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Luke T. Lee

Research Fellow in Chinese Law at Harvard University

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CHINESE COMMUNIST LAW: ITS BACKGROUND AND DEVELOPMENT†

*Luke T. Lee**

I. INTRODUCTION

IT is perhaps axiomatic to state that law is more than an instrument for the settlement of disputes and punishment of wrongdoers; it is, more importantly, a reflection of the way of life and the philosophy of the people that live under it. Self-evident though the above may be, it bears repeating here, for there is a much greater need for understanding Chinese law now than ever before. China's growing ideological, political, economic, and military impact on the rest of the world would alone serve as a powerful motivation for the study of its law. Certainly, we could not even begin to understand China's foreign policies, its future role in international organizations, its treatment of foreign rights and interests in China, and, above all, the acceptability of the Communist regime to the Chinese people, without some knowledge of its legal system and its concepts of justice and law, both domestic and international.

It should be noted at the outset that comparatively little study has been undertaken on Chinese law. One obvious reason is, of course, the language barrier. Law and Sinology are such difficult and time-consuming subjects that by the time a Westerner has mastered either of them, there is hardly time or energy left for a thorough pursuit of the other. Furthermore, there is a widely held opinion that Chinese "law" is not "law" in the Western sense of the word. Their difference is held to be so great that Escarra, a French jurist, once observed: "Where it is anything else but a fiction, the opposition traditionally established between Orient and Occident is met nowhere more clearly than in the domain of law."¹ Thus, he contrasted the Confucian society of China with

† The substance of this paper was written by the author in his capacity as Research Fellow in Chinese Law at Harvard University. The author wishes to acknowledge his great indebtedness to Harvard University for having made this research possible. Responsibility for the content of this paper, however, is entirely the author's.—L.T.L.

* M.A., Columbia University; Diploma, Hague Academy of International Law; Ph.D., Fletcher School of Law and Diplomacy, Tufts University.—Ed.

¹ ESCARRA, *LE DROIT CHINOIS* 3 (1936), English translation by Gertrude R. Browne, reproduced by Harvard Law School, 1961, p. 9.

that of the Western civilization dominated by the Greco-Roman conception of law, helped by the spread of Christianity.² The Westerner, he said, regards law as almost sacrosanct—as the regulator of the social conduct of all people. The Chinese, on the other hand, has traditionally a low opinion of the law.³

II. BASIC CONCEPTIONS OF LAW IN TRADITIONAL CHINA

But even in the West, the concept of law is by no means unanimous. Austin, for example, defines law as a command, prescribed or dictated by some superior, which an inferior is bound to obey under penalty of the law. Eugene Ehrlich, however, expounds the "living law of the people." Legal regulation and enforcement based on the political State are but a fraction, albeit an increasing fraction, of the sum total of this living law, the rest being norms resulting from the influence of family, religion, and other social organizations and associations.⁴ The Chinese equivalents of these two definitions of law would be *fa* and *li*; for in China there has traditionally existed a dichotomy between the concept of *li* and the concept of *fa*. *Li*—variously translated as "propriety," "ethics," or "moral rules of correct conduct and good manners"—embodies chiefly the teaching of Confucious, in particular, the "five relations": ruler and subject, father and son, husband and wife, elder and younger brother, friend and friend. "*Li*," says *Liki* (The Book of Li), "is a regulator of human desires that has been devised for the protection of the people."⁵ It is a form of social control against unrestrained expression of human desires. It "forbids trespasses before they are committed, whereas law [*fa*] punishes criminal acts after their commission."⁶ *Li* follows closely upon *tao*, the "natural order." This emphasis on "moral rules" and "natural order" is not unlike that on "natural law" in the West,⁷ which is constantly concerned with the problem of how actuality is related to the normative order.⁸ *Fa*, although it has been translated as "law," is

² ESCARRA, *op. cit. supra* note 1, at 3, Browne's transl. at 10.

³ ESCARRA, *op. cit. supra* note 1, at 4, Browne's transl. at 11.

⁴ EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 373, 493 (1936). For a succinct discussion of Ehrlich's theory, see FRIEDMANN, LEGAL THEORY 199-204 (1960).

⁵ English translation by Chang Chin-tsen, *Li and Law*, 2 CHINESE CULTURE 4 (1960).

⁶ *Ibid.*

⁷ See 2 NEEDHAM, SCIENCE AND CIVILISATION IN CHINA 544 (1956).

⁸ Schwartz, *On Attitudes Towards Law in China*, in AMERICAN COUNCIL OF LEARNED SOCIETIES, GOVERNMENT UNDER LAW AND THE INDIVIDUAL 29 (1957).

actually much narrower in scope. It is chiefly associated with the Legalist School of Han Fei-tze, which obtained its flowering in the despotic Ch'in dynasty in the third century B.C. The Legalists rely on sanctions by force to exact obedience to and compliance with the law. They thus stress government by law or decree, as opposed to the Confucian emphasis on government by man and *li*; they insist on complete equality before the law, as against the Confucian admission of the inequality of the people; they enforce an objective and unvarying rule of conduct, in contrast to the Confucian acceptance of different rules for different relations and positions. Although the Ch'in dynasty was shortlived, its influence has continued in varying degrees in subsequent dynasties, as evidenced by centralized bureaucracy and official codes—primarily criminal, but interspersed also with administrative and civil codes, for traditional Chinese law does not distinguish criminal from civil cases. The most comprehensive of all codes was, of course, the *Ta-Ching Lu-li*⁹ (Great Ch'ing Code), which was promulgated by Emperor Yung Cheng in 1728 A.D. and continued in effect for about 200 years.

The preference for *li* over *fa* in the traditional society of China was eloquently reasoned by Confucius:

“If the people are guided by *fa*, and order among them is enforced by means of punishment, they will try to evade the punishment but have no sense of shame, but if they are guided by virtue, and order among them is enforced by *li*, they will have the sense of shame and also be reformed.”¹⁰

Again, he said: “As a judge, I decide disputes, for that is my duty; but the best thing that could happen would be to eliminate the causes for litigation.”¹¹ Indeed, the highest ideal of *chün-tze* (gentleman) is to show oneself, in all circumstances, capable of exact proportions and moderation. Compromise or yielding with propriety is always far more important in China than invoking one's rights and privileges.

But to discard *li* as law and to identify *fa* alone with law on the criteria of codification and enforcement by superior government authorities is equivalent to denying, for example, the ex-

⁹ STAUNTON, PENAL CODE OF CHINA (1810) (English transl.).

¹⁰ CONFUCIAN ANALECTS, Book II, ch. III.

¹¹ CONFUCIUS, THE GREAT LEARNING, ch. IV.

istence of customary international law because of the absence of such qualities. While not fulfilling the Austinian definition of "law," *li* certainly fits in the broader definition of law as given by Ehrlich. In fact, *li* can be said to be a code, enforced by society instead of the government.¹² The commingling of *li* and law was reflected in the Tang Code which provided: "That which deviates from *li* comes within the competence of legal penalties. Violations of *li* are subject to punishment."¹³ In the Code of Law drawn up by Prime Minister Hsiao Ho and the Court Ceremonials formulated by Shusun Tung, *li* and law were made to coordinate and complement each other, a principle which was to endure 2100 years to the present century.¹⁴ Also it must be remembered that Confucius did not reject the role of *fa* altogether.¹⁵ Just as Ehrlich's definition of law would be inclusive of that of Austin, but not the other way round, so *li* would consider *fa* as one facet of the law, but not vice versa.

If we accept Ehrlich's definition of law, Wigmore was correct when he said in 1935 that the Chinese legal system is "the only one that has survived continuously to date—a period of more than 4000 years; in comparison, the other living systems of today are but children."¹⁶

III. MODERN DEVELOPMENT OF CHINESE LAW

Although the Chinese system of law—pervasive in *li* while essentially penal in *fa*—might have been adequate for a feudal, agrarian, and static society, its deficiency became increasingly apparent as China was forced to abandon its isolationism. Certainly, modern industrialization and commerce call for a more intricately defined relationship among the factors of production. Increased intercourse with foreign States unhappily resulted in the imposition of the unequal treaties and the extraterritorial regime on China,¹⁷ removal of which was also a powerful motivation for

¹² A similar view was expressed by Franz H. Michael in a speech, "The Role of the Law in Traditionalist, Nationalist, and Communist China," given before the American Society of International Law's Pacific Northwest Regional Meeting in Seattle, Washington, in the Spring of 1961.

¹³ Chang Chin-tsen, *supra* note 5, at 15.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 14.

¹⁶ WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEM 141 (1936).

¹⁷ On the features of the extraterritorial regime in China, see LEE, CONSULAR LAW AND PRACTICE 207-13 (1961).

the adoption of modern codes and judicial reforms. Thus, even before the downfall of the Manchu dynasty, a Law Codification Commission was established in 1904 to bring Chinese law into line with Western jurisprudence.¹⁸ The decision was made first to modify the existing law, which resulted in the abolition of excessive punishments, including physical torture as a means of extracting confessions. More than 2000 provisions of the old code were eliminated with the sanction of the "infant Emperor" Hsüan-tung in 1910. A so-called Judicature Act of China enacted in 1907 established a modern court system. The courts were divided into four grades, with a Procuratorate of corresponding rank attached to each grade. Some of the characteristics of this new system may be summarized: (1) Although the doctrine of *stare decisis* was not adopted, decisions of the Supreme Court or the Highest Court were binding in law until reversed by the Court itself; (2) the earlier system of using scholars who served as judges without legal training was replaced by the appointment of judges and procurators who must receive formal legal education and pass a number of special examinations; and (3) the power of interpretation was given to the Supreme Court. The last mentioned, according to Dr. F. T. Cheng, was responsible for the development of a large body of "judge-made law," covering such important doctrines as the requirement of "good faith" in the exercise of rights and duties, and the adjudication of cases based upon express rules, customs, and general principles—in that order.¹⁹ The influence of Western jurisprudence was unmistakable.

