief (Article 36);
- Freedom and privacy of correspondence (Article 40);
- Freedom of marriage (Article 49);
- Freedom to research literary and artistic and other cultural pursuits (Article 47).

#### Freedom of the person:

- Preserve life, no bodily harm or torture;
- No arrest without approval, prohibits unlawful detention, deprivation or restriction of freedom of the person (Article 37);
- Residence is inviolable (Article 39);
- Personal dignity is inviolable, no insult, libel, false accusation or incrimination (Article 38) (Li Buyun, 1986, pp. 50-88).

### *Power belongs to the people*

‘All power in the People’s Republic of China belongs to the people.’ ‘The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law’ (Article 2, Constitution of PRC).

The importance of these rights is recognized by the Constitution as it states, in its third paragraph of Article 33, that ‘the state respects and safeguards human rights’. Chapter 2 of the Constitution deals specifically with the fundamental rights and duties of citizens, for example, in Article 33-36, it grants that all citizens are equal before the law, and every citizen is entitled to the rights and duties prescribed by the law. Citizens have the right to vote regardless of their ethnic status, race, family background or religious belief. They are granted freedom of speech, of the press, of assembly, of association, of procession and of demonstration (Article 35) and freedom of religious belief (Article 36).

### ***Constitutional Principle 2 – The authority of the Constitution and the Rule of Law***

#### ***The Constitution is paramount in legal hierarchy***

The 1982 Constitution has been regarded as the best China has ever had (Lin, op. cit., p. 17). It formally confirms that the Constitution is at the pinnacle of the legal hierarchy and is the foundation on which other legislation is enacted. No laws or administrative rules and regulations may contravene the Constitution. Such a hierarchy of primary and subordinate legislation is essential for the integrity of the Chinese legal system (Wen Zhengbang, 1994, pp. 215-216).

The commitment of the CPC to the adoption of the rule of law principle in the PRC was formally confirmed by the 1999 amendments to the Constitution. In addition, the term ‘counter-revolutionary crime’ was replaced by the term ‘offence against national security’, in alignment with the latest amendment to the Criminal Law.

#### ***No legal privileges for state executives***

This Constitution states that it ‘is the fundamental law of the state and has supreme legal authority’ (2004 Constitution, preamble, p.7) and ‘No laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law’ (Article 5, Constitution, p.10).

#### ***Problems with the current Constitution***

There are several areas in the constitution that make the law less effective in power check, namely the lack of independence of the courts and judges; lack of a separate power check entity; lack of procedures (against state officials and against violation of basic rights); and Leadership as related to law.

## **17.2 Lack of independence of the courts and judges**

Due to the lack of independence of the judiciary, it is suggested that the Judicial Committees be abandoned. The Judicial committees were established by people's courts at all levels (Article 11 of the 1979 *Organic Law of the People's Court* as amended in 1983). (hereafter the *Organic Law*). The task of the committees is to sum up judicial experience and discuss important or difficult cases and other issues relating to adjudicative work (Article 11 (1) *The Organic Law*). The structure of the courts of the PRC consists of a president, vice-presidents, chief judges of divisions, associate chief judges of divisions and judges. The president of a court has the authority to nominate candidates for the judicial committee of its court, and presides over meetings of the committee. Under the democratic centralism rule, the committee discusses all issues within its jurisdiction, but the president of the people's court has the final decision-making authority concerning all issues submitted to the committee (Article 11 (1), the *Organic Law*).

The necessity for such a committee is controversial. Those in favour of the establishment of such committees argue that it would improve the quality of the judgment and reduce the pressure on the judges. Those against it believe that judges should be able to rule a specific case without any interference; and if his judgment is deemed unfit, it may be overruled by the court with appellate jurisdiction. Moreover, it is noted that the decisions of the committees are made in a short period of time, usually taking about ten minutes, so it is impossible to take into account the full complexity of a specific case. The bias of the presiding judge may also undermine the fairness of the case (Lin, op. cit., p.216).

Even so, some constitutional scholars in China believe in 'the authority of the courts in exercising adjudicative power independently'. The concept of this independence, however, differs among the legal theorists. To some, independent adjudicative authority means the exercise of the authority by the courts and not by individual judges (Wang and

Zhang, 1993, p.17). The judicial committees and their supervision of the judges, in this view, are consistent with the concept of judicial independence.

‘In China, the concept of judicial independence is not a favoured term. Instead, officials prefer to use the term “the authority to exercise adjudicative power independently”’ (Lin, op. cit., footnote p. 216).

The constitution states that ‘The People’s courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual’ (Article 126, 1982 Constitution of PRC).

However, it is undeniable that the court as a legal institution is not independent. And individual judges do not enjoy independence in adjudication – for their decisions must be approved by the divisional head and the president of the court – and yet this approval of cases has no statutory justification. Under the *Organic Law* and the relevant procedural laws, only individual judges and collegial panels within a court may try a case and make a judgment (Lin, op. cit., p. 231). The original purpose of approval is to prevent individual judges from making improper judgments, and this is not achieved by the approval procedure. The existing internal structure of the court, moreover, gives too much power to the heads of divisions to approve certain cases, thus weakening the integrity of both individual judges and collegial panels.

It is clear that *Judges bear the name but no power*. Although the ruling is exercised collectively, the judges as individuals, give out the ruling in their names and therefore bear the responsibility for any errors of the ruling, which seems to be unfair on the judges. The president and the divisional heads that have the veto power in the cases should instead share the responsibility and the accountability for their actions.

The lack of judicial independence is also seen in a lack of statutory interpretation authority in the courts, except the NPCSC, confirmed in the latest Law on Legislation. The Resolution of the NPCSC on Strengthening the Interpretation of Law adopted on 10 June 1981, Article 2, states that ‘The SPC is the only court that has authority to give judicial interpretation’. Thus it limits other courts’ power to give judicial interpretation. The SPC may only interpret a national law in actual adjudication. In theory it is a limited authority, but in practice it has issued opinions regarding the interpretation of various national laws

(Lin, op. cit., p. 231). In addition, higher level courts often give directions and orders to lower level courts, thus undermining the independence of adjudication by the lower level courts.

More importantly, the judiciary as a whole is subject to local governments' interference. This has been acknowledged by the President of the Supreme People's Court in his 1997 *Annual Report to the NPC* (Wang and Yao in Lin, n. 135, p. 231). The courts also face supervision by the people's congresses and their standing committees over specific cases, which is another improper restriction over the independence of the judiciary. Some scholars argue that the supervision by the people's congresses over the courts should be of general and abstract nature, rather than as direct supervision of individual cases (Wang and Yao in Lin, op. cit., p. 232).

Other external obstacles the judiciary face include: 1) it is subject to executive interference, although in theory judicial authority is separate from executive authority. 'Executive branches at all government levels actually control the funding and personnel arrangement of the people's court at the corresponding level'. 2) It is subject to interference by party organizations at corresponding levels. The local party branches issue direct instructions or make decisions, which interfere with the independent adjudication of the local courts. 3) It is subject to improper interference by people's congresses. On one occasion, deputies to the Sichuan Provincial People's Congress strongly criticized the President of its Higher People's Court for accepting a specific case and refused to give him an opportunity to explain his reasoning (Dai Dingjian in Liu Hainian in Lin, n. 141, p. 232). The case of *A judge tests China's courts*, in Part Three of this study, also indicated this kind of external interference from the local government as well as the local people's congress. Such 'supervision' by the congress has undermined the independent adjudication authority of the people's court.

