



Winter 1983

Western Law and Communist Dictatorship

David F. Forte

Cleveland State University, d.forte@csuohio.edu

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Jurisprudence Commons](#), and the [Law and Politics Commons](#)

Repository Citation

Forte, David F, "Western Law and Communist Dictatorship" (1983). *Law Faculty Articles and Essays*. 18.
https://engagedscholarship.csuohio.edu/fac_articles/18

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

Western Law and Communist Dictatorship

By
David F. Forte*

CONTENTS

| | Page |
|---|------|
| I. Introduction | 136 |
| II. The Russian Imperial Heritage | 138 |
| A. The Imperial Codes | 138 |
| B. Attempts at Westernization | 143 |
| III. The Chinese Imperial Heritage | 147 |
| A. The Imperial Codes | 147 |
| B. Attempts at Westernization | 156 |
| IV. Interregnum | 159 |
| A. The Russian Provisional Government | 159 |
| B. The Chinese Republic | 160 |
| V. The Soviet Choice | 164 |
| A. War Communism | 164 |
| B. The N.E.P. | 167 |
| C. The Marxist Phase | 171 |
| D. Stalin's Intervention | 176 |
| E. The Modern Codes | 182 |
| VI. The Chinese Communist Choice | 190 |
| A. Revolutionary Communism | 190 |
| B. The Regime in Power | 193 |
| C. Modernization | 195 |
| D. The Maoist Phase | 200 |

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. A.B., Harvard; M.A., University of Manchester; Ph.D., University of Toronto; J.D., Columbia University School of Law. The research leading to this paper was funded in part by grants from the Cleveland-Marshall Fund and by the Liberty Fund. I am grateful to the Institute for Humane Studies which provided me with the opportunity for the final drafting of this article. I am indebted to the many scholars in the field who aided me in the broad survey of law which comprises the paper. In particular, I am thankful for the comments and assistance of Professors John Hazard, R. Randle Edwards, Jerome Cohen, John Barton, William Jones, Victor Li, George Ginsburgs, and F. J. Feldburgge. The conclusions herein reached are those of the author. I am also grateful for the research assistance of Monica Williams, third-year student at Cleveland-Marshall College of Law.

| | |
|---|-----|
| E. Legal Reform | 205 |
| VII. Dictatorship, Law, and Freedom | 224 |

I. INTRODUCTION

Thirty years apart, Communism came to power in Russia and China through the overthrowing of a weak "liberal" government, itself a successor to centuries of imperial rule. From the inception of the new Communist regimes and for decades following, their leaders wrestled with an issue of fundamental force: what legal system should this historic entity adopt? Four alternatives were available to both the Bolsheviks and the Chinese Communists. They could adopt the traditional imperial legal structure and codes bequeathed to them by history; they could use a modified form of customary law arising from the culture of Russia and China and modify it for their purposes; they could import the ripened Romanist codes of the West;¹ or they could dispense with the Western concept of "legality" altogether and opt for a system more logically attuned to Marxist principles.

An imperial model of law is typified by the lack of formal constraints on the law-making capacity of the sovereign; a judiciary which is a part of the central imperial bureaucracy; and a decretal form of legislation usually directed to a single subject matter. Normally such decrees are formulated as administrative regulations addressed not so much to the populace as to the bureaucracy. Nearly always, the system lacks uniformity and consistency. Only occasionally are the decrees collected in a coherent form.

Customary law rises out of the mores of a society and is articulated and enforced interstitially. It retains longstanding patterns of behavior and frequently relies on self-help, arbitration, or consensus for adjudication and enforcement. Resolution of disputes comes from within the group, rather than from an external disin-

¹ I use the term "Romanist" to identify the system of law which developed in Western Europe following the revivification there of ancient Roman Law. In this fashion, one can distinguish that tradition of law not only from Common Law, but also from Romano-Byzantine law which took a different tack after Justinian. The use of the word "Romanist" generally follows the example set by Professor John Hazard. See J. HAZARD, *COMMUNISTS AND THEIR LAW* viii (1969).

terested agency. Either the substance or the form, or both, of customary law may be integrated into a developing legal society. Decrees, statutes, judge-enforced rules, and political decentralization have all been mechanisms of absorption of customary law into more developed legal systems.

Western law of the Romanist type refers to the developed systems of Western Europe which grew out of the "rediscovered" and rationalized Roman law structure of the later Middle Ages and after. Its modern form is predominant in continental Western Europe, and it is identified by a hierarchy of norms articulated in a series of comprehensive codes and organic laws and supplemented by statutes and administrative decrees. The legal system is seen as a rational whole whose parts relate to one another in logical and normative consistency. It possesses certain fundamental legal norms relating to the individual as subjective agent, such as: no valid law until promulgation, *nullem crimen sine lege* (no crime without specific positive law prohibition), no retroactive criminal statutes, fault for liability, formal requirements of consent for binding contracts, an independent judiciary, availability of counsel, and neutral procedures for determining guilt or liability.

A Marxist system of law would include mechanisms for the maintenance in power of the dominant economic class until the suppression of competing classes is completed. The system would be partisan and flexible to meet the political needs of the ruling class. Once all competing classes are eliminated, which can only occur under socialism, law would progressively simplify and atrophy. Mechanisms for the gradual elimination of law would be the hallmark of a Marxist system of law in a socialist society.

The two great Communist powers worked their respective ways through these alternatives in remarkably parallel time sequences. At one time or another, each state experimented with customary, imperial, Western, and Marxist forms of law. At a critical point, however, each state turned in a sharply different direction. Only now does China seem to have committed itself to the same choice made earlier by the Soviet Union, that is, to make Western law the dominant form in its legal system. Why and how the two states chose as they did is the subject of this study.

We shall first examine the imperial heritage that informed the legal culture of Russia and China, and then see to what extent regimes of Kerensky in Russia and the Nationalists in China modified that culture. Primarily, however, this paper analyzes the struggles in Communist China and the Soviet Union among the different legal schools since the rise to power of the Communists. Most importantly, the article explains why those who championed Western forms have at last triumphed in both countries.

II. THE RUSSIAN IMPERIAL HERITAGE

To the Bolsheviks, the adoption of the Tsarist legal framework—with such modifications as the Revolution required—was a viable option. There was much in the imperial manner of legislation that suited the new rulers. In addition, it was a distinct alternative to the bourgeois legal culture of Western Europe.

A. *The Imperial Codes*

Russian legal history is marked by progressive attempts to organize and collect legal power in the hands of a central authority. Certain fundamental aspects of the developing Romanist tradition in Western Europe such as rationalization, categorization, and universality of legal norms remained absent from imperial Russia until very late in its history. Yet its initial legal development was not far different from what the West had experienced.

When an Arab chronicler travelled to the Kievan Rus early in the tenth century, he reported on a state of law surprisingly like that of the Germanic tribes who had spilled into Europe centuries before. Ibn Rusta explained how these eastern tribesmen settled their disputes.

If one of them has a complaint against another, he summons him before their king and they plead their case against each other, and if he settles their differences it will be as he wishes, but if they disagree with his opinion, he orders them to settle it with their swords, and whichever sword is the sharper will be victorious, and the two sets of kindred go out, and they two [both] take up their weapons, and the dispute is adjudg-

ed in favor of the one who gets the better of his friend.²

The Kievan Rus formulated its first code of laws around 1018, barely thirty years after its conversion to Christianity. Ordered by Iaroslav the Wise, the code was styled the *Russkaya Pravda*, and it confirmed the traditional primitive law of arbitration and self-help. The code also reaffirmed the rights of blood feud and clan interaction. Private rights of action remained the norm, and state adjudication of disputes was practically nonexistent.³

The wergild statutes were specific and focused on particular actions, using a formula similar to a classic "if . . . then" phrasing:

ARTICLE 3. If anyone hits another with a club, or a rod, or a fist, or a bowl, or a [drinking] horn, or the butt [of a tool or of a vessel], and [the offender] evades being hit [in his turn], he [the offender] has to pay 12 *grivna* and that ends the matter.

ARTICLE 5. If [anyone] cuts [another's] arm, and the arm is cut off or shrinks, 40 *grivna*.

ARTICLE 7. If a finger is cut off, 3 *grivna* for the offense.

ARTICLE 8. And for the mustache, 12 *grivna*; and for the beard, 12 *grivna*.⁴

Over the following century, the *Russkaya* was revised and impregnated with many Romano-Byzantine concepts, as the new religion carried law into the Rus.⁵ For the first time, the blood-feud was abolished, and concepts of fiduciary duties imposed. Central

² *Ibn-Rusta on the Russians, Ca. 903-13*, in 1 A SOURCE BOOK FOR RUSSIAN HISTORY FROM EARLY TIMES TO 1917 § I:6, at 9 (G. Vernadsky ed. 2d ed. 1972) [hereinafter cited as SOURCE BOOK].

³ H. BERMAN, JUSTICE IN THE U.S.S.R. 191 (rev. ed. 1963).

⁴ MEDIEVAL RUSSIAN LAWS 27 (G. Vernadsky trans. 2d ed. 1969). One wonders if Peter the Great, seven centuries later, realized the ancient taboos he was breaking in his program of Europeanization.

⁵ Shortly after the conversion of Russia, certain manuals of Byzantine law had been translated into Slavic. *Id.* at 5. See Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553, 570 (1978) for an explication of how conversions to Christianity gave an impetus to the writing down of tribal customs, as in the *Russkaya Pravda*.

authority began to assert itself. The wrongdoer was compelled to pay fines to the prince, as well as to the victim or his family.⁶ Romano-Byzantine rules on loans, sales, bailments, intestacy, and slavery became operative.⁷ But, despite these changes, Russia remained legally backward. Whereas in Western Europe the "new life" of Roman law was bringing a fresh surge of jurisprudential and philosophical developments, the Rus possessed only a few ancient Roman devices handed over from a stagnant Byzantine tradition.

Further Western influence was significantly delayed by the Mongol conquest of 1240. For two and a half centuries, a ruthless and centralized politico-military structure ruled Russia. The Mongols applied the Code of Genghis Khan (the *Yasa*) to exact tribute and to require such things as compulsory universal service of males.⁸ But the *Yasa* was almost solely a code of military regulation, and except for intensifying some penal sanctions, the Mongols continued to let the *Russkaya* stand.⁹ They even allowed the Church to be exempt from paying tribute.¹⁰

The Mongol Yoke, as it is called, was overthrown in 1480 by the Mongols' own vassals, the Princes of Muscovy, who had learned the methods of their masters well. Combining the roles of Byzantine Christian Emperor and Khan, the Grand Duke of Muscovy (soon to take the title of Tsar) eventually claimed both the nobles and the peasantry as subject to his dominion. Legal reforms, having lain dormant for centuries, were quickly enacted. Along with setting up a judicial system along Romano-Byzantine lines, the Tsar enacted a procedural code in 1497 called the *Sudebnik*.¹¹ The *Sudebnik* reflected the new imperial ethos bequeathed to the Russians from the Mongols. More of a court manual than a code of

⁶ See *The Pravda Russkaia of the Twelfth Century*, in 1 SOURCE BOOK, *supra* note 2, § II:19, at 36-38.

⁷ *Id.*

⁸ E. L. JOHNSON, AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM 24 (1969).

⁹ *Juwaini on the Imperial Code of Chingis Kahn in the Early 1200s*, in 1 SOURCE BOOK, *supra* note 2, § III:7, at 47.

¹⁰ *A Mongol Charter Concerning Protection of the Russian Church, Ca. 1308*, in 1 SOURCE BOOK, *supra* note 2, § III:10, at 49.

¹¹ BERMAN, *supra* note 3, at 200-01.

laws, it was designed for administrative use by the Tsar's judicial appointees. It was addressed not so much to the people, but to the imperial bureaucracy in its adjudicative supervision of the people.¹²

Beyond bringing in some additional Byzantine elements, the new code contained elements of the *Russkaya*, of custom, and of parts of a code from the principality of Pskov.¹³ The Pskov Code, and its sister code from Novgorod, had been formulated a few years earlier in the mid-1400's. Both codes were themselves progeny of the *Russkaya*, but each (particularly the Novgorod Code) had a better system of judicial procedure.¹⁴ The Pskov Code also added rules on loans and hire.¹⁵

The *Sudebnik* was not entirely a useful charter, for the very disparity of its sources worked towards a complexity of jurisdiction and competence ripe for abuse. A 1550 revision helped clarify the duties of the various judicial organs, but at the same time, the code enforced a growing serfdom among the peasant class, concentrating on issues such as slavery, tenancy, and other contracts that tied a man to the land.¹⁶

Litigation involving peasants was settled in regional (*volost*) courts in which the local lord was required to have peasant elders to assist in the judgment.¹⁷ The *Sudebnik*, however, was not a comprehensive document and cases were decided either according to Tsarist decree or by custom. Ivan IV tried unsuccessfully to restrict the role of custom in peasant courts. In various charters granted to *volosti*, he allowed the peasants to elect their judicial

¹² The court structure, reflecting a hierarchical influence of the Byzantine church, was under the control of the Central Boyars' Duma or King's Council. In the Council there was a judicial panel that was to decide cases where "no law was known to exist or in which there was some doubt as to the interpretation of the applicable law." BERMAN, *supra* note 3, at 200. Such a structure, including the supervisory judicial panel, is similar to the imperial Chinese Board of Punishments. See *infra* text accompanying notes 83-86.

¹³ Hazard, *The Future of Codification in the USSR*, 29 TUL. L. REV. 239 (1955).

¹⁴ See *The Charter of Novgorod, 1471*, in 1 SOURCE BOOK, *supra* note 2, § IV:8, at 67.

¹⁵ *The Charter of Pskov, Ca. 1469*, in 1 SOURCE BOOK, *supra* note 2, § IV:27, at 83.

¹⁶ *The Sudebnik of 1497*, in 1 SOURCE BOOK, *supra* note 2, § VI:7, at 118; *The Sudebnik of 1550*, in 1 SOURCE BOOK, *supra* note 2, § VII:5, at 136-37.

¹⁷ *Id.* at 136.

elders who could themselves decide cases, but only "in accordance with our Code of Laws." The Charter of 1555 decreed that if a decision could not be reached, "they shall send the records of their court proceedings and both litigants to Moscow, to report to our treasurers. . . ."¹⁸ It is not likely that many peasants made the trip.

Direct intervention by Tsarist decree continued in other areas of the law. Ignoring the *Sudebnik*, the Tsar chartered inquest bodies that travelled to localities to investigate, charge, try, and execute thieves and other malefactors.¹⁹

The revised *Sudebnik* continued in use for another century until 1649, when Tsar Alexis published a massive new code, the *Ulozhenie Tsarya Aleksaya Mikhailovich*. Like previous codes, there was no attempt at a systematic legal ordering of society.²⁰ Rather, the *Ulozhenie* was itself a patchwork of previous laws, including Tsarist decrees, the *Russkaya*, the *Sudebnik*, and another borrowing, this time from the Lithuanian Code of 1588. The Lithuanian code had established an aristocratic structure in Lithuania and had given special privileges to the landed gentry.²¹ As transformed in the Russian code, it did not compromise the Tsar's authority, but it did establish serfdom more completely throughout the country.

Taken together, the 900 articles of the *Ulozhenie* were in such an unorganized state that in the next forty years, over fifteen hundred new legislative acts had been promulgated affecting much of the code's content. But there was no order to the reforms, and the Russian legal tapestry was even more a patchwork. With no organized digest, a judge could not tell which laws had been superseded by later edicts.

¹⁸ *Ivan IV's Charter to Volosti in the Ustiug Uezd, October 15, 1555*, in 1 SOURCE BOOK, *supra* note 2, § VII:8, at 140. See also *Ivan IV's Charter to Volosti in the Dvina Uezd, February 25, 1552*, in 1 SOURCE BOOK, *supra* note 2, § VII:7, at 139.

¹⁹ See, e.g., *Measures Against Crime: A Charter of October 23, 1539*, in 1 SOURCE BOOK, *supra* note 2, § VII:31, at 160; *Measures Against Crime: Instructions of August 25, 1555*, in 1 SOURCE BOOK, *supra* note 2, § VII:33, at 161.

²⁰ *The Ulozhenie of 1649*, in 1 SOURCE BOOK, *supra* note 2, § VIII:32, at 223.

²¹ See, e.g., *The First Lithuanian Statute, 1529*, in 1 SOURCE BOOK, *supra* note 2, § V:16, at 98-100; *The Second Lithuanian Statute, 1566*, in 1 SOURCE BOOK, *supra* note 2, § V:18, at 100-03.

B. *Attempts at Westernization*

Under Peter the Great and his successors, efforts were made to import Western culture and law, but most of the attempts foundered.²² From 1700 to 1815, more than ten commissions were appointed to draw up new codes; but to no avail.²³ One innovation, in 1722, was the creation of the office of procurator. Finally in 1830, the great jurist Michael Speransky put together a forty-six volume collection of laws and enactments dating from the 1649 *Ulozhenie*. This collection (the *Polnoye Zakonov Rossiiskoi Imperii*) contained nearly 31,000 enactments.²⁴ Speransky subsequently digested it into a more organized code of fifteen volumes (the *Svod Zakonov Rossiiskoi Imperial*), which was published in 1833.²⁵

Although the *Svod* was largely modeled on the *Corpus Juris* of Justinian²⁶ (which in fact itself made it something of an unsystematic document) Speransky desired a greater Western influence. Consequently, he organized volume ten (dealing with civil matters) on the model of the Napoleonic Code, and incorporated into volume eleven (dealing with commercial law) much of the law merchant.²⁷ The remaining volumes were made up of administrative decrees and regulations styled after the Byzantine example. The *Svod*, therefore, became the first substantial importation of Western Romanist concepts into the Russian legal system. It remained the controlling legal document of Russia thenceforth, being updated and republished in 1881 and 1905.²⁸

Nonetheless, the impact of Western law remained superficial. The Russian legal culture continued to be impervious to the funda-

²² BERMAN, *supra* note 3, at 205. Professor Berman suggests that Peter the Great's law reforms foundered because the monarchy itself did not pretend to ground its authority to rule on law, and further, because there was no real private law base on which to build. *Id.* at 203.

²³ *Id.* at 205.

²⁴ JOHNSON, *supra* note 8, at 16.

²⁵ See Nicholas's *Manifesto Announcing the Code of Laws of the Russian Empire*, January 31, 1883, in 2 SOURCE BOOK, *supra* note 2, § XII:4, at 534.

²⁶ See 2 M. FLORINSKY, *RUSSIA, A HISTORY AND INTERPRETATION* 770 (1953).

²⁷ JOHNSON, *supra* note 8, at 17.

²⁸ Hazard, *supra* note 13, at 240.

mental intellectual conceptions of Romanist law.²⁹ The code was not a central hierarchical corpus to which other decrees and statutes related. In the main, it was still only a collection of disparate enactments.

Speransky knew his reforms were inadequate. For decades, he had led a contested effort to reform the Russian state along Western liberal lines. As early as 1809, he had drafted a reorganization plan at the request of Tsar Alexander I, a plan that incorporated a separation of powers structure for the Russian state, a modern code, guarantees of procedural due process, economic freedom for all (including the serfs) and acceptance of the doctrine of popular sovereignty.³⁰ Conservative reaction to Speransky's plan forced him into exile in 1812.³¹

Speransky's continued agitation, however, bore some fruit. In addition to *Svod*, specialized legal collections were published, the most significant being a new criminal code in 1845.³² The code was designed to contend with another of the continuing waves of crime and violence sweeping Russia. Its provisions addressed labor strikes, worker oppression by factory managers, and serf insubordination. It was still far from a Romanist code, however. For example, it contained an analogy clause allowing prosecution for crimes not specifically provided for.³³

During the mid-nineteenth century, increasing numbers of Russian jurists, educated in the West, returned with high hopes of further legal reform. These desires were whetted by Tsar Alexander II's emancipation of the serfs in 1861. The emancipation decree mandated that lands be transferred to the *mir*, the local village, which was given the responsibility of dividing up the parcels for the separate peasant households. The region (*volost*) was given wider authority. Within each, an elected assembly was to choose

²⁹ BERMAN, *supra* note 3, at 216-17.

³⁰ *Speranskii's Plan for a General Reorganization of the Administration, October 1809*, in 2 SOURCE BOOK, *supra* note 2, § VIII:22, at 490.

³¹ *Id.* See also H. SETON-WATSON, *THE RUSSIAN EMPIRE, 1801-1917* 112 (1967).

³² 2 FLORINSKY, *supra* note 26, at 771.

³³ *The Criminal Law Code, August 15, 1845*, in 2 SOURCE BOOK, *supra* note 2, § XIV:7, at 536. The analogy clause was deleted in 1902. JOHNSON, *supra* note 8, at 39.

four to twelve members to staff the *volost* court.³⁴ (The peasants had already been given the right to have separate courts in 1837.)³⁵ Three of the *volost* judges sat on panels to hear cases. Their decisions were final "over all disputes and litigations between peasants alone of up to one hundred rubles inclusive in value." Jurisdiction included "not only immovable and movable property within the limits of the peasant allotment, but also loans, purchases, sales, and sundry kinds of transactions and liabilities, and likewise matters dealing with compensation for losses and damages caused to peasant property. . . ."³⁶ With peasants making the final decisions, customary law became even more the standard. In 1912, a rural appeals court was established, made up of a district Justice of the Peace, centrally appointed, and the heads of the judicial *volosts* in the district.³⁷

In 1864, the Tsar went further and undertook a thoroughgoing judicial reform of the country. He reformed the office of procurator to emulate the similar institution in France. He also established a regular court system that resembled the structure of the English model, but whose criminal procedure followed French lines. For example, under the new system, examining magistrates (like a *juge d'instruction*) were attached to courts in criminal cases, and a jury of judges and laymen decided guilt or innocence.³⁸ By means of its additions to the civil and commercial sections of the *Svod*, the judicial reorganization established Western Romanist norms throughout much of Russia. But, despite the extensive reforms, three-quarters of Russian society remained outside of Romanist legal culture.³⁹ Even though the old class courts for the military, the Church, merchants and the native tribes were eliminated from the judicial structure, the peasants retained their *volosti*, and the peas-

³⁴ *The Statutes on the Emancipation of the Serfs, February 19, 1861*, 3 SOURCE BOOK, *supra* note 2, § XV:14, at 600-02.

³⁵ SETON-WATSON, *supra* note 31, at 236.

³⁶ *The Statutes on the Emancipation of the Serfs, February 19, 1861*, art. 96, in 3 SOURCE BOOK, *supra* note 2, § XV:14, at 602.

³⁷ *The Judicial Reform of June 15, 1912*, in 3 SOURCE BOOK, *supra* note 2, § XVII:45, at 819.

³⁸ *The Judicial Reform of November 20, 1864*, in 3 SOURCE BOOK, *supra* note 2, § XV:27, at 614-15.

³⁹ BERMAN, *supra* note 3, at 213.

ant courts therefore continued to decide cases on the basis of "custom and morality."

Furthermore, even the educated and industrial section of Russia had not yet completely adapted to Romanist legal values, and in the 1880's, the reaction to Tsar Alexander II's assassination even brought a retreat from many of the Westernized innovations of 1864. Attempts at further reform were turned back. A civil code commission tried to develop a more modern and comprehensive Romanist code, but its recommendations were rejected, and, in 1903, a new criminal code was written, but never published.⁴⁰

The Revolution of 1905 and the revivification of the Duma brought fresh impetus. By 1913 a comprehensive new civil code modeled on the French and Swiss models was adopted by the Duma, but its official enactment was curtailed by the start of World War I.⁴¹

When the Russian Empire collapsed, its legal system had not yet matured into one resembling that in force in Western Europe. The bulk of its population continued to be ruled by customary law. Codification in the educated and industrial sectors was fundamentally a device for the collection and digesting of thousands of statutes and edicts. Even where the laws could be collected, they were soon displaced by a torrent of new and contradictory regulations stemming from a legally unchecked imperial power. The Romanist conceptions of law, as evidenced in the modern European codes, had not entered the Russian legal culture. Those hallmarks of the Romanist tradition—universality, hierarchy of norms, conceptual categorization, neutrality, and legal analysis⁴²—had not evolved within the Russian legal system despite the vigorous, though belated, attempts at reform. But the imperial structure at that time was well suited to a regime that wished less for the constricting traditions of regularity than for the ability to command changes

⁴⁰ Hazard, *supra* note 13, at 240. However, some portions were apparently adopted separately. See BERMAN, *supra* note 3, at 215.

⁴¹ JOHNSON, *supra* note 8, at 37. There is evidence that the values underlying the unenacted civil code had been accepted by much of the legal fraternity in and out of the universities. Ioffe, *Soviet Law and Roman Law*, 62 B.U.L. REV. 701, 725 (1982).

⁴² See BERMAN, *supra* note 3, at 180-82.

whenever the central authority deemed them necessary.

III. THE CHINESE IMPERIAL HERITAGE

Across the steppes, China too had been experiencing a centuries-long tension between customary and code law, the implication of which had a dramatic effect on the Communists after they took power. In particular, the development of the familiar *li-fa* distinction in the legal culture of traditional China established a fundamental duality to last for over 2,000 years.

A. *The Imperial Codes*

When the ancient Chou empire was disintegrating, Confucius appeared and prescribed a cure for the chaos that was infecting China. He asserted that China would not find peace until its rulers and people realigned themselves with the rules of natural harmony, rules supposedly observed during a legendary past.⁴³

China's peoples must internalize the duties and obligations of a hierarchial and organized order, Confucius taught. Indeed, any attempt to impose order through a system of external restraints would result only in friction and failure. The system of natural harmony (*li*) must be used to educate all Chinese to a proper consciousness of their respective stations. In Confucius' classic formulation, there must be

[k]indness on the part of the father, and filial duty on that of the son; gentleness on the part of the elder brother, and obedience on that of the younger; righteousness on the part of the husband, and submission on that of the wife; kindness on the part of the elders, and deference on that of the juniors, with benevolence on the part of the ruler, and loyalty on that of the minister.⁴⁴

Confucius (echoed later by Mencius) opposed the Legalists, who offered China the alternative of a uniform law as a corrective for

⁴³ For an insightful analysis of the Chou dynasty, and Confucius and the Legalists, see Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in J. COHEN, R. EDWARDS, & F. CHEN, *ESSAYS ON CHINA'S LEGAL TRADITION* 26 (1980).

⁴⁴ T'UNG-TSU CH'U, *LAW AND SOCIETY IN TRADITIONAL CHINA* 237 (1965).

disorder. The Legalists' law, *fa*, was imbued with principles of strict and universal sanction. All were to be equal before the law, and the punishment must fit the crime. Confucius held that to the extent that *fa* must be tolerated at all, it should be only a temporary expedient. Its only use was to supplement the workings of *li*, which, in point of fact, was regulated and enforced not through courts but through communal pressure and example. Further, in line with the variable duties and positions implicit in *li*, even *fa* ought to be applied variably according to the subject's station in life. In the end, when *li* succeeded in transforming the Chinese man into a moral person who knew his place in the cosmos, then virtue would be the lot of the people, and *fa* would wither away. Confucius looked forward to the "state of no litigation,"⁴⁵ where *li* would enable men to "regulate human desire [and] to eliminate disputes."⁴⁶

Led by theorists such as Han Fei Tzu and Shang Yang, the school of *fa* triumphed in the emergence of the Ch'in dynasty (221-206 B.C.). Succeeding in overcoming a Hobbesian state of nature by means of an equally Hobbesian solution, the Ch'in empire imposed a code of rigorous penalties to be applied universally. As Shang Yang declared, "Merit acquired in the past should not cause a decrease in the punishment for demerit later, nor should good behavior in the past cause any derogation of the law for wrong done later."⁴⁷ *Fa* is classic positive law: a written command backed by a specific sanction.⁴⁸

The nature of *fa* is penal, whereby the state regulates proscribed conduct by means of punishments. The nature of *li* is civil. It directs the relationships of men and women through persuasion and informal community councils.⁴⁹ This duality is crucial to Chinese law. Civil law is unwritten, customary, and regulated by the community informally. Penal law is written, legislated, and regulated

⁴⁵ *Id.* at 249.