IV. LAW IN NATIONALIST CHINA

A provisional criminal code was promulgated in 1912, the first year of the Republic. It was still based on the Great Ch'ing Code, the *Ta-Ching Lu-li*, although many principles of Western penal codes were incorporated. This was superseded by the 1928 Criminal Code compiled by the Law Codification Commission and was in turn replaced by the 1935 Code drafted by the Legislative Yuan (Department). A Civil Code was adopted in 1931, which embraced also the general principles of the Commercial Code. In

¹⁸ ESCARRA, *op. cit. supra* note 1, at 107, Browne's transl. at 154.

¹⁹ Cheng, *Fragments of Chinese Law Ancient and Modern*, 1 CHINESE CULTURE 1, 9-10 (1958).

addition, there were adopted such special laws as the Banking Law, Commercial Company Law, Admiralty Law, Insurance Law, Patent Law, and Stock Exchange Law.

In view of the peculiar intricacy of the common law system, Chinese codification looked to the civil law system for guidance, in particular, the Code Napoleon, the German Civil Code, and the Swiss Civil Code. But codification is one thing; actual application, quite another. One is reminded of what Roscoe Pound said: "But the life of the law is in its application."²⁰ Here the Chinese Nationalist judicial reforms failed to measure up to their original expectation. Several reasons may be assigned to their failure: In the first place, the Nationalist authority was based chiefly on the several eastern coastal provinces and never did extend to all of China. While nominally united (sometimes not even nominally), the post-Manchu period was in fact one of interregnum, punctuated by warlordism, Japanese aggressions, and civil wars. Peace and stability—essential conditions for a rule of law—have never been the lot of the Nationalists. Even today, on Taiwan, government by law remains an unfulfilled goal, as witness the Lei Chen affair²¹ and the circumvention of the constitutional prohibition against presidential re-election for more than two terms.²²

But even assuming that a period of peace had been afforded the Nationalist regime, it can be questioned whether a government by law could have been installed. Here it may be appropriate

²⁰ Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 277, 279 (1955).

²¹ Lei Chen, publisher of the *Free China* magazine and leader of the China Democratic Party, was arrested by the Nationalist Army in Taiwan and given a ten-year sentence on what appeared to be a trumped-up charge of "sedition" and harboring a Communist agent. The sentence was upheld by a military review court. It was widely believed, however, that the real reasons for his arrest were his outspoken criticisms against the undemocratic regime of the Kuomintang and his formation of a genuine opposition party in Taiwan favoring a wider role by Taiwanese in the government.

Criticisms of the government's handling of the Lei Chen affair by the newspaper *Kung Lun Pao* resulted in the government's ordering its publisher to turn over the control of the newspaper to a corporation headed by Kuomintang members. See N.Y. Times, Sept. 4, 1960, § 1, p. 2, col. 3; *id.*, Oct. 9, 1960, § 1, p. 1, col. 6; *id.*, Oct. 27, 1960, p. 4, col. 5; *id.*, Nov. 13, 1960, p. 20, col. 7; *id.*, Nov. 24, 1960, p. 2, col. 5.

²² This refers to Chiang Kai-shek's re-election by the National Assembly to a third term of presidency in 1960 despite the fact that the Nationalist Constitution of 1946 (art. 47) permits a person to hold such office for only two terms. See N.Y. Times, March 19, 1960, p. 4, col. 4; *id.*, March 21, 1960, p. 5, col. 2. For English translations of the 1946 Constitution, see HSIEH KWAN-SHENG, A BRIEF SURVEY OF THE CHINESE CONSTITUTION 55 (Pamphlets on Kuomintang Affairs, published by China Cultural Service, Taipei, 1954); CH'EN TUANG-SHENG, THE GOVERNMENT AND POLITICS OF CHINA 447-61 (1950).

to recall a warning by a sympathetic critic, Roscoe Pound, a former Adviser to the Nationalist Ministry of Justice:

“At the outset it was necessary to insist on the supreme importance of drafting a constitution with reference to the historical background and social conditions of the land for which it is designed. A constitutional government must be a gradual growth, arising out of the institutions, customs, and ideals of a people; not something borrowed and transplanted full-grown to which the people are expected to adjust themselves speedily and without friction because of its intrinsic reasonableness.”²³

Again, he said:

“What was needed in China was a Chinese constitution, not an American or British or French constitution imported to a land without the American or British or French historical and political background in which these constitutions respectively grew up and to which they are adapted.”²⁴

Pound's admonition was apparently aimed at avoiding a repetition of the Weimar-type constitution, whose ephemeral existence was attributed to its variance with the tradition and custom of the country. In this sentiment Escarra, too, concurred. A result of the heavily Western-oriented Nationalist laws and Constitution was that frequently in a conflict between *li* and Westernized codes, the latter were ignored.²⁵ Take the inheritance law,²⁶ for example. The traditional *li* would, in the interest of continuing the cult, pass everything from the deceased father to the eldest son of the legitimate wife. Other offspring, be they younger sons or daughters, married or unmarried, would not have any right to succession to the patrimony, although the deceased or the heir could relinquish a share of the hereditary property to the heir's brothers and sisters. Under the Nationalist Civil Code, however, since the equality of the sexes was the proclaimed policy of the State, all the

²³ Pound, *The Chinese Constitution*, 22 N.Y.U.L.Q. REV. 194, 196 (1947).

²⁴ *Id.* at 199.

²⁵ See McAleavy, *The People's Court* (mimeographed 1961); *Dien in China and Vietnam*, 17 J. ASIAN STUDIES 403, 411 (1958). See also Sugihara Shun'ichi, *Ten No Hōteki Seishitsu* (The Nature of Dien Law), 19 HōRITSU JIHŌ (Legal Review) 32 (1947).

²⁶ For inheritance law in China today, see VAN DER VALK, *THE LAW OF INHERITANCE IN EASTERN EUROPE AND IN THE PEOPLE'S REPUBLIC OF CHINA* (No. 5, Law in Eastern Europe Series) (1961).

children of the deceased, sons and daughters, married or unmarried, were allowed equal shares of the property. Still Escarra recounted a remark made to him by a high Kuomintang official bearing on this point:

“According to law, my interlocutor told me in substance, my wife would have the right, on the death of her father, to claim a share of the property equal to that of her brothers. Perhaps, according to the circumstances, she would have an understanding with them to obtain a share. But one fact is certain. That is, that she will never exercise her right (although it is inscribed in the Code) and that I will never permit her to plead on this point. For in so doing I should act contrary to the rites and I, as well as my wife, should have against me the unanimous disapproval of public opinion.”²⁷

It should be emphasized, however, that *li* need not be immutable. Just as Han Fei-tze (founder of the Legalist School) had no monopoly over the specific rules of *fa*, so Confucius could not dictate the content of *li* for all generations to come. *Li*, in a broad sense, may be interpreted as a custom which has acquired the force of law, characterized by moral teachings, the use of persuasion, the appeal to reason and good sense, and the exemplification of good conduct and behavior. Its metamorphosis into law hinges upon its widespread and unvaried acceptance by the society. Its specific content, however, may change with the times. Just as customary law may change with the times, so some rules of *li*, appropriate in Confucius' time, may not have relevance in the 20th century. He who can instill a new *li* into the spirit and mind of the people to replace that of the old would succeed in remolding the social behavior of the many millions in the same way as Confucianism had reigned supreme in time past. What is required is a new ideology, accompanied by a dynamic leadership to put it into practice. The Kuomintang had the San-Min-Chu-I²⁸ and the New Life Movement. But, for a variety of reasons, their goals have remained unfulfilled.

With respect to judicial personnel, there was the drawback of the absence of a unified legal training and doctrine: judges, law-

²⁷ ESCARRA, *op. cit. supra* note 1, at 20, Browne's transl. at 31.

²⁸ THE THREE PRINCIPLES OF THE PEOPLE: NATIONALISM, DEMOCRACY, AND THE PEOPLE'S LIVELIHOOD. Written by Dr. Sun Yat-sen in about 1905, these three principles form the dogma of the Kuomintang, which Dr. Sun founded.

yers, and teachers were schooled either directly or indirectly (through their instructors and textbooks) from such diverse countries as Canada, England, France, Germany, Japan, Scotland, and the United States. While diversified trainings and techniques in interpreting and applying codes could at times be a blessing by virtue of the eclectic approach—taking what is best from each—this was decidedly not the case with China. The multi-approach to law in the face of domestic disunity had merely the effect of negating law.

V. LAW IN COMMUNIST CHINA

The collapse of the Kuomintang in 1949 and its replacement by the People's Republic marked the end of mainland China's first period of legal reform and the beginning of a new and more intriguing chapter. In studying Chinese Communist law, we are entering a highly speculative area, made doubly so by the unavailability of source materials and the recentness of events. Furthermore, the Chinese Communists evidently have not themselves charted a clear and definitive course for their legal development. A great deal of discussion and experimentation is still going on in China. Fragmentary though the evidence may be, the proclaimed policy as well as the practice of the People's Republic may nevertheless enable us to make some tentative observations in several important areas of their developing system.

It has been quite tempting for Western jurists to dismiss the importance of Chinese Communist law on the ground that the term "Chinese Communist law" is an evident self-contradiction: terror and repression there is, but as to law there is none. I recall a recent conversation with probably the greatest living jurist in this country. Upon learning of my research interest in Chinese Communist law, he exclaimed: "Is there such a thing?" But then he started to reminisce and told me that one day, some forty years earlier, another young man came to see him about a research project on Russian Communist law. His reaction was exactly the same then as it was now: "Is there such a thing?" The consensus today seems to be that even a bad or repressive law is nonetheless law.

Another common reason for belittling the significance of Chinese Communist law is that it is but an imitation of Soviet law. Those who hold this view not only betray an ignorance of

Chinese culture and tradition, but unwittingly follow the same practice as the Communists in treating alike all "capitalist-imperialist" laws, which, to them, are merely tools of oppression by the ruling class against the down-trodden people. China indeed has its own distinct legal tradition, which, as will be seen shortly, has left an indelible mark on Chinese Communist law.

