

A Happy and Meaningful Occasion

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Hats off to Academia Sinica's Institute of Law on its tenth birthday! Although a decade is a very short time, the Institute has already made a significant impact not only at home in Taiwan but also increasingly abroad. The publications of its staff, its learned law journal, its conferences and round tables and its hosting of a variety of distinguished scholars and professionals from many countries have gradually served to put this young and distinctive group on the world's legal map.

Of course, in 2011 the Institute did not suddenly spring full-blown from the head of Zeus. Its roots trace back to the turn of the current century. Reflecting the island's then stunning recent progress toward democratic government, the rule of law and respect for human rights, a far-sighted group of local scholars initiated the process of establishing a research institution commensurate with the encouraging political-legal developments and the enhanced legal education that had begun to bolster this progress.

The current accomplishments of the Institute must be a source of great satisfaction to Professors and former Constitutional Court Justices Herbert Han-pao Ma and Tze-chien Wang and their colleagues who, over twenty years ago, began to discuss plans for what eventually developed under the leadership of Professor Dennis T. C. Tang, the Institute's first Director, and his

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successors Professor Tzu-yi Lin and now Professor Chien-liang Lee.

To be sure, scholars in other departments of Academia Sinica had already made significant contributions to various fields of legal research. I especially recall the very important work in China's legal history that the Institute of History and Philology undertook beginning in 1968 under the guidance of its recently-appointed member, Professor Wejen Chang. Building upon the Institute's collection of materials from the judicial archives of the Qing (Manchu) imperial government and other Qing legal documents that were soon gathered from basements around the island where they had been disintegrating, that Institute preserved these invaluable records, organized and reprinted them for public distribution and then produced scholarly analyses that enhanced our understanding of Chinese law and society on the eve of twentieth century modernization. I eagerly await publication of the book that Professor Chang has completed, which shows how the Qing judicial system was designed and actually functioned.

Perhaps Academia Sinica's records can confirm whether I can legitimately claim a bit of indirect credit for Professor Chang's worthy project. Earlier in 1968, I was a member of a three-person joint delegation to Taiwan of the American Council of Learned Societies and the Social Sciences Research Council. We were granted a ninety-minute interview with then President Chiang Kaishek and Madame Chiang. Just before the meeting, a presidential advisor alerted us to the likelihood that President Chiang would ask us for suggestions as to how conditions in Taiwan might be improved. When in fact he did pose the question, I was tempted to urge him to end his harsh military dictatorship and establish political freedom and democracy. Instead, however, with practical considerations in mind, I somewhat sheepishly asked the President to do more to support the development of studies of China's rich legal traditions.

After acknowledging his frequent public endorsements of the unique contributions to mankind of Chinese civilization — in contrast to Chairman

Mao's Cultural Revolution that was then ransacking the Mainland's past, I mentioned the opportunity that Chang Wejen's recent return from Harvard Law School presented for making a great leap forward in Taiwan's research in the nation's legal history. Chang, who had met me as I arrived at Taipei airport a few days earlier, was discouraged by the lack of response to his efforts to find a legal history teaching job at the island's law schools and had indicated that Academia Sinica might be a more appropriate host for his research, a suggestion that I passed to the President. On my next visit to Taiwan, I was thrilled to visit the Institute of History and Philology to witness Chang Wejen in action and become acquainted with the output of the productive research team that he had assembled.

During the long era of "White Terror" presided over by the Chiang Kaishek family, research in imperial Chinese legal history was not perceived to be as threatening as contemporary public law topics, which were not then allowed to be freely pursued. The end of that era, as the newly-established Institute of Law has demonstrated, made it possible to open up many formerly restricted subjects to unfettered analysis. I hope that in its second decade the Institute of Law will continue to build on these recent accomplishments in the public law arena.

Taiwan's academic community does not need my advice about what topics are most important to now pursue for domestic purposes. But I trust that a few comments about the international significance of the Law Institute's future preoccupations will not be deemed out of line.

First of all, it seems desirable for the Institute and other Taiwan scholars to do much more to inform the world — in English — about Taiwan's most distinctive and important legal challenges and achievements of recent decades. Not enough is known abroad, for example, about the operation and accomplishments of what has come to be called the Constitutional Court. At a time when judicial independence is increasingly under attack in countries that are descending from democracy to autocracy, the Taiwan experience offers

welcome encouragement and stimulus. Similarly, efforts should be made to publicize studies of the current efforts to come to grips with the complexities of dealing with “transitional justice” that trouble all countries that are struggling to securely emerge from dictatorial regimes.

I hope that the Institute will also be able to deploy the resources necessary for expanding its valuable studies of comparative law. Taiwan’s “New Southbound Policy” highlights the possibilities for delving more deeply into the legal systems of Southeast Asia and South Asia.

Above all, the Institute should devote much greater attention to the situation in China that it is uniquely positioned to analyze. Until now, Hong Kong, despite its handover to China in 1997, has maintained a vibrant academic community that has done great service to foreign understanding of the momentous legal developments in the Mainland. Sadly, for the foreseeable future, the many able legal experts in the Special Administrative Region who have done such outstanding work will be subjected to growing pressures and restrictions that will require the rest of us who study the Mainland to strive harder to fill the gap being created. Taiwan scholars should be best qualified to undertake this responsibility, and the Institute appears to be in a position to lead the way.

There are many reasons, of course, for China to become a more prominent area of the Institute’s activities. Looking back at the history of another island seeking to cope with a dynamic, continental neighbor, I recall that, as early as the reign of Henry the Eighth, wise governors recognized that study of the French and other European legal systems by scholars at Oxford, Cambridge and other distinguished places of learning could offer invaluable insights into the challenges before the country. To be sure, for legal scholars not only national security is at stake. Contemporary China is an unprecedented phenomenon that urgently warrants more, and more sophisticated, analysis by the masters of many disciplines, not the least of which is law as sensitized by the social and even natural sciences.

