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LAW IN COMMUNIST CHINA – PART 1

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In recent years, we have witnessed an ever-growing interest in Soviet political institutions and legal arrangements. They are being studied both for their own sake and as models for other Communist regimes as well as for those newly-emergent nations — like Mali or Guyana and Nkrumah's Ghana — which see merit in Soviet boldness and simplicity. Interest in the Soviet legal system is no longer confined to the student of Soviet society; it is spreading to the sociologist and the sociologist of law. It now makes sense to ask whether we are not witnessing the emergence of a "socialist" or Communist legal system, to be placed alongside and contrasted with the common law and civil law systems, and helping to illuminate both. It may even be that this "socialist" legal system and its presuppositions will help us to understand certain radical transformations in our own (Western) conceptions of the nature and function of law in a modern industrial society.[1]

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[1] Western lawyers and political scientists, especially in Germany and the United States, had reached a good sociological understanding of the nature and function of the Soviet legal system by the 1950s. There is now a growing number of serious and illuminating works that deal with Soviet law in these terms—see, e.g., H. J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (2 ed. 1963) and J. N. Hazard, *Law and Social Change in the U.S.S.R.* (1953). In the 1960's, scholars have been able to take this for granted and to move toward more detailed and technical examinations of Soviet legal provisions (given impetus by the promulgation of new criminal, civil, family and other codes in the Soviet Union during the last ten years) and toward examination of the "export" of Soviet law to Communist and socialist countries. Technical work on Soviet law has appeared in the series *Law in Eastern Europe*, published in Leyden, in the *International and Comparative Law Quarterly*, in the *American Journal of Comparative Law* and in a growing number of other law journals; several monographic studies have also appeared. The study of the "export" of Soviet law is being promoted by one of the pioneers of the study of Soviet law, Professor John Hazard, in his influential seminar in Columbia University; see his "The Soviet Legal Pattern Spreads Abroad" (1964) *University of Illinois L.R.* 1, "Unity and Diversity in Socialist Law" (1965) 30 *Law and Contemporary Problems* 270, "Guinea's 'Non-Capitalist Way'" (1966) 5 *Columbia J. of Transnational Law* 231, and "Mali's Socialism and the Soviet Legal Model" (1967) 77 *Yale L.J.* 28. The theoretical implications of certain signs of "convergence" between Soviet law and the law of Western industrial societies have so far not received the attention they deserve, though a few writers have begun comparing Soviet procedures or attitudes on specific legal issues with our own: see, e.g., J. G. Fleming's discussion of Soviet attitudes to

To all this, the emergence of Communist China has added a new and very perplexing dimension. Here is another backward agrarian society embarking on a social, political and economic programme of modernisation and industrialisation under Communist "totalitarian" control, consciously looking to Marxist ideology and Lenin's programme for the Sovietisation of Russia. In some respects it is like the Soviet Union; in others, it is remarkably different. In recent years it has been exalting these differences into a separate, "true" road to socialism, into an allegedly Marxist critique of Soviet "revisionism" and Soviet bureaucracy. In law, Communist China has taken over many features of the Soviet system of legal administration, yet the whole conception of law now prevalent in China and the whole system of social adjudication and control breathe a totally different spirit. Is this the product of specific Chinese traditions and conditions, of a different phase in the process of industrialisation, or of a different (truer?) conception of Marxian socialism? The answers, once again, are important not only to the student of Chinese Communism, but to the student of "socialist" legal systems and to the sociologist of law in general. Yet they are not easy answers to give. The student of contemporary Chinese legal developments must have a number of unrelated skills: a knowledge and appreciation of Chinese history and culture, an understanding of Marxism and Communist ideology, a close acquaintance with Soviet institutions and laws and more than a dash of sociological insight and imagination. Granted he has these skills, he will still find the situation in contemporary China rather like a distorting mirror in a fun-fair. The traditional Chinese fusion of custom, law and morality, the classical Marxist belief in the withering away of law and the State, and the Soviet politicalisation of law and legal procedures to serve the interests of social revolution and political totalitarianism, all shimmer before his eyes, interweaving in intricate patterns until it is no longer easy to distinguish one component from another.

The task of analysis, then, is a difficult one, and it is made more difficult by the paucity and unreliability of primary sources. The People's Republic of China is twenty years old: those twenty years have been marked by several major upheavals in social policy, by the intense politicalisation of all academic work and discussion, by strong internal and external controls on the flow of information and by a growing suspicion of foreign correspondents and foreign observers. Though a Constitution was promulgated in 1954, the Criminal Code and Criminal Procedure Code proposed during the 1950's have still not been published or enacted. The expert has to range through a large body of laws, decrees, regulations and Party directives and rulings, which the Chinese themselves have not collected or published in any systematic way and which make

liability for personal injuries in his "The Role of Negligence in Modern Tort Law" (1967) 53 *Virginia L.R.* 815; and the reports on Soviet procedures in such cases delivered by A. K. R. Kiralfy and B. Rudden to the 1966 tort damages colloquium of the U.K. National Committee for Comparative Law, summarised in A. Samuels, "Damages in Personal Injuries Cases" (1968) 17 *Int. and Comp. L.Q.* 443, at 458-463. Preliminary discussions surrounding the International Encyclopedia of Comparative Law planned by the International Association of Legal Science have produced some more general reflections on the similarities and differences between "socialist" law and "capitalist" law: see J. N. Hazard, "Socialist Law and the International Encyclopedia" (1965) 79 *Harv. L.R.* 278 and the articles cited there. Though much has been written, over many years, on Marxist and Communist legal philosophy, it seems to me for the most part surprisingly unthorough and unincisive; the bearing of intelligent Marxism on the philosophy and sociology of law has hardly been considered seriously. For an attempt to grapple with these questions that at least tries to do justice to the richness of Marx's thought and to the complexity of the problems he raised, see the forthcoming study by Eugene Kamenka and Alice Erh-Soon Tay, *Marxism and the Theory of Law* (1970).

no pretence of constituting either the complete or the fundamental laws of the People's Republic of China. Since 1957, the flow of legal and political journals in which such decrees and laws would be discussed or reproduced has diminished steadily; since the Cultural Revolution that flow has virtually ceased. In the first ten years of the State, legal text-books were few and far between; since then, so far as Western observers can tell, none has been published. Visitors find no opportunity for gathering solid data or engaging in frank discussion or detailed probing. We cannot expect from those who study Communist China the detailed, authoritative and authenticated analysis of the legal system that we expect and get from the student of the Soviet Union, who is able to draw on a full set of Soviet codes and legislative acts and an ever-growing body of detailed legal text-books and academic legal writing. Neither is the student of China confronted with a political system that has settled down into what looks like a comparatively stable pattern of government and administration.

Nevertheless, the last ten years have seen a growing body of work on Chinese law by Western and non-Communist Chinese experts, especially in the United States, in Taiwan and in France. This work, if far from definitive, provides a background from which to assess future Chinese legal developments and current political trends. The preliminary picture of the Communist Chinese legal system and of its significance for the sociology of law that emerges from these studies may be of interest to the readers of this *Review*. The present author lays no claim to substantial independent investigations into Chinese law; she is making a report on the work of others, supplemented, to some extent, with considerations drawn from her work on Soviet law and Marxist legal theory, and her involvement in Chinese culture. The report is in two parts. Part I, here published, attempts to set out the background to the operation of law in the People's Republic of China by considering law and legal attitudes in Imperial China, the law reforms of the Nationalist Kuomintang regime and the seed-bed of the Communist political style and of Communist legal arrangements in the Communist-controlled "red areas" before 1949. Part II will deal with the law and legal practice of Communist China from 1949 to the present day.

