'SMASH PERMANENT RULES': CHINA AS A MODEL FOR THE FUTURE*

*ALICE ERH-SOON TAY***

Part of the contemporary crisis in law, justice and morals in Western post-industrial societies is the appearance of an unusually strong and widespread revulsion from the style, attitudes, presuppositions and arrangements implied in the ideal of a society governed by laws and not by men. The fear is the fear of dehumanisation in a mass collectivity in which structures have become so vast, the ramifications of technological change so pervasive and irreversible, problems so complex and knowledge so specialised that the individual feels threatened in his ability to cope with, or even to understand, the things that go on around him. His life is changed so immediately and directly, his expectations are transformed at such speed and with such relentlessness that history and technology now appear as man's enemies rather than his friends. Objectivity has become a dirty word, a synonym for the inhuman. The emphasis is on personalisation—of administration, of news reporting, of intellectual and popular discussion, of education and of law. The extreme form of that personalisation is the belief that only the sufferer is competent to advise on the remedy, because only he or she has 'real' knowledge of the complaint. Beneath that personalisation and especially beneath its more extreme and strident forms lies something often not less horrible than the outrages of modern history or modern technology—the utter emptiness of the new post-industrial Ego, with its extreme but unstable and insecure individualism, its cult of self-expression and its inconsistent demand for instant satisfaction and external stimulation. It is not surprising that it flees from its own 'self-determined' and therefore characterless 'personality' to the ideal of an undifferentiated, characterless womb-like 'community', just as it flees from 'objectivity' and the de-personalised tradition of critical discussion and enquiry to physical 'encounters', nature mysticism and Zen Buddhism.

The pluralistic, commercial-individualistic society based on contract and the rule of law, which Tönnies called the *Gesellschaft*, is no doubt, as Marxists like to say, a bourgeois phenomenon, linked with the ascendancy of cities, trade and manufacture, and of internal and external markets, and with the decrease in importance of the agricultural household, of kinship, locality and common customs and traditions. But the *Gesellschaft* and its ideology were also a revolt against the bondage of family, status and religion, against the intense personalisation and communalisation of life, politics and govern-

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** Ph.D. (A.N.U.), of Lincoln's Inn, barrister-at-law, Professor of Jurisprudence in the University of Sydney.

ment in the *Gemeinschaft* of feudalism and of traditional pre-industrial societies generally. The divorce of law from morality, and of religion from both, the separation of the private and the public, and of the legislative, the judicial and the executive, the de-personalisation of law and legal administration, were charters of liberty without which the character, the achievements and the expectations of modern man would be totally unthinkable. The movement from status to contract does and did represent a genuine liberation of personality, of opportunity, of capacity. It is just such a movement, and not any flight back into the commune, which an increasing number of women are demanding today. If we want to know why, we have only to compare the life of Bella Abzug with that of Hester Prynne.

The liberties of the *Gesellschaft* were gained, of course, at a price. That price has been discussed by Karl Marx and by many modern thinkers, sometimes thoughtfully, sometimes less so, under the heading 'the alienation of man in modern, bourgeois society'. The political liberation of man as a citizen was accompanied by the liberation of civil society—of the world of industry and trade—from the restraints of religion, morality and politics. Formal political and legal equality concealed and even facilitated real economic and social inequality. Behind the Republic of the Market lay the Despotism of the Factory; behind freedom of trade lay the doctrine of the social, political, economic and cultural inferiority of colonies and dependencies. But the ideals and the view of man which have increasingly made gross social and economic inequality, cultural and physical deprivation, despotism and domination, morally and politically unacceptable are the ideals and the view of man brought into history by the *Gesellschaft*, by its conception of man as a free moral agent capable of liberty and equality, bound, in his social life, only by laws that he is also capable, as a rational being, of framing, understanding and obeying. These are not ideals to be given up lightly—even if, like the concept of the juridical person as a free and autonomous agent, they are in actuality fictions.

Nevertheless, men notice the shoe only where it pinches. *Gesellschaft* law today is seen by many as impersonal, inhuman, abstract, itself a form of alienation that tears man out of his living context, fails to see him as a man but recognises him only as a debtor, a criminal, a ratepayer, a contracting party, in short, as the holder or ower of a specific and limited legal right or duty *vis-à-vis* another. There is a remarkable longing for the personalisation of law and legal proceedings, for the restoration of man to a place in the organic community that judges him, and cares for him, as a total person, and that makes justice, at least in principle, the work of, the whole community, and not a specialised branch of learning and experience. It is here that the admittedly limited appeal of a sentimentalised picture of the People's Republic of China lies. Just as barefoot doctors seem more human because they are simpler as people, more like ourselves, more accessible than the high priests of a complex and difficult science, so people's courts and people's judges seem more human than the bewigged and begowned representatives of a complex and learned art which still believes that men must be judged by universal principles and that hard cases make bad law. But are people's judges and people's courts really more human?

Scholars, as I have noted in an earlier issue of this *Review*, have different attitudes and purposes; they have naturally found rather different ways of dividing into periods the economic and political history of the People's