⁴⁶ *Id.* at 238.

⁴⁷ *Id.* at 243.

⁴⁸ See J. NEEDHAM, HUMAN LAW AND THE LAWS OF NATURE IN CHINA AND THE WEST 24 (L.T. Hobhouse Memorial Trust Lecture No. 20, 1951).

⁴⁹ Cheng, *The Chinese Theory of Criminal Law*, 39 J. CRIM. L. & CRIMINOLOGY 461, 461 (1948).

by the state.

Although Chinese codification had begun previously in 536 B.C. in the state of Cheng,⁵⁰ it was the Ch'in dynasty which gave it a universal legitimacy. Under the Ch'in it became established that the primary purpose of *fa* was political. The Ch'in established a centrist imperial structure throughout China for the first time, and used a penal *fa* to cement its rule. The fundamental political and imperial character of *fa* as then instituted was not to change for more than 2000 years.

The Ch'in code helped unify China under an emperor and an appointed bureaucracy. A central state structure for the administration of justice was established.⁵¹ What we know of the Ch'in code comes mostly from fragments that were adopted by its successor, the Han dynasty (206 B.C.-200 A.D.), and from recent archeological discoveries.⁵² The Han code indicates that private vengeance as a legal remedy was fresh in the mind of the legislators, for such vengeance was specifically forbidden under the code. Beyond this (for the Han code is also incomplete), there is a nine-fold classification of crimes: 1) Theft, 2) Violence, 3) Detention, 4) Arrests, 5) Miscellaneous delicts, 6) General Laws (*lu*), 7) Taxes, 8) Stables (i.e. military stores), and 9) Family. As in early codes in other societies, the Han law established in great detail the specific punishments that must be meted for specific offenses. Unlike other early codes, however, fines were not the normal form of sanction, for "[t]o the Chinese if a matter involved law [i.e., *fa* or the codes], it involved punishment."⁵³ Physical penalties were the norm, and not only were many punishments severe in their details, but there also was harshness in certain legal doctrines, such as the rule that the family of the wrongdoer must share in his fate.⁵⁴

The use of a code to enforce centralized control, the prohibition of private punishments, and the delineation of specific offenses and

⁵⁰ D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 16 (1967).

⁵¹ A.F.P. HULSEWÉ, *REMNANTS OF HAN LAW* 71 (1955).

⁵² See 1 *THE T'ANG CODE* 7-8 (W. Johnson trans. 1979).

⁵³ Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 *AM. J. COMP. L.* 330, 349 (1974).

⁵⁴ See BODDE & MORRIS, *supra* note 50, at 57; HULSEWÉ, *supra* note 51, at 112.

punishments makes the function of the Han code remarkably similar to the revised *Russkaya Pravda*, which the Kievan Rus employed when rationalizing its political structure. But in one particular aspect, the Han code was uniquely Chinese: it attempted to reconcile *li* and *fa*.

Over the four centuries of Han rule, the dominance of Confucianism had reasserted itself. *Li* was revived, and it not only dominated the people in the countryside, but it ruled the actions of the upper strata as well. One enthusiastic emperor, Wen, so embraced the renewed Confucianism that he tried to dissolve the courts, abolish punishments, and raze the prisons.⁵⁵ But other than that episode, the process was gradual.⁵⁶

As it happened, *fa* did not disappear, but rather was restructured along Confucian lines. Penalties were differentiated according to the status of the wrongdoer, his membership in privileged groups, or his position in the family.⁵⁷ The code even attempted to place penal sanctions on certain traditional *li* rules. For example, a section on the family was added. This trend extended into the period of the T'ang dynasty (619-906), whose code (the *T'ang lu su-i*) is the earliest of which there is an extant copy. The T'ang code defined the worst possible crimes (called "the ten abominations") as those against the state and the family.⁵⁸ One oft-cited example concerns the punishment due an impious son who reports his father's wrongdoing to the authorities.⁵⁹ The role of *fa* in such a case is to enforce a requirement of *li* when informal group pressures had failed to educate the consciousness of the son to his proper responsibilities.⁶⁰ Even so, *fa* remained much more than a mere

⁵⁵ Cheng, *supra* note 49, at 462.

⁵⁶ For a discussion of the ways in which the successive dynasties dealt with the problem of private vengeance, see Dalby, *Revenge and the Law in Traditional China*, 25 AM. J. LEGAL HIST. 267 (1981).

⁵⁷ BODDE & MORRIS, *supra* note 50, at 33ff. See Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, 107 PROC. AMER. PHIL. SOC. 375 (1963).

⁵⁸ The ten worst crimes were: plotting rebellion, plotting great sedition, plotting treason, contumacy, depravity, great irreverence, lack of filial piety, discord, unrighteousness, and incest. 1 THE T'ANG CODE, *supra* note 52, at 17, 61-83.

⁵⁹ J. ESCARRA, CHINESE LAW AND COMPARATIVE JURISPRUDENCE 20 (1926).

⁶⁰ 1 THE T'ANG CODE, *supra* note 52, at 10-12.

corrective, as Confucius would have granted. It became a permanent and growing body of rules and penalties, an indispensable practical tool of the emperor's political sway.

The restructuring of *fa* caused the corpus of the codes to continue to grow. The T'ang code expanded to include 502 articles, divided into twelve sections: 1) General Principles (*lu*), 2) Imperial Guard, 3) Administrative Regulations, 4) Family, 5) Stables, 6) Levies, 7) Violence and Theft, 8) Conflicts, 9) Fraud, 10) Miscellaneous delicts, 11) Arrests, and 12) Trial.⁶¹ The "if . . . then" formula of specific offenses remained, and was to survive until the twentieth century. For example, as carried over into the Ch'ing code,

If a blow is struck with the hand or foot, and produces a hurt or wound . . . the punishment . . . shall amount to 30 blows. . . . The offense of tearing away more than an inch of hair shall be punished with 50 blows.⁶²

The impregnation of some *li* values into the codes has led some observers to conclude that an historic synthesis had taken place between *li* and *fa* by the time of the T'ang.⁶³ There is something to be said for that in the field of public law, but Chinese "private law" continued to be ruled by informal procedures adjudicating civil relations on the basis of *li*. Most issues of marriage, family, divorce, inheritance, property, sales, and debts, were not covered by *fa* in the codes. Even disputes formally subject to a punishment according to *fa* were likely to be kept from the magistrate and settled informally. At the same time, local judges frequently used their powers against Buddhists and Taoists who were seen as a threat to the state's Confucian structure.⁶⁴ At its base, the Chinese legal system remained fundamentally bifurcated: customary, traditional, and civil *li*; and legislated, specific, penal *fa*. China, like Russia, lived with this duality throughout its imperial history.

Whenever some person was unfortunate enough to fall enough afoul of the Confucian values as to be brought before a judge, the

⁶¹ 2 BHATIA & CHUNG, LEGAL AND POLITICAL SYSTEM IN CHINA 29 (1974).

⁶² TA TSING LEU LEE 324 (Staunton trans. 1810).

⁶³ See BODDE & MORRIS, *supra* note 50, at 29; ESCARRA, *supra* note 59, at 18.

⁶⁴ T'ANG-YIN-PI-SHIH 57 (Van Gulik trans. 1956).

entire procedure was "intended to impress everyone with the majesty of the law, and with the dreadful consequences of becoming involved in it."⁶⁵ The magistrate sat elevated with vestments and symbols of his office, while the accused had to kneel below him on the bare floor for the entire trial. The accused was assumed to be guilty and had to prove himself innocent. Beating followed upon a denial of guilt; hearsay evidence was allowable.⁶⁶ Law (or *fa*) was totally coercive and something to be feared.

Yet it is only at this point that China's history enters the era of the Kievan Rus. In 960, the Sung dynasty came to power and wrote its code (*Sung hsing-t'ung*) almost verbatim from the T'ang,⁶⁷ although there is evidence that it moderated some punishment.⁶⁸ But in the thirteenth century, China also fell to the same peoples who had crushed the Kievan Rus. The Mongols yoked the Chinese and the Russians under similar political regimes. In China, as in Russia, the Mongols imposed a military and political control bent on exacting tribute. As in Russia, the Mongols used the *Yasa* along side the local legal rules, but the influence of Genghis Khan's military code waned during the period in which the new dynasty was in power.⁶⁹ Styling themselves the Yuan dynasty in 1271, China's new overlords at first nullified the code of the previous dynasty. Eventually in 1323 the regime promulgated the *Ta Yuan t'ung-chih*, which contained much of the traditional Chinese legal structure and left the customary law intact.⁷⁰ Both the *li* and the

⁶⁵ *Id.* at 52.

⁶⁶ *Id.* at 55-56.

⁶⁷ BODDE & MORRIS, *supra* note 50, at 57.

⁶⁸ J. Langlois, Jr., "Living Law" in *Sung and Yuan Jurisprudence*, 41 HARV. J. ASIATIC STUDIES 165, 169 (1981). Langlois notes, however, that the drive for imperial power remained the same. Leniency was designed to enhance "the legitimacy of the state by making the state appear more benevolent." *Id.* The Sung emperors modified the effect of the inherited T'ang code by a plethora of statutes, edicts and precedents. Since there were also aspects of the will of the emperor, they were superior over the code in cases of conflict. There was a constant attempt at compiling the precedents to keep bureaucrats who adjudicate disputes informed as to state of the law. B. McKnight, *From Statutes to Precedent: An Introduction to Sung Law and its Transformation*, in LAW AND THE STATE IN TRADITIONAL EAST ASIA: SEVEN STUDIES (B. McKnight ed. forthcoming).

⁶⁹ See P. CH'EN, CHINESE LEGAL TRADITION UNDER THE MONGOLS: THE CODE OF 1291 AS RECONSTRUCTED xiv (1979).

⁷⁰ Riasanovsky, *Mongol Law and Chinese Law in the Yuan Dynasty*, 20 CHINESE SOC.

fa remained vital, even though stagnant, legal norms, sharing the fate of the *Russkaya Pravda*. The tension between the Yuan's code, which was less than comprehensive, and the needs of the Chinese society remained, however, and the regime sought to fill the gap with supplementary legislation.⁷¹

The foreigners from Mongolia taught the Chinese almost as well as they did the Moscow princes. In 1369 a peasant revolt dislodged Mongol control and established the Ming dynasty. The Ming adhered to China's dual system of law. It returned to the T'ang code for its own model (*Ta-Ming lu-li*), but it also kept much of the despotic political structure of the Yuan. Imperial power reached a new level of concentration. The emperor even established the qualifications of village elders to judge local disputes on the basis of *li*.⁷²

In their pursuit of internal political control, the Ming revised their code structurally in 1397.⁷³ The changes were significant. First, the former divisions of subject matter were discarded in favor of redividing the code along lines reflecting the central bureaucratic structure. Each part of the code was placed under a heading corresponding to the ministry responsible for its enforcement. Thus, following a section on general principles, there were groupings under Administrative Law, Civil Law (family, taxes, government granaries), Ritual Law, Military Law, Penal Law (the largest division) and Public Works. This structure was to carry over into the succeeding Ch'ing dynasty.⁷⁴

A second structural innovation under the Ming dynasty occurred in 1585. There, the Ming divided each part of the code into *lu* (general statutes) and *li* (specific instances, precedents, subsequent particular legislation—not the Confucian *li* of universal har-

& POL. SCI. REV. 266ff (1936-37).

⁷¹ CH'EN, *supra* note 69, at 36-37. There is little evidence that the *Yasa* greatly influenced the Yuan dynasty's haphazard legislation. Riasanovsky, *supra* note 70, at 289.

⁷² E. Farmer, Social Order in Early Ming China: Some Norms Codified in the Hung-Wu Period, 1368-1398, paper read at the ACLS Conference on Law and the State in Traditional East Asia, Harvard Law School, August 1978, pp. 1, 17.

⁷³ BODDE & MORRIS, *supra* note 50, at 60.

⁷⁴ See generally TA TSING LEU LEE, *supra* note 62.

mony).⁷⁵ The concept of general statutes and controlling case examples was a sophisticated legal development of great importance. It echoed a similar conceptual construct developed in ancient Roman law, though the Chinese version never reached the level of integrative jurisprudence that the rediscovery of Roman law had wrought in Western Europe.

The *lu-li* structure of *fa* grew further in the Ch'ing Code dynasty (1664-1912). The Ch'ing Code (*Ta-Ch'ing lu-li*) underwent successive revisions in 1690, 1721, 1764, 1818, and 1899, with the *li* portions being reviewed even more frequently.⁷⁶ In fact, the number of *li* grew steadily from 382 to 1892 as the empire sought to meet new and varied problems.⁷⁷ The integration of the specific *li* with the supposedly permanent and changeless *lu* might have been expected to bring a new dynamism to Chinese legalism. For one thing, the *li* were variable and thus able to help the *lu* provisions contend with new situations. Indeed, a rule of construction required that the *li* was to be controlling in case of conflict with *lu*.⁷⁸

Nonetheless, although this innovation might have made Chinese law susceptible to further jurisprudential development, such progress did not come to pass. The added *li* were almost invariably instances of new and frequently stiffer penalties. This trend was also reflected in another rule of construction that held that in case of conflict between two *lu*, the more severe was to be applied.⁷⁹ Thus, the superiority of a rule of *li* may not have arisen from a new belief either in precedent or in the principle of a later enactment overriding the former. Rather, the rule was instituted simply because the punishment of a later *li* was more likely to be more stringent than that of the earlier *lu*. Confirmation of this point lies in the reform of the *Ta-Ch'ing lu-li* in the early twentieth century. There, the code was "modernized" substantially by means of reducing the number of *li* and eliminating some of the crueler

⁷⁵ BODDE & MORRIS, *supra* note 50 at 65. Where needed, I shall henceforth call the traditional *li* the "Confucian *li*" to distinguish it from the particularistic *li* of the codes.

⁷⁶ S. VAN DER SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 59 (1966).

⁷⁷ BODDE & MORRIS, *supra* note 50, at 65-66.

⁷⁸ E. ALABASTER, *NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW AND COGNATE TOPICS* XLVI (1968).

⁷⁹ VAN DER SPRENKEL, *supra* note 76, at 63.

punishments.

Enforced by a bureaucracy, the code enhanced political control of the ever-growing empire.⁸⁰ Shun Chi, the first emperor of the Ch'ing, stated the aims of his dynasty's code. "The transgressor," he declared, "will not fail to suffer a strict expiation for his offenses, and will be the instrument of deterring others from similar misconduct."⁸¹ Where the central administration had little control—specifically in the area of civil law—the corresponding code section is a mixture of disparate elements, for civil relations remained primarily within the sphere of the Confucian *li*.

The judicial system of the Chinese empire was part of the central bureaucracy, and was rationally organized. There were four levels of courts, all staffed by professional civil servants. The lowest district or department level investigated all cases, but tried only those involving bambooning as a punishment.⁸² The second level, the prefecture, heard final appeals of bambooning cases, but transmitted all others upwards. The third, provincial level (the first level with a specialized legal bureaucrat, the judicial commissioner) tried all serious cases. Judgments at that level had to be approved by the provincial governor. Cases then went to Peking to the appropriate ministry whose code section had been violated (usually the Board of Punishments) for final judgments.⁸³ Capital sentences were even sent through two further levels and on to the Emperor for ratification. Like the Imperial Russians, the Chinese allowed many charges based on analogy, but here all sentences, even non-capital, had to be confirmed by the Emperor.⁸⁴ In civil matters, if the process of the Confucian *li* failed, an aggrieved individual might bring an action against another, but this of course brought the whole issue into the penal area. Such cases were re-

⁸⁰ As Professor William Jones observes, "[I]n China, the legal system was apparently designed solely to advance the interests of the central government." Jones, *Theft in the Qing Code*, 30 AM. J. COMP. L. 499 (1982).

⁸¹ TA TSING LEU LEE, *supra* note 62, at lxvi.

⁸² See generally J. WATT, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* (1972).

⁸³ See § 44 of the *Ta Ch'ing Lu Li*, quoted in Jones, *supra* note 53, at 342 n.42. See also BODDE & MORRIS, *supra* note 50, at 115-20.

⁸⁴ BODDE & MORRIS, *supra* note 50, at 117, 176. But see Chen, *On Analogy in Ch'ing Law*, 30 HARV. J. ASIATIC STUD. 212 (1970).

ferred up to the provincial level's financial commissioner for trial or review, not to the judicial commissioner. All sentences were referred back to the district for execution.⁸⁵

Along with the *Ta-Ch'ing lu-li*, the Ch'ing dynasty also published a collection of administrative regulations for the guidance of the bureaucracy (*Ta-Ch'ing Hui Tien*, 1690). Together, the two documents "provided the bureaucracy with comprehensive statements of what the central authorities required both of them and of the people resident in their areas of jurisdiction."⁸⁶ The seeming attempt of the two codes to cover every possible penal and regulatory contingency and their organization along bureaucratic lines impressed European observers who, ignorant of the continuing role of the Confucian *li*, applauded the "directness and lucidity" of the codes.⁸⁷ But the resemblance to modern European values proved illusory.

B. *Attempts at Westernization*

The continuing sensitivity of imperial China to its political position, the harshness of many of the punishments, and the economic desires of Westerners, combined to produce serious tensions in the 18th and 19th centuries. After an initial period of admiration for the *Ta-Ch'ing lu-li*, Westerners began to feel that it was unjust and arbitrary, if not downright primitive. A primary cause of the demand for extra-territoriality came from the enforcement of certain parts of the code believed to be highly objectionable, particularly the extension of criminal liability to innocent persons on the basis of a *respondeat superior* principle.⁸⁸ But the British, Japanese, and Americans specifically covenanted to give up their rights of extra-territoriality in return for a reform of Chinese law.⁸⁹ By the early twentieth century, the pressures on the failing Chinese empire had become too great, and the dynasty undertook to

⁸⁵ BODDE & MORRIS, *supra* note 50, at 120.

⁸⁶ VAN DER SPRENKEL, *supra* note 76, at 63.

⁸⁷ *Id.* at 64.

⁸⁸ TA TSING LEU LEE I.I xxx, I.I. xl, *supra* note 62, at 32, 41.

⁸⁹ M. MEIJER, *THE INTRODUCTION OF MODERN CRIMINAL LAW IN CHINA* 11 (1950, reprint 1976).

restructure its law.

The reasons for revision were stated bluntly in an imperial edict in 1902. All laws had to be re-edited to "bring them into accord with the circumstances arising from the negotiations with foreign powers."⁹⁰ The men charged with the revision, Wu T'ing-fang and Shen Chia-pen, had substantial goals in mind. First they wanted to cancel certain severe penalties that had outraged the Westerners. Then with Japan as a "mirror," they wished to redevelop Chinese law along Western Romanist lines.⁹¹ Wu pressed for an entirely new code, while Shen, at first, preferred the process to unfold in stages.⁹²

Wu and Shen presented a joint draft of their reforms to the Dowager Empress in 1907.⁹³ It was evident that they were aiming at a major inculcation of Romanist values, for they had submitted an entirely new code. Using the German/Japanese code as their model, and assisted by young legal scholars recently returned from Europe and Japan,⁹⁴ the two commissioners wrote a code suppressing the more cruel punishments and ending privileged treatment for sections of the population. They removed the civil section entirely and set up Westernized judicial procedures. There was no doubt that they were seeking to construct a modern criminal code.⁹⁵ Other reforms were appearing. A Judicature Act of 1907 established a hierarchical court structure. At the same time, formal law training had begun at Peking University.⁹⁶

The draft of the new criminal code, however, excited opposition from conservative forces in the bureaucracy. Believing that the traditional *li-fa* distinction was being undone, the protesters tried to block the new draft.⁹⁷ Their fears were well-founded, for Shen

⁹⁰ *Id.* at 12 (quoting Imperial Edict of China, dated May 11, 1902).

⁹¹ MELJER, *supra* note 89, at 14 (quoting Shen Chi-i hsien-sheng i-shu).

⁹² MELJER, *supra* note 89, at 48.

⁹³ *Id.* at 64.

⁹⁴ 1 BHATIA & CHUNG, *LEGAL AND POLITICAL SYSTEM IN CHINA* 31 (1974).

⁹⁵ MELJER, *supra* note 89, at 66-75.

⁹⁶ Macdonald, *Legal Education in China Today*, 6 *DALHOUSIE L.J.* 313, 315-17 (1980); Lee, *Chinese Communist Law: Its Background and Development*, 60 *MICH. L. REV.* 439, 443 (1962).

⁹⁷ MELJER, *supra* note 89, at 79-96.

and Wu not only intended to rationalize and mitigate the harshness of *fa*, they hoped also to place what had been the concern of the Confucian *li* area under a modern, written, civil code.

To prevent the opposition from undermining the entire project, Shen incorporated most of his reformist legal values into a second draft that purported only to revise the *Ta-Ch'ing Lu Li*. Presented in 1909, the revised code included the cessation of cruel punishments, the deletion of civil matters, and a general reorganization of the code more towards legal rather than bureaucratic categorization. The revised code had fewer problems and it was approved by the Emperor in 1910, taking the title *Hsien-hsing hsing-lü*.⁹⁸

Much the same as the Russian Romanist Speransky, Shen did not give up on the new "Western" criminal code, for events were moving fast in China. The old Dowager Empress had died in 1908, and a constitutional committee was at work aiming to turn the empire into a constitutional monarchy. An assembly was convened as a precursor to a parliament.⁹⁹

Shen, however, still had hopes for his draft criminal code. He undertook a revision and resubmitted it in 1910. It was still based on Romanist lines. Referred to the Assembly, the code became mired in debate. Disappointed, Shen resigned his commission.¹⁰⁰

Meanwhile, Wu T'ing-fang, Shen's co-commissioner, had left the service of the Emperor to join the revolution sweeping China. In 1911, he negotiated with the Emperor's main minister for an end to imperial rule.¹⁰¹ By 1912, the Emperor had abdicated and the republic was declared. Shen's draft criminal code became lost in the swirl of events.

In imperial history, law was an order of command from the emperor to his governmental bureaucracy. It was directed not to the citizens in their mutual relations, but to those who were charged with maintaining the emperor's peace.¹⁰² The magistrates were

⁹⁸ *Id.* at 52, 54.

⁹⁹ *Id.* at 102.

¹⁰⁰ *Id.* at 118.

¹⁰¹ W. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA 19-20* (1964).

¹⁰² Jones, *supra* note 53, at 338. "[O]ffenses are organized according to the way they

parts of the imperial bureaucracy who gained their positions by the examination system. Although legal training occurred in the Han and later dynasties, and although magistrates were at times tested on their knowledge of the law, there nonetheless never developed an academic tradition in China of how to analyze legal relations as took place, for example, in ancient Rome and in Islam.¹⁰³ As in Russia, there was no hint in the legal culture of the emperor being part of a framework of legal relations. A Northern Sung official once warned that if the emperor's rules "are generalized into a system of laws, then affairs will revert to [the control of] the officials, and the ruler's control will be lost"¹⁰⁴ Whatever progress there was in the codes was limited to organizational refinements.¹⁰⁵ In light of this tradition, only a revolution could have turned the emperor into a constitutional monarch. For the Communists, such a command-based legal system had obvious attractions.

The legal history of the Russian and Chinese empires were more similar than different. Both had a history of progressive codification. Each had a bifurcated system of law, split generally along customary and penal lines. Both were primarily concerned with the rule of the central administration. Both were influenced in the same way by the Mongol occupation. And both sought energetically, and belatedly, to inject substantial Romanist principles into their systems. Before the process could be completed, each empire expired in revolution.

IV. INTERREGNUM

A. *The Russian Provisional Government*

The time between empire and Communism differed so much in length in Russia and China, that the two countries fell out of historical synchronization. During its brief reign in 1917, the Provisional Government in Russia made an important legal choice. It decreed that the *Svod Zakanov* of 1833 would remain in force, subject to the revisions that the laws of the new government would

affect the work of the central bureaucracy, not according to the crime. . . ." *Id.* at 339.

¹⁰³ *Id.* at 331.

¹⁰⁴ McKnight, *supra* note 68, at ____.

¹⁰⁵ See Jones, *supra* note 53, at 331.

require. Ignoring the authorized but unpromulgated 1913 Civil Code of the Duma, the Kerensky government seemed in no hurry to restructure the law of the new Russia in a Romanist image. On July 16, 1917, the government passed a law establishing a Codification Division which was charged with revising and republishing the *Svod* in light of recent legal changes.¹⁰⁶ It never really began its task.

B. *The Chinese Republic*

In China, events had more time to develop. The new republican government in China also opted, at first, for imperial rather than the Romanist legal precedent. Soon after coming to power, the new leaders adopted the *Hsien-hsing hsing-lu* as their own Provisional Criminal Code, choosing not to resurrect Shen's Romanist draft. The government only excepted those provisions that were inappropriate to a republican legal order.¹⁰⁷ One practice no longer permitted was indictment by analogy.¹⁰⁸ For the next twenty years, traditional and modern forces jostled over the criminal code.

In 1914, conservative impulses engendered amendments to the Provisional Criminal Code that reestablished certain variable penalties according to the wrongdoer's family status.¹⁰⁹ By 1918, the government appointed a commission to create a new criminal code, but its results were disappointing. When the code was finally produced and promulgated in 1928, it was, once again, an amalgam of Western innovations and traditional Chinese conceptions of *fa*. In particular, there was included the practice of specifically defined grades and varieties of punishments.¹¹⁰

The Legislative Yuan, dissatisfied with the imperfect attempts at modernization, took on the job itself. Through advisory commis-

¹⁰⁶ I R. BROWDER & A. KERENSKY, *THE RUSSIAN PROVISIONAL GOVERNMENT 1917* 241 (1961).

¹⁰⁷ *THE CRIMINAL CODE OF THE REPUBLIC OF CHINA* viii (L. Fuller & H. Fisher trans. 1960); W. HUNG, *OUTLINES OF MODERN CHINESE LAW* 251-52 (1934); ESCARRA, *supra* note 59, at 19.

¹⁰⁸ P. CHEN, *LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C. TO 1960 A.D.* 41 (1973).

¹⁰⁹ *Id.*

¹¹⁰ *See* HUNG, *supra* note 107, at 285-92.

sions, it examined the codes of ten modern states, all of which were in the Western tradition.¹¹¹ In 1935, the debate ended when the Nationalist government published a criminal code undeniably Romanist in character.

The new code was not entirely devoid of Chinese content. The Three Peoples' Principles of Sun Yat-sen (nationality, democracy, sociology) had structural analogues in the code.¹¹² But in its conceptions of uniformity, individual guilt, corrective rehabilitation, and in *nullum crimen sine lege*, the code was fundamentally Romanist.

The idea of a Westernized civil code was also gaining adherents in the last days of the Ch'ing empire. In 1907, for example, the Empress had added to Shen Chia-pen's standing as a legal reformer by appointing him to a commission to devise a modern civil code. The commission made use of a Japanese legal scholar whose influence was significant. The code followed the German and Japanese models in having five major sections (general principles, obligations, things, family, and succession). The commission submitted the first three sections (of 1316 articles) in 1911. The remaining two sections (of 253 articles) were not completed until after the republic had been established. The task of their completion fell upon two other Chinese lawyers, who finished the draft in 1916.¹¹³

Meanwhile, Japanese-educated legalists grew in numbers in China after the revolution,¹¹⁴ and their influence was evident in a new civil code presented to the Legislative Yuan in 1925. But in contrast to the succeeding Criminal Code of 1928, the 1925 civil code draft struck the Nationalists as overly Western. Like Shen's code, it followed the European model, its text being taken nearly verbatim from the German Code of 1896.¹¹⁵ But the republican leg-

¹¹¹ CHEN, *supra* note 108, at 42.

¹¹² THE CRIMINAL CODE OF THE REPUBLIC OF CHINA, *supra* note 107, at x.

¹¹³ van der Valk, *Movables and Immovables and Connected Subjects in Chinese Law*, in MISCELLANEA 171 (Szirmai ed., Law in Eastern Europe, no. 7, 1963). See also Yu Kwei, *Some Judicial Problems Facing China*, 23 WASH. L. REV. 363 (1948).

