

UCLA

UCLA Pacific Basin Law Journal

Title

Post-Mao China and Environmental Protection: The Effects of Legal and Politico-Economic Reform

Permalink

<https://escholarship.org/uc/item/56d8b34w>

Journal

UCLA Pacific Basin Law Journal, 4(1-2)

Authors

Ross, Lester
Silk, Mitchell A.

Publication Date

1985

DOI

10.5070/P841-2021922

Copyright Information

Copyright 1985 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

POST-MAO CHINA AND ENVIRONMENTAL PROTECTION: THE EFFECTS OF LEGAL AND POLITICO-ECONOMIC REFORM*

Lester Ross**
Mitchell A. Silk***

INTRODUCTION

The progress in reform and modernization in post-Mao China has been widely reported. Greater reliance on material incentives and the relaxation of central planning have produced striking economic gains that, together with improvements in political conditions, have left observers cautiously optimistic about the future. Difficult questions remain, however, with regard to areas such as environmental protection. What effects do individualized decision-making and profit incentives have on environmental quality in China? What bearing does the genesis of a theory of protected individual property rights have on resource use in China? How does the establishment of a regulatory bureaucracy like the State Bureau of Environmental Protection affect the implementation of official policy?

This article will examine the actual conduct and changing con-

* Paper presented at the Fourteenth Annual mid-Atlantic regional meeting of the Association of Asian Studies on the panel "Chinese Approaches to Adjudication: A New Appreciation of Formalism." The authors wish to thank their colleague Professor Deng Jianxu, Professor of Law, Shenzhen University, and Visiting Fulbright Scholar, Harvard Law School, 1984-85, for his valuable insights into the special circumstances of pollution cases in China, and the issue of establishing an environmental court system in China. Errors are the authors' alone.

** Assistant Professor of Political Science, Purdue University. Ph.D., University of Michigan.

*** J.D., University of Maryland School of Law; Research consultant in East Asian Legal Studies, University of Maryland School of Law. Mr. Silk is presently working for the Beijing office of Coudert Brothers, and is also researching and teaching law at Beijing University under a National Academy of Sciences fellowship. Mr. Silk expresses his heartfelt thanks to Ronald B. Rubin, of Melnicove, Kaufman, Weiner, Smouse & Garbis, Baltimore, Maryland, for his keen comments on an earlier draft of this article.

text of environmental policy in China. After a capsulized survey of the post-Mao economic, political and environmental reforms, the article will analyze four prominent cases that illustrate the changing context of the PRC's environmental policy. The first case involves a pollution incident that took place in the early 1970s in the Maoist period, while the latter three concern post-Mao developments. Compiled from a wide canvas of sources,¹ these cases together provide the basis for examining the interrelationships between law and policy in a communist regime that is undergoing extraordinary change.

I. AN OVERVIEW OF THE POST-MAO REFORMS: THE IMPLICATIONS ON THE CONDUCT OF ENVIRONMENTAL POLICY

The People's Republic of China (PRC) has enjoyed sustained economic growth since the death of Mao Zedong. Between 1978 and 1984, the economy grew at an annual rate of over eight percent, and achieved striking gains in agricultural and light industrial performance.² Although economic gains consisted, in part, of a one-time only "catch-up" effect from the chaos of the Cultural Revolution, the post-Mao reform program has produced gains that are unprecedented in a communist regime. The major elements of these reforms include the introduction of a largely household based agri-

1. There is no central case reporting system in China, and even where systematic reports of cases are compiled, they are not always published. And even where published, they are often for internal reference only. The facts and analysis of the cases used below are thus based on the only available sources of information, namely newspaper and periodical reports.

2. Professor K.C. Yeh indicates that the net domestic product grew at an average of 5.8% per annum from 1978-82. See Yeh, *Macroeconomic Changes in the Chinese Economy During the Readjustment*, 100 CHINA Q. 691, 700 (1984).

TABLE 1
GROSS VALUE OF OUTPUT AND NATIONAL INCOME

Year	Gross Value of Output		National Income		
	10 ⁸ yuan [in current prices]	1952=100 reference prices	10 ⁸ yuan [in current prices]	1952=100 reference prices	per capita [in current prices]
1952	1,015	100.0	589	100.0	104
1957	1,606	170.9	908	153.0	142
1965	2,695	258.2	1,387	197.5	194
1978	6,846	725.8	3,010	453.2	315
1979	7,642	787.5	3,350	484.9	346
1980	8,531	853.7	3,688	515.9	376
1981	9,071	893.0	3,940	541.2	396
1982	9,963	977.8	4,261	586.1	423
1983	11,125	1,076.5	4,730	643.5	464
1984	13,004	1,227.3	5,643	732.9	548

Source: *China Statistical Abstract 1985*, 7. 1984 data is subject to revision. In 1985, 3 yuan = \$1 (U.S.) at the official exchange rate.

cultural contract-guarantee system³ in place of the people's communes, the shifting of investment funds from heavy industry to light industry, the increased role of market mechanisms in place of state procurement and distribution monopolies, heightened foreign trade and investment, and heightened entrepreneurial activity. Although problems involving industrial productivity and inflation persist, the general economic impact of the reforms has been positive.⁴ The incumbent leadership has rebuffed criticism of its reforms, and, beginning in late 1984, reaffirmed its belief that lasting economic development could be obtained only through further relaxation of price controls, freeing up of the labor market, and the extension of reform policies to the cities.⁵

In contrast, political liberalization has been less evident in this one-party state. Democratic principles were not included among the Four Modernizations,⁶ and many outspoken proponents of de-

TABLE 2
GROSS VALUE OF OUTPUT [average annual rate of increase]
[1952=100 reference prices]

Year	Percentage	Annual Percentage Change
1953-57 [First Five Year Plan]		11.3
1958-62 [Second Five Year Plan]		- 0.4
1963-65 [Readjustment Period]		15.5
1966-70 [Third Five Year Plan]		9.3
1971-75 [Fourth Five Year Plan]		7.3
1976-80 [Fifth Five Year Plan]		8.3
1981-84 [Sixth Five Year Plan]		9.5

Source: *China Statistical Yearbook 1984*, 21.

3. The "agricultural contract-guarantee system" is, "the culmination of an evolutionary process initiated in 1979 . . . whereby the rural collective's operational unit, the production team (of some 30-40 households) signs contracts with its smaller component units for the delivery of given quantities and assortments of output at stated prices." J. Prybyla, *A Short Economic History of Post Mao China, 1976-1985* (1985) (working paper for the Department of Economics, Pennsylvania State University); see also Crook, *The Baogan Daohu Incentive System: Translation and Analysis of a Model Contract*, 102 CHINA Q. 291 (1985).

4. 100 CHINA Q. (1984) (entire issue devoted to an analysis of the Chinese economic reforms); see also N.Y. Times, Mar. 27, 1986, at A14, cols. 1-4.

5. See 100 CHINA Q. (1984). See generally A. BARNETT, CHINA'S ECONOMY IN GLOBAL PERSPECTIVE (1981); J. PRYBYLA, CHINESE ECONOMY: PROBLEMS AND POLICIES (1981); 1, 2 & 3 WORLD BANK, CHINA, SOCIALIST ECONOMIC DEVELOPMENT (1983).

6. First enunciated by Zhou Enlai in his work report to the Second National People's Congress in 1964, the Four Modernizations are the basis of China's current economic program. The policy stresses development of agriculture, industry, science and technology, and the military. It was revived in then-Premier Hua Guofeng's "The Report on the Work of the Government" delivered at the First Session of the Fifth National People's Congress on February 26, 1978, reprinted in 21 PEKING REVIEW, No. 10, 18-40 (1978). See generally C. Y. CHENG, CHINA'S ECONOMIC DEVELOPMENT: GROWTH AND STRUCTURAL CHANGE (1982); J. PRYBYLA, CHINESE ECONOMY: PROBLEMS AND POLICIES (1981).

mocratization have been jailed or placed into detention camps.⁷ Nevertheless, the sweep of dictatorship has been greatly narrowed in two respects. First, freedom in personal and economic matters like employment, consumption, dress, and travel has been substantially broadened. Although these items frequently have no direct relationship to political democracy, they each involve a significant restriction of the Communist Party's power over individuals. Cumulatively they have potentially enormous political significance.

