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Cohen: The Criminal Process in the People's Republic of China 1949-1963: An Introduction., and Bodde & Morris: Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases with Historical, Social, and Juridical Commentaries

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RECENT BOOKS

Book Reviews

THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION. By *Jerome A. Cohen.* Cambridge: Harvard University Press. 1968. Pp. xvi, 706. $15.

LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES WITH HISTORICAL, SOCIAL, AND JURIDICAL COMMENTARIES. By *Derke Bodde* and *Clarence Morris.* Cambridge: Harvard University Press. 1967. Pp. ix, 615. $17.50.

I. WESTERN VIEWS OF CHINESE LAW: PREFACE TO A REVIEW ARTICLE

Until quite recently, the study of Chinese law has been greatly neglected in the West. While no one doubted the importance of such studies, practical barriers were imposed by the time and effort necessary to master both the discipline of law and the intricacies of the Chinese language and culture, and by the orientation of many lawyers and law schools toward the practice of law. As a result, the quantity and quality of scholarly activity in this area has been limited.

Many of the earlier works on Chinese law suffer from a combination of what may be called the "sinologist syndrome" and the "Mystical East syndrome." The first of these ailments tends to afflict scholars who are skilled in the Chinese language, but are untrained in law. They often pursue lines of inquiry that are not of particular interest to lawyers, or fail to pursue what lawyers might consider to be vital. Moreover, since the training of these scholars is very much in the classical Chinese mode, their attitudes and ideas follow closely those of the traditional literati class in China; thus in their discussions of law, they often merely repeat the Confucian clichés which described a legal theory and a legal system that probably never actually existed. The divergence between theory and practice exists, of course, in every society, including our own. In the Chinese context, however, where the cultural gap between the high and low levels of society is especially pronounced and where form so often prevails over substance, knowledge of only the theory may be more of a hindrance than an aid to understanding.

The "Mystical East syndrome" is harder to describe, although it probably affects all students of Chinese affairs to some degree.[1]

1. While directed principally at works by Western scholars, these remarks also apply, in a slightly different form, to works by Chinese scholars. All too frequently one finds that Chinese legal writings are very much out of touch with reality. This is due, in some cases, to the fact that the writer is a product of the Confucian tradition, and thus speaks of law in the usual tiresome Confucian categories and clichés. In other cases, the writers are Western trained "law reformers" bent on "modernizing" Chinese law. They strive for adoption of Western legal theories, institutions and codes, and give little thought to the feasibility of imposing a Western structure on the Chinese culture and environment.

Under its influence, even highly trained and perceptive scholars often apply less vigorous standards of analysis and proof when dealing with Chinese matters than when dealing with Western problems. In part, this approach reflects the frustration of having so little data and the difficulty of obtaining more information; it also reflects the laudable desire to guard against Western ethnocentricity. Sometimes, however, an element of intellectual laziness and confusion also seems to be involved. The East seems mysterious and the mind of the Oriental hard to fathom; hence, one is tempted to "accept" various allegations and explanations rather than submit them to diligent investigation and careful analysis.

A significant step toward bridging the separation between Chinese studies and legal scholarship was taken in 1959 when Professor Derk Bodde, a noted sinologist, and Professor Clarence Morris, a legal scholar of high repute, joined forces at the University of Pennsylvania. Soon thereafter, Professor Jerome Cohen, then a teacher of American law at the University of California Law School at Berkeley carried the process one step further when he undertook the study of Chinese and Chinese law. Since the pioneering efforts of these scholars less than a decade ago, over ten law schools have offered or are now offering a course in Chinese law on a regular basis. Interest in Chinese law undoubtedly will continue to grow as interest in China increases.

The study of a major social institution such as the legal system reveals a great deal about Chinese life and thought, both traditional and contemporary. On a more pragmatic level, direct contacts with the People's Republic of China probably will develop in the near future. When that time comes, we must be prepared not only to deal with China on the international plane, but also to handle the problems that will arise in the course of trade and of exchanging visitors and diplomatic personnel. Lastly, the inclusion of comparative courses such as Chinese Law in the law school curriculum is valuable both as a "consciousness expander" and as a tool for examining many aspects of our own legal system.

In recent years, a considerable number of articles and books concerning Chinese law have been published, although these are again of varying quality. The books range from translations of Chinese statutory material,[2] Chinese legal treatises,[3] and Soviet

2. FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA (A. Blaustein, ed. 1962). In addition, there are numerous assorted translations by the Peking Foreign Languages Press and the Joint Publications Research Service (JPRS) and in the *Survey of the China Mainland Press* (SCMP). Excellent translations of the laws of the Republic of China can be found in LAW REVISION PLANNING GROUP, COUNCIL ON UNITED STATES AID, THE EXECUTIVE YUAN, THE REPUBLIC OF CHINA, LAWS OF THE REPUBLIC OF CHINA (First and Second Series; Taipei 1961), and in KANG CHI-CH'AO, A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA (1967).