Republic of China since its proclamation in 1949. Nevertheless, so far as law is concerned, there has been general agreement that it is most useful to distinguish four periods before the present: *1949-1954* is a period of revolutionary expropriation and of the consolidation of power, involving the intense politicalisation of law and of all legal measures, as well as the open use of terror against selected sections of the population—landlords and counter-revolutionaries. Here there is great emphasis on law as a weapon of class rule and on informal on-the-spot action by the masses. *1954-1957* is a period appearing to herald a comparative stabilisation with some emphasis on formal legalism. It opens with the proclamation of the first Constitution of the Chinese People's Republic, consisting of four chapters and 106 articles, witnesses calls for draft codes of law and sees the promulgation of 'organic laws' establishing and governing a formal structure of courts and a procuracy. It ends in the brief blossoming of the quickly-suppressed 'Hundred Flowers' movement to discuss frankly the ills of China. *1957-1965* is 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 what Professor Kamenka and I, following Ferdinand Tönnies, have called *Gemeinschaft* strains,[1] *i.e.*, informal procedures, popular participation, the rejection of 'abstract' legalism and the union of theory and practice. *1966-1969* is the period of the Great Proletarian Cultural Revolution in which the primacy of politics, revolutionary enthusiasm and a levelling version of the *Gemeinschaft* spirit are encouraged to turn against all legalistic (*Gesellschaft*) and bureaucratic-administrative structures and tendencies (except the military) with a deliberate smashing of legal organs and institutions by a discrediting of their function and an unleashing of violence against their personnel. The new Constitution of the Communist Party of China adopted at the Ninth National Congress of the Party on April 14, 1969 formalises the underlying theoretical assumptions that characterise this period, while marking a return to comparative stability of government, which has lasted, on that basis, to the present. In 1970 sources in Taiwan published an account of an alleged draft of a new State Constitution discussed on the mainland in the last quarter of 1970 and to be submitted for adoption to the Fourth National People's Congress.[2] That Congress was finally held in January 1975, where a new State Constitution was indeed adopted.[3] This Constitution, too, embodies the fundamental assumptions behind the Cultural Revolution and the attacks on bureaucratism and Liu Shao-ch'i, as well as the subsequent attacks on Lin Piao and Confucius. It shows that for the moment at least, despite the halt to the Culural Revolution as such, there has been no total retreat from the anti-bureaucratic, anti-legalistic 'mass line' of the Cultural Revolution period, with its emphasis on

[1] See Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond the French Revolution: Communist Socialism and the Concept of Law', (1971) 21 *University of Toronto Law Journal*, 109-140, as well as Kamenka and Tay, 'Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology', in Eugene Kamenka and R. S. Neale (eds.), *Feudalism, Capitalism and Beyond*, A.N.U. Press, Canberra, Edward Arnold, London, 1975, 126-144, where our distinction between *Gemeinschaft* law, *Gesellschaft* law and bureaucratic-administrative regulation is fully set out.

[2] See Ch'en Kuang, 'A Comparative Analysis of the Old and New Constitutions of the Chinese People's Republic' (in Chinese), (1970) 4 *Chung-kung yen-chiu (Studies on Chinese Communism)*, No. 12, 38.

[3] An English translation of the text has been released by the Embassy of the People's Republic of China in Canberra as News Bulletin No. 7502, dated January 25, 1975, 'The Constitution of the People's Republic of China'.

continued struggle and contradictions under socialism—though there is more emphasis at the moment on work, self-reliance, thrift, simplicity and the principle of 'efficient' and simple administration (all mentioned in the Constitution) than on violent external and internal revolutionary struggle. Thus, in Chapter I of the new (1969) Constitution of the Communist Party of China, setting forth the general programme of the Party, we read:

> Socialist society covers a fairly long historical period. Throughout this historical period, there are classes, class contradictions and class struggle, there is the struggle between the socialist road and the capitalist road, there is the danger of capitalist restoration and there is the threat of subversion and aggression by imperialism and modern revisionism. These contradictions can be resolved only by depending on the Marxist theory of continued revolution and on practice under its guidance.

This passage is repeated, word for word, in the preamble of the new (1975) State Constitution—except that the more abusive term 'social imperialism' is substituted for 'modern revisionism' (*i.e.* the Soviet Union and its allies). It is this theory of continued revolution under socialism, this rejection of the evolution of a stable socialist State and socialist system of law and government, which makes all of the style and much of the practice of the Maoist element in Chinese politics utterly different from the legal and governmental style that has accompanied the alleged achievement of socialism in the Soviet Union and gives it much of its appeal. Both the Chinese Maoists and the Soviet 'revisionists' claim to be following the teachings of Marx and those of Lenin. Scholars interested in Communist China have debated, and are still debating, whether the more recent developments in China are to be understood as a sort of Protestant religious renewal of the original Marxist message, whether they are manifestations or reappearances of a traditional Chinese spirit and method of government, on which Marxism and industrialisation have made only a superficial impact, or whether China is—in essence—simply going, somewhat more slowly and confusedly, through an earlier stage of Soviet development, when the Soviet Government still saw itself as a revolutionary government mobilising and radicalising a society in flux. Be that as it may, Chinese propaganda, for some years now, has captured an important *moment* in the contemporary mood outside China, especially in the Western world—the longing for simplicity, popularity, the organic community, the distrust of and distaste for structured arrangements, bureaucracy, *legalism*, the conviction among some that all these can only serve the established. But does Chinese propaganda actually correspond with Chinese reality; is the distinction between populism and legalism, between the mass line and bureaucracy, organic togetherness and individual subjection and loneliness, really so simple? The history of the People's Republic of China is instructive.

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In February, 1949, eight months before the Communists established political control over the whole of mainland China, the Central Committee of the Chinese Communist Party proclaimed in its 'Instruction to Abolish the Six Codes of the Kuomintang and to Define the Judicial Principles for the Liberated Areas' that

> The Six Codes of the Kuomintang, like bourgeois law in general, were framed in such a way as to conceal their class character. But in reality, since there can be no State above classes, there certainly can be no law above classes. Like bourgeois law generally, the Six Codes gave the

> appearance that people are all equal before the law. But in reality, since there can be no real common interest between the ruling class and the ruled, between the exploiting class and the exploited, between the appropriator and the expropriated, between the creditor and the debtor, there certainly can be no real equal legal rights. Thus all the Kuomintang laws are nothing but instruments designed to protect the reactionary rule of the landlords, the compradores, the bureaucrats, and the bourgeoisie, and weapons to suppress and coerce the vast masses of the people.[4]

What appear to be non-class elements, protecting a general social interest, are in fact merely evidence of the ruling classes' need to maintain its interests against law-breakers within its own ranks and to placate its enemies. Thus the Instruction to Abolish the Six Codes points out that even the reactionary laws of the Kuomintang regime have

> to include now and then some provisions purporting to protect the interest of the people as a whole. This, like the State itself, is precisely a product and demonstration of the irreconcilability of class struggle. The reactionary ruling class, in order to safeguard its fundamental class interest (property and governmental power) has to take into consideration some of its allies' or potential allies' interests in an attempt to consolidate its class dominance. On the other hand, it also has to give some lip-service to its principal enemy, the toiling people, in order to ease the intensity of class struggle. Therefore, we cannot consider the Six Codes of the Kuomintang as a law which is only partially, not fundamentally, inconsistent with the interest of the vast mass of the people because of the existence of those provisions which purport to protect the interest of the people as a whole. Instead, we should regard the Codes as basically inconsistent with the interest of the people.[5]

While socialist law protects different interests, it has, according to the Chinese, precisely the same kind of class character and lack of political independence.