LAW IN IMPERIAL CHINA

"Chinese administration of justice," Max Weber wrote in connection with traditional China,[2], "constitutes a type of patriarchal obliteration of the line between justice and administration. Decrees of the emperor, both educative and commanding in content, intervene generally or in concrete cases. The finding of the judgment . . . is oriented towards substantive rather than formal standards. When measured by formal or economic 'expectations', it is thus a strongly irrational and concrete type of fireside equity." For Weber there was a sharp contrast between the "estate" type of patrimonial princely justice found in medieval Europe, and the "patriarchal" type of patrimonial princely justice found in the Orient. In the former, the prince grants rights in the form of "privileges" to estates and persons in the society — a rigorously formal, adjudicative conception of law develops and even "administration" becomes

[2] Max Weber, *Wirtschaft und Gesellschaft* (2 ed. 1925), as translated in Max Rheinstein (ed.), *Max Weber on Law in Economy and Society* (1954) 264-65. While the general trend of the passage cited (and of the others cited below) is clear, the reader should remember that Weber uses words like "rational", "irrational", "patriarchal" and "patrimonial" in technical senses carefully defined in his text.

a matter of negotiating, bargaining and contracting about "privileges", so that it operates in the spirit of judicial procedure. In the patriarchal form, on the other hand, the prince issues "regulations" instead of according privileges, treats law administratively instead of treating administration judicially.

> Again law and administration are identical, but not in the sense that all administration would assume the form of adjudication but rather in the reverse sense that all adjudication takes the character of administration. The prince's administrative officials are at the same time judges, and the prince himself, intervening at will into the administration of justice in the form of "Cabinet justice", decides according to his free discretion in the light of consideration of equity, expediency, or politics. He treats the grant of legal remedies to a large extent as a free gift of grace or a privilege to be accorded from case to case, determines its conditions and forms, and eliminates the irrational forms and means of proof in favour of a free official search for the truth.[3]

An individual's prospect of obtaining a certain decision in his favour, thus, "is not a 'right' of his but rather a factual 'reflex', a by-product of the regulation, which is not legally guaranteed to him. It is the same as in the case where a father complies with some wishes of his child without thinking, however, that he binds himself to any formal juristic principles or fixed procedural forms. . . . The extreme consequence of a 'patriarchal' administration of justice by the *parens patriae* is but a transposition of the intrafamilial mode of settling conflicts into the political body".[4]

While the concrete application of Weber's typology to traditional China has raised many problems,[5] there is no doubt that the overwhelming majority of Western observers have felt that traditional Chinese justice is "parental" rather than "adjudicative" justice, oriented toward situations rather than individual rights, toward settlement of disputes rather than definition of claims. They have seen it as drawing no sharp or effective distinction between law and morality, private and public law, civil and criminal law. In terms of the distinction made famous by Tönnies,[6] it is the law of a *Gemeinschaft* and not of a *Gesellschaft;* it is based on the primacy of traditional social relationships and not on the primacy of the right-and-duty-bearing individual, on social ties rather than contractual obligations.

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[3] *Id.* 264.

[4] *Id.* 263.

[5] See, e.g., the discussion of Weber's general views on China, of the inadequacy of much of the information available to him, and of the "serious methodological flaw in his approach" in Otto van der Sprenkel, "Max Weber on China" (1964) 3 *History and Theory* 348.

[6] Ferdinand Tönnies, *Gemeinschaft und Gesellschaft* (1887, 8 ed. 1935), transl. and supplemented by C. P. Loomis as Tönnies, *Community and Association* (1955) (American paperback ed., with slight variations, under the title *Community and Society* (1957)). For a brief summary of Tönnies' position see Eugene Kamenka, "*Gemeinschaft* and *Gesellschaft*" (1965) 17 *Political Science* (N.Z.) 3. Tönnies, of course, is concerned with the distinction between feudal-agrarian and modern capitalist society; to apply his categories to traditional China is to contrast Chinese with Western bourgeois law. Weber, on the other hand, was contrasting agrarian China with medieval Europe and stressed that the differences were to be explained in political and not economic terms. We are here not concerned with these typologies for their own sake, but for what they bring out about China, the characteristics they teach us to look for. The contrast between familial and rational-legal ways of settling disputes and defining claims, of which both Weber and Tönnies were extremely conscious, has become more evident and socially relevant even within Western society as the internal structure of corporations, industries, universities, etc., engages our attention as much as the external relations between them. Within these institutions, the internal social ties are often seen as more important than the strict definition of legal rights: in practice, e.g., "industrial law" becomes "industrial relations" rather than

If China was a society with a "patriarchal" legal system, it was also — as Weber was all too well aware — a society with a highly developed and complex bureaucracy and system of administration. The layman is likely to underestimate grossly the volume, the antiquity and the systematic detail of legislation, codification, legal commentary and legal treatises published under the Emperors of China. While the full texts of the earlier "books of punishments" promulgated in the feudal states from 536 B.C. onward and of the penal code of the Han dynasty (promulgated *circa* 200 B.C.) have been lost, we do have the sequence of dynastic penal codes from the T'ang Code of 653 A.D. containing 501 articles, to the Ch'ing (Manchu) Code, compiled in its definitive form in 1740, arranged in 436 sections with a greater number of statutes and about 1,800 sub-statutes. Besides this, there are the legal chapters in the dynastic histories, compendia of law cases, including one of 1211 A.D., and legal sections in various encyclopaedic compilations of governmental institutions. The vast body of Chinese sub-legal rules and customs (clan rules, guild rules and regulations, village and gentry councils, etc.) is difficult to study with precision because of the scattered nature of the material and the informal method of its operation;[7] the literature on formal Chinese law, as Professor Bodde puts it,[8] "is large in quantity, fairly readily available, and covers a longer time span than that of any other present-day political entity". The voluminous codes of each dynasty from the T'ang onward, in particular, present us with a much fuller formal record of legal and social development than any we have for European nations over a comparable period;[9] yet Western

formal-legal adjudication. As I write this article, the Mayor of New York is frankly spending a great deal of his time trying to prevent a number of important matters — illegal strikes, parity between unions, charges of intimidation by Negro militants in a New York school — from coming up for legal determination because this would inevitably polarise the issues and the contending parties and lead to a break-down in social relations, while the Dean of the Columbia School of Law is arguing, on behalf of the University, in the New York Criminal Court that trespass charges against students involved in a sit-in in Columbia should now be dismissed because a university is a family, which must "continue to live and function together as a unit" and thus represents a situation in which "better justice can be achieved privately".

[7] Nevertheless, the attention of Sinologists — who tend in their work on Chinese society to be sociologists and social anthropologists rather than lawyers — has been centred on these sub-legal questions much more than on the formal legal system and quite a bit of useful work has been done. See, e.g., Hu Hsien Chin, *The Common Descent Group in China and Its Function* (Viking Fund, New York, 1938); Hui-chen Wang Liu, *The Traditional Chinese Clan Rules* (Association for Asian Studies, New York, 1959); Kung-chuan Hsiao, *Rural China, Imperial Control in the 19th Century* (Seattle, 1960); J. A. Cohen, "Chinese Mediation on the Eve of Modernization" (1966) 54 *California L.R.* 1201; Franz Michael, "The Role of Law in Traditional, Nationalist and Communist China" (1962) *China Quarterly* 124. Ch'ü, *op. cit. infra* n. 10, devotes a great deal of attention to the social context in which law operates; so does Sybille van der Sprenkel, *Legal Institutions in Manchu China* (1962). Quite understandably, sociologists and anthropologists have tended to follow Weber and Ehrlich in emphasising that the formal (State) laws of a society form only a small portion of the rules or laws by which men live. As we shall see below, in the Chinese case this emphasis is particularly pertinent: see, e.g., L. Pospisil, "Legal Levels and Multiplicity of Legal Systems in Human Societies" (1967) 11 *J. of Conflict Resolution* 2, where the author argues that recognition of a multiplicity of legal systems and levels within Chinese (as within any other) society, and hence of the subjection of the individual to many "laws" of many groups, enables us to turn the confusing and unpredictable pattern of Chinese behaviour into a fascinating interplay of structural units and their jural relationships.

[8] D. Bodde and C. Morris, *Law in Imperial China* (1967) 7.

