# LAW IN COMMUNIST CHINA – PART 2

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The legal "pre-history" of the People's Republic of China, traced in Part 1 of this article (*Sydney Law Review*, October, 1969, 153-72), already gives some indication of the complexities involved in any critical, analytic discussion of the main trends and presuppositions of Chinese Communist law. We have, as part of the background to Chinese Communist rule on the mainland, the administrative traditions enshrined in Imperial Codes and arrangements, with their strong reliance on a highly sophisticated and formalised bureaucracy; we have the Confucian tradition and Chinese popular attitudes, representing the life-style and values of the predominantly agrarian *Gemeinschaft*, projecting the familial mode of organisation on to society at large, rejecting the individualism and abstraction of the commercial-industrial *Gesellschaft* whose ideology was consummated in the French Declaration of the Rights of Man and the Citizen. We have again the Western-inspired reforms of China's legal and administrative system that preceded and accompanied the period of Nationalist rule on the mainland, with their mixture of Anglo-American and Civil Law forms and procedures. Mingling with this and reshaping or rejecting it we have, in Communist-held territory, the far from consistent or coherent mixture of competing strains of Marxist ideology, of revolutionary flexibility and opportunism, and of the borrowing of Soviet models which themselves were in a state of flux. Disentangling these strains in a particular social situation or political system is difficult enough at any time. In China, it is made especially difficult by a number of factors linked with the ambiguity inherent in Marxism and in what is often wrongly described as "*the* Soviet model". Karl Marx presented his followers with a very ambiguous legacy indeed and its contradictions become sharply evident when we look at China today. Marx's rejection of economic and political individualism, his radical critique of the abstraction and alienation of the bourgeois commercial-industrial *Gesellschaft*, his emphasis on man's social nature and man's need of a community can be presented as having a certain continuity with traditional Chinese attitudes; there are areas of Chinese

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Communist ideology and strains within it where it is not at all easy to distinguish the heritage of Marx from that of Confucius. True, Marxism is normally presented as rejecting completely and unequivocally the concept of hierarchy implicit in the old *Gemeinschaft*; yet in practice the Leninist elitist doctrine of the Party and the Leninist insistence on "democratic centralism" (complete obedience to Party decisions by those who initially opposed them) call for the surrender of judgment and the acceptance of hierarchical authority. The cult of Mao, Father of his people and Light of the Universe, may have elements of backsliding from Marxism to traditional Chinese Emperor-worship; yet it is also the same culmination of Marxism-Leninist elitism as we found in that great cult of the personality of the *vozhd* (Stalin) in the Soviet Union. The continuity between Bolshevik methods of government in the Soviet Union and those of the Tsars has often been remarked; so have the Byzantine pretensions and style of Stalin and the clique around him. In so far as Communism in China and in the Soviet Union has involved totalitarianism — the total union of Church and State and the subordination of all significant social activity and organisation to the centralised bureaucratic Church-State — there are areas of Chinese Communist ideology and practice in which it is not at all easy to distinguish the impact of the Leninist-Stalinist version of Marxism from the continued influence of the traditions of Chinese Imperial and Russian Tsarist ideology and organisation, or from the "oriental despotism" approached or aped by Byzantine emperors. Yet there is also another side to Marx's legacy: his rejection of rural idiocy, his emphasis on the central economic, political, social and cultural role of the process of industrialisation, his insistence on rationality, calculation and planning, his acceptance of the concern with personal freedom and individual self-development preached by the European Enlightenment, his recognition of the world-historical consequences of capitalism, with its opening up of totally new conceptions of human dignity and human capacities. It is this which makes Marxism an heir as well as a critic of the French Revolution and enables Communists, in China as in the Soviet Union, to vacillate between the affirmation of Westernising trends and the rejection of these. Both can be presented as *Marxist* positions; each has a history outside Marxism and can draw on traditions and attitudes independent of Marxism.

The problem of assessing the relative importance of Chinese governmental and popular traditions, of Marxist and revolutionary ideology and of Soviet models and advisers in shaping Chinese Communist administration, then, is not a straightforward one. Indeed, this way of posing the problem may confuse more than it illuminates. It requires us to distinguish, and to counter-pose quite sharply, "native" Chinese traditions on the one hand and Marxist and Soviet traditions on the other. In fact, in China as in the Soviet Union, Marxism has played and can continue to play both a Westernising and an anti-Westernising rôle; it can strengthen native traditions or weaken them, it has points of continuity with them and points of discontinuity. The reason for this, as we have seen, lies in the fact that Marxism both assumes and rejects the modern commercial-industrial *Gesellschaft*. We therefore cannot counterpose, at all sharply or effectively, the "native" Chinese tradition in general and the "foreign" Marxist tradition in general; they come together at some points and conflict, often confusedly, at others; the points of conflict and of agreement can change with bewildering rapidity as either Marxism or the native Chinese tradition, or both, are reinterpreted by political leaders

and ideologues. The same has been true of the Soviet Union, where the relationship between Marxism and native traditions has been similarly complex and far from invariant. If we consider further the "oriental despotic" component in native Russian traditions, whether we attribute it to the direct impact of the Tartar yoke, to Byzantium or to geopolitical and military factors that produced a similarly strong centralised bureaucracy, the distinction between Soviet impact and Chinese traditions becomes just as difficult a distinction to draw sharply as the distinction between Chinese tradition and Marxist ideology. In law, these difficulties are exacerbated by the fact that the Soviet legal system and Soviet legal ideology themselves present us with a mixture of competing strains, the relative importance of which has varied at different periods of Soviet history since 1917. Soviet law has a strong bureaucratic and State-ideological strain that brings it into significant relationship with aspects of Tsarist and Chinese Imperial rule. It has a *Gemeinschaft* strain represented by the formal rejection of individualism and the plurality of interests, by popular tribunals, the mingling of politics, law and morality and the insistence on judging the whole man that draws on Marx's critique of the French Revolution and purely political democracy, but which has very significant affinities with the *Gemeinschaft*-traditions of both Russian and Chinese popular culture. At the same time, Soviet law since the first Soviet codes of the 1920s has rested heavily on the Civil Law system, both through direct borrowing from Continental codes and through the continued impact of earlier Tsarist borrowings. Thus, once again, we cannot counterpose or distinguish, as though they were mutually exclusive, "the" Soviet legal model, the impact of Western law through the Nationalist reforms and the native Chinese tradition, whether governmental or popular.

In recent discussions of the historical place and more general characteristics of law in Communist China there have been two trends. One, typified by the work of Jerome Cohen at Harvard,[1] stresses that law and legal attitudes in Communist China are part of the history of China and should be approached and understood through that history. The other trend, typified by the line taken in John Hazard's most recent work, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (1969),[2] treats the legal system of Communist China as

[1] See esp. two papers by Jerome A. Cohen, "The Criminal Process in the People's Republic of China" (1966) 79 *Harvard L.R.* 469 and "Chinese Mediation on the Eve of Modernization" (1966) 54 *California L.R.* 1201, reprinted as No. 1 and No. 3 of the Harvard Law School *Studies in Chinese Law*. Professor Cohen has reaffirmed and developed this approach in a number of papers delivered recently and now ready for the press. Another scholar currently at Harvard, Dr. Tao Lung-sheng, in a paper, "Law in Communist China", read to the Chinese Studies Colloquium held at Brown University, Providence, Rhode Island, on October 30, 1969, said: "To a considerable extent contemporary Chinese attitudes are the product of the Confucian tradition. From this perspective, thorough knowledge of law in Communist China requires an understanding of China's imperial tradition and legal order" (p. 30 of the manuscript, here cited with the author's permission). Work now in progress at Harvard on Chinese Communist attitudes to international law and on Chinese law and legal history emphasises and presupposes a marked continuity in Chinese legal development and attitudes to law.

[2] Professor Hazard's approach was adumbrated and applied to a series of concrete cases other than China in a number of articles by Hazard cited in Part 1 of this article ((1969) 6 *Sydney L.R.* 153, n. 1). Professor Leng Shao-chuan, though conscious of continuities between Communist and Imperial China, also tends to emphasise the influence of the Soviet experience and of revolutionary practice in the Communist-held territories of China between 1927 and 1949: Leng Shao-chuan, *Justice in Communist China* (1967) 25-26. A number of other scholars cited below have argued that even where the Chinese Communists have used traditional terms and institutions, they have completely altered their character and their function, destroying any real continuity with their pre-Communist counterparts.

belonging to the family of Marxian socialist legal systems, based on the spread of the Soviet legal model and essentially to be understood through that model and its Marxist Communist foundations. Against this counterposition of "native" and "foreign" (Soviet and Marxist) trends and attitudes, I would like to suggest to the reader that he approach the account of legal developments in Communist China since 1949 which is to be given below with a different set of categories—categories that cut across the distinction between native and foreign traditions and help to explain why these traditions in fact intertwine in the most complex of ways. These categories, the foundations for which were to some extent adumbrated in Part 1 of this article, emerge as we distinguish four "ideal types" of social regulation: the *Gemeinschaft*-type, the *Gesellschaft*-type, the bureaucratic-administrative-type and the domination-submission-type.[3] In the *Gemeinschaft* type of social regulation, punishment and resolution of disputes, the emphasis is on law and regulation as expressing the will, internalised norms and traditions of an organic community, to whom every individual member is part of a social family. Here there tends to be no sharp distinction, if there is any formal distinction at all, between the private and the public, between the civil wrong and the criminal offence, between politics, justice and administration, between political issues, legal issues and moral issues. There is little emphasis on the abstract, formal criteria of justice, and the person at the bar of judgment is there, in principle, as a whole man, bringing with him his status, his occupation and his environment, all of his history and his social relations. He is not there as an abstract right-and-duty-bearing individual, as just a party to the contract or as the ower of a specific and limited duty to another. Justice is thus substantive, directed to a particular case in a particular social context and not to the establishing of a general rule or precedent. The formalisms of procedure in this type of justice, which can be considerable, are linked with magical *taboo* notions, are emotive in content and concrete in formulation; they are not based on abstract rationalistic conceptions of justice and procedure. In Part 1 of this article, I attempted to bring out the almost overwhelming strength of this *Gemeinschaft* strain in traditional Chinese legal procedure, with its emphasis on the Emperor and the magistrate as the father of his people, and in popular Chinese conceptions of political issues, justice, morality and the place of the individual in society. In Marxism, this same strain is represented by the Marxist critique of bourgeois democracy and bourgeois law, by the Marxist emphasis on man as a member of a community who cannot confront the community or the State on the basis of abstract equivalence and claim abstract rights as an abstract citizen-individual, by the Marxist rejection of political and legal formalism in favour of concrete social emancipation through the substitution of social action for merely political and legal action. In the Soviet Union, this strain has competed with other strains. It came very much to the fore in the period of War Communism from 1917 to 1921, with its emphasis on popular tribunals, simplicity, informality,

[3] For the fuller definition and elaboration of these four "ideal types" of regulation, the product of joint work with Dr. Kamenka, see Eugene Kamenka and Alice Erh-Soon Tay, "*Gemeinschaft, Gesellschaft,* and the Bureaucratic-Administrative State: The Future of Law in the Soviet Union and in Communist China", a two-part paper delivered at the Bundesinstitut für ostwissenschaftliche und internationale Studien, Cologne, on January 9, 1970, to be published shortly; Kamenka and Tay, "Beyond the French Revolution: Communist Socialism and the Concept of Law" (1971) *University of Toronto L.J.* and Kamenka and Tay, *Marxism and the Theory of Law* (forthcoming), *passim.*

flexibility and "the revolutionary consciousness of justice" as opposed to the application of written codes, specific definitions and formal procedures. It was revived, to a more limited extent, by N. S. Khrushchev in the early 1960s, with his proclamation of the accelerated building of Communism, and the increased participation of the populace in justice and administration through the informal Comrades' Courts in the work-place and housing units and through the volunteer citizens' police, the *druzhinniki*.[4]

The *Gesellschaft* type of law and legal regulation is in all respects the very opposite of the *Gemeinschaft* type. It arises out of the growth of individualism and of the protest against the status society and the fixed locality; it is linked with social and geographical mobility, with cities, commerce and the rise of the bourgeoisie. It assumes a society based on mechanical as opposed to organic solidarity, made up of atomic individuals and private interests, each in principle equivalent to the other, capable of agreeing on common means while maintaining their diverse ends. It emphasises formal procedure, impartiality, adjudicative justice, precise legal provisions and definitions and the rationality and predictability of legal administration. It is oriented to the precise definition of the rights and duties of the individual through a sharpening of the point at issue and not to the day-to-day *ad hoc* maintenance of social harmony, community traditions and organic solidarity; it reduces the public interest to another, only *sometimes* overriding, private interest. It distinguishes sharply between law and administration, between the public and the private, the legal and the moral, between the civil obligation and the criminal offence. Its model for all law is contract and the *quid pro quo* associated with commercial exchange, which also demands rationality and predictability. It has difficulty in dealing with the State or State instrumentalities, with corporations, social interests and the administrative requirements of social planning or a process of production unless it reduces them to the interests of a "party" confronting another party on the basis of formal equivalence and legal interchangeability. The American Constitution and Bill of Rights and the French Declaration of the Rights of Man and the Citizen are the fundamental ideological documents of the *Gesellschaft* type of law, which reached the peak of its development in the judicial attitudes of nineteenth century England and of the nineteenth century German Civilians. It is enshrined, at least in part, in the concept of the *Rechtsstaat* and the rule of law. In the Soviet Union, the most interesting of the Marxist theoreticians of law, E. B. Pashukanis, argued with great cogency that this concept of law is intimately connected with money economy, commodity production and the rise of the bourgeoisie, and that it is totally inimical to (Marxian) socialism, to pervasive revolutionary transformation, socio-economic planning and the elevation of the community.[5] In fact, however, the codes introduced in the Soviet Union in the early 1920s and the judicial practice that arose in their application were premised in large measure on the *Gesellschaft* view of society and law, with the State and socialist and Party and planning interests intervening externally to override or nullify such legal provision.