> The Soviet criminal law, as a part of the socialist superstructure, is like other laws built on the economic foundation of the socialist system of public ownership. It protects the foundation of the socialist system and the legal order of socialism, and serves the interest of the Soviet toiling people. Therefore, the nature of offence and the application of punishment in the Soviet criminal law are determined by the interest of the vast mass of toiling people.
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> The criminal law of the Soviet Union is an instrument of the proletarian dictatorship. It first regards instances of counter-revolutionary behaviour aimed at overthrowing the foundation of the Soviet system, which was established by the peasant-worker government, as most dangerous offences. Then it also regards instances of behaviour which obstruct the socialist legal order, including stealing socialist property, speculative acts and violations of the citizen's right of person, as offences. The application of punishment is based on the nature of offence, and the aim of punishment is to condemn, reform and educate the offender in order to prevent the

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[4] Cited in The Institute of Criminal Studies, Central Political-Juridical Cadres' School, *Lectures on the General Principles of Criminal Law in the People's Republic of China (Chung-hua Jen-min Kung-ho-kuo Hsing-fa Tsung-tse Chiang-i)* (Legal Press *(Fa-lu Ch'u-pan-she)*, Peking, September, 1957). The *Lectures*, not readily available in Chinese, have been translated by the Joint Publications Research Service, Washington, D.C., JPRS:13331, March 30, 1962. I have amended the translations, but have kept page references to the English-language translation. The passage cited is at pp. 5-6.

[5] *Lectures on Criminal Law*, 6-7 (English translation amended).

recurrence of offence.[6]

The difference between the old law and the new is in its *political* content, not in its *legal* form, or in a new principle of legitimation:

> Criminal phenomena in socialist States are also the manifestation of class struggle. The difference between this and crime in exploitative States is that a fundamental change has occurred in the class nature of crime.
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> Because classes, class struggle and the possibility of capitalist restoration still exist during the stage of transition, there is a need for the socialist State to use the declaration of crime to struggle against behaviour that seriously endangers the interests of the State and people.[7]

This view of law as having a highly active political function, as a weapon of class struggle, was naturally enough very much to the fore in the opening years of the People's Republic of China. Law was then seen as largely a series of decrees, expropriating the expropriators, *etc.*, and as backed by the revolutionary consciousness of the masses, or at least of communist activists. The predominant tone was therefore a mixture of terror with manipulated *Gemeinschaft* procedures, *ad hoc* mass and popular trials, struggle campaigns, etc. However, as Profesor Kamenka has reminded us,

> . . . the modern Communist-type revolution . . . begins with an anarchist and terrorist emphasis on destruction, creating and usually meant to create those violent conditions that make revolutionary upheaval seem 'normal'. The opening stage is followed by (occasionally even accompanied by) a deceptive and usually cynical popular front line, meant to gain mass support. This is initiated or developed as soon as the seizure of power has been accomplished, and the mass line is then manipulated so as to isolate particular enemies of the new regime at separate stages and to destroy them one by one. This accomplished, radical social transformation begins in an organised way, i.e., with the full use of bureaucratic authority and centralised power.[8]

The regime's initial concern with mass support, with alienating no more than 5-10% of the population at any one time,[9] was expressed in China in the theory of the New Democracy and the Common Programme promulgated in 1949, which purported to stand on a broader base than proletarian interest or Communist Party theory, though both were given the leading role in the revolution. The main Chinese Communist effort went into encouraging mass participation through *Gemeinschaft* procedures, but the Common Programme, the concern to link Communism with a general movement toward human rights and individual self-development, did result in the use of certain *Gesellschaft* procedures and a certain appeal to *Gesellschaft* concepts of law. Compared with the early years of the Soviet Union, the period of War Communism, the opening years of the Chinese People's Republic do not represent a marked difference in style, though the mass line with its *Gemeinschaft* features was carried out and incorporated into the communist style of government in a much more systematic way.

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[6] *Lectures on Criminal Law*, 7-8. The Soviet Union was at that time regarded by the Chinese as an older and more experienced Socialist State.

[7] Tsao Tzu-tan, 'On the Relationship between Crime and Class Struggle', (1964) *Cheng-fa yen-chiu (Studies on Politics and Law)* No. 1, transl. in (1969) 1 *Chinese Law and Government*, No. 3, 80 at 85.

[8] Eugene Kamenka, 'Revolution—The History of an Idea', in Eugene Kamenka (ed.), *A World in Revolution?*, Canberra, 1970, 1 at 12-13n.

[9] A series of Communist Party instructions to cadres carrying out campaigns against counter-revolutionaries, landlords and rich peasants warned that such campaigns should never be directed against more than 5 to 10% of the population of any village or area.

By mid-1952, as Professor Jerome Cohen also suggests,[10] the era of 'revolutionary justice' and violent suppression of counter-revolutionaries, reactionaries and all others threatening the gains of the New Democracy was coming to a close and 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. The Chinese jurists responsible for drafting the *Lectures on Criminal Law* in 1957 took the same view of the matter. They divided the legal history of Communist China between 1949 and 1957 into two periods:

(a) The period of restoration of the national economy from 1949 to 1952, when the central task of the State was the suppression of counter-revolutionary activities, the consolidation of the revolutionary order and the restoration of the national economy. During this period, there were carried out the Land Reform Movement, the Resist America Aid-Korea Campaign, the Movement for the Suppression of Counter-revolutionaries, the 'Three-Anti' and the 'Five-Anti' Campaigns and a host of other minor 'social democratic' reform movements.