Second, although the regime still maintains its Marxist, dictatorial *Weltanschauung*, debate has been encouraged on many policy issues, especially those of a scientific or economic nature. As a consequence, many Chinese and foreigners are cautiously optimistic that further liberalization in these two areas will improve the prospects for attaining more democratic rule in China.⁸

The post-Mao reforms pose a more difficult test for the public interest of environmental protection. In market economy countries, pollution arises from market failure in which producers impose externalities on the general population by dumping residuals and degrading or over-utilizing resources to which private property rights do not attach. Some observers therefore conclude that central planning and/or development of social bonds and collectivist ethics under which polluting is a morally bad act is essential for the preservation of environmental quality.⁹ Indeed, a number of foreign observers celebrated China's environmental accomplishments in the Maoist era, which they attributed to the subordination of individual interests to collective interests, and to the promotion of a simple, non-sumptuary life style.¹⁰ The post-Mao reforms, by expanding individual decision making and sanctioning the pursuit of profit, have raised justifiable concern that they will unleash economic and

7. See generally AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS—PRISONERS OF CONSCIENCE AND THE DEATH PENALTY IN THE PEOPLE'S REPUBLIC OF CHINA (1984) [hereinafter cited as Amnesty Int']; FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES, 1983-1984 (R. Gastil ed. 1984); THE FIFTH MODERNIZATION: CHINA'S HUMAN RIGHTS MOVEMENT, 1978-1979 (J. Seymour ed. 1980); Dreyer, *The Limits of the Permissible in China*, 29 PROBS. COMMUNISM 48 (1980); Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287 (1981) [hereinafter cited as Eliasoph]; Goldman, *Human Rights in China*, 112 DAEDALUS 111 (1983); Shirk, *Human Rights: What About China?*, FOREIGN POL'Y 109 (1978); Silk, *The Crime of Dissent in China*, 34 PROBS. COMMUNISM 61 (1985).

8. Shapiro and Liang, *Buds of Freedom*, 193 NEW REPUBLIC, Oct. 7, 1985, at 18.

9. K. KAPP, ENVIRONMENTAL POLICIES AND DEVELOPMENT PLANNING IN CONTEMPORARY CHINA AND OTHER ESSAYS (1974); HUA QINGYUAN, ZONGHE LIYONG YAO XINGLI QUHUI [Comprehensive Utilization Requires Us to Promote the Good and Discard the Harmful (1971); see also McIntyre & Thornton, *Urban Design and Energy Utilization: A Comprehensive Analysis of Soviet Practice*, 2 J. COMP. ECO. 334 (1978).

10. K. KAPP, ENVIRONMENTAL POLICIES AND DEVELOPMENT PLANNING IN CONTEMPORARY CHINA AND OTHER ESSAYS (1974); Westoby, *Making Green the Motherland*, in CHINA'S ROAD TO DEVELOPMENT 231 (N. Maxwell ed. 1979).

social forces resulting in increased exploitation of natural resources and pollution of the environment.¹¹

Although new problems do emerge from any change in policy, the PRC's early efforts at environmental protection have often been overstated. In fact, by the end of the Maoist period, China was characterized by extremely high levels of pollution.¹² As China pushed to expand its productive capacity during this period, the pollution problem was exacerbated by low fuel conversion efficiency or energy utilization rates in factories and power plants, which resulted in proportionately greater amounts of residuals given the level of economic activity as compared to industrialized nations.¹³ The fact that the system failed to reward efficiency or technological innovation was a factor contributing to the level of pollution.

Pollution reached the levels it did in China in part because of a lack of understanding of the problem, a condition that existed worldwide, but also because China's central planning placed a higher priority on economic development than on environmental protection.¹⁴ At the local level, factory managers were judged by their ability to increase productivity, and therefore had no incentive to engage in the nonproductive diversion of resources into installing pollution control equipment.¹⁵ The regime attempted to deal with pollution through campaigns, exhorting enterprises to collect and recycle wastes, but generally state enterprises were unwilling to subordinate their direct interests in fulfilling production goals to the vague need to reduce pollution.¹⁶ Additionally, the anti-intellectual ferment and general turmoil of the Cultural Revolution discouraged public protest and debate on the subject of pollution.¹⁷ In contrast,

11. See White, *Implementing the "One-Child Per Couple" Population Program in Rural China: National Goals and Local Politics*, in POLICY IMPLEMENTATION IN POST-MAO CHINA (D. Lampton ed. 1987) (forthcoming).

12. V. SMIL, *THE BAD EARTH: ENVIRONMENTAL DEGRADATION IN CHINA* 100-110, 114-123 (1984) [hereinafter cited as SMIL].

13. See Zhou Fuxiang, *Dui Huanjing Jingjixue Yixie Wenti de Shentao* [A Discussion of Some Issues in Environmental Economics], in LUN HUANJING GUANLI [On Environmental Management] 126 (G. Y. Yu. ed. 1980); SMIL, *supra* note 12, at 115-117.

14. L. ROSS & M. SILK, *ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA* (1987) (forthcoming).

15. Ottley & Valauskas, *China's Developing Environmental Law: Policies, Practices and Legislation*, 6 B.C. INT'L & COMP. L. REV. 81, 108 (1983).

16. The clearest evidence of the negligible impact of the campaigns lies in China's low recycling rates. See W. Kinzelbach, *Environmental Problems in the People's Republic of China*, Presented at the Third International Conference on Energy Use Management, West Berlin, Germany (Oct. 26-30, 1981); see also Li Jinchang, *Guanyu "Sansheng" Zonghe Liyong Zhibiao Tixi de Yidian Shexiang* [Some Thoughts on A Comprehensive Indicator System for the "Three Lives"], HUANJING BAOHU [Environmental Protection], May 1984, at 4.

17. L. ROSS & M. SILK, *ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA* (1987) (forthcoming); Liu, *Some Remarks About Environmental*

the post-Mao reforms provide the basis for realistic decision making with regard to environmental issues. Price decontrol has resulted in the establishment of market prices for resources that reflect their scarcity, thereby discouraging wasteful consumption and leading to more efficient use of resources. At the same time, widespread use of effluent fees has forced producers in some industries to internalize the social cost of their pollution, providing economic incentives to lower the volumes of their effluent discharges during the production process.¹⁸ Administratively, the establishment of a State Bureau of Environmental Protection and the strengthening of related administrative agencies illustrates greater attention to environmental considerations. Additionally, the more open research and publishing climate made possible by the new respect accorded science by the "Four Modernizations" has permitted scientists and environmentalists to communicate their concerns over environmental degradation. Last, and particularly striking, is the tolerance shown to localized popular protest against pollution.

A central element in China's economic reforms is the development of a corpus of legislation on environmental policy that specifies goals and individual rights, and provides practical means for their enforcement. Draft laws were passed in 1979 on environmental protection and forestry. Since that time a number of other laws and regulations have been issued.¹⁹ However, the legislation would be of little practical significance without both political backing by the governing authorities and the development and publication of a body of case histories to guide citizens and officials. The cases cited below reveal notable advances in this regard along with continuing shortcomings.

II. CASE ONE: LIU YUHE AND ZHANG YUNSHU

A. The Facts²⁰

The first case arose during the latter stages of the Maoist era while the country was racked by a bitter struggle between leadership factions over political succession. It involves the type of rural small-scale industry using simple, often indigenous technology that was promoted throughout the countryside for the purpose of raising

Economics, in LUN HUANJING GUANLI [On Environmental Management] 73 (G. Y. Yu ed. 1980); Lan, *Some Reflections on the Changes in Moral Atmosphere Brought on by the Rural Reforms*, Guangming Ribao [Enlightenment Daily], Nov. 19, 1984, at 3.

18. Foreign Broadcast Information Service—China, Apr. 23, 1981, at R1.

19. Many of these laws are cited individually in the course of this article. Many of their texts can be found in L. ROSS & M. SILK, ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA (1987) (forthcoming).

20. This case was not reported. For problems with the reporting system in China, see *supra* note 1. The facts rely on Sun, *Was This a Counterrevolutionary Incident?*, HUANJING, No. 10, 24-25 (1984) [hereinafter cited as Sun].

rural prosperity and reducing the urban-rural gap.²¹ Unfortunately, many of the new plants were operated without regard for human health or environmental quality by officials anxious to promote local industrial performance by whatever means were available. All too frequently, terrible pollution occurred which the local populace was forced to endure without any means of redress.

A phosphate fertilizer factory began operating in the spring of 1973 in Dalian Commune, Shahe County, Hebei province. This county-run factory soon was emitting large volumes of sulfur and noxious gases into both the air and water. Agricultural production declined by as much as seventy percent in the surrounding area, and farmers blamed their misfortune on pollution by the new factory.

The affected agricultural production teams began to express their displeasure with the situation, but their pleas went unheeded. The situation became heated. On the night of August 4, 1973, a number of angry farmers staged a rally criticizing government complacency regarding this matter and calling upon the factory to install anti-pollution devices. This exceptional act did not result in punishment of the participants, but neither did it prompt the authorities to respond. Seeing they were not obtaining results, the farmers surreptitiously organized several people who sabotaged the factory's power supply, incapacitating the factory.

The county authorities quickly styled the event a "counter-revolutionary" incident, a ubiquitous label during a time of political turmoil and heightened concern over ideological rectitude. In connection with the incident, Liu Yuhe and Zhang Yunshu, acting secretary and deputy secretary of the Zhaoqiushui Production Brigade Party branch, were held responsible and soon expelled from the Party, arrested, paraded through the streets for seven days,²² and sentenced to three and seven year prison terms respectively. The local populace greatly resented this decision. Commune members complained during the next few years that the factory management, rather than Liu and Zhang, committed the real crime. As in the past, however, the authorities did not respond to their complaints.