To sum up the restrictions the current judiciary and court systems face:

- 1) The emphasis on the court as collective, not as independent judges;
- 2) A judge's ruling must be approved by the divisional head and president of the court;
- 3) The final statutory interpretation authority resides in the NPCSC, not the courts;

- 4) Higher courts often direct and order lower courts;
- 5) The judiciary as a whole is subject to interference from local government;
- 6) The judiciary is also subject to congresses and their standing committees;  
and
- 7) Local government has control over the personnel, funding facilities and administration of the courts.

### **17.3 Lack of separate power check entity**

These are the structural problems in the Constitution, which affect judicial independence and also indicate an inseparable nature of power concentration. The purpose of power check, as we have discussed in Part Three, has not been fulfilled by the current power check structure in the Constitution. There are no clear self-restraints or power demarcations between the three most powerful elements of the state, namely the executive branch, the CPC, and the People's Congress. Their interference with the judiciary is a result of power combined in controlling the law, rather than being controlled by law. This has made the argument for a separate power check mechanism even more pressing. The Constitution is expected to overcome this structural problem.

The court itself also needs to be checked. Lin is of the same view that 'While acknowledging the importance of judicial independence, it should also be noted that an appropriate mechanism must be established to ensure that the exercise of independent adjudication authority will not lead to the corruption of the people's courts' (Lin, 2000, p. 233). This is because the corruption within judicial organs including the courts is also serious. According to Prof Guo Daohui, in the Ningxia autonomous region, there were sixty wrongly judged cases in 1997, and many of them involved corruption of judges. In Liaoning Province, during an investigation which lasted for fifteen months, 563 were found to involve judicial corruption and personal relationships (Guo Daohui, 1999, p. 85, Lin, n. 145, p. 233). To combat this, it is acknowledged that 'external supervision is essential to the control of judicial corruption. Social supervision, especially supervision by the media, has also been strongly advocated' (ibid, p. 85, Lin, p. 233).

The courts, the people's procuratorate, and many government organs are all subject to the leadership of the Committee of Politics and Law within the party organization. In many places, the head of the Committee of Politics and Law is the director of the public

security bureau at the same level. This means that the head of the Public Security can order the courts at the same level. Such a committee signifies a form of power concentration which can lead to prosecutors and the criminals all in one. This lack of separate power check entity is obvious and has no legal accountability.

#### **17.4 Lack of procedures**

Another problem is a lack of procedures in the Constitution to deal with government officials. Article 41 of the 1982 Constitution has also provided a constitutional supervision over governmental officials in cases of unlawful (including unconstitutional) and derelict acts. But Lin points out that various procedural administrative laws (Review Law, Litigation Law and State Compensation Law and so on) do not open to the ordinary individuals or legal professionals, because they 'do not have a formal legal channel through which they can challenge the constitutionality of the acts of governmental officials. Strictly speaking, only the NPCSC or the NPC have the authority to decide the constitutionality of the acts undertaken by governmental officials under the existing constitutional setting. The NPC and NPCSC have the authority to remove senior governmental officials from their positions if they commit unconstitutional acts.' (Article 63 of the 1982 Constitution) 'Article 41 of the Constitution may well be regarded as the constitutional grounds for either the NPC or NPCSC to exercise their supervision authority over the constitutionality of the acts undertaken by governmental officials. However, procedural law is still required for either the NPC or the NPCSC to exercise such authority' (Lin, *op. cit.*, p. 325). Others see law as the most important authority of constitutional supervision. 'Many countries grant such authority to the judiciary' (*ibid.*, p. 315).

The procedure to review and to impose penalties if legal procedure is not followed is also important. The cases cited in Part Three show that a lack of review of such procedure left the cases unsolved and the law ineffective. The normal procedure for criminal cases is that if the president of the court commences a case, the case must be submitted to the judicial committee for discussion and decision (Article. 177(1) of the 1991 Civil Procedural Law). If the SPC or the higher level people's court discovers the existence of error, it can either ask for the case to be transferred to its body for retrial or designate a court to try the case (Article 177 (2) of the 1991 Civil Procedural Law). If the retrial process is initiated by the parties concerned, the procedure depends on which judicial organ he brought his claim

to. The people's courts at all levels must be accountable for handling a petition lodged by a party to a case against a legally effective judgment or order. Many courts have also set up an appeal adjudication division to receive petitions for the parties concerned (Lin, 2000, p. 230). In Administrative Litigation Law (1990), violation of legal procedure is separated from violation of substantial legal provisions and both of them are grounds for judicial review in China (See Article 54 of the Administrative Litigation Law 1990 of PRC). However, as shown in the cases discussed in Part Three of this study, procedural justice is completely disregarded in criminal justice. As for the court or judges, as Lin rightly pointed out, certain internal administrative penalties should be imposed if they don't follow the legal procedures (Lin, *op. cit.*, p. 230).

### **17.5 Leadership and law**

This lack of legal independence is also indicated in relation to the Leadership. The court is subject to the Committee of Politics and Law within the party organization, which consists of, among others, the President of the court, the Chief-procurator, the Director of the Public Security Bureau and the Director of the Justice Bureau at the corresponding level. This committee of Politics and Law 'ensures that all judicial organs, including the people's court, are subject to the leadership of the CPC. This often turns out to be the dictatorship of the secretary-general of the Committee of Politics and Law' (*ibid.*, p. 232).

On the other hand, the court is unable to constrain the legal privilege enjoyed by party officials. In the discussion of the authority enjoyed by the people's procuratorates according to the Constitution and relevant laws, it is clear that there are limits of this authority, in particular, in relations to the privilege of the party. The exercise of procuratorial authority, the decision-making process for public prosecution, in practice, 'is subject to external interference. First, whenever a case involves a member of the CPC, it must be investigated by the CPC's disciplinary committee at the relevant level. Only when that investigation is complete will the case be transferred to the people's procuratorate at the corresponding level for public prosecution' (*ibid.*, p. 244). For example, the case involving the former Mayor of Beijing Municipality has been held up in the Central Commission for Disciplinary Inspection of the CPC for several years (Renwen, 1999, n.136, p. 46). A political decision must be made by the CPC Central Commission for Disciplinary Inspection, as to whether or not the Mayor should be subject to criminal

punishment, before the people's procuratorate can become involved. This is an example that the status of the party is higher than the Supreme People's Procuratorate in reality. The 'string' of the party is behind the law, but who will hold the 'string' against the party? The leadership of the CPC, seems to remain above the law in many accounts, which can only be rectified by a separate legal mechanism, outside the party itself.

The People's Procuratorate is also subject to the leadership of the Committee of Politics and Law within the party organization, as with the courts. In many places, the head of the Committee of Politics and Law is the director of the Public Security Bureau at the same level. This means that the Director of the Public Security Bureau can order the court at the same level. Such leadership of the party 'can lead to interference by an organ with the executive branch of a local people's government with the exercise of independent prosecutorial authority ... Such a practice does not have any legal ground to support it and is purely a practice of the CPC' (Lin, op. cit. p. 245).

People's Congress: As the assembly of people's representatives, the People's Congress is perceived negatively as a rubber-stamp of the party by many. In theory, the Peoples' Congress is the governmental organ that exercises state power. Lenin once stated that 'All other governmental organs are created by and responsible to the People's Congress and the People's Congress is superior to all other governmental organs' ('Up Changed', n.1, pp. 139-143, from *Selected Works of Lenin*, vol.3, and pp. 133-134). This statement is consistent with Marx's concept of the new state, in which the congress is elected by voters as legislative authority. On the other hand, the People's Congress should never be placed under the dictatorship of the ruling party, for Marx and Engel's never endorsed a party supremacy above the will of the people and unconstrained by law. In principle, the people's representative organ should have the authority to appoint government officials. The voters have the authority to remove representatives from their positions at any time if the latter do not execute their jobs properly. Engels, at a later stage, further clarified the concept of decision-making authority as 'all political authorities, including the executive authority, should be concentrated in the hands of the people's representative organ' (Cai Dingjian, 1998, p. 3).