¹¹⁴ During the 1920's, 70% of the textbooks at Peking Law College were translations of Japanese works. Macdonald, *supra* note 96, at 318.

¹¹⁵ Y. TSENG, MODERN CHINESE LEGAL AND POLITICAL PHILOSOPHY 206 (1930).

islature did not, in the end, modify significantly the code's Romanist character. And, taking into account newer advances made by the Swiss Code of 1907, and more importantly, adding in the judicial doctrines developed by the new Chinese Supreme Court, the Legislative Yuan revised the draft into a final product.¹¹⁶

The modern Chinese Court system had been inaugurated under the Provisional Constitution of 1912. At first, following the reform of 1907, four levels of courts were contemplated, paralleling the imperial structure but with the added principles of judicial independence and *stare decisis*. The ascending levels were Primary Courts, District Courts, High Courts, and the Supreme Court. The Primary Courts soon fell into disuse, however, and the District Courts became fora of first instance. There was much emphasis on fair judicial procedure, and there was even an Administrative Court structure following the French example. During the years when China remained in turmoil and the legal structure had not yet formed, the courts filled an important gap. Operating very much like a court of common law, the Supreme Court redefined many civil relations in terms of Western law.¹¹⁷ Its work during that period provided a fundamental corpus of interpretation and conceptualization out of which the codes could be formed.¹¹⁸ Consequently, when the codes were finalized, they were drafted in a way that courts could understand and apply.

The Republic of China solidified its legal structure during the years 1929-1935. During that period the Kuomintang produced the Six Codes: 1) the Organic Law, 2) the Commercial Law, 3) the Civil Code, 4) the Criminal Code, 5) the Civil Code of Procedure, and 6) the Code of Criminal Procedure.¹¹⁹ Although reformed in 1932, the Chinese court structure retained its 1912 outlines. The Administrative Courts remained, and French procedure dominated

¹¹⁶ Tay, *Law in Communist China—Part 1*, 6 SYDNEY L. REV. 153, 164 (1969) [hereinafter cited as Tay, *Part 1*]. See generally B.P. CHU, COMMENTARIES ON THE CHINESE CIVIL CODE (1935). The tension between westernized law codifiers and traditional forms was most evident in the civil law area during the 1920's. ESCARRA, *supra* note 59, at 30.

¹¹⁷ See V. RIASANOVSKY, CHINESE CIVIL LAW 22 (1938).

¹¹⁸ See generally CHU, *supra* note 116.

¹¹⁹ Tay, *Part 1*, *supra* note 116, at 164.

the judicial activity of the regular courts.¹²⁰ The Chinese incorporated the office of procurator into their system. Although French in origin, the institution of the public procurator closely resembled the traditional office of the Chinese Censorate. Ironically, the Kuomintang may have more directly derived the institution from the Soviet system.

The Civil Code remained the capstone of the nationalist legal reforms. Roscoe Pound, legal adviser to the Chinese government after World War II, praised it as "an excellent law book which will take its place with the very best of recent codes."¹²¹ Despite the disruption caused by the war, Pound believed that the modern Chinese legal system was having an efficacious effect on the society.¹²²

In retrospect, we know that Pound was overly sanguine. During his years on the mainland, Chiang Kai-shek had never fully solidified his control. Although the structure of his laws was Romanist and in the Western European "liberal" mold, Chiang's record on fundamental political freedoms was not exemplary. The regime lived under three provisional constitutions until it finally promulgated a permanent document in 1946 (also while Dean Pound was an advisor to the Chinese Ministry of Justice).¹²³ Because of the civil war and the subsequent "state of seige" on Taiwan, the political freedoms in that document also have never been fully realized.

Nonetheless, there were significant areas of mainland China that lived under the writ of the Nationalists. A relatively developed court system was able to effectuate much of the new Romanist legal system. Had the Nationalists triumphed in the civil war, it is likely that Chinese legal relations would have become more progressively aligned with the structured codes as enforced by that well staffed court system.

It may be thought that the Kuomintang's legislation returned

¹²⁰ Pound, *Progress of the Law in China*, 23 WASH. L. REV. 345, 353 (1948).

¹²¹ Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 279 (1955).

¹²² *Id.* at 291.

¹²³ See J. Cohen, *China's Changing Constitution*, paper read at the Conference on Law and the Economy in the PRC, Harvard Law School, pp. 1-5 (Aug. 30, 1978).

the ideology of the ancient Legalists to dominance. It is true that specifically defined crimes, a uniform system of punishments, and a written code are common to both; however, the Nationalists differed from the Legalists in viewing the penal sanction not as the failure of the traditional methods of persuasion, but as a prelude to further rectification. Their punishments were far less severe, and their ideas of a civil code as nonpenal were totally outside the ken of the Legalists. When the Nationalists were defeated in 1949, they left for the taking a systematic, developed, sophisticated legal system, far more modern, and far more Romanist than the system that Kerensky had left for Lenin.

V. THE SOVIET CHOICE

A. *War Communism*

We turn now to the Communists and how they regarded the legal legacy that was open to them. Soon after the Bolsheviks took power they issued a series of decrees on the judiciary. In the main their thinking at first followed the immediate example of the Kerensky government: acceptance of the imperial codes as revised by numerous special and general decrees, and subject to the "revolutionary conscience" of the judges.¹²⁴

In December, 1917, the First Decree on the Courts instituted District Courts of first instance, each court staffed by a professional judge and two lay assessors.¹²⁵ It was this decree that maintained the *prima facie* validity of imperial law. The Second Decree on the Courts (February 15, 1918) established a Peoples' Court for more serious crimes and required that any departure from imperial law be justified "by a reasoned opinion."¹²⁶

¹²⁴ See Decree of the Council of Ministers of the RFSFR, December 5 (November 22), 1917, "On the Judiciary" (Decree No. 1), S.U. R.S.F.S.R. 1917, No. 4, Text 50, Y 5 in Z. ZILE, IDEAS AND FORCES IN SOVIET LEGAL HISTORY: STATUTES, DECISIONS AND OTHER MATERIALS ON THE DEVELOPMENT AND PROCESSES OF SOVIET LAW 31, 33 (1967); JUSTICE AND THE LEGAL SYSTEM IN THE U.S.S.R. 13 (R. Conquest ed. 1968). In 1920, another law added an appeal structure. See JOHNSON, *supra* note 8, at 33; Hazard, *Soviet Law: The Bridge Years, 1917-1920* in RUSSIAN LAW: HISTORICAL AND POLITICAL PERSPECTIVES 235 (W. Butler ed. 1977).

¹²⁵ JOHNSON, *supra* note 8, at 31.

¹²⁶ *Id.* at 32.

By the spring of 1918, however, the Bolshevik leaders had decided to jettison all ties to the imperial legal forms and adopt a revolutionary Marxist structure designed to oversee the transition towards a stateless society. Lenin had earlier asked Jacob Sverdlov, Chairman of the Party and Chairman of the Central Executive Committee, to develop a draft of a constitution for the new state, and a constitutional commission was formed for that purpose in early 1918.¹²⁷ Although Lenin's enthusiasm for the project waned, the drafting was completed and the Constitution of the R.S.F.S.R. was proclaimed on July 10, 1918.¹²⁸

The constitution was primarily a collection of decrees reflecting the revolutionary Marxist stage of Soviet legality. It declared the political aims of the revolution¹²⁹ and delineated the central structure of the Soviet state.¹³⁰ Various provisions abolished private property, decreed universal labor, and established the new state's authority.¹³¹

The revolutionary government had set its face against regularized legal forms. As Lenin pointedly noted, the constitution was "not the invention of a commission, nor the creation of lawyers."¹³² Article 23 gave the state the power to deprive individuals and groups of rights used "to the detriment of the interests of the socialist revolution," the provision which Lenin said was "the article of the constitution that we observe most strictly and which shows that in all our activities we stick to the constitution."¹³³ The 1918 constitution, like the constitutions to follow, was not primarily a law-making document. Rather, it was "proclamatory," reflecting the current view of the regime regarding its desired political ends

¹²⁷ Hazard, *The Common Core of Marxian Socialist Constitutions*, 19 SAN DIEGO L. REV. 297, 298 (1982); A. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR* 9-10 (1981).

¹²⁸ *Constitution (Fundamental Law) of the Russian Socialist Federative Soviet Republic of 1918* [hereinafter cited as *R.S.F.S.R. Const. of 1918*], in *CONSTITUTIONS OF THE COMMUNIST PARTY STATES* 2 (J. Triska ed. 1968).

¹²⁹ *R.S.F.S.R. Const. of 1918*, paras. 1-23, *id.*, at 2-5.

¹³⁰ *R.S.F.S.R. Const. of 1918*, paras. 24-63, *id.*, at 6-11.

¹³¹ *R.S.F.S.R. Const. of 1918*, paras. 3, 12, *id.*, at 2, 4.

¹³² 28 V. I. LENIN, *COLLECTED WORKS* 36, 146 and 30 V. I. LENIN, *COLLECTED WORKS* 30, 456 (1960-1970), *quoted in* UNGER, *supra* note 127, at 11.

¹³³ 30 V. I. LENIN, *COLLECTED WORKS* 239 (1960-1970), *quoted in* UNGER, *supra* note 127, at 13-14.

and the suitable legal principles. It did not order legal relationships; it merely provided the ideological signal of what those relationships should be and what their purposes were.

On November 30, 1918 another decree dealing with the Peoples' Courts finally abolished the imperial laws altogether and required that judges decide cases on the published decrees of the revolution. When decretal law did not cover a particular case, the judges were instructed to be guided by their "socialist conscience."¹³⁴ The District Courts were abolished but the new law retained the Peoples' Courts each with the panel of one judge and two assessors for minor cases.¹³⁵ The decree reserved the trials of counterrevolutionaries and political dissidents to the Revolutionary Tribunals which, free of all procedural inhibitions, had been in place since the October Revolution.¹³⁶ In addition, the Cheka, or secret police, had their own independent arrest and adjudicatory means to deal with the Revolution's enemies.¹³⁷

The abolition of the Tsarist codes was the most significant legal act of the early Bolshevik era. It signified both a break from the past, and a rejection of the bourgeois law of Western Europe. The regime's goal was to win the civil war and then impose a new system of political and economic relationships on Russia. The old set of legal rules could only hamstring the effort. A.G. Goikhbarg, a leading Bolshevik lawyer, described the enemy: "The temple of bourgeois rule is legislation and its fetish is the law . . ." ¹³⁸ Lenin had been impatient to replace the imperial codes from the start. From the time he signed the First Decree on the Courts, Lenin evinced the desire that there be more laws emanating from the new regime to guide the courts.¹³⁹ P.I. Stuchka, Commissar of Justice,

¹³⁴ JOHNSON, *supra* note 8, at 32.

¹³⁵ Decree of the All-Russian Central Executive Committee, November 13, 1918, "On the People's Courts of the Russian Socialist Federative Soviet Republic," S.U. R.S.F.S.R. 1918, No. 85, Text 889, § 22 in ZILE, *supra* note 124, at 34-35.

¹³⁶ BERMAN, *supra* note 3, at 31.

¹³⁷ See 1 A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 300 (1973).

¹³⁸ van den Berg, *Elements of Continuity in Soviet Constitutional Law*, in *RUSSIAN LAW: HISTORICAL AND POLITICAL PERSPECTIVES*, *supra* note 124, at 227. See also Shelley, *Soviet Criminology after the Revolution*, 70 J. CRIM. L. & CRIMINOLOGY 391 (1979).

¹³⁹ Hazard, *supra* note 124, at 247.

was an outspoken critic of the idea of formalized law.

Imagine talking about unchangeable written civil law (actually bourgeois law) during the transition to a socialist system! Or about generally binding criminal law (*i.e.*, the law which above all else protects the legal relations of the existing system) at the moment when this entire system is sinking into oblivion!¹⁴⁰

The Marxist understanding of law was also reflected in a set of Guiding Principles of Criminal Law, issued for the R.S.F.S.R. in 1919. There, law was defined as "organized force" designed to protect the ruling class. Criminal laws were measures of repression ensuring the "social relations of a particular 'class society,'" and Soviet criminal law was the means whereby the social relations established by the dictatorship of the proletariat could be protected during the transition from capitalism to communism.¹⁴¹

The attitude also affected the government's enactments of substantive law. Early decrees and laws abolished large landholdings, nationalized the banks, gave the workers control of the factories, expropriated various industries, liberalized marriage and divorce rules, and delineated basic working conditions.¹⁴² Political objectives, not legal models, animated the Bolshevik leaders. By means of the revolution, they seemingly had liquidated the concept of a structured "law" as antagonistic to their needs.

B. *The N.E.P.*

The three year period of militant Communism came to an end in 1921 with the initiation of the New Economic Policy. Lenin had decided that more was needed to revitalize the economy than judge-made law and revolutionary decrees.¹⁴³ The new policy was

¹⁴⁰ P.I. Stuchka, *Staryi I. Novgi Sud (The Old and the New Judiciary)*, P.I. Stuchka, *Izbrannye Proizvedeniia Po Marksistsko—Leninskoi Teorii Prava (Selected Writings on the Marxist-Leninist Theory of Law)* 227, 231-235 (Riga 1964) (Orig. Pub. in *Pravda*, January 5, 1918) in ZILE, *supra* note 124, at 44.

¹⁴¹ Guiding Principles of Criminal Law of the R.S.F.S.R. (1919) in ZILE, *supra* note 124, at 46.

¹⁴² JOHNSON, *supra* note 8, at 28-30.

¹⁴³ Hazard, *supra* note 124, at 247.

designed to strengthen the Soviet economy and to give the regime additional economic and political stability. Instead of socialism via revolution, the regime pursued transitional capitalism via order. Code law became a prime means by which the Soviet state rationalized the social structure.

The R.F.S.F.R. took the lead in formulating the codes. Not all of the codes were Romanist, or even particularly Western in content. On the one hand, the Land Code of 1922 retained the nationalization of large estates, and the Family Code of 1926 was even more radical than its predecessor. The Labor Code of 1922, on the other hand, was not unlike those in liberal Western nations.¹⁴⁴ Content aside, the process itself represented acceptance of the principle that a society should be ordered through inclusive codes. In so doing, the Soviet leaders went beyond the Tsarist tradition of having mere restatements of widely disparate decrees and statutes.

Beyond accepting the Western conception of "code," the Russian state went further and actually adopted Romanist models for their civil and criminal legislation. Considering that the Tsarists had never developed a modern civil code, and considering that even Kerensky's government was not enthusiastic over the possibility, it is surprising that the R.F.S.F.R. adopted a Romanist civil code so unhesitatingly (at least at first). The Civil Code of 1922 had elements primarily taken from the French and Swiss Codes.¹⁴⁵ Ironically, a major vehicle of these codes used by the Russians was the 1913 Draft Civil Code of the Duma.¹⁴⁶ Once the decision was made to have a code, it took only four months to produce an acceptable draft.¹⁴⁷ Goikhbarg was the compiler, and his training as lawyer and legal writer under the imperial regime served him well in the task. He was not, however, an apostate from Bolshevism, for it was he who authored the radical Family Code.¹⁴⁸

¹⁴⁴ JOHNSON, *supra* note 8, at 36.

¹⁴⁵ Hazard, *supra* note 13, at 242.

¹⁴⁶ I. V. GSOVSKI, *SOVIET CIVIL LAW* 25 (1948). Professor Ioffe suggests that the lawyers of the revolution had not been immune to the trend of Romanism that had begun to impregnate legal thought prior to the revolution. Ioffe, *supra* note 41, at 726.

¹⁴⁷ I. V. GSOVSKI, *supra* note 146, at 24.

¹⁴⁸ G. K. GUINS, *SOVIET LAW AND SOVIET SOCIETY* 47 (1954).

With the exception of areas of land and family law—the compilers having chosen to treat them separately—the contents of the code were not very much different from what could be found in Western Europe. Subjects covered property (movables), contract, tort, succession, legal capacity, persons, corporations, transactions, and mortgages.¹⁴⁹ Familiar Romanist rules had few new glosses.¹⁵⁰ Knowing that the code was the law of bourgeois nations, however, Soviet legalists feared it would contaminate the revolution. Consequently, Art. 1 declared, “Civil Rights are protected by law except in those cases when they are exercised in a manner contrary to their social and economic purpose.”¹⁵¹ The provision allowed courts to void transactions that seemed overly capitalist or exploitative. At first, the Peoples’ Courts applied the article widely, but appellate courts subsequently restricted the breadth of its effect.¹⁵²

A similarly Romanist Civil Procedure Code was enacted in 1923. Rules were specific and intended to be strictly enforced. The code emphasized the primacy of documentary evidence, and enforced clear requirements of jurisdiction and notice. Judges were precluded from using custom, but they were encouraged to take an active role in the case to bring out all of the facts (a practice similar to that in German courts). The state prosecutor, moreover, was allowed to intervene in the interest of securing justice.¹⁵³

There were three important criminal codes in the period of the NEP: the R.F.S.F.R. Criminal Code of 1922, the U.S.S.R. Basic Principles of Criminal Law of 1924, and a follow-up R.F.S.F.R. Criminal Code of 1926. The codes were complemented by the institution of the Procuracy with its sources partly traceable to a Tsarist heritage, but in its modern formulation more directly copied from the French.¹⁵⁴ Significantly, Lenin had accepted Romanist

¹⁴⁹ 2 GSOVSKI, SOVIET CIVIL LAW 15 (1949).

¹⁵⁰ JOHNSON, *supra* note 8, at 38.

¹⁵¹ *Id.* at 37.

¹⁵² *Id.*

¹⁵³ J. HAZARD, W. BUTLER, & P. MAGGS, THE SOVIET LEGAL SYSTEM 134 (3d ed. 1977).

¹⁵⁴ Decree of the All-Russian Central Executive Committee, May 28, 1922, “Statute on Procuratorial Supervision,” S.U. R.S.F.S.R. 1922, No. 36, Text 424, in ZILE, *supra* note 124, at 65. See UNGER, *supra* note 127, at 51; Rudden, *Courts and Codes in England, France and*

models without any evident qualms. In 1918, he had been "outraged" when presented with a draft criminal code based on the imperial model, but when shown the drafts of the new codes in 1922, he calmly initiated them "without question,"¹⁵⁵ despite the fact that there remained a vociferous wing of Bolsheviks who were unreconciled to accepting a form of structured law.¹⁵⁶ Nevertheless, although the codes followed Romanist examples, there were significant socialist variants. In the 1926 Criminal Code, for example, there was a retrospective offense carrying the death penalty that applied to former members of Tsarist officialdom.¹⁵⁷ And, generally speaking, punishments for political offenses were severe, and there were special provisions for official and for economic crimes. The compilers even found the Tsarist (and without knowing it the Chinese imperial) device of criminality by analogy useful for socialist purposes.¹⁵⁸

The Codes of Criminal Procedure (R.F.S.F.R. in 1923, and U.S.S.R. Fundamental Principles in 1924) were even more heavily Romanist, hewing closely to the continental style.¹⁵⁹ It included such classic devices as the *juge d'instruction*, and the ability to tie in civil suits with criminal prosecutions.¹⁶⁰ Although the code included procedural guarantees, it also allowed for short-cuts to be taken against those whom the regime regarded as threats. State security organs, for example, were exempt from the rules on arrest and investigation.¹⁶¹ In special cases the procurator could keep an accused under indefinite detention pending investigation, without the accused having a right to counsel.¹⁶² Higher court procedures often denied persons the right to counsel and the right to their

Soviet Russia, 48 TUL. L. REV. 1010, 1018 (1974). See generally Timasheff, *The Procurators' Office in the USSR*, in LAW IN EASTERN EUROPE (Szirmai ed., Law in Eastern Europe, no. 1, 1958).

¹⁵⁵ Hazard, *supra* note 124, at 247.

¹⁵⁶ 2 *Istoriia Gosudarstva I Prava SSSR* (History of USSR State and Law) 161, 162-164 (Moscow 1962), in ZILE, *supra* note 124, at 61.

¹⁵⁷ JOHNSON, *supra* note 8, at 40.

¹⁵⁸ K. GRZYBOWSKI, *SOVIET LEGAL INSTITUTIONS* 185 (1962).

¹⁵⁹ H. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* 47 (2d ed. 1972).

¹⁶⁰ HAZARD, BUTLER, & MAGGS, *supra* note 153, at 108-09.

¹⁶¹ BERMAN, *supra* note 159, at 49.

¹⁶² *Id.* at 52.

own witnesses in certain serious crimes.¹⁶³

There were also administrative sanctions that could be used to detour around the required criminal procedures. Under non-judicial arms of the bureaucracy, administrative infractions could be adjudged outside of the Code of Criminal Procedure, and sanctions imposed ranging from fines and reprimands to corrective labor and imprisonment.¹⁶⁴ Those who fell through this gap in the procedural system can never be counted.¹⁶⁵

The legal values of the NEP were confirmed in the new constitution promulgated on January 31, 1924.¹⁶⁶ This second constitution officially established the Union of Soviet Socialist Republics by joining the constituent republics into a federal structure tied together in fact by the ubiquity and central control of the Communist party. The constitution did establish a judicial structure with a Supreme Court and a recognized role for the procuracy.¹⁶⁷ Although the secret police were formally placed under the supervision of the procuracy,¹⁶⁸ the police were not truly limited. They continued unchecked in their extra-legal pursuit of the enemies of the state.¹⁶⁹ In 1926-27, the U.S.S.R. published a four volume compilation of laws in force at the federal level.¹⁷⁰ It was the last major legal reform of the NEP.

C. *The Marxist Phase*

Ending in 1929, the NEP period had seen the Soviet Union in an uneasy experiment with Western European models. The legal superstructure had been cast in a Romanist form. Though a few tra-

¹⁶³ *Id.* at 56.

¹⁶⁴ *Id.* at 49-50.

¹⁶⁵ See SOLZHENTSYN, *supra* note 137. But see Stratman, *Political and Lumpen Prisoners, The Question of Compliance and Sociological Investigation*, 27 STAN. L. REV. 1629, 1636 (1975).

¹⁶⁶ *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics* [hereinafter cited as *U.S.S.R. Const. of 1924*], in TRISKA, *supra* note 128, at 17.

¹⁶⁷ *U.S.S.R. Const. of 1924*, paras. 43-48, *id.* at 24-26.

¹⁶⁸ *U.S.S.R. Const. of 1924*, para. 63, *id.* at 27.

¹⁶⁹ UNGER, *supra* note 127, at 52.

¹⁷⁰ Butler, *Towards a Svod Zakonov for the Union of Soviet Socialist Republics*, in CODIFICATION IN THE COMMUNIST WORLD 91 (F. Feldbrugge ed., Law in Eastern Europe, no. 19, 1975) [hereinafter cited as CODIFICATION].

ditions from Tsarist times had remained,¹⁷¹ the real competitor to the codes was the continued hankering for a truly revolutionary legal system. Even during the NEP, Lenin himself had not completely disguised his hostility to the effects of the legal system.

[W]e must enlarge the interference of the State with the relations pertaining to "private law," enlarge the right of the government to annul, if necessary, "private contracts," and to apply to private law relations, not the *corpus juris romani*, but our revolutionary concept of law.¹⁷²

While the civil codes were tolerated as useful temporary expedients to guide the new state through an induced capitalist stage, the criminal codes, lacking the structural rigor that the Western European models had developed, were perceived as not working well at all. Taken together they were "full of unintended inconsistencies and ambiguities" and "a hodgepodge of rules and exceptions to rules."¹⁷³ Political rhetoric clouded the underlying Romanist structure.¹⁷⁴

Within a very few years of the imposition of the Romanist codes, the Soviet legalists were busily preparing for their eradication. As the NEP was extinguished, collectivization enforced, and totalitarianism cemented, most juristic opinion held that the codes could be substantially dispensed with, as bourgeois forms of law were no longer relevant. The leading Soviet jurist E. B. Pashukanis declared that since the only function of law was to regulate private interests, then as private interests fade, so will the law.¹⁷⁵ Pashukanis' "commodity exchange theory of law" held that private legal relations were the result of a need of capitalist society to have individuals hold and exchange commodities. As capitalism was eradicated, law as such would disappear, to be replaced by a system of administrative rules and regulations.¹⁷⁶

¹⁷¹ There was, for example, the role of the Procurator, and the tendency to pass waves of decrees and statutes in bewildering confusion. See BERMAN, *supra* note 3, at 25.

¹⁷² 1 GSOVSKI, *supra* note 146, at 28.

¹⁷³ BERMAN, *supra* note 159, at 114.

¹⁷⁴ *Id.*

¹⁷⁵ See 1 GSOVSKI, *supra* note 146, at 167-170.

¹⁷⁶ See E. PASHUKANIS, *THE GENERAL THEORY OF LAW AND MARXISM* (1st ed. 1927), in P. BEIRNE & R. SHARLET, *PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW* 40 (1980).

Although the commodity exchange theory of law was not uncontested, it became the dominant legal theory in Russia in the late 1920's and early 1930's. In 1933, N.V. Krylenko asserted that the Civil Code was already sixty percent dead.¹⁷⁷ Stuchka, President of the Supreme Court, wrote that "Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether."¹⁷⁸ A Soviet law textbook officially confirmed the doctrine: "Marxism declares a merciless war against the capitalist legal concepts and the dogmatic method in jurisprudence."¹⁷⁹ The legal developments paralleled the start of the first Five-Year Plan and Stalin's increasing war against "class enemies" such as the intelligentsia and peasant landowners.¹⁸⁰

The state of the law seemed to be following the trend of legal opinion. A system of arbitration, specifically separated from the requirements of the Civil Code, was instituted to resolve disputes between state enterprises. The Civil Code itself was "treated with considerable disdain."¹⁸¹ There were moves to replace tort law by a universal system of liability insurance. The entire study of law declined in importance.¹⁸² In the law schools, students were instructed on how "to preside over the gradual withering away of the law."¹⁸³

The experiment with the bourgeois Romanist codes seemed doomed. Pashukanis decried the "immobility" of capitalist law. "[W]e need the utmost elasticity in our legislation," he said. "We cannot tie ourselves to any system because we are every day breaking up the economic system."¹⁸⁴ Work moved briskly on the drafting of codes befitting a post-capitalist society. Stuchka had taken

¹⁷⁷ 1 GSOVSKI, *supra* note 146, at 6.

¹⁷⁸ 3 *Entsiklopediia gosudarstya i prava* (Encyclopedia State and Law) 1594 (P. Stuchka ed. 1927), *quoted in* BERMAN, *supra* note 3, at 26.

¹⁷⁹ 1 GSOVSKI, *supra* note 146, at 164.

¹⁸⁰ See P. JUVILER, *REVOLUTIONARY LAW AND ORDER*, 42-58 (1976) (discussion of class struggle and law).

¹⁸¹ BERMAN, *supra* note 3, at 45.

¹⁸² *Id.* at 46.

¹⁸³ BEIRNE & SHARLET, *supra* note 176, at 26.

¹⁸⁴ Pashukanis, *The Situation on the Legal Front*, 11/12 *SOVIET STATE* 47-48 (1930), *quoted in* 1 GSOVSKI, *supra* note 146, at 186.

the lead in drafting a set of federal fundamentals on civil law that would have replaced the 1922 Civil Code of the R.F.S.F.R. and the parallel codes of the other republics. According to his draft, which he published in 1931, private property was to be permitted "in [an] ever lessening degree."¹⁸⁵ The transitional nature of private rights was noted elsewhere in the code.¹⁸⁶ Judges were to apply private rights under the code unless they contradicted, among other things, the "consolidated state plan for the reconstruction of the national economy."¹⁸⁷ Certain private groups, such as religions, were denied legal legitimacy.¹⁸⁸ The code was to bow in all instances to state economic legislation, and nothing that was outside of the code of state legislation, such as custom, could guide the judge. Since relations among state agencies were to be arbitrated under special legislation, it was expected that the remaining legal relations, which were under the code, would soon dwindle. The distinction between "law" as seen in a civil code and administrative regulations as based on economic policy is central to the commodity theory of law. Yet even Stuchka's draft was too conservative for the Pashukanis wing of the Soviet legal fraternity. In 1931, the 1st Congress of Persons Engaged in Soviet Construction and the Law resolved against a separate civil code and called instead for a set of "Fundamental Principles of Economic Law."¹⁸⁹ For that group, the very concept of a "civil code" was representative of a bourgeois legal order.