[4] There is a good deal of reason to suppose that Khrushchev's enthusiasm about these, which was not shared by the leaders of Soviet academic legal thought at the time and which has not been fully maintained by Khrushchev's successors, is an instance of Chinese developments reacting back on the Soviet Union and providing a Soviet leader with the ideas for reviving popular enthusiasm.

[5] See Kamenka and Tay, "The Life and Afterlife of a Bolshevik Jurist" (1970) 19 *Problems of Communism*, No. 1, (January/February) 72.

It is ironic but important that the Soviet Union's worst reign of terror was inaugurated by the condemnation of Pashukanis' "legal nihilism", by the proclamation of the 1936 Stalin Constitution (still in effect) which is very much of the *Gesellschaft* in its formal structure and its formal if inoperative guarantees of individual liberties and rights, and by a new insistence on the theory of socialist legality and of the creative development of socialist law. Since 1936, and very obviously and publicly since the promulgation of new Soviet codes from the late 1950s onward, the elevation of the State and Party political interests has taken place primarily through extra-legal and administrative measures backed by ideology, by legal lacunae and particular decrees; the overall formal character of codes, with their clear distinction between civil, criminal and administrative law, the trend of judicial decision and of professional legal discussion, and the future hopes (though not the present expectations) of a large body of the Soviet people have been based on a very *Gesellschaft*-like conception of formal adjudicative justice and the rule of law, with precise definitions, stated punishments, strict procedures and guarantees of individual rights. The stability and strength of the Communist Party dictatorship in the Soviet Union today does not rest on its having created a new Communist legal system designed to impose its will, but on the extent and pervasiveness of the extra-legal pressures and controls that lie at the disposal of the Party-State.

*Gemeinschaft*-type law takes for its fundamental presupposition and concern the organic community. *Gesellschaft*-type law takes for its fundamental presupposition and concern the atomic individual, theoretically free and self-determined, limited only by the rights of other *individuals*. These two "ideal types" of law necessarily stand in opposition to each other, though in any actual legal system at any particular time, both strains will be present and each type may have to make accommodations to the other. In the bureaucratic-administrative type of regulation, the presupposition and concern is neither an organic human community nor an atomic individual; the presupposition and concern is a non-human ruling interest, public policy or ongoing activity, of which human beings and individuals are subordinates, functionaries or carriers. The (*Gesellschaft*-)law concerning railways is oriented toward the rights of people whose interests may be infringed by the operation of railways or people whose activities may infringe the rights of the owners or operators of railways seen as individuals exercising individual rights. (Bureaucratic-administrative) regulations concerning railways take for their primary object the efficient running of railways or the efficient execution of tasks and attainment of goals and norms set by "the authorities" and taken as given. Individuals as individuals are the *object* of some of these regulations but not their subject; they are relevant not as individuals having rights and duties as individuals, but as part of the railway-running process and its organisation, as people having duties and responsibilities. Such people are seen as carrying out rôles, as not standing in a "horizontal" relation of equivalence to the railway organisation or to all their fellow-workers, but as standing in defined "vertical" relations of subordination and sub-subordination. Bureaucratic-administrative regulation, thus, is quite distinct from both *Gemeinschaft* and *Gesellschaft* law, but it does not stand in quite the sharp uncompromising opposition to them that they do to each other; pursuing different aims, it nevertheless finds points of contact and affinity with each of the other forms. The bureaucratic-administrative emphasis on an interest to which

individuals are subordinate, on the requirements of a total concern or activity, brings it to the same critical rejection of *Gesellschaft* individualism as that which is characteristic of the *Gemeinschaft*; it gives it a similar interest in maintaining harmonious functioning, in allowing scope for *ad hoc* judgment and flexibility, in assessing a total situation and the total effects of its judgment in that situation. This is why the growth of corporations has produced *Gemeinschaft*-like features in the internal direction of the corporation, even while the corporation maintains *Gesellschaft* relations with its external counterparts. At the same time, bureaucratic-administrative regulation is a phenomenon of large-scale, non-face-to-face administration, in which authority has to be delegated. As the scale grows, bureaucratic rationality — regularity and predictability, the precise definition of duties and responsibilities, the avoidance of areas of conflict and uncertainty — becomes increasingly important. This requirement of bureaucratic rationality in the bureaucratic-administrative system stands in tension with *Gemeinschaft* attitudes, unless they are strictly limited in scope. It finds a certain common ground with the distinguishing features of *Gesellschaft* law in the emphasis on the universality of rules and the precise definition of terms, in the important rôle ascribed to the concepts of *intra* and *ultra vires*, in the rejection of arbitrariness and of the excessive use of *ad hoc* decisions to the point where they threaten this rationality. In the Soviet Union, the bureaucratic-administrative strain has been very strong indeed, imperfect as the execution may often have been. While earlier Soviet theoreticians saw law being replaced by the Plan, which would strengthen the *Gemeinschaft* side of socialism, in fact the influence of Plan and of bureaucratic requirements in the Soviet Union has been notably in the direction of strengthening the presuppositions of bureaucratic rationality and of thus strengthening the respect and need for *Gesellschaft* law. We shall see below that this is of crucial importance for assessing future development in China, where the prospects of *Gesellschaft* law are intimately associated with the elevation or non-elevation of bureaucratic-administrative features and requirements and the consequent growth or retardation of interest in bureaucratic rationality.[6]

Much of the argument in jurisprudence has been concerned with judging the merits of competing prescriptions for the use of the term "law", though the dispute has rarely been purely verbal. There is a strong tradition which wants to reserve the word "law" for use in a narrow sense (as in "the rule of law") to refer to what we have called the *Gesellschaft* type. Others would say that *Gemeinschaft* law is also law and some use the word "law", at least in one sense, broadly enough to include bureaucratic-administrative regulation, even in its pure ideal type form, as well. Domination-submission, however, is clearly extra-legal in that it neither implies nor requires a *structured system* of regulation incorporating certain values and moral or socio-political assumptions; gangsters can and do rule by terror and the imposition of force and they need not ideologise their pretensions. Domination-submission therefore does not inevitably confront the *Gemeinschaft*, the *Gesellschaft* and the bureaucratic-administrative form as a fully-blown rival pattern of a social

[6] The demarcation between *Gesellschaft* law and bureaucratic-administrative regulation has been partly obscured by that bureaucratic rationality which gives them some common elements and features. It is made even more complex in Western societies, especially in the British Commonwealth and the United States, by the extent to which *Gesellschaft* law has shaped social attitudes and expectations and has made respect for the legal rights of those involved an important condition for successful bureaucratic direction and administrative control.

structure or value-system; it can, to some extent, live above or within all of them, modifying or shaping the conditions in which they operate. The ideals of *Gemeinschaft,* in their classic formulation, incorporate domination-submission in so far as it can be plausibly presented as voluntary exercise of "parental" responsibility and voluntary submission to "parental" will. As such, these ideals are particularly susceptible to degeneration into naked relations of domination and helpless or hopeless submission. The French Revolution and the ideals of the *Gesellschaft* were, in fact, a protest against precisely this sort of degeneration, an attempt to create a political and legal system that was by its very nature inimical to the institutionalisation of status, of dependence, of relations of dominance and submission. I have argued that *Gesellschaft* law as a pure ideal type is indeed inimical to the recognition of social hierarchies; it does presuppose the equality and equivalence of all the parties before it and it operates best when those parties are in fact equal and do not stand, one to the other, in a relation of pervasive dependence or subordination.[7] The bureaucratic-administrative form, on the other hand, lends itself much more readily to an institutionalisation of domination-submission. In Communist countries, the domination-submission relationship has been institutionalised, or at least ideologised, in the doctrine of the leading role and historical infallibility of the Communist Party, and in the proclamation of "democratic centralism"; a vast range of legal and extra-legal measures have been taken to ensure that that domination remains secure. The overwhelming basis of domination is, in the narrower sense of law, extra-legal. Though *Gemeinschaft* attitudes and bureaucratic-administrative structures are more easily manipulable in the interest of domination than *Gesellschaft* attitudes and structures, *Gemeinschaft* can produce a dangerously uncontrollable popular enthusiasm or resistance through its implicit elevation of fellowship, of popular participation and non-impersonal relations, and its stress on the mutual ties between rulers and ruled. Bureaucratic rationality, on the other hand, can produce attitudes highly critical of irrational bases for domination and "inexpert" personnel in control. The history of the Soviet Union in the past 50 years confirms all of these points: the Soviet regime has been able to manipulate all three of the ideal types in the interest of its domination, but it has also been confronted by limited challenges from each. The Soviet government, indeed, has not committed itself exclusively to any of the three types. It has kept all the options open and has quite skilfully balanced *Gemeinschaft* and bureaucratic-administrative attitudes and

[7] The criticism of the *Gesellschaft* and of *Gesellschaft* law is that dependence and subordination manifest themselves in extra-legal areas, in difference of economic power, education, etc., and that the legal fiction of equality and equivalence in fact promotes inequality and inequivalence. The Republic of the Market, as Pashukanis puts it, conceals the Despotism of the Factory. Concern with this aspect of the matter has produced and is still producing the heavy inroads of social regulation, partly of a *Gemeinschaft* and partly of a bureaucratic-administrative character, into contemporary law in the West, resulting in mixed forms born of attempts to elevate "public" interests and "social" requirements while keeping some presumptions in favour of individualism and individual rights as a barrier against the tyranny of the state or the majority. In Communist states, liberals and "revisionists" have been striving for the same optimal pragmatic mixture by seeking to emphasise and develop a "socialist" doctrine of natural justice and individual human rights that would strengthen *Gesellschaft*-like conceptions of legality and effectively check the manipulation, terror and tyranny not made impossible by the "parental" legal procedures and attitudes linked with the *Gemeinschaft* elements in Communism or by concentration on the bureaucratic-administrative concern with "social" policy, the "public" interest and the maintenance of order and "proper" functioning as the real subject of law, having primacy over all other interests.

procedures with appeals to socialist legality and limited but patent *Gesellschaft* guarantees and assurances.

The State-imposed laws of traditional China, where they are not primarily rules of bureaucratic organisation, may be seen in either of two ways. They presuppose and seek to maintain the social life of the *Gemeinschaft* and even the Emperor's seemingly arbitrary exercise of judicial and punitive powers is taken to be part of his parental function. In this sense, they are the laws of a *Gemeinschaft* concerned with a whole man and an organic society. At the same time, the dominant Confucian tradition with its strong internalisation of *Gemeinschaft* values had to insist that rigorous punitive intervention by the State and its magistrates was a sign that social harmony had been breached, that the *Gemeinschaft* had been broken. It thus presents State law not as a product of the *Gemeinschaft*, but as an attempt to restore the *Gemeinschaft* through a basically external intervention, through the iron-fisted exercise of power relations, of domination and submission. The external intervention was justified or ideologised in so far as its aim was to restore the *Gemeinschaft* and in so far as it was based on the Emperor's recognition of his duties as *parens patriae*, but the punitive laws themselves could be seen, in this context, as terroristic interventions, as resting immediately if not ultimately on bare domination and submission. Imperial China, indeed, went much further than this: it enforced and symbolised, in the *Kow-tow*, the institutionalised acceptance of total Imperial power, the citizen's complete prostration before the Emperor and the magistrate.

This aspect of terroristic intervention, of total domination and submission, is stressed by the theorists of totalitarianism and in Professor Karl Wittfogel's theory of the hydraulic society. It cannot be counterposed, as a "native" Chinese tradition, to the Marxist-Leninist view of State administration and judicial or extra-judicial punishment. The systematic use of legal and extra-legal terror as an exercise of naked domination has played an important rôle in the development of all Communist states; it is given ultimate ideological foundation, but no coherent legal or ideological form, by the doctrine of the leading rôle of the Party and of the necessarily ruthless Dictatorship of the Proletariat. It is best understood, however, in relation to the *Gemeinschaft* concept or aspirations that strive to give it legitimacy, for even a heavily terroristic government, especially in modern conditions, will seek to legitimise its despotism and conceal its arbitrariness; it will argue that terror is used to restore or create a *Gemeinschaft* and applies only to the violator who has put himself outside it. There is thus again a complex intertwining of traditional Chinese and foreign themes, of universal problems and trends which emerge just as clearly in other Communist societies and are as much Marxist-Leninist as Chinese. The use of terror in the pre-1949 Red Areas of China, described in Part 1 of this article, and the further developments to be set out below, bring this out clearly; they also indicate the care that the Chinese Communist Party has taken to limit the application of terror, at any particular time, to a specifically circumscribed section of the population small enough to be treated as standing outside the *Gemeinschaft* and to limit the duration of any specific terror-campaign in such a way as not to threaten the underlying *Gemeinschaft* legitimation of the Party. This is the aim and significance of the important distinction re-emphasised by Mao in the 1957 speech to be discussed below, between the (*Gemeinschaft*) ways of handling contradictions among the people and the (domination-submission) use of coercive terror in

handling contradictions between the people and its enemies.