This democratic form of government is far superior to a totalitarian one. In order to prevent representatives from abusing their power and becoming masters rather than servants of the people, 'Engels proposed two specific measures: one, to make the

representatives subject to direct election and supervision of the voters, and two, to deprive them of any financial privileges by paying the representatives the same wages as the workers' (ibid., p. 6). Cai argues that Lenin endorsed this idea of the representative organ as the highest power comprising all powers in order to realize the dictatorship of the people, that all powers should be concentrated in the hands of the people's representative organ, that is, the People's Congress. All representatives of the congress are subject to the people who can remove their representatives at any time. 'Lenin believed that only if such authority to remove representatives was acknowledged and implemented could the system be treated as a genuine democracy' (ibid., p. 14).

This state organ of congress was later translated to the party and became a concentrated power that cannot be removed or appealed against by the people at all. In other words, the status of the party has divorced itself from the original criteria of the people's representatives. Every state's ruling party enjoys decision-making authority; which can make its leadership a dictatorship, as seen in recent history. The Party used to exercise direct leadership over all national affairs and issue orders to all governmental organs and the people directly. The decision-making authority of the CPC virtually replaced the decision-making authority of the People's Congress. 'In practice, the decision-making authority of the People's Congress became useless' (ibid., p. 335).

This problem was acknowledged by the CPC itself. In 1987, in its 13th Plenary Meeting Report, the CPC stated that the leadership of the CPC should only be political leadership. (Collection of documents Concerning the People's Congress of the PRC, 1990, p. 433). Thus the exercise of such leadership is to convert the CPC's policies through legitimate channels into legislation of the state. It also acknowledges the necessity to separate the CPC organs from state organs. However, Lin argues that any decisions adopted by the CPC should not have any direct effect at all, because in order for them to become legally effective, the decision made by the CPC must go through the People's Congress and be adopted by the Congress (Lin, op. cit., p. 100).

The People's Congress in China, (the NPC) is the decision-making authority. It is designed to be 'the balance imposed by legislature over the executive branch of the government and the supervision by the legislature over the executive branch' (Zhu Guanglai, 1987, in Lin, p. 97). It is particularly important for the local congresses to have this decision-making authority as a means for people to express their interests and to make

decisions through the relevant people's congress. This authority should be extended. One view is that this decision-making authority should be used to amend, supplement and interpret legislation. Such authority is available only to those with legislative authority (NPC) and their standing committees (*ibid.*, p. 99). (Note: In China, only the NPC, NPCSC, provincial congresses, those autonomous regions and municipalities directly under the central government, or major cities, have the legislative authority. Other people's congresses and their standing committees do not have this legislative power (See Article.63 of the Law on Legislation).

In theory, the People's Congress has the authority to decide major issues, and the government is responsible for their implementation. In practice, the CPC has more authority through the executive branch than the decision-making authority of the people's congresses (Cai Dingjian, *op. cit.*, p.340). The consequence is that officials from the executive branch of the government have a higher status than those from the People's Congress in the relevant party organ. The executive branch has more authority than the People's Congress, which is a fundamental violation of the principle of power check. To make it worse, 'the CPC often makes decisions jointly with the executive branch of the government' (Lin, *op. cit.*, p. 101). Thus the demarcation of authorities between the congress (decision-making) on one hand, and the government (administrative power of the executives) is obscured. The lack of real power of the congress in asserting its proper role of decision-making, by the control of the party and governmental executives, has resulted in the lack of respect for the People's Congress and given the congress the reputation as a 'rubber stamp' (He, *op. cit.*, pp. 156-158, in Lin, p. 101). This is an issue of leadership crossing the legal demarcations of law-making and law implementations, jointly with the state executives, at the expense of the people's representative organ, the Congress. This issue has to be rectified if China is serious about the rule of law and the power check by law. It calls for a separate and independent mechanism to limit the power of the executives and party bosses, outside the existing system of the CPC and the government.

It is fair to say that there still are various structural problems within China's constitutional structure, which have seriously undermined the effectiveness of the power check. The main reason for this is the lack of a framework for an independent legal entity equipped for the task. The legitimacy of the party leadership, granted by the Constitution, seems to provide a legal immunity from fair legal procedures and equality in law.

Furthermore, the government executives enjoy the benefit of being protected by a total power structure, where they are also immune from legal sanctions, because there is no demarcation of legal responsibility and public accountability between the government, the party, and the judiciary institutions. When the need arises, it is only the party power that seems to work from above, through various political-legal committees top down, subjecting everything in its way to its power. Meanwhile, man's basic rights are not protected by law.

China has adopted an instrumentalist approach towards its constitution. It has been used as an instrument for political struggle in the past, such as the Constitution of the Soviet in 1934 and the Constitution in 1975 during the Cultural Revolution, and for economic development from the 1980s onwards. The Constitution has evolved from an instrument for so-called class struggle to an indispensable tool for economic development, evident in its frequent amendments in recent years. It is hoped that the Constitution will develop beyond its economic instrumentalist functions, and will become indispensable in its role of power check, by providing a comprehensive framework for limiting the power of the state executives and denouncing any legal privilege in the implementation of the law.

## **Chapter 18            Models of power check – supervision**

### **18.1    The mechanism under the 1982 Constitution**

The 1982 Constitution grants the authority of constitution supervision to the NPC and NPCSC. In its Preamble, (Articles 5, 62, and 67) it lays down the constitutional basis for the constitutional supervision mechanism. It states in Article 5 that 'All acts in violation of the Constitution or the law must be investigated' and 'No organization or individual is privileged to be beyond the Constitution or the law'. Many interpreted this as giving the NPC and the NPCSC the constitutional supervisory authority (Hu Jinguang, 1998, p. 200). The Constitution also provides that the NPC may establish various special committees, which will examine and draw up bills and resolutions. These special committees have been assigned the task of assisting the NPC and NPCSC in conducting constitutional supervision, which is stated in other relevant legislation, such as the Organic Law of the NPC.

The 1982 Constitution has expanded the authority of the NPCSC in its legislative power and constitutional supervisory power. The NPCSC has been granted the authority to

make laws and to interpret the Constitution and national laws. However, in cases of inappropriate use of power by the NPCSC, the 1982 Constitution has also added another check and balance. It provides that the NPC has the authority to alter or annul any inappropriate decision of the NPCSC (Article 62 (11) of the 1982 Constitution).

## **18.2 The problems of the existing mechanism**

The constitution and laws are believed to be the manifestation of the will of the CPC that represents the people, and the NPC has the authority to amend the Constitution. (Article, 62 (1) of the 1982 Constitution). The NPC and NPCSC also have the authority to enact and amend laws. It is argued that when enacting or amending laws, the NPC and NPCSC are two authorities controlled by the same state organ. The only difference is in procedural arrangements. Most people in China are not aware of such a difference, and it is not easy to make such a differentiation in China because the CPC dominates both politics and the legislature (Lin, *op. cit.*, p. 314). Some further argue that either the NPC or the NPCSC have performed unconstitutional acts. For example, the Criminal Law and Criminal Procedural Law are basic laws, of which the basic principles cannot be amended by the NPCSC (Article. 67 (3) of the 1982 Constitution) and yet in reality, the NPCSC in fact partially amended certain basic principles of those two laws (Guo Daohui, *op. cit.*, in Lin, p. 314).

The constitutional supervision mechanism laid down in the 1982 Constitution has more details and is more structured than those in the 1954 and 1978 Constitutions, yet the actual implementation of it by the NPC has not been satisfactory. 'Neither the NPC nor the NPCSC have formally annulled or repealed any laws, administrative regulations, local legislation and local rules' (Lin, *op. cit.*, p. 299).