Meanwhile, N.V. Krylenko, head of the R.F.S.F.R. People's Commissariat of Justice, led the drive for a new criminal code. The man who had directed the prosecution of state enemies in the early years of militant Communism had never been reconciled to the 1922 Criminal Code. It was bourgeois in form, and Krylenko

¹⁸⁵ Osnovnye nachala grazhdanskago zakonodatel'stva SSSR, Proekt (pod redaktsiei i s predislaviem P. I. Stuchka), art. 1 (1931) [hereinafter cited as Draft Stuchka—Pashukanis], quoted in Hazard, *The Abortive Codes of the Pashukanis School in CODIFICATION*, *supra* note 170, at 150.

¹⁸⁶ Draft Stuchka—Pashukanis, arts. 12, 49. *Id.* at 153.

¹⁸⁷ Draft Stuchka—Pashukanis, art. 2c. *Id.* at 150.

¹⁸⁸ Draft Stuchka—Pashukanis, art. 26. *Id.* at 153.

¹⁸⁹ *Id.* at 147-48. Stuchka had published his draft after the declaration of the Congress in the hope that the momentum would shift to his side. His tactic was unsuccessful. *Id.* at 148.

pressed for a code more reminiscent of the decrees under which the courts had operated from 1919 until 1922.¹⁹⁰ His own draft code appeared in 1930, reflecting the doctrines of the Pashukanis school. Krylenko asserted that his draft code pointed to the day "when the proletariat will need no law of any kind, including criminal law."¹⁹¹

The primary feature of Krylenko's draft lay in its rejection of the so-called "dosage system," whereby punishments were calculated to fit specific crimes. Pashukanis held this to be the essence of the bourgeois market mentality. In its stead there were to be but two kinds of crime: 1) highly dangerous acts or omissions to act, and 2) other crimes. Those found guilty of serious crimes against the socialist order were to be branded as class enemies and brutally repressed. Those who committed the more ordinary types of crimes would not be repressed, but would be re-educated.¹⁹² According to Krylenko there would not be "punishment" as such, no "market payment" for one's crime. Repression meant the protection of the socialist commonwealth, not retribution for the act. Consequently, severe measures of "self-protection" could be tolerated against those who were threats, even though their specific crimes might be regarded as relatively minor under a bourgeois system.

Krylenko listed categories and examples of especially dangerous acts. In descending order, they were: 1) counter-revolutionary acts, 2) "equivalents to counter-revolutionary acts," 3) crimes against the administrative order, 4) economic crimes, 5) labor law violations, 6) crimes against individuals, 7) property crimes, and 8) "crimes that were relics of a tribal culture."¹⁹³ Krylenko also gave a list of kinds of repression to be applied by the judge depending on the circumstances of the threat.¹⁹⁴ Article 6 allowed for the persecution of potential class enemies.

Measures of class oppression, and of enforced educational in-

¹⁹⁰ *Id.* at 159.

¹⁹¹ *Id.*

¹⁹² *Id.* at 159-60.

¹⁹³ *Id.* at 161-62.

¹⁹⁴ *Id.* at 162-63.

fluences, may be applied to persons who have committed a certain delinquency as well as to persons who, in spite of not having committed a definite crime, justify the serious apprehension that they eventually may commit delinquencies, in consequence of their relations to criminal surroundings, or of their own criminal past.¹⁹⁵

When he gave examples of the less dangerous categories of crime, he grouped them not according to type of action, but instead according to what aspect of the socialist order might be disrupted: e.g., "opposition to an officer of state authority," or "false testimony to state investigators."¹⁹⁶ Krylenko was equally wrathful of the Code of Criminal Procedure, crying "down with chicanery, down with fetishistic adherence to the letter of laws, down with the present complexity of the Code of Criminal Procedure."¹⁹⁷

At the same time that Krylenko published his draft code for the R.F.S.F.R., a state committee under E. Shirvindt put out a set of federal "fundamentals" on criminal law. It too followed the trend to more flexibility in criminal categories, although there were more verbal resemblances between it and the 1924 Fundamentals.¹⁹⁸ Despite the doctrinal similarities between the two drafts, the splenetic Krylenko rejected the Shirvindt version as insufficiently Marxist.¹⁹⁹

D. *Stalin's Intervention*

In the same year of 1930, Stalin undermined the doctrinal base of the Stuchka, Krylenko, and Shirvindt drafts. In his famous speech to the XVI Congress of the Communist Party, Stalin declared that the law would not wither away by degree as socialism grew. On the contrary, the state must be strengthened until socialism is completely built and all imperialist states around the world

¹⁹⁵ Draft Krylenko—Pashukanis, art. 6 (1930), *quoted in* R. SCHLESINGER, *SOVIET LEGAL THEORY* 208 (1945).

¹⁹⁶ Hazard, *supra* note 185, at 163.

¹⁹⁷ D. W. Chenoweth, *Soviet Civil Procedures: An History and Analysis*, 199-201 (Ph.D. thesis, St. Louis University, 1971).

¹⁹⁸ *Id.* at 165. Shirvindt would have had a judge rule by analogy where a "crime" was not specifically listed in his code. *Id.* at 166.

¹⁹⁹ *Id.* at 164.

have been destroyed.²⁰⁰

For a year or so after Stalin's speech, the Pashukanis drafters continued their agitation, but soon they realized that the tide was not running in their favor. At the same time that he increased the nationwide terror that he had begun in the late 1920's, Stalin centralized his absolute dominion over party affairs. As part of that effort he chose to leave the existing legal codes in place and to treat the enemies of his regime through separate legislation and extralegal procedures.²⁰¹ New criminal statutes reflected the increased repression. Theft of socialist property could be punished by death, and resistance to collectivization, or indulging in private entrepreneurial activities brought harsh retribution. Unconsciously imitating the ancient Chinese, the state held whole families responsible for their sons' desertion from military service.²⁰² Beginning in 1934, the People's Commissariat of Internal Affairs (NKVD) was empowered to pass sentence upon dangerous persons through their own Special Board. Millions were sent to the forced labor camps.²⁰³

Stalin's choice to leave the formal Romanist codes in place was cemented in 1936 when a new constitution was promulgated with Stalin's words, "We need stability of laws now more than ever."²⁰⁴ The new Constitution of 1936 had more of a formal structure than its two predecessors.²⁰⁵ Its style and form was not unlike Western constitutions.²⁰⁶ As such, it seemed to be in harmony with the idea

²⁰⁰ *Id.* at 166-67.

²⁰¹ Revolutionary legality at this stage thus expressed the unilateral relationship between the ruled and the ruler. Under this principle of legality, strict observance of law by the people was required, but those at the center of power were immune from any legal restrictions. They were entitled to set aside every law whenever it was necessary in the name of the dictatorship of the proletariat.

Oda, *Revolutionary Legality in the USSR: 1928-1930*, 6 REV. SOCIALIST L. 141, 149 (1980).

²⁰² BERMAN, *supra* note 159, at 29.

²⁰³ *Id.* at 31. See also JUVILER, *supra* note 180, at 58-75 (discussion of types of crimes and prison sentences received therefrom).

²⁰⁴ BERMAN, *supra* note 159, at 32.

²⁰⁵ *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics* [hereinafter cited as, *U.S.S.R. Const. of 1936*], in TRISKA, *supra* note 128, at 37.

²⁰⁶ Hazard, *Foreign Policy and the 1977 Soviet Constitution*, 72 AM. J. INT'L L. 350 (1978).

of rationality and order implicit in Romanist legal architecture. In fact, the Constitution of 1936 was a combination of regularized legal forms and a fictional list of political rights for all in a country now officially without a bourgeois class. The document provided an additional and important weapon in Stalin's plan to consolidate his personal control, to strengthen the Soviet state, to intensify his program of terror both within and outside of the law, and to provide himself with a propaganda piece establishing the legitimacy of the Soviet state in the eyes of the Western powers and in Western intellectual opinion. All in all it was a master stroke that helped to accomplish every one of his goals.

In the Constitution of 1936, the structure of the courts and of the procuracy was further developed, and rights and regularized legal procedures promised to all citizens.²⁰⁷ Article 131, however, confirmed that "Persons encroaching upon public, socialist property shall be enemies of the people."²⁰⁸ It was a tag that denoted those persons who could be dealt with outside of the legal system.

The Constitution of 1936 was promulgated in the midst of the Great Purge. Under the doctrine of "socialist legality," Pashukanis and Krylenko were liquidated as "wreckers" while the chameleon Vyshinsky intoned the new catechetical rule.

Why do we need stability of laws? Because the stability of laws fortifies the stamina of the political regime and the span of governmental discipline; it multiplies and makes ten times stronger the forces of socialism, mobilizing and directing them against forces opposed to socialism.²⁰⁹

N.I. Bukharin, the primary drafter of the constitution apparently believed that "in this constitution the people will have more room. They can no longer be pushed around."²¹⁰ Less than two years

²⁰⁷ *U.S.S.R. Const. of 1936*, arts. 102-133, in TRISKA, *supra* note 128, at 49-52. In fact, Stalin had rejected the traditional Communist practice of having a policy-oriented preamble to the constitution. *Id.*

²⁰⁸ *U.S.S.R. Const. of 1936*, art. 131, *id.* at 52.

²⁰⁹ SOVIET CONSTITUTIONAL LAW 54 (1938), *quoted in* 1 GSOVSKI, *supra* note 146, at 187-88.

²¹⁰ B. NICOLAEVSKY, *POWER AND THE SOVIET ELITE* 22 (1966), *quoted in* UNGER, *supra* note 127, at 134 n.12.

later, he too was executed following one of Stalin's famous show trials.

With the massiveness of Stalin's terror that continued until his death, and with the willing complicity of legal authorities who themselves systematically violated legal forms, one might question whether in fact there was any true "law" in the Soviet Union under Stalin. After all, the terror launched against the Soviet people would not have been contrary to the ideas of Krylenko and Pashukanis. The discarded draft codes of that wing of the Party explicitly provided for continuing persecution of the regime's enemies.²¹¹ But the new constitution and the maintenance of the Romanist codes gave Stalin much that the proposed codes did not have. First, there was the personal motive. Stalin had set himself the task of removing any potential competitors to his rule. Adopting legal rules contrary to the views of the Pashukanis wing delegitimized their position and provided a basis for their removal. Second, the Pashukanis school held that both the law and the state would progressively diminish as socialism developed. Stalin may not have cared much for the law, but above all, the totality of the power of the state had to be maintained. If legal forms meant the continuation of the strong central state, then he would have legal forms.²¹² Third, the strength of the state apparatus was not merely an internal matter. The blunting of Western fears and hostility were also necessary. The surface structure of Romanist law and the dramatic new constitution helped to reduce Russia's isolation in Western opinion. Fourth and most crucially, Stalin saw that law itself could be an instrument for greater control. A structured legality could assure his control over the vast area of "non-political" relations among the Russian people. The very desire for totalitarian control made the use of a centralized code system a natural

²¹¹ The ideas of Pashukanis and Krylenko have been called "the jurisprudence of terror" as providing a basis for Stalin's persecution of his enemies (including ultimately, themselves). BEIRNE & SHARLET, *supra* note 176, at 29.

²¹² As Vyshinsky put it, "Law and state cannot be studied separately and apart from each other. Law draws its force, and obtains its content from the state." And, quoting Lenin, Vyshinsky states, "Law is nothing without a mechanism capable of *compelling* the observance of legal norms." A. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 5 (H. Babb trans. 1948).

instrument. Tying the need for control together with the law, Vyshinsky said, "Only in a socialist society does law acquire a firm soil for its development."²¹³

As for control over political elements, the law continued to permit direct action against them to the full extent that Stalin desired. Law was not an obstacle to Stalin's aims. Where Krylenko wanted to destroy Romanist law to get at socialism's enemies, Stalin kept the law and still got his enemies. A 1940 textbook on Soviet law justified applying "to class foes extraordinary measures necessarily evoked by the conditions of class struggle."²¹⁴ Law was essentially an instrument, and only one instrument, based "on the coercive force of the state" and applied "to the end of safeguarding, making secure, and developing social relationships and arrangements agreeable and advantageous to the dominant class."²¹⁵ The Soviet Union, as a consequence, developed a new bifurcated system: direct terror to be used against the enemies of the people and the state, and clearly defined principles of law to regulate the "socialist" element of society.

What Stalin had realized was that Romanist law structures could be expanded or contracted like an accordion to suit the needs of the party for strengthening the state. Where legal regularity could improve the economic basis of society without threatening political competition, it could be permitted. Where "ordinary" civil and criminal activities were regulated, a greater sense of predictability in the law for both the people and the government could be achieved.²¹⁶ After the brutal years of forced collectivization and industrialization, the constitution and the reaffirmation of the codes promised some measure of stability to the ordinary Soviet citizen. Despite the fact that Stalin's terror continued to permeate every area of Soviet society, it nonetheless remained true that in some areas of civil and criminal relations, the Soviet citizen experienced

²¹³ BASIC TASKS OF THE SCIENCE OF SOVIET SOCIALIST LAW 27 (1938), *quoted in* 1 GSOVSKI, *supra* note 146, at 175.

²¹⁴ S. A. GOLUNSKII & M. S. STROGOVICH, THE THEORY OF THE STATE AND LAW (1940), *quoted in* J. HAZARD, SOVIET LEGAL PHILOSOPHY 393 (1951).

²¹⁵ *Id.* at 370.

²¹⁶ Nevertheless, with millions being imprisoned by the NKVD, it is difficult to say what was or was not the "ordinary" criminal process of the era.

a greater sense of legal regularity and predictability.

With one exception, the development of further codes of the Romanist type did not occur until after Stalin's death. Nonetheless, it was this insight of the man's malevolent genius that has provided the basis of the modern Soviet state, namely, that Romanist structures are efficient methods to further the control of the state over its people without the danger of "contamination" by those values that are the ultimate basis of the Romanist legal tradition. As Vyshinsky put it, "There can be no discrepancy in Soviet law between the law and expediency because the Soviet law is precisely the expression of what is expedient for the construction of socialism and the fight for socialism."²¹⁷ Highlighting Stalin's desire for an even greater unification of law at the center, the 1936 Constitution authorized the central government to write codes in most areas of law for all of Russia, thus replacing the federal system. Although code commissions were formed for this work, nothing came of the project until well after Stalin's death.²¹⁸ It is possible that political and international exigencies had in part caused Stalin to lose interest in the idea. In the meantime, Soviet courts returned to using the codes that had been neglected before 1936. By interpretation, high courts reinstated previously neglected Romanist glosses. Fault had to be proven to establish contract or tort liability, although in tort cases, the burden of proof fell on the defendant to show lack of fault.²¹⁹ In criminal law, crimes by analogy, though revived temporarily during World War II, were circumscribed.²²⁰ Soviet courts mitigated the harshness of a 1947 edict of the Presidium dealing with the theft of state property.²²¹ Article 1 of the Civil Code, which permitted the suspension of civil rights when exercised "contrary to their social purpose," fell into disuse.

²¹⁷ Vyshinsky, *The Stalin Constitution*, 8 SOCIALIST LEGALITY 12 (1936), quoted in 1 GSOVSKI, *supra* note 146, at 187.

²¹⁸ THE SOVIET CODES OF LAW xxx (W. Simons ed., Law in Eastern Europe, no. 23, 1980).

²¹⁹ Hazard, *supra* note 185, at 154. J. HAZARD, COMMUNISTS AND THEIR LAW 385 (1969). For an update on contract law in the U.S.S.R., see Speer, *Contract Rights and the Planned Economy: Peaceful Co-existence under the 1969 Soviet Statutes on Deliveries of Goods*, 3 L. & POL. INT'L BUS. 510 (1971).

²²⁰ Hazard, *supra* note 185, at 154.

²²¹ F.J. FELDBRUGGE, SOVIET CRIMINAL LAW 26 (1964).

The industrial arbitration tribunals metamorphosized into commercial courts.²²² A new Judiciary Act of 1938 emphasized legal formality and regularity. At the same time, however, the mass of new legislation continued to be formulated by Presidium edict and by decree by the Council of Ministers, most of which was never published.²²³

E. *The Modern Codes*

An additional opportunity to review the Romanist legal structure occurred after Stalin's death. In 1957, the constitution was amended to allow for the traditional differentiation between federal "Fundamentals" and Republican codes. The U.S.S.R. Fundamentals of law are codes applicable through the country, while the constituent republics were allowed to pass codes extending the Fundamentals to cover more specific issues. The debate began anew between those who wanted law to reflect a progressive withering of the state and those who demanded legal integration within unitary codes. At first, the flamboyant Khrushchev made speeches seeming to side with the neo-Pashukanist school. He called for the development of informal courts untied to strict criminal procedure. He also urged mass public trials against enemies of the state.²²⁴ But his rhetoric seemed to have little effect on the legal system itself.

Among the compilers, the debate centered around the issue of one civil code or two. The neo-Pashukanists called for a socialist code of economic law and a separate civil code for the remaining private relationships left in society. The opposition group demanded a single unitary civil code to cover all relationships—public as well as private. The issue was central to the nature of the legal system. A Romanist civil code is based on the legal parity of subject agents, a strictly capitalist notion according to the commodity exchange theory of law. A separate civil code would signal that the Romanist structures would have a lessening role to

²²² The modern use of arbitrazh is examined in Pomorski, *State Arbitrazh in the U.S.S.R.: Development, Functions, Organization*, 9 *RUT.-CAM. L.J.* 61 (1977).

²²³ UNGER, *supra* note 127, at 105.

²²⁴ Hazard, *supra* note 185, at 154-55.

play in the legal system. The neo-Pashukanists seemed to be gaining the upper hand when Khrushchev designated Aleksei Kosygin to resolve the dispute. Kosygin sided entirely with the single-code group²²⁵ and the issue was settled definitively.²²⁶

In 1961, the new U.S.S.R. Fundamentals of Civil Legislation appeared. It regulated relationships among all segments of Soviet society: citizens, co-operatives, and the state enterprises.²²⁷ The idea of applying similar legal rules to all parts of the society was more Romanist than anything that had come before. The Soviet Union had decided to expand "the area of predictability epitomized by norms."²²⁸ The Fundamentals of Civil Legislation defined and regulated legal capacity, juridical persons, liability, agency, statute of limitations, property, obligations (with particular and lengthy emphasis on the law of contracts), insurance, credit, injuries (torts), copyright, patents, succession, and some provisions on aliens, choice of law rules, foreign transactions and treaties.²²⁹ The new Fundamentals continued basic Romanist law principles: contracts in general are permitted except those that are specifically forbidden; legal capacity was based not on class definition or on the requirements of economic policy but on the fact of having been born;

²²⁵ *Id.* at 154. See Westen, *The New Codes of Civil Law*, PROB. OF COMMUNISM, March/April 1965, at 37.

²²⁶ Ironically, Western Europe itself distinguishes between its civil codes, based on the relations of individuals one to another, and its economic laws wherein individual transactions are regulated according to a rather explicit state policy. See Kato, *Civil and Economic Law in the People's Republic of China*, 30 AM. J. COMP. L. 429, 437-441 (1982). But where in the West such a distinction makes sense conceptually, in the Soviet Union the same division would be a political signal that the legalization trend is in doubt. Consequently, the Soviet leaders have made a political decision to opt for a single code even with its attendant conceptual anomalies.

²²⁷ *Fundamentals of Civil Legislation of the USSR and the Union Republics* art. 2, [hereinafter cited as *Fund. of Civ. Leg.*], in FUNDAMENTALS OF LEGISLATION OF THE USSR AND THE UNION REPUBLICS 150, 152 (1974).

²²⁸ Hazard, *Preface to SOVIET LAW AFTER STALIN XII* (D. Barry, G. Ginsburgs, & P. Maggs eds., Law in Eastern Europe, no. 20(I), 1977). Although Soviet legislation follows the pattern of modern Western law, its debt to Romanist forms goes back even to ancient Roman law rules. See Ioffe, *supra* note 41, at 702-21.

²²⁹ *Fund. of Civ. Leg.*, *supra* note 227, at 150. For a view as to how Soviet tort law is leading towards "full convergence with the tort laws of other modern Romanist legal systems," see Osakwe, *An Examination of the Modern Soviet Law of Torts*, 54 TUL. L. REV. 3, 72 (1979).

juristic persons have similar legal rights and obligations as natural persons; testamentary freedom is guaranteed. In fact, the definition of contractual obligations continues to follow the German model closely,²³⁰ as do the rules of offer and acceptance.²³¹ The Fundamentals, however, continued to provide the traditional escape clause: "Civil rights shall be protected by law, except as they are exercised in contradiction to their purpose in socialist society in the period of communist construction."²³² The Fundamentals of Civil Legislation were followed in 1964 by a longer Civil Code of the R.S.F.S.R. which added many legislative details to the structure of the Fundamentals.²³³

The Soviet Union also promulgated a Fundamentals of Civil Procedure²³⁴ in 1961, followed again in 1964 by a far more detailed Civil Code of the R.S.F.S.R.²³⁵ Both codes follow the classic Romanist models of Western Europe, including "inquisitorial principles, separation of the judiciary, rules of evidence, cassationary powers, . . . an increased stress on legality, a streamlining of procedures, and a reduction in the amount of procedural conflicts."²³⁶

The 1961 Civil Code was but one part of a major commitment by the Soviet government to regulate public life by the mechanism of comprehensive codes. In 1958, the government had promulgated three major codes on criminal law, criminal procedure, and court organization.²³⁷ Soviet criminal procedure hews closely to Roman-

²³⁰ Compare *Fund. of Civ. Leg.*, art. 33, *supra* note 227, at 165 with THE GERMAN CIVIL CODE § 241 (I. Forrester, S. Goren & M. Ilgen trans. 1975).

²³¹ J. HAZARD, COMMUNISTS AND THEIR LAW 316 (1969).

²³² *Fund. of Civ. Leg.*, art. 5, *supra* note 227, at 153.

²³³ *The Civil Code of the RSFSR* (A.K.R. Kiralfy trans.), in THE SOVIET CODES OF LAW, *supra* note 218, at 387.

²³⁴ *Fundamentals of Civil Procedure of the USSR and the Union Republics*, in FUNDAMENTALS OF LEGISLATION OF THE USSR AND THE UNION REPUBLICS 205 (1974).

²³⁵ *The Code of Civil Procedure of the R.S.F.S.R.*, in THE SOVIET CODES OF LAW, *supra* note 218, at 543.

²³⁶ Chenoweth, *supra* note 197, at 199-201. For a discussion of civil procedure in the U.S.S.R., see Note, *Civil Procedure in the U.S.S.R.*, 7 CASE W. RES. J. INT'L L. 211 (1975).

²³⁷ *Fundamentals of Criminal Legislation of the USSR and the Union Republics* [hereinafter cited as *Fund. of Crim. Leg.*], in FUNDAMENTALS OF LEGISLATION OF THE USSR AND THE UNION REPUBLICS 238; *Fundamentals of Criminal Procedure of the USSR and the Union Republics*, *id.* at 272; *Fundamentals of Legislation on the Judicial System of the USSR, and the Union and Autonomous Republics*, *id.* at 137. For an annotation of the

ist lines (including the right to be represented by counsel). So does substantive criminal law, although it has retained some distinctive aspects. For example, in the 1958 Fundamentals of Criminal Legislation, some crimes were still defined as "socially dangerous" acts, although such acts now had to be defined in law.²³⁸ In addition, the principle of crime by analogy was abolished—only those found guilty of existing law by a court can be punished, and guilt can only be imputed to one who acts wilfully or negligently in a manner contrary to law.²³⁹ On the other hand, the Fundamentals on Criminal Legislation were published in conjunction with a Law on Crimes against the State and a Law on Military Crimes.²⁴⁰ Clearly the authorities were attempting to make coherent the coercive methods used against the regime's enemies, and the Fundamentals and subsequent republican codes did much to accomplish that end. The content of the actions constituting crimes remained as wide as the regime needed. The Law on Crimes against the State still contains notoriously vague language regarding acts that "undermine," "weaken," or "wreck" the Soviet State.²⁴¹ Similarly, in 1961, stiffer penalties were enacted for fraud.²⁴² Thus, although Soviet substantive criminal law followed the trend towards Romanist forms, it did so to a lesser degree than did the law of procedure. The regime still required sufficient flexibility to deal with the many actions

major articles of the Fundamentals of Criminal Legislation, see Osakwe, *Contemporary Soviet Criminal Law: An Analysis of the General Principles and Major Institutions of the Post-1958 Soviet Criminal Law*, 6 GA. J. INT'L & COMP. L. 437 (1976).

²³⁸ *Fund. of Crim. Leg.*, art. 7, *supra* note 237, at 240.

²³⁹ *Fund. of Crim. Leg.*, art. 3, *supra* note 237, at 238.

²⁴⁰ *Law on the Criminal Responsibility for Crimes against the State* in LAW IN EASTERN EUROPE 73 (Z. Szirmai ed., Law in Eastern Europe, no. 3, 1959); *Law on the Criminal Responsibility for Military Crimes* in LAW IN EASTERN EUROPE 87 (Z. Szirmai ed., Law in Eastern Europe, no. 3, 1959). See F.J. FELDBRUGGE, SOVIET CRIMINAL LAW 38 (1964). For a study on how the new codes and statutes affected the way the USSR treated those accused of violating state secrets, see Ginsburgs & Ruisis, *Soviet Criminal Law and the Protection of State Secrets*, in MISCELLANEA 3 (Z. Szirmai ed., Law in Eastern Europe, no. 7, 1963). For a study of Soviet military trials, see Sims, *Soviet Military Law: Judicial and Non-judicial Punishment*, 13 NEW ENG. L. REV. 381 (1978)

²⁴¹ R.W. MAKEPEACE, MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW 248 (1980).

²⁴² FELDBRUGGE, *supra* note 240, at 39. Anti-parasite legislation was also enacted. For an example of its use against an intellectual, see Burford, *Getting the Bugs out of Socialist Legality: The Case of Joseph Brodsky and a Decade of Soviet Anti-Parasite Legislation*, 22 AM. J. COMP. L. 465 (1974).

that it might regard as a threat. Since 1958, decrees, legislation, and codes of the USSR and the republics have, on the whole, made more activities criminal and with harsher penalties.²⁴³ In addition, although the Soviet Union has preferred to deal with its enemies more through its developing structure of criminal law, the freedom of agencies like the KGB to continue to harass and persecute dissidents remains ingrained in the legal structure.²⁴⁴

Following after the federal Fundamentals, the R.S.F.S.R. Law on Court Organization declared the multifaceted tasks of a court as including the education of "citizens in the spirit of loyalty to the Motherland and to the cause of communism and in the spirit of strict and undeviated execution of Soviet laws. . . ."²⁴⁵ That code also demanded equality of citizens before the law, judgment only according to law, independence of judges (though accountable to the agencies that elect them, including right of recall), open trials (with exceptions permitted by other laws), a right to a defense, and the intercessory role of the procurator.²⁴⁶ The R.S.F.S.R. main-

²⁴³ See JUVILER, *supra* note 180, at 83-85; MAKEPEACE, *supra* note 241, at 249-67. See also Morgan, *People's Justice: The Anti-Parasite Law, People's Volunteer Militia, and Comrades' Courts*, in MISCELLANEA 49 (Z. Szirmai ed., Law in Eastern Europe, no. 7, 1963); Hazard, *The Soviet Post-Industrial Era and Soviet Law*, 30 CURRENT LEGAL PROBS. 85, 90-92 (1977); Feldbrugge, *Law and Political Dissent in the Soviet Union*, 26 CURRENT LEGAL PROBS. 241 (1973); Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 AM. J. COMP. L. 575 (1970); Connor, *The Soviet Criminal Correction System: Change and Stability*, 6 L. & Soc. REV. 367 (1972); Osakwe, *Due Process of Law under Contemporary Soviet Criminal Procedure*, 50 TUL. L. REV. 266 (1978). Osakwe notes that although Article 3 of The Fundamentals of Criminal Procedure implies no prosecutorial discretion or selective enforcement of law and Article 4 rejects crime by analogy, a crime still need not be defined with great particularity. *Id.* at 275, 283. For differing views on "presumption of innocence" in Soviet courts, see Gorgone, *Soviet Criminal Procedure Legislation: A Dissenting Perspective*, 28 AM. J. COMP. L. 577 (1980); Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 U.C.L.A. L. REV. 1203 (1968); and Berman, *The Presumption of Innocence: Another Reply*, 28 AM. J. COMP. L. 615 (1980).