(b) The period of planned economic construction from 1953 onward, when the general task of the State is the realisation of socialist industrialisation, socialist transformation and the accomplishment of socialism. During this period, for the maintenance of 'a good social order and the citizen's positive attitudes', criminal law keeps a close vigilance over 'habitual robbers and thieves, racketeers, crooks and other criminals who endanger the social order and violate the lawful interests and rights of the citizens'.[11]

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.[12] 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

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[10] Cohen, 'The Party and the Courts: 1949-1959', (1969) *China Quarterly* 120, at 130-131, also published as "The Chinese Communist Party and Judicial Independence": 1949-1959', (1969) 82 *Harvard Law Review* 967, at 978, the version reprinted as *Harvard Law School Studies in Chinese Law*, No. 11.

[11] *Lectures on Criminal Law*, 18-19.

[12] 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 *People's 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*, September 5, 1951. This reluctance to formalise and systematise, to commit the future too definitely, has persisted in China and accounts for the quite astonishing lacunae in the 1975 State Constitution.

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, 'subjective judgment' without investigation, *etc.* 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.[13] Yet the number of judicial cadres in the whole of China in 1952 was officially put at 28,000.[14]

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.[15] 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; 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 with 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'.[16]

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 govern-

[13] Reported in *Chieh-fang jih-pao*, Canton, February 1, 1953. The recent (still current?) anti-Confucian campaign inaugurated in 1973 has brought renewed charges of remarkably traditional forms of corruption and abuse of power, including sexual abuse, by party cadres, administrators and legal personnel.

[14] *Ch'ang-chiang jih-pao*, Hankow, August 24, 1952.

[15] 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.

[16] Shih Liang, 'Report Concerning the Thorough Reform and Reconstruction of the People's Courts at all Levels', *Ch'ang-chiang jih-pao*, Hankow, August 24, 1952, cited by Leng Shao-chuan, *Justice in Communist China* (New York, 1967), at 40. Shih Liang was then Minister of Justice: her article and its main points were reproduced throughout the country.

ment, 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 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. Certainly, 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.

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, the period of socialist construction and socialist legality from 1954 to 1957.

The calls issued by the Second National Conference on Judicial Work were promptly acted upon. They were meant to mark the transition from violent revolutionary transformation (characterised by Mao as the exceeding of proper limits in order to right a long-standing wrong) 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 the discussion of draft proposals for the Constitution of the People's Republic of China; newspaper articles proclaimed the virtue and social importance of the 'law-abiding spirit' and called on Party members especially to obey the Party Constitution and to set an example in keeping strictly to the law. The State Constitution was formally promulgated on September 20, 1954; a day later the Provisional Regulations concerning courts, the Procuracy and people's tribunals were replaced by the Law of the People's Republic of China Governing the Organisation of People's Courts 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. Regulations on Arrest and Detention were enacted on December 20, 1954.

The Constitution, while emphasising the leading role of the Communist Party and the importance of the 'mass-line', 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 the guarantee of legal rights 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 exempted the local procuracy, from interference by local organs of state. Both the Constitution and the Law Concerning the Organisation of Courts provided that 'the people's courts administer justice independently, subject only to the law' (Article 78 of the Constitution, Article 4 of the Court Law).

The precise meaning and the practical value of the 'judicial independence' proclaimed by the 1954 Constitution could 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 were not even in theory independent; in the latter, in theory, they were and their judgment could only be appealed or quashed *within* the judicial system, at least until one reached the Standing Committee of the People's Congress, which unites in itself the legislative, the judicial and the executive function. 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 they were overwhelmingly interpreted even by their supporters as not denying the overall leading role 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 reinterpretation 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.[17] 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, 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

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

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 counter-revolutionaries, 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 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.[18]

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

[18] *1 Eighth National Congress of the CCP* (English language edition, Peking, 1956), 81-82.

laws of the State.[19]

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 committees do not know the law or the circumstances of individual cases. Their leadership therefore may not be correct.[20]

These, no doubt, were the strongest formulations of the trends to socialist legality heralded by the National Conference on Judicial 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 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;[21] 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

[19] As reported in the *New China News Agency*, Peking, September 20, 1956.
[20] As reported by Feng Jo-ch'uan, 'Refute Chia Ch'ien's Party Nonsense About "Independent Adjudication"'. (1958) 1 *Political and Legal Studies* 18.
[21] See the editorial in *Jen-min jih-pao*, October 9, 1957.

of the rule of law.[22] 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.[23] Tung Pi-wu in his speech to the Eighth Congress, admitted:

> The problem to-day 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.[24]

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 beginning of China's period of socialist legality, recognition of the Soviet Union's role as the senior and most experienced socialist 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 onto the local Chinese scene in a mechanical way, without making any significant changes or any intelligent selection of the relevant models. 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, can only be understood in the context of Soviet legal theory and legal development. The names of the

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[22] 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 (ed.), *Fundamental Legal Documents of Communist China* (New Jersey, 1962), 222-226. 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.

[23] The Minister of Justice, Shih Liang, when introducing the law, claimed that it provides for a socialist marriage system not only basically different from the feudal marriage system but in prinicple 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.

[24] 2 *Eighth National Congress of the CCP, 1956.*

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. 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 simplificaion of German civil and criminal jurisprudence of the late 19th century. Understandably in the circumstances, 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 formed 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,[25] 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 dictatorhip 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 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.[26]

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

[25] A basic people's court, to take one example which 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 interefer 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", (1955) *Cheng-fa yen-chiu*, No. 1, 35-40.

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

hand, the committees were expected to summarise and analyse the judicial experience of the court in ways that would help to achieve 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 practise in which it set out uniform descriptions of crimes, kinds of punishment and criteria for the measure of punishment.