3. CHUNG-HUA JEN-MIN KUNG-HO-KUO HSING-FA TSUNG-TSE CHIANG-YI [Lectures on the

treatises on the Chinese legal system,[4] to bibliographical studies,[5] studies of law and the legal process,[6] and studies of matters related to law.[7] Chinese legal scholarship in the West has perhaps finally come of age with the publication of the two volume *Law in Imperial China*, by Professors Bodde and Morris, and Professor Cohen's *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction.* For law teachers and students, these two books provide the first set of well-organized and thought-provoking teaching materials to cover a wide range of subject matter in the area of law and social control. For scholars in other disciplines who are involved in Chinese studies, these books are basic and indispensable sources of data and ideas. They effectively demonstrate the relevance and usefulness of legal studies to research in every other social science.

II. The Methodology of Studying the Chinese Legal System

Despite its modest title, Professor Cohen's book is a work of imposing size, both physically and intellectually.[8] With painstaking thoroughness and care, he has sifted through an enormous quantity of materials and has distilled from them the essentials of the system of criminal law in the People's Republic of China. If only for the molding of chaos into a coherent structure, this book would be a remarkable work. More significantly, however, Professor Cohen has raised the level of discussion and thinking far above the hitherto common recitals of organizational charts of the various legal insti-

general principles of criminal law in the People's Republic of China] (Teaching and Research Office for Criminal Law of the Central Political-Legal Cadres School ed. Peking 1957); CHUNG-HUA JEN-MIN KUNG-HO-KUO MIN-FA CHI-PEN WEN-T'I [Basic problems in the civil law of the People's Republic of China] (Institute of Civil Law of the Central Political-Legal Cadres School ed. Peking 1958).

4. V. CHUGUNOV, CRIMINAL COURT PROCEDURES IN THE PEOPLE'S REPUBLIC OF CHINA (Moscow 1959), translated in JPRS no. 4595 (Washington, D.C.: U.S. Department of Commerce, Office of Technical Services 1961); L. GUDOSHNIKOV, LEGAL ORGANS OF THE PEOPLE'S REPUBLIC OF CHINA (Moscow 1957), translated in JPRS no. 1698N (Washington, D.C. 1959).

5. T. HSIA, SELECTED LEGAL SOURCES OF MAINLAND CHINA (1967); F. LIN, CHINESE LAW PAST AND PRESENT (1966).

6. T. CH'Ü, LAW AND SOCIETY IN TRADITIONAL CHINA (Paris 1961); T. CH'Ü, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING (1962); S. VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA, A SOCIOLOGICAL ANALYSIS (1962).

7. D. BARNETT, CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA (1967); W. HINTON, FANSHEN, A DOCUMENTARY OF REVOLUTION IN A CHINESE VILLAGE (1966); K. HSIAO, RURAL CHINA (1960); R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961); F. SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA (1966).

8. The casual reader ought to be warned that this book is intended primarily to be a set of teaching and reference materials. Only the long introductory essay presents a digested and synthesized description of the Chinese legal system. The bulk of the book consists of several hundred items arranged by subject matter, together with explanatory notes and questions—an ideal set-up for classroom purposes, although not for bedtime reading.

tutions. He has established the approach and methodology, described the basic principles and movements in the Chinese legal system, and identified the crucial issues and problems. Subsequent writers may agree or disagree with him, and may expand or improve on his work; all, however, will use his ideas and his formulations as the starting point. Thus, in a very real sense, subsequent works on Communist Chinese law will be outgrowths of Professor Cohen's work.

Implicit in Professor Cohen's approach is the concept that the criminal justice system is a complex process that cannot be adequately described or explained merely by summarizing the "legal rules," paraphrasing a country's constitution, or by discussing the organizational structure of the courts. The shaping and controlling of conduct is founded first of all upon the values and attitudes of the people—and in China these values may range from a desire for peace and orderliness, or a belief in the "mass line" ideal, to an almost fanatical striving for accuracy and correctness. In the numerous case studies presented in this book, such values and attitudes are brought out clearly and forcefully. In addition, conduct always takes place within a particular social framework, and is in turn greatly affected by the shape and content of that framework. In recognition of this fact, Professor Cohen devotes over a hundred pages to a detailed examination of the informal controls and sanctions available to the quasi-governmental neighborhood structure.