To what extent is the present legal system in China inherited from the past? How much of it is borrowed from Russia? What is Communist China's own creation? The answers to these and allied questions form the subject of the ensuing discussion.

A. *Basic Features*

In the first place, there is no question but that the guiding spirit of Chinese Communist law, which is merged with the law itself, is Maoism-Leninism-Marxism, in that order. Fully apprehensive of the danger inherent in a discrepancy between *fa* and the people's sense of justice, the Communist Party, renowned for its mass organizational ability, mobilized all the human resources at its disposal—party members, cadres, and students—to remold public opinion into embracing the Communist *li* based on Mao's New Democracy. Mass meetings and study groups were constantly formed for the purpose of re-educating the people. Furthermore, promulgation of important laws, including the 1954 Constitution and the projected Criminal Code and Civil Code, was preceded by intense public discussion and debate, and the public was invited to send in comments and suggestions.²⁹ Although it appears that basic policies and doctrines are predetermined by the Communist Party, there is always room for change on the technical level. There is no doubt that such measures have been instrumental in giving the public a sense of identity with new legislation, and thus has helped to bridge the gap between the Communist *li* and *fa*. If the Soviet experience can be of any guidance, we may expect a continued narrowing of the gap in the future.

Where a gap does exist, the Chinese Communists have not

²⁹ See report of the Japanese jurists' mission which visited China in 1959, *Chūgoku no ho to shakai* (Law and Society in China); see especially Mizuno, *The Judicial System*, *id.* at 51. Over 150 million people reportedly participated in the discussion of the 1954 draft Constitution. See CHOU HSIN-MIN, ORGANIZATIONAL QUESTIONS ON THE DEVELOPMENT OF LEGAL SCIENCE IN THE CHINESE PEOPLE'S REPUBLIC 6 [Joint Publications Research Service (hereinafter cited as J.P.R.S.) No. 4649, 1961]; original text in Russian, SOVETSKOYE GOSUDARSTVO I PRAVO, No. 3, at 64-72 (1961).

hesitated to follow the centuries-old tradition of elevating *li* (the Communist *li*, of course) over *fa*. Thus, despite the guarantee of religious freedom in article 88 of the Constitution, such freedom is at best restrictively interpreted and at worst severely impinged upon because of its incompatibility with dialectical materialism. Even the number of Christian churches in Peking, for example, was not free from regulation. Again, article 78 of the Constitution guarantees judicial independence in that courts must be guided by law alone when deciding cases. But such independence has been interpreted to mean that courts must follow the national policy, must be controlled and supervised by the people, and must be in harmony with local government activities.³⁰ Thus, in 1952, and again in 1957, "rightist" judges were exposed and replaced wholesale by politically reliable personnel who lacked sufficient legal qualification.³¹ Article 10 of the Constitution which insures to capitalists the protection of the right of ownership of the means of production might just as well not have been written. The same is true with respect to article 87 guaranteeing the freedoms of speech, publication, assembly, association, procession, demonstration, and the Government's material assistance in their implementation.

B. Courts and Judiciary

Another Communist move which had its precedent in 1910 was the decision in 1949 to repeal all Kuomintang laws even before new codes were adopted.³² Dr. F. T. Cheng, referring to the

³⁰ WEI WEN-PO, TUI-YU "CHUNG-HUA JEN-MIN KUNG-HO-KUO JEN-MIN FA-YUAN TSU-CHIH-FA" CHI-PEN WEN-T'I TE JEN-CHIH (Understanding the Basic Problems of "The Organic Law of the People's Courts of the People's Republic of China") 7 (1956).

³¹ It must be remembered that reluctance to entrust the judiciary to professional lawyers is a common phenomenon after a revolution that brought about a drastic social upheaval. Referring to the American experience, Lewis Mayers wrote:

"But in the early decades of the Republic it was by no means everywhere that men were willing to entrust to the judiciary the shaping of the law of the new nation. The rising spirit of equalitarianism was intolerant of lawyers as a special order, and of the judiciary as leagued with it. The notion that the law was not properly the possession of a monopolistic profession, but was equally understandable by any man of intelligence, was so congenial to the spirit of the times that in several states men wholly without legal training were elevated to high judicial office. The common sense of the legislature was looked to as adequate to the formulation of a new code of law to supplant the judge-made English law of the colonies, now, like everything English, condemned as unfit for a free nation. The people, through their elected representatives, and on the basis of common sense instead of precedents largely developed in a semi-feudal society, would provide a new code of laws congenial to republican institutions." MAYERS, *THE AMERICAN LEGAL SYSTEM* 348 (1955).

³² The repeal of the complete Kuomintang book of six laws was contained in the

1910 move when more than 2000 provisions of the old code were abolished, likened it to

“ . . . weeding the field before fertilizing the soil. Moreover, it is much easier to repeal an old law than to introduce a new one; for, apart from the fact that a new law has to be introduced after mature consideration, an old one may have become obsolete or proved to be pernicious long before its abolition.”³³

Dr. Cheng's reasoning would apply equally to the Chinese Communist abolition of Kuomintang laws, which, incidentally, also paralleled the Soviet abrogation of Czarist laws in 1918.³⁴ As was the case in Russia, the courts were instructed to apply the “new programmes, laws, orders, regulations, decisions, and, in their absence, . . . the policy of the new democracy.”³⁵ This, in effect, conferred upon the courts a certain legislative function and a great latitude in applying their own conception of what the legal norms should be.³⁶

In considering the major characteristics of the legal system of the People's Republic, we must be aware of the fact that its system is a product of many sources. There can be detected a particularly strong influence from the Soviet Union as well as the indigenous Chinese conditions—both traditional and Communistic. That the Soviet system should exercise a profound influence over the Chinese is quite understandable. As the first Communist state, the Soviet Union has had a judicial experience of more than forty years. By following its model, many mistakes which the Soviet Union, for want of precedents, had made through trial and error need not now be repeated. Furthermore, its system, which witnessed the Soviet transformation from a backward agrarian and feudal society into a first-rate industrial and military power, must have many things to commend it to a country like China, whose

February 1949 directive of the Central Committee of the Communist Party, art. 5, cited in Ma Hsi-wu, *The Work of the People's Judiciary in the Shensi-Kansu-Ningsia Border Area Based on the New Democratic Revolution*, Cheng-fa Yen-chiu, 1955, No. 1, at 14. See also BONNICHON, *LAW IN COMMUNIST CHINA* 4 (1956); CHOU HSIN-MIN, *op. cit. supra* note 29, at 2.

³³ *A Sketch of the History, Philosophy, and Reform of Chinese Law*, in *STUDIES IN THE LAW OF THE FAR EAST AND SOUTHEAST ASIA* 41 (1956).

³⁴ Hazard, *The Future of Codification in the U.S.S.R.*, 29 *TUL. L. REV.* 241 (1955).

³⁵ See Ma Hsi-wu, *supra* note 32.

³⁶ See DEKKERS, *LETTRES DE CHINE* 34 (1956).

present economic condition and problems are not unlike those which existed in Russia following the Bolshevik Revolution. But the Chinese Communist Party was the first among all Communist parties to realize (with good reasons)³⁷ the principle that there are different roads to socialism and that each country ought to adapt Communism to its own peculiar history, custom, and need. The legal system was no exception. In fact, even before the People's Republic was established in 1949, the Chinese Communists had had some eighteen years of experience and experimentation with judicial administration. For as soon as the Chinese Soviet Republic was installed in Juichin, Kiangsi, in November 1931, on the fourth anniversary of the Canton Commune, a special session of the Executive Committee on December 13 passed Decree No. 6, paragraph 9 of which is of special interest. It provided that legal sections could be formed in the provincial, county, and regional governments to function as temporary judicial organs until the formation of courts.³⁸ In February and July of 1932, the Executive Committee promulgated temporary rules governing the functions, organization, and procedure of the courts.³⁹ Two years later, Mao, in his report to the Second Congress of Chinese Soviet, already praised the legal institutions for having made "long strides of progress" toward the "mass character," of which the establishment of the "travelling courts" was cited as a proof.⁴⁰

More particularly, the following features of the Communist legal system bear special investigation: the use of people's assessors, *kung-shen* (mass trials), judicial independence, the procuracy, conciliation commissions, and the educational role of the courts.⁴¹

1. *People's Assessors*

Even during the Kiangsi-Yenan period of the early 1930's, "lay assessors" were elected from various trade and farm labor

³⁷ For a revealing account of the complex and tortuous relationship between the Chinese and Soviet Communist Parties, see generally ISAACS, *THE TRAGEDY OF THE CHINESE REVOLUTION* (2d ed. 1961).

³⁸ CHUGONOV, *CRIMINAL COURT PROCEDURES IN THE CHINESE PEOPLE'S REPUBLIC* 2 (J.P.R.S. No. 4595, 1961); original text in Russian, *UGOLOVNOYE SUDOPROIZVODSTVO KITAYSROY NARODNOY RESPUBLIKI* (1959).

³⁹ *Ibid.*

⁴⁰ Chinese Text in the Chinese Workers' Correspondence, Shanghai, vol. 4, No. 11, March 31, 1934; English translation by YAKHONTOFF, *THE CHINESE SOVIETS* 261 (1934).

⁴¹ The limitation of space, unfortunately, makes impracticable a detailed discussion in this paper of the court system and procedure of the People's Republic.

unions⁴² for a dual purpose: to participate in the investigation and deliberation of court cases, thus broadening the workers' role in the government, and to enable the courts to feel the pulse of public sentiment and keep a common-sense approach to justice.⁴³ Over the years, with some modifications, the assessor system has been continued. Thus, in the place of an Anglo-American jury system the Organic Law of the People's Courts of 1954 provides that people's assessors shall participate in the trial of all cases in the courts of first instance, except in petty civil and criminal matters and other specified cases.⁴⁴ Any citizen over 23 years of age who has the right to elect or be elected and has not been deprived of political rights may be elected a people's assessor.⁴⁵ During the discharge of his duty, he shall continue to draw his pay from his regular employer or receive corresponding remuneration from the court.⁴⁶ A directive issued on July 21, 1956, by the Ministry of Justice⁴⁷ leaves flexible the number of people's assessors in each court—depending on the number of cases handled. In general,

⁴² CHUGUNOV, *op. cit. supra* note 38, at 17.