[9] The best general introductions in English are Bodde and Morris, *op. cit.* and T'ung-tsu Ch'ü, *Law and Society in Traditional China* (Paris and the Hague, 1961). The lost Han Code, to which there are many references in contemporary and later materials, is being studied in A. F. P. Hulsewe, *Remnants on Han Law* (vol. I, Leyden, 1955, second vol. in preparation); the dynasties between Han and T'ang are discussed in Etienne Balazs, *Le Traite juridique du 'Souei-chou'* (Leyden, 1954); the fully extant T'ang Code and commentary, according to Professor Bodde, is currently being translated by Wallace

scholars are only beginning the work of considering these codes in a serious and systematic way, especially as landmarks in a legal development.[10]

The Ch'ing or Manchu Dynasty that conquered China in 1644 and ruled it until 1911 was well aware of the strength and importance of native legal-administrative traditions and followed previous dynasties in promulgating two vast, detailed and systematic compilations of laws, decrees and regulations by which the Empire was to be governed. These were the *Ta Ch'ing Hui Tien* or Collected Institutes of the Great Ch'ing Dynasty — an administrative code or constitutional law laying down and regulating the administrative machinery of the Manchu Empire, first promulgated in 1690 — and the *Ta Ch'ing Lü Li* or Fundamental and Supplementary Laws of the Great Ch'ing Dynasty — a detailed enumeration of all punishable offences, first promulgated in 1647.[11] Both were based on the similar codes of the preceding Ming and earlier dynasties.[12] The *Ta Ch'ing Hui Tien,* unlike most Western constitutions, does not create or guarantee rights; it describes establishments. It is in effect a (highly complex and worked-out) set of orders creating governmental departments, defining their functions and internal organisation and the duties of the officers serving within them. Changes in administrative structure and procedure were recorded in successive revisions (1732, 1764, 1818 and 1899);

S. Johnson of the University of Kansas; a code of the Mongol (Yuan) dynasty has been partly translated and analysed in Paul Ratchnevsky, *Une code des Yuan* (Paris, 1937). A compilation of 144 legal cases made in 1211 has been translated by R. H. van Gulik, *T'ang-yin-pi-shih, Parallel Cases from Under the Pear-tree* (Leyden, 1956); 190 cases from the 19th-century compilation of over 7,600 cases published in Shanghai *circa* 1886 are translated in Bodde and Morris, *op. cit.*, Part II.

[10] Apart from a spate of Chinese historical and academic legal writing accompanying the modernisation of China and the concern with law reform, Japanese scholars in the last 100 years have done a great deal of scholarly and critical work on Chinese law in the dynastic period. The Chinese legal system attracted the interest of Europeans (missionaries, travellers, etc.) in the 16th century and until the end of the 18th century European accounts of Chinese law tended to be favourable. The Ch'ing Codes were translated into Russian by order of Catherine II in the 1780s, and G. T. Staunton's translation of much of the Ch'ing penal code (see n. 11, *infra*) aroused so much interest when it appeared in 1810 that it was translated into French and Italian within two years. A contemporary assessment (Francis Jeffrey, "Penal Code of China" (1810) 16 *Edinburgh Review* 476) noted that the Chinese code was clear and businesslike, and added: "We scarcely know any European code that is at once so copious and so consistent, or that is nearly so free from intricacy, bigotry and fiction." Within a few decades, however, European attitudes to Chinese law became less sympathetic — probably as a result of the growing humanitarian reforms of European penal and criminal practice, of the increasing friction between Chinese judicial practice and Europeans resident in China and, perhaps, of the degeneration of the Ch'ing administration itself (and its increased reliance on savage punishment) as it faced the combined pressure of European intrusion and native rebellion. An excellent account of varying European attitudes and of European, Russian, Chinese and Japanese work on traditional Chinese law may be found in C. H. Peake, "Recent Studies on Chinese Law" (1937) 52 *Political Science Quarterly* 117. An interesting account of Chinese law may also be found in J. H. Wigmore, 1 *Panorama of the World's Legal Systems* (1928) 141-205, where the administrative achievements of Chinese law are stressed — e.g., its use of a system of registration of title to land 150 years before the Torrens system.

[11] The *Ta Ch'ing Hui Tien,* so far as I am aware, has not been translated into English; Aleksei Leontiev's three-volume Russian tranlation appeared in St. Petersburg in 1781-83. G. T. Staunton's *Ta Tsing Leu Lee, being the Fundamental Laws and a Selection from the Supplementary Statutes of the Penal Code of China* (London, 1810) remains the standard (though incomplete) English translation of the *Ta Ch'ing Lü Li;* it may be supplemented by the fuller (but still incomplete) French selection by G. Boulais, *Manuel du code chinois* (Shanghai, 1924). Leontiev's one-volume Russian translation (1770) was done from the 1725 Manchu version of the Ch'ing Code.

[12] The Manchus admitted this frankly in the preface to the 1647 *Ta Ch'ing Lü Li,* which said: "When we contemplate the progressive establishment of our dominions in the Empire, by our royal ancestors and immediate predecessors, we observe that the simplicity of the people originally required but few laws; and that, with the exception of crimes of extraordinary enormity, no punishments were inflicted besides those of the whip and the bamboo. Since, however, the Divine Will has been graciously pleased to entrust us with the administration of the Empire of China, a multiple of judicial proceedings arising

there were tables of statistics, including criminal statistics which show a grand total of 3,987 punishable offences.[13] The offences themselves, however, were defined in the *Ta Ch'ing Lü Li* and it was under this penal code that offences against the *Ta Ch'ing Hui Tien* or departure from its spirit by officials would be dealt with. The administrative code itself is of more interest to the historian of public administration than to the historian of law, who would look most to the Penal Code of each dynasty. The Penal Code, the *Ta Ch'ing Lü Li* (revised in 1723-27; 1740 (a major revision); and thereafter at intervals until 1911), is divided into seven major parts: a general part which sets out definition of terms, general principles of criminal law and punishment, types of punishment and circumstances bearing on the application and severity of punishment, and six specific parts dealing with the Boards (or Departments) of State under which Chinese administration was organised: the Boards of Civil Office, of Revenue, of Ceremonies, of War, of Punishments, and of Public Works. Under these latter headings, the Code covered in turn: irregularities by officials; fiscal offences (for instance non-payment of taxes) by either magistrates or the people; improprieties in official worship, court etiquette, mourning etiquette, and so on; security of the palace, imperial roads and city walls, together with military regulations, protection of frontiers and the postal service; criminal offences generally (as the concern of the Board of Punishments, a sort of Ministry of Justice); and neglect of public works such as buildings, road embankments, and bridges. The crimes coming under the Board of Punishments (articles 254-423 of the 1740 Code) are arranged under the following general headings: violence and theft, homicide, affrays and blows, abusive language, accusations and suits, bribery and "squeeze" (extortion), deception and fraud, sexual violations, miscellaneous offences, arrests and escapes, and trial and imprisonment. These crimes were carefully subdivided into categories according to circumstances bearing on punishment, such as motive, method, and relationship between wrong-doer and victim. (Homicide, for example, was divided into fifteen varieties.) The Code specifically provided for the application of "analogy" — where no statute was precisely applicable, it said, cases should be determined by "an accurate comparison with others which are already provided for and which approach most nearly to those under investigation."[14] Punishments were correction with the lighter and the heavier bamboo (in five degrees of severity in each case), temporary or perpetual banishment, and death by strangulation or decapitation (or, as a measure of exceptional severity, by slicing). A scale of punishments was provided in the Code; another scale showed the rate at which punishment could be commuted to money payment, according to rank. Branding accompanied conviction for stealing, embezzlement of public property or theft of official seals and documents; mutilation of the body preceded decapitation in high treason and parricide. In many respects, however, for instance in the punish-

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out of the various dispositions and irregular passions of mankind in a great and populous nation, have successively occupied our attention. Hence we have suffered much inconvenience from the necessity we have almost constantly been under of either increasing or mitigating the sentences of the magistrates." To overcome this "inconvenience", they turned to the Codes of their predecessors: Staunton, *op. cit. supra* n. 11, preface; also cited in Ohlinger, "Some Leading Principles of Chinese Law" (1909) 8 *Michigan L.R.* 199.