Remedial action was not initiated until a strong central government was in place and committed to the improvement of the general standard of living. On February 3, 1979, less than two months after the decisive Third Plenum, when Deng Xiaoping and his supporters consolidated their political position,²³ the State Council Environ-

21. See generally D. PERKINS, *RURAL DEVELOPMENT IN CHINA* (1984); J. SIGURDSON, *RURAL INDUSTRIALIZATION IN CHINA* (1977).

22. This is a common practice in China, and brings great humiliation to the alleged criminal.

23. For the events of the Machiavellian power struggle which took place during this period, see L. PYE, *THE DYNAMICS OF CHINESE POLITICS 197-214* (1981); Chang, *Elite Conflict in Post-Mao China*, in 1983 OCCASIONAL PAPERS/REPRINTS SERIES IN

mental Protection Leading Group took action. The Group's Office [secretariat] wrote a letter to the Hebei Office of Environmental Protection with instructions to reexamine the case.²⁴

Pursuant to the State Council letter, the Hebei Office of Environmental Protection, together with various other environmental and legal units, formed an investigatory committee. The committee found that Liu and Zhang's actions were justified and recommended that they be exonerated. Liu and Zhang subsequently regained their Party status. Furthermore, the committee awarded them each monetary damages for hardship suffered.²⁵

B. Analysis

Liu and Zhang were originally sentenced under Article 10 of the 1951 Act for the Punishment of Counterrevolution,²⁶ which provides:

Those who, with a counterrevolutionary purpose, commit any one of the following acts of provocation or incitement shall be punished by not less than three years of imprisonment, where the circumstances of their cases are major they shall be punished by death or life imprisonment:

- (1) Stirring up the masses to resist or to undermine the enforcement of grain levies, tax levies, public service, military service of the people's government, or other government orders;
- (2) Provoking dissension among the various nationalities,

CONTEMPORARY ASIAN STUDIES, No. 2; Lieberthal, *The Internal Political Scene*, 24 PROBS. COMMUNISM 5-6 (1975); Oksenberg & Bush, *China's Political Evolution, 1972-1982*, 31 PROBS. COMMUNISM 8 (1982); Solinger, *The Fifth National People's Congress and the Process of Policymaking: Reform, Readjustment and the Opposition*, 22 ASIAN SURV. 1242-45 (1982); Tien, *The Communist Party of China: Party Powers and Group Politics from the Third Plenum to the Twelfth Party Congress*, in 1984 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES, No. 2.

24. The relevant portion of the letter is reproduced in Sun, *supra* note 20, at 24.

25. Zhang was awarded 300 yuan (the equivalent of three to six months' wages); Liu was awarded 100 yuan (the equivalent of one to two months' wages). See Sun, *supra* note 20, at 24.

Note, however, that Liu and Zhang's cases are *sui generis* to Chinese practice. A good number of those branded as counterrevolutionaries have rarely enjoyed freedom outside reeducation and labor camps, let alone exoneration. The distinguishing factor is that the vast majority of such offenders are serving sentences for political offenses not even remotely connected to protection of their livelihood, or to environmental enhancement. Compare Liu and Zhang's cases with Lin Xiling's appeal to the Beijing Municipal Higher People's Court. Court Circular of May 13, 1980, reproduced in ZHONGGUO ZHI CHUN [China Spring], Oct. 1983, at 8.

26. The English translation is in J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA* 299-302 (1968) [hereinafter cited as COHEN]; and appended in S.C. LENG & H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA* 177-81 (1985) [hereinafter cited as LENG & CHIU]. The original Chinese version is in 1 ZHONGHUA RENMIN GONGHEGUO FALING HUIBIAN [Collection of Laws and Decrees of the People's Republic of China] 3-5 (1951).

democratic classes, democratic parties and groups, people's organizations or between the people and the government;

(3) Conducting counterrevolutionary propaganda and agitation and making and spreading rumors.

In determining counterrevolutionary purpose, the culprit's personal history, motive, and the means by which the crime was committed must be taken into account.²⁷

The review committee, one of many formed to investigate politically tainted cases from the Cultural Revolution period, focused on Zhang and Liu's motive for engaging in protest and destroying the power source. The review committee determined that Zhang and Liu were not motivated by a counterrevolutionary purpose. First, it was the factory's disregard for environmental protection that provoked the two to take such actions.²⁸ Second, Zhang and Liu did not act until after careful reflection over the situation.²⁹ Only after peaceful means of resolving the dispute were exhausted did Zhang and Liu seek to remove the threat to safe living conditions by sabotaging the factory. The review committee's decision recognized that, under certain circumstances, environmental protection outweighed the need to maintain social order and protect collective property.

III. CASE TWO: THE WUHAN PORT

A. The Facts³⁰

This case began to develop in the early 1970's in the port of Wuhan, a major industrial city and Yangtze River port. Pier 41 handled coal shipments. Owing in part to a notorious neglect of inland navigation facilities, coal was offloaded from railroad hopper cars without anti-pollution devices. As a result the machines belched clouds of black smoke, polluting the air and endangering the twenty thousand residents living in the vicinity.

A rise in coal shipments in 1974 caused pollution to rise to a dangerously high level. The situation drove area residents indoors

27. See Sun, *supra* note 20, at 24.

28. *Id.*

29. *Id.*

30. This case made the headlines of the *Zhongguo Fazhi Bao* [China Legal System Newspaper], and is regarded as a landmark case in the area. On the *Wuhan Port* case, see Jiang & Qin, *Chang Jiang Hanyun Guanli Ju Xiqu Jiaoxun — Henzhua Huanjing Baohu Gongzuo Chujian Chengxiao* [Chang Jiang Shipping Administrative Bureau learns lesson: strong emphasis on the task of environmental protection brings preliminary results], *Zhongguo Fazhi Bao* [China Legal System Newspaper], Feb. 25, 1983, at 1, col. 1, translated in *China Report (Science and Technology): China Addresses Environmental Issues*, Joint Publications Research Service, June 11, 1984, at 142-43. cursory legal analysis is provided in Cheng, *The Abuse of Rights and Self-Defense in Environmental Pollution Cases*, *ZHONGGUO HUANJING KEXUE*, No. 6, 11-15 (1984) [hereinafter cited as Cheng].

during the offloading of coal. Effectively imprisoned, they did not even dare to go outdoors to cool off or hang their clothes out to dry. The residents lodged numerous complaints with the Standing Committee of the Wuhan Municipal People's Congress, the Chang Jiang Shipping Administrative Bureau, the Chang Jiang Ribao [Chang Jiang Daily], and the Wuhan Office of Environmental Protection. Yet their efforts were to no avail. Confident of their immunity from popular protest as state agents, Pier authorities failed to take remedial measures.

The situation peaked in 1982. In February of that year, residents locked themselves indoors, fearing even to open their windows or relax outdoors. The heat and the pollution level rose to oppressive heights in July 1982. This triggered low-scale protest rallies by residents on July 5th and 6th at Pier 41 — extraordinary actions that again were to no avail.

On July 7th, the situation worsened. The coal pollution created a thick fog limiting visibility to twenty meters. In the early evening a number of angry residents broke into Pier 41. They made their way to the electric room and sabotaged the coal unloading machines. Pier 41 was rendered inoperative for a week and reportedly suffered losses of over 11,000 yuan.³¹

After the incident public security officers detained the alleged ringleaders. Surprisingly, however, central officials exonerated the three culprits once they learned of the incident through an account published in a periodical for restricted circulation only. These leaders, notably Vice-Premier Wan Li, defined the protest as a legitimate instance of popular action even if it involved the destruction of property.

B. Analysis

From a legal standpoint, the culprits' behavior was *prima facie* illegal on two accounts. First, the protests, combined with the reckless destruction of property, amounted to counterrevolutionary activity under the 1951 Act of the People's Republic of China for Punishment of Counterrevolution.³² Second, the acts carried criminal responsibility under the new Criminal Law.³³

31. On July 7, 1982, the dollar-renminbi [people's dollar or yuan] exchange was one U.S. dollar to 1.9417 yuan. See 117 FAR EASTERN ECON. REV., July 2, 1982, at 104. The pier thus lost close to six thousand dollars, which amounts to approximately two years' wages for the average worker.

32. See *supra* note 26.

33. English and Chinese texts in J. COHEN, T. GELATT & F. LI, THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA (1984); YU, A FULL TRANSLATION OF THE CRIMINAL LAW CODES OF THE PEOPLE'S REPUBLIC OF CHINA (1980). English only in Cohen, Gelatt & Li, *The Criminal Law of the People's Republic of China*, 73 J. CRIM. L. & CRIMINOLOGY, 138 (1982); Foreign Broadcast Information

1. *Responsibility under the 1951 Act of the People's Republic of China for Punishment of Counterrevolution.* Article 2 of the 1951 Counterrevolution Act equates counterrevolutionary purpose with the goals of "overthrow[ing] the people's democratic regime" or "undermin[ing] the undertaking of the people's democracy."³⁴ Past trends suggest that Chinese authorities will construe these terms broadly to find a counterrevolutionary purpose although guiding regulations and case law on point are lacking.³⁵ Assuming that the instigators could have been found to have harbored such an intent, and that the 1951 Counterrevolutionary Act was binding,³⁶ then the

Service — China, July 27, 1979, Supp. 019, at 33-62; LENG & CHIU, *supra* note 26; Wang Chi, *The Criminal Law of the People's Republic of China*, 7 REV. SOCIALIST L. 199 (1981). Chinese in *Zhonghua Renmin Gongheguo Di Wu Jie Quanguo Renmin Daibiao Dahui Di Er Ci Huiyi Wenjian* [Documents of the Second Session of the Fifth National People's Congress of the People's Republic of China] 149. Discussed and noted in Jones, *The Criminal Law of the People's Republic of China*, 6 REV. SOCIALIST L. 405 (1980); Meijer, *China's New Criminal Code*, 5 REV. SOCIALIST L. 471 (1979).