Militating strongly and obviously against formal legalism and *Gesellschaft* conceptions of law were the 'mass line' never abandoned by the Party, which emphasised the social-educational role of the courts, the importance of popular participation and the superiority of 'mediation and conciliation' over formal legal determination. The Chinese Communists, indeed, going back to, or making use of, a Chinese tradition of preferring arbitration by elders to proceedings before an imperial magistrate, had, already in the 'red areas' of the 1930s, emphasised mediation and conciliation in disputes among 'the people' in preference to legal decision. Mediation and conciliation committees had been set up after 1949 and their position as dealing with minor disputes had been regularised in the Court Law of 1954. Now, to an enlarged session of the Supreme State Conference meeting on February 27, 1957, Mao delivered his subsequently celebrated speech 'On the Correct Handling of Contradictions Among the People'. The importance of the speech lay not in its proclamation of a new doctrine, but in its choice of a particular moment to re-emphasise the spirit of the period of struggle in contrast with the spirit of consolidation and economic upbuilding. All history, Mao reminded his hearers, was the history of class struggles and such class struggles continued *after* the socialist transformation of the means of production had been completed, *i.e. after* Communist power had been consolidated. There were, even under socialism therefore, two types of social contradictions: the contradiction between the people and its enemies and the contradiction among the people themselves. The former contradiction rests on a basic conflict of interests linked with class and property position; confronted by this contradiction, faced by the enemies of the people, law becomes a weapon of suppression, an instrument of dictatorship which is by definition non-benevolent, violent and entitled to exceed proper limits to crush the enemy, who is to be deprived of all legal or constitutional rights. Contradictions 'among the people' are based on differences of occupation and social location; there are contradictions within the working class, within the peasantry, within the intelligentsia, between all three of these and even between the Government and the People, in the form of a contradiction between the interests of the State, the interests of the collective and the interests of the individuals. These latter contradictions, however, all conceal an underlying unity of interests; they are non-antagonistic contradictions. They should therefore be resolved benevolently through mediation and conciliation according to the 'dialectical' principle of 'unity-criticism-unity'. The implication of the speech was clear: it struck squarely at the elevation of either *Gesellschaft* or bureaucratic-administrative conceptions of law and substituted a conception of 'law' as either terror (against enemies) or persuasion and mediation (in relation to the people). The prescribed mixture was that of freedom and discipline—what the Chinese continue to call 'democratic dictatorship'—and this unity of contradiction is, of course, made possible by dialectic. As Mao put it:

> Within the ranks of the people, democracy is correlative with centralism, and freedom with discipline. They are the two opposites of a single entity,

> contradictory as well as united, and we should not one-sidedly emphasise the one to the denial of the other. Within the ranks of the people, we cannot do without freedom, nor can we do without discipline; we cannot do without democracy, nor can we do without centralism. This unity of democracy and centralism, of freedom and discipline, constitutes our democratic centralism.

The requirements of domination-submission, then, were still being clearly recognised, but the speech served as a signal for a considerable extension of the role 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 that culminated in the Cultural Revolution bring out clearly the extent to which these committees have been less and less concerned with mediation as such (traditionally, with 'saving the face' of both parties) and more and more with political mobilisation and indoctrination, with *directing* the disputing parties to subordinate themselves and their problems to a political end. 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 was launched 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 began. 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. 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 institutes, were exposed as 'rightists' with reactionary and anti-socialist views. The purges of judicial cadres in 1952, with their attack on those who held to old concepts of law and abstract legal norms, 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'. Even the limited guarantee of 'judicial independence' in Article 78 of the Constitution was now reinterpreted to deny that it could be understood as guaranteeing the court's independence of the Party in reaching concrete decisions in a case. As one writer put it:

> 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 inter-

> vention 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.[27]

The Office of Teaching and Research on State and Legal Theory of the Chinese People's University in Peking, in its compendium on the Leap Forward in Scientific Studies on Law, entitled *On the People's Democratic Dictatorship and the People's Democratic Legal System*,[28] explained that law can have no source outside Party policy and can in no way place itself above Party policy or even on an equal level with it:

> When a law is needed for the realisation of Party policy, it will be enacted; when the law is no longer suitable for Party policy, it will be revised or abolished. . . . Since not all Party policies are necessarily enacted into laws, and since the Party policy must be firmly implemented, it becomes an irrevocable principle for us to do things in accordance with the Party Policy.[29]
>
> When we do things according to law, it does not mean that we observe the law in isolation. It means that it is necessary that we do things in accordance with the law, in accordance with prerequisites of Party policy. If the law is no longer suited to the needs of struggle, then we can depend only upon the new policy proposed by the Party.[30]

Party policy applies not only to the enactment of law, but to its application, which must be governed by policy as much as by the law. One cannot 'dogmatically and mechanically do things in accordance with the law'; Party policy is 'the soul of the law', that through which it is understood and interpreted. At the more popular level, the whole trend of the post-1957 period was summed up in the headline of the *Journal of Political and Legal Studies* published in May, 1958: 'Smash Permanent Rules, Go One Thousand Li in One Day'.[31]

The dominant tone of the period since 1958 has been set by Mao's directives to prevent the so-called restoration of capitalism. These directives, as a Soviet critic points out,[32] 'are free from such concepts as "law", "socialist legality", "rights of citizens" and "awareness of the law". They elevate to the level of a general law, geared to "a hundred years or even centuries", the struggle against the enemies, who constitute—as has been forecast for hundreds of years into the future—5% of the population'. They emphasise, to the exclusion of any recognition of formal characteristics of either law or the State, the role of policy in social life and vacillate between crushing repression directed against enemies and mass campaigns, persuasion and indoctrination in dealing with the people. As the Soviet Orientalist, G. S. Ostroumov, puts it, not unfairly:

> In recent years, the organisation of 'deafening', 'thunderous', and 'sky- and earthshaking' mass campaigns, which inflame unhealthy passions and instincts and take no account of the elementary social standards and

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[27] Jo-Chuan and Ho Fang, 'No Perversion of the Nature of the People's Courts is Allowed', *Jen-min jih-pao*, December 24, 1957.

[28] Here cited from the translation in (1970) 2 *Chinese Law and Government*, no. 2, 3 at 4.