Law and social administration in the People's Republic of China are still in a state of flux. Since 1949, there have been sharp changes of outlook and emphasis that make it possible to divide the history of the People's Republic of China into markedly distinct and often contradictory periods. There are patent unresolved tensions, on the legal "front" as on other fronts, and there is a good deal of evidence that the remarkably slow pace of legal formalisation and systematisation is linked with this uncertainty about the future. *Gemeinschaft* strains compete with bureaucratic-administrative strains that would be strengthened by accelerated industrial development and a stabilised administration, but which were in fact weakened by Russian withdrawal and the Sino-Soviet split. Limited *Gesellschaft* strains came to the fore in the proclamations accompanying the formation of the Republic in 1949 and the promulgation of the Constitution in 1954; their base lies almost entirely in the attempt to maintain some continuity with the Sun Yat-sen revolution, to engage the sympathies of a comparatively Westernised educated class and to facilitate international contact and acceptance among civilised nations, and in bureaucratic rationality, the desire for orderly development and practicable rules. They are at the moment of writing remarkably weak. Domination-submission, the concern with preserving the unity of the country and the leading rôle of the Communist Party or of those who can hold the country together on a path of social transformation, is a central concern. Much of the uncertainty of China's future is connected with the fact that no comparatively stable relations have emerged between this fundamental concern and the *Gemeinschaft, Gesellschaft* and bureaucratic-administrative patterns that provide, in a mass society, the only rational systematic elaborations of social control. Each of these carries some dangers, as well as benefits, for a Party bent on maintaining domination. The dangers can to some extent be neutralised, at least for a period, by a manipulative use of all three in combinations that enable the Government to exploit the potentials for domination in each at the same time as using the tensions and conflicts between the three to limit the pretensions of each. This, roughly speaking, has emerged as the Soviet Union's pattern, though its success is perhaps dependent on a much more pervasive systematic, regular and administrative extra-legal control of the citizen's life and work opportunities and receipt of social benefits than the Chinese have achieved. In China, the pattern has not yet emerged. The categories set out above, I believe, are necessary tools for understanding why this is so and for appraising the significance of the legal developments and non-developments I now set out to describe.

When the People's Republic of China was formally established on October 1, 1949, the Chinese Communist Party had had over 20 years' experience of government, even if not continuous in any one region; in the Red Areas the Communists had, at times, administered populations totalling from 70 to 90 million people. They had created and operated a wide range of legal-administrative and judicial bodies and extra-judicial organs and processes.[8]

[8] These included the Ministry of Justice (*chung-yang ssu-fa pu*) of the Juichin Government of 1931, the judicial bureaux (*ssu-fa ch'u*) established in the Border Regions during the United Front interlude, the three-tier system of People's Courts (*jen-min fa-yüan*), the *ad hoc* people's tribunals (*jen-min fa-t'ing*) created to mete out on-the-spot justice in connection with political movements and campaigns, the revolutionary tribunals (*ke-min fa-t'ing*) of the 1930s attached to local authorities, used against counter-revolutionaries, and conciliation or mediation committees (*jen-min t'iao chieh wei yüan*

In April, 1949, when the People's Government of North China, anticipating victory and copying one of the first acts of the Bolshevik Revolution in Russia, ordered that the Kuomintang's Six Codes and all other "reactionary laws" should be abrogated, it was not wiping the slate as clean as the Russian Workers' and Peasants' Government had thought it was doing. The latest People's Government was able to order that the new legal system in China should be based on new people's laws *and* on the programmes, laws, orders, regulations and resolutions promulgated by the People's Governments and the People's Liberation Army (which in fact embodied the previous 20 years of Communist experience in China), as well as on the policies expressed in the New Democracy. Scholars are to some extent divided on the significance of the pre-1949 experience in assessing or explaining post-1949 legal developments. While Professor Leng insists that "it provided the foundation for future legal development in the People's Republic and offered significant clues to the basic character of 'people's justice' ",[9] the late Henry McAleavy wrote that "the border experience, important as it was, was for the most part of too local a nature to provide adequate guidance for the problems that faced the People's Government at its establishment in October, 1949".[10] To those who stress the continuity of traditional and post-1949 Chinese attitudes to law,[11] the border experience is significant not so much for its own sake as for the way in which it tied the growth and ideology of the Chinese Communist Party to the Chinese peasant and the Chinese soldier, to the traditional Chinese countryside and thus strengthened the element of continuity. Others put weight on the conscious borrowing of Soviet models.[12]

The importance of the formalised manifestations of judicial procedure and legal control and the significance of tracing these to a specific origin in a Soviet, Nationalist or Imperial Chinese institution or concept should not be overstressed. The specific Communist contribution to defining the rôle

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*hui*), procuracies and public security organs, the 1931 Constitution of the centralised Chinese Soviet Republic and a mass of provisional regulations, revolutionary decrees and "progressive laws" described in Part I of this article, (1969) 6 *Sydney L.R.* 153, at 165-172 ("Militant Communism and Law in the 'Red Areas' ").

[9] Leng Shao-chuan, *op. cit., supra* n. 2 at 26.

[10] H. McAleavy, "The People's Courts in Communist China" (1962) 11 *American J. of Comparative Law* 52 at 55.

[11] These scholars emphasise that in Communist and Imperial China, State interests prevail over individual interests, crime is not sharply distinguished from moral wrong, the adjudicative organs are an administrative institution for carrying out national goals rather than an independent judicial office concerned with making a just allocation between parties to a dispute, and that there is strong emphasis on mediation. See Franz Michael, "The Role of Law in Traditional, Nationalist and Communist China" (1962) 9 *China Q.* 124; B. Schwartz, "On Attitudes toward Law in China" in M. Katz (ed.), *Government Under Law and the Individual* 27-39; Tao Lung-sheng, "Law in Communist China" *ms cit. supra* n. 1 at 16; Cohen, articles cited *supra* n. 1. See *contra* S. Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China" (1967) 56 *Calif. L.R.* 1284, with its detailed study of the methods and style adopted in Communist mediation which are shown to contrast sharply with mediation in traditional China and to substitute for the concern with harmony and avoiding mutual loss of face a totally new emphasis on political correctness and *subordination* of both parties to socio-political demands.

[12] The rôle of Soviet advisers and Soviet manuals, and the extent of conscious borrowing in the legal area during this period or subsequently, have not been studied in detail, though the former President of the Supreme People's Court of the People's Republic of China, Tung Pi-wu, specifically acknowledged the importance of Soviet models in working out the new people's democratic legal system: New China News Agency report, datelined Peking, Sept. 20, 1956. Such institutions as the Procuracy, derived from the Civil system, are both Soviet and Western institutions and were adopted by the Nationalist regime, as they were by Tsarist Russia, before the Communist regime.

of law in society has been the revolutionary insistence that law is an instrument of politics, a means by which a ruling class protects its interests and conducts the struggle against other classes: therefore a tool for social transformation and not an inviolable framework of rules confining or controlling change, guaranteeing social stability and continuity, and excluding the propriety of violent "illegal" change. It was on this basis that the Bolshevik Government took power in Russia; it is on the same basis that Chinese Communists stand when they call for revolutionary transformation.[13] The politicalisation of law and legal procedure is the outstanding characteristic of Communist regimes, especially in their early years. *Gemeinschaft* conceptions, ranging from *ad hoc* trials with popular participation to thought-reform, bureaucratic-administrative emphasis on proper authorisation and interpretation of directives, and to some extent even *Gesellschaft* conceptions of the majesty and inviolability of the law (when applied to decrees and judicial decisions rather than judicial procedure), can all be put in the service of such politicalisation, as long as other foundations for domination are secure. The point is the extent to which each of these trends, and the structure associated with it, gains independent force.

Scholars with different attitudes or purposes have found different ways of dividing the economic or political history of the People's Republic of China since 1949 into specific periods. So far as law is concerned, there is general agreement that it is most useful to distinguish four periods: *1949-1954*, a period of revolutionary expropriation and consolidation of power, involving the intense politicalisation of all legal measures and the open use of terror against selected sections of the population — landlords and counter-revolutionaries — with great emphasis on law as a weapon of class rule and on informal on-the-spot action by the masses; *1954-1957*: a period appearing to herald a comparative stabilisation with some emphasis on formal legalism, which opens with the proclamation of the first Constitution of the Chinese People's Republic, witnesses calls for draft codes of law and the promulgation of the organic laws of the courts and procuracy and ends in the brief blossoming of the quickly suppressed "Hundred Flowers" movement to discuss frankly the ills of China; *1957-1965*: a period in which the economic failure of the Great Leap Forward and the withdrawal of Soviet help result in a sharp reversal of the more formal and legalistic attitudes of the preceding period, and in a re-emphasis on *Gemeinschaft* strains, on informal procedures, popular participation and the union of theory and practice; *1965-1969*: the period of the Great Proletarian Cultural Revolution in which the primacy of politics, revolutionary enthusiasm and a levelling

[13] "Law is an instrument for the protection of a given ruling class, and a weapon of the ruling class for the conduct of the class struggle"; it is subordinate to politics: Institute of Criminal Law Research, Central Political-Judicial Cadres' School, *Lectures on the General Principles of Criminal Law in the People's Republic of China* (Pekin, 1957); Joint Publication Research Service (JPRS) No. 13331, CSO:2050-S, March 30, 1962, art. 1. "We thus see that the legal system of the people's democracy is an instrument used by the Party to realise the dictatorship of the proletariat and to build socialism. For this reason, legal work merely follows and carries out the Party's policy. . . . The Party's policy is not only the basis of law making; it is also the basis of law execution. . . . In order that the Party's policy may be duly, correctly and thoroughly implemented, the legal system laws, decrees, regulations, etc., must undergo necessary changes to meet the Party's policy:" "Several Problems relating to the Legal System of the Chinese People's Democracy," *Cheng-fa yen-chiu* (Political and Legal Studies), No. 2, Peking, 1959; JPRS, No. 1858-N, CSO:3505-N/2. For Mao Tse-tung, courts are necessarily "violent, not benevolent": *Lun jen-min min chu chuan cheng* (On the People's Democratic Dictatorship), Peking, 1953, 11.

version of the *Gemeinschaft* spirit are encouraged to turn against all *Gesellschaft* and bureaucratic-administrative structures and tendencies, with a deliberate smashing of legal organs and institutions by a discrediting of their function and an unleashing of violence against their personnel.

## 1949-1954: THE COMMON PROGRAMME

On September 27, 1949, the Chinese People's Political Consultative Conference meeting in Peking adopted a Common Programme which proclaimed, in its Preamble, the establishment of the People's Republic of China, announced the organisation of "the people's own central government" and set out in 60 articles the general principles on which the People's Republic, its organs and its policies were to be based. These provided for military control and the "abolition" of all reactionary Kuomintang organs of State power in newly-liberated areas, to be followed, when conditions permitted and counter-revolutionary activities had been suppressed, by the convocation of All-Circles Representative Conferences which in turn would give way to elected Congresses (Article 14). All laws, decrees and judicial organs of the Kuomintang were declared abolished; laws and decrees "protecting the people" were to be enacted and a people's judicial system was to be established (Article 17). The organs of State power at all levels were to practise "democratic centralism"; minorities within the Congresses and Government Councils were to obey the majority; the appointment of People's Governments at each level was to be ratified at the higher level and each level was to obey Governments at the level above it and the Central People's Government (Article 15). People's Governments from county and municipal level upward were to set up People's Supervisory Organs to supervise the performance of duties by State organs and public functionaries of all types and to propose disciplinary action to punish violation of laws or negligence (Article 19). Article 18 provided:

> All State organs of the People's Republic of China must enforce a revolutionary working-style, embodying honesty, simplicity and service to the people: they must severely punish corruption, forbid extravagance and oppose the bureaucratic working-style which alienates the masses of the people.[14]

On the same day, the People's Political Consultative Conference adopted the first two Organic Laws of the People's Republic: the Organic Law of the Consultative Conference itself and the Organic Law of the Central People's Government.[15] The Organic Law of the Conference established the Conference as the supreme organisation of the democratic united front of the entire Chinese people, to meet in Plenary Session once every three years (unless the National Committee chose to advance or postpone the meeting) and

[14] This article, with its call for the opposition to a bureaucratic working-style, is specifically referred to, but not reproduced, in the leading Soviet text on law in Communist China as an article which calls for "the strengthening of the state machinery of the People's Republic": L. M. Gudoshnikov, *Sudebnye organy Kitaiskoi narodnoi respubliki* (Moscow, 1957), translated as Legal Organs of the People's Republic of China, JPRS 1698-N, CSO:2446-N (30 June, 1959) at 27. An English translation of the full text of the Common Programme is available in Albert P. Blaustein, *Fundamental Legal Documents of Communist China* (1962) 34-53. The 60 articles of the Programme are divided into seven chapters: General Principles, Organs of State Power, The Military System, Economic Policy, Cultural and Educational Policy, Policy Toward Nationalities, and Foreign Policy.