[13] *Cf.* Bodde and Morris, *op. cit. supra n.* 9, at 103. They suggest that the keeping of the number below 4,000 may have been conditioned by a deliberate attempt to conform to the historical tradition that the earliest Chinese legal text, the *Lu Hsing* or "Punishments of Lu", provided for 3,000 offences falling under the five punishments.

[14] Staunton, *op. cit. supra* n. 11 at 43.

ment of larceny, Ch'ing punishments were significantly more humane than those of pre-industrial England.

The structure of the *Ta Ch'ing Lü Li*, as of the codes of preceding dynasties, was formal, complex and sophisticated; the code of a government well aware of the intricacies of administration. It set out general laws, provided for extensions and modifications of these laws, gave cross-references to other provisions in the code, and added comments giving the intention of the law, the procedure to be used in examining different kinds of cases, and certain malpractices specially to be guarded against.[15] Nevertheless, it was very definitely a code of *punishments*. The characteristic form of its provisions was "Whoever does *x* shall be given punishment *y*"; or "Whoever performs *a*, *b* or *c* actions in an *x* (improper) manner shall be given punishment *y*"; or "*a*, *b* or *c* should be done — whoever fails to do them when required, or does them improperly, shall receive punishment *y*".[16] Although the Code dealt with virtually all aspects of a citizen's and an official's life — including marriage, divorce, inheritance and debt — it dealt with all of them *in penal form* and China had no other (civil) code of law. Law was thus concerned with the State interest; there was no conception of civil law as a State matter, of the resolution of disputes or the determination of rights by an impartial legal order. Though the court had power to order restitution or compensation, every suit before a Chinese magistrate had to end in *punishment* (which might only be a reprimand) — either of the person complained of, or of the person complaining for bringing an unsubstantiated charge.[17] The magistrates themselves were not primarily legal officers, but *administrative* officers of the Government, carrying out both judicial and investigatory functions as an integral part of their administrative duties, which included tax collection, supervision of local public works, political and moral exhortation and control of the region. They were not trained in law as a specific discipline, but in the Confucian classics and the principles of "right behaviour", in which moral propriety, *li*, was put above positive law, *fa*. The code itself made *li* legally relevant by punishing offences against specific Confucian proprieties and by linking the severity of punishment, in other cases, to (Confucian) moral reprehensibility.[18] There was no legal profession as such in China and persons before the Court were not represented. In the late Ch'ing, it is true, magistrates appointed (and paid out of their own pocket) "legal secretaries" who would combine a knowledge of the Code with a knowledge of local custom; but these, too, had no formal legal training.[19] The

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[15] For a short analysis of the Code, and some samples of its provisions, see van der Sprenkel, *op. cit. supra* n. 8 at 59-60, 131-32.

[16] *Id.* 60-61.

[17] As Bodde puts it, "the official law always operated in a vertical direction from the State upon the individual, rather than on a horizontal plane directly between two individuals, if a dispute involved two individuals, individual A did not bring a suit directly against individual B. Rather he lodged his complaint with the authorities, who then decided whether or not to prosecute individual B": Bodde and Morris, *op. cit. supra* n. 9 at 4.

[18] The importance of *li* in the psychology of rulers and ruled alike has been stressed by virtually all writers on China: see e.g., Ch'ü, *op. cit. supra* n. 10 at 226-279; J. Escarra, *Le droit chinois* (Peking and Paris, 1936) 9-119; B. Schwartz, "On Attitudes Toward Law in China", in M. Katz (ed.), *Government Under Law and the Individual* (1957) 27-39.

[19] These secretaries were not permitted to hear cases, though they often wrote the legal reports which the *hsien* (district) magistrate prepared for his superiors — see, for an account of their work, T'ung-tsu Ch'ü, *Local Government in China under the Ch'ing* (1962) ch. 6. While the Chinese system provided for review of magisterial decisions by officials higher in the hierarchy, right up to the Emperor himself, judicial review was only one aspect of a general system of administrative review of actions by inferiors. Officials exclusively concerned with law and legal aspects operated only at comparatively high levels of the administrative structure.

atmosphere of Court proceedings, as virtually all observers have stressed, was one of total obeisance before imperial power, and of complete dependence on the judge's specific and often moral assessment of the *particular* case before him[20] — which, of course, opened the road to the corruption and arbitrariness that had certainly become an important feature of late Ch'ing administration.

The *Ta Ch'ing Lü Li* to rulers and subjects alike, then, was not the framework of law around which ordinary civil life was organised; on the contrary, it was the punitive State law which intervenes in civil life when other norms and procedures have failed. Its concern was not with the rights of individuals or their claims for their own sake, but with the social order and the interests of the State — individuals invoked the courts and the law at their peril.[21] In place of a framework of law governing all civil relations, the State supported and protected the hierarchical organisation of civil life — the extended family with the strong *potestas* inherent in its head, the clan organisation with its head or council of elders, the village council, the guild council, the respect due to and accorded to a wise, old or educated member of the community. (The *pao-chia system* of crime-reporting and the *li-chia* system for tax collection and distribution of grain in times of need reinforced these hierarchies by throwing on family elders or other representatives of groups the responsibility of rooting out crime in their midst, seeing that taxes were paid, registration of citizens and property and other information, and criminal answerability for failure to prevent or report misconduct by those under them.)[22]

"If the people be led by laws," Confucius wrote in a passage every educated Chinese knows by heart, "and uniformity is sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by *li*, they will have a sense of shame and, moreover, will become good." The notion that strong reliance on *fa* or positive law is evidence of a breakdown in the social order, of a lack of harmony between the State and society, is deeply ingrained in traditional Chinese thinking. So is the notion that social harmony is threatened, rather than promoted, by emphasis on the individual as a separate, walled-in unit, having "his" rights. The (morally) superior man, guided by *li*, will be ready to adjust his conception of his rights to the

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[20] Confucian writings abound in statements like, "It is the judgment and not the law which makes justice", "The ancient kings deliberated on circumstances in deciding".

[21] The K'ang-hsi Emperor (one of the best-known of the early Ch'ing emperors) suggested, in reply to a memorial, that this was deliberate policy: "Law-suits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the law-suits of the other half. I desire therefore that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate" (cited in S. van der Sprenkel, *op. cit. supra* n. 8 at 77).

[22] Scholars disagree about the extent of mediation and sub-legal adjudication in China under the Ch'ing dynasty. Some stress that rural leaders and elders, etc. were encouraged to settle disputes and that even magistrates might remove a case from their own jurisdiction and encourage the appointment of informal mediators. Others draw attention to a passage in the Official Commentary to the *Ta Ch'ing Lü Li* limiting the authority of rural leaders and elders to mediation in petty matters relating to domestic relations and real property: see Cohen, *supra* n.8, at 1 09-226. Some of the disagreement is due to the lack of 19th century sociological investigations that would provide satisfactory empirical evidence, but the dispute may also reflect vacillations in Government policy. Karl Wittfogel, *Oriental Despotism* (rev. paperback ed. 1963) 108-126, argues that the dynastic governments were anxious to control everything that was politically relevant, but recognised a "law of diminishing administrative returns" and permitted a "beggar's democracy" to reign in the politically irrelevant areas — including minor civil disputes, etc.

