

The Development of Jurisprudence in the New Era

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There has been a renaissance in Chinese jurisprudence under the direction of Deng Xiaoping theory since the discussions on the criteria for truth, and the determination by the Third Plenary Session of the Eleventh Committee of the Chinese Communist Party that freedom of thought and the search for truth should be guiding principles. In a lively academic environment, previously forbidden areas have been opened up for theoretical study, and theoretical confusions clarified. For example, the equality of all before the law was recognized as a socialist value, and both the concept and specific phenomenon became weapons against privilege, and the prerequisite for maintaining the authority of the law and ensuring its enforcement. This does not mean underplaying the nature of class or discussing equality with class enemies. Democracy is the very premise and foundation of the law, and the law confirms and guarantees democracy. This is evidenced by the fact that people's rights were violated during the "cultural revolution" when the Constitution was merely a piece of waste paper. The law is never insignificant. The policies of the Party and the laws of the state, which are both useful for socialist construction, are related to yet different from each other. The role of law can never be replaced by Party policies. While policies represent the will of the Party, the law is a combination of the will of the Party and the will of the people. To emphasise the Party's policies over the laws of the state violates the principle of modern democracy that the people are the master of the state. In this regard, the former concept and practice of replacing the laws of the state with the policies of the Party are wrong. Let us take another example: The concept that an independent judiciary is an important guarantee of just and objective courts of law grew out of the modern democratic idea of separation and checks and balances of power. The judiciary under the dual leadership and supervision of the Party and the People's Congress does not imply "separation from the Party." Let us now examine the principle of the presumption of innocence in modern criminal procedure. This principle is the complete opposite to the feudal presumption of guilt and arbitrary decisions related to the offence and penalties. The presumption of innocence is designed to avoid preconceptions, lack of evidence and the violation of a suspect's rights in a trial. This principle is founded on democratic and scientific principles, for example, the accuser's responsibility to

provide evidence, not using torture to gain a confession, and no punishment if the perpetration of the offence cannot be proved, and is by no means a capitalist trick. Law is based on convention. We can “transplant” laws because there are common grounds and rules between different laws in content, form and nature. It is therefore possible for us to adopt whatever is democratic and scientific from ancient and Western laws in our legislation. It is wrong to say that socialist laws are unrelated to both ancient and Western laws and therefore we cannot draw upon them. After deep and wide-ranging discussions in the early 1980s, we have reached a general consensus on the above theories and principles, and this has had a major impact on China’s legislation and judiciary practice. The principle that all are equal before the law and the principle of an independent judiciary, once excluded from the Constitution, were restored in 1982. The protection of people’s democratic rights by law has been a key principle in the legislation of criminal, civil and administrative laws. The situation in which the policies of the Party overrode the laws of the state has generally been corrected. That the “activities of the Party must be limited within the Constitution and other laws” has even been officially written into the revised Constitution of the Communist Party of China. It has been common practice to study and learn from the pros and cons of ancient and Western laws. Theoretical studies on human rights have been successfully carried out in the field of jurisprudence since 1990. While in the early and mid 1980s it was generally believed that “human rights is a capitalist slogan,” people now agree that the banner of human rights should be held high. Although we still have a long way to go, we have reached agreement on some important issues concerning human rights, for instance, that a man enjoys human rights because of nothing other than his nature and the quality of being a man; that human rights essentially refer to deserved rights, although they may exist in three forms, namely, deserved rights, legal rights and rights actually enjoyed; that as a unity of generality and specificity, human rights embody something universal that we should not deny; and, that economic rights, political rights, individual rights and group rights are equally important. For the first time in history, “respect for and protection of human rights” was included in the report of the Fifteenth National Congress of the CPC.

The major achievement in jurisprudence made under the guiding principle of seeking truth from facts is the scientific verification of theories related to governing by law. Before the “cultural revolution” China’s leaders generally believed that “the majority cannot be governed by law,” and that “law can only be a secondary consideration.” Some scholars also argued that all states are ruled by man since man-made laws are enforced by man, and that governing by law is nothing but a capitalist trick. At the end of September 1979, three comrades presented their treatise titled “On Governing by Law” at the national symposium to celebrate the 30th anniversary of the People’s Republic, hosted by the

Chinese Academy of Social Sciences. They proposed the principle of governing by law and offered a comprehensive and systematic explanation.¹ This was followed by extensive discussion and contention within the field of jurisprudence. There were three major opinions on the issue: the first urged governance by law instead of by man; the second adopted a stance mid way between these two extremes; and the third considered the principle inadequate and unscientific, believing that the principle of “perfecting the socialist legal system” was sufficient since there was no difference between “the legal system” and “governance by law.” The three views were later labelled the theory of governance by law, the theory of combination, and the theory of elimination respectively.