[15] English translations of the full text of these are in Blaustein, *op. cit.*, 96-114.

with power to formulate or amend the programme of the New Democracy (Articles 1, 6 and 7). Power to select the groups or units to be represented, to determine the number of delegates and to choose the individual who will represent such groups or units was formally vested in the National Committee of the Conference (Articles 2 and 3); delegates were required to abide by all resolutions passed at Plenary Sessions, even if they had opposed them (Article 4); disciplinary measures to deal with violations of this principle included "causing the unit concerned to replace its delegates and annulling the membership of the participating unit" (Article 5). The Organic Law of the Central People's Government of the People's Republic of China provided that "the People's Republic of China is a State of the people's democratic dictatorship led by the working class" (Article 7) and that its government through a system of people's congresses at various levels is "based on the principle of democratic centralism" (Article 2). The law defined the functions and authority of the Central Government and provided, *inter alia*, that it should establish a Government Administration Council as the higher executive body for State administration, a Supreme People's Court as the highest judicial body in the country and the People's Procurator-General's office as the highest supervisory body in the country (Article 5). Article 18 provided that the Government Administration Council (or inner Cabinet) also set up by the Organic Law should form, *inter alia*, a Committee of Political and Legal Affairs to direct the work of the Ministry of the Interior, the Ministry of Public Security, the Ministry of Justice, the Commission of Legislative Affairs and the Commission of the Nationalities' Affairs, all of them also provided for in the same Article. Articles 26-30 briefly provided that the Supreme People's Court should have a President, a number of Vice-Presidents and a number of committee members, that the People's Procurator-General's office should have supreme supervisory power to ensure the strict observance of the law by all government institutions, public functionaries and ordinary citizens and that the Central People's Government Council should enact organisational regulations for the Supreme People's Court and People's Procurator-General's office.

Such regulations — the Provisional Regulations governing the organisation of the People's Courts in the People's Republic of China and the Provisional Regulations concerning the organisation of the People's Procuracies — were finally promulgated, as *provisional regulations*, on September 3, 1951, and September 4, 1951, respectively,[16] after some three years spent in discussing drafts; they remained in force until replaced by Organic Laws on these subjects promulgated in September, 1954, and discussed below. Under the Provisional Regulations for Courts,[17] three levels of People's Courts were

[16] The Chinese text of these Regulations is printed in *Chung-yang jen-min cheng-fu fa-ling hui-pien, 1951* (Collection of Laws and Decrees of the Central People's Government, 1951) (Peking, 1952), 79-85 and 86-89; I have not seen an English translation.

[17] Discussion of the Regulations had been initiated in the winter of 1948 by the Legal Committee of the Chinese Communist Party's Central Committee; in the spring of 1950, the drafting was taken over by the Codification Committee of the Central People's Government. The results were discussed at the First National Judicial Conference in August, 1950, and then submitted to the Committee of Political and Legal Affairs of the Government Administration Council and the Standing Committee of the National Committee of the Chinese People's Political Consultative Conference for examination and revision. The final Regulations were approved and promulgated by the Central People's Government Council. The chairman of the Committee on Political and Legal Affairs, Hsu Te-heng, claimed at that time that the original draft on courts was a distillation of the Party's experience of legal work in the regions long under Communist control

established — the county courts, the provincial courts and the Supreme People's Court — besides some special courts, such as military courts, courts concerned with technical matters such as mining and forestry, and people's tribunals for land reform. The Regulations imposed on the courts the duty to consolidate the people's democratic dictatorship, to maintain the social order of the New Democracy, and to safeguard the fruit of the people's revolution and all legitimate rights and interests. They were to hear criminal cases, punishing criminals who endanger the State, destroy the social order and infringe upon the legitimate rights and interests of the State, of organisations and of individuals. They were to decide civil cases, settling disputes that affect the mutual rights and interests of organs, enterprises, organisations and individuals. They were also to use court work as a means of educating litigants and spectators in the laws of the new regime, and the judges were to engage in educational and propaganda work outside the courts. The judges were to "base their decisions on the provisions of the Common Programme of the Chinese People's Political Consultative Conference and on the laws, decrees, resolutions and orders issued by the People's Government. In the absence of the above, they shall base their decisions on the policy of the Central People's Government" (Article 4, emphasis in the Regulations). Stress was thus still placed on popular participation and propaganda among the populace: the courts were required to follow the "mass line" and Article 7 of the Regulations specifically incorporated into the judicial process the "popular justice" described in Part 1 of this study, i.e. investigatory organs and courts going "on circuit" to hold on-the-spot hearings and to initiate on-the-spot and mass trials.

In the normal People's court, cases were to be heard in public (unless the law prescribed secret hearings), by a single judge or in very important cases by a college of three judges (Articles 15 and 23). The Regulations (Article 6) permitted, in appropriate cases, the appointing of two lay assessors to sit with a single judge in the court of first instance (the normal Soviet system), but the official view was that China was not yet ready for the general use of lay assessors.[18] They allowed only one appeal save in exceptional circumstances;[19] cases involving the interests of the entire nation or endangering state and public property went to the Supreme Court as the Court of first instance, without right of appeal (Article 28(2)).

Neither the Provisional Regulations nor the Common Programme pretended that the judiciary was independent. Article 4 of the Provisional Regulations on Courts described the People's Courts as an organic part of the People's Government at the same administrative level. It provided for dual control of the courts, from above by the next court in the hierarchy and horizontally by the government congress or council at the same level[20] in part through

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enriched by many ideas drawn from the organisation of courts in the Soviet Union and from Soviet legal experience: reported in *Jen-min jih-pao* (People's Daily), Sept. 5, 1951.

[18] See Hsu Te-heng, as reported in *Jen-min jih-pao, loc. cit. supra* n. 17.

[19] Hsu Te-heng (*loc. cit.*) justified the limiting of appeals and the suspension of any right of appeal in serious political matters as a measure that would "effectively suppress counter-revolutionary activities and prevent cunning elements from taking advantage of the two-trial system to delay the settlement of a case".

[20] Reporting, in 1951, to the First National Committee of the Political Consultative Conference, Shen Chun-ju, the first President of the Supreme People's Court, said: "People's governments at various levels must strengthen their leadership over people's courts. . . . Our judicial work must serve political ends actively, and must be brought to bear on current political tasks and mass movements": *Jen-min jih-pao,* October 30, 1951.

the People's Supervisory Organs at that level and the county or provincial procuracy.[21]

The dominant tone of the period remained the combination of harsh repression — officially directed only against agents of the Kuomintang and counter-revolutionary activities — and of the "popularisation" of justice, often for the same purpose. Both trends were, if anything, intensified during 1950. A Joint Directive on the Suppression of Counter-revolutionary Activities issued by the Government Administration Council and the Supreme People's Court on July 23, 1950, following the outbreak of the Korean War, called for even harsher repression of counter-revolutionaries new Regulations for the Punishment of Counter-revolutionaries promulgated early in 1951 imposed sentences of death or life-imprisonment on a large range of counter-revolutionary activities, permitted retroactive application of the Regulations to acts committed before the Communists took control and revived the Imperial, Tsarist and Soviet doctrine of analogy. The Organic Regulations of the People's Tribunals promulgated on July 20, 1950,[22] at the same time re-established the revolutionary People's Tribunals used in the Red Areas before 1949. Power was given (in Article 1) to people's governments at provincial levels, "in response to practical needs", to organise such tribunals on an *ad hoc* basis for specific tasks, e.g., for the punishment of local despots, bandits, special agents and counter-revolutionaries, for consolidation of the people's dictatorship and for the solution of disputes associated with agrarian reform (that is, expropriation of landowners). The tribunals had power to arrest, detain, try and sentence, and to impose any penalty up to and including the death sentence. Formally, sentences more severe than five years' imprisonment had to be confirmed by the provincial government (Article 7); in practice, as was freely admitted later, countless executions were carried out publicly and on the spot; the specific prohibition in the Regulations of the imposition of corporal punishment was mostly ignored. The personnel of a tribunal (Article 4) was to consist of a presiding judge, a deputy judge and half the (variable) remaining number of judges appointed by county or municipal government; the other half was to be elected by popular representative conferences or mass organisations — a method of involving activists from the lower levels in politico-judicial work and training them to be future cadres. Each tribunal was dissolved after its work had been completed; hundreds and tens of thousands of such tribunals were set up in connection with the major campaigns of the early 1950s: the Land Reform Movement of 1950 and the Three-Anti and Five-Anti Campaigns of 1952, the Three-Anti being directed against corruption, waste and bureaucracy in the Party and State organs and the Five-Anti being against bribery, tax-evasion, fraud, theft of State property and communication of State economic secrets, primarily in the commercial community and among employees.[23]

[21] The Procuracy, in turn, had and has the duty of supervising administrative organs as well as courts; up to 1954 this was put as being the duty to see that government policy was being carried out in the area of State economic and socio-cultural construction as well as in judicial work: see A. E. Lunev, *Sud, prokuratura i gosudarstvennyi kontrol v Kitaiskoi narodnoi respublike*, (Moscow, 1956) 15. The 1954 Procuracy Law spelled out in detail the "procuratorial authority" over all executive and administrative organs of State, but by then the emphasis was formally on ensuring observance of law rather than policy.

[22] The Chinese text of these is printed in *Chung-yang jen-min cheng-fa fa-ling hui-pien, 1949-1950* (*supra* n. 16), vol. 1, 71-72; for an English translation see *Current Background*, (issued by the American Consulate General, Hong Kong) No. 151, January 10, 1952.

[23] Particular provisions regarding the establishment of people's tribunals in connection with the two latter campaigns were promulgated by the Government Administration

Emphasis on revolutionary justice and the mass line, as well as a serious shortage of legal cadres and trained personnel of all kinds, set a very slow pace for formal legislation in 1950 and 1951; there was, perhaps, also a marked reluctance to formalise and systematise legal structure and legal policy too early in the history of the regime.[24] The only significant legislation between 1950 and 1952 was that which was urgently necessary: the Government promulgated the Marriage Law, the Agrarian Reform Law and the Trade Union Law in 1950, Regulations for the Punishment of Counter-revolutionaries in 1951 and Regulations for the Punishment of Corruption in 1952. The Ministry of Justice and a Codification Committee set up by the Government Administration Council discussed proposed drafts for the Principles of Criminal Law, the General Principles of Judicial Procedure, Company Law and Provisional Regulations Governing the Reform of Criminals; none of these have yet been enacted and those drafts that were produced have not been released, at any stage, for publication in forms available to the general public in China or to anyone abroad. Nevertheless, the sheer vastness of China's population created an extraordinary amount of judicial and administrative work, and the Chinese press between 1949 and 1952, printed a large number of complaints concerning an enormous backlog of cases in various areas, the use of incompetent and untrained judicial personnel, corruption, violation of law, and "subjective judgment" without investigation. In East China alone, between June, 1952, and February, 1953, the Courts heard 165,000 cases and set up 45,960 conciliation committees, with 302,000 people actively involved in helping the people's judiciary to administer justice.[25]

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Council in 1952: for the Chinese text, see *Chung-yang jen-min cheng-fa etc.*, 1952, 18-21. The functions served by the tribunals were re-emphasised in a report presented by the Minister of Justice, Shih Liang, in September, 1952:

> In their work the people's tribunals, as a rule, first use criminal trials to conduct propaganda on the laws and policies of the government and to mobilize and educate the masses to denounce the reactionaries and law-breakers. Then they rely upon the help of the masses to investigate, hear and dispose of cases. Reliance is placed on the people both in the struggle against the enemy and in the mediation of the internal disputes among the people. There are many ways in which the people's tribunals may be dependent upon the masses. In response to the needs of the mass movements, the people's tribunals often invite the relevant departments of the government as well as representatives of the interested people's organisations to participate in their work. At the same time the work is reported to the people's representative conferences to get their support. In this way, the criminals are punished and the masses are educated. Meanwhile, large numbers of workers, peasants and women are trained to become good judicial workers. During the Great Agrarian Reform, Three-Anti and Five-Anti Movements, many excellent judges have emerged from among the workers and peasants. In Shanghai alone, 600 workers, shop clerks and housewives have joined the work of the people's tribunals during the Five-Anti Movement. . . . The people's tribunals are also a most convenient system for the people, as they will go wherever they are needed, whether to villages, factories or mines, to save time for the labouring people and assure the speedy and correct handling of cases. . . . In uniting the leadership with the broad masses, the people's tribunals have contributed greatly to the success of the various mass movements.

Shih Liang, "Achievements in the People's Judicial Work during the Past Three Years", *Chieh-fang jih-pao*, (Liberation Daily) Sept. 23, 1952, translated in Leng, *op. cit. supra* n. 2 at 39.

[24] P'eng Chen, then Mayor of Peking, argued, in a report to the Government Administration Council on May 11, 1951, that the time for complete and detailed codes of law was not yet ripe and that they were not urgently necessary; in any case, laws should proceed gradually from the simple to the complex, from general rules to detailed articles, and from single decrees to comprehensive codes. An editorial in the *Peking Daily* in September, 1951, said: "some people disregard the present practical conditions and prematurely and fancifully insist on the immediate enactment of a complete collection of laws. . . . ; these viewpoints are obviously . . . impracticable . . . and must be resolutely corrected": *Jen-min jih-pao*, Sept. 5, 1951.

[25] Reported in *Chieh-fang jih-pao*, Canton, February 1, 1953.