34. See *supra* note 26.

35. See Berman, Cohen & Russell, *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIMINOLOGY 238 (1982) [hereinafter cited as Berman, Cohen & Russell]; LENG & CHIU, *supra* note 26, at 123-24, 145-50. The cases of *Wei Jingsheng* and *Lin Xiling* are instructive with regard to such practice.

On *Lin Xiling's* case (an outspoken student dissident during the Hundred Flowers era in the late 1950s who was sentenced to fifteen years imprisonment), see X. Lin, GEI DENG XIAOPING DI WANYAN SHU [A statement of views for "Emperor" Deng Xiaoping's perusal] (1984); Mu, *An Inside Look at Lin Xiling's Miscarriage of Justice*, QISHI NIANDAI [The Seventies — Hong Kong], Sept. 1983, at 52; Nanhaijing Sheng (pseudo.), *Deng Xiaoping, Peng Zhen, and Yang Shangkun Will Not Agree to Exonerate Lin Xiling*, ZHONGGUO ZHI SHENG [The Voice of China — U.S.], No. 3, 3-10 (1983); Wang, [We] Should Get to the Bottom of *Lin Xiling's Miscarriage of Justice and Exonerate Her*, QINGKUANG HUIBIAN [A collection of facts and circumstances], June 1, 1979, at 1-8; Zhong, *Why Don't the Chinese Communists Exonerate Lin Xiling?*, ZHONG BAO MONTHLY (HONG KONG), Nov. 1983, at 57-58; ZHONGGUO ZHI CHUN [China Spring — U.S.], Oct. 1983, at 1, 4-8; Zou, *Lin Xiling Seeks Truth in Rectifying Her Label of Being a "Rightist"*, Renmin Ribao Neican [People's Daily—internal reference], Nov. 1979.

On *Wei Jingsheng's* case (an advocate of freedom, democracy and human rights during the Beijing Spring Movement of the late 1970s who was also sentenced to fifteen years imprisonment), see Chiu, *Socialist Legalism: Reform and Continuity in Post-Mao People's Republic of China*, OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES, No. 1, 23-26 (1982); Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES, No. 1, 10-13 (1981), reprinted in 7 REV. SOCIALIST L. 53-72 (1981) [hereinafter cited as *Structural Changes*]; Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORDER 287 (1981); Jones, *Due Process in China: The Trial of Wei Jingsheng*, 9 REV. SOCIALIST L. 55 (1983); LENG & CHIU, *supra* note 26, at 146-48.

Amnesty International's new study also treats this problem and cites a number of cases. See Amnesty Int'l, *supra* note 7.

36. There is a question as to the binding effect of the 1951 Act. Since the promulgation of the Criminal Law in 1979, the 1951 Act has yet to be repealed. Tao-tai Hsia, Chief of the Far Eastern Law Division of the Library of Congress and noted scholar on Chinese legal affairs, points out that "[t]he question remains, therefore, as to which law would ultimately apply—the special statute governing punishment of counterrevolu-

instigators would bear criminal responsibility under Articles 4,³⁷ 10(2),³⁸ or 16³⁹ of the Act.

2. *Responsibility under the 1979 Criminal Law.* The culprits' conduct was also illegal under the 1979 Criminal Law.⁴⁰ Their ac-

tionaries, or the relevant specific provisions of the new Criminal Code." Hsia, Book Review, 10 MD. J. INT'L L. & TRADE (forthcoming).

37. Article 4 provides:

Of those who incite, entice or buy public employees, armed military units, or people's militia to conduct insurrection, the principal elements and leaders of the military units used in the insurrection shall be punished by death or life imprisonment. Others who participate in the inciting, enticing, buying or insurrection shall be punished by not more than ten years of imprisonment; where the circumstances of their cases are major they shall be punished with increased severity.

See *supra* note 26.

38. Article 10(2) provides:

Those who, with a counterrevolutionary purpose, commit any one of the following acts of provocation or incitement shall be punished by not less than three years of imprisonment; where the circumstances of their cases are major they shall be punished by death or life imprisonment:

(2) Provoking dissension among the various nationalities, democratic classes, democratic parties and groups, people's organizations or between the people and the government; . . .

See *id.*

39. Article 16 provides:

Those who, with a counterrevolutionary purpose, commit crimes not covered by the provisions of this Act may be given punishments prescribed for crimes [enumerated] in this Act which are comparable to the crimes committed.

See *id.* This provision as well as Article 79 of the 1979 Criminal Law allow for crime by analogy. China is one of the few countries which retains this principle. Most countries, including the Soviet Union, recognize that crime by analogy contradicts the general principle of *nulla poena sine lege* (no punishment without a pre-existing prohibitory rule). On the Soviet abolition of this principle, see Berman, Cohen & Russell, *supra* note 35, at 249. Note also that such provisions would not withstand the specificity requirements under the laws of the United States and other countries. In the United States such statutory provisions are held void-for-vagueness on the grounds of denying due process and failing to provide fair notice. See 344 U.S. 174 (1952); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 108 U. PA. L. REV. 67 (1960).

In the debate over crime by analogy in Chinese legal circles, most scholars and jurists advocate a restrictive use of this principle. See Li, *On the Stipulation and Analogy of Offenses and Penalties*, FAXUE YANJIU, Mar.-Apr. 1980, at 19; Tao, *Problems of the Study of Criminal Law*, FAXUE YANJIU, Sept.-Oct. 1980, at 25.

40. The three requirements to determine criminality under Chinese law are set forth in the following sources: Cao, *Questions and Answers on China's Criminal Law*, BEIJING REV., June 9, 1980, at 19-20; Criminal Research Group of the Legal Research Institute of the Chinese Academy of Social Sciences, *Lectures on the Criminal Law*, CHINESE L. & GOV'T, Summer, 1980, at 1, 22-26 (D. Cameron, et al., trans. 1980); FALU WENTI BIANXIE ZU, XINGSHI FALU WENTI [Questions on Criminal Law] (1983) [hereinafter cited as FALU WENTI]; Tao, *On Fundamental Problems of the Characterization of Crimes*, FAXUE YANJIU, July-Aug. 1979, at 29; FENG ERTAI, ET AL., FALU DAWEN SIBAI TI [Four Hundred Questions and Answers on the Law] 54, 56-64 (1984); LENG & CHIU, *supra* note 26, at 124; ZHANG SHANGZHUO, ZHONGHUA RENMIN GONGHEGUO XINGFA GAILUN [The Essentials of the Criminal Law of the

tions fulfilled the three basic criteria for actionable conduct.

First, the conduct endangered society. Article 10 of the Criminal Law provides:

All acts that . . . undermine social order, violate property owned by the whole people or property collectively owned by the laboring masses, . . . and other acts that endanger society, are crimes if according to law they should be criminally punished, . . .⁴¹

The small-scale rallies served to disrupt social order, and the damages to the machinery violated property rights. Thus, under Article 10, the instigators committed a socially dangerous act.

Second, the culprits intentionally destroyed the equipment. The Criminal Law imputes criminal responsibility for intentional crimes.⁴² Article 11 provides:

An intentional crime is a crime constituted as a result of clear knowledge that one's own act will cause socially dangerous consequences, and of hope for or indifference to the occurrence of the consequences.⁴³

Although the residents' purpose was to stop the emission of pollution, the direct and necessary consequence of sabotaging the machines was the destruction of the machines. Since the socially dangerous consequences were clearly in mind when the act was committed the *mens rea* element was satisfied.

Third, the residents' destruction of the machines were acts punishable by law. Under the law, an intentional socially dangerous act only amounts to a crime when the Criminal Law proscribes such act(s),⁴⁴ or when the act is closely analogous to a crime codified in the Criminal Law.⁴⁵ The Special Provisions of the Criminal Law enumerate eight different types of crimes by ordinary citizens and workers alike, namely crimes of counterrevolution,⁴⁶ endangering public security,⁴⁷ undermining the socialist economic order,⁴⁸ infringing upon the rights of the person and the democratic rights of

People's Republic of China] 67-132 (1981) [hereinafter cited as ZHANG SHANGZHUO]; ZHANG YOUYU & WANG SHUWEN, FAXUE JIBEN ZHISHI JIANGHUA [Lectures on Basic Knowledge in Law] 94-101 (1979); ZHONGYANG ZHENGFA GANBU XUEXIAO XINGFA, XINGSHI SUSONG FA JIAOYAN SHI, ZHONGHUA RENMIN GONGHEGUO XINGFA ZONGZE JIANGYI [Lectures on the Principles of the Criminal Law of the People's Republic of China] [hereinafter cited as ZHONGYANG ZHENGFA] 69-116 (1982).