needs and demands of others, to avoid hostile confrontation, to prove his moral superiority by being prepared to yield *(jang)*. A social ethic oriented towards mediation and compromise, toward recognising the extent to which another man's emotions and dignity are involved in his claim rather than toward the abstract question of the *justice* of his claim, is likely to avoid any clear, uncompromising definition of rights or claims *ab initio*. Where Western legal procedure tends to depersonalise claims in order to bring out more sharply the question at issue, Chinese tradition personalises all claims, seeing them in the context of a human relationship. It thus rejects the notion that a sharp legal distinction or a formal legal pronouncement can by itself resolve the dispute between the parties by re-establishing harmony and mutual respect.[23] Ch'ing law, like the law of preceding dynasties, both reflected and reinforced these attitudes. In treating law as a matter of punishments, it maintained the conception of law as an *external* sanction, the monopolistic interest of the State and not the guarantee of rights or the *main* basis of civil order, as it affected the citizen. In particularising its application, it strengthened the primacy of morality and the psychology of mediation. The tension between these two implicit attitudes was bridged, as long as the Government kept popular confidence, by the conception of the Emperor (and hence of his magistrate) as "the father of the people", who "was accordingly justified in choosing appropriate and necessary methods of discipline".[24]

LAW AND THE KUOMINTANG

The 19th century, which saw the ever-increasing penetration of European power and European commercial activity into China and the consequent disintegration of Ch'ing administration, brought forth a direct confrontation between Chinese and European law. As Peake puts it:

> An outstanding historic development, conditioning the attitude toward and interest in Chinese law on the part of both the Chinese and Westerners, was the rise of the extraterritorial regime after 1840. This emerged, in the ultimate analysis, out of the contrasting conceptions in the West and in China of the function of law in society. The conflict became acute in homicide cases which resulted from the contacts between foreigners and Chinese at Canton in the pre-treaty days. What the Westerners found especially repugnant in Chinese law was not only the application of the death penalty in a clear case of homicide, but also the application on the

[23] The notion that written laws and defined rights, on the contrary, will polarise human relationships and intensify disputes forms the substance of the famous criticism by a high dignitary of a neighbouring feudal state of the action of Tzu-ch'an, Prime Minister of the State of Cheng, who in 536 B.C. ordered a penal code inscribed on a set of bronze vessels. The objection, reported in the *Tso chuan* history probably compiled in the 3rd century B.C., ran: "When the people know what the penalties are, they lose their fear of authority and acquire a contentiousness which causes them to make their appeal to the written words, on the chance that this will bring them success. . . . As soon as the people know the grounds on which to conduct disputation, they will reject the accepted ways of behaviour (*li*) and make their appeal to the written word, arguing to the last over the tip of an awl or knife. Disorderly litigations will multiply and bribery will become current. By the end of your era, Cheng will be ruined. I have heard it said that a state which is about to perish is sure to have many governmental regulations": cited, in a modified version of the Legge translation, in Bodde and Morris, *op. cit. supra* n.9 at 16-17.

[24] William S. H. Hung, *Outlines of Modern Chinese Law* (Shanghai, 1934, photographic reprint, Taipei?, 1966) 5. Dr. Hung adds: "Scholars, when found to be guilty of minor offences, were punished by being caned on their hands in the same way as students are punished by schoolteachers when they are found not to be behaving in a proper manner."

part of the Chinese officials of the highly developed doctrine of responsibility, which held that the captain of a vessel, or an official, was liable for the act of a subordinate, and that all the members of a particular nationality were responsible for the offences committed by any one among them. This concept seemed to the individualized Westerner, and his equally individualized law, highly unreasonable. Likewise abhorrent to the Westerner, whose law was only then passing through a process of humanization accompanied by mitigation of punishments and improvement of prisons, were the penal character of all Chinese law both civil and criminal, the application of torture during trial, the unsanitary conditions obtaining in the prisons, and the cruel treatment of prisoners. The attitudes engendered in this conflict, which led to the successful establishment of extraterritoriality, created in the West a general conception of Chinese law as a type which, if not barbaric, was at best primitive or undeveloped.[25]

The Chinese themselves, of course — or at least their rulers, administrators and intellectuals — were affected by this attitude. The humiliations imposed upon China by the foreigner and the internal unrest symbolised by the T'ai-p'ing T'ien-kuo rebellion of 1850-64 drove home the need for modernisation if China was to regain internal tranquillity and respect among nations; the spread of European ideas, including those of Rousseau and Locke, did affect the Chinese intellectual's conception of government and law. Educated Chinese began to visit Europe and Japan (which was, for them, the bridge to Europe); the Ch'ing, already a tottering regime in 1902, began a revision of the *Ta Ch'ing Lü Li* that went well beyond the traditional periodic review and strove to bring Chinese law in line with at least some of the basic Western conceptions.[26] Some of the more barbarous punishments and the use of torture were abolished; a Law Codification Commission was established (in 1904) to draft new codes of law, including civil law, civil procedure and bankruptcy; it was joined by European and Japanese advisers and studied European and Japanese codes (the latter, in turn, having themselves been the product of an attempt to reform Asian law on the basis of Western models). In 1907, a European-style Judicature Act was promulgated, separating judicial organs and functions from administrative organs and functions. It provided for a hierarchy of courts with procuracies attached to each grade, for a Supreme Court with binding authority and power to interpret laws and for professional examinations qualifying persons with university degrees to become judges or procurators.[27]

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[25] Peake, *supra* n. 10 at 118.

[26] The movement for modernisation and reform, though resisted by the Empress Dowager, had been given additional impetus by China's defeat in the Sino-Japanese war of 1895 and by Japan's exaction of extra-territorial status for her own citizens; on the legal side it was specifically prompted by the declared readiness of the European powers to put an end to their extra-territorial privileges once China satisfied them that her laws and legal administration were not repugnant to "civilised standards". Thus the revised commercial treaty concluded with Great Britain in 1902 contained the following provision: "China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations . . . Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extra-territorial rights when she is satisfied that the state of the Chinese laws, the arrangements for their administration and other considerations, warrant her in so doing." The commercial treaties concluded with the U.S.A. and Japan the following year contained a similar provision. See Tien-Hsi Cheng, "The Development and Reform of Chinese Law" (1948) 1 *Current Legal Problems* 170 at 177.

[27] The traditional examinations for the Chinese civil service, which did not distinguish legal from other civil officers, were abolished in 1905; under the 1907 provisions, a degree from a college of law or political science was a prerequisite for taking the first judges' or procurators' examination and successful candidates had to serve two years as probationary

The process of legal reform was greatly accelerated by the fall of the Ch'ing Dynasty in 1911 and the Proclamation of the Republic. The Law Codification Commission established under the Ch'ing continued its work (one of its members, Yuan Shih-kai, had become the first President of the Republic); the draft criminal code it had prepared under the Ch'ing was enacted as the Provisional Criminal Code of 1912 (subsequently replaced by the Criminal Codes of 1928 and 1935). This code consciously drew on the Criminal Codes of Hungary (1878), Germany (1871), Holland (1881), Italy (1887), Egypt (1904), Siam (1908) and Japan (1907). A Provisional Constitution, containing an American-style Bill of Rights, was promulgated in 1912 and became the subject of frequent revisions.[28] Most of the government's energies, however, were to be absorbed, in the next 15 years, in the suppression of bandits and war-lords, and the creation of conditions for a central administration, finally established in Nanking in 1927. Between 1929 and 1935, the Government brought to fruition the work on various drafts and provisional codes by enacting what came to be known as the Six Codes: the Organic Law, the Commercial Law, the Civil Code, the Criminal Code, the Civil Code of Procedure and the Criminal Code of Procedure. Other laws relating to specific branches of commerce and commercial activity — bankruptcy, company, insurance — followed. The Civil Code, largely based on the Swiss Code of 1907, won especial praise from Roscoe Pound when he acted as adviser to the (Nationalist) Chinese Ministry of Justice in Nanking in 1946. So did the Code of Civil Procedure (based on the Austrian Code), for its "advanced, flexible and simple" character.[29]

Chinese law in the period of the Republic, then, was becoming Western law, based on Western models and drafted with the help of eminent Western jurists. The courts were organised on the French model, except that China followed the Anglo-American principle of separating the judiciary from the executive. The Chinese procurator combined features drawn from the Anglo-American system and from the French: he was a cross between an examining magistrate, a grand jury and a public prosecutor on the one hand, and a *juge d'instruction* on the other. The Chinese Civil Code belonged to the family of the Code Napoleon, the German and the Swiss Code; the Criminal Code abolished over 2,000 provisions of the old dynastic codes, overthrew the principle of collective and substitutional responsibility and followed the Anglo-American tradition of presuming innocence and rejecting analogy. The concept of the "rule of law", and the elaboration of an adjudicative rather than administrative

judges or procurators at District Court level before being able to take the second examination and go on to permanent and higher positions. One of the architects of the Act and a leading member of the Law Codification Commission, the well-known Chinese lawyer and diplomatic representative of the Chinese Court in America, Dr. Wu Ting-fang, was himself a member of the English Bar.