²⁴⁴ Although Soviet jurists have pressed for greater judicial review of the legality of administrative actions, there is apparently little institutional change in that direction as yet. See Barry, *Administrative Justice and Judicial Review in Soviet Administrative Law*, in SOVIET LAW AFTER STALIN 241 (D. Barry, G. Ginsburgs, & P. Maggs eds., Law in Eastern Europe, no. 20 (II), 1978).

²⁴⁵ *The Law on Court Organization of the RFSFR*, art. 3 in THE SOVIET CODES OF LAW, *supra* note 218, at 1221-222.

²⁴⁶ *The Law on Court Organization of the RFSFR*, arts. 5, 6, 7, 12, 13, 18, 19 & 24, *id.* at 1222-224, 1226.

tained the traditional structure of district courts of first instance, various forms of regional courts, and a supreme court with original and appellate jurisdiction, and with the power to issue "explanatory directives" on the application of the law.²⁴⁷ At the federal level, the USSR Supreme Court has actively issued such directives adding to the systemization of the law.²⁴⁸

The development of comprehensive codes had just begun. Since 1961, the Soviet Union has promulgated federal Fundamentals and republican codes on customs, marriage and the family, merchant shipping, land law, corrective labor, health, labor, water, public education, mineral resources, forestry, and housing.²⁴⁹ The hallmark of the process became the new Constitution of 1977, impressed upon the Soviet Union by Leonid Brezhnev with the same vigor as Stalin had championed his Constitution of 1936. The impetus of the new constitution can be traced to 1959, when Nikita Khrushchev called for amendments to the 1936 constitution. By 1962 a constitutional commission had been formed to write an entirely new document. Shortly after taking control, Brezhnev had promised a new constitution by 1967, but it was ten years before the document was finally promulgated.²⁵⁰

Almost twice as long as Stalin's constitution, the new Constitution is far more explicit about the political and legal structure of

²⁴⁷ *The Law on Court Organization of the RFSFR*, art. 50, *id.* at 1235.

²⁴⁸ Barry & Barner-Barry, *The USSR Supreme Court and the Systemization of Soviet Criminal Law*, in CODIFICATION, *supra* note 170, at 1.

²⁴⁹ THE SOVIET CODES OF LAW, *supra* note 218, at xlvii. There have been recent calls for an entirely new legal regime for agricultural enterprises. Osofsky, *Soviet Agricultural Law and Policy*, 7 U. Tol. L. Rev. 1071, 1079 (1976). For a study of the effects of legislation on marriage see Gorecki, *Communist Family Pattern: Law as an Implement of Change*, 1972 U. Ill. L.F. 121, and Bolas, *No-Fault Divorce: Born in the Soviet Union?* 14 J. Fam. L. 31 (1975). See also Luryi, *Soviet Family Law*, 10 MAN. L. J. 117 (1980), for an extensive review of family law provisions, supplemented by case histories known to the author who practiced law for twenty-five years in the U.S.S.R.

²⁵⁰ See UNGER, *supra* note 128, at 173; see generally R. SHARLET, *THE NEW SOVIET CONSTITUTION OF 1977* (1978) (text and analysis). Other eastern European governments are moving toward more "legality" in statutory law. See Markovits, *Law or Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513 (1982); Hazard, *The Common Core of Marxian Socialist Constitution*, 19 SAN DIEGO L. REV. 297 (1982).

the Soviet state.²⁵¹ Unlike previous constitutions, it specifies in detail the leading role of the party in all parts of society.²⁵² The Constitution is more centralist than previous structures. It looks towards the eventual elimination of national differences within the Soviet Union, and the "strengthening of the social homogeneity of society."²⁵³ Indeed, the main purpose of the Constitution is to centralize and rationalize the organized control of the society by the state. State ownership is now declared the "basic" form of property in the U.S.S.R. into which apparently other forms will eventually be merged,²⁵⁴ although the right to use small agricultural plots is given to all citizens.²⁵⁵ The attempt at comprehensive organization even includes a section on the goals of the Soviet state's foreign policy.²⁵⁶ The part of the Constitution allotted to individual rights and duties is significantly longer than the corresponding section of the 1936 constitution. There are few significant substantive

²⁵¹ See Ginsburgs & Poworski, *A Profile of the Soviet Constitution of 1977*, in *THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS 3* (F. Feldbrugge ed., Law in Eastern Europe, no. 15, 1979); Ramundo, *The Brezhnev Constitution: A New Approach to Constitutionalism*, 13 J. INT'L L. & ECON. 41 (1978). Professor John Hazard notes that one school of legal thought in Russia is pressing for a concept of "constitutional law" as opposed to "state law." The champions of the change assert that constitutional law reflects a more complete structuring of the society including the actions of the Communist Party. Stated thus far, the constitutional school merely reflects the regime's purpose in a more ordered and predictable control over the people. But the constitutional school necessarily meets opposition in its proposal to have some kind of institution operate to keep governmental bodies within constitutional bounds. Hazard, *A Constitution for "Developed Socialism,"* in *SOVIET LAW AFTER STALIN*, *supra* note 244, at 11-14.

²⁵² *Constitution (Fundamental Law) of the Union of the Soviet Socialist Republics* [hereinafter cited as *Const. of U.S.S.R.*], preamble. For a study of the various ways in which the Communist Party tries to control the system of justice, see Sharlet, *The Communist Party and the Administration of Justice in the USSR*, in *SOVIET LAW AFTER STALIN* 321 (D. Barry, F. Feldbrugge, G. Ginsburgs, & P. Maggs eds., Law in Eastern Europe, no. 20 (III), 1979).

²⁵³ *Const. of U.S.S.R.*, art. 19. The general trend of Soviet legality under Brezhnev has been to centralize power. See, e.g., Schultz, *Codification and Soviet Federalism*, in *CODIFICATION*, *supra* note 170, at 333; Hazard, *The Future of Soviet Law*, 8 SYDNEY L. REV. 590 (1979).

²⁵⁴ *Const. of U.S.S.R.*, art. 11.

²⁵⁵ *Id.*, art. 13. See generally Cameron, *The Development of Individual Property Rights under Soviet Law*, 14 AM. BUS. L.J. 333 (1977). For a discussion of the effect of this provision, see Osofsky, *The Legal Status of the Russian Collective Farm Household*, 22 AM. J. COMP. L. 541 (1974).

²⁵⁶ *Const. of U.S.S.R.*, arts. 28-30.

additions, however, even though the courts are now assized of the power to protect citizen's rights against actions by the administrative organs of the state.²⁵⁷ The Constitution explicitly subjugates the purview of all individual rights to the interests of the state.²⁵⁸ Within a year, all the constituent republics of the U.S.S.R. had adopted parallel constitutions.

The last part of the program to Romanize the legal structure consists of collecting, organizing, and publishing a digest for all the decrees and statutes that remain in effect outside of the new codes. A 1972 Statute on the Ministry of Justice directed that agency to formulate a collection of laws-in-force.²⁵⁹ It has not proved to be an easy task. First, there is the sheer mass of the legislation. From 1945 until 1965 alone the Soviet Union issued approximately 200 laws, 10,000 edicts and 57,400 decrees over 80 per cent of which remained unpublished.²⁶⁰ Second, the leaders of the U.S.S.R. do not want to lose control of a legislative tool they can use whenever code law becomes an impediment. At present a Systematic Collection (*Sobranie*) of Legislation in the U.S.S.R. is scheduled to be published in the early 1980's to be followed by a Digest (*Svod*) of Laws for the U.S.S.R.²⁶¹ The *Sobranie*, however will not be available to the public.²⁶²

The Soviet Union has expended an astounding amount of energy in the last twenty-five years in creating an integrated Westernized legal system. But legalization has its limits. The Soviet Union's

²⁵⁷ *Id.*, arts. 57-58. At the same time, Soviet judges continued to press for greater independence from the administrative oversight of the Party. See Ginsburgs, *The Political Undercurrents of the Legal Dialogue*, 15 U.C.L.A. L. Rev. 1226 (1968).

²⁵⁸ *Const. of U.S.S.R.*, art. 39. The dissonance between Soviet legal obligations and human rights practice continues. See Comment, *Human Rights in the Soviet Union: The Policy of Dissimulation*, 29 DEPAUL L. REV. 819 (1980); Feldbrugge, *The Soviet Human Rights Doctrine in the Crossfire between Dissidents at Home and Critics Abroad*, 13 VAND. J. TRANSNAT'L L. 451 (1980); V. CHALIDZE, *THE SOVIET COURT AND HUMAN RIGHTS* (1975).

²⁵⁹ Butler, *supra* note 170, at 89.

²⁶⁰ Loeber, *Legal Rules "For Internal Use Only"*, 19 INT'L & COMP. L.Q. 70, 76 (1970). For a description of the structure of positive legislation in the Soviet Union, see Vanneman, *The Hierarchy of Laws in the Communist Party-State System in the Soviet Union*, 8 INT'L LAW. 285 (1974) and Butler, *Sources of Soviet Law*, 28 CURRENT LEGAL PROBS. 223 (1975).

²⁶¹ THE SOVIET CODES OF LAW, *supra* note 218, at xxxi.

²⁶² *Id.* at xli n.13.

quest for orderly process has been pursued only when the maintenance of control is thereby improved. Where any crime has "political" implications, "the rule of law gives way to unbridled arbitrariness at both the operational and planning levels of the government."²⁶³ As a distinguished observer has noted, "the secret police function—whether somewhat larger or somewhat smaller—remains central and vital, now as ever, in the Soviet state."²⁶⁴ Similarly, despite its Western structure, the entire purpose of the civil law is to harness the energies of the Soviet citizen to the accomplishment of the policies of the party.²⁶⁵

VI. THE CHINESE COMMUNIST CHOICE

A. *Revolutionary Communism*

Unlike the Bolsheviks, the Chinese Communists had a relatively long period of "pre-history" in which to experiment with legal forms before coming to power. Between 1926 and 1931, while the Kuomintang was undertaking a sophisticated program in code building, the Communists controlled only remote rural areas. There, they enforced a direct and often ruthless rule, designed to cement their power and to begin social revolutionary activity at once. Because they were desperately struggling to maintain a military base in outlying areas, exigencies of rebellion rather than jurisprudential conceptions had much to do with their style of ruling.

If there was any kind of legal model extant, it seemed a combination of Leninist ideology, militant Bolshevism, *fa* styles of punishments, and a desire to smash Confucianism and to construct a new *li* among the people. Such devices as land reform and the establishment of a new status for women were promulgated and enforced by special *ad hoc* revolutionary tribunals. Legal rules, such

²⁶³ Osakwe, *Due Process of Law and Civil Rights Cases in the Soviet Union*, in 1 SOVIET LAW AFTER STALIN, *supra* note 252, at 214.

²⁶⁴ Feldbrugge, "Does Soviet Law Make Sense?": *Rationality and Functionality in Soviet Law: An Epilogue*, in SOVIET LAW AFTER STALIN, *supra* note 252, at 400.

²⁶⁵ While it is the purpose of Western civil law to provide the individual with an orderly legal framework within which he can conduct his own affairs, with as little hindrance as possible, it is the primary objective of Soviet civil law to realize the ideological goals of the Communist social system.

Westen, *supra* note 226, at 40.

as they existed, were direct applications of substantive revolutionary goals. There was no judicial structure, but rather a series of individual trials that would educate the masses through terrorist means (using the example of a *fa*-type severe punishment) directed against "evil" kinds of persons.²⁶⁶ As in traditional China (and the soon-to-come Soviet show trials), the whole point of the exercise was exemplary punishment, which could include the traditional bambooning, imprisonment, or execution. One writer has noted, "Judicial procedure, crude as it may have been, was on the whole regarded as a weapon against counter-revolutionaries."²⁶⁷ In contrast, disputes among loyal comrades were handled informally along the lines of the traditional *li* pattern (although the substance of the new *li* consciousness was radically different).

In 1931, the Communists declared the areas under their control to be an independent Chinese Soviet Republic. As a constituted "government," the regime began inaugurating a legal superstructure. Here the Chinese communists copied many of the *non-Romanist* aspects of the Russian Soviet system, together with some traditional Chinese glosses.

Substantive legislation was passed dealing with land reform, labor conditions, marriage law, and activities of counter-revolutionaries. The government established a judicature in which existed a Supreme Court made up of three chambers: civil, military, and criminal. This roughly paralleled an appeal board that heretofore had assisted the Emperor in reviewing capital cases. Lower courts were staffed and controlled by the Commissariat of Justice, also following the imperial Chinese tradition of a bureaucratic judiciary. The trial courts were staffed by a judge and two lay assessors, assisted by procurators, but the Communists continued to make wide use of special tribunals for mass educative show trials.²⁶⁸

The leadership also made use of a contemporary Soviet practice, giving the Chinese version of the NKVD independent powers

²⁶⁶ Tay, *Part 1, supra* note 116, at 166; McAleavy, *The People's Courts in Communist China*, 11 AM. J. COMP. L. 52, 54-57 (1962).

²⁶⁷ Tay, *Part 1, supra* note 116, at 166.

²⁶⁸ *Id.* at 168-69.

against enemies and agents. However, in dealing with minor offenses and civil disputes, the government preferred relying on informal conciliation and re-education.²⁶⁹

In 1937, the Communists and Nationalists joined in a common front against the Japanese. The Chinese Soviet Republic was dissolved, though the Communists retained autonomous authority in the regions they controlled. Consciously or not, the Communists began to follow Stalinist-type policy that placed a greater emphasis on legality, though not to the same degree. The High Courts in their provinces came under the titular authority of the Supreme Court of the Republic, and the connection had some effect. The Communists enforced some Republican legislation, and adopted a formal structure of criminal adjudication. Torture and corporal punishment were banned; evidence, not confession, was the basis of conviction; and appeals were allowed. Public security organs were restricted in their powers, and there were even calls for draft codes of criminal and civil law.²⁷⁰ It was the Communists' first brush with Romanist procedures.

The leadership, however, did not let things go too far. It put the increasingly independent judiciary under political control again in 1943, placing party cadres at every judicial level. The pressure for informal conciliation remained strong, and the practice of mass show trials continued.²⁷¹

The renewed revolutionary trends were increased during the Communists' final push for victory after the end of the World War. Party control of the formal court structure intensified, and there were even more mass trials, public executions, and legislation by revolutionary decree. When the Communists gained ultimate power in 1949, their long struggle had given them some experience with many legal practices: 1) direct revolutionary rule, 2) *fa*-style punishments, 3) *li*-style adjudications, 4) Soviet examples, 5) imperial judicial structures, and 6) Romanist forms.

²⁶⁹ *Id.* at 169.

²⁷⁰ *Id.*

²⁷¹ *Id.*

B. *The Regime in Power*

The victorious new regime began its legal rule remarkably like the Bolsheviks had during their period of militant Communism. Two of the regime's first acts were to abolish the Nationalist Government's Six Codes,²⁷² and to direct judges to decide cases according to the new laws that would be forthcoming, or in their absence, by the spirit of the "New Democracy."²⁷³ Under the Provisional Regulations of the People's Courts of 1951, each local court was to be politically controlled, staffed normally by one judge, and given jurisdiction over both criminal and civil cases. The function of the courts was to consolidate the revolution and to aid in the social reorganization of the country. The judges were to base their decisions on the policy of the Central People's Government, criminal prosecutions were to issue against those committing "socially dangerous acts," and appeals were discouraged.²⁷⁴ The courts typically sentenced an accused "without telling him which law he was alleged to have violated."²⁷⁵

Thousands of *ad hoc* revolutionary tribunals flourished throughout the country and took on the bulk of criminal adjudications. Goaded on by the land reform movement, and the Three-Anti and Five-Anti campaigns,²⁷⁶ the tribunals were part of a massive plan to repress counter-revolutionary activity. The police possessed a free hand to deal with class enemies. Many "judicial" organs routinely conducted business in secret.²⁷⁷ Millions perished. Mean-

²⁷² *The Common Program of the Chinese People's Political Consultative Conference*, art. 17, reprinted in *THE NEW CONSTITUTION OF COMMUNIST CHINA: COMPARATIVE ANALYSES* 285 (M. Lindsay ed. 1976) [hereinafter cited as LINDSAY].

²⁷³ Tay, *Part 1*, *supra* note 116, at 171.

²⁷⁴ Comment, *The Background and Evolution of Party Policy on the Drafting of Legal Codes in Communist China*, 15 *AM. J. COMP. L.* 506, 513 (1967).

²⁷⁵ Chiu, *The Judicial System under the New PRC Constitution*, in LINDSAY, *supra* note 272, at 73 (footnote omitted).

²⁷⁶ In 1951 and 1952, the Three-Anti campaign (anti-corruption, waste, and -bureaucratism) and the Five-Anti campaign (anti-bribery, tax evasion, theft of public assets, fraud, and theft of government secrets) were designed to bring the revolution to the government bureaucracy and to private industry. Liu, *Economic Development of the Chinese Mainland, 1945-1965*, in 1 *CHINA IN CRISIS* 611 (P. Ho & T. Tsou ed. 1968).

²⁷⁷ Bassiouni, *The Criminal Justice System of the Union of Soviet Socialist Republics and the People's Republic of China*, 11 *REV. D. P.* 163, 183 (1971).

while, swamped by an enormous case load, the People's Courts appointed local conciliation committees to help take over the mass of civil complaints that had been brought to them.²⁷⁸ The court structure never truly solidified.

As it had been with the early Bolsheviks, substantive legislation was limited to land reform, marriage, labor conditions, corrective labor camps, and counter-revolutionary activity.²⁷⁹ For the first few years, the idea of a codification of laws was ridiculed by the state's propaganda organs. "Some people," declared an editorial, "disregarding the present practical conditions, prematurely and fancifully insist on the immediate enactment of a complete collection of laws [T]hese viewpoints . . . must be resolutely corrected."²⁸⁰ However, in 1952, a codification committee in the Ministry of Justice began to work on proposed codes of criminal law, judicial procedure, company law, and criminal rehabilitation.²⁸¹ But as yet, the committee was running against the dominant trend.

The militant ideology of the period was reflected in the regime's harsh attitude towards formal law in general. While the codifiers were beginning their work, a purge of the judiciary ensued, taking as its rationale the Leninist dictum that law and most of the judges were appendages of the old exploitative order. Romanist legal principles such as equality before the law, statutes of limitations, *nullum crimen sine lege*, the prohibition of *ex post facto* laws, and the independence of the judiciary were all singled out for excoriation. In their stead, the principle of analogy was approved,

²⁷⁸ Tay, *Law in Communist China—Part 2*, 6 SYDNEY L. REV. 335, 351 (1971) [hereinafter cited as Tay, *Part 2*].

²⁷⁹ See Statute on Punishment for Counter-revolutionary Activity (1951), Temporary Regulations for the Surveillance of Counter-revolutionary Elements (1952), Statute on Penalties for Corruption (1952), Statute on Labor Re-education, the Marriage Law (1950), the Agrarian Reform Law (1952), and the Trade Union Law (1950), in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA, 215, 222, 227, 240, 266, 276, 470 (A. Blaustein ed. 1962) [hereinafter cited as BLAUSTEIN]. For a textual analysis of the 1950 Marriage Law, see Woodsworth, *Family Law and the Resolution of Domestic Disputes in the People's Republic of China*, 13 MCGILL L.J. 169 (1967).

²⁸⁰ Editorial, *Strengthen & Consolidate the People's Revolutionary Legal System*, JEN-MIN JIH-PAO, Sept. 5, 1951; CURRENT BACKGROUND No. 183 (Hong Kong, U.S. Consulate General), quoted in Comment, *supra* note 274, at 507.

²⁸¹ Tay, *Part 2*, *supra* note 278, at 351.

as well as the application of retroactive laws to those guilty of previous counter-revolutionary activities.²⁸² Local "self-criticism" committees took on most of the purging and by April 1953, over eighty percent of the judicial personnel had been fired.

C. Modernization

In 1954, Communist China ended its militant phase. For the next four years, it attempted to consolidate its control at home, to industrialize, and to seek legitimacy abroad. Though means differed, the basic objectives were similar to those of Lenin's NEP. The legal phase had been prefigured by the National Conference on Judicial Work, which at the end of the purge in 1953, had called for extending the judiciary and populating it with newly trained cadres. The law school of Peking was revived,²⁸³ and propaganda appeared exhorting party members to adhere to a "law abiding spirit."²⁸⁴ All seemed in harmony with the goals of the first five-year plan of economic development.

The newly promulgated Constitution of 1954 confirmed the new trend. It was based upon the model of Stalin's constitution of 1936.²⁸⁵ Encouraging citizens to "uphold the law," the Constitution in some detail indicated a formal structure of courts and a significant amount of judicial independence.²⁸⁶ Cases were to be heard "in public unless otherwise provided for by law" and the accused possessed "the right to defence [*sic*]."²⁸⁷ The procuracy was constitutionalized.²⁸⁸ The document recognized individual, peasant, artisan, and capitalist ownership of property in addition to state and cooperative forms.²⁸⁹ Inheritance was to be protected²⁹⁰ with the

²⁸² Comment, *supra* note 274, at 514. Tay, *Smash Permanent Rules: China as a Model for the Future*, 7 SYDNEY L. REV. 400, 407 (1976).

²⁸³ Macdonald, *supra* note 96, at 323.

²⁸⁴ Tay, *Part 2*, *supra* note 278, at 353.

²⁸⁵ See Cohen, *China's Changing Constitution*, 1978 CHINA Q. 794, 798. Soviet law professors soon arrived at Peking University. Macdonald, *supra* note 96, at 324.

²⁸⁶ *Constitution of the People's Republic of China (1954)*, art. 78, in 1 SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1, 45 (J. Wang ed. 1976) [hereinafter cited as SELECTED LEGAL DOCUMENTS].

²⁸⁷ Art. 76. *Id.*

²⁸⁸ Arts. 81-84. *Id.* at 46-47.

²⁸⁹ Arts. 5-11. *Id.* at 12-15.

only significant limitation being that the constitution forbade "any person to use his private property to the detriment of the public interest."²⁹¹ Like Stalin's constitution, there was also a long list of rights whose observance has not been historically confirmed. They included equality before the law;²⁹² freedom of speech, press, assembly, association, demonstration, religion;²⁹³ privacy of homes and freedom to change one's residence; and freedom from arbitrary arrest.²⁹⁴ Also in 1954 a Court Law, a Procuracy Law, and Regulations on Arrest and Detention were announced. The revised court structure followed the Soviet model closely.²⁹⁵ The Court Law enjoined the courts "to try criminal and civil cases, and, by judicial process, to punish criminals and settle civil disputes."²⁹⁶ This law also followed the Soviet model closely. Independence of the courts was guaranteed "subject only to the law."²⁹⁷ Similarly, equality before the law, public trials, the right to a defense, recusal, and court responsibility to the political organs were all included.²⁹⁸ Under the Procuracy Law, the procurators were "[t]o see that the judicial process of people's courts conforms to the law."²⁹⁹ The Arrest and Detention Act was also designed to ensure proper arrest procedures through the procuracy and the police.³⁰⁰ During the next three years the procuracy grew in power and importance.³⁰¹

Although process of law and formal decision-making became more important during this period, the Chinese never entirely gave

²⁹⁰ Art. 12. *Id.* at 15.

²⁹¹ Art. 14. *Id.* at 16.

²⁹² Art. 85. *Id.* at 51.

²⁹³ Arts. 87-88. *Id.* at 51-52.

²⁹⁴ Arts. 89-90. *Id.* at 52.

²⁹⁵ Li, *The Role of Law in Communist China*, 1970 CHINA Q., at 66, 78.

²⁹⁶ *Organic Law of the People's Courts of the People's Republic of China*, art. 3, in BLAUSTEIN, *supra* note 279, at 131.

²⁹⁷ Art. 4. *Id.* at 132.

²⁹⁸ Arts. 5, 7, 12 & 14. *Id.* at 132, 134-35.

²⁹⁹ *Organic Law of the People's Procuratorates of the People's Republic of China*, art. 4(4), in BLAUSTEIN, *supra* note 279, at 145. See Cohen, *The Communist Party and "Judicial Independence," 1949-1959*, 82 HARV. L. REV. 967, 980 (1969) [hereinafter cited as Cohen, *Judicial Independence*].

³⁰⁰ J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963* 360-62 (1969) [hereinafter cited as COHEN, *CRIMINAL PROCESS*].

³⁰¹ Ginsburgs & Stahnke, *The People's Procurate in Communist China: The Period of Maturation, 1951-1954*, 1965 CHINA Q., at 53, 79-88.

up on the informal dispute settlement devices. The lower people's courts, for example, called People's Tribunals, were empowered to hear civil and minor criminal offenses and were staffed in the Soviet style with one judge and two lay assessors. But they were also encouraged to set up People's Conciliation Committees to aid in the resolution of disputes arising from "contradictions among the people."³⁰²

The work begun on civil, criminal, and procedural codes in 1952 was pressed forward. Problems arose, however, because of the lack of legally trained personnel to do proper drafting, most experts having been purged earlier. In addition, although the party left the courts in a relatively unencumbered position, many members still doubted whether legalism could fit in with the revolutionary character of the society. Despite these difficulties, a draft criminal code was ready by the end of 1956. Progress on the civil and procedural codes was somewhat slower.

The draft criminal code had 261 sections, "divided into two parts, the first made up of 'general principles' and subdivided into five chapters, and the second comprising nine chapters under the general title 'special provisions.'"³⁰³ The code structure may seem reminiscent of the *lu-li* form of the *Ta Ch'ing*, but what is more significant is that the form followed the Nationalist code, which had 357 sections divided into a "General Principles" part of twelve chapters, and a "Special Provisions" part of thirty-five chapters.³⁰⁴ Although the specific contents of the draft code were never released, there is evidence that the drafters were looking to the Soviet Union's NEP-era Criminal Codes for guidance.³⁰⁵

The pace of codification was still too slow for many. During the Hundred Flowers Campaign, which began in May 1956, men as high as Liu Shao-chi and Tung Pi-wu, elder statesmen and President of the Supreme People's Court, vehemently pressed for the establishment of a legal system. Tung Pi-wu, a "humanist" edu-

³⁰² Tay, *Part 2*, *supra* note 278, at 360.

³⁰³ Comment, *supra* note 274, at 520.

³⁰⁴ See *The Criminal Code*, in LAW REVISION PLANNING GROUP, CUSA, *THE EXECUTIVE YUAN, THE REPUBLIC OF CHINA, LAWS OF THE REPUBLIC OF CHINA* 893-1081 (1961).

³⁰⁵ Comment, *supra* note 274, at 522.

cated in Japan,³⁰⁶ called "urgently" for complete codification.³⁰⁷ Complaining that party functionaries would not obey court orders, Tung used words startlingly like those of the Legalists of ancient Ch'in.

All the laws must be strictly observed. No violations of the law should henceforth be permitted. . . . In future any person who deliberately violates the law must be prosecuted even if he is in a high position and has rendered meritorious service to the State. . . . To demand that everyone do his work in accordance with the law is one of the chief methods of ending the occurrence of violations of the laws of the State.³⁰⁸

In like manner, Liu Shao-chi, who had witnessed how the same debate in Russia had been resolved in favor of those who wanted to maintain the codes, opted for the Stalinist solution.