[29] *Op. cit.*, at 7-8.

[30] *Op. cit.*, at 9.

[31] (1958) *Cheng-fa yen-chiu*, no. 5, 58.

[32] G. S. Ostroumov, 'Politico-Juridical Ideology and the Crisis of Political Power in China', (1967) *Sovetskoe gosudarstvo i pravo*, no. 6, transl. in (1969) 1 *Chinese Law and Government*, no. 3, 4.

> citizens' legal interests and rights, has become one of the Mao group's main methods. It is closely linked with another of Mao's typical methods of accomplishing political aims—provocative appeals for the wide-scale expression of different views and criticism, which are followed by massive reprisals.[33]

Classical Marxism, even in its Leninist form, emphasises the hollowness of a political revolution that is not a social revolution, that is not solidly grounded in socio-economic advance. It is fair to say, as the Russians now increasingly insist, that Mao's successes have been hollowly and temporarily political, that each campaign has ended with the threat of chaos and not with new foundations for upbuilding. This is the main reason why the legalists in China have not been decisively defeated, and why some indeed—Teng Hsiao-ping, *e.g.*—are returning to high places in government even now. The failure of the Great Leap Forward and the tacit abandonment of Mao's grandiose conceptions for the communes led, in 1961, 1962 and 1963, to some renewed interest in orderly administration and the legal styles associated with it. The launching of the Great Proletarian Cultural Revolution was, it seems, yet another of Mao's campaigns in reaction to this—an attempt to violate the logic of stability and of economic progress and to smash those associated with it. The Cultural Revolution, with its attempt to elevate the anarchist, Blanquist, Paris Commune strain in Marxism, in its opposition to all forms of specialisation and expertise, had to blur all distinctions. It was preceded by interesting discussions held under the auspices of the Research Department of the Political and Law Association of China, the Institute of Law of the Chinese Academy of Sciences and the editorial department of *Cheng-fa yen-chiu* in May, 1964,[34] in which most of the speakers stressed that there is no theory of law as such but that law is the theory of the State and of political superstructures, though some still maintained that there was both a theory of the State and a theory of law, interdependent as they may be. The trend was by now clearly against the latter. The Cultural Revolution emphasised the mass line, opposition to any specialisation of functions and to any development of departments and bureaux to carry out such functions: it also unleashed considerable violence against their personnel. Thus a Cantonese Red Guard paper attacked P'eng Chen's past emphasis on equality before the law and legal impartiality as denying the necessity to have a class viewpoint over and above that of the law:

> [P'eng Chen and his ilk are in effect denying] the class nature of the law, thus overthrowing the very basis of the dictatorship of the proletariat. Such being the case, the bureau of public security, the procuratory court, the court and the army are no longer the instruments of dictatorship. They become ordinary agencies of administration. . . .
>
> The principle of the law is to fully develop the power of the proletarian dictatorship so that we can attack the enemy more effectively and more accurately, and it may never be used to restrict the functioning of dictatorship.[35]

Those who stress the importance of administration, of trained cadres, of

[33] Ostroumov, *op. cit.*, 8.

[34] A Symposium on the Objects of Legal Study, reported in (1964) *Cheng-fa yen-chiu*, no. 3, 39, transl. in (1969) 1 *Chinese Law and Government*, no. 2, 27.

[35] 'Completely Smash the Feudal, Capitalist and Revisionist Legal System' in *Fan P'eng, Lo hei hsien (Oppose the Black Line of P'eng and Lo)* in a Cantonese Red Guard type newspaper, English transl. in (1970) 2 *Chinese Law and Government*, no. 4, 7 at 9 and 10.

expert knowledge and expert personnel were described as 'negative teachers' who must be removed from the Party and positions of authority; the Party organisation itself was subjected to strong criticism and the previously parallel Party and State organisations were merged to eliminate bureaucratism. While some courts continued to function during the period of the Cultural Revolution, the 'rectification' of Party and State organisations, cultural institutions, *etc.* was carried out by shock troops of *Tsao-fan*, organising struggle meetings, violently attacking and humiliating those suspected of revisionism and operating, with Mao's specific authority, outside the law in respect of all their actions except murders and rapes.[36] The actual work of administration in these conditions was carried out by the new 'three-in-one' revolutionary committees, consisting of representatives of (select portions of) the masses, representatives of the Party and of members of the Army. There is a good deal of evidence that the Army in fact provided the only disciplined cadres carrying out administrative tasks in this period and helping to exempt certain vital State interests—defence industry, nuclear research and the Army itself, as well as military government over such regions as Tibet—from serious disruption by the anarchist trends of the *Tsao-fan*.

The Great Proletarian Cultural Revolution came to a halt, like all of Mao's previous campaigns. It both symbolised and consummated a purge of the bureaucratic-administrative experts emphasising economic upbuilding and of the legalists concerned with stabilising administration and social life. In that sense it represented a real victory for the Maoists in a bitter faction struggle within the Party leadership: what is described as the clique of 'top persons in authority taking the capitalist road' (Liu Shao-chi, P'eng Chen, Pen Te-haui, Lo Jui-ching, Wang Ming, *etc.*) was removed from power and authority, though at the cost of destroying much of the Party organisation and using the Army as the main base for stable government. The victory was formalised in the decisions of the Ninth Party Congress held in 1969, which completely repudiated and reversed the call for stability and legality of the Eighth Party Congress and which adopted a new Constitution of the Party enshrining the position of Mao and the ideology of the Cultural Revolution into a formal document.