The major basis for the theory of combination is that the role of law and that of the leaders are equally important, thus governing by law should be combined with governing by man. As Mao Zedong noted, the greatest combat effectiveness comes from the combination of weapons and soldiers. But it is wrong to draw a simple equation between governing by law and the role of law, or governing by man and the role of man, since these are different concepts. In fact, governing by law and governing by man involve two contrasting theories and principles for running a state. The theory of governing by law suggests that good and authoritative laws and institutions, rather than a couple of wise leaders, are the decisive factors and conditions for the prosperity and long-term stability of a nation. Governing by man is just the opposite. Chinese people used to look solely to a few wise and authoritative leaders in relation to the country's prospects. They considered laws insignificant, not realizing the decisive role of the legal system for the long-term stability of a country. With ideas like this, they certainly did not pay much attention to democracy and legal construction. We emphasize governance by law over that by man because we want to resolve this problem at the level of the theory and guiding principles of governance. Governance by law as a guiding principle means that a state should have a complete legal system, that law should be supreme, and that all organizations and individuals should act according to the law. Both conceptually and in practice governing by man means the opposite. Power has always overridden the law in China, and people acted according to men and their power rather than according to the law. We want to resolve this problem at the level of principles and strategies for running a country.

The theory of elimination sees the concept and principle of governance by law as inadequate, mainly because governance by law obscures the role and authority of the leaders. This, however, is not the case. Law as a behavioral norm can never take the place of the organizational work of the leaders in terms of the economy, politics and culture. Governing by law only means that the power of the state and the leaders and the procedures for the use of power should be determined by the law, and therefore cannot be abused by any organization or individual. With

reference to the relationship between the legal system and the leaders, Deng Xiaoping once said, "It is true that the errors we made in the past were partly attributable to the way of thinking and style of work of some leaders. But they were even more attributable to the problems in our organizational and working systems. If these systems are sound, they can place restraints on the actions of bad people; if they are unsound, they may hamper the efforts of good people or indeed, in certain cases, may push them in the wrong direction. Even so great a man as Comrade Mao Zedong was influenced to a serious degree by certain unsound systems and institutions, which resulted in grave misfortunes for the Party, the state and himself."² In this sense, governing by law does not deny the role and authority of leaders at all; moreover, it can prevent them from making mistakes. Another equally important reason why the theory of elimination rejects governance by law is that governance by law is seen as contradictory to the leadership of the CPC. This, however, is not the case. Governance by law does not conflict with the leadership of the CPC. On the contrary, it is a necessary condition for the latter, and can help to consolidate and improve it. Party members only comprise a small part of the whole population. The Party cannot be placed over the state, nor can Party organizations take the place of state departments. The Party should not ignore the Constitution and other laws and order people around. This is not allowed in a modern democracy. The Communist Party of China as a ruling party is elected by the people and admitted by the Constitution. It directs Chinese people to make and enforce laws. The policies of the Party serve as a guide to legislation and law enforcement. The legislation of Communist Party policies turns the Party's will into the will of the state, so that Party policies can be practiced effectively throughout the country. Socialist law is a combination of the Party's will and the people's will. It is also a democratic process. In the process of formulating laws, citizens may disagree on some policies and proposals made by the Party, or they may suggest supplements and revisions to the Party's proposals, or even make new proposals. This is an important premise for guaranteeing the leadership of the Party.

Another reason why the theory of elimination rejects governance by law is that there is no distinction between "governance by law" and the legal system itself. There is no need to place special emphasis on governance by law since we have always tried to "perfect the socialist legal system." This again is wrong. Governance by law naturally implies the establishment and constant improvement of the socialist legal system, although there are important differences between the two. Firstly, the legal system is posited in opposition to economic, political and cultural systems, while governance by law is posited in opposition to governance by man. One can never talk about governance by law without mentioning governance by man. Secondly, the legal system refers to all laws and legis-

lative and enforcement systems, including legislation, trials and procuratorship, while governance by law is a theory, a principal and a strategy for running a country, and is the opposite to governance by man. Thirdly, a country must have a type of legal system at any given time, although it is not necessarily ruled by law, for example, in China during the rule of Chiang Kai-shek and Germany under Hitler's domination. Our attitude in the past was "to have laws to abide by, and to see to it that laws are observed and strictly enforced, and that lawbreakers are brought to book." Some think that governance by law is unnecessary since the above covers all aspects of the law. Although it played a key role in the past, this view is now far from sufficient because it can only serve the old notion of governance by law. To govern by law and build a socialist state governed by law today we need sound and specific ideas and basic premises. For example, we need not only laws, but good laws, that is, laws that correspond to the times and people's interests and wishes. While governance by law in ancient times was based on authoritarianism, in modern times the law requires democracy as its political foundation. While the old version of governance by law could not secure human rights, its modern version considers human rights as its ultimate goal. While all the power in the ancient state, governed by law as it was, was concentrated in the hands of the ruler, a modern state is characterised by separation of power and mutual constraints, as well as by an independent judiciary.