The work of the police, particularly the meting out of "administrative" (as opposed to "criminal") sanctions, is also closely studied. In every society the great bulk of the work of controlling antisocial conduct is handled by the police; typically only a few incidents penetrate through to the public prosecutors and the courts.[9] Moreover, the quality of police investigation determines to a considerable degree the final outcome of the cases that do reach the courts. In China, these considerations take on added significance since the police not only tend to dominate the courts, but also have the power to impose sanctions ranging up to three years of "rehabilitation through labor"—a kind of forced labor. Finally, the trial and sentencing processes and the means of obtaining post-conviction relief are examined, and there is a particularly interesting chapter on the rehabilitation of criminals through "thought reform."

Throughout this study, there is a realization that actual practice may differ a great deal from the theoretical model, and that it is vitally important to know both what is claimed and what is in fact done. For example, the Constitution of the People's Republic establishes a judiciary and a court structure with which a Western lawyer would feel quite at home. Professor Cohen's discussion of judicial independence, however, raises questions not only as to

9. *See generally* J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).

whether the courts are free of political influence, but also as to whether the courts even make any decisions. Indeed, it sometimes appears that the courts merely act as forums for announcing decisions made previously by other bodies.

Professor Cohen uses a variety of materials to depict the Chinese legal system. These include published statutes, regulations, and directives, articles from Chinese "law reviews," journals, and newspapers, and writings by Western observers. He also relies heavily upon interviews with former Chinese residents who were involved with the legal process either as administrators or as litigants. The necessity of using refugee informants is due to the difficulty of obtaining information—China guards its data outlets jealously—and to the fact that we cannot visit the country. There are simply not enough of the usual "legal" sources to give a complete and accurate picture of the legal system in contemporary China. In addition, even where published sources are available, we cannot be sure that they are reliable. In Chinese society, as in our own, there is considerable divergence between law as theoretically envisioned and law as in fact practiced. Thus, the use of interviews with actual participants in the legal process not only supplements the published data, but also acts as a check upon it.

I have no difficulty accepting the use of refugee interviews as a legitimate and valuable source of information about China. While it cannot be disputed that interviewing presents many serious risks of distortions caused by bias or inaccuracy,[10] I believe that by diligent questioning and careful choice of subject matter these distortions can be reduced to an acceptable level. By the same token, I must reluctantly conclude that it is probably impossible for a researcher to convince someone else of the validity of his interviewing data. All one can do is say: "After processing this information through my mind and applying my knowledge and expertise, I believe that it is accurate."

There are, nonetheless, several methodological suggestions I can offer that would make the interviewing materials easier to use. It is often difficult to evaluate the worth and accuracy of some of the interviews because one is unfamiliar with the interviewee. Has he been proved correct or incorrect on other occasions? Does he appear generally experienced and knowledgeable? Are his eyes shifty? It is hardly possible to tell the reader enough about each interviewee so that he can judge the subject's veracity and reliability for himself; but some description of background, work experience, and even personal characteristics could be included for the major inter-

10. *See generally* Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, 20 J. LEGAL ED. 33 (1967).

viewees.[11] Perhaps a rating system could be established, ranging from "very reliable" to "somewhat questionable"—presumably any interviews with subjects falling below this level of credibility have been discarded. The interviewer can then indicate how each particular interviewee ranks on this scale.

It would also be helpful if all the interviews given by one subject were identified as such. This would allow the reader a greater opportunity to form judgments about the character and reliability of each interviewee, and to find patterns that may arise in the course of his interviews. Extending this process one step further, a common identification system should be worked out with other scholars who also rely on refugee interviews.[12] Since many scholars are engaged in such interviewing, there are a number of instances in which the same refugee has been interviewed by many investigators. It is important for readers to know that information repeated in different books by different authors in fact comes from a single source.

III. The Development of Criminal Law in Post-Revolutionary China

In trying to describe and characterize the legal system, particularly the criminal justice system, of the People's Republic of China, the author has avoided several pitfalls. One should not fasten upon a few instances of arbitrariness and generalize to the conclusion that "there is no law in Communist China." Indeed, Professor Cohen's work demonstrates that despite some deviations and aberrations, there is a regular and rational system of law in China, although it is a system very different from our own.