There are problems in the existing mechanism in the role of constitutional supervision. These problems suggest a reluctance on the part of the NPC and its standing committee to allow constitutional supervision to be conducted independently by legal experts, similar to the function of the court. This suggests a lack of confidence in the existing legal system, the court, and the lower level of legislature, in their capacity to give rulings in accordance with the law. This conclusion is drawn from the following factors.

The constitutional supervision cannot be conducted satisfactorily in the existing structure because 1) the shorter meeting season of NPCSC and its many other functions, (21 functions) of which the main function is to legislate (Article 67 of the 1982 Constitution). 2) The members of the NPCSC have other full-time positions and it is difficult to concentrate on constitutional supervisory activities. 3) The special committees of NPC, though assigned to assist the NPC and NPCSC in constitutional supervision, rarely provide such assistance in reality. This is due to the fact that none of these committees are allowed to make decisions in their own name – they must report their opinions or proposals to the NPC. This means that any decision on the unconstitutional acts still needs to be made by the NPC or the NPCSC. Moreover, these special committees already have heavy workloads in legislation and other duties. 4) The special committees do employ specialists as advisors, but allow them only the right to give their opinions without voting power. And yet these specialists are expected to play a key role in constitutional supervision. 5) Since every such special committee is obliged to assist the NPC, their authority or duties are very diversified and widespread, with the increasing possibility of annulled responsibility and expertise.

Many unconstitutional activities exist, as illustrated in this study, which have not been properly handled in the past. This has highlighted the need for a specialized constitutional supervision organ. (For detailed discussion of such unconstitutional activities, please refer to Guo Daohui, 1990, *Discussion of the Phenomenon of Disorder in Legislation and the Measures against such Phenomenon*, Legal Study and Research, vol. 5).

### **18.3. The choice of models of supervision**

There are six main models summarized by Lin Feng, a Chinese constitutional scholar.

#### *1. Supervision by ordinary courts (Japan)*

The Japanese Constitution provides that the Supreme Court has the final adjudicative power to decide whether any legislation, order or regulations are consistent with the Constitution. It does not limit such authority to the Supreme Court alone, so theoretically the ordinary courts may also conduct constitution supervision (Article 81 of the Japanese Constitution).

#### *2. Supervision by the supreme organ of state power (Sweden, Vietnam and China)*

In the case of Sweden, a legislative committee is established within the Parliament under the 1974 Act of Parliament (The Riksdag Act). It is one of sixteen standing committees and is responsible for constitutional supervision.

*3. Supervision by a special institution (Iran, Egypt, Austria, Germany, and France)*

It may be a constitutional court or committee supervising the implementation of the constitution. Germany, for example, has a constitutional court, and France has a constitutional committee to conduct the constitution supervision.

*4. Supervision by the President (Afghanistan and Iraq)*

When being sworn in, the President must promise to comply with and supervise the implementation of the Constitution.

*5. Supervision by the Parliament, Executive and judiciary jointly (Switzerland)*

The federal Parliament, federal central government and federal courts have the task of supervising the implementation of the Constitution.

*6. Supervision by the supreme organ of state power and procuratorate (North Korea)*

The North Korean Constitution provides that the Central People's Committee, which is the highest organ of state power, has the obligation to supervise the implementation of the Constitution. The procuratorate also has the obligation to supervise the consistency of resolutions or orders of state organs with the Constitution (Article 103 (5) and Article 144 (2) of the 1972 North Korean Constitution in Lin, op. cit., pp. 301 – 302).

#### **18.4 The objects of constitutional supervision**

This is concerned with activities that are subject to constitutional supervision as follows:

1. To examine the constitutionality of certain legislation.

In Sweden, for example, its legislative committee within Parliament only exercises the power to examine the consistency between legislation and other documents adopted by Parliament and constitutional documents.

2. To examine the constitutionality of legislative documents, the activities of state organs and their personnel in the exercise of their powers.

In Japan, for example, its constitution provides that its Supreme Court has the power to determine the constitutionality of any law, order, regulation or official act.

3. To examine the constitutionality of legislative documents, the activities of state organs and their personnel and various other organizations in the exercise of their powers.

### 18.5 Procedures for constitutional Supervision

This is concerned with the procedure by which constitutional supervision is actually conducted. There are four main types of practice as follows:

1. *No provisions for the procedure of constitutional supervision.*

Taking Japan as an example, its constitution provides the basic contents of constitutional supervision for the supervisory organ, but no details as to how the supervisory power should be exercised.

2. *The constitution provides that the procedure is from other legislation.*

The Constitution of Kuwait provides that the jurisdiction and working procedure for constitutional supervision shall be stipulated by legislation.

3. *The constitution provides for the basic principles concerning the supervision.*

Taking Italy as an example, its constitution provides that the examination of the constitutionality of legislation and of the exercise of state power by central covenantal organs and local governments will only be conducted when actual disputes or conflicts arise. The examination of the constitutionality of the acts of the President or Ministers is only conducted when they have been accused. Italy's Constitution also provides that other relevant rules will be provided for by other legislation, which is a good model to follow.

4. *The constitution directly provides for detailed supervisory procedures.*

Austria is an example of this kind. Its constitution provides that upon the request of the Supreme Administrative Court or other court, reviews may be conducted of the constitutionality of state legislation (Lin, op. cit., p. 319).

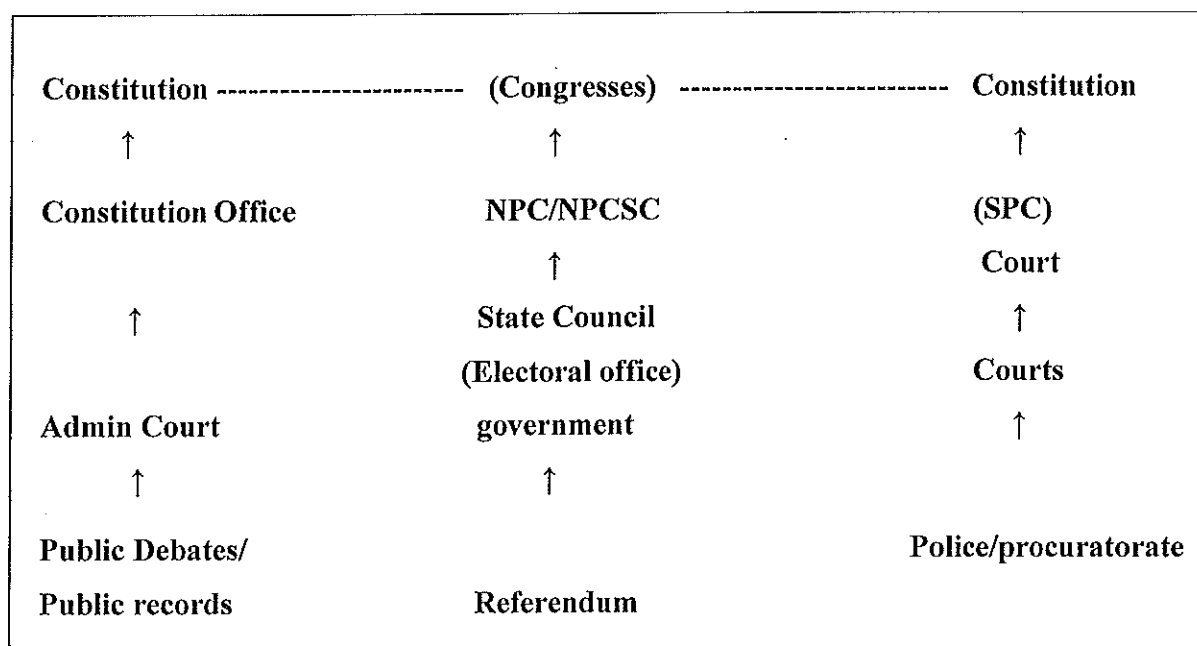
Based on these models and the hierarchic status of the NPC and other legislation, it is suggested that relevant provisions in the Constitution on constitutional supervision and interpretation should be amended (Cai Dingjian, op. cit., p.147).