Yet the number of judicial cadres in the whole of China in 1952 was officially put at 28,000.[26]

The reaction of the regime to this problem in 1950 and 1951 was to combine calls (and some crash-course arrangements) for the training of judicial cadres with attempts to make maximum use of politically reliable but untrained personnel.[27] The Three-Anti Campaign of 1952, however, gave great prominence to complaints of allegedly wide-spread bribery, corruption, miscarriages of justice due to incompetence, and violations of legal norms. The Government chose to attribute these shortcomings to the continued influence of Kuomintang attitudes and of Kuomintang-trained personnel in the judicial apparatus and called for a cleansing of judicial cadres and judicial work. The Judicial Reform Movement was promptly launched;[28] it lasted from August, 1952, to April, 1953. Newspaper articles throughout the country estimated that 6,000 of the 28,000 judicial cadres had been former members of the Kuomintang or of its Youth Corps and Secret Police; they were charged with being depraved, law-violating elements, continuing their criminal activities, bringing old judicial concepts and styles of work to the new courts and corrupting even the old Party cadres. Traditional legal concepts such as the separation of law from politics, the equality of all persons before the law, the independence of the judiciary, periods of limitation and the bar against retroactive application of law, as well as the maxim *nullum crimen sine lege*, were held up as aiding landlords and counter-revolutionaries at the expense of the people. The judicial cadres that brought these concepts to their work were responsible for the low esteem in which the masses were said to hold the courts and for the failure of the courts "to serve actively the central political tasks of the country".[29]

The conducting of the purge, in conformity with the "mass line" emphasis of Chinese Communism and its concern with popular participation and mobilisation, was — on the face of it — very much less centralised and administrative in character than such purges have been in the Soviet Union, where arrest and dismissal remained a State and Party matter, even if followed or preceded by meetings alleged to express popular outrage. In China, the Judicial Reform Movement was officially placed in the hands of local government, which was instructed to set up judicial reform committees consisting of representatives of the Party, mass organisations, and State and judicial organs. These committees organised mass "struggle meetings" in

[26] *Ch'ang-chiang jih-pao*, Hankow, August, 24, 1952; *cf.* Leng, *op. cit. supra* n. 2 at 40.

[27] In law, as later in medicine and a host of other matters, there is reasonable ground for suspecting that the emphasis on the *ideological* virtue of using untrained personnel is closely linked with, and masks, its material base—the desperate shortage of trained personnel.

[28] Professor Cohen suggests that by mid-1952, the era of "revolutionary justice" and violent suppression of counterrevolutionaries, reactionaries and all other threatening the gains of the new Democracy was coming to a close and that Party strategists were beginning to look ahead to a period of "socialist construction" patterned after the Stalinist model requiring a regularised, comparatively sophisticated judicial system. This new period was delayed, according to Cohen, when the Three-Anti Movement revealed great corruption in the judiciary, which had to be eradicated before the courts could safely be given the greater powers which would come with the new era: Cohen, "The Party and the Courts: 1949-1959" (1969) *China Q.* 120 at 130-131, also published as "The Chinese Communist Party and 'Judicial Independence': 1949-1959" (1969) 82 *Harvard L.R.* 967 at 978, the version reprinted as *Harvard Law School Studies in Chinese Law*, No. 11.

[29] Shih Liang, "Report Concerning the Thorough Reform and Reconstruction of the People's Courts at all Levels" *Ch'ang-Chiang jih-pao*, Hankow, Aug. 24, 1952, cited by Leng, *op. cit. supra* n. 2 at 40. Shih Liang was then Minister of Justice; her article and its main points were reproduced throughout the country.

which judicial cadres had to face popular criticism, indulge in self-criticism, and help to expose the guilty and remould the repentant among them. The extent to which such meetings were kept under centralised and local official control, and hit only approved targets in each judicial organ, cannot be judged from the evidence available outside China; the composition of the committees and the conduct of proceedings do indicate a fair degree of official control, at least in the initiation of meetings and the selection of the original targets. According to official Communist sources, at the end of the Judicial Reform Movement, over 80% of judicial personnel who had held such positions before the Communists took over government had been dismissed; whether cadres with the right political background and connections were also dismissed, was not indicated.

In April, 1953, to signalise the formal ending of the purge, the Second National Conference on Judicial Work was held in Peking. It hailed the Reform Movement as having laid a solid foundation for the consolidation of the People's Dictatorship and the strengthening of the people's judicial work in the New China and declared that the country was now ready for further development of the people's judicial system. It called for specific programmes at central and regional level to train judicial cadres and establish schools for them, for an extension of the use of people's assessors sitting with judges, for the creation of more special courts in factories, mines, railroads and waterways, and for more conciliation committees, more court activity on circuit among the people and for the creation of people's reception offices associated with the courts, to deal with letters, petitions, complaints and enquiries. It thus inaugurated a new period.

## 1954-1957: THE CONSTITUTION AND THE NEW LEGALITY

The calls issued by the Second National Conference on Judicial Work were promptly acted upon. They ushered in a new period of socialist construction and socialist legality in which violent revolutionary transformation (the exceeding of proper limits in order to right a long-standing wrong) was meant to give way to orderly development resting on stable foundations and proceeding according to stabilised policies and rules. The First Five-Year Plan, inaugurated in 1953, was intended to promote rapid industrialisation through concentration on heavy industry; an extensive propaganda campaign in the press early in 1954 sought to involve the masses in discussion of draft proposals for the Constitution of the People's Republic of China; newspaper articles proclaimed the virtues and social importance of the "law-abiding spirit" and called on Party members, especially, to obey the Party Constitution and to observe their obligations as Party members by setting an example in strictly keeping the law.[30] The State Constitution was formally promulgated on September 20, 1954; a day later the Provisional Regulations concerning

[30] See, e.g., the article by Ch'en Han-pai, "A Discussion of the Law-Abiding Spirit" *Hsüeh-hsi* (Study), Peking, No. 7, July 2, 1954, cited by Leng, *op. cit. supra* n. 2 at 51. Such articles remained a prominent feature in the press throughout the next three years and culminated in the strong emphasis on socialist legality in the reports presented to the Eighth National Congress of the Chinese Communist Party in 1956, to be cited below, especially in the reports by Liu Shao-chi and Tung Pi-wu (the latter, incidently, being the only prominent member of the higher Government echelon who had a legal education, obtained, in his case, in Japan). There was also considerable emphasis during these years on learning from experience (and from the Soviet Union), but the stress was on judicial experience when the discussion concerned matters related to law.

courts, procuracies and people's tribunals were replaced by the Law of the People's Republic of China Governing the Organisation of People's Courts (the Court Law) and the Law of the People's Republic of China Governing the Organisation of the People's Procuracy of the People's Republic of China (the Procuracy Law), both promulgated on September 21, 1954. Work was begun or resumed on draft codes of criminal and civil law and criminal and civil procedure. Regulations on Arrest and Detention were enacted on December 20, 1954.

The Constitution,[31] in its Preamble, defines the fundamental task of the State in the period of transition to socialism as that of bringing about, "step by step . . . the socialist industrialisation of the country, and step by step, . . . the socialist transformation of agriculture, handicrafts and capitalist industry and commerce". It notes that with the successful conclusion of the large-scale struggles for the reform of the agrarian system, for resistance to American aggression and aid to Korea, and for the suppression of counter-revolutionaries and the rehabilitation of the national economy, the necessary conditions have been created for planned economic construction and the gradual transition to socialism. It proclaims that China "has already built an indestructible friendship with the great Union of Soviet Socialist Republics and the People's Democracies" and that China will continue the policy of establishing and extending diplomatic relations with all countries on the basis of equality, mutual benefit and mutual respect for each other's sovereignty and territorial integrity. Socialism, the leading rôle of the working class and the alliance of workers and peasants are enshrined in the Preamble and Article 1 of the Constitution. The Communist Party is mentioned in the opening sentence and again in the fourth paragraph of the Preamble as having led the people of China to great victory in the people's revolution and as leading the people's broad democratic united front; it is not mentioned elsewhere and has no formal standing in the legal organisation and constitution of the State. Article 2 proclaims that "all power in the People's Republic of China belongs to the people," that the people exercise power through the National People's Congress[32] and the local people's congresses and that all these bodies and all organs of State "practise democratic centralism". The equality of nationalities within a China described as "a single multi-national State" is declared in Article 3, which prohibits discrimination against or oppression of any nationality, grants freedom to use and foster national languages and customs and permits regional autonomy in areas where national minorities form compact communities, but states that "national autonomous areas are inalienable parts of the People's Republic of China".[33]

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[31] For an English translation of the complete text, see Blaustein, *op. cit. supra* n. 14 at 1-33.

[32] The National People's Congress and its Standing Committee replace, as the highest organs of State authority, the People's Political Consultative Conference and its National Committee, provided for in the 1949 Common Programme.

[33] The territorial integrity of the People's Republic of China has thus been elevated into a cardinal constitutional principle, limiting the exercise of national autonomy and governing China's diplomatic relations with other states (the latter, according to the Preamble, being based on recognition of each other's sovereignty and territorial integrity). The 1936 Soviet Constitution as the constitution of a federal state, includes a clause (Art. 17) which formally guarantees the right of member-Republics to secede from the U.S.S.R., makes it possible for autonomous regions to be elevated in status to member-Republics. Art. 53 of the Chinese Constitution, in contrast, deals with the (highest) "organs of self-government" of Autonomous Regions as equivalent, in status, to the provincial governments (which are the highest level of local government, responsible directly to the Central Government), and to the governments of municipalities "directly

The Constitution defines the basic forms of ownership of the means of production as "at present" consisting of State ownership, co-operative ownership, ownership by individual working people and capitalist ownership. It protects the right to exercise such ownership according to law, as well as the right to own lawfully-earned income, savings and houses and to inherit private property according to law. It permits the State, in the public interest, to buy, requisition or nationalise land and other means of production. It defines the policy of the State as that of ensuring priority for the development of the State sector of the economy, of protecting co-operative property and encouraging, as a transitional form, co-operative production, co-operative buying and co-operative marketing by individual peasants, of restricting and gradually eliminating rich-peasant economies and of using, restricting and transforming capitalist industry and commerce (Articles 5-13). No person may use his private property to the detriment of the public interest (Article 14); capitalists are forbidden to engage in "unlawful activities which injure the public interest, disrupt the socio-economic order or undermine the economic plan of the State" (Article 10). Feudal landlords and bureaucrat-capitalists are deprived of political rights for a specified period of time according to law; the State provides them with an opportunity to reform through work and become citizens able to earn their livelihood by their own labour (Article 19).

The Constitution contains a chapter (Chapter Three, Articles 85-103), devoted to the "fundamental rights and duties of citizens". This chapter guarantees equality before the law, the right to vote without reference to nationality, race, sex, occupation, social origin, religious belief, education, property status and length of residence,[34] freedom of speech, assembly, association, procession and demonstration, freedom of the press and of religious belief, inviolability of the person and home, privacy of correspondence, freedom of residence and change of residence, and freedom to engage in scientific research and other cultural pursuits. It puts on citizens the duty to "abide by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics" (Article 100), to protect public property, pay taxes and perform military service according to law. A chapter devoted to the cultural and educational policy of the State provides that its culture and education "shall be New Democratic—national, scientific and popular"

under central authority" (which are the local governments of those large cities not made an administrative part of the surrounding province, but having their own municipal councils directly responsible to the Central Government). Art. 69 of the Constitution reaffirms that the "organs of self-government of all autonomous regions . . . exercise the functions and powers of local organs of state" as specified elsewhere in the Constitution: i.e. that they are "administrative organs of state", with power to direct and supervise the work of inferior organs, and to annul their decisions, but themselves "subordinate to and under the co-ordinating direction of the State Council" (Art. 66). "Organs of self-government" in autonomous regions, however, can "administer their own local finances within the limit of the authority prescribed by law" (Art. 70), whereas other provincial governments can only "examine and approve local budgets and financial reports" (Art. 58); organs in the autonomous regions may also "organise their local public security forces in accordance with the military system of the state" (Art. 70), employ in the course of their duties the spoken and written language commonly used in the locality" (Art. 71) and "draw up statutes governing the exercise of autonomy or separate regulations suited to the political, economic and cultural characteristics of the nationality or nationalities in a given area, which statutes and regulations are subject to endorsement by the Standing Committee of the National People's Congress" (Art. 70).

[34] Except for insane persons and persons deprived by law of the right to vote and stand for election (Art. 86).

(Article 41) and that "love of the fatherland, love of the people, love of labour, love of science and care of public property shall be promoted as the public spirit of all nationals" of the People's Republic (Article 42). The Constitution makes no provision for citizens or organisations to challenge the constitutionality of legislation, of government action or decrees in the light of these guarantees (or on any other basis). It does, as we shall see, charge the Procuracy with ensuring the "observance of law" by governmental bodies and citizens. It does not envisage the Procuracy appealing the constitutionality of legislation or the Supreme Court ruling upon it. The power to "interpret laws" is vested by the Constitution in the Standing Committee of the National People's Congress, which also has power "to annul decisions and orders of the State Council [the highest purely executive authority] which contravene the Constitution, laws or decrees" (Article 31(6)). The Constitution and the Court Law give the Supreme Court no such power. Other articles of the Constitution provide that cases shall be heard in public unless otherwise determined by law and that the accused has a right to defence (Article 76), that citizens of all nationalities have the right to use their own language in Court proceedings (Article 77), and that the system of people's assessors applies to judicial proceedings in people's courts, that is, that lay judges shall take part in the decision (Article 75).

Section VI of Chapter Two of the Constitution, devoted to the People's Courts and the People's Procuracy, goes beyond the Provisional Regulations on Courts of 1951 in providing specifically that "in administering justice the People's Courts are independent, subject only to the law" (Article 78). Article 80, however, provides that the Supreme People's Court is responsible to the National People's Congress or its Standing Committee and reports to it and that local People's Courts are responsible to the local People's Congresses and report to them. An earlier section of the Constitution (Article 31) provides that the Standing Committee of the National People's Congress among its other functions and powers, shall supervise the work of the Supreme People's Court and appoint and remove the Vice-Presidents, judges and other members of the Supreme People's Court. Only the Congress itself has power to appoint and remove the President, whose term of office is four years. No terms are designated in the Constitution for other judges and no grounds are specified or required for removal of the President or any other judge. The Procuracy is subject to similar control by the National People's Congress or its Standing Committee. The hierarchy of courts and the structure of organs of the People's Procuracy envisaged by the Constitution include the provision that the higher court or organ supervise the work of the immediately inferior court or organ respectively; the Supreme People's Court in the court structure and the Supreme People's Procuracy in the structure of organs in the procuracy supervise work at all levels below them (Articles 79 and 81). The Supreme People's Procuracy also "exercises procuratorial authority over all departments of the State Council, all local organs of State, persons working in organs of State, and citizens, to ensure observance of the law. Local organs of the People's Procuracy and special People's Procuracies exercise procuratorial authority within the limits prescribed by law" (Article 81). "The organisation of People's Procuracies is determined by law. In the exercise of their authority local organs of the People's Procuracy are independent and are not subject to interference by local organs of State" (Articles 82 and 83).