Without doubt, there were and still are many instances of injustice and excessive cruelty under the Communist regime. A notable example is the Land Reform period of 1949-1951, during which time many persons were killed or imprisoned and their property confiscated in proceedings that can be described only as kangaroo courts and mockeries of justice. Many of the extremely unfavorable comments by anticommunist writers with strong views on law—or rather, on the lack of law—in China stem from occurrences during this period. Similarly, even after the frenzy of the initial post-revolutionary years had subsided, there were periodic retrogressions into capriciousness and excess. During the frequent ideological

11. I realize that this may result in "identifying" the interviewee, something all interviewers have promised not to do. Nevertheless, it seems to me that enough of the essential facts can be changed (*e.g.*, the place where he comes from) to afford an adequate degree of anonymity without unduly distorting the description of the person. In addition, I think that the need for anonymity is greatly overrated. I have no doubt that the identities of all persons who are interviewed at length by American scholars in Hong Kong are well known.

12. *See, e.g.*, D. Barnett, *supra* note 7.

campaigns, frenzy again took hold, and sanctions were meted out without regard for the most basic safeguards.

Such deviations, however, must be viewed in their proper perspective. The takeover by the Communists in 1949 was the climax of a true revolution, with a complete change in the political and social order. As Chairman Mao Tse-tung so cogently stated: "A revolution is not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained and magnanimous. A revolution is an insurrection, an act of violence by which one class overthrows another."[13] Some countries have had revolutions occur in a gradual and relatively peaceful manner. Others, such as France and the Soviet Union, were less fortunate, and considerable violence accompanied the overthrow of the former regimes. Given the Chinese situation in the first half of this century, there was no reason to expect that a peaceful takeover would be possible. From the collapse of the Nationalist-Communist coalition in 1926, when Chiang Kai-shek's attacks on the Communists reduced Party membership from 58,000 to 10,000, the seeds of violence were sown.[14] They were nurtured by Chiang's encirclement and annihilation campaigns of the early 1930's, which reduced Communist Party membership from 300,000 to a mere 40,000,[15] and by the barbarisms of the Second World War. Thus it was no surprise that the Communist victory of 1949 was accompanied by a desire for revenge and a resolve to eradicate the enemy class.

I am by no means trying to justify the actions of the Communists during the Land Reform period. Such actions can be viewed only with shame and sadness. I do say, however, that the attack on an enemy class of several decades' standing—an enemy that was often no less cruel and ruthless than the Communists themselves—is the kind of action that is likely to occur only once during a revolution. To seize upon what happened during Land Reform and suggest that this kind of "revolutionary justice" continued into the late 1950's and beyond would be quite erroneous. Having repaid the "blood debts," and having dismantled the old system, the regime turned from the work of destruction to the work of nation-building. With the shift in goals and motivations came a change in the functioning of the legal system. It became less of an instrument to suppress the enemy and more of a tool to help the people; efficient operation of the system and fairness to the participants became important concerns. As Liu Shao-ch'i described the process:

13. Mao Tse-tung, *Report on an Investigation of the Peasant Movement in Hunan*, 1 SELECTED WORKS 28 (Peking 1965).

14. F. SCHURMANN, *supra* note 7, at 129.

15. *Id.*

> During [the early days after the liberation of the country], 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 organization or any individual.[16]

In like manner, I think that the aberrations which have occurred during the various ideological campaigns must be viewed in the light of their particular circumstances. The People's Republic of China has been in existence for less than twenty years, and is still quite insecure. There was and still is a pervasive fear of threats from without by the foreign enemies whose troops ring China, and of threats from within by those who would turn the revolution from what the leaders conceive to be its true path. These fears may or may not be justified, but they are very real. The feeling of insecurity often leads to hasty and violent action, which usually takes the form of biennial rectification campaigns during which the normal rules are abrogated. The United States is not unfamiliar with such phenomena; witness our confinement of the Nisei during World War II, and some of the extremist statements being made today concerning the handling of urban riots. The point is that during times of stress, societies as well as individuals act in strange ways. While these actions are important and cannot be ignored, they should not be used as the basis for a general description of the legal system during normal periods. The dreaded midnight knock on the door still takes place in China; nevertheless, we must remember that such acts constitute only a small part of the total operation of the legal system.

Keeping these thoughts in mind, one can divide the development of the Communist Chinese legal system into two distinct periods. From the takeover in 1949 until the antirightist movement in 1957, there was a continuous though irregular attempt to develop a formal legal system. Article 17 of the Common Program abolished all of

16. Liu Shao-ch'i, *The Political Report of the Central Commitee of the Communist Party of China to the Eighth National Congress of the Party*, 1 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 82 (Peking, 1956).

the "laws, decrees and judicial systems of the Kuomintang reactionary government"[17] but, in fact, many of the Kuomintang (KMT) judicial and police organs together with many of the KMT personnel were retained by the Communists after Liberation. The organs were useful and necessary instruments of administration, and could be converted with relative ease to serve the goals of the new regime. Some of the old personnel were needed to operate these organs, since they possessed technical skills and specialized knowledge which the Communist cadres had not acquired. Care was taken, however, to assure that the work of such personnel was closely supervised.