[28] For a discussion of the various Nationalist Constitutions in the first 15 years of the Republic, see Tseng Yu-hao, *Modern Chinese Legal and Political Philosophy* (Shanghai, 1930) 134-61. The Supreme Court, after the fall of the Ch'ing, swiftly and boldly assumed the functions of indirect legislation in the spirit of legal reform; one of its earliest decisions laid down that "civil cases shall be decided according to the provisions of law, in the absence of such provisions according to customs and, in the absence of customs, according to general principles": Second Year of the Republic (1913) A.C. 64, cited in Cheng, *supra* n.26 at 183. The Court and its functions were subsequently absorbed in the Judicial Yuan, one of the five departments of government established by the Republic's Constitution.

[29] Roscoe Pound, "Progress of the Law in China" (1948) 23 *Wash. L.R. and State Bar J.* 345 at 354. See also *id.*, "Comparative Law and History as Bases of Chinese Law" (1948) 61 *Harv. L.R.* 749.

legal system, made some headway during the period of Nationalistic rule, but their impact was seriously impeded by the unsettled condition of the country as well as by the patently authoritarian strains in the thought of Sun Yat-sen and of his successor, Chiang Kai-shek. From 1911 until its expulsion from the mainland of China in 1949, the Nationalist Government was primarily engaged in trying to weld China into a single unified state (the struggle against war-lordism and then against the Communists), and to expel foreign invasion (the struggle against the Japanese). Nationalist leaders, unlike liberal reformers, saw China's problem as one of *mobilising* the people, of forcing or inspiring them to seek the national interest.[30] When Chiang Kai-shek, in his *China's Destiny*, wrote of *fa-chih* — the respect for law — he was not thinking primarily of the rights of the individual or of the rule of law over governments, he was thinking of the individual's subordination to the social interest as expressed in law. The people, on the other hand, retained much of their suspicion of both government and law, as well as attitudes and informal institutions designed to settle conflicts and to make social adjustments at a sub-judicial level. Over much of the country, the government's writ did not run; in war-time conditions, corruption and arbitrary military justice were more common than orderly judicial procedure. Before the people even had time to consider the impact of the new laws on their traditional ways of dealing with inheritance, social and familial relations, divorce and commerce, law schools were being evacuated, courts burned, and the centres of government moved away from the Japanese. The restoration of the Republican Government in China at the end of the Second World War was followed by its overthrow by the Communists less than four years later.[31]

MILITANT COMMUNISM AND LAW IN THE "RED AREAS"

Soviet Russian Communism came to power in a single coup in the capital, based primarily on industrial workers; Chinese Communism came to power in the countryside, over an extended period during which it welded groups of rebellious and displaced peasants into an Army of Liberation sponsoring local peasant soviets and a rebel Soviet Republic. From 1921 — when a small group of intellectuals met in Shanghai in what was later dubbed "the First National Congress of the Communist Party of China" — until 1927, the Party followed the Comintern-sponsored policy of united front with the Kuomintang, but it also actively organised revolutionary peasants in Hunan, Hai-lu-feng, Kiangsi, Fukien and other provinces. In 1926-27, when increasing tension culminated in Chiang Kai-shek's repudiation of the united front with the Communists, Communist soviets were set up in these areas, acting as local rebel governments,

[30] In a very interesting comment on militarism and political disintegration in Republican China, Wang Gungwu has argued that the failure of the warlords and the success, in turn, of the Kuomintang and the Chinese Communist Party, showed that only a party using ideology to mobilise the nation and inculcate nationalism had real prospects of success in twentieth century China: "Comments by Wang Gungwu" in Ping-ti Ho and Tang Tsou (eds.), 1 *China in Crisis* (1968) 264.

[31] The legal reforms and provisions of the Nationalist Republic have been maintained by the Government of the Republic of China in Taiwan. Despite a certain continuing authoritarianism and a re-emphasis on Confucian values in reaction to Communism, this Government has, on the whole, amended and revised its laws in an increasingly Western spirit. There is an official English translation of the Constitution, Civil and Criminal Codes, and the Administrative, Military and other Laws now in force (including the Temporary Provisions Effective During the Period of Communist Rebellion): *A Compilation of the Laws of the Republic of China* (2 vols., Taipei, 1967).

introducing social and economic reforms, suppressing landlords and "counter-revolutionaries". To these Soviets, as to members of the Chinese Communist Party (CCP) generally, law was what it was to Lenin — "the programme of the Party uttered in the language of power", the will of the new ruling class backed by physical sanctions, a means of propaganda and of social transformation. Between 1926 and 1931, at the time that the Kuomintang Government was undertaking its most important programme of (Western-style) law codification, the Communist soviets were establishing and enforcing their own system of "revolutionary justice", combining simple decrees with popular terror. They issued decrees and regulations establishing land reforms, reducing interest rates, prohibiting gambling and opium-smoking and safeguarding the rights of women; they initiated campaigns against "local bullies, bad gentry and law-breaking landlords". Law, for them, was intimately connected with military and revolutionary activity, with class struggle rather than with the foundations of a stable society, with mobilisation rather than the settled life.[32] Justice, in this period, was almost entirely popular and informal. Landlords and other "counterrevolutionaries" were tried by special tribunals (*ad hoc* courts or gatherings) which often inflicted corporal punishment on the accused, sentenced them to imprisonment or public execution, and arranged humiliating parades of the accused as well as "struggle meetings". It was later admitted that this period saw many abuses and excesses, including arbitrary arrest, corporal punishment and the use of torture to obtain confessions.[33] Judicial procedure, crude as it may have been, was on the whole regarded as a weapon against counterrevolutionaries; disputes among "loyal comrades" or genuine peasants and workers were handled as matters for informal mediation, with military leaders and party cadres replacing the traditional elder.

In November, 1931, the local soviets of the "red areas" met in the first National Congress of Soviets and agreed to proclaim a centralised Chinese Soviet Republic, pledged to "liberate" the remainder of China. They adopted a Constitution and established a central government, which proceeded to enact laws in a more formal and systematic way and to organise a provisional but formal judicial system. Basic Laws were passed: the Land Law of 1931, the Labour Law of 1931, Marriage Regulations (1931) and a Marriage Law (1934), as well as Regulations for Punishing Counterrevolutionaries (1934). The structure of government and the judicial system were defined in the Temporary Regulations on the Organisation and Procedure of Judicial Depart-

[32] In the Soviet Union, this emphasis was gradually modified after 1922: in Communist China it has remained very strong. The following passage from a text-book of criminal law published in Peking in 1957, while having its roots in classical (and Soviet) Marxism, emphasises coercion and military parallels in a way quite unusual in Soviet writing for many years: "Criminal law is an instrument for the protection of a given ruling class and is a weapon of the ruling class for the conduct of the class struggle. . . . As a weapon of class struggle, criminal law, like the army, is used by the ruling class as a visible coercive force to suppress its class enemies so that they will not resist or destroy its ruling order. It is a form of state consciousness compulsorily and openly enforced by the ruling class with arms": *Chung-hua Jen-min Kung-ho-kuo Hsin-fa Tsung-tse Chiang-i* (Lectures on the General Principles of Criminal Law in the People's Republic of China) (1957). An English translation has been issued by the Joint Publication Research Service, Washington, Doc. No. 13331 (30th March, 1962).