So many topics cry out for attention. In recent years my own preoccupation has been the variety of coercive processes and pressures by which the Communist Party and the state have sought to bend the will and direct the energies of their people.¹ Determined not to suffer the fate of the Soviet system that spawned it, the Xi Jinping government has created new legal institutions and practices that have embellished the Leninist model imported by Chairman Mao. The National Supervision Commission established in 2018 is the foremost illustration.²

One fascinating study for which Taiwan experts are especially equipped might be a comparison of the evolution of the criminal process in China with that in Taiwan beginning with the imposition of the long nightmare of Chiang Kaishek's version of Leninism. In 2013 Margaret Lewis and I published a study of Taiwan's abolition of its infamous truncated judicial procedures for punishing alleged "liumang" (hooligan) offenders. As we pointed out, this had obvious implications for contemporary Chinese efforts to abolish, at least in name, the extrajudicial punishment system of "re-education through labor".³

Yet it would be a mistake for the Institute to limit its focus to the repressive aspects that underlie China's progress. Law plays increasingly important roles in the country's economic and social development as well as in its now totalitarian controls. Xi Jinping's frequent calls for "the rule of law"

¹ See e.g., Jerome A. Cohen, "Rule of Law" with Chinese Characteristics: Evolution and Manipulation, 19 INT. J. CONST. LAW (forthcoming 2021); Jerome A. Cohen, *Law's Relation to Political Power in China: A Backward Transition*, 86(1) SOC. RES.: AN INT'L Q. 231 (2019) [hereinafter Cohen, *Law's Relation to Political Power in China*]; Yu-Jie Chen & Jerome A. Cohen, *Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan and Hong Kong*, in OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (David Law, Holning Lau & Alex Schwartz eds., forthcoming).

² See e.g., Cohen, *Law's Relation to Political Power in China*, *supra* note 1; Jamie P. Horsley, *What's so controversial about China's new anti-corruption body? Digging into the National Supervision Commission*, THE DIPLOMAT (May 30, 2018), <https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body>.

³ See JEROME A. COHEN & MARGARET K. LEWIS, CHALLENGE TO CHINA: HOW TAIWAN ABOLISHED ITS VERSION OF RE-EDUCATION THROUGH LABOR (2013).

surely do not advocate “government under law” but rather “law under government”. Despite continuing lawlessness on the part of the Party-state’s ubiquitous police, Beijing’s legislative and administrative productivity and judicial activity in many fields, including regulation of the nation’s intellectual property and its new technology and industries, has been impressive and deserves greater scrutiny.

Given current measures to prevent transparency, evolving methods of attempting to resolve disputes among the people and particularly between the people and local governments are not easy to study, but the effort should be made. Certainly the PRC’s energetic and overextended Belt and Road Initiative has sparked the establishment of new Chinese legal institutions that are somewhat more possible to research, although one should not overlook the obstacles.

The work of the Supreme People’s Court, striving for judicial reforms that might inspire popular confidence especially in civil and economic matters, while openly serving as the obedient instrument of the Party, offers further opportunities for analysis.⁴ The Institute should also not neglect the transformation of education that has been less obviously taking place in the nation’s more than six hundred law schools and that will profoundly influence the future.

I could go on and list the distinctive features of the PRC’s preaching and practice regarding public international law⁵ as well as the currently suspended role of law in cross-strait relations,⁶ but I hope that the point has been made.

⁴ For example, Susan Finder’s blog, *Supreme People’s Court Monitor*, has done a great service by documenting and analyzing the activities of China Supreme People’s Court. See SUPREME PEOPLE’S COURT MONITOR, <https://supremepeoplescourtmonitor.com> (last visited Sept. 3, 2021).

⁵ See Jerome A. Cohen, *Law and Power in China’s International Relations*, 52 N.Y.U. J. INT’L L. & POL. 123 (2020).

⁶ See Yu-Jie Chen & Jerome A. Cohen, *China-Taiwan Relations Re-Examined: The “1992 Consensus” and Cross-Strait Agreements*, 14 U. PA. ASIAN L. REV. 1 (2019).

I am confident that, to the extent that in pursuit of its agenda the Institute finds it useful to expand its cooperation with foreign counterparts and scholars, it will meet with an enthusiastic response. I am glad to have been asked to serve as a cheerleader of the future. Very best wishes to the Institute for the coming decades.

References

- Chen, Yu-Jie, and Jerome A. Cohen. 2019. China-Taiwan Relations Re-Examined: The '1992 Consensus' and Cross-Strait Agreements. *University of Pennsylvania Asian Law Review* 14:1-40.
- . Forthcoming. Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan and Hong Kong. In *Oxford Handbook of Constitutional Law in Asia*, edited by David Law, Holning Lau and Alex Schwartz.
- Cohen, Jerome A. 2019. Law's Relation to Political Power in China: A Backward Transition. *Social Research: An International Quarterly* 86(1): 231-251.
- . 2020. Law and Power in China's International Relations. *New York University Journal of International Law and Politics* 52:123-165.
- . Forthcoming 2021. "Rule of Law" with Chinese Characteristics: Evolution and Manipulation. *International Journal of Constitutional Law* 19.
- Cohen, Jerome A., and Margaret K. Lewis. 2013. *Challenge to China: How Taiwan Abolished Its Version of Re-Education Through Labor*. Great Barrington, MA: Berkshire Publishing.