⁴³ See similar reasons for the Soviet adoption of the assessor system in HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY* 34 (1960).

The common sense approach to justice was also dominant in the early American judiciary. Pound said:

"[W]ith a few conspicuous exceptions the courts before and for some time after the Revolution were made up largely of untrained magistrates who administered justice according to their common sense and the light of nature with some guidance from legislation. . . . Of the three justices of the Superior Court in New Hampshire after independence, one was a clergyman and another a physician. A judge of the highest court of Rhode Island from 1814 to 1818 was a blacksmith, and the chief justice of that state from 1819 to 1826 was a farmer. When James Kent went upon the bench in New York in 1791, he could say with entire truth: 'There were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own and nobody knew what [the law] was.' . . . [T]he bulk of the [legal] profession was made up of men who had come from the Revolutionary armies or from the halls of the Continental Congress and had brought with them many bitter feelings and often but scanty knowledge of the law. It was natural that they should resent any serious investigation of the English authorities and perhaps endeavor to palliate their lack of information by a show of patriotism. . . . [A]s we have seen, at the beginning of the nineteenth century American law was undeveloped and uncertain. Administration of justice by lay judges, by executive officers and by legislatures was crude, unequal, and often partisan, if not corrupt. POUND, *THE SPIRIT OF THE COMMON LAW* 113, 116, 118 (1921). See also note 31 *supra*.

⁴⁴ Art. 8. Text in CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HSUAN-CHI (Selections of Statutes and Regulations of the People's Republic of China) 38 (1957).

⁴⁵ Art. 35, *id.* at 43.

⁴⁶ Art. 37, *id.* at 43.

⁴⁷ Ssu-fa-pu Kuan-yü Jen-min P'ei-shen-yüan te Ming-o, Jen-ch'i ho Ch'an-shen Pan-fa te Chih-shih (Ministry of Justice's Guide to the Number, Length of Service, and Selection of People's Assessors), July 21, 1956, *id.* at 289.

however, the ratio of two assessors to each judge is to be kept. The directive also provides provisionally that an assessor shall perform his duty ten days a year for a two-year term.

A significant difference between the 1954 Law and the earlier practice is that under the new law assessors enjoy equal rights with the judges in the performance of their duties (article 36), whereas the earlier system did not afford assessors the same voting rights as the judges. As of 1956, there were more than 200,000 people's assessors (excluding temporary assessors) throughout China.⁴⁸

Certainly, the idea that a professional judge could be outvoted by two laymen on a point of law may appear abhorrent to people steeped in the Anglo-American tradition. However, in a country like China where the avowed aim of the revolution is to build a new government based on the masses,⁴⁹ the judiciary could not be allowed, as in the West, to develop its separate system and doctrine in its own good time. It should be noted, however, that all appeal cases are handled by courts composed exclusively of professional judges.⁵⁰

2. Mass Trials

Another institution that dated from the Kiangsi-Yenan days is *kung-shen* or mass trials. Based on the 1934 resolution of the Second Congress of Chinese Soviets which called for "attracting" the masses toward participation in Soviet courts,⁵¹ *kung-shen* be-

⁴⁸ *Id.* at 290.

⁴⁹ See art. 17 of the Constitution.

⁵⁰ The appeal procedure has been very much simplified. Except for those submitted by procurators or defense attorneys which must conform to rigid rules, appeals to a higher court can be entered in any form: verbally in court or in its public reception office, or in writing in a legal consultation office. Copies of the appeal must be transmitted to both the opposing party and the court within ten days after the receipt of notification of the court decision. See CHUGUNOV, *op. cit. supra* note 38, at 175-76.

Insufficient data exist for a thorough evaluation of the assessor system, which, incidentally, prevails also in all countries of the People's Democracies, as well as in certain German courts, the so-called *Schöffengerichte*. One reaction is that given by a British jurist, D. N. Pritt, Q.C., who observed that it has worked "admirably" in China. (See *China Reconstructs*, December, 1955, p. 14.) The small number of appeal cases despite the simplicity of the appeal procedure might be an indication that the trials in which assessors have participated may be meeting with general satisfaction. In Sian, out of 68 cases tried between January and March of 1954 by the court of the fourth precinct, only one case was appealed. GUDOSHNIKOV, *LEGAL ORGANS OF THE PEOPLE'S REPUBLIC OF CHINA* 55 (J.P.R.S. No. 1698, 1959); original text in Russian, *SUDEBNYYE ORGANY KITAYSKOY NARODNOY RESPUBLIKI* (1957). In Shanghai, a city of ten million, only fifty-five appeals were heard by the city's higher court in 1958. See BENEDEK, *THE CHINESE SYSTEM OF ADMINISTERING JUSTICE* 6 (J.P.R.S. No. 3121, 1960); original text in Hungarian, *TARSADALMI SZEMLE* (Social Review), February 1960, No. 2, pp. 90-102.

⁵¹ Cited in GUDOSHNIKOV, *op. cit. supra* note 50, at 9.

came a central feature of the Communist judicial system, until it was replaced recently by the regular courts. In *kung-shen*, especially in cases of political or educational significance, thousands of workers, peasants, and Red Army soldiers would participate. Charges could be made by anyone present against the accused, and defense could also be undertaken by anyone present, including the accused himself. Political speeches were often made by members of the tribunal and Communist members and cadres, thus transforming the session almost into a mass educational and indoctrination meeting. Obviously mass psychology was resorted to, which sometimes led to excesses or injustice resulting from mob hysteria. This type of proceeding was especially prevalent at the time of the land reform program, when peasants were encouraged to overcome the centuries-old fear of landlords.

If *kung-shen* was to attain its desired goal of re-educating the people, it had to be carefully planned beforehand. Three necessary ingredients were given for the holding of a successful *kung-shen*: (1) the trial must aid in the development of mass movement and have great educational significance for the masses; (2) there must be sufficient evidence against the accused so that no doubt could arise in the course of the trial; and (3) the trial must be carefully organized and prepared by the court in advance.⁵² Judging from these conditions it would appear that the trials were not held primarily for the purpose of determining the innocence or guilt of the accused, but rather a *pro-forma* proceeding for a political purpose. Sometimes, the number of people attending such trials was carefully recorded. Between January and May of 1955, for example, more than 890,000 persons attended 2067 public court sessions in 50 county and city courts of Kwantung. In Nanking, during a ten-month period in 1955, more than 62,700 persons attended the mass trials of 528 cases.⁵³ Publicity of the trials was accomplished not only by public attendance, but also sometimes by radio broadcast of the proceedings over the entire country and their publication in newspapers, wall papers,⁵⁴ and

⁵² COLLECTION OF REPORTS ON THE WORK OF THE PEOPLE'S GOVERNMENT FOR 1950, 81 (1951), cited in CHUGONOV, *op. cit. supra* note 38, at 27.

⁵³ CHUGONOV, *op. cit. supra* note 38, at 26.

⁵⁴ Because of the scarcity and expensiveness of paper in China, it is common practice to post newspapers and other important notices (often hand-written) on walls at strategic locations where pedestrians may stop and read.

periodicals. Even the number of people who read the wall papers was sometimes painstakingly recorded.⁵⁵

But *kung-shen* was at best a makeshift arrangement whereby speedy results could be obtained. It could never, in the long run, replace the court as the regular forum for dispensing justice, which explains, perhaps, its subsequent disappearance from the judicial scene. Some of its effects are nevertheless preserved by holding *public* (in contra-distinction to *mass*) trials, by conducting court sessions at the place of residence or work or at the scene of the crime, and by proclaiming sentences before a specially assembled audience.⁵⁶

3. *Judicial Independence*

A provision in identical terms is contained in the Constitution (article 78) and the Organic Law of the People's Courts (article 4) which was absent in earlier laws: "In administering justice the people's courts are independent, subject only to the law." The adoption of this principle in 1954 reflects the growing self-confidence of the People's Republic and an increasing emulation of the Soviet legal system. It was Stalin who, in his Report on the Draft Constitution in 1936, said: "We need stability of laws now more than ever."⁵⁷ This in effect reversed the hitherto accepted thesis of Pashukanis that law reaches its highest stage of development under capitalism. The task of implementing the new line fell upon Vyshinsky, who said: "The development of capitalist society goes in the direction of the decay of law and of legality," whereas "history demonstrates that under socialism . . . law is raised to the highest level of development."⁵⁸

The Chinese Communist acceptance of the principle of judicial independence, coming as it did barely five years after the control of the mainland, must of necessity be a qualified one. There was the risk that the courts, many of which were still staffed by personnel left over from the Kuomintang era,⁵⁹ might, under the convenient sanctuary provided by "judicial independence," frustrate the Communist efforts at realizing their goals. There was the further problem of a transition from political domination of

⁵⁵ CHUGONOV, *op. cit. supra* note 38, at 27-28.

⁵⁶ *Id.* at 28.

⁵⁷ Cited in BERMAN, *JUSTICE IN RUSSIA* 44 (1950).

⁵⁸ *Id.* at 45.