On the face of it, then, the Constitution enshrined much more definitely than any previous Chinese Communist enactment some of the *Gesellschaft* conception of the separation of judicial and administrative functions, of the rule of law and of the independence of the judiciary. It did so within decided limits: it denied any security of judicial tenure; it gave the supreme standing organ of the legislature power to "supervise the work" of the Supreme Court; it created an ill-defined, ambiguous relationship of "reporting to" between local courts and local people's congresses; it did not specifically exempt the local courts, as it had specifically exempted the local organs of the procuracy, from interference by local organs of state.[35] The Court Law and the Procuracy Law promulgated the following day were premised on very much the same definite but limited conception of a specific and independent judicial-adjudicative function. The Court Law[36] reaffirms the Constitutional provisions that "the people's courts administer justice independently, subject only to the law" (Article 4), that the accused have the right to defence and that trials be public save where otherwise provided by law (Article 7). It allows a party to a case to ask a judicial officer to withdraw if the party considers that the officer has a personal interest in the case or that he for any other reason cannot administer justice impartially; it gives the power of decision on such a request to the President of the court (Article 13). The task of the (people's) courts is "to try criminal and civil cases, and, by judicial process, to punish criminals and settle civil disputes, in order to safeguard the people's democratic system, maintain public order, protect public property, safeguard the rights and lawful interests of citizens, and ensure the successful carrying out of socialist construction and socialist transformation in the country". The people's courts, in all their activities, "educate citizens in loyalty to their country and voluntary observance of law" (Article 3). The provincial people's congresses are given power to elect and remove the presidents of lower courts; people's councils have power to appoint and remove judges and members of the judicial committees of lower courts (Article 32). The Procuracy Law[37] makes it one of the functions of the Procuracy to "see that the judicial process of people's courts conforms to the law" (Article 4(4)). The Court Law (Article 10) authorises procurators to attend trials for the purpose of supervision and gives the Chief Procurator at each level power to participate, without vote, in the proceedings of the court judicial committees dealing with difficult or important cases. Each procurator has the right, at his level, to lodge a protest against a court decision he believes to be erroneous and to ask for its reconsideration according to the relevant procedure for appeal or for its quashing, if it is already effective, in accordance with the relevant procedure for "judicial supervision" (Procuracy Law, Articles 15 and 16). The Chief Procurator of the Supreme People's Procuracy is to attend meetings of the Judicial Committee of the Supreme Court and to participate in the proceedings; if he does not agree to any decision taken there he has power to refer the matter to the Standing Committee of the National People's Congress "for examination and decision" (Procuracy Law,

[35] Since the courts, in administering justice, were specifically said to be subject only to law, it might be argued that such a provision was redundant, in the case of an administrative organ like the Procuracy; but the Procuracy was not required by the Constitution itself to report to local people's congresses.

[36] For the full text of the Law, in English translation, see Blaustein, *op. cit. supra* n. 14 at 131-143.

[37] For the full text, in English translation, see *id.* 144-152.

Article 17). The Procuracy is also charged with supervising the execution of judgments in criminal cases and the activities of "organs in charge of reform through labour" (that is, prisons and correctional institutions); it is to "notify" the organs responsible for any violations of law in these matters that they should correct such violations (Article 18).

The precise meaning and the practical value of the "judicial independence" proclaimed by the Constitution can be — and in China itself soon became — the subject of some dispute. The Constitution, the Court Law and the Procuracy Law, while certainly not intending or safeguarding the independence of the judiciary as a body of men who are made as immune from pressure as possible, did seem to make an important if subtle and only implied distinction between *the courts as bodies of men carrying out the general task of administering justice* and *the courts as collegiate benches reaching judicial decisions in particular cases,* as rendering judgment in a given concrete situation. In their former capacity, the courts are not even in theory independent; in the latter, in theory, they are and their judgment can only be appealed or quashed *within the judicial system,* at least until we reach the Standing Committee of the People's Congress, which unites in itself the legislative, the judicial and the executive function.[38] During the period of "legality" that lasted up to the end of 1957, as we shall see, this concept of "judicial independence", and the limitations on direct political control implied by the distinction drawn above, became a matter of more than academic significance, attracting supporters and influencing legal work and decision to some extent, though it was overwhelmingly interpreted even by its supporters as not denying the overall leading rôle of the party, the importance of popular participation in judicial work and the need for political commitment by judges.

The total structure and internal procedure of courts laid down by the Court Law show a similar theoretical acceptance and development of a substantial degree of legal formalism, a considerable weakening of *ad hoc* arrangements and *ad hoc* revolutionary justice. They do imply a re-interpretation of the Chinese "mass line" and of the concept of "popular participation" in such a way as to limit their meaning considerably and to institutionalise them, even if not rigidly, within a formal legal system.[39] Courts are described

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[38] As Professor Cohen puts it, in specific reference to the Constitution, the Court Law and the Procuracy Law:

> The basic documents thus suggested that, although the selection, promotion, and removal of judges remained within the unfettered discretion of the political authorities, it was indeed intended that the courts and not other government officials decide concrete cases. Courts were required to file reports with the legislative body of the corresponding level and receive some scrutiny from it. They were also placed under the supervision of the procuracy, which had access to their processes and could seek reconsideration of their judgements. But the plain import of the organizational plan was that government agencies were no longer to have any responsibility for individual exercises of the judicial power. Although, once the judicial process had run its course, the Standing Committee of the NPC could overturn decisions of the Supreme Court, this was not regarded as vitiating Article 78's command that adjudication by the courts be conducted independently, for the decisions of the Standing Committee are legislative acts.

Cohen, *supra* n. 28, 82 *Harvard L.R.* at 981.

[39] In the Court Law, as in the Constitution and its Procuracy Law, the influence of the bureaucratic and legal formalism of the Soviet Stalin Constitution and of the Soviet court system is quite strong. The hierarchy of courts and of responsibilities, the role of the Procuracy and the use of lay assessors sitting with a judge, are similar to the Soviet system in operation at the time and evidently drawn from it. The copy, however, is not slavish: the organisation of the judicial system in China, like that of the administrative system generally, is on the whole less complex and the allocation of functions and powers with it, except in the case of the Procuracy, is less carefully

as belonging to one of three categories: *local people's courts,* concerned with general civil and criminal matters (hierarchically divided into basic people's courts, intermediate people's courts and higher people's courts), *special people's courts* (comprising three sub-categories — military courts, railway-transport courts, and water-transport courts), and the *Supreme People's Court* at the apex of both local and special people's courts. The *Supreme People's Court,* as the highest court in the People's Republic, has jurisdiction as a court of first instance over cases of national importance. It has appellate jurisdiction to hear appeals and procuratorial protests against judgments given and orders made by higher and special people's courts. It further has jurisdiction to hear protests lodged by the Supreme People's Procurator in the exercise of his right to protest on the basis of "definite error" against a judgment or order of a people's court at any level which has already become legally effective (Article 30, to be read in conjunction with the Procuracy Law, Articles 15 and 16). The Court consists of a President, Vice-Presidents, chief judges of divisions, associate chief judges of divisions and judges; it has a criminal division and a civil division and "such other divisions as are deemed necessary" (Article 29). Like the Supreme Court of the U.S.S.R. and the Supreme Courts of its component Republics, the Supreme People's Court in China has power, as part of its supervisory function, to take cognisance of any court hearing or decision in any court below it and it may, of its own volition or on the protest of the Supreme People's Procuracy, review the case or order a re-trial (Articles 12 and 30). In the U.S.S.R., however, any case can in principle be appealed all the way to the Supreme Court by ordinary citizens and not only by the Procuracy; in China, for the citizen-party, the court of second instance is the court of last instance, and appeal must have been brought to the court next highest in the hierarchy. If the Supreme People's Court is the court of first instance, then, in China as in the U.S.S.R., there is no appeal possible to the citizen-party (Article 11). The Supreme People's Procuracy, however, may, on a number of grounds and in a number of ways, have a Supreme Court judgment order or decision discussed and reviewed by the Standing Committee of the National People's Congress (Articles 16 and 17).

The *special people's courts* provided for by the Court Law (Article 26) — the military courts, railway-transportation courts and water-transportation courts, earlier also taken to include mining, forestry and other "technical" courts — had been envisaged in the Provisional Regulations Governing the Organisation of the People's Courts promulgated in 1951, and were based on Soviet models. Between 1953 and 1957, more and more railway- and water-transportation courts had been set up in Tientsin, Wuhan, Chungking and Shanghai. The function of these courts, as described in 1953 by the Second National Conference on Judicial Work, was to hear cases relating to counter-revolutionary sabotage, corruption, theft, indifference to duty or negligence resulting in serious loss to production or state property, and accidents endangering the safety of transportation workers and employees. By 1957, 19 railway- and water-transportation courts, with 31 branches, had been established; on September 7, 1957, all were abolished by a decision of the

defined; the significantly different spirit and context in which the Chinese Communist Party operates is, to some extent, revealed in — or at least suggested by — the formal provisions.

State Council, which transferred the jurisdiction of these courts over general criminal cases relating to transportation to basic local people's courts and over criminal cases endangering transportation to intermediate people's courts.[40] The special military courts, which are still in existence, have their origin in the Chinese Red Army courts in the period 1927-1936 and in the military tribunals which handled a wide range of matters during the period of provisional government and military control of the "newly-liberated areas" in 1948-1950. The Court Law leaves the structure and organisation of military courts as "special courts" to be prescribed by the Standing Committee of the National People's Congress. The Standing Committee, in creating a hierarchical structure of military courts, made the highest court in the military structure the "military division" of the Supreme People's Court, with status equal to that of the other divisions of that Court.[41]

Among the local courts, the most numerous are the *basic people's courts*, which consist of county and municipal people's courts, people's courts of autonomous counties and people's courts of municipal districts (Article 15). They are courts of first instance for ordinary civil and criminal cases, but may ask the people's courts at higher levels to take over original jurisdiction in important cases (Article 18). They must try to settle minor civil and criminal disputes by conciliation, and may set up, in accordance with local conditions (those of locality, its population and its cases), *people's tribunals* to hear such disputes (Article 17). The tribunal is *part* of the people's court and its judgments and orders are the judgments and orders of the basic people's court. The "ordinary civil and unimportant criminal cases" which it hears are those classified as "contradictions among the people" (that is, as not involving the people's enemies, or acts hostile to the people): for example domestic relations, debts, housing disputes, minor criminal offences, and injuries or damage from negligence. The tribunals also conduct propaganda on laws and policies, deal with the the people and their complaints, and guide conciliation committees. In their character and function, thus, these tribunals, as part of the permanent court system, are in no way related to the *ad hoc* people's tribunals established in the pre-1949 Red Areas and in the 1949-1954 period, in connection, especially, with the Land Reform Movement, the Three-Anti and the Five-Anti Campaigns, and with the Suppression of the Counter-revolutionaries Campaign. The new people's tribunals rather replace the earlier circuit courts, but have fixed localities enabling people to consult them at any time. (After the promulgation of the Court Law, some circuit courts already in existence were converted into tribunals.) People's tribunals are ready, at appropriate times, however, to travel in order to conduct on-the-spot trials and investigations.

The Court Law (Article 19) requires the basic people's courts to set up *People's Conciliation Committees* for the purpose of settling by conciliation civil disputes and minor criminal cases and through such conciliation to engage in propaganda and legal education regarding policies, laws and decrees. In March, 1954, the State Administration Council had already promulgated

[40] The courts of this type had been abolished in the Soviet Union in 1956; the order abolishing them in China a year later made no reference to this and gave no reasons. *Jen-min jih-pao*, in a report published on July 14, 1956, had referred to the small number of cases that these courts were handling.

[41] *Jen-min shou ts'e* (People's Handbook), Peking, 1965, 127, cited by Hsia Tao-tai, *Guide to Selected Legal Sources of Mainland China*, 12.

Provisional Rules Governing the Organisation of People's Conciliation Committees. These Rules[42] provided that these committees, attached only to basic courts, operate at village and police precinct levels, and be made up of three to eleven members, resident in the relevant community, of good reputation, having "close links with the masses" and "enthusiastic" (Article 6). The committees must carry out mediation according to law; parties, however, appear on a voluntary basis and the committees have no power to compel appearance, to apply punishment or to make arrests, but must carry out mediation "according to policy and law" (Articles 6 and 7). The issuing of the Rules was accompanied and followed by high-level declarations on the political and social virtues of conciliation, amounting to a propaganda campaign that reached a crescendo, as we shall see, in 1957. By the middle of 1955, according to the Minister of Justice, Shih Liang, 157,966 committees had been established in shops, schools, workshops, enterprises, at street, work-team and production-brigade levels.[43]

Intermediate people's courts are established in various areas of an autonomous region, of a municipality directly under central authority or of any other comparatively large municipality; they may be established at the lower *chou* (prefecture) level where this is necessary to relieve the burden on higher courts and to facilitate litigation. They are both courts of first instance and courts of appellate jurisdiction, in the same manner as higher courts. As courts of first instance, they may transfer cases for hearing in higher court on the basis of "great importance" (Article 22).