The period of revolutionary storm and stress is past . . . and the aim of our struggle is changed to one of safeguarding the successful development of the productive forces of society; a corresponding change in the methods of struggle will consequently have to follow and a complete legal system becomes an absolute necessity. . . . All state organs must strictly observe the law.³⁰⁹

At the same time, the Institute of Criminal Law Research in Peking published a textbook of law, apparently geared for the guidance of the courts in anticipation of the forthcoming legal structure. Entitled *Lectures on the General Principles of Criminal Law in the People's Republic of China*,³¹⁰ the content was really a translation of Soviet legal principles, and Romanist form was implicit. A series of lectures on civil law that reflected a new legality was also published. Contract law, for example, never really a part

³⁰⁶ Boorman, *Tung Pi-wu: A Political Profile*, 1964 CHINA Q., at 66, 82.

³⁰⁷ Comment, *supra* note 274, at 507 (quoting *Speech by Tung Pi-wu*, EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 79-97 (Peking 1956)).

³⁰⁸ As reported by the *New China News Agency*, Peking, Sept. 20, 1956, *quoted in* Tay, *Part 2*, *supra* note 278, at 364.

³⁰⁹ *Id.*

³¹⁰ No. 13331, Joint Publications Research Service, Office of Technical Services, U.S. Dept. of Commerce, 30 March 1962, trans. of *Chung-hua Jen-min Kung-ho-kuo Hsing-Fa Tsung-tse Chiang-i* (1957) [hereinafter cited as *Lecture on Criminal Law*].

of Chinese Communist legal doctrine, was delineated in Western juridical terms.³¹¹ In the face of such pressure, Premier Chou En-lai resisted, defensively asserting that the enactment of codes was awaiting the final liquidation of private property.³¹²

The new legalists, however, were not mollified. The tone of argument turned to direct attacks on the party. "Some Party members," said Tung, "even looked upon themselves as special personages and considered that the law was made for the people and that they themselves were over and above the law."³¹³ Chia Ch'ien, President of the Criminal Division of the Supreme People's Court, said bluntly, "[J]udges need only be subject to the law and must not receive any other leadership from the Party."³¹⁴ Chia Ch'ien joined others in declaring that the party committees' leadership may not be correct in that they did not know the applicable law in the circumstances of individual cases, a reference to the practice of ad hoc intervention.

Part of the struggle lay in the fact that the law in China was administered by two separate groups of legal specialists. One group, trained under the Nationalists or recently graduated from the retained law schools, served the new regime by their expertise and their more Westernized values of law. Another group of law cadres had been appointed by the party, not because of their legal knowledge, but because of their ideological dependability.³¹⁵

The legal experts had no illusions. They knew that they were fighting a desperate struggle with the revolutionaries within the party. Even as legal forms began to mature in 1955 and 1956, the party launched a new wave of extra-judicial persecution and liquidation of class enemies.³¹⁶

³¹¹ Pfeffer, *The Institution of Contracts in the Chinese People's Republic—Part 2*, 1963 CHINA Q. at 115, 117.

³¹² Comment, *supra* note 274, at 519.

³¹³ *Id.* at 518.

³¹⁴ Cohen, *supra* note 299, at 992, quoting Feng-Jo-ch'uan, *Refute Chia Ch'ien's Anti-Party Nonsense about "Independent Adjudications,"* [1958] 1 POLITICAL-LEGAL RESEARCH 18.

³¹⁵ V. LI, LAW WITHOUT LAWYERS 22-23 (1977). Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395, 397 (1982).

³¹⁶ Bassiouni, *supra* note 277, at 184.

D. *The Maoist Phase*

The criticism of the party had become too intense. The leadership believed the party's authority was being threatened. In 1957 the Hundred Flowers Campaign abruptly terminated, and during the subsequent purge of "rightist" elements, the Communist Party of China made its choice: there would be no Romanist legal forms to structure the new socialist society. The draft criminal code was about to be distributed, and the civil code was nearly complete when the scene changed. Nothing more was heard of either for twenty years.³¹⁷ Economically, the new campaign was paralleled by the "Great Leap Forward," a program vigorously opposed by Liu-Shao-chi that was designed to develop China along non-Western lines. It turned out to be an economic disaster, and the reversal of its consequences was not to begin until the late 1970's.

The *Lectures on the General Principles of Criminal Law* was being printed when Mao Tse-tung and Chou En-lai announced the new line in May of 1957. The editors decided to proceed with publication with the explicit hope that the draft criminal code would soon be promulgated, but they hastily formulated an introductory confession that "we are too late to reflect the significance of this hectic struggle in our lectures, nor are we able to criticize and refute the bourgeois rightists reactionary statements on criminal legislation and judicial problems."³¹⁸ In the proper self-critical mode the editors asked that the reader "not hesitate to criticize these lectures and give us advice so that we can correct our mistakes, make up our defects, and revise the lectures at the time of re-printing."³¹⁹ There was no second edition. Instead, there was a return to extra-legal practices. Professional members of the judiciary

³¹⁷ An anemic attempt to promulgate new legislation surfaced in the early 1960's, but did not prosper. Kato, *supra* note 226, at 435.

³¹⁸ *Lectures on Criminal Law*, *supra* note 310, at i.

³¹⁹ *Id.* at ii. Just before the hundred flowers campaign turned on the legalists, there were other textbooks on civil law, the state and law, and the constitution. In addition, the period from 1954 to 1957 was relatively rich in other legal publications, particularly in collections of laws on various subjects. See Hsia, *Chinese Legal Publications*, in J. COHEN, CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVE 22-36 (1970) [hereinafter cited as COHEN, CONTEMPORARY CHINESE LAW].

were replaced by military and public security personnel.³²⁰ The new forces disposed directly of many cases, and there was a resumption of forced labor. Lawyers disappeared from any official function. The "smashing of all permanent rules" was the party's goal. Direct party rule through all its branches was the policy.

Echoing the new requirements, Chao Yuan, President of the Higher Provincial People's Court of Fukien, said

The people's courts must not only observe the policy and directives of the Party, but also obey the direction and supervision of the Party over adjudication of actual cases. They must voluntarily seek instructions from and report their work to the Party committees. When an official of a court goes to the countryside, he must do his work under the unified leadership of the local Party committee, no matter where he happens to be.³²¹

It was decreed that an "expert" in the law was one whose revolutionary consciousness had been properly formed. Consequently, formal legal training was regarded as unnecessary. The new judicial cadres enforced the party's laws and decrees directly with the people, "not by books."³²²

The "mass line" dictated total aversion to formal codes and structures. A 1959 document stated,

Those who advocate the writing of law codes do not consider what our country actually needs. They insist on producing subjectively and formally, a so-called complete system which amounts actually to reducing our laws to a rigid system. Thus, this view does not accord with the spirit of permanent revolution. We must oppose it.³²³

³²⁰ Tay, *Part 2, supra* note 278, at 369.

³²¹ Chao Yuan, *Report on a Year's Work of the People's Court of Fukien Province, China*, delivered before the Fukien People's Congress and published in *FUKIEN JIH-PAO*, Feb. 13, 1959, *quoted in* Comment, *supra* note 274, at 523.

³²² Li, *supra* note 295, at 95. Although statutes remained on the books, their provisions were subordinated entirely to Party policy. For an example of Party control over marriage in the face of contrary statutory regulations, see Kato, *supra* note 226, at 431-32 n.16.

³²³ *Several Problems Relating to the Legal System of the Chinese People's Democracy, Cheng-fa Yen-Chiu* (Political and Legal Study) No. 2 (Peking, 1959), *quoted in* Comment, *supra* note 274, at 507.

Attacks were once again launched against specific Romanist principles such as the presumption of innocence, and the "judge's free evaluation of the evidence."³²⁴ People's attorneys were ordered to divulge all admissions of guilt made to them by their clients.³²⁵ Any appeal to a higher court almost always resulted in a heavier sentence.³²⁶ High officials were forced to adhere to a "socialist self-reform pact," promising "to give [their] hearts to the Party."³²⁷

The party began a systematic program to replace judicial procedures and judicial organs. The Ministry of Justice was eliminated. The procuracy was criticized for having a pro-defendant attitude and for failing to prosecute elements of the population found dangerous by the police.³²⁸ The courts were forbidden to hear economic disputes between state enterprises. Instead, all such disagreements were to be "mediated" by an appropriate ministry. This was not the Soviet arbitration system, which in contrast had developed towards being a formal court.³²⁹ For individual civil disputes, mediation and conciliation groups were given almost complete authority. Before long, the institution of the "People's attorneys" was itself abolished.³³⁰ Just before the Great Cultural Revolution, an American professor asked a former Chinese official from Shanghai about the legal profession in that city. The official replied, "Lawyers in Shanghai? What do you think China is—the Soviet Union?"³³¹

The party's crusade against a formal legal system reached its

³²⁴ Chang Tzu-pe'i, *Censure the Bourgeois Principle of the "Judge's Free Evaluation of the Evidence,"* 2 CFYC 42 (1958); Wu Yu-su, *Censure the Bourgeois Principle of "Presumption of Innocence,"* 2 CFYC 37 (1958); in J. COHEN, *CRIMINAL PROCESS*, *supra* note 301, at 4 n.6 (1968).

³²⁵ Bassiouni, *supra* note 277, at 185.

³²⁶ Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, 7 REV. SOCIALIST L. 3, 56 (1981) [hereinafter cited as Chiu, *Structural Changes*].

³²⁷ Hsiao, *The Role of Economic Contracts in Communist China*, 53 CALIF. L. REV. 1029, 1036 (1965).

³²⁸ Cohen, *Due Process?*, in R. TERRILL, *THE CHINA DIFFERENCE* 240 (1979).

³²⁹ Li, *supra* note 295, at 101.

³³⁰ Chiu, *supra* note 326, at 56.

³³¹ Cohen, *Continuity and Change in China: Some "Law Day" Thoughts*, 24 S.C.L. REV. 3, 3 (1972).

highest pitch in the Great Cultural Revolution, which Mao Tse-tung launched in 1966. The new campaign was directed against the "four olds" (old customs, old habits, old culture, and old social thought).³³² During the Cultural Revolution, the Red Guards attacked all law-making authorities, including the public security organs.³³³ Entire areas of the legal/administrative structure were abandoned, as China pressed towards a "no law" situation, controlled by the party, and enforced by a vast mediation system. The government closed the law schools and universities. The Red Guards destroyed legal libraries throughout the country. Law professors were actively persecuted and found surcease only if they could show some utility in another field, such as teaching foreign languages.

Some courts remained, but their function was to punish the "enemies of the people" for the edification of the populace.³³⁴ The Supreme People's Court was purged and most of its positions were filled by people from the military or security organs.³³⁵ Where re-education through various local mediation committees failed, where the independent power of the police to punish was to no avail, and where the malefactor was notorious enough that the independent action of revolutionary groups was insufficient, then the residual court system would take over.³³⁶ For the most part, however, the courts had been shorn of Western procedures and their legal specialists. They became part of the revolutionary struggle.³³⁷

³³² Oxnam, *The Past is Still Present*, in TERRILL, *supra* note 328, at 65.

³³³ Li, *supra* note 296, at 105-07.

³³⁴ Some sense of the plastic definition of "enemy" can be seen in Comment, *Communist China's Emerging Fundamentals of Criminal Law*, 13 AM. J. COMP. L. 80, 85-86 (1964).

³³⁵ See R. Edwards, *Reflections on Crime and Punishment in China, with Appended Sentencing Documents*, 16 COLUM. J. TRANS. L. 45, 50 (1977), [reprinted in OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES (No. 8, 1977).] See also Tao, *Elite Politics and the New Constitution in the PRC*, in LINDSAY, *supra* note 272, at 221; Hong Yung Lee, *Mao's Strategy for Revolutionary Change: A Case Study of the Cultural Revolution*, 1979 CHINA Q. 50.

³³⁶ See Li, *supra* note 315, at 61-65. Crimes by analogy and retroactive findings of criminality were imbedded in the residual legal system. Comment, *supra* note 334, at 86-87. For an analysis of the Chinese Communist concept of "trial," see Jones, *A Possible Model for the Criminal Trial in the People's Republic of China*, 24 AM. J. COMP. L. 229 (1976).

³³⁷ Tao, *The Criminal Law of Communist China*, 52 CORNELL L.Q. 43, 68 (1966). See H. Chiu, *Criminal Punishment in Mainland China: A Study of Some Yunnan Province Docu-*

In one sense, but only a formal sense, the struggle between the revolutionary and the legal specialists was a reflection of the ancient Chinese *li-fa* distinction. The new legalists pressed for the universalization of legal norms while the revolutionaries desired a constant process of re-education at the local level.³³⁸ The Maoist solution was the traditional imperial Chinese solution: the values of the (new) society would be enforced by local pressure supplemented by exemplary "legal" punishment of those unable to be re-educated properly. Of course, the social values were not Confucian, either in content or style.³³⁹ The new social relationships were to be Marxist or Maoist. The party changed the nature of the informal adjudicative system by politicizing even civil disputes, so that the parties were "less able to compromise their differences" than before.³⁴⁰ There was not, however, to be any stability even in these new Marxist relationships. The process of re-education was constant.³⁴¹ The population was kept off-balance by a series of party-inspired campaigns each rectifying the errors of the one that went before. Permanent revolution was designed to keep the people totally dependent on the next directive of the party. In its necessary arbitrariness, the Cultural Revolution was anti-legal in its very essence. Permanent revolution was the formula for permanent control.

Where Stalin's enemies had been the anti-legalists, Mao's were the legalists. Where Stalin had seen that law could be a technique of control, Mao believed that any kind of stable rules had to be an impediment to his authority. No institution having any indepen-

ments, 68 J. CRIM. L. & CRIMINOLOGY 374 (1977), [reprinted in Occasional Papers/Reprints Series in Contemporary Asian Studies (No. 6, 1978).] Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 79 HARV. L. REV. 469, 485 (1966).

³³⁸ See H. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST 151-52 (1981).

³³⁹ Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356 (1977), [reprinted in Occasional Papers/Reprints Series in Contemporary Asian Studies 2 (No. 5, 1978)].

³⁴⁰ Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law"*, in J. COHEN, *Contemporary Chinese Law*, supra note 319, at 230, 235.

³⁴¹ In the internecine struggles within the Party, the campaign later transformed into a "Criticize Confucius—Criticize Lin Piao" program. See *Resolution of the First Session of the Fourth National People's Congress of the People's Republic of China on the Report of the Work of the Government* (January 17, 1975) in 1 SELECTED LEGAL DOCUMENTS, supra note 286, at 127.

dent social or legal existence outside of the party could be tolerated.

If one were to compare the brutality of the regimes of Stalin and Mao, it would be difficult to determine who should be declared the "winner" in such a sorry exercise. For all their common aims and pernicious policies, Stalin nonetheless grasped an insight that eluded the Chinese leader: a rational structure of law that orders relations in a predictable manner can be a vital mechanism for state power. Where Mao feared that any coherent body of rules and experts to administer them would necessarily diminish party authority, Stalin perceived not only that the rules increased control, but that the leader could fine tune the relationship between structured law and arbitrary decree according to the political needs of the situation. The successors of Stalin believed that even he had been too arbitrary for the good of the regime (and for their own safety). They nonetheless decided that his conception of the utility of law should be followed. They have undertaken a massive program of legalization of the society in the Romanist mode.

E. Legal Reform

By the time Mao Tse-tung died in 1976, forces within the Chinese Communist Party were already at work to undertake a fundamental legal restructuring of the society. The high point of the Cultural Revolution had lasted from 1966 until 1969. In 1968 Liu Shao-chi had been dismissed as chief of state and in 1970 Mao declared supreme commander of the whole nation and the whole army. Yet despite the purges and liquidations, the struggle between the legalists and the revolutionaries renewed. Mao's support of Chou En-lai in opening China to the United States gave heart to those who wished to strengthen China economically and technologically. Such a policy necessarily called for an ordering along more predictable lines within the country.

Even one of Mao's ideological campaigns during the Cultural Revolution had the ironic effect of strengthening the hands of the legal reformers. In the early 1970's, Mao launched a "Criticize Confucius" campaign. Its objective was to break down traditional Chinese values among the populace, and once again to leave them

with no standard but the party's. It also sought to undermine those functionaries who sought to gain for themselves positions of privilege and respect.³⁴² In order to demonstrate the evil of the Confucian tradition, the media extolled the virtues of the ancient legalists.³⁴³ The power of the new legalists was growing, but it did not triumph over those who championed the Cultural Revolution until after Mao's death.

In 1975, the revolutionaries sought to solidify their line in a new constitution, a document only slightly moderated by the legal reformers.³⁴⁴ The preamble declared that the society was to be guided by "the theory of continued revolution."³⁴⁵ The procuracy was formally abolished and its functions given over to the police. Public showcase trials for the education of the people were approved, and trials in general had to follow the "mass line."³⁴⁶ The 1975 constitution also omitted nearly every judicial protection formerly provided by the 1954 constitution, most significantly the rule that all were to be equal before the law. The new constitution did retain the distinction between the people and the enemies of the people, the latter, of course, targeted for specific attack.³⁴⁷ One technique for exposing the enemies of the people had been the use of "big-character" posters prominent during the Cultural Revolution and revived by Mao in 1974.³⁴⁸ The constitution made the practice a guaranteed right.³⁴⁹ Only two forms of property owner-

³⁴² See, e.g., Mao's speech to the important Congress of Communist and Workers' Parties in Moscow in 1957, *The Dialectical Method of Creating Unity within the Party* (November 18, 1957), 10 CHINESE L. & GOV. 63, 63-66 (1977).

³⁴³ Oxnam, *supra* note 332, at 66. See, Leng, *supra* note 339, at 369-73.

³⁴⁴ The 1975 Constitution was shorter than the Constitution of 1954 and followed rather closely drafts that were developed in 1970 and 1973. See *Revised Draft of the Constitution of the People's Republic of China* (1973), in LINDSAY, *supra* note 272, at 312, 319 (1976). The major difference among the drafts was that the 1970 version specifically designated Lin Piao as Mao's successor while, following his purge and disappearance, the 1973 draft and the Constitution of 1975 omitted any reference to him.

³⁴⁵ *The Constitution of the People's Republic of China (1975)* [hereinafter cited as *P.R.C. Const. of 1975*], in 1 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 68.

³⁴⁶ Art. 25. *Id.* at 85.

³⁴⁷ See Cohen, *supra* note 328, at 240-44. *P.R.C. Const. of 1975*, arts. 14-15, in 1 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 77-78.

³⁴⁸ See Chan & Unger, *The Case of Li I-che*, 10 CHINESE L. & GOV. 5 (1977).

³⁴⁹ *P.R.C. Const. of 1975*, art. 13, in 1 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 85.

ship remained under the constitution: state and collective.³⁵⁰ Private property had already been abolished by the people's commune movement following the Hundred Flowers Campaign.³⁵¹ The document listed certain welfare rights but was silent on the previous right of small artisans to own their means of production, and it rejected a 1954 provision guaranteeing the right to change one's residence. Of course, the rights listed in the 1954 constitution had turned out to be fictional for the most part, at least after 1957. Some of these same "rights" were incorporated into the 1975 constitution, including freedom of speech, press, assembly, association, demonstration, and a new right to strike.³⁵² However, in other respects the 1975 constitution possessed a greater congruence to the actual legal and political situation. The leadership of the Communist Party was emphasized throughout. The provision of the 1954 document guaranteeing a right to scientific, literary, and artistic activity was replaced by the directive that such activities "must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labour."³⁵³ The promulgation of the constitution was accompanied by a campaign to "restrict bourgeois rights."³⁵⁴

As was noted above, Communist constitutions are not law-making documents. They are statements of the fundamental goals of the regime. The proclaimed rights are rights only of the "people" and are rights only for the strengthening of socialist society and not for any anti-socialist purpose. When the goals of the regime change, the constitution becomes irrelevant, or it is replaced.³⁵⁵ Shortly after the death of Mao, the legal reformers purged the radical elements of the party (symbolized by the "Gang of Four")³⁵⁶

³⁵⁰ Art. 5. *Id.* at 72.

³⁵¹ Kato, *supra* note 226, at 431 n.12.

³⁵² *P.R.C. Const. of 1975*, art. 28, in 1 *SELECTED LEGAL DOCUMENTS supra* note 286, at 87.

³⁵³ Art. 12. *Id.* at 76.

³⁵⁴ Baum, *Politics and the Citizen*, in TERRILL, *supra* note 328, at 168.

³⁵⁵ See generally Rowe, *The PRC's Constitutions and the Philosophy of Constitutionalism*, in LINDSAY, *supra* note 272, at 185 (discussing the evolution of the Chinese Constitution).

³⁵⁶ The "Gang of Four" was a group of radical leaders who exercised significant power during and after the Cultural Revolution. They were Chiang Ch'ing, Chang Ch'un-chi'iao,

and by 1978, had promulgated their own constitution.

In October 1976, the campaign against the Gang of Four was launched. It signalled the beginning of the ascendancy of the legal reformers. Hua Kuo-feng was designated the successor to Mao, but after some time, it was clear that the twice purged and twice rehabilitated Teng Hsiao-p'ing directed, as Vice-Premier, the program to purge the radical wing of the party, to modernize the economy, and to develop the law.

True to the Chinese Communist tradition, the new movement pursued its policies through a number of campaigns. The umbrella campaign is known as the Four Modernizations: agriculture, industry, defense, and science and technology. Originally urged by Chou En-lai in 1975, the Four Modernizations has become the representative slogan of the new leadership.³⁵⁷ At the same time, a second major campaign was to purge the country of the influence of the Gang of Four. That occurred after a great political struggle between contending factions after Chou En-lai's death in January, 1976.³⁵⁸ Although the campaign did not culminate in a public trial of the four radicals until 1981, it was carried out vigorously in the cities and countryside from 1976 onwards.

In exposing the terror of the Cultural Revolution, the leadership almost universally criticized the actions of the Red Guards, the Gang of Four, and radical officials, as "contrary to legality." Throughout the nation the standard became obedience to the law, both in terms of actions by party leaders and by administrative officials.³⁵⁹ Although legal procedures have not been universalized and although the regime continues to persecute those tagged as "enemies of the people," the movement to structure the society more along Romanist legal lines has continued. During the late

Wang Hung-wen, and Yao Wen-yuan. *See generally* Onate, *Profiles: The Origins of the Gang of Four*, 10 *ASIAN FORUM* 9 (1980).

³⁵⁷ *See generally* R. BAUM, *CHINA'S FOUR MODERNISATIONS: THE NEW TECHNOLOGICAL REVOLUTION* (1980).

³⁵⁸ *See generally* Domes, *The "Gang of Four" and Hua Kuo-feng: Analysis of Political Events in 1975-76*, 1977 *CHINA Q.* 473; Onate, *Hua Kuo-feng and the Arrest of the "Gang of Four,"* 1978 *CHINA Q.* 540.

³⁵⁹ *Strengthen Legal System and Democracy*, *BEIJING (PEKING) REVIEW*, July 6, 1979, at 35.

1970's universities and law schools reopened. Elderly law professors were rehabilitated and put to work teaching throughout the country. National and regional judicial conferences were held to move the country into legality. Posters, radio broadcasts, and mass meetings exposed the "illegal" abuses of the Gang of Four. Regional conferences were held to drum up support for a new legality. Suppressed organizations were reborn, including the Legal Research Institute of the Academy of Social Sciences and the Legal Committee of the Standing Committee of the National People's Congress.³⁶⁰ Foreign legal specialists arrived. Chinese students were sent to law schools in Western countries. Even Chinese law professors—in great demand at home—became visiting scholars at American and other law schools. Once again, the government led by Hua Kuo-feng announced the policy of "Let a hundred flowers blossom, let a hundred schools of thought contend,"³⁶¹ a phrase incorporated directly into the new constitution.³⁶² Hua, however, cautioned that the renewed openness must "adhere to the six political criteria"³⁶³ one of which requires that words and deeds "should help to strengthen, and not shake off or weaken, the leadership of the Communist Party."³⁶⁴

The new legalists marked their ascent to power by promulgating a new constitution in 1978. Containing twice as many articles as its three-year old predecessor, the new constitution made some progress towards re-establishing legality in China.³⁶⁵ Even though many provisions were retained from the Constitution of 1975,³⁶⁶ the phrasing became more declaratory than hortatory. With but a nod to the Cultural Revolution in the preamble (attacks on the

³⁶⁰ Kato, *supra* note 226, at 436.

³⁶¹ Hua Kuo-feng, *Unite and Strive to Build a Modern, Powerful Socialist Country!—Report on the Work of the Government delivered at the First Session of the Fifth National People's Congress on February 26, 1978*, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 79.

³⁶² *The Constitution of the People's Republic of China* [hereinafter cited as *P.R.C. Const. of 1978*], art. 14, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 139.

³⁶³ Hua Kuo-feng, *supra* note 361, at 79.

³⁶⁴ *Id.* at 117-18 n.5.

³⁶⁵ See, for example, the analysis in a pro-Peking Hong Kong journal: Ho Ming, *On the Way to the Rule of Law*, 11 CHINESE L. & Gov. 115 (1978).

³⁶⁶ See generally Cohen, CHINA'S CHANGING CONSTITUTION, *supra* note 285.

Cultural Revolution itself would surface two years later), the Constitution of 1978 re-established the judicial structure and the procuracy.³⁶⁷ The articles on human rights were expanded to include protection against arbitrary arrest and searches.³⁶⁸ Article 55 provided:

Citizens have the right to lodge complaints with organs of state at any level against any person working in an organ of state, enterprise or institution for transgression of law or neglect of duty. Citizens have the right to appeal to organs of state at any level against any infringement of their rights. No one shall suppress such complaints and appeals or retaliate against persons making them.³⁶⁹

Although the Constitution of 1978 signalled a new turn to legalism, it did not abjure many of the prime techniques of social control of the past. Hua Kuo-feng promised to "enforce dictatorship over the reactionary classes and elements and all those who resist socialist transformation and oppose socialist construction."³⁷⁰ For example, the educative function of show trials was maintained in the new constitution. Article 41 declared, "[w]ith regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions."³⁷¹

The distinction between the people and the enemies of the peo-

³⁶⁷ *P.R.C. Const. of 1978*, arts. 41-43, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 161-63.

³⁶⁸ Art. 47. *Id.* at 165.

³⁶⁹ *Id.* at 168.

³⁷⁰ Hua Kuo-feng, *supra* note 361, at 90.

³⁷¹ *P.R.C. Const. of 1978*, art. 41, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 161. The transitional nature of the Constitution of 1978 was revealed at the Eighth National Conference on People's Judicial Work, called to drum up support for the new constitution. There, Teng-kuei, member of the Political Bureau of the Chinese Communist Party Central Committee, spoke of the constitution in classic Maoist terms. He praised Chairman Mao's leadership in the law and likewise found the extant legal system and the legal cadres worthy. He called for exemplary mass trials against those causing "damage to the interests of the state and people. . . ." Such trials "will delight the people," he said. At the conference, Chi Teng-kuei also insisted that party leadership over judicial work had to be maintained and that all had to adhere to the "mass line." *Reportage on National Judicial Conference Held in Peking*, Foreign Broadcast Information Service, Daily Report—People's Republic of China [hereinafter cited as FBIS], May 31, 1978, at E1-2. Soon, however, the emphasis on legality became more prominent.

ple was also maintained. As Hua put it "Dictatorship over the enemy and democracy among the people are the two inseparable aspects of the dictatorship of the proletariat."³⁷² The constitution furthermore honestly admitted that "enemies" are not limited to the residue of the bourgeoisie toppled in 1949, but included "new-born bourgeois elements" as well.³⁷³ Hua himself demonstrated the elasticity of the tag by calling Lui Shao-chi, Lin Piao, and the Gang of Four all "bourgeois."³⁷⁴

During the Cultural Revolution, the technique of big-character posters was used to expose the enemies of the regime. Similarly, suppressing the followers of the Gang of Four, the new leadership made use of the same means of publicity. Thus, the right to write big-character posters was retained in the constitution of 1978.³⁷⁵ But the practice grew out of hand. During the campaign against the illegal or, more accurately, the non-legal abuses of the Gang of Four, the regime faced a growing human rights movement in China. In 1978 and 1979, a wall-poster campaign erupted. The authors demanded increased democratic freedoms. They attacked inequalities, called for greater freedom of communication, criticized leaders, exposed China's "Gulag," and showed sympathy to foreign political systems.³⁷⁶ Yet at the same time the authorities demonstrated that they had grasped the principle that the legal system could be adjusted or contracted to fit the needs of social control. In 1980, they amended out of the constitution the provision permit-

³⁷² Hua Kuo-feng, *supra* note 361, at 91.