⁵⁹ See CHOU HSIN-MIN, *op. cit. supra* note 29, at 4.

the courts to judicial independence. Indeed, China must chart its legal course through the narrow, hazardous waters between the Scylla of a kangaroo court and the Charybdis of a genuinely independent court which might bite the hand that created it. What has evolved is a system in which courts are made responsible to people's assemblies at corresponding levels and report to them.⁶⁰ At the same time, however, there should be no interference with the functioning of the courts, whether by government authorities, public organizations, or individuals. In other words, judicial independence in China means "on the one hand, the prohibition of illegal interference in the work of the court, and, on the other hand, the essential control of the courts by the people."⁶¹

The question naturally arises as to the compatibility between strict political and ideological control of the country by the Communist Party and judicial independence. Could there be respect for law if the Communist Party dominates the political scene and decides all important issues of State? The Soviet experience in this regard may be cited to show what lies within the realm of theoretical possibility. Professor Harold J. Berman of the Harvard Law School wrote in *Justice in Russia*: "The evidence tends to show a surprising degree of political compartmentalization of the legal and the extralegal." He recounts a report by Boris Konstantinovsky, a former Soviet lawyer who emigrated to the United States, to the effect that in all his extensive judicial experience there was only one case in which the Communist Party interfered with the court trial, and in that case, the procurator (a Party member) went against the Party decision and in effect annulled it. Professor Berman cited as further evidences of such compatibility the absolutism of the imperial rule of the Roman Empire existing alongside a legal system, and the illegal oppression of Negroes in a legally advanced country, the United States.⁶²

It is true that what has happened in the Soviet Union need not necessarily happen in China. Indeed, in his recent book,⁶³ Roderick MacFarquhar cited many instances of the "rightists'" criti-

⁶⁰ See art. 14 of the Organic Law of the People's Courts.

⁶¹ See Wang Huai-an, *The Superior Elements of the Chinese People's Judicial System*, in *Jen-min Jih-pao*, Oct. 16, 1954, p. 3; Liu K'un-lin, *Toward an Understanding of: "In Administering Justice the People's Courts Are Independent, Subject Only to the Law,"* *Cheng-fa Yen-chiu*, 1955, No. 1, p. 35.

⁶² BERMAN, *op. cit. supra* note 57, at viii.

⁶³ MACFARQUHAR, *THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS* (1960).

cisms of the Communist Party members for conducting themselves in a manner above the law and regarding their own words as "golden rules and jade laws."⁶⁴ Another critic said: "Although citizens had the right to appeal to the law against state personnel for unlawful acts or dereliction of duties, yet no one had ever exercised this right."⁶⁵ Be that as it may, Stalin had to wait for some twenty years after the Bolshevik Revolution before stressing the "stability of laws," and what has developed in China is as yet insufficient to foreshadow events to come.

4. *Procuracy*

Another feature of Chinese Communist law which is quite unfamiliar to the Anglo-American lawyer, but has its parallel in the Soviet Union, is the Procuracy. Its primary function is the supervision over the execution of the law. More specifically, its functions include: (1) the determination of the legality of activities of the local assemblies, administrative organs (including the police and other investigatory agencies), or private citizens; (2) the investigation and prosecution of criminal cases as well as the determination of the legitimacy of court decisions and their subsequent execution; and (3) the prosecution or participation therein of important civil cases which affect national interests.⁶⁶

Unlike the courts which are responsible to the people's assemblies of corresponding levels, all procurators are under the general supervision of the Procurator General,⁶⁷ who, in turn, is responsible to the People's Congress or, when it is not in session, to its Standing Committee.⁶⁸ The Procuracy may not, however, interfere with the actual administration of the government. Its protests, in other words, may be ignored if the organ complained against or the latter's superior body refuses to heed them. On the other hand, the effectiveness of the work of the Procuracy should not be underrated. In 1956, for example, out of 1400 court decisions protested by the Procuracy, 1159 were either overruled or

⁶⁴ *Id.* at 114.

⁶⁵ *Id.* at 223.

⁶⁶ See art. 4, Organic Law of the People's Procuracy of the People's Republic of China, promulgated by the Chairman of the People's Republic of China on September 28, 1954; text in CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HSUAN-CHI 48-53 (1957).

⁶⁷ Art. 6, *id.* at 49.

⁶⁸ Art. 7, *id.* at 50.

remanded for new trials.⁶⁹ According to an incomplete estimate, the criminal cases investigated by the Procuracy were broken down as follows: corruption affecting public property, 41 percent; economic crimes, 10.8 percent; infringements of personal liberties, 37.6 percent; and others, 10.6 percent.⁷⁰

Though patterned immediately upon the Soviet model, the Chinese Procuracy could actually trace its genesis to the censorate of the Imperial China. Designed to serve as the eyes and ears of the Emperor, the censors were dispatched to all parts of the country to criticize and report any irregularities among government officials directly to the central government. This system acquired such an entrenched position in the traditional government structure that Dr. Sun Yat-sen decided to retain its main features in the Control Yuan, which, under the Nationalist Constitution, enjoyed theoretically a co-equal status with that of the Executive, the Legislative, the Judicial, and the Examination Yuan. The Nationalist Government, however, did not make effective use of this instrument to check maladministration and corruption. It is yet too soon to predict whether the Chinese Communists would utilize the Procuracy to full advantage. The Soviet experience at least indicates that there is no inherent contradiction between an efficient, impartial, and honest Procuracy, on the one hand, and "democratic centralism," on the other, so long as no question of political loyalty is involved.⁷¹

5. Conciliation Commissions

A unique feature of the Chinese Communist judicial system is the Conciliation Commission. It partakes of some of the characteristics of the informal settlement of inter-family disputes traditionally undertaken by the council of elders on the village level. After initial experiments in the Shensi-Kansu-Ninghsia border area, long before the establishment of the People's Republic, the Conciliation Commission was regularized by the Provisional Organizational Act of the People's Conciliation Commissions promulgated by the State Administrative Council on March 22, 1954.⁷²

⁶⁹ See Chang Ting-cheng, *Report on the Work of the Procuracy for the Year 1956*, CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN (Compilation of Statutes and Regulations of the People's Republic of China), JULY-DECEMBER 1957, 291 (1958).

⁷⁰ *Id.* at 289.

⁷¹ BERMAN, *op. cit. supra* note 57, at 170.

⁷² Text in CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HSUAN-CHI 295 (1957).

It has as its primary function the conciliatory settlement of civil and petty criminal cases.⁷³ Consisting of from three to eleven members, the Commission operates, under the supervision of the local government and the courts of the first instance, on the village level in the countryside and on the precinct level in the cities.⁷⁴ Members are elected every year, with the right of re-election by local people's assembly on the bases of political right-thinking, impartial reputation, organizational ability, and enthusiasm for conciliatory work.⁷⁵ The Commission functions within the framework of government policies and law, acquires jurisdiction through the voluntary consent of the disputants, and is forbidden to apply punishment or make arrests. It should be noted that recourse to conciliation is not a pre-condition to court litigation, and no compulsion to conciliate exists.⁷⁶ Members of the Commission function only after their normal working hours. Where reconciliation has been effected, it must be registered by the Commission and a certificate issued to the parties, if necessary.⁷⁷

The use of informal means to settle minor disputes is certainly both in accord with the Chinese tradition and in the interest of alleviating the otherwise overcrowded court calendars. It also fulfills a legal education function. The prevalent use of Conciliation Commissions may be seen from the fact that, according to an incomplete count for the province of Szechuan alone, in the period of January-September 1953, some 40,000 disputes were settled by Conciliation Commissions distributed over 117 hsien (counties).⁷⁸ The Commissions settle disputes of a wide range. In the same period of 1953, for example, the Commissions in a certain district of Wei Hsien, Shantung, were presented with 681 cases. By October, 507 disputes had been completely resolved, among which were 167 land disputes, 198 family quarrels, 21 disagreements over inheritance, 101 marriage and divorce troubles, and 20 debt disputes.⁷⁹ A report by Madame Shih Liang, Minister of Justice, indicated that there existed in July 1955, 157,966 Concili-

⁷³ Art. 3, *id.* at 295.

⁷⁴ Arts. 2, 4, *id.* at 295.

⁷⁵ Art. 5, *id.* at 296.

⁷⁶ Art. 6, *id.* at 296.

⁷⁷ Art. 8, *id.* at 296.

⁷⁸ Jen-min Jih-pao, March 23, 1954, p. 1.

⁷⁹ *Id.*, p. 3.

ation Commissions in all parts of China,⁸⁰ with perhaps five times that number of Commission members.⁸¹

6. *Educational Role of Courts*

While to a certain extent courts of all countries have as one of their purposes the education of the people, in China this role has been emphasized to an unprecedented degree. The emphasis on reformatory education for prisoners may be traced to Mao's Report to the Second Congress of Chinese Soviets in 1934 in which the following policy was laid down: Except those under the death sentences, all prisoners must be trained "in the Communist spirit and with labor discipline."⁸² The educational role of the courts is even written into the 1954 Organic Law of the People's Courts. Article 3 obligates the courts to "utilize their entire resources to educate the citizenry towards patriotism and a conscious respect for law." The education is aimed at both the public at large and the principals directly involved. With respect to the former, a favorite device in the past was the holding of *kung-shen* (mass trials) which the public was "urged" to attend. Even though mass trials have recently been abandoned, the educational role of the courts has continued through the holding of public trials and publication of court proceedings and decisions. With respect to the principals involved, the methods adopted are "re-education-through-labor," ideological remolding, group discussion, mass self-criticisms, and confession. Since numerous books and articles have been written on brain-washing or re-education—depending on the outlook of the authors—it is necessary here to say only a few words about confession. The requirement of a confession preliminary to conviction was a characteristic of the traditional Chinese law. It was productive of much abuse through the application of physical torture—a near-universal practice.

In present-day China, confession is still regarded a desirable, but not absolutely necessary, goal for the following reasons:

- (1) Confession contributes to the establishment of limits of investigation and collection of evidence, connected with facts of the crime;
- (2) in cases where the organs of public security

⁸⁰ Jen-min Jih-pao, July 30, 1955, p. 6.

⁸¹ The ratio of roughly five members to each commission is obtained from figures given for Shansi and Kansu in Shih Liang's report, Jen-min Jih-pao, July 30, 1955, p. 6.