The *higher people's courts* are set up for provinces, autonomous regions and municipalities directly under central authority (Article 23); they have both initial jurisdiction over cases assigned to them by law or transferred to them by reason of complexity or importance from lower courts and appellate jurisdiction to hear appeals and procuratorial protests (Article 25).

All local people's courts — basic, intermediate and higher — have a President, one or more Vice-Presidents and a number of judges. The intermediate and higher courts must form a civil and a criminal division and may form such other divisions as are necessary (Articles 21 and 24); the basic people's court may form a civil and a criminal division if necessary (Article 16). Each division is headed by a chief judge, and has an associate chief judge. In all cases where the court sits as a court of first instance, except in simple civil or minor criminal cases and where otherwise provided by law, it administers justice as a collegiate bench of one judge and people's assessors. In appeal cases, it sits as a collegiate bench of judges only (Articles 8 and 9). People's assessors, during the period in which they exercise their functions, are members of that division of the court in which they participate, have equal rights with the judges and must attend the court to exercise their functions at the time appointed by the court (Articles 36 and 37).[44] Citizens who have the right to vote and are over 23 years of age are eligible to become assessors; those who have ever been deprived

[42] Published in *Jen-min jih-pao,* March 23, 1954; also in *Chung-yang jen-min cheng-fu fa-ling hui-pien* (Compendium of the Laws and Regulations of the Central People's Government, 1954) 47. For the English text, see Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction* (1968) 124-25.

[43] *Ta-kung pao,* July 31, 1955, cited by Leng, *op. cit. supra* n. 2 at 92.

[44] During this period they continue to receive wages as usual from their regular place of employment; if they are not wage-earners, they are to be given adequate allowance by the people's courts (Art. 37).

of political rights are excluded (Article 35). The numbers, term of office and way of selecting people's assessors are to be prescribed by the Ministry of Justice. For a period after the promulgation of the Court Law, a growing number of assessors were brought into judicial work under informal rules and arrangements decided upon regionally and at each level; generally, two assessors sat on the bench with the judge and had an equal vote with him. The assessors were supposed, as in the Soviet Union, to take the judge's advice on all points of law; in practice, as in the Soviet Union, assessors tended to take his advice generally. When the Ministry of Justice, on July 21, 1956, finally issued Instructions Relating to the Number, Term of Office and Methods of Selection of People's Assessors, it noted that some 200,000 assessors were already at work. The Instructions provide that assessors shall be elected for a term of two years by people's congresses, residents of a district, or staff and workers of State organs, people's organisations and enterprises, always at the same level as the court for which election is being made. The Instructions leave it to the courts to arrange the selection of assessors, to choose any one of the methods set out for election, and to vary them according to local conditions. The Instructions reaffirm that two assessors should sit with a judge in those cases where assessors are prescribed by law and direct that assessors, in general, should not be required to sit in court for more than ten days a year during the term of their election.[45]

People's courts at all levels are also required to establish *judicial committees* attached to the courts. These committees are concerned with the administration of justice and the general formulation of judicial policy; they are directed to "sum up judicial experience and to discuss cases of great importance or difficult cases, as well as other questions relating to the judicial work" (Article 10). The members of each committee below the Supreme People's Court level are appointed (and removed) by the people's council at the corresponding levels upon the recommendation of the president of the court involved (Article 10). The judicial committee of the Supreme People's Court is appointed by the Standing Committee of the National People's Congress upon the recommendation of the President of the Supreme People's Court. Usually, members of the judicial committee are the President, division chiefs and judges of the court involved; the chief procurator at the corresponding level has the right to attend and participate in the discussions of the committees. Apart from its function of summarising of judicial experience, and of thereby providing guiding principles for the court's practice and procedure (badly-needed in the absence, throughout this period and subsequently, of adequate legislation on criminal and civil law and procedure) the judicial committee has the power, on a submission from the President of the relevant court, to review a legally effective judgment if some definite error in the determination of facts or application of law is found (Article 12). In doing this, the committee may nullify an erroneous judgment; it may ask the court or a lower court to conduct a retrial or the procuracy to make additional investigation. The Court Law provides for marshals to be attached to each court in connection with the execution of judgments and orders, for clerks and for such other staff as prescribed by the Ministry of Justice (Articles 38-40), and provides that the judicial administrative work of the people's courts at

[45] For the text of these instructions, in English translation, see Cohen, *op. cit. supra* n. 42 at 431-33.

all levels is directed by the judicial administrative organs (Article 14). Two other bodies, the *People's Reception Offices* and the *Comrades Adjudication Committees* called for by the Conference on Judicial Work in 1953, were operating at grassroots level by the time the Court Law was promulgated. The Reception Offices handled (and still handle) written and verbal enquiries and complaints from the people, settled simple cases requiring no extensive investigation, advised on matters relating to law and litigation, prepared petitions and recorded agreements (that is, functioned as a notary).[46] The comrades adjudication committees were set up in 1953 in factories and mines to deal with industrial accident disputes, breaches of labour discipline, neglect of duty and minor thefts committed in factories or mines. They were made up of workers and employees of industrial units elected by their fellow-workers, and were subject to the general supervision of people's courts as well as to the guidance of Party and government officials. The sanctions formally available to the committees were criticism, reprimand, education, and recommending demotion and dismissals. At appropriate periods, the committees also conducted propaganda campaigns among the people to "heighten revolutionary vigilance". The 1954 Court Law provided (in Article 19) that the work of the committees should be directed by the basic people's courts. Since 1957, little has been heard of them in this form; their tasks have been taken over by less formal and more pervasive organisations.

In the three years between the Second National Conference on Judicial Work held in Peking in 1953 and the Eighth National Congress of the Communist Party of China held in 1956, then, the People's Republic of China made its chief, and only sustained, attempt to formalise, regularise and to some extent further legitimise its system of social administration on the basis of those features common to bureaucratic rationality and a (very limited) *Gesellschaft* conception of the rule of law. The Congress, held in September, 1956, came in the middle of a new Party campaign to induce intellectuals to offer their constructive criticism of the work of State and Party in China — a campaign launched in May, 1956, under the slogan "Let A Hundred Flowers Blossom, Let A Hundred Schools Contend" and abruptly halted in July, 1957. The theoretical note struck at the Eighth Congress and by most of the intellectuals and judicial cadres who spoke out during the Hundred Flowers period was that China must now emphasise socialist legality and the rule of law and proceed with the creation of complete codes of law and with the systematic elaboration of rules governing judicial procedure and other aspects of legal work. Liu Shao-chi, presenting the Political Report of the Party's Central Committee to the Congress, said:

> During the period of revolutionary war and in the early days after the liberation of the country, in order to weed out the remnants of our enemies, to suppress the resistance of all counterrevolutionaries, to destroy the reactionary order and to establish revolutionary order, the only expedient thing to do was to draw up some temporary laws in the nature of general principles in accordance with the policy of the Party and the People's government. During this period, the chief aim of the struggle was to liberate the people from reactionary rule and to free the

[46] Their notarial and advising functions lost significance to some extent in 1955, when those functions were taken on by the Legal Advisory Offices established as the system of "people's lawyers" (a Communist bar) temporarily grew in importance.

> productive forces of society from the bondage of old relations of production. The principal method of struggle was to lead the masses in direct action. Such laws in the nature of general principles were thus suited to the needs of the time. Now, however, the period of revolutionary storm and stress is past, new relations of production have been set up, and the aim of our struggle is changed into 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. It is necessary, in order to maintain a normal social life and to foster production, that everyone in the country should understand and be convinced that as long as he does not violate the laws, his civil rights are guaranteed and will suffer no encroachment by any organisation or any individual. Should his civil rights be unlawfully encroached upon, the State will certainly intervene. All State organs must strictly observe the law, and our security departments, procurators' offices and courts must conscientiously carry out the system of division of function and mutual supervision in legal affairs.[47]

The President of the Supreme People's Court, Tung Pi-wu, declared:

> All the laws must be strictly observed. No violations of the law should henceforth be permitted. Particularly, all the judicial bodies should abide by the law more strictly. . . . We are opposed to all law-breaking practices as represented by doing work not in accordance with the laws. 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. As for those who are ignorant of the laws, we must not only teach them what the laws are but also educate them to abide by the laws. 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.[48]

Tung warned particularly against Party members and government personnel not attaching much importance to the legal system and the observance of law and against local Party committees failing to distinguish between Party and government, issuing orders or arrogating to themselves administrative tasks properly the concern of local governments. This was contrary to the "strict and clear-cut distinction between Party organisation and State organs; . . . taking the affairs of State into its own hands . . . tends to weaken the political leadership that the Party should exercise over the State organs". The President of the Criminal Division of the Supreme People's Court, Chia Ch'ien, also stressed this point:

> The Party realises its leadership in judicial work through the enactment of laws. Since the law represents the will of the people as well as that of the Party, a judge who obeys the law obeys in effect the leadership of the Party. Hence, all a judge needs to do is to obey the law, there is no need for any more guidance from the Party. . . . The Party

[47] 1 *Eighth National Congress of the CCP* (English language edition, Peking, 1956) 81-82.

[48] As reported by the *New China News* Agency, Peking, September 20, 1956; *cf.* 2 *Eighth National Congress of the CCP*, 94.

committees do not know the law or the circumstances of individual cases. Their leadership therefore may not be correct.[49]

These, no doubt, were the strongest formulations of the trend to socialist legality heralded by the National Conference on Juridical Work in 1953 and launched by the promulgation of the Constitution in 1954. They were soon to be repudiated in the 1957/8 Anti-Rightist Movement that followed the Hundred Flowers and suppressed the most important of the Contending Schools; nevertheless they do serve to illustrate the strength and seriousness of a "legalising trend" within the Party and the State, and they do bring out the extent and impact of the rational-bureaucratic and limited *Gesellschaft* concepts and procedures implied in the Constitution and the Court and Procuracy Laws. They were preceded by numerous newspaper articles in 1954 and 1955 stressing the importance of studying diligently the policy and laws of the State, the works of legal science and the advanced legal experience of the Soviet Union and calling for more comprehensive and systematic legislation. Apart from the attitudes to law implicit in the Constitution, in the Court Law and in some of the distinctions made in the Procuracy Law, the legalising trend in China had very little concrete legislation to fasten on to. The Communist Government, indeed, had passed 4,072 laws and decrees in the eight years from October, 1949, to October, 1957;[50] but these did not form any systematic, coherent or even consistent body of law. They were for the most part directed to particular situations and transitional problems; they were loosely and crudely drafted; many of those enacted during the "revolutionary period" between 1949 and 1953 were frankly designed to uphold the very counterpart of the rule of law.[51] Those that amounted to major substantive legislation — there were only three, the Marriage Law, the Agrarian Reform Law and the Trade Union Law, all promulgated in 1950 — had at one stage been held up as show-pieces of Communist law-making, but almost exclusively to the masses and almost exclusively on the grounds of their (allegedly) new and revolutionary social content.[52] Tung Pi-wu, in his speech to the Eighth Congress, admitted:

> The problem today is that we still lack several urgently-needed, fairly complete basic statutes such as a criminal code, a civil code, rules of court procedure, a labour law, a law governing the utilisation of land and the like.[53]

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[49] As reported by Feng Jo-ch'uan, "Refute Chia Ch'ien's Party Nonsense About 'Independent Adjudication'" (1958) 1 *Political and Legal Studies* 18; *cf.* Cohen, *supra* n. 28, 82 *Harvard L.R.* 992.

[50] See the editorial in *Jen-min jih-pao*, October 9, 1957.

[51] See, e.g., the Temporary Regulations for the Surveillance of Counter-revolutionary Elements adopted by the State Administration Council, June 27, 1952, translated in Blaustein, *op. cit. supra* n. 14 at 222-26. These provided, *inter alia*, that persons who have committed crimes in the past and have not shown repentance by deed after 1949 may be placed under surveillance without being taken into custody or charged for the purpose of criminal punishment. Such persons are subject to deprivation of the rights of freedom of speech, publication, assembly, unions, correspondence, choice of dwelling-place, moving to other places, street processions and demonstrations. Surveillance is ordered by an organ of public security and comes into force, after confirmation, through announcement at an appropriate mass meeting. After this announcement, everyone has the right to check on persons so placed under surveillance and to report on their "illegal" actions.

[52] The Minister of Justice, when introducing the marriage law, claimed that it provides for a socialist marriage system not only basically different from the feudal marriage system but in principle quite different from the marriage system of the bourgeoisie: Shih Liang, *The People's China*, June 1, 1952, 9. Non-Communist lawyers are generally unimpressed with its content, which is not especially or strikingly "progressive", and highly critical of its sloppy drafting.