41. See *supra* note 26.

42. See *supra* note 33.

43. See *supra* note 26.

44. See *supra* note 33.

45. Criminal Law of the PRC, art. 79. For text, see *supra* note 33. For discussion on crime by analogy, see *supra* note 39.

46. See Criminal Law of the PRC, *supra* note 33, arts. 90-104.

47. See *id.*, arts. 105-115.

48. See *id.*, arts. 116-130.

citizens,⁴⁹ property violation,⁵⁰ disrupting the order of social administration,⁵¹ disrupting marriage and the family,⁵² and dereliction of duty.⁵³ Numerous provisions proscribed the culprits' actions, most notably: Article 105 (prohibiting the use of dangerous means to sabotage factories),⁵⁴ Article 109 (prohibiting sabotage of electric utilities),⁵⁵ Article 125 (prohibiting the destruction of machinery or equipment out of spite or retaliation),⁵⁶ Article 156 (prohibiting the intentional destruction of public or private property)⁵⁷ and Article 158 (prohibiting disrupting the social order by hindering production).⁵⁸ Thus, there existed ample positive provisions under which to classify the behavior as acts punishable by law.

49. *See id.*, arts. 131-149.

50. *See id.*, arts. 150-156.

51. *See id.*, arts. 157-178.

52. *See id.*, arts. 179-184.

53. *See id.*, arts. 185-192.

54. Article 105 provides:

Whoever endangers public security by setting fires, breaching dikes, causing explosions or using other dangerous means to sabotage factories, mines, oil-fields, harbors, rivers, water sources, warehouses, dwellings, forests, farms, valleys and fields, pastures, important pipelines, public buildings or other public or private property, in cases where serious consequences have not resulted, shall be sentenced to not less than three years and not more than ten years of fixed-term imprisonment.

See supra note 33.

55. Article 109 provides:

Whoever sabotages electric power, gas or other combustible or explosive equipment, endangering public security, in cases where serious consequences have not resulted, shall be sentenced to not less than three years and not more than ten years of fixed-term imprisonment.

See id.

56. Article 125 provides:

Whoever, in order to give vent to spite or gain revenge or for other personal motives, destroys machinery or equipment, or slaughters draft animals, or uses other means to sabotage collective production is to be sentenced to not more than two years of fixed-term imprisonment or criminal detention; when the circumstances are serious, the sentence shall be not less than two years and not more than seven years of fixed-term imprisonment.

See id.

57. Article 156 provides:

Whoever intentionally destroys public or private property, when the circumstances are serious shall be sentenced to not more than three years fixed-term imprisonment, criminal detention or a fine.

See id.

58. Article 158 provides:

It is prohibited for any person by any means to disturb the social order. When the circumstances of disturbance of the social order are serious, so that work, production, business and education or scientific research cannot be conducted and the state and society suffer serious losses, ringleaders are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control or deprivation of political rights.

See id.

3. *Imputing Criminal Responsibility: Enforcement of the Environmental Protection Law as a Mitigating Circumstance.* Although the ringleaders apparently had been guilty of criminal acts, they were exonerated. The driving force behind this decision was the rise of environmental awareness in China, as typified by the 1979 Environmental Protection Law (EPL).⁵⁹ Careful analysis of the Wuhan case further supports the proposition that China is leaning away from "revolutionary" justice toward "procedural" justice,⁶⁰ and is showing greater appreciation for both legalism and

59. The Chinese text can be found in Renmin Ribao [People's Daily], Sept. 17, 1979, at 2; MINISTRY OF URBAN AND RURAL CONSTRUCTION, OFFICE OF ENVIRONMENTAL PROTECTION, GUOJIA HUANJING BAOHU FAGUI WENJIAN HUIBIAN [Collection of Laws, Regulations, and Materials on State Environmental Protection] 38 (1983) [hereinafter cited as BFWH]; CHINESE ACADEMY OF ENVIRONMENTAL SCIENCE, ZHONGHUA RENMIN GONGHEGUO HUANJING BAOHU YANJIU WENXIAN HUIBIAN [A Compilation of Research Materials on Environmental Protection in the People's Republic of China] 32 (1983) [hereinafter cited as HBYWZ]. English text in *Collection of Laws and Regulations of China Concerning Foreign and Economic Trade Relations—Zhongguo Duiwai Jingji Maoyi Huibian* Z144-59 (1984); Foreign Broadcast Information Service-China, *supra* note 18, Sept. 18, 1979, at LI; appended in Gresser, *The Principle of Multiple Use in Chinese Environmental Law*, in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 450-54 (J. Cohen ed. 1983); SMIL, *supra* note 12, at 231-28; S. SWANNACK-NUNN, ENVIRONMENTAL PROTECTION IN THE PEOPLE'S REPUBLIC OF CHINA (B. Boxer ed. 1978).

For commentary on the EPL and general principles of environmental law in China, see Chen, *Creating a Body of Local Environmental Civil Law*, HUANJING, No. 5, 28-29 (1984); Guo, Li & Wang *Four Modernization Construction and Enactments for Environmental Protection*, FAXUE, No. 8, 36 (1982); Li Chaobo *Explains Environmental Protection Law at NPC Session*, Foreign Broadcast Information Service-China, Sept. 13, 1979, at LI; Luo & Deng, *Economic Law and Environmental Protection*, ZHONGGUO HUANJING KEXUE, No. 3, 6 (1981), reprinted in 9 FALU 63 (1981); MA XIANGCONG, HUANJING BAOHU FA JIBEN WENTI [Basic Problems in the Law of Environmental Protection] 1-48 (1983); Ma, *Preliminary Discussion on the Law of Environmental Protection*, Faxue Yanjiu, No. 2, 40-43 (1979); Ma, *A Study of Legal System of Environmental Protection*, ZHONGGUO HUANJING KEXUE, No. 1, 23-27 (1981); Robinson, *Environmental Law Begins in China*, N.Y.L.J., April 22, 1980, at 1, col. 1; Song & Shao, *A Brief Talk on the Status and Fundamental Principles of the Environmental Protection Law of China*, ZHONGGUO HUANJING KEXUE, No. 3, 45-49 (1984); Ottley & Valauskas, *China's Developing Environmental Law: Policies, Practices and Legislation*, 6 B.C. INT'L & COMP. L. REV. 81 (1985); Valauskas & Ottley, *Recent Developments in Environmental Protection in the People's Republic of China*, 7 REV. SOCIALIST L. 35 (1981); Weil, *Cleaning Up China's Environment*, 8 CHINA BUS. REV. 50 (1981); Wen Boping, *Huanjing Baohu Fa Gailun* [Essentials of the Law of Environmental Protection], FAXUE YANJIU, Jan.-Feb. 1980, at 21; Wu, *Brief Comments on Environmental Legislation and Juridicature of China*, FAXUE YANJIU, July-Aug. 1984, at 56.

60. The "revolutionary" (also known as societal or informal) model stresses "socially approved norms and values, implemented by political socialization and enforced by social pressures." The "procedural" (also known as jural or formal) model "stands for formal, elaborate, and codified rules enforced by a centralized and institutionalized bureaucracy." On the terms definition and transformation, see Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356 (1977); LENG & CHIU, *supra* note 26, at 7; Lo, *The Legal System and Criminal Responsibility of the Intellectuals in the People's Republic of China, 1949-*

effective environmental protection. Two reasons support this conclusion.

First, the authorities apparently took into account the motive behind the residents' actions, thereby distinguishing them from blatant criminal acts.⁶¹ The destructive acts were aimed at protecting the residents' legal rights, as well as enforcing the newly promulgated Environmental Protection Law. The residents had responded to the threat posed to their health and livelihood, and only following the Chang Jiang Shipping Administration Bureau's repeated refusals to comply with the Environmental Protection Law.

The residents identified numerous violations of the EPL. For example, even after pollution had attained dangerously high levels, the Pier authorities failed to take any preventive or remedial measures. In fact, they increased coal shipments and unloading in response to central plans. This amounted to a flagrant violation of Article 23 of the EPL, which provides:

The units which emanate harmful gases or dust should actively adopt sealed production equipment and technology, and install ventilating dust collecting and purifying, and recovery facilities. The amount of permissible harmful gases and dust in the working environment must conform with the standards for industrial hygiene specified by the State.⁶²

Further, the authorities failed to comply with Article 6 of the EPL in that they did not file an Environmental Assessment outlining the effects of coal shipping and unloading on the environment,⁶³ which

82 in 1985 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES (forthcoming).

61. See Cheng, *supra* note 30.

62. See *supra* note 59. The guiding regulations are the Emission Standards for the Atmosphere, promulgated by the State Council on April 6, 1982, *reprinted in* BFWH, *supra* note 59, at 351-54.