⁸² See YAKHONTOFF, *op. cit. supra* note 40, at 262.

and the procurator's office do not yet have sufficient material in the case, the confession of the accused can extend the framework of investigation, establish new facts of the crime and new criminals, lessen difficulties in combatting crime; in particular, confession has an important role in exposing counter-revolutionary organizations and accomplices in the crimes; (3) confession by the accused aids the court, the procurator's office and the organs of public security in successfully handling the case, and (4) makes it possible to determine the degree of repentance of the accused and his moral qualities.⁸³

It has been quite a common practice for a prisoner to make a successive number of confessions until one is acceptable to the Communist authorities.⁸⁴ From the available evidence, physical torture, having been legally abolished,⁸⁵ is no longer the primary means used to obtain a confession.

The following statistics on confessions may be of interest: After a six-day "heart-baring, self-awakening" movement among the "reform-through-labor" prisoners in Yu-ling Machine Shop in Kwangsi, 284 of them confessed to rebelliousness, 34 to the thought of escaping, 261 to distrustfulness of the government policy, 299 to refusal to admit any guilt, and 22 to dissatisfaction with the government and hostility to the cadres. In addition, there were also prisoners who admitted to crimes not hitherto revealed.⁸⁶ In Lin-chi Collective Farm in Hunan, 70 percent of the prisoners wrote letters of resolution pledging to the government their complete reformation.⁸⁷

It is a most hazardous task to speculate into the true state of mind of an individual; hence it is difficult, if not impossible, to evaluate with any certainty the effectiveness of the courts' educational role in China. Conflicting evidence may be marshalled, which only confuses the issue. The fact that study groups and rectification campaigns have continued incessantly to this day certainly belies the view that the educational role has been entirely

⁸³ See Chang Tse-pei, *Correct Attitude Toward the Confession of the Accused*, Kuang-ming Jih-pao, Nov. 13, 1956, p. 3.

⁸⁴ See generally RICKETT & RICKETT, *PRISONERS OF LIBERATION* (1957); BONNICHON, *op. cit. supra* note 32, at 10, 31.

⁸⁵ See Mao's Report to the Second Congress of Chinese Soviets in YAKHONTOFF, *op. cit. supra* note 40, at 262.

⁸⁶ See Meng Shao-liang, *Basic Conditions of the Work of Reform-Through-Labor in the Past Nine Years*, Cheng-fa Yen-chiu, 1958, No. 5, p. 69.

⁸⁷ *Ibid.*

successful. Contrariwise, the apparent stability and respect for the law by the populace in the face of widespread food shortages today may testify to its effectiveness. I shall leave the answer to wiser counsel.

C. *Legal Education*

It may be appropriate at this point to examine briefly the legal profession in China. The legal profession in traditional Chinese society never attained the same status and importance as it has in the West. This may be attributed to the elevation of the Confucianist concept of *li* over the Legalist emphasis of *fa*. The Westernized codes and judicial system instituted after the downfall of the Manchu dynasty, though generally ineffective, did have an interesting by-product: the creation of lawyers as a new class. For the training of lawyers and judicial personnel, a number of law schools were established, the foremost among which was the Soochow University Law School, later renamed the Comparative Law School of China. Founded in Shanghai in 1915 by American missionaries, it exercised a considerable influence in the Chinese judiciary and had by far the largest enrollment of law students. Even in 1950-51, a year after the establishment of the People's Republic, its enrollment still exceeded 300.⁸⁸ In that same year, there was a total of eleven law schools in China.⁸⁹ Their continued existence along with that of other private and missionary schools was due, perhaps, to the Communist pre-occupation with the more pressing politico-economic-military affairs at the time. However, the days of these schools were clearly numbered, and the Korean War led to the inevitable. In the fall of 1952, all institutions of higher learning underwent a major reorganization. Thus, universities which had hitherto offered many subjects became specialist schools—concentrating on perhaps a single subject.⁹⁰ In the process, the law curriculum was virtually eliminated. The 1953 *Guide to Higher Institutions* listed only one school as offering law degrees.⁹¹ It must be remembered that this was also a time of ten-

⁸⁸ See T'ou-k'ao Ta-hsüeh Shou-ts'e (Handbook for College Entrance Examination) 57 (1951).

⁸⁹ Compiled from handbook cited in note 88 *supra*.

⁹⁰ See TZE MIN, KAO-TENG HSUEH-HSIAO HSUEH-SHENG TE HSUEH-HSI HO SHENG-HUO (Learning and Life of Students of Higher Education) 3 (1955).

⁹¹ I-CHIU-WU-SAN-NIEN KAO-TENG SHENG-HSUEH CHIH-TAO (Guide to Higher Institutions, 1953) 13 (1953). This book lists Chungshan University (Canton) as the only school offering the law degree, although Cheng-fa Yen-chiu (1954, No. 2, p. 74) states that the Chinese

sion heightened by the Korean War, *San-fan*⁹² and *Wu-fan*,⁹³ the suppression of counter-revolutionaries, and the inception of the land reform program. Mass meetings, mass trials, confessions, and self-criticisms took place almost incessantly, and in a certain sense, these replaced the normal functioning of the courts. The Kuomintang laws were abolished, but new laws were slow in coming. There was very little law for the law schools to teach, and lawyers as a class were castigated as menial tools of the capitalists, imperialists, and of all those who resisted social progress. There was a serious doubt as to whether lawyers would ever have a place in the New Democracy. When the turmoil subsided somewhat, a reversal of the attitude toward lawyers became gradually noticeable. Thus, Peng Cheng, Vice Chairman of the Political-legal Committee of the State Administrative Council, emphasized the lawyers' role to be that of strengthening the democratic government, completing social reforms, safeguarding economic achievements, and protecting people's democratic rights against infringement.⁹⁴ The 1954 *Guide to Higher Institutions* attacked a prevalent notion among high school students: "Boys study engineering; girls learn medicine," but "those who are inferior, seek after politics and law."⁹⁵ It cited Mao's stress on the role of courts, along with that of the armed forces and police, in strengthening the people's governmental machinery and safeguarding national defense and people's rights. "Only after accomplishing the above," said Mao, "can China be assured of the transformation, under the leadership of the workers and the Communist Party, from an agrarian to an industrial country, from a new democratic society to a socialist and communist society, which will obliterate class distinction and bring about world fellowship."⁹⁶ Hailing the new

People's University (Chung-kuo Jen-min Ta-hsüeh) has had a Law Department since its founding in 1950. The statistical figures hereinafter cited should be taken as an indication of the general trend rather than for absolute accuracy.

⁹² Literally translated as "three-anti": anti-corruption, anti-waste, and anti-bureaucratism. For an account of this campaign as well as the "five-anti" campaign in 1951-52, see Chen & Chen, *Three-Anti and Five-Anti Movements in Communist China*, 31 PAC AFFAIRS 3 (1953).

⁹³ The "five-anti" campaign was launched in 1952 to combat alleged evils in business practice: bribery, tax-evasion, fraud, theft of state property, and theft of state economic information. See HOUN, *TO CHANGE A NATION* 35 (1959).

⁹⁴ Cited in I-CHIU-WU-SSU-NIEN SHU-CH'I KAO-TENG HSUEH-HSLAO SHENG-HSUEH CHIH-TAO (Guide to Higher Institutions for the Summer of 1954) 141 (1954).

⁹⁵ *Id.* at 143.

⁹⁶ *Ibid.*

lawyer as protector of people's rights and guardian of the New Democracy, the *Guide* urged the best brains to enter the legal profession: "We must esteem and protect the new lawyer!"⁹⁷

With Mao's new elevation of law as a respectable and even honorable subject, what happened to its incidence among the institutions of higher learning? In 1953-1954, according to the 1954 *Guide*, three universities were offering courses leading to degrees in law. But the *Guide* also announced an expansion to take place in 1954-1955, when two more universities would offer law degrees. All the law courses took four years to complete after middle school (roughly equivalent to high school in the United States). By 1956, the results of the new line were very clear. The *Guide* for that year revealed that the number of law schools had doubled over the 1954 figure—to ten—and the length of study required had been increased from four to five years in five of the universities. The remaining institutions (one university and four institutes of political science and law) continued to require only four years.⁹⁸ A recent move to reconsolidate law schools into such geographical centers as Peking, Shanghai, Wuhan, Sian, Chungking, and Kirin has been reported. Thus, the law schools of Chungshan University (Canton) and Wuhan University were amalgamated into the Hupei University, and the Law School of Fu-tan University and the East China Institute of Political Science and Law were consolidated into a newly established Shanghai Institute of Social Sciences.⁹⁹ The Institute of Law (*Fa-hsueh Yen-chiu So*) was added to the Chinese Academy of Sciences in October 1958. Primarily a research organization, the Institute planned to expand by 1962 to have 200 researchers, 50 of whom would be senior scholars.¹⁰⁰

There is no question but that the Chinese legal education system has been heavily influenced by that of the Soviet Union.¹⁰¹ The Law School of the Chinese People's University, established in 1950, for example, offered courses on Soviet jurisprudence

⁹⁷ *Ibid.*

⁹⁸ I-CHIU-WU-LIU-NIEN SHU-CH'I KAO-TENG HSUEH-HSIAO SHENG-HSUSH CHIH-TAO (Guide to Higher Institutions for the Summer of 1956) at 64, 65. The 1957 Guide reveals no change in the number of law schools.

⁹⁹ See Fukushima, *A Study of Legal Education*, CHUGOKU NO HO TO SHAKAI (Law and Society in China) 87 (1960).

¹⁰⁰ Chou Hsin-min, *On the Establishment of the Institute of Law and Its Future Plans*, Cheng-fa Yen-chiu, 1958, No. 5, p. 75.

¹⁰¹ Chou Hsin-min, *Organizational Questions on the Development of Legal Science in the Chinese People's Republic* 1, 2 (J.P.R.S. No. 4649, 1961).

under the direction of Soviet legal experts. The School also translated Russian legal education and reference materials and pioneered in the development of the Chinese legal education system. Its graduates are staffing many law schools as well as many judicial organs.¹⁰² The Law School of Peking University, abolished in 1952 but re-established in 1954, has developed a close relation with the Law School of Moscow University, which has supplied it with much-needed legal documents and books.¹⁰³ In almost any issue of *Cheng-fa Yen-Chiu* (Studies in Government and Law) can be found Chinese translations of Russian works or descriptions of Russian legal system.