[33] These were the "mistakes" enumerated in Instruction No. 6 of December, 1931, issued by the Central Executive Committee of the Chinese Soviet Republic formed in that year. Mao Tse-tung, in his writings from the Hunan period, admitted bluntly that "it was necessary to bring about a brief reign of terror in every rural area" (Mao, 1 *Selected Works* (1954) 26-27); and justified these mistakes with the slogans that have subsequently become so well known — a revolution is not a dinner party and a wrong cannot be righted without the proper limits being exceeded.

ments (1932), the Organic Law of Local Soviets (1933) and the Organic Law of the Central Soviet (1934).[34] At the formal apex of the judicial system, stood a Supreme Court composed of three chambers — civil, criminal and military — and including procurators as *ex officio members*. Below this apex, the People's Commissariat of Justice was charged with creating judicial departments at provincial, county, district and municipal level, composed of a director, a deputy director, and several judges and procurators, all of them direct employees of the Commissariat of Justice. These departments were charged both with studying and discussing administrative and judicial problems in their areas by forming special judicial committees, and with setting up criminal and civil courts, including circuit courts where they were needed. These courts sat under a judge appointed by the department, who was aided by two elected lay assessors. There was no jury. Apart from these "People's Courts", the separate military courts, and the special labour courts formed by the municipal judicial departments to handle violations of the labour law, the Chinese soviets established specific provisions for special popular trials of an educative-political nature through the Comrades' Adjudication Committees and Mass Adjudication Meetings. These committees and meetings, organised on the spot in various enterprises and organisations by the Workers' and Peasants' Inspectorate, dealt especially with questions of "labour discipline", comradely relations, and the like. In 1933, in connection with the politically-charged Land Investigation Movement, the circuit courts were used as the base for a more massive politico-educational campaign through mass trials *(Kung-shen)*. These, held mainly in the villages, were arranged with great attention to publicity and mass effect: the holding of the trial was widely publicised in advance, a crowd formed, the accused was brought before it to answer charges from any one present who cared to make them, inflammatory political speeches were made, the verdict was carried by acclamation and sentence was carried out immediately, in the presence of the excited crowd.[35] In counterrevolutionary cases — and the term "counterrevolutionary" had very wide application, especially at this stage — the Organs of the State Political Security Bureau had sole authority to make arrests, conduct preliminary investigations (modelled on Soviet Russian procedure) and to initiate prosecutions; formally, however, the Courts still held the sole authority to try and decide cases. A death sentence, "except under extraordinary conditions"[36] had to be approved by a superior court. In April, 1934, with the increasing threat of counterrevolution, greater powers of arrest, trial and sentence (including power to impose and carry out the death penalty) were given to local departments of the Commissariat of Justice and to special committees charged with suppressing counterrevolution. The State Political Security Bureau was given power to take emergency measures against enemy agents and counterrevolutionaries in border areas or at the front. These provisions were contained in the Judicial Procedure Law of 1934, which also provided that all cases were subject to one judicial appeal and no more unless the procurator protested

[34] The Chinese texts of these, as compiled under the direction of General Ch'en Ch'eng, are available in *Chih-fei fan-tung wen-chien hui-pien* (A Collection of Red Bandit Reactionary Documents) (China, 1935, repr. in 6 vols. in Taipei, 1960). For an introductory discussion of Communist legal development in the pre-1949 period of local and centralised soviets, see Shao-chuan Leng, *Justice in Communist China* (1967) 1-26.

[35] For documentation see *id.* 8n.

[36] Various directives of the period provided that "at times of uprising" the revolutionary masses had the right to take direct action against "local bullies, landlords and others".

after the second hearing. In the same year, the Regulations for Punishing Counterrevolutionaries listed a wide range of crimes as offences against the rule of the Soviets and their political and economic structure and made possible their further extension by providing, in Article 38, that "all the counterrevolutionary crimes not included in these Regulations shall be punished according to similar crimes specified in these Regulations". Throughout this period, criminal provisions distinguished, for the purposes of punishment, between offenders drawn from counterrevolutionary elements (former landlords, gentry, rich peasants and capitalists) and the toiling masses, workers and peasants — the former being placed with instigators of crimes and principal offenders as persons to be punished severely, the latter being likened to accomplices who should be treated leniently.[37] It was in connection with this group of offenders from the toiling masses, that the CCP in this period began developing the labour reform institutions for the re-education of prisoners through toil, and to use conciliation as a means of settling minor criminal offences as well as civil disputes.

In 1937, the CCP and its rebel Chinese Soviet Republic concluded a new anti-Japanese united front agreement with the Nationalist Government. The Chinese Soviet Republic was formally dissolved, and Communist-held territory, by now confined to the border regions of Shensi-Kansu-Ninghsia (SKN) and Shansi-Chahar-Hopei (SCH), was placed under (Communist-led) SKN and SCH Border Region Governments, responsible to the Nationalist Central Government and formally within the framework of the (Nationalist) Republic's laws and courts. CCP policy in this period (the so-called "Yenan period") became one of comparative moderation. Some Nationalist laws — for instance against opium, banditry and treason — were adopted and implemented; the High Court of the Border Regions was nominally under the jurisdiction of the Nationalist Supreme Court of China. In practice, however, this High Court became the highest organ supervising legal affairs in the border regions, and the courts organised under it were similar in organisation to the courts of the Soviet Republic. Attached to courts at all levels were procurators; judges were appointed by the People's Political Council of the Border Region and given the task of punishing "traitors, bandits and other criminals harmful to the interests of the Anti-Japanese United Front and the democratic system."[38] An incipient tendency to judicial independence, encouraged by Nationalist legal provisions, was dealt with firmly in the Communist border regions: in 1943 the special commissioner of a prefecture was made *ex officio* the head of that prefecture's branch of the High Court, and the country magistrate (an administrative official) the head of the local court or county justice bureau (the latter having replaced the departments of the People's Commissariat of Justice). In civil matters, the emphasis was still upon informal adjudication, but in criminal matters there was some increased emphasis upon the observance of formal legality and procedure. Judicial and public security organs were entitled to arrest only where there was sufficient evidence to warrant arrest

[37] See, e.g., Instruction No. 6 of 1931, Art. 7 and Regulations for Punishing Counterrevolutionaries (1934), Arts. 34 and 35. The formal judgments of the Provisional Supreme Court at that period normally described the social origins of the accused.

[38] The main legal enactments and directives of this period, i.e., the legal provisions of the Border Region Governments, have been collected and published (in Chinese) under CCP auspices: *Hsien-hsing fa-ling hui-chi* (Compendium of Current Laws and Directives) (1945); *Shan-Kan-Ning pien-ch'u ts'an-i-hui wen-hsien hui-chi* (Compendium of Documents of the People's Political Council of the SKN Border Region) (Peking, 1958); and

and were required to act strictly according to legal procedures.[39] "Democratic" features of the legal system, however, were emphasised much more than legality or the safeguarding of rights: trials were to be informal and uncomplicated, and — above all — public; torture and corporal punishment were once more banned; conviction was to be based on evidence rather than confession. A system of appeals from the local to the High Court was maintained; no capital sentence could be carried out without automatic review by a higher court and confirmation by the Chairman of the Border Region Government. While a great many regulations — dealing with such matters as rent, debt, interest, corruption, and land ownership — were issued during this period, and while draft codes of civil and criminal law and procedure were called for, the Border Region Governments did not create or adopt a systematic structure of law. At the same time, the Yenan period saw an increase in mass trials, on-the-spot trials and circuit trials, all based on earlier practice in the soviet period, and designed to bring the judicial officials into direct contact with the masses. The system of assessors was also continued: these were sometimes selected by invitation by the judicial organs, sometimes directly elected by the members of trade unions or military units, and sometimes appointed by a social or economic organisation concerned in the case: for example by the relevant trade union in a labour discipline matter, by a women's organisation in a domestic matter, or by peasants' associations in a land dispute. In civil matters and minor criminal matters, the Border Region Governments and the CCP encouraged still further conciliation and mediation (either as part of the court hearing or by the parties outside the court), especially in the 1942 Regulations on Conciliation Work issued in the SKN Border Region, and the 1944 Directives on the same subject issued in the SCH Border Region. A mass movement to popularise conciliation was inaugurated in both areas, under the slogan that conciliation strengthened the unity of the people, decreased the number of lawsuits and increased agricultural production.