63. Article 6 provides:

All enterprises and institutions shall pay adequate attention to the prevention of pollution and damage to the environment when selecting their sites, designing, constructing and planning production. In planning new construction, reconstruction and extension projects, a report on the potential environmental effects shall be submitted to the environmental protection department and other relevant departments for examination and approval before designing can be started. The installations for the prevention of pollution and other hazards to the public should be designed, built and put into operation at the same time as the main project. Discharge of all kinds of harmful substances shall be in compliance with the criteria set down by the State.

The units which have caused pollution and other hazards to the environment shall, according to the principle of 'whoever causes pollution shall be responsible for its elimination', make plans to actively eliminate such, or alternatively submit an application to the competent authorities for approval to transfer the property or move to some other place.

See *supra* note 59.

is mandatory wherever major construction and renovation is intended.

The problem probably would have persisted indefinitely if the Central Party had not become involved by criticizing the leadership of the Chang Jiang Shipping Administrative Bureau.⁶⁴ Members of the Central Committee as well as provincial and local authorities held meetings with the Bureau to examine its bureaucratic work style.⁶⁵ After acknowledging their responsibility, arguably a foregone conclusion given the political forces assembled against them, the Bureau took positive measures to remedy the situation. They added dust hoods to all handling equipment, and equipped all coal yards with high-pressure water guns and spray equipment.⁶⁶ Water pollution treatment also was reportedly improved.

IV. CASE THREE: THE BEIJING CAKE AND PASTRY FACTORY

A. The Facts⁶⁷

The Beijing (Western District) Cake and Pastry Factory, like many factories, is located in a residential area of China's capital. When in operation, the archaic machinery produced deafening noises, and shook so violently that the vibrations caused thermoses on tabletops in the building next door to crash to the floor. The noise and vibrations normally carried on incessantly through the night and the situation took its toll on the neighbors. Some residents attempted to insulate their walls and windows with foam rubber, while others slept with earplugs. Area residents also filed numerous complaints with central and municipal authorities.

On April 28, 1977, Han Wen of the Western District Office of Food Control wrote a letter to the factory expressing his concern, and encouraged the factory to find an equitable solution. Personnel from the local Office of Environmental Protection also made numerous visits to the factory to convey the residents' sentiments, and try to solve the problem. Finally, in December 1978, a factory manager announced that the factory would prepare a proposal to control the noise by the Chinese New Year in early 1979, within a few months, and promised that work would begin soon thereafter. However, the factory failed to meet its commitment. Under pressure from the Office of Environmental Protection, the factory finally

64. *See supra* note 30.

65. *Id.*

66. *Id.*

67. This was not a reported case. *See supra* note 1 for problems with the reporting system in China. The relevant facts are based on Ge, *This Lawsuit Was Not Fair*, HUANJING, No. 1, 24-25 (1985) [hereinafter cited as Ge].

submitted a proposal in May 1979, but failed to specify a date when renovations would begin.

In the face of the factory's dilatory response and relative inaction, area residents in July 1979 put up a *dazibao* (big character poster), a demonstrative form of popular expression that came into use during the Cultural Revolution but which has since been outlawed because of its potential as an instrument for instigating political opposition.⁶⁸ The factory then issued a new proposal, to which the residents submitted a counterproposal. The residents also suggested that the factory halt operations between 10 p.m. and 6 a.m. to ensure peaceful sleeping conditions. The factory seemed to accept these conditions despite the problems they posed for a bakery.

The situation took a radical turn just a few days later. On August 26, a factory representative called the Office of Environmental Protection and apparently claimed immunity from all charges of operating a common nuisance on the basis of prior existence. He stated, "Our cake and pastry factory was established under the Kuomintang, and they [the residents] did not move in until after that."⁶⁹ He also disputed the validity of the residents' complaints. On September 1, the factory resumed night operations, allegedly at a noise level even higher than before. That same evening area residents again lodged complaints with the factory, but again without effect.

The situation came to a climax on September 2. Two young workers who were kept awake by the noise arose in the early morn-

68. The right to "paste up" *dazibao* was first guaranteed in Article 13 of the 1975 Constitution. Article 13 provided, "speaking out freely, airing views fully, holding great debates and writing big character posters as new forms of carrying on socialist revolution created by the masses of the people." Chinese text in ZHONGHUA RENMIN GONGHEGUO DI SI JIE QUANGUO RENMIN DAIBIAO DAHUI DI YI CI HUIYI WENJIAN [Documents of the First Session of the Fourth National People's Congress of the People's Republic of China] 3 (1975); ZHONGGONG YUANSHI ZILIAO BIANJI WEIYUANHUI, ZHONGGONG XIANFA [The Communist Chinese Constitutions] 90 (1983) [hereinafter cited as ZHONGGONG XIANFA]. English in THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1975); M. LINDSAY, THE NEW CONSTITUTION OF COMMUNIST CHINA 328-36 (1976). Article 13 gave effect to *Sida* or the "Four Bigs": *daming* (contending in a big way); *dafang* (airing views in a big way); *dabianlun* (arguing things out in a big way); and *dazibao* (big-character posters).

The 1978 Constitution also included the "Four Bigs" in Article 45. Texts in I C. FANG, X. ZHANG, L. CHOU & M. CHOU, LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA [Zhonghua Renmin Gongheguo Fagui Xuanji] 11, 14 (Chinese/English ed. 1982); DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 125-72 (1978); *Zhonggong Xianfa, supra*, at 112-36. The "Four Bigs" were, however, abolished at the behest of the Central Committee of the Chinese Communist Party. The fact that a mere recommendation from the Central Committee was sufficient for constitutional amendment does not say much for the sanctity of the Constitution in China. On the abolition of the "Four Bigs" see *The "Dazibao": Its Rise and Fall*, BEIJING REV., Oct. 6, 1980, at 22; Eliasoph, *supra* note 7, at 287-88.

69. See Ge, *supra* note 67, at 25.

ing and shattered the factory's glass window with umbrellas. Some of the glass fell into flour bins. An assistant manager of the factory promptly called the local branch of the Bureau of Public Security.

Public security officers detained two culprits on the charges of "beating, smashing and looting,"⁷⁰ catch-all terms for organized violence like that which had occurred during the Cultural Revolution. Public security ordered the culprits to make full reparation, and the culprits' workplaces withheld their wages.

The area residents did not take kindly to the situation. "Does this mean to say polluters are meritorious, and those subject to such pollution are criminal," they queried.⁷¹ The residents then filed complaints with environmental protection officials.

After its investigation verified that the factory actually was in the wrong, the Office of Environmental Protection urged the Bureau of Public Security for Beijing's Western District to release the culprits. The public security officers maintained, however, that regardless of the provocation, destruction of property is, among other things, a disruption of social order. They thus refused to release the prisoners.

That same evening, environmental protection officials informed the Beijing Municipal Government and the Beijing Public Security Bureau of the situation. The deputy chief of the municipal government for Beijing's Western District reviewed the relevant reports on the incident and personally asked the Public Security Bureau to exonerate the two youths, order the factory to return the monetary award, and compel the factory to control the noise level. All parties complied.

B. Analysis

Criminal responsibility was easily established in this case. In fact, the proceedings against the culprits went even farther than those in the Wuhan Port Case. In this case, the public security office formally charged, sentenced, and executed judgment against the culprits without a judicial hearing before higher authorities inter-

70. Article 137 of the Criminal Law provides:

Assembling a crowd for "beating, smashing and looting" is strictly prohibited. Whoever causes a person's injury, disability or death through "beating, smashing and looting" is to be handled under the crime of injury or the crime of killing another. In cases where articles of public or private property are destroyed or forcibly taken and carried away, in addition to the ordering of restitution or compensation, ringleaders are to be handled under the crime of robbery.

Whoever commits the crime in the preceding paragraph may be sentenced exclusively to deprivation of political rights.

See *supra* note 33.

71. Letter from residents on Er Long Rd. to local office of Public Security, cited in Ge, *supra* note 67, at 25.

vened to rectify the situation. Such a summary proceeding carried out by the public security office was not unusual following the evisceration of the procuratorial and judicial organs in the 1950's.

The culprits' conduct again amounted to a *prima facie* case of "beating, smashing and looting," as well as more conventional crimes.⁷² There is no question that the two youths committed intentional acts that were socially dangerous and in violation of various criminal decrees.⁷³ Their willful smashing of the window was an intentional act since they clearly knew the consequences. Breaking the window damaged the factory's property, and therefore constituted socially dangerous activity.