## Chapter 19      The proposal

### 19.1    Structural overview

Based on the existing models both in China and in other countries, and taking into account the problems discussed in this study, a model with three components is proposed here as a remedy. The discussion on Constitutional Supervision, as mentioned in Lin Feng's study, is both comprehensive and complex. By comparison, the remedy model advocated in this study will be focused on limiting the state executive's power only, rather than a review mechanism of constitutionality in general. The three components of this proposed model are: a Constitution office, an Administrative court and a judiciary system directly under the Constitution. Although the following explanation is a much-simplified version for the purpose of theoretical debates by both the public and specialized legal scholars alike, the remedy is directed at the power abuse in its current forms.

I would propose that the Constitution provides for the basic principles concerning the power check supervision. The Constitution should also grant, in all necessary terms, the establishment of a power check framework, which includes a Constitutional Office, an Administrative Court, and a Court system that is independent of other state organs in all aspects – financial, administrative, and political. The relationships between these establishments and the people's Congress, the State Council and the governments will be explained in the above simplified graph as follows:



The constitution should provide the basic principles concerning the supervision.

Principle: This model is based on the Supervision principle that all power needs a counterpart – all power check needs to be open to public scrutiny (and the media).

Explanation: (*mutual power check chart*)

- Congresses checked by Constitution, and Electoral Office/public (mid vertical line)
- Government checked by Administrative Court and Congress (mid vertical line)
- Court checked by Constitution Office and Congresses (right vertical line)
- Police and Procuratorate checked by the courts (right vertical line)
- Constitution by majority of Congresses and referendum (not NPCSC)
- Constitution Office checked by Constitution, NPC and public
- Administrative Court checked by Constitution and its Office
- Public has direct access to Constitution Office and election of Government/Congress.

Condition: *The Constitutional provision of this establishment is essential.*

## 19.2 Three components

Of this proposed ‘remedy model’, each component will be explained as follows:

### *Component 1            Constitution Office*

The first component of the remedy model is a Constitution Office with its authority and procedures granted by the Constitution. The office will be responsible to the Constitution and the people directly and must be located outside the legislature of the NPC.

The objective of this office is to examine the constitutionality of legislative documents and amendments made by the NPC and NPCSC, and the activities of state organs and their personnel and various other organizations in the exercise of their powers. It is also to examine the consistency of the conduct of public office executives of state organs, political parties and social organizations at any level, including that of the NPC, within the Constitution.

Its authority is granted by the Constitution; which enables the Office to declare an unconstitutional act void or even repeal it, and order the relevant organ to resolve the act or issues and make it constitutional. Its decision is legally binding with legal consequences

enforceable by the relevant legal institutions. It reports to the NPC for comments but is not subject to its authority. It has supervision over the Administrative Court, which deals with state officials under the Administrative Law, with legal consequences. The Office is directly accessible to the public. This is to ensure that any amendment of the Constitution requires a referendum and other legal requirements.

It is funded by state budgets with permanent and specialized staff, and has the authority to receive petitions and complaints from the public, investigate allegations against corrupt state officials, and have access to all financial information of the officer in question across all state agencies or departments. It may impeach a governmental official who has violated the law or acted against the interests of the people, or is found to be in serious dereliction of public duty. Its staff are appointed or removed by a majority of NPC and SPC members jointly.

Under the Office, there are ombudsmen's offices designated to investigate and discipline the corrupt state officials at any levels under the authority of the Constitution. The differences between this office and People's Congress (at all levels) are as follows:

- The People's Congress supervises only the organs it has established and their personnel, whereas the Office has the supervision of the People's Congress itself.
- The People's Congress supervises finance, elections, and appointments of senior state executives, whereas the Office has a focus of exposing and diminishing corrupt state executives.
- The People's Congress hears reports, raises criticisms, and makes suggestions and offers advice, whereas the Office conducts investigations across the national and local levels with law-binding results. (For more on the difference discussion, please refer to Cai Dingjian, *op. cit.*, pp. 144-147, and Li Zhong, 1999).

The Constitution Office has the final adjudicative power to decide whether any legislation, order and regulations are consistent with the Constitution, as well as to specify the means by which an unconstitutional act committed by a state executive can be rectified. It may respond to courts of any level to clarify constitution-related issues or concepts as well as to similar requests from the public. Its records may be published, and reviewed by the public, the NPC and the SPC. Most importantly, the Constitution should provide the

procedures for such supervision to specify how such supervisory power should be exercised, or how to refer the relevant procedure from other legislation.

## *Component 2                      Administrative Court*

The second component of the remedy model is an Administrative Court, similar to that of the French model. This court is directly under the supervision of the NPC and the Constitution Office. It conducts its procedures in accordance with the Administrative Law, and other relevant court procedures. It will be funded by the National budget, and is not subject to the authority of any government or state organs. Its primary objective is to implement relevant administrative laws, and to make rulings on all matters related to the activities of state officials and state organs, as well as various other organizations, in the exercise of their powers. It employs only qualified personnel specialized in public administration and justice, or public administrative law.

It is in particular designated to curb the corruption of public officials. Its purpose is to ensure that legal consequences are exercised by imposing legal penalties on any governmental officials who have violated the law and are found to be in serious dereliction of their public duties. The People's Congress, through its supervision of such a court, will ensure it follows the will of the people, and protect the interests of the people. Here is an example of how such relevant legal consequences may be imposed:

In Germany, for example, its constitution provides that if the Federal constitutional Court finds the Federal President guilty of a wilful violation of the Basic Law or other federal statute, it may declare him to have forfeited his office. After impeachment, it may issue an interim order preventing the federal President from exercising his functions (Lin, op. cit., p. 326).

### *The Administrative Court Procedure*

Firstly, the Administrative Court will follow the procedure of appellate jurisdiction of the court.

Secondly, it will establish specific procedures for dealing with corrupt Government officials by the NPCSL and the NPC. It is noted that such procedures are not provided for in the current constitution (Lin, op. cit., p. 325). Thirdly, the examination of the exercise of state power by central covenantal organs and local governments will only be conducted when actual disputes or conflicts arise. Taking Italy as an example, the constitutionality of

the acts of the President or Ministers is only conducted when they have been accused. Italy's Constitution also provides that other relevant rules will be provided for by other legislation, which is a good model to follow. Fourthly, there should be procedures by which, upon the request of the Constitution Office, or SPC and other courts, the Administrative Court may review or investigate the conduct of state officials and make a final ruling over it.

### ***Component 3            Courts directly under the Constitution***

The third component of this remedy model is a court system that is directly under the authority of the Constitution, without being subject to various bureaucratic sub-authorities. The structure of the court should be simplified. This means an abandonment of the existing judiciary committees, politburo-legal committees, the divisional heads, president, vice president and those branches of political-legal committees at local, provincial and state levels, in this new court structure. It aims to eliminate the undesirable elements of interference from all kinds of political and social sources existing in the current form of law. No extra 'approval' authority is necessary for the collegial panel decisions, and no unqualified legal personnel is authorised to make rulings.