³⁷³ *P.R.C. Const. of 1978*, art. 18, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 141.

³⁷⁴ Hua Kuo-feng, *supra* note 361, at 88. Parroting the propaganda line at the time, the chief judge of the Chekiang Provincial People's Higher Court said, "The 'gang of four' were skillful in 'disguising themselves as ultraleftists' to promote an ultrarightist line." *Meeting of Representatives, FBIS*, *supra* note 371, May 31, 1978, at E7, E8. By 1980, the Gang of Four were recharacterized as "Left deviationists." *Why the Gang of Four's Was an Ultra-Left Line*, BEIJING (PEKING) REVIEW, Feb. 11, 1980, at 24. Later, Teng Hsiao-ping posthumously rehabilitated Liu Shao-chi. *Eternal Glory to Comrade Liu Shaogi, a Great Marxist and Proletarian Revolutionary! Memorial Speech by Vice-Chairman Deng Xiaoping*, BEIJING (PEKING) REVIEW, May 26, 1980, at 9.

³⁷⁵ *P.R.C. Const. of 1978*, art. 45, in 2 SELECTED LEGAL DOCUMENTS, *supra* note 286, at 164.

³⁷⁶ See generally J. SEYMOUR, *THE FIFTH MODERNIZATION* (1980) (China's 1977-78 democratic movement explored).

ting big-character posters.³⁷⁷

The legal ordering of society continued apace. Shortly after the Constitution of 1978 was promulgated, a Chinese domestic broadcast declared that "to bring great order across the land and make China a powerful, modern socialist country before the end of this century, it is necessary to have a set of rules for managing the affairs of state and strengthening the socialist legal system."³⁷⁸ In January, 1979, the *Beijing (Peking) Review* announced that "[s]ome 30 codes and regulations need to be drafted right away."³⁷⁹ The following month the regime published a law regulating arrest procedures.³⁸⁰ In March, the regime echoed Stalin's dictum. "There must be stability and continuity of laws, rules, and regulations," declared the news magazine, paraphrasing Ye Jianying, Chairman of the Standing Committee of the National People's Congress.³⁸¹ An eight year National Program for the Study of Law was commenced.³⁸²

On July 1, 1979, the National People's Congress of the People's Republic of China promulgated seven new statutes. Two dealt with the structure of the government. Five went directly towards establishing a new legal order. They were the Criminal Law, the Code of Criminal Procedure, the Organic Law of the People's Courts, the

³⁷⁷ Hsia, Book Review, 6 REV. SOCIALIST L. 524 (1980) (reviewing *THE NEW CONSTITUTION OF COMMUNIST CHINA: COMPARATIVE ANALYSIS* (M. Lindsay ed. 1976)). The human rights movement in China represented a different form of dissent from that which the leadership had previously known.

[T]he major way to express dissent in the Soviet Union has been to go outside the system, to the underground and the foreign press. While underground protests became important in the PRC in 1978-79, the chief approaches to the expression of dissent there have remained either forming alliances with political factions in the establishment or capitalizing upon opportunities available when the leadership itself has allowed dissent for its own political purposes.

Goldman, *Dissent in China*, PROB. OF COMMUNISM, March-April 1982, at 58-59. See also Dreyer, *Limits of the Permissible in China*, PROB. OF COMMUNISM, November-December 1980, at 48-65.

³⁷⁸ *Meeting of Representatives*, FBIS, *supra* note 278, May 31, 1978, at E7.

³⁷⁹ Jones, *The Criminal Law of the People's Republic of China*, 6 REV. SOCIALIST L. 405, 416 n.5 (1980).

³⁸⁰ Chiu, *Certain Problems in Recent Law Reform in the People's Republic of China*, Occasional Papers/Reprints Series in Contemporary Asian Studies (No. 5, 1980).

³⁸¹ *Speeding the Work of Law-Making*, BEIJING (PEKING) REVIEW, Mar. 2, 1979, at 3.

³⁸² Macdonald, *supra* note 96, at 313.

Organic Law of the People's Procuracies, and the Law on Joint Ventures with Chinese and Foreign Investment.³⁸³

The purge of legal experts in China had had an effect on the new codes. Despite the fact that the new Criminal Law was claimed to have been the product of thirty-nine earlier drafts,³⁸⁴ there are evidences of lacunae in the provisions, and many definitions are unclear.³⁸⁵ Yet, the Romanist form is present throughout. In fact, the new Criminal Law appears to one observer to be "an abridged version" of the 1935 Criminal Code of Nationalist China.³⁸⁶ The code is replete with Western concepts. Punishments are delineated.³⁸⁷ The element of intent is required.³⁸⁸ Most of the specific offenses are Romanist in formulation.³⁸⁹ Even the structure of the statute follows the German example.³⁹⁰ Nonetheless, like the Criminal Codes and Fundamentals of the U.S.S.R., the Criminal Law of the P.R.C. is explicit on the requirement for state control of the society. Article 2 declares:

The task of the criminal law of the People's Republic of China is to use punishment to combat all counterrevolution-

³⁸³ The statutes went into effect on January 1, 1980. Those dealing with the governmental structure were the Organic Law of the Local Peoples' Congresses and Local Peoples' Governments at Various Levels, and the Electoral Law of the National Peoples' Congress and Local Peoples' Congresses at Various Levels. Jones, *supra* note 379, at 405, 416 n.4. The Chinese press joined in the movement. "We need protection of contracts, and thus must enact a civil code." See Su Ching & Wang Chia-fu, *A Civil Code Must Be Drafted*, People's Daily FBIS, *supra* note 371, Dec. 5, 1978, at E4. See also Speech by Chao Tsant-pi, Minister of Public Security and Deputy Leader of the Central Political and Judicial Group, reported in People's Daily (Oct. 29, 1978), reprinted in FBIS, *supra* note 371, Nov. 1, 1978, at E1, E4. Because of its importance to Western business interests, the Joint Venture Law has received unusual attention. See, e.g., Comment, *China's New Joint Venture Law: Analysis and Economic Overview*, 4 B.C. INT'L & COMP. L. REV. 115 (1981); Rich, *Joint Venture in China: The Legal Challenge*, 15 INT'L LAW. 183 (1981); Shiao-Ming, *China's New Law on Joint Ventures Using Chinese and Foreign Investment*, 34 SW. L.J. 1183 (1981); Cf. Wan, *A Comparative Study of Foreign Investment Laws in Taiwan and China*, 11 CALIF. W. INT'L L.J. 236 (1981).

³⁸⁴ *New Laws in Effect*, BEIJING (PEKING) REVIEW, Jan. 28, 1980, at 3.

³⁸⁵ Jones, *supra* note 379, at 405.

³⁸⁶ *Id.*

³⁸⁷ *The Criminal Law of the People's Republic of China*, arts. 27-56, 7 REV. SOCIALIST L. 199, 204-07 (W. Chi trans. 1981).

³⁸⁸ Arts. 11-13. *Id.* at 202.

³⁸⁹ See, e.g., arts. 116-117, 121, 131, 133-135, 139-140. *Id.* at 214-17.

³⁹⁰ Jones, *supra* note 279, at 409.

ary crimes and acts of criminal offenses, defend the dictatorship of the proletariat, and protect socialist property of the whole people, property collectively owned by the workers, and legitimate private property of citizens.³⁹¹

A very large section of the law is devoted to counterrevolutionary crimes including the outlawing of "big-character posters" and "small-character posters" as well.³⁹² Finally, the Criminal Law permits prosecution by analogy³⁹³ thus differing from present-day Soviet law and violating one of the most significant Romanist legal principles. It is clear then that although China's new Criminal Law is part of a restructuring of the society along Romanist lines, it follows the Soviet example in containing fewer Western legal norms than other parts of the emerging legal order.

The Code of Criminal Procedure and the Organic Law of the People's Courts are more thoroughly Romanist.³⁹⁴ Provisions include a guarantee of equality before the law, procuratorial approval of public-security arrests, time limits on detention before trial, the right to a defense and to a public trial, the requirement that confessions must be verified, and a prohibition on appellate courts increasing sentences.³⁹⁵ Only courts are permitted to try cases. Shortly after the code was promulgated, the *People's Daily* quoted a law professor who declared that the courts "must strictly abide by the law, and must reject instructions and orders from any

³⁹¹ *The Criminal Law of the People's Republic of China*, *supra* note 387, at 201. After the passage of the criminal law and prior to its entering into force on January 1, 1980, the Central People's Broadcast Station presented eleven lectures explaining the new criminal code. *Lectures on the Criminal Law*, 13 CHINESE L. & GOV. 1 (No. 2, Summer 1980). The lectures emphasized that "(t)he main attacking spearhead of China's Criminal Law is aimed at counterrevolutionary elements, enemy agent elements, and other criminal elements." *Id.* at 11.

³⁹² *The Criminal Law of The People's Republic of China*, art. 145, *supra* note 387, at 217.

³⁹³ Art. 79. The law does require approval for analogical prosecution from the Supreme People's Court. *Id.* at 210.

³⁹⁴ See generally Zhang Sipei, *Basic Principles of the Law of Criminal Procedure*, BEIJING (PEKING) REVIEW, June 9, 1980, at 23.

³⁹⁵ Herbst, Book Review, 7 REV. SOCIALIST L. 460-61 (1981) (reviewing POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA, AN AMNESTY INTERNATIONAL REPORT (1978)).

organization other than the law."³⁹⁶ Public security officials are admonished to observe procedural requirements strictly.³⁹⁷ The courts now have functioning civil and criminal chambers, as well as economic chambers in cities with large populations.³⁹⁸

Following the promulgation of the seven new laws, the regime continued to institute new legislation, including a Nationality Law and laws and regulations on income tax, foreign exchange, offshore drilling, lawyers, and an Economic Contract Law.³⁹⁹ A notary public system has been restored,⁴⁰⁰ and legal offices opened throughout the country.⁴⁰¹ More significantly, successive drafts of a civil code have been circulated while university law departments

³⁹⁶ Qiao Wei, *Independent Judiciary, Adherence to Law*, quoted in *People's Daily*, FBIS, *supra* note 371, Jan. 9, 1979, at E-11.

³⁹⁷ *Code of Criminal Procedure*, art. 4. Jones, *supra* note 379, at 421 n.99. The policy of the *Code of Criminal Procedure* was previewed in a 1978 editorial in the *Anhui Daily*: "It is necessary to give full play to the roles of the public security departments, procuratorate and people's courts in coordinating with each other and also restraining each other. They should work together to uphold the strictness of the legal system." Strengthen the Socialist Legal System, *Anhui Daily*, August 31, 1978, (Editorial) reported in FBIS, *supra* note 371, Sept. 6, 1978, at G-3.

³⁹⁸ Kato, *supra* note 227, at 431. But see, Ellis & Shea, *Foreign Commercial Dispute Settlement in the People's Republic of China*, 6 INT'L TRADE L.J. 155, 275 (1980-81), in which the Chinese emphasis on informal dispute settlement seems likely to remain dominant.

³⁹⁹ Texts of new laws may be found as follows: *The Nationality Law of the People's Republic of China*, BEIJING (PEKING) REVIEW, Oct. 6, 1980, at 17; *The Income Tax Law of the People's Republic of China concerning Joint Ventures with Chinese and Foreign Investment*, *id.*, Oct. 6, 1980, at 17-18; *The Income Tax Law of the People's Republic of China Concerning Foreign Enterprises*, *id.*, Dec. 28, 1981, at 17; *Rules Governing the Carrying of Foreign Exchange, Precious Metals and Payment Instruments in Convertible Currency Into or Out of China*, *id.*, at 19; *Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Foreign Enterprises*, *id.*, Apr. 5, 1982, at 20; *Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Co-operation With Foreign Enterprises*, *id.*, Feb. 22, 1982, at 14. See He Bian, *China's Lawyers*, *id.*, June 7, 1982, at 14, and Kato, *supra* note 226, at 457, for a description of the law on lawyers. For an analysis of the Nationality Law, see Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 AM. J. COMP. L. 459 (1982). The new Economic Contract law is especially needed as previously the contract itself was often the only positive legal document available to the parties. *Analysis of Chinese Contractual Policy and Practice*, 27 WAYNE L. REV. 1229, 1242 (1981). For a discussion of modern tax enactments, see Pomp, Gelatt, & Surrey, *The Evolving Tax System of the People's Republic of China*, 16 TEX. INT'L L.J. 11 (1981).

⁴⁰⁰ *Notary Republic System*, BEIJING (PEKING) REVIEW, Feb. 4, 1980, at 5.

⁴⁰¹ He Bian, *supra* note 399, June 7, 1982, at 16.

teach the principles of civil law, as well as "prescription, ownership, contracts, torts, inheritance, patents and copyright."⁴⁰²

The primary work of the newly established judicial system apparently has been to review and rectify all the criminal "cases" brought against persons during the era of the Gang of Four.⁴⁰³ The propaganda organs of the regime continue to emphasize "equality before the law" as central to the new legality. By that they mean that party functionaries (particularly local party functionaries) may not stand outside of the legal directives of the government. But the government is extending the legal rule of equality to encompass the standard Western law requirements for imputing guilt, *viz.*, "no one can be prosecuted unless 1) objectively the act endangered society; 2) subjectively the person involved committed the act deliberately and [sic] through negligence; 3) the act fell into categories stipulated by the criminal law as punishable."⁴⁰⁴ There is even a debate in the Chinese press on whether to extend the guarantee of equality to the legislative sphere where decrees depriving persons of their social rights because of their membership in an enemy class would be forbidden. If that comes to pass, only persons who committed specified acts could be prosecuted.⁴⁰⁵

In addition, the Chinese are laying the theoretical groundwork for accepting Romanist law forms into their Marxist society. It has been argued in the Chinese press that the destruction of the legal system after 1957 was harmful to China; that it is a legitimate

⁴⁰² Kato, *supra* note 226, at 436, 441-42 n.59. For a summary of the present state of civil law in China, see *id.* at 443-457.

⁴⁰³ In 1980, The Supreme People's Court made the astonishing claim that the people's courts had re-examined 1.13 million cases including 270,000 "counter-revolutionary" cases of which 175,000 were found to be without merit or with unduly harsh sentences. *Report on the Work of the Supreme People's Court (Excerpts)*, BEIJING (PEKING) REVIEW Oct. 6, 1980, at 15.

⁴⁰⁴ *NPC Official Discusses Equal Application of Law*, Beijing XINHUA (English ed.), Jan. 19, 1980, reported in FBIS, *supra* note 371, Jan. 21, 1980, at L-6.

⁴⁰⁵ *Trends in Chinese Jurisprudence*, BEIJING (PEKING) REVIEW, Apr. 6, 1981, at 14, 15. Already by late 1978, a factory committee was chastised for having imposed a criminal penalty on one of its members partly because of the "comrade's poor family background." *Three Wrong Convictions Reversed in Kweichow*, Peking People's Daily, Aug. 23, 1978, reported in FBIS, *supra* note 371, Sept. 6, 1978, at J-1. Another article stated, "The practice of inequality in applying the law because of family status makes law exist in name only." *Some Current Problems in Drafting Law*, FBIS, *supra* note 371, Dec. 26, 1978, at E-8.

function of law to regulate "social relations" as well as being "an instrument of class warfare"; that the concept of "presumption of innocence," though bourgeois in origin, may not be contrary to the "proletarian principle of seeking the truth" but may merely refer "to the legal position of the accused prior to the trial"; and that the nature of law permits some laws to be assimilable from previous regimes with different ruling classes.⁴⁰⁶ This last principle justifies the tacit borrowing from the Kuomintang codes of law. After all, virtually all of the legal experts in China today were trained before 1949 in European conceptions of law.

It is evident from the foregoing that China, like the Soviet Union, has decided to utilize a Western, primarily Romanist, legal form in ordering its society. This conclusion, however, is not without some qualifications. The government has had difficulty in completing work on the civil and commercial codes. Drafts of the civil code have been prepared and it is expected that the code will also follow the Romanist model. But in China, as in Russia in the late 1950's, groups are debating whether to have one comprehensive civil code or two, one to regulate the dying area of private relationships while the other regulates the "socialist" segment.⁴⁰⁷ Others argue that civil and economic laws should be enacted piecemeal as the need arises.⁴⁰⁸ In the commercial area also there is an apparent dispute whether to make the code fashioned on a model analogous to the U.C.C., or more like the European model which is a form of corporation law. The Chinese are receiving significant legal advice from American legal experts, which may explain the pressure for the first alternative. On the other hand, the Chinese are entering many joint ventures and Western companies are pressing for a Chinese corporation law so that they know with what kind of entity they are dealing.⁴⁰⁹ In the meantime, the courts follow the

⁴⁰⁶ *Trends in Chinese Jurisprudence*, *supra* note 405, at 14-16. In November 1978, the Institute of Jurisprudence of the Chinese Academy of Social Scientists declared, "We may also undertake a comparative study of laws in capitalist countries, because they also contain factors worth considering." *Peking Meeting Discusses Legal System, Democracy, Peking Domestic Service in Mandarin*, FBIS, *supra* note 371, Dec. 1, 1978, at E9.

⁴⁰⁷ *Trends in Chinese Jurisprudence*, *supra* note 405, at 16.

⁴⁰⁸ Kato, *supra* note 226, at 442.

⁴⁰⁹ As with many indications of current (as of this writing) trends in China, one has to rely on information gathered in conversations with the Chinese and with those who deal

Maoist habit of basing their decisions on party policy in the absence of promulgated statutes.⁴¹⁰

There is also a serious question as to whether China can produce the infrastructure necessary to effectuate the legalization of society. In 1957 there were approximately 3000 lawyers in China, but twenty years of persecution have taken a toll. Despite major efforts to reopen law schools and train new lawyers, in 1981 the Chinese counted only 6,200 full-time and 2,350 part-time attorneys.⁴¹¹ These numbers are clearly insufficient to service a society of one billion. The Chinese are attempting to expand the pool by giving specialized legal training to people who already have expertise in certain industries.⁴¹² At the same time, the effectiveness of the legal reforms to reorder the society as the party wishes has not yet come to fruition.⁴¹³

The problem therefore remains: how far can legalization proceed? The regime seems to be using the traditional technique of mass educational programs to help accomplish its objective,⁴¹⁴ but the need for specific codes becomes evident for the success of the legalization campaign. If the cadres of the party (many of whom are still appointees of the Gang of Four) can be mobilized to follow the letter of the law, then the society can be reformed, once again, through education. Law will provide the unitary predictable standard of social control.⁴¹⁵ Nonetheless, some observers suggest that

with them. Such is the source of the data tentatively put forward in the statements above. See generally G. HSIAO, *THE FOREIGN TRADE OF CHINA: POLICY, LAW, AND PRACTICE* (1977); G. GINSBURGS, *THE LEGAL FRAMEWORK OF TRADE BETWEEN THE USSR AND THE PEOPLE'S REPUBLIC OF CHINA* (1976); V. LI, *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* (1977); *LEGAL ASPECTS OF DOING BUSINESS WITH CHINA* (H. Holtzmann ed. 1976).

⁴¹⁰ Kato, *supra* note 226, at 431. For a view that party policy is likely to remain unfettered by the area of labor law, see Lewis & Ottley, *China's Developing Labor Law*, 59 WASH. U.L.Q. 1165 (1982).

⁴¹¹ He Bian, *supra* note 399, at 16.

⁴¹² *Id.* at 16-17.

⁴¹³ See Foster, *supra* note 315, at 425-27.

⁴¹⁴ See, e.g., *supra* note 391, the broadcast lectures that accompanied the publication of the criminal code. For a description of the mechanisms used to educate the populace in the new legal forms, and a criticism of the asserted process of popular participation, see Foster, *supra* note 315, at 419-24.

⁴¹⁵ See comments and speculation by Jones, *supra* note 379, at 412-13. Frances Foster has suggested that the legalization process has undergone seven stages since the death of

the Chinese leadership may be abandoning its goal "of promulgating all-inclusive legislation."⁴¹⁶ There is no doubt that there has been a waning in the momentum of the legalization drive, but this does not necessarily indicate a withdrawal from the technique of using legal codes as the preferred mechanism of social control. The Chinese have just begun the codification process. It took the Soviet Union a full twenty years after Stalin's 1936 Constitution even to begin to launch a thorough campaign of modern codification. The Chinese do not yet possess the legal infrastructure that the Soviets had at that time. They also have a longer period of "anti-legality" as part of their history to overcome. It seems more likely that the current hesitation to further codification in China is tactical rather than strategic.⁴¹⁷

As in the codified Soviet Union, the government will continue to dispense with the requirements of the legal system for certain political objectives. The Communists see no contradiction between this practice and legality. The highly publicized trial of the Gang of Four, for example, contained serious legal deficiencies throughout.⁴¹⁸ The Chinese also continue to utilize the technique of the mass trial in a new campaign to prosecute officials for economic crimes. Here the government has reverted to the traditional bifurcation of law and punishment (*fa*) on the one hand and education (*li*) on the other. "The stress is on big and serious cases," the *Beij-*

Mao, the most recent of which has "discredited" the "[s]upremacy of law" in favor of the directives of the party leadership. Foster, *supra* note 315, at 409-10. It is the contention of this paper that no Communist leader, Chinese or Soviet, has ever acknowledged the "supremacy" of law. Legal forms have been and continue to be a mechanism of control by the party. They are not seen (by the present leaderships) as antithetical to the dictatorial role of the party. Foster herself properly notes in the conclusion to her article that China's laws "are articulated party policies given concrete legal form through an elaborate indirect drafting process." *Id.* at 428. See Su Ching & Wang Chip-fu, FBIS, *supra* note 379, at E-4, calling for economic laws to force "leading comrades" to fulfill contracts and implement state policies.

⁴¹⁶ Foster, *supra* note 315, at 425.

⁴¹⁷ For a thoughtful agnostic view on the tactical versus strategic issue, see Jones, *Reflections on the Modern Chinese Legal System*, 59 WASH. U.L.Q. 1221 (1982).

⁴¹⁸ See, Chiu, *Certain Legal Aspects of the Recent Peking Trials of the "Gang of Four" and Others*, in J. Hsiung, *Symposium: The Trial of the Gang of Four and Its Implications in China*, Occasional Papers/Reprints Series in Contemporary Asian Studies 27 (No. 3, 1981).

ing (*Peking*) *Review* reported.

The law must be strictly enforced to punish offenders who have done serious damage to the economy, no matter who they are . . . [I]t is absolutely impermissible for anyone to try to shield them or plead for lenient treatment. Anyone who violates this principle will be held responsible and punished accordingly.

As for minor cases, the offenders should be dealt with mainly through education. . . .⁴¹⁹

Even during the trial of the Gang of Four, the government lamely excused Mao's actions on the traditional ground that they were "mistakes" and not "crimes."⁴²⁰

Hand in hand with the drive for more law has been a campaign against those who would espouse individualist values. Teng Tsiaoping himself announced a new campaign against liberalization in early 1980.⁴²¹ Recently, spokesmen for the government have decried that the "bourgeois ideological tendency" is "consciously or unconsciously demanding China forsake the socialist road and install the so-called capitalist liberal system in the political, economic, social and cultural arenas."⁴²² Lawyers are instructed that their "first duty is to find the truth and uphold the law, not to protect a guilty client from legal prosecution."⁴²³ A new marriage law further weakens the family unit as a possible competitor to the state.⁴²⁴

⁴¹⁹ *Decision on Combating Economic Crimes*, BEIJING (PEKING) REVIEW, Apr. 26, 1982, at 9.

⁴²⁰ "Mistakes are matters where criticism and education come in, where one should draw lessons from them and accept Party and government disciplinary measures, whereas in the case of a criminal offence, a person shall bear criminal responsibility for his offence and is punishable by law." In *The Trial Doesn't Involve Chairman Mao*, BEIJING (PEKING) REVIEW, Jan. 3, 1981, at 3, the news organ stated that the Central Committee officially took note of Mao's "mistakes" six months later. *On Questions of Party History—Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China* (June 27, 1981), reprinted in BEIJING (PEKING) REVIEW, July 6, 1981, at 10, 23-24.

⁴²¹ *Opposes Further Liberalization*, Hong Kong AFP (English ed.), Jan. 18, 1980, reported in FBIS, *supra* note 371, Jan. 21, 1980, at L-14.

⁴²² *Hu Qiaomu on Bourgeois Liberalization and Other Problems*, BEIJING (PEKING) REVIEW, June 7, 1982, at 20.

⁴²³ He Bian, *supra* note 399, at 14.

⁴²⁴ See *China's Marriage Law*, reprinted in BEIJING (PEKING) REVIEW, Mar. 16, 1981, at

The capstone of the process of legalization for political control is yet another constitution, a draft of which was published in May, 1982 and adopted on December 4, 1982.⁴²⁵ The regime stated that the values of the Cultural Revolution were still present even in the Constitution of 1978. Consequently, a new document is needed.⁴²⁶

The new Constitution makes more formal the state decision-making structure. It provides for equality before the law, the independence of the judiciary, and forbids extra-legal detention or arrest.⁴²⁷ Foreign enterprises are allowed, as permitted by legislation; the two forms of socialist real property are maintained; and citizens are permitted to retain personal property.⁴²⁸ On the other hand, individual rights are much more severely restricted. The right to use "big-character" posters remains absent and the right to strike is deleted.⁴²⁹ The new charter permits criticism of the government, but "fabrication or distortion of facts with the intention of libel or frame-up is prohibited."⁴³⁰ Freedom of religion is much more severely restricted: "No one may make use of religion to . . . interfere with the educational system of the state."⁴³¹ In a restriction targeted against the Catholic Church, the Constitution declares, "Religious bodies and religious affairs are not subject to any foreign domination."⁴³² The new Constitution is evidence of how seriously the Chinese are pursuing their drive for legalization as a mechanism of political control. The Constitution is seen as setting primary norms of national policy to which law must always remain subservient. Article 5 declares that "No law or administrative or local rules and regulations shall contravene the Constitu-

24.

⁴²⁵ *Draft of the Revised Constitution of the People's Republic of China* (April 21, 1982), reprinted in *BEIJING (PEKING) REVIEW*, May 10, 1982, at 27. *Constitution of the People's Republic of China*, reprinted in *BEIJING (PEKING) REVIEW*, Dec. 27, 1982, at 10 [hereinafter cited as *Const. of P.R.C.*].

⁴²⁶ See *Draft of Revised Constitution Made Public*, *BEIJING (PEKING) REVIEW*, May 3, 1982, at 5, and Hu Sheng, *On the Revision of the Constitution*, *id.* at 15.

⁴²⁷ *Draft of Revised Constitution Made Public*, *supra* note 426, at 5. *Const. of P.R.C.*, arts. 33, 37, 126, *supra* note 425, at 16, 28.

⁴²⁸ *Const. of P.R.C.*, arts. 6, 10, 13, *supra* note 425, at 13.

⁴²⁹ Hu Sheng, *supra* note 426, at 17.

⁴³⁰ *Const. of P.R.C.*, art. 41, *supra* note 425, at 17.

⁴³¹ *Const. of P.R.C.*, art. 36, *supra* note 425, at 16.

⁴³² *Id.*

tion," and no person or organization is "above the Constitution and the law."⁴³³ No mechanism for enforcement of these norms, however, is provided for.