Six years later, the lines worked out in 1969 have been stabilised and raised to the level of fundamental, constitutional ideology, as they were in the draft State Constitution of 1970. The anarchism and violence of particular elements in the Great Proletarian Cultural Revolution, it is now said, was a form of ultra-leftism which, objectively, merged with the adventurism of Lin Piao; nevertheless the Great Proletarian Cultural Revolution itself was an essential element in the experience of the Chinese people, strengthening them in their rejection of old styles of working, of bureaucratism, elitism, and legalism. Mao himself, clearly, is no longer in a physical condition to be counted on as a force in Chinese politics, except through the reverence paid to his thought and his past pronouncements (carefully edited and revised though they may have been). The most important difference between the draft State Constitution published in Taiwan in 1970, whose authenticity is now hardly in doubt, and the State Constitution accepted by the Fourth National People's Congress in 1975 is the omission of any reference to Mao as a

[36] The surprisingly large number of which were exposed by the regime in a series of trials after the shock troops had been disbanded by the military.

person holding any formal position in the People's Republic of China,[37] though the Constitution does provide, in Article 15, that 'The Chairman of the Central Committee of the Communist Party of China commands the country's armed forces'. Politically, one may ascribe the remarkably long delay in the adoption of a Constitution first drafted no later than 1970 to uncertainty about the position and life-span of Mao, to the almost incredible affair surrounding his nominated successor Lin Piao, which ended in that leader's death and disgrace, to the consequent jockeying for position and influence in the Party, governmental and military structure, and to the allied attempts to resolve tensions between these structures. Granted that the question of succession has always threatened to precipitate a crisis in Communist states, the Chinese leadership has in fact been remarkably successful in refurbishing the facade of a united front leadership which can guide China into the post-Mao era.

On law and administration, the new State Constitution contains no surprises and no reversals of the lines stabilised in 1969. The limited guarantee of judicial independence is completely removed, the Constitution as a whole is reduced, like the draft Constitution, from the 106 articles enacted in 1954 to 30 articles, virtually all of them substantially rewritten. Chapter II, Section V, dealing with the judicial organs and procuratorial organs, now contains only one article as follows:

Article 25

> The Supreme People's Court, local people's court at various levels and special people's courts exercise judicial authority. The people's courts are responsible and accountable to the people's congresses and their permanent organs at the corresponding levels. The presidents of the people's courts are appointed and subject to removal by the permanent organs of the people's congresses at the corresponding level.
>
> The functions and powers of procuratorial organs are exercised by the organs of public security at various levels.
>
> The mass line must be applied in procuratorial work and in trying cases. In major counter-revolutionary criminal cases the masses should be mobilised for discussion and criticism.

Articles 26, 27, 28 and 29 set out the fundamental rights and duties of citizens which include the duty of supporting the leadership of the Communist Party of China and the socialist system and abiding by the Constitution and laws of the People's Republic as well as the duty of performing military service and defending the motherland. Rights are the right to work and to education, to rest and pension and illness benefits, to complain to organs of State of transgressions of law or neglect of duty by people working in such organs, to freedom of speech, correspondence, the press, assembly, association, procession, demonstration, strike, to believe in religion or not to believe in it and to propagate atheism, to inviolability of homes and to freedom from arrest save by a decision of the people's court or with the sanction of a public security organ.

Articles 1-14 of the Constitution, which comprise Chapter I, 'General Principles', convey the general flavour and present ideology of the regime:

[37] The draft Constitution of 1970 had declared Mao to be 'the Great Leader of all the ethnic groups of China and Head of the State of the Dictatorship of the Proletariat, and Supreme Commander of All the Armed Forces of the country' and Lin Piao 'his dear comrade in arms and successor and Assistant Commander in Chief of All the Armed Forces'.

Article 1

The People's Republic of China is a socialist state of the dictatorship of the proletariat led by the working class and based on the alliance of workers and peasants.

Article 2

The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China.

Marxism-Leninism-Mao Tsetung Thought is the theoretical basis guiding the thinking of our nation.

Article 3

All power in the People's Republic of China belongs to the people. The organs through which the people exercise power are the people's congresses at all levels, with deputies of workers, peasants and soldiers as their main body.

The people's congresses at all levels and all other organs of state practice democratic centralism.

Deputies to the people's congresses at all levels are elected through democratic consultation. The electoral units and electors have the power to supervise the deputies they elect and to replace them at any time according to provisions of law.

Article 4

The People's Republic of China is a unitary multinational state. The areas where regional national autonomy is exercised are all inalienable parts of the People's Republic of China.

All the nationalities are equal. Big-nationality chauvinism and local-nationality chauvinism must be opposed.

All the nationalities have the freedom to use their own spoken and written languages.

Article 5

In the People's Republic of China, there are mainly two kinds of ownership of the means of production at the present stage: socialist ownership by the whole people and socialist collective ownership by working people. The state may allow non-agricultural individual labourers to engage in individual labour involving no exploitation of others, within the limits permitted by law and under unified arrangement by neighbourhood organisations in cities and towns or by production teams in rural people's communes. At the same time, these individual labourers should be guided onto the road of socialist collectivisation step by step.

Article 6

The state sector of the economy is the leading force in the national economy.

All mineral resources and waters as well as the forests, undeveloped land and other resources owned by the state are the property of the whole people.

The state may requisition by purchase, take over for use or nationalise urban and rural land as well as other means of production under conditions prescribed by law.

Article 7

The rural people's commune is an organisation which integrates government administration and economic management.

The economic system of collective ownership in the rural people's communes at the present stage generally takes the form of three-level ownership with the production team at the basic level, that is, ownership by the commune, the production brigade and the production team, with the last as the basic accounting unit.

Provided that the development and absolute predominance of the collective economy of the people's commune are ensured, people's commune members may farm small plots for their personal needs, engage in limited household side-line production, and in pastoral areas keep a small number of livestock for their personal needs.

Article 8

Socialist public property shall be inviolable. The state shall ensure the consolidation and development of the socialist economy and prohibit any person from undermining the socialist economy and the public interest in any way whatsoever.

Article 9

The state applies the socialist principle: 'He who does not work, neither shall he eat' and 'From each according to his ability, to each according to his work'.

The state protects the citizens' right of ownership to their income from work, their savings, their houses, and other means of livelihood.

Article 10

The state applies the principle of grasping revolution, promoting production and other work and preparedness against war; promotes the planned and proportionate development of the socialist economy, taking agriculture as the foundation and industry as the leading factor, and bringing the initiative of both the central and the local authorities into full play; and improves the people's material and cultural life step by step on the basis of the constant growth of social production and consolidates the independence and security of the country.