Needless to say, the Western-styled "academic freedom" does not exist in Chinese law schools.¹⁰⁴ Group research is in general preferable to individual research, although under special circumstances individual professors may be given research assistance in their fields of specialization.¹⁰⁵ A handicap to legal scholars appears to be the unavailability of court reports, which, according to one critic, has accounted for the divorcing of theories from realities in teaching and research.¹⁰⁶

Obviously, the law curriculum has also undergone changes.¹⁰⁷ Many courses that were taught under the Nationalist regime and are still offered in Taiwan have been abolished. In this category are such courses as Anglo-American Criminal Law, Insurance Law, Three People's Principles, Company Law, Torts, Admiralty Law, Law of Bankruptcy, Jurisprudence, Contracts, Equity, Common Law Forms of Action, Negotiable-Instruments, Agency, and Partnership and Corporation. In their place, the following are typical of the courses given: Marxism and Leninism, Dialectical Materialism, Historical Dialecticism, History of the Chinese Revolution, Theory of the State and Law, Organization of People's Courts and People's Procuracy, Medical Law and Russian Language. Other courses may retain the same titles, but their content has been substantially revised: Criminal Law, Civil Law, Adminis-

¹⁰² Cheng-fa Yen-chiu, 1954, No. 2, pp. 74-75.

¹⁰³ Cheng-fa Yen-chiu, 1955, No. 3, pp. 50-51.

¹⁰⁴ Fukushima, *supra* note 99, at 92.

¹⁰⁵ *Id.* at 93.

¹⁰⁶ See *Kuang-min Jih-pao*, June 12, 1957, p. 3.

¹⁰⁷ Information concerning changes in the law curriculum is compiled principally from the 1956 GUIDE TO HIGHER INSTITUTIONS, p. 22; KUO-LI CHUNG-SHAN TA-HSUEH ERH-SHIH-I NIEN-TU KAI-LAN (The Twenty-First Year of the National Chungshan University), 147-51 (1933); and the SOOCHOW UNIVERSITY ANNUAL (1959).

trative Law, Labor Law, Land Law, Family Law, Civil Procedure and Criminal Procedure. There appears to have been a de-emphasis in the study of International Law,¹⁰⁸ although such a course has been listed in law school curricula. The Institute of Law, however, has decided to establish a Department of International Law as one of eight departments under its five-year plan (1958-1962).¹⁰⁹

An increasing amount of the students' time has been taken up by the "study-through-labor" program. They work in factories and the communes and serve as internes or trainees in various judicial organs.¹¹⁰ While useful in affording the students practical experience and acquainting them with the actual functioning of society, the program may nevertheless occupy so much of the students' time as to infringe upon their academic learning.

Following the rectification campaign, a new admission policy was promulgated by the Ministry of Education in 1958. Henceforth, "In accordance with the regulations, the institutions of higher education should observe the principle of enrolling new students of better qualification in academic attainment and physical condition on the condition that their political qualification is assured." Furthermore, "In political knowledge, the candidates will this year be examined with the important political events of a domestic nature and important current events which took place during the year (principally to test the awareness and behavior of the students pertaining to the rectification campaign and the anti-rightist struggle). When enrolling students, the institutions of higher education should consider the day-to-day political thinking of the candidates and should not limit their consideration to the examination results of these candidates in political knowledge."¹¹¹

The hitherto centralized admission policy was decentralized to permit local investigation and observation of the applicant's political beliefs and health, which, along with scholarship, constitute

¹⁰⁸ See MACFARQUHAR, *op. cit. supra* note 63, at 115.

¹⁰⁹ See Chou Hsin-min, *supra* note 100, at 74.

¹¹⁰ Cheng-fa Yen-chiu 1959, No. 2, p. 57.

¹¹¹ See *Ministry of Education Promulgates Regulations Governing Enrollment of New Students for Institutes of Higher Education in 1958* (New China News Agency, Peking, July 2, 1958); English translation in SURVEY OF CHINA MAINLAND PRESS, No. 1810, 21 (1958). Similar provisions are contained in the 1959 Regulations; text in CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN 272-75 (January-June, 1959); English translation in ORLEANS, PROFESSIONAL MANPOWER AND EDUCATION IN COMMUNIST CHINA Appendix F (1960).

the trinity of admission standards, and in that order. Priority in admission was weighed in favor of applicants who came from the labor and peasant classes. They might even be exempted from taking the entrance examination. This was justified on the ground that although the two classes comprised more than 80 percent of the total population, their children constituted only one-third of the total enrollment in colleges and universities.¹¹²

D. *The Legal Profession*

With respect to professional organizations, the following may be mentioned. The Chinese Association of Political and Juridical Sciences was founded in 1953 to provide Chinese jurists with, among other things, an outlet through which their research and publication interests could be channeled.¹¹³ It started in 1954 the bi-monthly periodical *Cheng-fa Yen-chiu* (Studies in Government and Law), which is the most valuable and indispensable tool in the study of Chinese Communist Law. The Association has been instrumental in promoting international visits of jurists with such countries as Argentina, Bolivia, Brazil, Canada, Colombia, Egypt, Hungary, India, Japan, Peru, the Soviet Union, Uruguay, and Venezuela.¹¹⁴

A people's bar has been established on an experimental basis in such cities as Peking and Tientsin.¹¹⁵ The All-Chinese Assembly

¹¹² Jen-min Jih-pao, July 3, 1958, pp. 1, 7.

¹¹³ See the constitution of the Chinese Political and Juridical Science Association in *Cheng-fa Yen-chiu*, 1954, No. 1, pp. 65-66; and the revised constitution in *Cheng-fa Yen-chiu*, 1958, No. 5, pp. 30-32.

¹¹⁴ See *Cheng-fa Yen-chiu*, 1955, No. 6, pp. 13-36, 43; *id.*, 1958, No. 1, p. 42; *id.*, 1958, No. 4, pp. 52, 71; *id.*, 1958, No. 5, p. 50; *id.*, 1958, No. 6, pp. 45, 69.

¹¹⁵ Although direct information on the people's bar is unavailable, its general functions and organization may be gleaned from a description of the Soviet bar. The Soviet bar is a voluntary association of lawyers. Non-members of the bar, however, may perform lawyers' activities only with the permission of the Minister of Justice of the Soviet Union or of a Union Republic. The bar operates under the direction of a Presidium, whose members are elected in secret ballots for two-year terms. It meets once a year (1) to elect members of the Presidium and the Control Committee; (2) to hear and discuss reports by the Presidium and the Control Committee; (3) to pass on the budget and the organizational system submitted by the Presidium; and (4) to adopt internal work regulations governing the members of the bar.

The functions of the Presidium are: (1) to admit new members of the bar; (2) to decide on the establishment of new Legal Consultation Offices (see note 117 *infra*), to allocate new members of the bar to various Legal Consultation Offices, and to appoint chairmen of such offices; (3) to determine the number of lawyers for each Legal Consultation Office and its budget; and (4) to supervise the work of the Legal Consultation Offices as well as of all lawyers. See Lawyers' Regulations adopted by the Supreme Soviet

of Attorneys, meeting in Peking in July 1957, noted a great increase in the number of lawyers' offices throughout the country—in all large and medium-sized cities as well as in counties and cities in rural areas where courts are situated. A tally in that year revealed the number of such offices and attorneys to be 817 and 2500 respectively.¹¹⁶ Rules for charging lawyers' fees were promulgated. While in general lawyers' fees vary according to the cost of living and the complexity of the case, the actual sum is determined by agreement between the clients and the head of the Legal Consultation Office.¹¹⁷ Up to 25 percent of a lawyer's income must be contributed to the people's bar. Besides, under certain circumstances, a lawyer should render free service to his client if, for example, the client can prove financial insolvency, is injured while engaged in productive activities, or claims alimony or pension.¹¹⁸

Despite the recent increase of lawyers, their number is still not sufficient.¹¹⁹ Furthermore, against this increase must be set the loss, at least quantitatively, of those judges and the lawyers of the old school who, even if they were fortunate enough to survive the 1952-1953 mass movement for court reforms in connection with *San-fan* and *Wu-fan* (particularly *San-fan*), could hardly

on August 16, 1939, cited in Wang Ju-chi, *The Functions and Organization of Soviet Attorneys*, Cheng-fa Yen-chiu, 1955, No. 6, p. 26.

¹¹⁶ See *Growth in the Number of Lawyers' Offices*, Druzhba, July 7, 1957, cited in CHUGUNOV, *op. cit. supra* note 38, at 36.

¹¹⁷ Again, because of the absence of direct information on the Legal Consultation Office in China, a description of the functions and organization of its Soviet counterpart may be useful. The latter is an organ of the bar charged directly with assisting Soviet citizens. It is headed by a chairman whose decisions are binding upon attorneys. The chairman's functions are: (1) to effect a division of labor to the end that attorneys' work load be evenly distributed; (2) to help new attorneys in the discharge of their duties; (3) to supply attorneys with laws, decrees, and documentary materials in the furtherance of their work; (4) to exercise strict supervision over attorneys' compliance with work discipline; (5) to determine attorneys' fees within prescribed limits and decide on the exemption from the payment of fees; (6) to supervise the activities of each attorney and to report any violation of work discipline to the president of the provincial bar; and (7) to handle correspondence concerning the Legal Consultation Office. See Cheng-fa Yen-chiu, 1955, No. 6, p. 26.

¹¹⁸ See Provisional Rules Governing Lawyers' Fees, promulgated by the Ministry of Justice on July 20, 1956; text in CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HSUAN-CHI 292 (1957).