The objective of this court system is to implement and interpret the laws and the Constitution. It has the authority to check the legality of power exercised by all state organs and the political parties; to safeguard the procedure and integrity of the law and law enforcement; and to ensure that the protection of people's basic rights is properly implemented. The courts at all levels have access to the Constitution Office for advice and clarifications on the Constitution, and as in the existing courts of law, the collegial panels have the authority to make a final ruling (rather than bureaucrats of the various committees). This is to ensure that all involved abide by the law and follow the legal procedures properly. The SPC, as the highest court of this court hierarchy, has the authority to supervise both the NPC and NPCSC, since it is impossible for the NPCSC to conduct a fair supervision of its own legislation, nor does it have the authority to conduct supervision of the constitutionality of the Acts of the NPC (Lin, op. cit., p. 315). The courts of lower levels, however, should have the authority to interpret laws with binding effect, under the supervision of the higher court.

The funding of the courts should come directly from the State Council or the national budget, not the local or provincial governments. This is to limit the government's control over the court.

The personnel of the court will enjoy the legal protection and immunity from pressure and interference of either governmental executives or congresses. The courts are responsible only to the law and their authority in legal rulings over state officials is binding and final. The court itself is to abide by the law, including disciplinary procedures for court corruption and its conduct may be reviewed by a higher court, the Constitution Office, and the NPC. The professional quality of the court needs to be assured by the criteria and standards existing in the current Law of People's Courts. The collective method of decision-making needs further investigation: it is unfair to be responsible for errors of others by a judge whose name is on a case. This has to be a collective responsibility for a collectively made decision or ruling. This collective responsibility may need clarification.

The 'request and reply' method will be replaced by a Law Information Desk to respond to any inquiry of any court, by quoting the details of the source of the law in question. This is to avoid the higher courts dictating to the courts at lower levels and the confusion of authority and accountability in the decision-making process. Furthermore, the Basic Courts should have the authority to interpret the Constitution, with the best-qualified judges and advice from the Constitution Office, as they handle over 90% of cases in China.

In this court system, both police and procuratorate are subject to courts' supervision. Their powers are limited to the order of the court, but not independent of, or higher than the courts. This is due to the ambiguous status of the people's procuratorates in the current legislation, as to whether they should be defined as state organs of legal supervision. Although their role of supervision is similar in nature to constitutional review in theory, they have been closely associated with police and prosecution. Their original role of comprehensive supervision of the implementation of law by governmental organs and state officials, as Lenin created, has never been matched with reality. It is argued that it is neither necessary nor desirable to have the procuratorate as another organ with comprehensive legal supervision authority, beside the People's Congress and the People's Courts (Cai Dingjian, *op. cit.*, pp. 227-229).

## **Summary of Part Four**

Having established that law has a role to play in the power check, this section has suggested the ways the law can facilitate the change by setting up the principle of power check and granting the independent status of legal institutions and their staff as legal professionals. The law can also facilitate a structural change by means of the Constitution. I have also proposed a model to deal with the corrupt officials and their legal privileges; and to provide a legal forum for people to voice their concerns without fear of being persecuted or imprisoned.

The implication of this study is that in the context of Marx's vision for a civil society, and after a Marxist revolution in a socialist state like China, there seems a lack of readiness in a former feudal mentality for a post-industrial philosophy and an application of such an ideology to justify the feudal power structure without capacity to reach the next step in history. The next step would be, that, regardless of whether it is a socialist or capitalist model; proletariat or bourgeois as a class, the people's supervision over the state power must be established, to make the power subject to the people and accountable by law.

## **Chapter 20                    Implications of this study**

There are two major implications of this study in terms of the original vision.

Firstly, this study has repositioned Marx's vision of the new civil state that is based on democratic values, to subject the state power to people's supervision. The vision is a rejection, not an endorsement, of a feudal style of power totality after a Marxist revolution in a socialist state. Any political ideology used as a justification for this arbitrary form of power has been proved futile. Curzon once commented on Soviet jurisprudence that 'Marxism rejected peaceful co-existence in the area of philosophy and ideology' (Curzon, op. cit., p179). This is not necessarily true. This is because any ideology that justifies its monopoly of power above a common will and scrutiny is a deviation from the original intent of Marx's vision of a people's state. In this sense, it is not only possible, but also natural that philosophy and ideology co-exist. On the other hand, those ideologies that cannot come to terms with this philosophy cannot be called a genuine revolution in Marxist terms – rather it is a mere formality in the name of Marxism – without the true spirit of humanity.

Secondly, this power reposition entails a profound historic and cultural change as well. It will be a change in the relationships between men, in that one individual has no coercive power over another, based merely on one's perception of the ideological beliefs of the other person. It will be a process of social transition of culture and values, from the former power culture and the values associated with that power, to a new notion of man both in terms of his duty and his respect. His duty as a citizen to ensure that state and public power are ruled by law, and his dignity and respect as a human being is recognized and protected by law. Furthermore, all citizens are to be treated with this respect and dealt equally by the rule of the law, including all public power agencies and officials. This conceptual change in the elevated value of man, will take a long time to evolve, and is a part of the social transformation with greater political freedom that Marx has predicted in a true socialist state.

Historically, this study suggests that it is unrealistic that a former feudal society with a slavery mentality under its power structure is capable of reaching a socialist state in the pure Marxist sense, without an evolution in the concept of humanity in man, and the structures of power transfer from a total dominance of one ruling party and its leaders to the

will of the people through their assemblies in various forms, by the due process of the law. In this sense, this is a change of not only the law, but also a legal culture that has been based on power relationships of serving one's master instead of humanity or the common good – a culture that is based on the dogmatic control of the human mind against free reasoning. This is therefore a fundamental change in the concept of man and how man should be treated and have his rights protected by the integrity of the law.

As a stage of the historic development, this study has shown that there seems to be a correlation between the strong authority of the ruling power and a weak economy in a former feudal and agrarian society. Along with the current economic progress that has brought prosperity and security to the people of China, it is expected to bring also the demand for securing this prosperity and for political stability in life. As a result, the demand for accountability of state powers by public scrutiny is expected to increase. As argued in this study, economic growth does not necessarily bring about the idea of power check as a principle and this is where the legal structure can play its role as a legal mechanism for power constraint. This is how law, in the Marxist theory of superstructure, is expected to respond to the basic economic and social needs. One of these fundamental needs is to break the feudal style totality of state power structure. It is clear that any regime that maintains its power by silencing its critics cannot be ideologically or spiritually healthy or stable. Retaining power by the suppression of the citizens' basic rights as a means of holding onto power supremacy with no sanction of the law, would lead to internal power struggles or to external and violent overthrows with catastrophic consequences, similar to that of the Great Cultural Revolution, as history has already shown. A revolution that kept the old political and social relationships as the one between the Tsar and the serfdom cannot be called a true revolution, for the people have no power over their state and the leaders of the government.

## CONCLUSION

Power must be checked both in principle and in the Constitutional structure. There are several reasons why we cannot justify a form of power totality, in the name of the proletarian dictatorship or Marxism. This is an abuse of the vision that Marx and Engels described at the time, and a betrayal to the democratic principles of the revolution. It is argued that no ideology can be justified without preserving the basic values in humanity. The Cultural Revolution in the 1960s in China is an example of this abuse where ideology was used at the expense of humanity to preserve a monopoly of state power in the hands of a few individuals. It showed that under a repressive regime of political totality, people's basic rights could not be protected. The written laws had little effect in combating this power abuse, for the legality of this power monopoly superceded any other means of legal challenge. This study challenges this legality of power that is ordained by its own authority, but not by the collective will of the people through their representatives. This is against the socialist principle of people's right to supervise or alter their governing body.