Article 11

State organisations and state personnel must earnestly study Marxism-Leninism-Mao Tsetung Thought, firmly put proletarian politics in command, combat bureaucracy, maintain close ties with the masses and wholeheartedly serve the people. Cadres at all levels must participate in collective productive labour.

Every organ of state must apply the principle of efficient and simple administration. Its leading body must be a three-in-one combination of of the old, the middle-aged and the young.

Article 12

The proletariat must exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture. Culture and education, literature and art, physical education, health work and scientific research work must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labour.

Article 13

Speaking out freely, airing views fully, holding great debates, and writing big-character posters are new forms of carrying on socialist revolution created by the masses of the people. The state shall ensure to the masses the right to use these forms to create a new political situation in which there are both centralism and democracy, both discipline and freedom,

> both unity of will and personal ease of mind and liveliness, and so help consolidate the leadership of the Communist Party of China over the state and consolidate the dictatorship of the proletariat.
>
> *Article 14*
>
> The state safeguards the socialist system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries.
>
> The state deprives the landlords, rich peasants, reactionary capitalists, and other bad elements of political rights for specified periods of time according to law, and at the same time provides them with the opportunity to earn a living so that they may be reformed through labour and become law-abiding citizens supporting themselves by their own labour.

* * *

Is the *Gemeinschaft*, then, morally superior to the *Gesellschaft*, the 'mass line' better than the rule of law, the people's judge and the people's court more human than persons and institutions acting on the basis of, and in the spirit of, the Common Law? The language of Chinese propaganda and of the new Chinese Constitution has about it a homely simplicity and betrays a seeming concern with the people, and especially with the problem of popular participation in the work of a mass society, which understandably strike responsive chords among those who fear dehumanisation and the loss of control over themselves and their environment in the highly fragmented and specialised society of the West. But the language of the Chinese Constitution is also the language of the seventeenth-century Puritan Divines which led to and made possible the Salem witch trials. Listen to the Reverend Thomas Hooker,[38] a man sincerely beloved by his colleagues and a saint according to his own lights:

> Christ has appointed church-censures as good physic to purge out what is evil. All men are made watchmen over the welfare of their brethren, and by virtue of their consociation and combination have power over each other and a judicial way of process against each other in case of any sinful aberration.

In its complete politicisation of all aspects of human life, in the pervasiveness and the ruthlessness of its pressure on every human individual in a nation or group of nations of more than 800 million persons, the People's Republic of China comes closer to Orwell's *1984* than either Nazi Germany or the U.S.S.R. It is morally superior in its much more sparing use of murder as a weapon of control. But the number of suicides in China both before and after the Revolution, does bring out how intolerable life in a *Gemeinschaft* can be, how inescapable its pressures, how hopeless the outlook for those who seek either to protest or to withdraw. 'One's own shirt', says a Russian proverb, 'is nearest one's back'—we resent and fear our own discomforts and lack imagination for the agony of others, especially, as Hume remarked, if they live in a time or a place or in conditions not at all like our own. We yearn for the *Gemeinschaft* if and because we have never known it.

Those who long for community, of course, wish to dissociate it from the structured, hierarchial, *Gemeinschaft* of feudalism and they do not often mention the comparatively unhierarchical but even more intolerant *Gemeinschaft* of Puritan New England. The history of the Soviet Union and of the People's

[38] As cited in Ludwig Lewisohn, *The Story of American Literature*, New York, 1939, 9.

Republic of China help to remind us that the concept and the reality of *Gemeinschaft* have a logic of their own. So, of course, have the concept and the reality of revolution. Revolutions are about power, not community. It is not by accident that the Chinese theoretical journal *Hongqi* (*The Red Flag*) reminded its readers on 4 February, 1967—in the very hour that the ultra-leftists of the Cultural Revolution were proclaiming the need for communes—that a real revolution is not the act of abolishing all authority, but that of replacing one authority by another:

> Some persons oppose all authority. This is an expression of the inherent bad characteristics of the petty bourgeoisie, an expression of anarchism . . . Engels wrote, 'Have these gentlemen'—the anti-authoritarians—'ever seen a revolution? A revolution is certainly the most authoritarian thing there is. It is an act whereby one part of the population imposes its will upon the other part by means of rifles, bayonets and cannon' . . .[39]

The history of England, like the history of any other country, contains enough examples of cruel and sustained coercion, of judicial injustice and even murder, of the suppression of speech, assembly and the right to sympathise with great causes. Nevertheless, the ideals of the Common Law have been otherwise and it is not preposterous to connect the formation and strength of those ideals with the comparative weakness of thorough-going revolutionary ideology and the comparative absence of genuine revolutionary breaks in England's history.

Even without revolution, however, *Gemeinschaft* is an ideal that necessarily degenerates or carries with it features that are not part of the ideal. The social cement of the *Gesellschaft* is the social and economic interdependence of a host of particular individuals and activities, having their own specific character, and the framework of laws within which these move. The social cement of the *Gemeinschaft* is not provided by some mystical, spontaneous cohesion that springs up in an undifferentiated mass, drawn together as it were by the flare of camp-fires or the rhythm of marching to song. The social cement of the *Gemeinschaft* is religion or ideology, status and hierarchy, expressed, in modern conditions, by the organisation of a disciplined State and Party apparatus, the creation of a centrally-supervised ideology and the placing of 'responsible persons' in all politically significant areas of social life. The Maoist *Gemeinschaft* does not abolish bureaucracy, hierarchy or status—it simply ensures that these, too, shall have no security and no independent power *vis-à-vis* the leader (or leadership) that represents the ultimate and fundamental unity in the collectivity, that is the real and necessary cement that holds together masses not bound by law.

[39] See Eugene Kamenka, 'The Paris Commune and Revolution Today' in Kamenka (ed.), *Paradigm for Revolution? The Paris Commune 1871-1971*, Canberra, 1972, 98-99.