In more major criminal matters, the CCP extended earlier attempts at reformation and re-education into a deliberate public policy of magnanimity toward those willing to repent. Article 7 of the Programme of Administration of the SKN Border Region, adopted on May 1, 1941, read:

> With regard to traitors, except those resolutely unwilling to repent, a policy of magnanimity should be adopted towards them irrespective of their past history. Efforts should be made to convert them and to provide them with a future in politics and in livelihood. They should not be wantonly killed, manhandled, forced to give themselves up, or coerced into writing statements of repentance. Such elements as renegades and anti-Communists who plot wrecking activities in the Border Region should be treated similarly.[40]

For ordinary criminals, too, the emphasis was on political re-education and corrective labour.

Shan-Kan-Ning pien-ch'u cheng-ts'e t'iao-li hui-chi (Compendium of Policies and Regulations of the SKN Border Region) (Yenan, 1944). For a general description of judicial work in this period by a leading Communist jurist of the time, actively involved in civil and criminal cases, see Ma Hsi-wu's well-known article (in Chinese), "The People's Judicial Work in the SKN Border Region During the State of the New Democratic Revolution" (1955) *Cheng-fa yen-chiu*, No. 1 (Studies in Political Science and Law, Peking).

[39] Art. 8 of the 1942 Regulations on the Protection of Civil and Property Rights, SKN Border Region.

[40] *Shan-Kan-Ning pien-ch'u etc.* (*Supra*, n.38) 104, as transl. in Leng, *op. cit. supra* n.34 at 13.

The "Yenan period" of Chinese Communism from 1935 to 1945, then, despite the periods of comparative co-existence with the Kuomintang, remained in essence a period of grass-roots revolutionary activity, continuing and developing the judicial and political attitudes shaped in the period of the local soviet and the central Soviet republic. The characteristic features of Chinese Communist legal administration — the welding together of political, administrative and judicial interests through judicial committees operating at all levels of the court hierarchy and associating Party and government personnel, including the procurators, with court problems and decisions; the use of trials as forms of propaganda; the involvement of the masses in judicial decision through elected assessors and mass and on-the-spot trials, the fostering of conciliation under Party guidance; the emphasis on repentance and reform — were taking ever more definite shape and represented an interesting blend of revolutionary Marxist and popular traditional Chinese attitudes and concerns. Vacillations in policy were primarily reflections of the external situation, reflections of the shifts from militant rebellion to united front policies and of the changes in the security of the "red areas". Beneath this, however, lay a more fundamental "contradiction" — a marked tension between the extreme politicalisation and popularisation of law, openly proclaimed, on the one hand, and a concern with formal legality, the formation of legal cadres and the professionalisation of legal work on the other. This, we shall see, is a tension that has not yet been resolved.

With Allied victory in World War II, the "Yenan period" and the united front with the Kuomintang came to an end. The CCP set out to conquer China. This campaign in many ways reinforced the contradiction we have noted: it led, on the one hand, to a renewed wave of violence against "counterrevolutionaries" and landlords in newly-occupied areas; it led, on the other, to Communist assurances that the Party stood for the rule of law and welcomed all those ready to join in the new democratic order. Thus, in April 1946, Lin Po-ch'u in a report to the People's Political Council of the SKN Border Region stressed the importance of judicial independence and of prosecuting citizens regardless of their official or Party position for any illegal acts they might commit.[41] The policy regarding "war criminals, counterrevolutionaries and enemy agents" was "to punish the principal offenders, to pardon those forced to join in counterrevolutionary activities and to reward those who have established merit". But no leniency was to be shown to major offenders; no statute of limitations was to apply to them. In fact, the campaign against landlords and counterrevolutionary elements between 1945 and 1949 (and later) again revived the early *ad hoc* special tribunals and mass trials, making full use of popular justice, "struggle meetings", and accusation rallies. In 1946, the number of such meetings and trials ran into hundreds of thousands, with millions of people taking part; violence and terror were used freely, torture, corporal punishment, manhandling by the crowds and on-the-spot public executions were frequent occurrences. As more and more areas came under Communist control during the 1945-9 civil war, "people's courts" were set up in the "liberated areas" on a regional basis, at county or municipal, provincial and regional level. Each court had, as before, a judicial committee attached to it. Composed of judges, administrative officials, party cadres and representatives of popular organisations, it discussed and decided important

[41] See Ma Hsi-wu, *supra* n.38 at 14.

cases and acted as the main vehicle of Party control. The "experienced" cadres of the Border Regions were in heavy demand to fill judicial and Party posts in the "liberated" areas; the enormous shortage of judicial personnel forced the Communists to retain some former Kuomintang officials, especially in the cities, and to vest in one and the same person chairmanship of the local people's government and of the local people's court.

In February, 1949, with complete control of the mainland in sight, the Central Committee of the CCP declared that "the work of the people's judiciary should not be based on the Kuomintang's Six Codes but should be based on new people's laws". Two months later a directive of the North China Government repeated that the Six Codes and all reactionary laws "designed to preserve the domination of the feudal landlords, compradors and bureaucratic bourgeoisie and to suppress the resistance of the broad masses of the people" were abolished.[42] Communist laws, decrees and codes were recognised to be few and inadequate, and the People's Courts were directed to guide themselves by the programmes, laws, orders, regulations and resolutions promulgated by the People's Government and the People's Liberation Army, as well as by the policy embodied in the New Democracy.[43] Regional authorities in fact issued directives and provisional regulations which provided some form of legal order for the "liberated areas", covering policy and organisational matters, public security and judicial work, regulating court procedure and prohibiting torture, indiscriminate killing, etc. In Shanghai, for instance, the Municipal People's Court on August 11, 1949, promulgated provisional regulations on civil and criminal procedure which contained provisions for mediation, appeal, public trial, lay assessors, the right of defence and disqualification of judicial officials on ground of interest, etc. Article 10 of the Regulations stipulated that "in rendering judgment special attention must be given to the collection of all possible evidence and the combination of investigative and analytic work on the case".[44] More general regulations on judicial procedure and general principles of law published by the North China Government pointed out that punishment was to educate and reform criminals and not to seek revenge nor to humiliate and torture the offenders. All death sentences imposed by the lower courts were to be sent to the North China Court for review and to the chairman of the North China Government for final approval.[45] In the hour of victory, moderation and the rule of law were re-emphasised, in words at least. The People's Liberation Army in April, 1949, promised protection to the life and property of every individual except war criminals, and to all privately-owned factories, stores, banks, warehouses, vessels, wharves, and the like, except those "controlled by bureaucratic capital".[46] Another policy directive issued by the North China People's Government stated:

> The people shall enjoy without interference freedom of speech, publication, assembly, association, belief, travel, and change of domicile; they shall also have guarantees for the safety and freedom of their person. Except judicial and public security organs, carrying out their duties according

[42] North China People's Government 1 *Fa-ling hui-pien* (Collection of Laws and Directives) (Peking, 1949) at 181; *cf.* Leng, *op. cit. supra* n.34 at 23.

[43] Directive of the Central Committee of the CCP of February, 1949 and Instruction of the People's Government of North China of April 1, 1949, cited by Leng, *op. et loc. cit.*

[44] *Id.* 24.

[45] 1 *Fa-ling hui-pien* (*supra* n.42) at 184.

[46] See Leng, *op. et loc. cit. supra* n.44.

to the law, no other organs, military units, groups or individuals may arrest, imprison, try or punish any person.[47]

Before the year had ended, the North China People's Government had given way to the Chinese People's Republic, controlling all of China except Taiwan and a few off-shore islands.

(Part II of this article, dealing with law in the Chinese People's Republic 1949- , and reviewing the general significance of legal developments in China, will appear in the next issue of this Review.)

[47] 1 *Fa-ling hui-pien* (*supra* n.42) at 7.