In this case, however, these criminal law principles conflicted with the intent of the environmental legislation designed to outlaw pollution. Public security's customary reaction was to defend state and collective property, but it was overruled by higher levels of authority. The Senior Vice Premier, Wan Li, at the Second National Conference on Environmental Protection in late 1983 severely criticized the initial disposition of this case for totally disregarding the EPL.⁷⁴ The two youths certainly bore criminal responsibility; however, officials excused these actions in the name of self-defense against environmental threats to human health and livelihood, a truly extraordinary legal doctrine. The factory violated various provisions dealing with environmental protection, most notably Article 7(5) of the Act of the PRC for Security Administration Punishment, which prohibits "in cities, willfully making loud noises that [adversely] affect the work and rest of surrounding residents, in disregard of an order to stop."⁷⁵

V. CASE FOUR: THE GUILIN DUMPLING FACTORY

A. The Facts⁷⁶

A privately owned dumpling restaurant opened for business in an open storefront on the bottom floor of a four-story building on Zhongshan Central Road in Guilin, one of China's most scenic cit-

72. See *supra* note 70.

73. See, e.g., the Act of the People's Republic of China for Security Administration Punishment (1957), republished in February 1980. Chinese text in MINISTRY OF PUBLIC SECURITY, OFFICE OF POLICY AND LEGAL RESEARCH, GONGAN FAGUI HUIBIAN, 1950-1979 [A Compilation of Laws and Decrees on Public Security] 113-22. English text in COHEN, *supra* note 26, at 215, 218-19, 221, 224, 227, 228, 230, 231, 232, 233, 235, 237, 250; LENG & CHIU, *supra* note 26, at 235-48.

74. Guangming Ribao [Enlightenment Daily], Jan. 1, 1984, at 1.

75. See *supra* note 73.

76. This case was not reported. On problems with the reporting system in China, see *supra* note 1. Professor Deng Jianxu personally investigated this case and provided the facts. A copy of the facts are on file at the East Asian Legal Studies program, University of Maryland School of Law.

ies. In 1977, the restaurant manager erected a fourteen meter tall exhaust pipe, as high as the fourth story. The pipe soon emitted large quantities of steam, smoke, dust, and carbon dioxide. The situation had adverse effects on the fourth floor residents and in the summer one resident passed out several times due to the heat and pollution.

Fourth floor residents and an officer from the Bureau of Urban and Rural Construction had conveyed the residents' concern over the placement of the exhaust pipe prior to its installation. They requested that the restaurant distance the system from the building, or in the alternative raise the pipe to release the exhaust above the roof. The management ignored the advice, presumably for reasons of cost and ease of construction, or simply out of indifference to safety and comfort.

The residents then lodged a flurry of complaints with the municipal Offices of City Planning, Housing Control, and Environmental Protection in the hope that these government agencies would persuade the management to comply with relevant building regulations.⁷⁷ The management again failed to take remedial measures despite repeated communications from these agencies.

The residents' patience finally reached an end. On September 16, 1977, three fourth floor residents stopped up the pipe with cement and metal plates. This forced the restaurant to shut down for ten days. The restaurant lost approximately 4,200 yuan.⁷⁸

After an initial investigation, the public security unit prepared to arrest the culprits. However, personnel from the Offices of Urban and Rural Construction, and Environmental Protection intervened on the culprits' behalf, and persuaded the public security apparatus to halt the proceedings without arresting anyone.

B. Analysis

The three alleged culprits' actions again amounted to culpable behavior. The act was socially dangerous since it violated property rights. With regard to the *mens rea* element, the three clogged the exhaust system knowing clearly that such action would render the system inoperative, imposing substantial costs upon the restaurant management. Their actions also contravened criminal provisions proscribing the destruction of public or private property.⁷⁹

77. The relevant standards are set forth in the *Provisional Emission Standards for the Industrial "Three Wastes,"* reprinted in BFWH, *supra* note 59, at 453-62.

78. On September 16, 1977, the dollar-renminbi [people's dollar or yuan] exchange was one U.S. dollar to 1.8439 yuan. See 97 FAR EASTERN ECON. REV., Sept. 16, 1977, at 71. The restaurant thus lost over two thousand two hundred dollars, which amounts to almost one year's wages for the average worker.

79. See, e.g., Act of the PRC for Punishment of Counterrevolution, *supra* note 26, art. 9(i).

C. Imputing Criminal Responsibility: Environmental Enforcement as a Mitigating Factor

The Bureau of Public Security in this case came very close to arresting the three residents and initiating criminal proceedings. Again, however, pressure from the Offices of Environmental Protection, and Urban and Rural Construction swayed public security officials to place greater weight on the task of environmental protection. The facts reveal that the restaurant erected the exhaust pipe in total disregard of the advice of local regulatory agencies, and of local building ordinances, which were later codified in the EPL. This posed a serious threat to area residents in violation of the Provisional Emission Standards for the Industrial "Three Wastes" (1973).⁸⁰ But once again, the authorities excused an otherwise illegal action on the grounds that the residents acted in defense of their legal rights,⁸¹ and only after having exhausted peaceful means of dispute resolution.

VI. CONCLUSIONS

This case survey underscores several key aspects of the interplay between politics, economics, law, and environmental protection in China. The first is that, in the absence of a strong commitment by central authorities to environmental protection, pollution is frequently aggravated by a centrally planned economy. In all four cases the pollution problem originated as a byproduct of the effort to satisfy planning norms, a situation characteristic of Maoist China. Generally, factory managers regarded the fulfillment of economic output norms as their overriding consideration. Any diversion from this task was considered illegitimate and was not undertaken, even for the purpose of reducing the risk to human health. Although affected third parties could beseech polluters and government agencies to ease their plight, in practice their pleas were usually disregarded and critics ran the risk of incurring severe sanctions.

This has changed since Mao's death. The pragmatists who gained power realized that a single-minded emphasis on physical output was a recipe for continued economic stagnation. Deng Xiaoping and his associates were determined instead to relax economic controls and stimulate managerial and technical innovations.

80. See *supra* note 77.

81. One can infer from the 1982 Constitution a right to be free from hazardous health conditions. Article 26 of the 1982 Constitution guarantees that "[t]he state protects and improves the living environment and the ecological environment, and prevents and remedies pollution and other public hazards." English text is in THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 24-5 (1983). The Chinese is in Renmin Ribao [People's Daily], Dec. 5, 1982, at 1; ZHONGGONG XIANFA, *supra* note 68, at 186.

Although environmental protection was not formally included among the Four Modernizations, in December 1978 at the historic Third Plenum, the Party Central Committee approved a State Council report defining the Four Modernizations as including environmental protection. In other words, the leadership recognized that long-term economic growth and social well-being were dependent upon maintaining an ecological balance. Indeed, Wen Li several years later explicitly said that economic development and environmental protection must proceed in tandem, rather than one before the other.⁸² Environmental protection's standing was also indirectly enhanced as scientists and ordinary citizens were allowed increased freedom to express their views on issues of concern that had been neglected by the authorities.

These four cases demonstrate that concern for environmental protection has grown. Ordinary citizens and even Party members who destroyed factory equipment in acts of desperation were eventually exonerated while the polluters were criticized for failure to act in a socially responsible manner. The publicizing of the four cases demonstrates that the regime intended not only to smooth social frictions to prevent the outbreak of violence, but also to express the regime's heightened concern for human health and environmental quality, and to deter future pollution.

However, the cases also reveal severe institutional weaknesses both in regulating the environment, and in maintaining social order in the context of rapid modernization. The cases reveal that realizing gains in modernization within China's socialist economic system, while maintaining social order and regulating the environment, is a difficult task involving conflicting interests. The factories involved in pursuit of higher productivity presumably acted at least with the tacit support and possibly at the behest of their parent ministries or bureaus. The public security apparatus was predisposed to protect state and collective property, and to maintain social order without regard for mitigating circumstances. Caught between these forces and protesting citizens affected by the pollution were the new regulatory agencies. While sometimes stepping in to curb the abuses, these agencies were largely powerless when it came to imposing their will on polluters because of the tightly circumscribed, vertical decision-making channels of the Chinese system, which resist external influence.⁸³ Press accounts of environmental protec-

82. On the Four Modernizations, see QU GEPING, *ENVIRONMENTAL PROBLEMS AND STRATEGIES IN CHINA* 250 (1984). See also *supra* note 74.

83. This situation is the product of China's political culture which is based on the tenets of Leninism. On Chinese organizational culture, see A. BARNETT, *CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA* (1967); H. HARDING, *ORGANIZING CHINA* (1981); H. SCHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA* (1968). For our purposes, Leninism is "organizational Machiavel-

tion agency orders to suspend production or halt construction are by no means uncommon, but the effectiveness of such orders is another matter.

For example, the economically dynamic city of Wenzhou in Zhejiang was the subject of critical stories in the summer of 1985. A textile mill to be built in the city's inner suburbs went through the prescribed site selection process, in itself testimony to the rise in attention to environmental impacts. However, the local government arbitrarily chose a new site in a restricted watershed. Although the local environmental protection bureau refused to approve the new location, the municipality proceeded anyway, making a mockery of its recent acclaim as a model in environmental management in the new boom era. Only intervention by higher authorities halted construction.⁸⁴

In light of the procedures followed, one is also lead to question whether the implications of the cases serve to further effective environmental enforcement while maintaining social order. Indeed, the citizens who damaged the factories' property would have suffered severe sanctions had the higher authorities not intervened in their behalf. Leadership action by the culprits was justified by the evolving doctrine of self-preservation or self-defense, which holds that individuals can in effect take the law into their own hands in cases of dire danger when all legal remedies have been pursued to no avail, and when the action is proportionate to the danger.⁸⁵ This doctrine bears similarity to Japanese practice which actually limits

lianiam attached to a Marxist *Weltanschauung*. It centers on the dominance of society by the polity, of the polity by a single party, and the party by one group (sometimes one person)." Robinson, *Domestic Politics of the People's Republic of China*, in CHINA POLICY FOR THE NEXT DECADE 113, 114 (U. Johnson, G. Packard & A. Wilhelm eds. 1984).