After long-term discussions and contention, a consensus over governance by law was finally achieved in academic circles, and was accepted as a slogan by leading organizations of the Party and the state. Comrade Jiang Zemin gave an important speech titled "Governance by Law for Long-term Stability" after he had listened to experts' reports during a lecture on governance by law sponsored by the Central Committee of the Communist Party on 8 February 1996. In March of the same year, "governance by law and construction of a socialist country governed by law" was written into the documents of the Fourth Session of the Eighth People's Congress as a basic policy and a national goal. It was explained more comprehensively and scientifically in the report of the Fifteenth National Congress of the Communist Party of China, another milestone in the historical process towards governance by law and the construction of a state governed by law, which began after the Third Plenary Session of the Eleventh Committee of the Chinese Communist Party. Governance by law is an important part of Deng Xiaoping theory. Comrade Deng Xiaoping stressed that the long-term stability of a state cannot always be dependent on the authority of a couple of leaders. Laws and institutions determine the nature of the Party and the state. Deng's arguments have laid a theoretical foundation for the realization of governance by law. He presented us with a clear and precise blueprint for a socialist state governed by law by proposing policies for perfecting the socialist legal system. The third generation of leaders with Comrade

Jiang Zemin at the core officially made governance by law and the construction of a socialist nation a basic governing strategy, and a goal in terms of politics and the law. This is a great development of Deng Xiaoping theory. It has significance both for the past and the present, and can stand alongside other key policies such as “economic construction as the central task,” “establishing a socialist market economy,” and “opening up to the outside world.”

The success of the conceptual updating and institutional reform in relation to research and practice in jurisprudence is, after all, the result of the Party's guidelines for emancipating the mind and seeking truth. During the historical process of coming to rely on governance by law, we will continue to follow these guidelines, to correct dogmatism, and eliminate the mental straight jacket of taking class struggle as the primary and ultimate foundation. We still have a long way to go, as is demonstrated by the different views expressed in relation to the following fundamental issues:

The first concerns the nature and functions of the law. Some still argue that law is the expression of the ruling class's will and a weapon of class struggle, even in a socialist country. This argument is hardly tenable. Firstly, a “ruled class” no longer exists in Chinese society since the exploiting class was wiped out in 1956, and since this time the term has never appeared in the speeches and writings of state leaders. There can be no “ruling class” without a “ruled class,” and therefore the belief that socialist law is still the “expression of the ruling class's will” is illogic and does not conform to the facts. Secondly, class struggle exists only “within certain limits,” according to China's Constitution. The fact is that the rival forces are small in number, and socialist law as a tool for socialist construction expresses the interests and will of the people, as well as socialist institutional culture. To see the law simply as a “weapon of class struggle” is impractical and lopsided. Thirdly, it is quite wrong to think of law as a type of “will,” since it is interests that underlie “will.” I would rather say that rights and obligations constitute the heart of the law, while its foundation is based on interests. Will must also be restrained by rules. If the establishment of the law does not conform to present conditions and the rules of development, then it becomes merely random. The fundamental question in formulating laws is thus how to ensure the rights of citizens, and coordinate interest relations and conflicts between different legal subjects according to socialist values and ethics, and how to coordinate the law with present conditions and developmental trends. The major concern for legislators should not be how to make the law conform to “the ruling class's will” or how to carry out “class struggle” using the law. It is impractical, and even harmful, to think that socialist law is essentially “an expression of the ruling class's will” and “a weapon of class struggle.”

The question of the origin and nature of human rights also arises.

Although people agree that man obtains rights simply by being Man, some see man only as a social being and not as a natural being. This is not the case. The nature of man is the sum total of all social relations. People do not live in the world in isolation, but in relation to one another. Human rights are affected and constrained by all kinds of institutions, in particular economic institutions. These are, however, the external factors of existence and the development of human rights. Moreover, man is a rational being who is capable of knowing and changing the world. Everyone needs material and spiritual well-being, freedom and equality, and wants their life and health to be protected from harm. These are the goals and eternal dynamic, the inner reason and foundation of human rights. Human rights are meaningless if we deny man's nature and attributes as a natural being. Although they embody political and ideological dimensions, for example, political rights and freedom, some of man's innate rights go beyond politics and ideology, such as the right to enjoyment and health, physical and mental freedom, and other humanistic rights. These must be respected regardless of political views and ideologies. Human rights should be class free although they are actually class-oriented in a class society. However, this is alienation rather than the real essence of human rights. It is the conflict between ideals and reality that inspires people to struggle for universal human rights, universal happiness, freedom and equality. Based on this theory and principle, the Chinese government has criticized some Western countries for their "double standards" in terms of human rights, and for their politicization and "ideologicalization" of human rights. Those who insist that human rights are always political and determined by class are miles from reality and China's international policies on human rights.

From this perspective we still have a long way to go to realize the CPC's guiding principles of emancipating the mind and seeking truth in the field of jurisprudence.

NOTES

1. *Guangming Daily* decided to publish the thesis after hearing the opinions of experts from departments of law, but insisted that the title be changed to "Practicing Socialist Governance by Law" since the terminology was an issue of some consequence. An excerpt of the thesis appeared in the paper on 2 December 1979, while the entire article was included in *Collected Theses on Discussions Concerning Governing by Law or by Man* (Qunzhong Press, 1980).
2. Deng Xiaoping, *Selected Works of Deng Xiaoping*, vol. 2, p. 316, Foreign Languages Press, Beijing, 1984.

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