[53] 2 *Eighth National Congress of the Chinese Communist Party 1956.*

Another jurist, Huang Shao-hung, joining other jurists during the Hundred Flowers period to call for a speedy programme of systematic legislation, wrote:

> The country's legislative machinery is not perfect, and lags behind the development of the objective situation. The criminal code, the civil code, police regulations and regulations for the punishment of public functionaries have all not been enacted and promulgated. Economic laws and regulations are especially incomplete. The first five-year plan is about to be fulfilled, and yet the country still has not enacted regulations governing weights and measures.[54]

The lack of a systematic body of Communist Chinese legislation making manifest the principles of socialist legality, combined with the political impossibility of appealing back to the Westernising legal reforms of the Nationalist Revolution, threw the technical lawyer and the partisan of socialist legality in Communist China into a considerable degree of dependence on Soviet legal models and Soviet legal textbooks. In 1954, at the opening of China's period of socialist legality, recognition of the Soviet Union's rôle as the senior and most experienced Communist State was part of official Chinese Party policy. In law and the organisation of government, as in economic production, the Soviet Union was taken as having reached a stage of development upon which the Chinese were only embarking. The Soviet Union had observed and administered fully or partly socialist codes of law, socialist court procedures and socialist concepts of law for more than 30 years; for the same period, it had been building up on the basis of its experience a socialist legal science and textbooks of law. The conditions of China were in many respects significantly different from those obtaining in the Soviet Union and Chinese "legalists" did not intend, or expect to be able, to transport Soviet laws and Soviet procedures on to the local Chinese scene in a mechanical way, without making any significant changes or any intelligent selection of the relevant. Faced by constant and gaping lacunae in their own law, however, they did go to Soviet codes, Soviet procedures and Soviet texts for guidance. *The Lectures on the General Principles of Criminal Law in the People's Republic of China*, prepared in the absence of any criminal code, by the Institute of Criminal Law Research at the Central Political-Judicial Cadres' School in Peking and completed in April, 1957,[55] can only be understood in the context of Soviet legal theory and legal development. The names of the people cited in the frequent homely illustrations in the text are given as Chang and Li; the principles illustrated are the principles applicable to the understanding of Soviet codes and elaborated in Soviet textbooks. Very rarely do the Peking *Lectures* attempt to connect them with Chinese Communist legislation; only in the final section on punishment is there a significant use of legislative material and Ministerial instructions issued in Communist China. The arrangement and topics of the *Lectures* — with their distinction between objective and subjective aspects of offences, with their discussion of kinds of intention, kinds of fault, and types of defences under the standard Soviet headings, and with their treatment of the stages in the commission of an offence — immediately suggest to the informed reader the distinctive Soviet reworking and simplification of German civil and criminal jurisprudence of the late 19th century. Understandable in the circumstances,

[54] *New China News Agency*, May 16, 1957.
[55] *Supra* n. 13.

the need to rely on the fruits of Soviet experience made the proponents of legalism in China vulnerable when Sino-Soviet relations suddenly deteriorated sharply.

The delay in, and ultimate non-consummation of, the proposed programme of systematic legislation, especially on civil and criminal matters, robbed the proponents of the rule of law in China of any firm basis in the formal legal-administrative edifice. At the same time, they had been confronted throughout by strongly countervailing trends enshrined in Party policy and at least equally legitimated by the Constitution. The primacy of social policy (in practice, the primacy of the Party) and the authoritarian principle of democratic centralism, which form the foundation of domination-submission in the society, could not seriously be challenged. They were reinforced by a complex and powerful system of horizontal and vertical political, procuratorial and judicial supervision,[56] and by the language and tradition of Communist ideology throughout the world, bluntly but accurately expressed in a Joint Directive of the Supreme People's Court and the Ministry of Justice issued on December 10, 1954;

> The enforcement of dictatorship and the protection of democracy are the two inseparable aspects of the basic mission of the people's courts. The work of the judiciary must be made to serve the political mission of the State. During the transitional period, the judiciary's general task is to safeguard the smooth development of socialist construction and the socialist transformation of the State. The people's courts must not only punish people but also educate them. They must carry out their proper functions to serve socialist construction and the central task of the State through the medium of judicial activities.[57]

The judicial committees attached to courts at all levels were, at the time of their inception, in principle manipulable in either direction, on behalf of the politicalisation of law or of its independence and formalisation. The committees were instructed to discuss both the trend of cases and points in individual cases in relation to general policy; in such discussions political and extra-judicial concerns could and did come in very strongly. On the other hand, the committees were expected to summarise and analyse the judicial experience of the court in ways that would help to achieve legal clarity and uniformity. Several of them published collections of model decisions, mostly in the criminal jurisdiction, and in 1956 the Supreme People's Court issued a summary of judicial practice in which it set out uniform descriptions of crimes, kinds of punishment and criteria for the measure of punishment. A synthesis of reports on the criminal and civil procedure used in higher and

[56] A basic people's court, to take one example that will bring into focus the constitutional provisions described above, is subject to scrutiny and varying degrees and forms of interference or control *horizontally* by its own judicial committee and by the people's congress and the procurator at the corresponding level, and *vertically* by the court and procurator at the level above it, by the Supreme People's Procurator and by the Supreme People's Court. In 1955, one writer anxious to promote judicial independence and the rule of law argued that these checks were sufficient to remove the danger of "subjective opinion or judgment" and constituted a reason why outside organs should not interfere in any individual case. Courts ought to maintain regular contacts with organs concerned, he argued, and hear their opinions in relevant aspects, but these opinions should only serve as relevant matter in the study of a case; they should not be binding: Liu K'un-lin, "Understanding 'People's Courts Shall Conduct Adjudication Independently and Shall be Subject Only to the Law'" (i.e., Art. 78 of the Constitution), *Cheng-fa yen-chiu*, No. 1, 1955, 35-40; see Cohen *supra* n. 28, 82 *Havard L.R.* 983-84.

[57] *Jen-min jih-pao*, December 11, 1954.

intermediate courts in 14 cities, based on information gathered by judicial committees, was also prepared by the Supreme People's Court, sent to the Standing Committee of the National People's Congress and then issued to local people's courts and special courts for implementation on a trial basis.[58]

Militating much more strongly and obviously against formal legalism and *Gesellschaft* conceptions of law were the "mass line" never abandoned by the Party and emphasising the social-educational rôle of the court, the importance of popular participation and the superiority of "mediation and conciliation" to formal legal determination. The speech "On the Correct Handling of Contradictions Among the People", delivered by Mao Tse-tung to an enlarged meeting of the Supreme State Conference on February 27, 1957, and since made famous by the adherents to his cult, contained nothing that was in principle new. Its sharp dichotomy between the conciliatory rôle of law in disputes among the people and the harsh repressive rôle of law in relation to the enemies of the people, however, gave comfort to those who wished to dissolve *Gesellschaft* concepts of law and replace them with a mixture of *Gemeinschaft* and terror. The speech, indeed, though it did not prevent the strong pleas for the rule of law still heard till a few months later, was the signal for a considerable expansion of the rôle of conciliation work and the number of conciliation committees. Though many observers and students of China have seen these committees as representing a traditional *Gemeinschaft* strain in Chinese life, good in itself and useful in lightening the load on an overworked judiciary, the developments to be studied when we come to the third period of Chinese legal attitudes under Communism bring out clearly the extent to which these committees have been less and less concerned with mediation and more and more with political mobilisation, with *directing* the disputing parties to subordinate themselves and their problems to a political end.[59] The ideology associated with these committees and their work in fact provided a strong base for the attack on bureaucratic and legal formalism.

The attack erupted in July, 1957, as the suspended Hundred Flowers discussions gave way to the Anti-Rightist Movement and a purge of "rightist" intellectuals and judicial cadres. Calls for the rule of law and questions about delays in legislation were now evidence of "rightism". The draft criminal code, according to reports, had been discussed by the Standing Committee of the National People's Congress on June 28, 1957, and was to have been distributed to delegates of the NPC; the civil code, according to reports, was almost ready at the same time. No more has been heard of either.[60] Instead, between September and December, 1957, a significant proportion of China's most prominent jurists, including the President of the Criminal Division of the Supreme People's Court, Chia Ch'ien and three other members of that Court, four members of the Standing Committee of the NPC, high officials of government legal bureaux, the Ministry of Justice, the Procuracy, and local judicial departments, as well as leading professors and members of research

[58] Reported, as part of his account of the work of the Supreme People's Court between 1955 and 1959, by Kao K'o-lin, to the Second National People's Congress on April 24, 1959: *New China News Agency*, Peking, April 24, 1959; see Hsia, *supra* n. 41 at 23-26.

[59] See the excellent article by Stanley Lubman (*supra* n. 11), which will be referred to again in the concluding part of this study.

[60] For the sharpness with which the delays in promulgating the codes were attacked during the Hundred Flowers period, especially in the caustic "Twelve Questions Directed to President Tung Pi-wu" by the Harvard-trained lawyer Yang Chao-lung, who had previously directed a division of the Nationalist Ministry of Justice, see Hsia, *op. cit. supra* n. 41 at 29-30, where the text of Yang's questions is reproduced.

institutes, were exposed as "rightists" with reactionary and anti-socialist views.[61] Rightist cadres were removed from their posts — a purge that seriously affected judicial work at all levels and replaced (as Professor Cohen notes[62]) the products of law schools with demobilised military personnel and public security officials. The purges of judicial cadres in 1952 were again held up as a model for the relationship between law and politics and as correctly emphasising the class character of law. The Government and Party reverted to a number of practices prominent before 1954 and rejected by the "rightists": they again allowed non-judicial bodies to handle many kinds of cases, both civil and criminal, and gave the public security forces renewed power to impose serious sanctions, such as "rehabilitation through labour" and "controlled production". The reconstituted judicial cadres were put through an intense course of ideological training, criticism and self-criticism; this was reinforced, for them and for the population generally, by a chorus in the press explaining the "real" meaning of the judicial independence guaranteed by Article 78 of the Constitution and emphasising the commanding position of the Party in the judicial, as in all other, areas:

> The Party's leadership over the State is expressly set forth in the Preamble and Article 1 of the Constitution. . . . The people's courts, being an instrument of the State, should of course follow the Party's guidance in the administration of justice. This is fully in accord with the constitutional provisions. . . . Facts have shown that the Party's active intervention in the trial work of the people's courts not only breaches no law but can effectively supervise and correct unlawful phenomena that may appear in the judicial process. . . .[63]
>
> Our laws are the manifestation of the will of the people led by the working class. . . . They are enacted and enforced by the people under the leadership of the Party. . . . How can one say, "The Party Committees do not know the law"? . . . Furthermore the Party Committees have a complete grasp of the entire situation, know the political conditions as a whole, understand the relationship between the enemy and ourselves, and are well acquainted with the feelings and demands of the people. Therefore, they are most qualified to weigh the pros and cons of a case in relation to the situation as a whole and to direct properly the work of all departments. It is only under the leadership of the Party that the People's courts can be assured that they are correctly administering justice.[64]
>
> To effect its leadership, the Party must first formulate correct policies and programmes. But this alone is not enough. The Party must also supervise and investigate how these policies and programmes are carried out by the people's court; it must exercise concrete leadership in the trial work of the courts in order to ensure the thorough implementation of its policies.[65]

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[61] For details of those attacks, see Leng, *op. cit. supra* n. 2 at 55 and the Communist newspaper reports there cited.

[62] Cohen, *supra* n. 28, 82 *Harvard L.R.* 990.

[63] Jo-Chüan and Ho Fang, "No Perversion of the Nature of the People's Courts is Allowed" *Jen-min jih-pao*, December 24, 1957, see Leng, *op. cit. supra* n. 2 at 61.

[64] Feng Jo-ch'uan, "Refute Chia Ch'ien's Anti-Party Erroneous View of 'Judicial Independence'" *Cheng-fa yen-chiu*, No. 1, 1958, 21-22; see Leng, *op. cit.*, 62.

[65] Wang Nai-yuan and Ch'en Ch'i-wu, "Our Understanding Regarding 'In Administering Justice the People's Courts are Independent Subject Only to the Law'", *Fa Hsüeh*, No. 2, 1958, 32; Leng, *op. cit.*, 62.

The period that had come to a close was not a period of the rule of law in China. The formal and obvious limitations on any such rule of law that we have already noted were only the tip of an iceberg; the submerged nine-tenths of informal pressure and consciousness of political dependence were, even in the best periods, infinitely more important. From all the evidence we possess, presidents of local people's courts did consult with the local Party secretary and seek his approval and support before handing down decisions and sentences in individual cases, let alone on matters of general policy. But there is reason to suppose, as Professor Cohen argues, that local Party secretaries in this period of socialist legality were recognising the growing complexity and specialised skills involved in the administration of justice, so that

> Consultation was often rather perfunctory, the president showing the Party secretary the proposed judgment and obtaining his immediate approval. If the secretary sought clarification or disagreed with the court, the president would explain the facts and law of the case. In some instances, the secretary would not make an immediate decision but would retain the file for study, and occasionally a case would be sufficiently important to warrant discussion with other members of the local Party committee. Whatever the procedure, the president usually had an opportunity to argue the considerations that motivated the court, and in an era when the Party centre was preaching the virtues of "legality", the local Party bureaucrats were frequently influenced by these arguments. Disagreements between the president and the Party secretary were often resolved by compromise.[66]

Against the limited practical and somewhat less limited theoretical recognition of a degree of division and specialisation of functions, and of law as a process of formal, rule-bound adjudication, the new period inaugurated by the Anti-Rightist Movement set up a new ideal—the smashing of permanent rules and the fusion of functions under the leadership of the Party, a world in which the judicial, the procuracy and the police "have become one fist, attacking the enemy even more forcefully". The article in which these latter words appeared, published in the *Journal of Political and Legal Studies*, is headed, "Smash Permanent Rules, Go One Thousand Li in One Day".[67] It sums up the pretensions of the Great Leap Forward and of the next two periods in the development of law and legal attitudes in Communist China, to be discussed in the concluding portion of this study.

*(Part III of this article, devoted to the periods 1958-65 and 1965-69 and to some discussion of the probable future of law and administration in China, which brings this study to a close, will appear in the next issue of this Review.)*

[66] Cohen, *supra* n. 28, 82 *Harvard L.R.* 988-89.
[67] *Cheng-fa yen-chiu*, No. 5, 1958, 58 at 60.