Even deprivations of human freedoms are reflected in constitutional provisions. Disturbance of the state economic plan is prohibited.⁴³⁴ The state "combats capitalist, feudalist, and other decadent ideas."⁴³⁵ Work, education, family planning, and national unity are constitutional duties, as is the obligation "not to commit acts detrimental to the security, honour and interests of the motherland."⁴³⁶ No citizen may exercise any right or freedom which infringes the interests of the state.⁴³⁷

In sum, we can see that China is pressing forward with the use of Western legal forms while restricting individual freedoms at the same time. The government seems to be relying on educative campaigns to impress the legal norms on the people and the bureaucracy. But where need arises, the party has little hesitation to avoid legal procedures, to use trials as techniques of mass propaganda, and to revert to the traditional distinction between mistake and crime.

It is ironic that Chinese history actually presented a more highly developed Romanist legal system to the Communists than that which the Tsars bequeathed to the Bolsheviks. Yet the Chinese took much longer in turning to it. The Tsars' movements towards Romanism had been haphazard, and where progress was made, in the early nineteenth century for example, it was often later retracted. Indeed, the model the Soviets used for their civil code was an unpromulgated draft of the Duma.

On the other hand, the Chinese had greater experience not only with hierarchical codes, and with a structured judiciary, but the Nationalists had developed a fully Romanist system for China by 1935. Of course, the very fact that it was the Kuomintang's system

⁴³³ *Const. of P.R.C.*, art. 5, *supra* note 425, at 12-13.

⁴³⁴ *Const. of P.R.C.*, art. 15, *supra* note 425, at 14.

⁴³⁵ *Const. of P.R.C.*, art. 24, *supra* note 425, at 15.

⁴³⁶ *Const. of P.R.C.*, arts. 42, 46, 49, 52 & 54, *supra* note 425, at 17-18.

⁴³⁷ *Const. of P.R.C.*, art. 51, *supra* note 425, at 18.

obviously made it distasteful to Mao, but the reasons for his rejection go deeper than that.

The Russians faced the issue of doing away with their codes in the 1930's, while the Chinese faced the question of adopting them in the 1950's. Yet for both states, the response went against the contemporary direction of thought. Stalin reversed a growing consensus among his legal scholars, and Mao did the same with opposite results. There may have been a personal element in each decision, for the only organized groups with a coherent and mutually supporting ideology were the legal confraternities. In both China and Russia, their public autonomy necessarily infringed on Stalin's and Mao's respective control.

But the real control aimed at was societal, not merely factional. For Stalin, the state could not afford to be weak. Contradictions among the people could only be measured and controlled through their external behavior. Perhaps knowing that the Bolshevik takeover was fundamentally opportunistic and not determined by the objective forces of history, Stalin wished to use all means possible to maintain the regime's sway. Despite all that has been written on the Soviet desire to create a "new Socialist man,"⁴³⁸ the legal structure confirmed by Stalin fundamentally and primarily seeks to channel the external behavior of the citizen into predictable and manipulable patterns.⁴³⁹

Mao's Chinese heritage, on the other hand, taught him that revolution must be internal. He believed that any threat to the new regime could only come from the minds of the people. For him, the contradictions were those of an internal struggle, not external. Using the ancient Chinese example of *li*, but transforming it to suit a new totalitarian need, Mao increased his anti-legalist campaign. He rejected codes for fear that they would take control of the revolution out of his hands. Despite the failure of the Great Leap Forward, he continued to attack legal forms throughout the

⁴³⁸ See, e.g., BERMAN, *supra* note 3, at 284.

⁴³⁹ "[F]ar from eliminating crime, socialism has in fact created new categories of criminal conduct." Shelley, *Crime and Punishment Under Socialism*, PROB. OF COMMUNISM, July-August 1982, at 71.

Cultural Revolution and beyond. When that too ended in economic and political chaos, the legalist faction regrouped and consolidated power upon the death of the revolution's leader. If the current drive for legalization fails, and if there is a reversion to Maoism, it will come partly from the persistence of the traditional Chinese pattern of inculcating values internally coupled with the dynamic of Communist totalitarianism.

Although the current leaders of China deny any connection with the "social-imperialist clique" that rules Russia, the fact is that they have today opted for the Soviet model. Romanist forms are to be used to cement political control. True, there are variations. The Chinese do not have the legal infrastructure that the Russians have. They will rely more on local bodies to enforce the new legal norms. The Chinese are still far behind the Soviet Union in legislation. But whatever the differences, the two legal systems are now variations on a single type. China and the Soviet Union have made Western forms of law a central feature of their architecture of dictatorship.

VII. DICTATORSHIP, LAW, AND FREEDOM

As the Communists have adopted Romanist law into their respective systems, the question always asked, particularly by academics in the West, is, "Do they mean it?" Western observers have been perplexed because they (like Marx) have presumed the basic incompatibility between the values underlying Western law and the exigencies of dictatorship. The suspicion arises that the forms of law used by the Communists are merely part of a propaganda scheme directed both at their people and at the West. There is doubt whether the Communists can make their reforms work even if they are serious about them. And there is the hope that the adoption of Western law will eventually modify, if not undermine, the power base of the regime. To these questions the Russian and Chinese leaders have given answers. Yes, they really mean to institute the reforms. Yes, they intend to make them effective throughout their societies. No, they do not expect to be undermined by Western values.

To begin with, the foregoing history reveals that the decision of

the U.S.S.R. and the P.R.C. to structure their law along Romanist lines was a conscious choice. There was nothing automatic about the acceptance of Western forms. The reforms occurred after much struggle and bloodshed. Yet, at first sight, it might have seemed that one or another of the alternatives would have been preferable. Customary, imperial, and Marxist forms of law were available.

For centuries, the Russian Tsars and the Chinese emperors had successfully ruled over a large peasantry by utilizing a legal structure that incorporated customary norms. But with the exception of the *mir*, or village, which is only a ghostly backdrop to the collectivist structure of Soviet agriculture, there is little left of the customary peasant legal structure. In fact, Stalin's policy towards the Russian landowning peasant was nothing less than an economic war of extermination for the purpose of industrialization.⁴⁴⁰ The Bolshevik revolution itself was built on a different base: the peasants belonged to a rival socialist party. It is not inconceivable that the Communist Party of the Soviet Union could have taken the *volost* legal structures of the peasantry and adapted them to control of the party, while utilizing other forms of law for the industrial sector of society. Yet the Bolshevik leaders made little effort to harness the customary structures of the peasantry to the revolution's purposes. Capitalist legal forms were more acceptable than feudal.

The Chinese Communists were more open to customary forms. They did try to adopt the traditional *li-fa* distinction to their ends. By using the local mediative mechanisms for those amenable to re-education and reserving the more formal legal adjudications for exemplary punishment of the ideologically incorrigible, the Communist leadership utilized a customary form familiar to the Chinese. The customary form, however, contained little of the customary values. In the effort to impregnate Communist values into Chinese society, the implicit battle against the Confucian ethos became explicit during and after the Cultural Revolution. Now, however, the present leadership seems bent on reversing the customary formula of using *fa* to supplement *li*. Instead, the leadership is establishing

⁴⁴⁰ Osofsky, *supra* note 249, at 1071.

a formal structure of *fa* to be internalized by *li* type educative measures. Excepting the Kuomintang era, the values of the legalists have not been so dominant in China for over two thousand years.

Both Communist states have utilized some parts of the imperial model in their style of governance. In Russia, decretal law was the norm until the late 1950's when Romanist codes and statutes began progressively displacing that mode. Recently, the drive for the collection, and organization, the digesting and publication of the tens of thousands of decrees has continued, although the regime is still reluctant to jettison its right to pass secret decrees.

Similarly, the Chinese Communists long have continued to use the Chinese imperial model of having the judiciary as part of the central bureaucracy staffed by loyal functionaries. The pressure of the legalists to give the judicial process a major measure of independent adjudicatory authority based on Western legal norms has now reached a new level and is being fostered by the present regime. In both countries, then, Western forms are now more dominant than imperial forms.

The third alternative, the Marxist, was vigorously attempted, yet it too was found inadequate. For the first fifteen years, Marxist principles directed the legal development of the Soviet Union. Immediately after the revolution, the period of war communism swept away the previous regime's laws. The Bolsheviks waged war against the displaced classes by direct decree and direct action. In the NEP, when capitalism was partially restored, bourgeois codes of the Romanist type were instituted. Following the NEP when the codes fell into desuetude, Soviet legal experts devised new codes to reflect more accurately the stage of the class struggle that they believed the country was entering. Pashukanis created a sophisticated jurisprudential theory for the new legality. The Marxist legalists expected the new codes and law itself would gradually disappear as the class struggle waned.

Similarly in China, the Communist Party ruled by a form of war communism during the first few years after its ascension to power. A weaker NEP-type period followed, which was accompanied by

the beginnings of Romanist law structures. But then China reverted to a long period of renewed war communism, pursuing the party's class enemies by direct action and by recurring purges. Law and legal process were themselves objects of attack. Unlike in Russia, however, the Chinese radicals were able to cap their policy by their own radical Constitution of 1976. In fact, during the Maoist period, Chinese law reflected Pashukanis' theories more than Soviet law ever did.⁴⁴¹ Now, however, China has made an about-face. The government echoes Stalin's words that it needs "stability of laws now more than ever." It too is restructuring its society along Romanist law lines.

The reason for the choice made by both states is now evident. The Communist Party in the U.S.S.R. and the P.R.C. chose Western legal structures because those forms seemed a superior and more sophisticated mechanism to gain control of the society and direct it to desirable policies. The motivation is Leninist, although the form the law took might have surprised him.

It is true that the policies of the current leadership fly in the face of the received views of Marx. He had said, for example, in 1849,

[S]ociety does not depend on the law. That is a legal fiction. The law depends rather on society, it must be an expression of society's communal interests and needs, arising from the material mode of production, and not the arbitrary expression of the will of the single individual. I have here in my hands the Code Napoleon, but it is not the Code which created modern bourgeois society. Instead, it is bourgeois society, as it originated in the eighteenth century and underwent further development in the nineteenth century, which finds its merely legal expression in the Code. As soon as the Code ceases to correspond to social relations, it is no more than a bundle of paper.⁴⁴²

Instead of bearing witness to Marx's prediction, the modern Soviet and Chinese leaders have adopted Romanist codes for the same

⁴⁴¹ Hsiao, *supra* note 327, at 1059-60 (1965).

⁴⁴² Marx's speech in his defense at the "Trial of the Rhineland District Committee of Democrats," 1849, *quoted in* P. PHILLIPS, *MARX AND ENGELS ON LAW AND LAWS* 187 (1980).

reason that Napoleon did: it helps to consolidate power at the center. With hierarchical codes and regularized procedures, the patterning of human action can be better calculated and directed. "Socialist law is one of the most effective means by which the policy of the Party and state is carried out," states a current Soviet legal writer.⁴⁴³

As Napoleon needed to reduce the power of the provinces, so the two Communist leaderships seek uniformity throughout their respective nations. Regularity and uniformity provide a basis for efficient manipulation. The call for "the precise observation and fulfillment by all government and non-government bodies, officials and individuals of Soviet laws and enactments based upon them"⁴⁴⁴ is but one more tool to make the government's policies effective.⁴⁴⁵ So long as the government remains above the law with the absolute power to shrink it or modify it, then the objectives of state policy are more efficiently achieved.

The leaders of Russia and China seem less concerned than are Western scholars about their contradicting Marx. Most of those in the party who were perturbed by the acceptance of Western law have been eliminated. Nor does legal opinion in either country seem much exercised by the problem. Soviet writers continue to cling to the line that the new extensive legal structure is still prefatory to the final withering of the state and law in the communist ending to history.⁴⁴⁶ They assert that law's purpose is educative, that the Soviet man will internalize all its values so that the external compulsion of the state will no longer be necessary.⁴⁴⁷ But the elite remains outside of the rule of law and must remain so if it is to oversee the re-education of those who are its subjects. As a re-

⁴⁴³ V. CHKHIKVADZE, *THE STATE, DEMOCRACY, AND LEGALITY IN THE U.S.S.R.: LENIN'S IDEAS TODAY* 47 (1976).

⁴⁴⁴ *Id.* at 322.

⁴⁴⁵ V. CHALIDZE, *TO DEFEND THESE RIGHTS* 4 (1974).

⁴⁴⁶ For an excellent survey of such Soviet apologetics, see Funk, *Lessons of Soviet Jurisprudence: Law for Social Change Versus Individual Rights*, 7 *IND. L. REV.* 449, 453-66 (1974).

⁴⁴⁷ *Id.* at 466-76. Funk reveals the tension between the value of the rule of law, and the use of legal mechanisms for authoritative educative purposes. *Id.* at 494-95. See also BERMAN, *supra* note 3, at 282. Cf. Hildebrand, *The Sociology of Soviet Law: The Heuristic and "Parental" Functions*, 22 *CASE W. RES. L. REV.* 157 (1971).

sult, "the program of Soviet jurisprudence becomes locked" in the stage of the dictatorship of the proletariat.⁴⁴⁸ One Soviet legal philosopher, V. Chkhikvadze, distinguishes between a law's "essence" and its "content." He refuses to accept the offer by Western Sovietologists to divide Soviet law into a Romanist form and a socialist content. Form and content are indistinguishable in law, he asserts. The "essence" of the law he defines as its class basis, *i.e.*, the proletarian dictatorship. The law's content, however, can change according to the social requirements at any particular time and place.⁴⁴⁹

For its part, contemporary Chinese legal philosophy divides law into two categories. One is the element directed at class suppression. The other element orders social relations no matter what the particular social system.⁴⁵⁰ They do not seem to worry that Marx may have been concerned only about the first form of law.

It is also evident that China and the Soviet Union are serious about the degree to which law is to order the whole society. The U.S.S.R. has had decades to develop the infrastructure to staff its complex legal system. Its legislative program has not abated. The Chinese have just begun. Woefully understaffed, the Chinese regime seems to be attempting to short-circuit the process by having law impressed upon the society through mass education campaigns. Of course a palace coup by the anti-legalists could change China's policy overnight, but the present regime appears to be committed to the legalization of social and economic relations throughout the society.

The Communists are much more concerned with preventing the infiltration of Western ideas of rights than they are with fidelity to the Marxian theory of law. For the most part, both China and Russia have succeeded in keeping the situation well under control. Modern Soviet jurisprudential theory discounts the danger of contamination by Western values. As Chkhikvadze puts it, "Under so-

⁴⁴⁸ Funk, *supra* note 446, at 497. See generally J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966).

⁴⁴⁹ CHKHIKVADZE, *supra* note 443, at 262-63.

⁴⁵⁰ *Trends in Chinese Jurisprudence*, *supra* note 405, at 14-15.

cialism individual freedom is based upon the identity of personal and social interests and upon the unity of rights and obligations."⁴⁵¹ This means that "[o]nly those who contribute to the common cause in accordance with their abilities and who observe discipline and public order have the right to make demands upon society."⁴⁵² In both Russia and China, as legalization has proceeded, the campaign against dissidents has increased.⁴⁵³

Throughout his book, Chkhikvadze lays the basis of contemporary Soviet law at the feet of Lenin. Yet Lenin, though a lawyer, was ambivalent about the form that law should take in a revolutionary state.⁴⁵⁴ He seemed to prefer simple adjudicative structures. He even echoed the Marxist view that law would progressively wither with the diminishing need for suppression of the enemy classes.⁴⁵⁵ But Lenin showed no uncertainty in the reason for law. To the question, "What is Law?" Lenin's reply was, "The expression of the will of the classes which have emerged victorious and hold the power of the state."⁴⁵⁶ But, Lenin emphasized, for the will of the state to be maintained, it "must be expressed in the form of a *law* established by the *state*. Otherwise the word 'will' is an empty sound."⁴⁵⁷ In Soviet legal theory, the will of the state is the will of the ruling class, the proletariat, though, of course the state is not the sum of individual proletarian wills but an "abstracted" Rousseauian-type will perceived and articulated by the party. For Marxism-Leninism, therefore, law in its essence is not merely coercive. It is suppressive.

The true father of modern Soviet law, then, is Joseph Stalin. He froze it in its suppressive state and reversed Marx's and Lenin's

⁴⁵¹ CHKHIKVADZE, *supra* note 443, at 221.

⁴⁵² *Id.* at 220.

⁴⁵³ Chkhikvadze explains it thus: "The further Soviet society advances towards communism, the more acute becomes the reaction to every case of lawlessness and arbitrary action." *Id.* at 326.

⁴⁵⁴ As Robert Sharlet puts it, there were "several Lenins." Sharlet, *Legal Policy under Khrushchev and Brezhnev: Continuity and Change*, in *SOVIET LAW AFTER STALIN*, *supra* note 244, at 320.

⁴⁵⁵ See generally V. LENIN, *STATE AND REVOLUTION* (2d ed. 1932), and analysis in JUVILER, *supra* note 180, at 17.

⁴⁵⁶ 13 V. LENIN, *COLLECTED WORKS* 327, *quoted in* CHKHIKVADZE, *supra* note 443, at 265.

⁴⁵⁷ 25 V. LENIN, *COLLECTED WORKS* 90, *quoted in* CHKHIKVADZE, *supra* note 443, at 265.

earlier view of its progressive simplification, informality, and evaporation.⁴⁵⁸ Instead, Stalin justified his actions by calling on a sterner Leninist definition of the dictatorship of the proletariat as "the legally unlimited dominance of the proletariat over the bourgeoisie, resting on violence, and enjoying the sympathy and support of the toiling and exploited masses."⁴⁵⁹ But even in regard to the "toiling and exploited masses," the law exercises a control to direct them to accomplish the objectives set by the state. Such a state is not designed to wither except when the ever distant goal of the stage of communism is achieved. Rather, for Brezhnev as much as for Stalin, law's function is to consolidate the Soviet state even further.⁴⁶⁰ Consequently, "Soviet legal science rightly holds that the victory of socialism does not mean the 'winding up' or 'withering away' of regulation by means of the law. On the contrary, the role of law in Soviet society is growing."⁴⁶¹

In one way, however, the role of Soviet law is in harmony with the classical views of Marx and Lenin. The Soviet leadership continues to operate on a two class basis: the party and the people.

⁴⁵⁸ Lenin himself moved towards a more "realistic" view of law's capabilities during the NEP. Sharlet, *supra* note 454, at 320.

⁴⁵⁹ J. HAZARD, *SOVIET LEGAL PHILOSOPHY* 303-04 (1951).

⁴⁶⁰ ЧХКХКВВДЗЕ, *supra* note 443, at 224. Robert Sharlet describes the change in legal policy that followed Stalin as movement from the "prerogative" to the "normative." Sharlet, *supra* note 454, at 319. Yet it was Stalin who saw the control function of law. Although his own personality led him to weigh the balance of Soviet law on the "prerogative" side, his successors have only taken his insights on the uses of the "normative" and extended them beyond the inefficiencies of Stalin's prerogative sphere. This is not to say that Stalin's successors have given up on the prerogative. It remains a central aspect of their rule, expandable whenever the instituted law falls short of their aims. As Professor Juviler states, "One feels that the recent Party leaderships do not appreciate the rule of law or legality as inherently good (where have we heard that before?) but, rather, as long as and in ways that enhance their authority, social stability, economic and community discipline." Juviler, *Some Trends in Soviet Criminal Justice*, in 3 *SOVIET LAW AFTER STALIN*, *supra* note 253, at 80.

It can be seen that the debate between F.H. Lawson and Rene David over whether Marxism has "transformed the Romanist base" of Soviet law is a bit beside the point. The Romanist structures are substitutes for Marxist structures, but they are used to further Stalinist ends, i.e., purposes Marx thought would only be present in late capitalism or possibly soon after the capitalist overthrow. See J. Hazard, *Soviet Law and Western Legal Systems*, Parker School of Comparative Law, Columbia School of Law 5 (rev. 2d ed. 1970) (unpublished materials).

⁴⁶¹ ЧХКХКВВДЗЕ, *supra* note 443, at 308.

Using a formula of "he who is not with us is against us,"⁴⁶² the leadership treats the Soviet people as a subjugated class. The party hierarchy possesses the mechanisms of the law that Marx and Lenin described as necessary to maintain control over a people presumed to be antagonistic to the position of the party.⁴⁶³ It is no exaggeration to note that the history of the U.S.S.R. since 1917 is a history of a government at war with its people, even when the people were not at war with the government. But with the modern structures of law at its disposal, the government has achieved control with far less blood.

Stalin is hardly mentioned in official Soviet publications any longer, despite the political and legal debt the current leadership owes him. In Mao's China, Stalin was constantly glorified even though Mao rejected the mechanism of law to control the populace. Only now is the Chinese government belatedly adopting the Stalinist model. Where Mao had declared in a curious reversal of the American adage, "Depend on the rule of man, not on the rule of law,"⁴⁶⁴ China's current leaders believe that the rule of man can better be accomplished by the rule of law.

At the beginning of the current drive for legalization, Hua Kuo-feng declared, "It is essential to strengthen the socialist legal system if we are to bring about great order across the land."⁴⁶⁵ As in Russia, the Chinese have used the law to rationalize control, while at the same time further restricting individual freedoms. The public Lectures on the Criminal Law emphasized throughout the goal of combating counter revolutionary justice.⁴⁶⁶ Lawyers are required to "find the truth and uphold the law" and not protect the guilty.⁴⁶⁷ Even party propaganda statements are parallel in the two countries. Where Leonid Brezhnev said that there is "no place" in Soviet society for "those who harm society, be they roughneck or criminal, bureaucrat or layabout, parasite or misappropriator of

⁴⁶² CHALIDZE, *supra* note 445, at 19.

⁴⁶³ See generally BESANCON, *THE RISE OF THE GULAG* (1981).

⁴⁶⁴ Leng, *supra* note 339, at 356.

⁴⁶⁵ Hua Kuo-feng, *supra* note 361, at 92.

⁴⁶⁶ *Lectures on Criminal Law*, 13 CHINESE L. & GOV. 6 (1980).

⁴⁶⁷ He Bian, *supra* note 401, at 14. See also *supra* note 423 and accompanying text.

public property,"⁴⁶⁸ Hua Kuo-feng had said, "We must also exercise dictatorship over new bourgeois elements, thieves, swindlers, murderers, arsonists, criminal gangs, smash-and-grabbers and other scoundrels who seriously disrupt public order."⁴⁶⁹ Both regimes have maintained the capacity to pursue their domestic enemies outside of the legal framework if necessary. There is no indication that the state leadership is becoming imprisoned in its own legal structure.

What has the effect been of the Soviet and now Chinese use of a Westernized legal system? To answer this question is no easier than to answer the question, for example, what has the effect been of the Napoleonic Code on French society. We may essay a few indications, however, knowing they remain tentative pending qualified long term studies.

First, if the Soviet Union and China believed or believe that the Western codes will markedly assist a dramatic economic development, then there has been a serious miscalculation. It is true that if the basic economic and other relationships between and among a state and its people are ordered by predictable and rational standards, productivity will certainly be greater than in a chaotic state of arbitrary and terrorizing changes in party decree. The period during and since the Cultural Revolution has proven that. But beyond these basics, there is little evidence of any growing strength in the Soviet economy, which unlike the Chinese has had many years to operate under these legal rules.⁴⁷⁰ Indications are that the Soviet Union has increasingly serious and fundamental economic dislocations with which to contend. As in the West, economic policy is variable in relation to the form of the law. Romanist legal structures can accommodate a state run economy as well as a free market economy.

The Soviet and Chinese leaderships may, however, be reaping a different form of benefit. It has frequently been noted that law has

⁴⁶⁸ CHKHIKVADZE, *supra* note 443, at 283.

⁴⁶⁹ Hua Kuo-feng, *supra* note 361, at 90.

⁴⁷⁰ In fact, it is more true that economic policy is at the behest of political objectives rather than the other way around. See Ioffe, *Law and Economy in the USSR*, 95 HARV. L. REV. 1591 (1982).

a legitimizing function. Where it is authoritative, rational, public, and creates basic order, the promulgating agency gains legitimacy. Since legitimacy on the stage of history is *the* primary goal for all revolutionary Communist regimes, such a benefit is to be highly prized. Furthermore, revolutionary regimes such as the Napoleonic frequently seek to gain legitimacy from their adversaries by adopting their adversaries' own symbols of authority. If that be the case, then Stalin's constitution and the triumph of the legalists in China were significant achievements. It should be noted, however, that the gains in domestic legitimacy have been compromised by the deep and continuing cynicism that pervades Chinese and Soviet society. There is no indication that the people may revolt. Cynicism is different from outrage. But neither is there much evidence that the enthusiastic unalienated socialist man has yet to arrive, despite all the unending beatific smiles we see in Communist government publications.⁴⁷¹

Finally, might there be an infiltration in Soviet and Chinese culture of the very values that underlay the development of law in the West? Will the Soviet and Chinese citizen come to internalize those values we include in the concept of due process? Will he begin to see himself as an individual entitled in law to equality of treatment and to a recognition that without explicit legal reason his voluntarist actions should be respected? At present, despite the constitutional guarantees, and despite the U.S.S.R.'s international obligations, "[i]n Soviet law there is no procedure for defending one's constitutional right in court if this right is not repeated in another law for which a judicial procedure for its defense is provided."⁴⁷² It is possible that in time, the normative presuppositions behind Western law may turn increasing cynicism into an articulable demand for a different kind of government. But a frank examination does not indicate that the dissidents are folk heroes to any important segment of Russian or Chinese society. The proper answer to the question of the long term effects of Western law on Communist political society is beyond the scope of this study. At

⁴⁷¹ See Boim, *Ombudsmanship in the Soviet Union*, 22 AM. J. COMP. L. 509, 538 (1974).

⁴⁷² Chalidze, *Human Rights in the New Soviet Constitution*, in 2 SOVIET LAW AFTER STALIN, *supra* note 244, at 81.

present, however, it does not seem that Romanist legal forms have substantially infiltrated the basic political values of the system. Unless the values of the legal system are themselves among the primary values of the political culture, that is to say, until the rulers are themselves regarded as part of and beholden to the law, then the law will not be efficacious in the realization of fundamental human values.

Since Stalin, the Communists have proceeded on the idea that law is only a means for the ruling center to exert its control. Law remains brutally instrumental. The tail does not wag the dog. If we are dismayed that legal forms do not necessarily bring in their train those human values that originally led to their creation, then we should be dismayed for ourselves as well as for the citizens of Russia and China. The modern history of those two states shows the danger of having law used as a manipulative tool for a social end. In the West, realist and sociological theories of law similarly justified legal rules on both subjective and consequentialist grounds. A state operating purely on an instrumental theory of law can so bear down a society in a matrix of rules that a spiritual deadening of the person and of society can come about, as Solzhenitsyn so trenchantly warned.⁴⁷⁸ On the other hand, if law is seen as emanating from a basic theory of rights or of value, then it can have a dynamic effect in limiting the arbitrary will of those in charge of the state. The recent explosion in rights theory in Anglo-American jurisprudence gives heart. Law and the human spirit should not be at odds with one another.

⁴⁷⁸ See generally A. SOLZHENITSYN, *A WORLD SPLIT APART* (1978).



Content downloaded/printed from

[HeinOnline](#)

Wed Oct 16 19:09:16 2019

Citations:

Bluebook 20th ed.

David F. Forte, *Western Law and Communist Dictatorship*, 32 *Emory L. J.* 135 (1983).

ALWD 6th ed.

David F. Forte, *Western Law and Communist Dictatorship*, 32 *Emory L. J.* 135 (1983).

APA 6th ed.

Forte, D. F. (1983). *Western law and communist dictatorship* *Emory Law Journal* 32(1), 135-236.

Chicago 7th ed.

David F. Forte, "*Western Law and Communist Dictatorship*," *Emory Law Journal* 32, no. 1 (Winter 1983): 135-236

McGill Guide 9th ed.

David F Forte, "*Western Law and Communist Dictatorship* " (1983) 32:1 *Emory LJ* 135.

MLA 8th ed.

Forte, David F. "*Western Law and Communist Dictatorship* ." *Emory Law Journal*, vol. 32, no. 1, Winter 1983, p. 135-236. HeinOnline.

OSCOLA 4th ed.

David F Forte, "*Western Law and Communist Dictatorship* ' (1983) 32 *Emory L J* 135

Provided by:

Cleveland-Marshall College of Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device