84. People's Daily, July 7, 1985; Dong Dingxun, *Organize and Coordinate the Strength of All Sectors to Open a New Vista in Environmental Protection Work*, HUANJING GUANLI, No. 1, 41 (1984).

85. Article 17 of the Criminal Law *supra* note 33, provides:

Criminal responsibility is not to be borne for an act of legitimate defence that is undertaken to avert present unlawful infringement of the public interest or the rights of the person or other rights of the actor or of other people.

Criminal responsibility shall be borne where legitimate defence exceeds the necessary limits and causes undue harm. However, consideration shall be given according to the circumstances to imposing a mitigated punishment or to granting exemption from punishment.

The principle of self-defense under Chinese law is similar to most other legal systems. Compare principles set forth in C. JENKS, *THE COMMON LAW OF MANKIND* 139-43 (1958) (establishing that all legal systems in the world recognize notions of self-defense); with, for Chinese criminal law, FALU WENTI, *supra* note 40, at 8-10; GAO MINXUAN, XINGFA XUE [The Study of Criminal Law] 163-71 (1982); ZHANG SHANGZHUO, *supra* note 40, at 134-45; ZHONGYANG ZHENGFA, *supra* note 40, at 139-51; and for tort theory under Chinese civil DONG ROU, MINFA YUANZE [The Principles of Civil Law] 224-25 (1983). Cheng, *supra* note 30, applies a self-defense theory to the Wuhan Port case.

the scope of this defense to very narrow circumstances.⁸⁶ However, in light of dangerous precedents set in the cases above, the invocation of "self-defense in the environmental context" deserves close scrutiny. The Chinese have in essence recognized—in contravention of their own legal principles—the right to violence. After all, in China the right to use force in self-defense traditionally is circumscribed to use against natural persons only, and even then only in the face of imminent harm.⁸⁷ The Chinese should therefore reformulate and clearly delineate the difference between unlawful

86. J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 48-50 (1981) [hereinafter cited as GRESSER].

An analogous situation arises in the American system with regard to workplace conditions. Interestingly, the American system generally recognizes the right of the worker to refrain from working when confronted with unsafe working conditions, and even permits workers to engage in collective activity ("strikes") as a method of pressuring management into remedying the situation. Three federal statutory provisions bear on workers' rights with regard to health and safety matters. First, the Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 651-678 (OSHA), provides a limited right to walk off the job to avoid a health or safety hazard. The Supreme Court upheld a regulation promulgated under the OSHA to this effect in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). Second, the Supreme Court in *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974), found a separate statutory right to a limited strike where a health and safety hazard existed. Third, sections 7 and 13 of the National Labor Relations Act (NLRA) provide workers generally with the right to strike under labor laws. 29 U.S.C. §§ 157, 163. NLRA health and safety strikes are, however, often restricted by general no strike clause provisions, and it appears that unorganized workers' rights may be superior. See *National Labor Relations Board v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Note also that developing state common law non-at-will employment developments may create additional rights. See, e.g., *Adler v. American Standard Corp.*, 432 A.2d 434 (Md. 1981); *Staggs v. Blue Cross of Maryland, Inc.*, 486 A.2d 798 (Md. App. 1985). *But see* *Railway Labor Act*, 45 U.S.C. §§ 151a, 152.

However, in contrast with the rulings in the case studies above, which appear to recognize worker violence as a legitimate method of pressuring management to ameliorate workplace conditions, the American system specifically rejects this principle. Thus, under the Norris-La Guardia Act, 29 U.S.C. §§ 101-115, and § 10 of the National Labor Relations Act, 29 U.S.C. § 160, federal courts are expressly granted the power to enjoin labor practice that involves violence, whereas the courts are otherwise prohibited from interfering with non-violent concerted activity. Furthermore, the American statutory scheme which generally prohibits courts from interfering with labor "strikes" or other job actions, specifically grants courts the authority to enjoin labor violence. *Norris-La Guardia Act*, *supra*.

The most noted incident of public protest over environmental conditions in the Soviet Union was the Lake Baikal affair. The outcome established that it is permissible within certain limits to question through public protest the environmental impact of a state project. But by no means did the dissent exceed implicit limits of Party authority, let alone give rise to an unlawful act of aggression. The trends indicate that even if aggression was used, the culprits would have been dealt with through normal legal procedures without interference. For an account of the Lake Baikal affairs, see T. GUSTAFSON, REFORM IN SOVIET POLITICS: LESSONS OF RECENT POLICIES ON LAND AND WATER 40-46 (1981). A recent example of a Soviet environmental case illustrates how such cases are handled through normal legal means. *N.Y. Times*, July 17, 1985, at A10, col. 4.

87. The risk the Chinese take in setting such a precedent is a call for mob rule

acts of aggression and legal uses of force in response to environmental dangers.

Under the circumstances, improvements in environmental protection require more institutional solutions. First, the governing pragmatists must continue to strengthen the environmental and related regulatory agencies so that they can more effectively counterbalance the production oriented ministries in the critical arena of bureaucratic politics. Particularly noteworthy measures already have been taken in this regard. In late 1984, the environmental protection organ was upgraded to the status of a General Administrative Bureau following the establishment of a State Commission on Environmental Protection earlier that year. Additionally, environmental agencies have received substantial increases in funding and personnel, and have been assigned a veto power for projects that fail to incorporate appropriate environmental impact mitigation measures.

Second, changes in legal institutions are needed to implement the growing body of environmental legislation and to resolve disputes centering around the rights of producers and the rights of individuals adversely affected by the residuals and byproducts of production. A truly independent judiciary would appear to be essential to implement environmental policy more consistently and effectively than ad hoc intervention by Party officials, but our own cases reveal the Party's reluctance to sever its control.⁸⁸ It was the

whenever there is a perception of an environmental infraction which is causing a health or safety hazard.

For the Chinese principles governing self-defense under civil and criminal law, see *supra* note 85.

88. The Party meddling in legal affairs continues to trouble students of Chinese law despite recent reform in the system. The Party continues to exert power in the legal realm even though Article 126 of the 1982 Constitution provides that "[t]he people's courts shall in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, social organizations or individuals." Professor Hungdah Chiu notes, "since the Party is neither an administrative organ nor a social organization, this provision appears not to prohibit Party interference in the judiciary." Chiu, *Chinese Law and Justice: Trends over Three Decades*, in 1982 OCCASIONAL PAPERS/REPRINTS IN CONTEMPORARY ASIAN STUDIES, No. 7, at 20.

Another related problem is retention in the Chinese system of the practice of a substantial number of legal cases being reviewed by the Party secretary in charge of political-legal affairs. The procedure is referred to as "deciding a case by the secretary" (*shuji pian*), and is discussed in length in Chiu, *Structural Changes*, *supra* note 35, at 7-9.

If, then, Party dominance is accepted as the norm in China—which the above discussion indicates—query whether it is an issue at all? If Party organs administer the law with the intent that they are acting in furtherance of legislative goals, and this practice has indeed crystalized into customary practice, then there seems to be little, if any, difference between a Party or a judicial organ applying the law.

In sum, however, until the Party distances itself from involvement in judicial affairs, the judicial organs will be faced with great difficulty winning the trust of parties to a dispute. The absence of a widely accepted conflict resolution mechanism is likely to

Party itself rather than the courts or even the government that reversed the Wuhan Port decision. However, the legal organizations may play a more effective role if the Party determines that they are needed. Some scholars have argued that special environmental sections within the trial court system are needed, but this seems an extravagance given the present institutional weaknesses that afflict the judicial system, and may well be unnecessary. It would suffice if the economic sections of the trial courts undertook a more vigorous and autonomous role, in conjunction with less formal mediation and arbitration structures patterned after Japanese practices.⁸⁹ It is encouraging that these changes appear to be underway. Should there be a shift away from the prevailing pragmatic tone in the Party leadership back towards utopian radicalism and the reassertion of central planning, environmental quality will most certainly suffer.

have very unfortunate consequences given the limited capacity for senior officials to personally intervene unless ongoing organizational and personnel changes bring like-minded persons into place at lower levels within the system with the willingness to integrate economic development and environmental protection. In the short run, however, an absence of Party involvement will handicap the ability of the courts and regulatory agencies to enforce their decisions.

89. GRESSER, *supra* note 86, at 25-49, argues that informal means of dispute resolution like those adopted in the 1970 Law for the Resolution of Property Disputes are culturally more suited to the Japanese than formal court proceedings in many cases. On China, see Deng, *Some Questions on Establishing Conflict Arbitration Organizations*, HUANJING BAOHU, No. 4, 11-12 (1982); Deng, *The Necessity of Establishing an Environmental Protection Trial Court System*, HUANJING BAOHU, No. 1, 3-4 (1982).