Power must be checked even though it will take a long time. History seems to point in the direction where the monopoly of power by a single ruling entity that positions itself above the law and people's collective will, would come to an end either by gradual and legal processes, or by violent movements like the 'cultural revolution'. This is what the current Chinese leaders will strive to prevent. This is why China adopted the rule of law in the first place. The essence of the rule of law, as argued in this paper, is to protect people's basic rights; and to submit the dominance of the ruling party to the authority of the common will. The law, in the forefront, is to serve this new value and principle. Law, in its form as an economic regulator, has a similar function in all kinds of states with different political systems or ideologies. However, it has a greater mission of protecting people by restricting the ruling power under the rule of law. This mission would be impossible without the admission of the rulers that no power or party should have over-riding authority over the state apparatus and organizations; and no power should be left unrestricted by counter-measures. This is the precondition of the law to protect the citizens.

Furthermore, this precondition entails a number of elements, such as the principle of power check, the commitment of the ruling party to this principle, the independence of the power check mechanism, and a separation between the party, the government and the court system. But most importantly, it is the authority of law including the authority of

interpreting the law that needs to be first established. This authority has to be independent of the party and the government and have direct access to the public and the Constitution. Furthermore, its decision must be legally binding without the order of the party.

Law, as expressed in the Constitution, should provide a legal forum where, without fear of retaliation, people's rights of supervision over the use of state power are to be exercised; where people's concerns are expressed and dealt with; and where the corrupt officials are punished by the rule of law. This battle of power check as a principle is yet to be won and the structure of power check is yet to be put in place. Law as a legal forum can provide a legal protection of citizen's basic rights and their rights to choose or dismiss their leaders and the government. As an expression of common will, law can also provide a legal structure to restrict the state power in a crosscheck system. In this sense, law is not only relevant at this critical stage of transition of power, but also indispensable in the process of placing any ruling body under the will of the people.

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Zhang was arrested on 24 September 1969, with handcuffs she glanced her husband from the stage on the way to a jeep and said "They'll pay for this!" to her beloved family, this was the last time they saw her. For the next six years Zhang Zhixin was put in solitude and suffered incredible torture and rape by the incited criminals in the prison. The hooligans and hoodlum were encouraged to tyrannize Zhang as the price for a 'good prisoner' bond to get a reduced sentence. This maltreatment included a show of false shooting at an execution ground, by putting her suddenly in a prison van and filling her mouth with plastic pieces and then sealing her mouth with a tape. This was to prevent Zhang from making any protest or claims. After the shooting dead the other two male prisoners Zhang was taken back to the prison. This course of action failed to change Zhang's mind. Zhang looked at the two pools of blood calmly and was not moved by this threat.

During the investigation sessions, Zhang was always neat in appearance and refused to be treated as a criminal. She refused to take orders and reserved the right to answer the questions. So a 'reflective' form was used to get answers. The following was part of the record of 'reflective sessions': (Q = interrogator, A = Zhang Zhixin)

- Q: "What do you think about coming here (the prison) about your problems?"  
A: "I was arrested on the 24 September after a mass Struggle Meeting, I have not committed any crime and I cannot accept this."  
Q: "You never admit your crime, where is your strength coming from?"  
A: "What I said is fact, truth, I didn't say it irresponsibly to others, including my husband. I related the matters to my heart to the Party in accordance with the principle of the party organization. This is the basic right of a Communist. How can it be a crime?"

(The interrogator then concluded that Zhang's issue was purely ideological in nature, which could not constitute a crime, therefore could not be sentenced. The authority 'above' was furious at the decision, sacked the interrogator for having a serious rightest attitude, and appointed a new one)

The interrogation continued.

- Q: "What do you attack Lin XXX so aggressively?"  
A: "This is my opinion, not an act of anti-revolution."  
Q: "To against Lin XXX is to against the Party, against socialism!"  
A: "Which of my action is against socialism? Answer me!"  
Q: "You have committed the crime of attacking great Communist Party of China!"  
A: "I do not. I am a Communist, It is the party that supported me in joining the army, and in my university education, and how could I go against it? A Communist states her own view is in accordance with the Party principle!"

Later Zhang wrote a (ten thousand words long) statement to reconfirm her belief and stand. She was then sentenced to 15 years imprisonment. Yet it was too light a punishment for someone who was named by the 'top boss', for the head of provincial government who not only dismissed any legal rules, but also more importantly understood the real intend of his superiors, the top leaders. So he conducted more interrogations, this time by himself. But he lost his authority over the matter, when Zhang questioned him "Who ordered you?"

and shouted with guilt: "Zhang Zhixin would never admit her crime, so her sentence must be severe! More severe!" As a consequence of this outrage, the interrogator overthrew the opinion of the local court and sentenced Zhang life imprisonment.

Zhang was apprehensive about the state of law in China: How could someone openly trample the law in such a wilful way? To abuse the dictator machine of proletariat! Where is the truth? Despite of all these Zhang never admitted that she was criminal and put an X on the word 'convict' in all her written documents.

This was the time when the Gang of Four reached its peak, and ordered to 'kill'. This was carried out by the Gang's subordinate. One of the Gang members instructed: "Zhang Zhixin is so stubborn, determined to fight against us everyday while she is alive. Kill her and finish it off." **He even ordered the court to arrange the procedure necessary for the increased penalty.** (Jin 1993 p87-92) This was a typical example of political expediency overruled the law, and to make the legal system nothing but a formality or a showcase.

On the day before her prosecution, Zhang made her last public speech in the court. She exposed the criminal behaviour of the Gang of Four and stated: "I am a Communist, I said but what a Communist should say. My view is established with reasons, and stands by evidence. I have the right to my view!" Several interrogators tried in vain in the court then the court demanded Zhang sign a document. When she asked to see the record of the proceedings, she was refused without a reason. Zhang then protested: "It is illegal not to let me see the record, I therefore refuse to sign it! Take me back to prison!" Yet the law was trashed to the extent that an unsigned court trial record then became the basis and evidence to change the previous life imprisonment to death sentence by the court.

To make the case even more absurd, the ones in charge ignored the existing legal requirement of the appeal period of 12 days, after each death sentence was pronounced; instead, the prosecution was taken place the very next morning. When asked what to say at last, Zhang said calmly: "I am a Communist, my view will not change to my death!". On the killing ground, the prosecutors were so afraid what Zhang may say, they thrust her throat with a knife, to stop her from making the final proclamation. It was the 4Th of April 1975, six years after her arrest and torture. On the photo of Zhang's body, there was a piece of black cloth bound her neck, as an attempt to cover the horrendous crime committed. She was 45 years old.

After 2100 days struggle and sleepless nights writing in the prison, after the brutal beating, torture and rape, after the threat of the court and false shots in the prosecution field, nothing could stop Zhang Zhixin's voice, not the plastic balls filled in her throat, or the crystal thick plastic tape firmly on her mouth, and finally the sharp knife that cut her aspiratory veins, as an attempt to deprive her right to speak, even to the last moment of her life.

This shows that what we are against is no ordinary evil of man, or a theory for academic discussion. It is a battle against real enemies of idealism, against human slavery and soul selling, and against human cruelty and vicious mental control in the form of politics. This is murderous crime against humanity as a whole.

There are many like Zhang Zhixin who faced the hard decision of life or death and chose to follow the light of idealism as against the abuse, at the highest price human can offer to the cause they believed in. Their faith in humanity and in the ultimate victory was never shaken even in the wake of the abuse.

(Source: Jin 1993: *The Death archives of the Cultural Revolution*,  
The Great Earth Publishing co., Beijing China )

### Appendix 3

#### Mao's Image

During the Cultural Revolution, the image of Mao has magic power over people, the power to let individuals live or die. The image was well used by the people in power to intimate and control the masses. There were many incidences where unfortunate individuals damaged the picture of Mao unintentionally and were put to death unconditionally, and the image brought a mixed feeling of fear as well as awe into minds of millions.