¹¹⁹ Take, for example, the city of Shanghai, the largest city in China. The number of lawyers in 1956 was estimated at only 200 or 300 by Professor René Dekkers of Belgium. See *La vie juridique*, LE REGIME ET LES INSTITUTIONS DE LA REPUBLIQUE POPULAIRE CHINOISE 60 (1960) [Journées d'études: 12-16 Octobre, 1959, Centre d'étude des pays de l'Est Institut de Sociologie Solvay (Université Libre de Bruxelles)].

endure the rigor of the rectification campaign which followed the "Let Hundred Flowers Bloom" in 1957. This deficiency in legal personnel is partly remedied by the provisions of article 7 of the Organic Law of the People's Courts, which afford the accused the right not only to defend himself or to be defended by his attorney, but also to be defended by citizens approved by the court or recommended by public organizations as well as by close relatives or guardians.¹²⁰ In addition, the accused could resort to the facilities provided by the Conciliation Commissions or the public reception offices (the legal aid service of the courts), neither of which requires the use of attorneys. Operating under the direct supervision of the court chairman and located right at the entrance of the court, the public reception office has the duties "to take action on any correspondence received; to interview visitors; to interpret questions relating to legal processes and the law; to prepare petitions; to record verbal complaints and settle simple cases, which require no preliminary investigation or the conduct of inquiries."¹²¹ From an incomplete tabulation covering 22 provinces, 10 large cities and the autonomous region of Inner Mongolia, about 60 percent of the courts maintained, in the summer of 1954, a total of more than 1,200 public reception offices.¹²² In the latter half of 1953, similar offices in Shanghai, Peking, and Kirin Province alone handled more than 14,000 letters and 84,000 visitors. In the first half of 1953, the offices in Tientsin received more than 600 letters criticizing the delay of court trials and the attitude of Communist cadres. This, it is said, had the effect of supervising the functioning of courts and establishing a close relationship between the people and the courts.

VI. CONCLUSION

We see, then, that since the mid-1950's law and lawyers in China have become "respectable," and an expansion of legal education has taken place. Undoubtedly, Mao's exhortation on this

¹²⁰ Similar provisions could be found in early Soviet statutes, e.g., arts. 12, 16 CODE OF CIVIL PROCEDURE, RSFSR, July 7, 1923. Permission for nonprofessionals to defend the accused is said to symbolize "the original idea of the tribunal of primitive society before which parties would be accused and defended by blameless citizens sensing their social duty to assist the local wise men in preserving social order." See HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY* 248 (1960).

¹²¹ Jen-min Jih-pao, July 21, 1954, p. 3.

¹²² GUDOSHNIKOV, *op. cit. supra* note 50, at 71.

matter helped considerably to bring this about. But this was not a sufficient reason. The demand for lawyers was only a derivative one—stemming from the demand and respect for laws themselves, which increased considerably during the 1950's. As the Communists embarked upon the task of transforming China from a backward, feudal, corrupt, and divided society based on the landlord-peasant economy, into a highly centralized, efficient, and industrialized modern State, the need for lawyers to legislate, administer, and interpret laws concerning economic planning, public utilities, urban development, workmen's compensation and insurance, trade unions, taxation, and similar problems, was obvious. Indeed, the necessity to retract or readjust the "Big Leap Forward" claims of 1958 may be attributed to misinterpretations of government decrees by over-zealous local officialdom. There are many instances of complaints concerning the misapplication of wage legislation with the resultant deteriorating morale among workers. Economic laws were held to be so inadequate that toward the end of the first Five-Year Plan, there was still reportedly no regulation governing weights and measures.¹²³ Impressive as China's economic achievements already are, they might have been greater and more balanced¹²⁴ by the enactment and enforcement of appropriate laws governing economic relations between different production units or between a regulatory agency and a production unit.¹²⁵

¹²³ See MACFARQUHAR, *op. cit. supra* note 63, at 47. An instance of a wasteful loss through the apparent disregard of proper channels and procedure by Communist cadres may be cited: In a reclamation project hastily undertaken in Inner Mongolia where tractors and a large group of technicians and workers were employed, the Communist cadres ordered the continued digging of land despite the evidence that the soil contained a large amount of salt and alkalis. In the end, out of 50,000 acres of land "reclaimed," only 1,000 were found suitable for cultivation. See *id.* at 213.

¹²⁴ For a discussion of this subject, see Ma Yin-ch'u, *Discussing the Theory of Comprehensive Balance and Law of Proportional Development in Connection with Actual Conditions in China*, in *Jen-min Jih-pao*, December 28, 1956, p. 7; *id.*, December 29, 1956, p. 7; *id.*, May 11, 1957, p. 7; *id.*, May 12, 1957, p. 7. See also Handke, *Law of Proportional Development*, 2 CONTEMPORARY CHINA 100 (1956).

¹²⁵ In this regard, some of the features of the Soviet *Gosarbitrazh* might usefully be discussed. *Gosarbitrazh* (State Board of Arbitration) is a special system of courts established for the settlement of property and contract disputes between economic organs belonging to different ministries. For the settlement of disputes within a single ministry, the Departmental *Arbitrazh* was established. Originally a mere arbitration board outside the regular judicial framework, *Gosarbitrazh* was converted in the mid-1930's into virtually a commercial court, bound by the *Civil Code* as well as the *Code of Civil Procedure*. Judicial protection of property and contract rights has thus replaced momentary economic expediency as the guiding principle governing industrial disputes.

Perhaps one reason for the inadequacy of economic laws is that the traditional Chinese concept of contract is almost totally different from that of the West.¹²⁶ Although the Nationalist Government adopted the Western concept of contract, its effort in this regard, like others in the field of law, failed to produce any lasting results. Following the establishment of the commune system in 1958, the Chinese Communist Party decided to emphasize the Western form of contract as a regulator of economic activities.¹²⁷ A suggestion was made that henceforth contract disputes be settled by either administrative or judicial organs.¹²⁸ As of the summer of 1959, however, such disputes were still being resolved by the Communist Party rather than by courts.¹²⁹ In view of the absence of a Western-styled contract tradition, judicial settlement of contract disputes in China may prove to be a much more formidable task than is generally realized.

The foregoing discussion amply justifies the classification of Chinese Communist law into what Llewellyn called the "parental" system as opposed to the Western "adversary" system. The characteristics of the "parental" system have been summarized as follows:

- "(1) The Court may dig up evidence for the defendant.
- (2) The court may make a prior investigation of facts. (3) The objective of the trial is reintegration of the offender with the Entirety; confession and repentance are normal preliminaries to a treatment viewed primarily as re-educational ("making an example," elimination of the offender, are out of key with the procedure, an extreme measure of panic; love for the Entirety and for the erring member is the proper emo-

This no doubt affords a measure of stability to planning—the central feature of socialism. For concise information on this subject, see BERMAN, *JUSTICE IN RUSSIA* 63-78 (1950); HAZARD, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* 50 (1953).

¹²⁶ Thus, Escarra said: "Neither the specific categories, nor the general category of contracts, for example, are familiar to Chinese lawyers, even to those who received a western education in law. They remain completely strange to the lawyers of the imperial epoch. This absence of a technical element so essential in our eyes is a conspicuous trait of the opposition between the Far East and the Occident in the domain of law." See ESCARRA, *op. cit. supra* note 1, at 63, Browne's transl. at 88.

¹²⁷ See Hsieh Min, *On the Contract System*, Cheng-fa Yen-chiu, 1959, No. 2, pp. 42-43.

¹²⁸ *Id.* at 43. See also CHUNG-HUA JEN-MIN KUNG-HO-KUO MIN-FA CHI-PEN WEN-T'I (Basic Questions of the Civil Law of the Chinese People's Republic) 210 (1958). It may be of interest to note that of the twenty-two chapters of this civil law text book, eight chapters (pp. 197-315) are devoted to contracts.

¹²⁹ See *On Several Questions Concerning the Contract System Since the Establishment of the Communes*, Cheng-fa Yen-chiu, 1959, No. 4, pp. 36-37.

tional and intellectual keynote). (4) Criminal and civil offenses tend to merge, though reparation and restitution aspects are readily seen as involving private rights which need to be respected. (5) It is natural and right to draw into the case any past misconduct, even though previously punished, and defendant's attitude as well as his actions; prior good conduct can weigh in mitigation (the wrong was a mere lapse) or in severity (knowledge and experience entail extra responsibility); not the offense alone but the whole man is in question."¹³⁰

The "parental" element is also evident in the assiduously fostered image of Mao as the benign and beloved father—the giver of all good things—of the 700 million Chinese. This fusion of filial piety toward Chairman Mao in the best of the Confucianist tradition, with loyalty and devotion to the State and Communism, bespeaks the trend of the Chinese legal system in integrating the old with the new and blending the East with the West. Thus, other "Chinese" characteristics of the Mainland legal system may be detected: the emphasis on informal settlement of disputes, the adoption of a simple and direct court procedure, the common people's approach to justice, and reform and re-education through persuasion and labor. On the other hand, the Chinese Communists have not hesitated to adopt or to set as their ultimate goals such Western features as comprehensive codifications of law and compliance therewith, prison reforms, and the increasing use of lawyers.

As a final observation, there is discernible an increasing emphasis on law as a regulator of human conduct in Communist China.¹³¹ There is still, however, a discrepancy between the Communist *li* and *fa*. The future success or failure of the Chinese Communist legal system may well hinge just as much upon their respective content as upon the narrowing or widening of the gap.

¹³⁰ Llewellyn, *Lectures on Jurisprudence* (mimeographed 1948), cited in BERMAN, *op. cit. supra* note 125, at 307.

¹³¹ Indeed, Gudoshnikov, the Soviet jurist, already said in 1957: "The legal organs are the most important part of the government machinery of the People's Republic of China; they are the instrument of democratic dictatorship of the people, carrying out in China the functions of the dictatorship of the proletariat." GUDOSHNIKOV, *LEGAL ORGANS OF THE PEOPLE'S REPUBLIC OF CHINA* 1 (J.P.R.S. No. 1698, 1959).