This supernatural feeling was further intensified by Lin Bio's ultra-left slogan of four great titles giving to Mao as people's great teacher, leader, general and helmsman whom we wish to live up to thousands and thousands of years. In this frenzy whirlpool nobody wished to make a mistake on Mao's image. Mao's words must not be altered, and people must show utmost respect on mentioning his name, as if he was the emperor or God.

In one incidence a man was singing the song from Mao's Quotation Book in a showroom, to make a joke he changed the words "you young people, energetic and highly spirited, like the morning sun at 8.9 o'clock..." to "you old people, stale and withered, in the ending period", someone overheard it and reported. The man had a jail sentence later by the revolutionary committee in the workplace.

In another case, a peasant went to buy a Mao's sculpture at the market at the foot of the mountain. To carry the heavy sculpture he used a rope to hold the sculpture's neck and put it on his back but was soon arrested before leaving the market. They called the peasant 'active counterrevolutionary' and sent him to jail without even going back home that day, for 5 years. (Feng 2004, p.124)

This power of image is better illustrated by an incident in 1969. While China as a nation responded Mao's call for yet another mass movement, the military training became the fashion of the day. In Feng's story, a high school training group was walking in a hilly area when a soldier carrying Mao's sculpture made of heavy china slipped over and smashed the sculpture in pieces. Everyone was astounded at the scene. In Feng's words:

"To smash Chairman Mao's sculpture is to lose one's head!" was the thought n everybody's mind. In no time did the soldier kneel down to the ground, to plead guilty to Chairman Mao, the team head followed; the whole team followed and knelt down asking for punishment. The second

team and the third team all followed in a like manner. Each person tried to kneel first, as if whoever knelt first was the most loyal and most firmly dedicated with least hesitation, just like the size of Mao's badges – the bigger the size, the greater degree of loyalty it seemed to suggest.” (Feng 2004, p.118)

**Formality had become a fashion** among the people, especially young students to show off the biggest badge for the admiration of others. This was a formality without appreciation of human life, a formality without the essence of humanity, and it was based on fear.

“People were all mad then”, “at that time people's nerves were as tight as the string fully stretched. Worse still, no one cared to get up first, whoever stood up first was most disloyal. What end would it be for this drama? One could not kneel like this forever: under the moonlight, in the open field, a vast dark human bodies knelt on the earth, no one dared to make a single sound, no one moved and no one looked at others, all facing the pieces of china with a guilty heart. Some even wetted the pants...till the leader found the ‘enemy’ in front so the whole troop moved on, and yet, no one dared to step on those china pieces on the way.

(Feng 2004, pp.118-120)

## Appendix 4

### T's story:

Background: T is a fitter in a factory in northern China. His ‘fault’ was to criticize his superior which was frowned upon, a crime of “fan shang – offend the superior above” in the feudal time, but was a crime as ‘not close to the party organization (zuzhi)’ in modern language. T complained about the Cultural Revolution to a close friend when they had a drink saying that when Zhu Yuanzhang became a Chinese emperor he killed all his meritorious officers. It was on the 1<sup>st</sup> March 1968 and the friend reported him. On the second day a mass meeting was held and T was pronounced a counterrevolutionary seeking class revenge. The inked posters changed his class origin to be bourgeois to justify his ‘class revenge’ a crime more serious than mere counterrevolutionary, suddenly covered the walls as if they were schemed. (Feng 2004, p.123)

From the beginning, the persecution of T seemed to be well planned, well organized by certain groups of people in power. This was a typical pattern of act at the time and no written instructions from the top level of leadership were necessary. It indicated that people had knowledge and readiness to suppress others, but contrarily had no knowledge or concept of how to protect and respect other human beings with equal rights.

- Promising her of housing, party membership, and nre marriage
- She was followed by the military rep everywhere.
- conducting study meetings to work on T's wife

The rhetoric used in this case included: (This kind of political rhetoric was typical for the era as everything one came cross was politicised coated with the jargons of the day.) The chairwoman said: "the house is yours pending on your revolutionary action" "this is the responsibility the party has for you". T's mother was asked to recall the 'pain under the old system' in the past. "only if you divorce you can return to the people's cause, to draw the line. You are our sister of the same class so how can we not care for you? ..." (Feng 2004, p.145)

When the wife was hesitant, and considered to divorce as a result of this pressure, she sought advice at the court, and was surprised to learn that her work unit had already asked the court for a divorce on her behalf, prior to her knowledge and consent. This was an example of how the power holder of an organization controls one's life, the personal matters of marriage, divorce, choice of career or family decisions had often been the arena of party and the government organizations. It was common for the party leaders of the department to take over the decision-making process and dictate the outcome for the individuals in question.

The treatment of people like T and his wife varied according to the needs of those abusers, from temptation to threats. This revealed their undesirable characters and the way they exposed these characters in the highly sensitive political climate. In other words, this was the way they played the game and profited from the game. These abusers at different levels of leadership must be exposed, otherwise the misery they caused to general public would never end. They were the abusers of power at lower ladder of the society, and yet the consequences were just as damaging as what those at top level of the party machine. In a sense, people like the committee head and the military representative in a local factory were vital link between the top leaders and the ordinary people, and they played a crucial role of implementing the political games throughout the period of the Cultural Revolution.

The undesirable characters of the power abusers revealed in T's case were the varieties of torments imposed upon T's wife which were harsh and calculative, again a common feature of the time. It was evident in these factors: Once T's wife decided not to divorce, the factory committee changed the tone and became hostile towards her. The sweet promises of housing and jobs changed into harsh physical punishment. T's wife was then assigned to the 'human shield' team to dig the drenches as a hard labourer. She felt injustice because she did not even harm a kitten or a puppy all her life, and yet she had to endure such an endless suffering. While she was digging the underground tunnel, more damaging posters came out against her, this time accusing her of being a concubine of her own father.

And as if these physical and mental torments were not enough, the earthquake added to the disaster. The dwelling was damaged, but no one helped this 'counterrevolutionary' family to rebuilt, and the work unit ignored them, no man helped to collect the bricks to build a temporary shelter, T's wife could only put an asphalt on the wires and put some mud on the ground as bed for time being. The

worse time was when it rained, the half 'bed' was soaked in the water and she had to find more mud to cover it. There was no electricity and no one took the responsibility to fix the problem, so she used a kerosene lamp that was swinging wildly in the wind like ghost at night. The wife's father, son and herself, the family of three, of three generations hugged tightly for the night in the mud. The family slept in the cold and wet condition like this for several years and survived. T's wife thought of suicide at the time but persevered to the end. The human needs and dignity were thus reduced to minimal level, showing a total disregard for life and apathy for human suffering on the part of the power holders.

How did people gain advantages from the abuse at local level? What was the motive for such a brutality in pursuing their interest? The chairwoman was determined to finish this business of arranged marriage for the soldier, because from this deal she would be able to maintain her position in the factory committee, and even get promoted, with the support of the soldier as the military cadre who held certain power in the factory. For the soldier, he would benefit a great deal by marrying T's wife, a girl in the city. This meant that he did not have to go back to his native village for the rest of his life.

In fact that was what happened. After a change of the policy from the top to accommodate the interests of different factions in the workplace, as a power sharing exercise, it was important to note that both the chairwoman of the revolutionary committee, and the military representative in the factory were again in the new leadership group as the heads of the factory soon after. Thus the beneficiaries of the turmoil, the master of abuse, with all required revolutionary vocabulary as their justifications, once again were able to ride on the new waves to pursue their interests in the name of revolution and people's cause, as workers' committee chairman and leaders. This happened despite that the policy or the law was changed at the top level of the government or the party, the result was nevertheless the same for the local abusers.