Beginning in 1950 and culminating in the constitutional and organic enactments of 1954, a judiciary and a procuracy patterned after the Soviet models were established.[18] At the same time, a number of laws were enacted. These were usually of a "revolutionary" nature, such as the Land Reform Law[19] and the Marriage Law,[20] or of a propagandistic nature, such as the Labor Law and the Labor Insurance Law.[21] In addition, there were promulgated several statutes dealing with control of criminal activity, and a large number of economic regulations directed at those enterprises that were still privately owned.

Throughout the period from 1949 to 1957, there was a belief in China that a viable legal system and strict adherence to the rules were necessary for the proper functioning of the country.[22] This was increasingly true as the danger of counterrevolutionary activity declined and society began to return to normal. Many attempts were made to regularize court procedures and police practices. Work was begun on a criminal code, for example, and a draft of this code was circulated for study at the 1956 National People's Congress.[23] There were indications that a code of criminal procedure and a civil code were also on the way. Law schools were established, and the work of lawyers was praised and promoted.[24] Civil litigation became more popular; this was perhaps a reflection of the people's feeling of con-

17. A. BLAUSTEIN, *supra* note 2, at 41.

18. S. LENG, JUSTICE IN COMMUNIST CHINA 77-119 (1967).

19. AGRARIAN REFORM LAW OF THE PEOPLE'S REPUBLIC OF CHINA TOGETHER WITH OTHER RELEVANT DOCUMENTS (4th ed. Peking 1953).

20. Reprinted in A. BLAUSTEIN, *supra* note 2, at 266.

21. IMPORTANT LABOUR LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (enlarged ed., Peking 1961).

22. *See, e.g.*, the speech by Tung Pi-wu, President of the Supreme People's Court: "[L]aw must be complied with. All laws and regulations, once enacted, must be strictly enforced and complied with. All judicial organs, in particular, should strictly abide by them and are absolutely forbidden to violate them." *Speech by Comrade Tung Pi-wu*, 2 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 95 (Peking 1956).

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

24. J. COHEN 12, 439 (item 202).

fidence in the courts, as well as their belief that the courts were proper places for the resolution of disputes.

A fundamental change in attitude toward law took place, however, with the onset of the antirightist movement and the Great Leap Forward. There was no official declaration of this change, but after 1957 the prestige and activity of the courts and the legal profession declined drastically. The entire legal system moved toward greater informality, with emphasis placed on handling cases "according to the concrete situation" rather than "according to law." There was no further mention of the proposed criminal and civil codes. Instead, the new line became: "Those who advocate the writing of law codes do not consider what our country actually needs. They insist on producing subjectively and formally, a so-called complete system which amounts actually to reducing our laws to a rigid system. Thus, this view does not accord with the spirit of permament revolution."[25] This desire for flexibility and fear of being bound by written words persist down to the present day, and most likely will continue for some time.

IV. Some Proposals for Further Study

There are a number of places where one might disagree with Professor Cohen's treatment of the Chinese criminal process. Most of these involve minor differences of facts or interpretations, and are too unimportant to deserve comment. However, there are several items of a more substantial and substantive nature where discussion would be useful. In making these comments, I am not trying to "prove" or "disprove" any particular sets of facts or interpretations. I do not believe—and I think all who have worked in this field would agree—that we are far enough advanced in the study of

25. *Several Problems Relating to the Legal System of the Chinese People's Democracy*, Cheng-fa yen-chiu [Political-Legal Research] No. 2 (Peking, 1959), translated in JPRS no. 1858N, quoted by Stahnke, *supra* note 23, at 507. *Cf.* a 6th Century, B.C., criticism of the promulgation of an early criminal code:

> [The ancient kings] taught the people [the principles of] sincerity, urged them by [discriminations of] conduct, instructed them in what was most important, called for their services in a spirit of harmony, came before them in a spirit of reverence, met exigencies with vigor, and gave their decisions with firmness. . . . In this way the people could be successfully dealt with, and miseries and disorder be prevented from arising.
>
> When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express words, hoping peradventure to be successful in their argument. They can no longer be managed.

Tso Chuan, in 5 The Chinese Classics 609 (J. Legge transl. 1960). *Cf.* also a "Western" attitude toward law as spoken by Sir Thomas More in the play *A Man for All Seasons*:

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?

R. Bolt, A Man for All Seasons 66 (1960).

law in China to state anything more than tentative conclusions which must be subject to revision as more work is done. I hope here only to offer some suggestions for further work and further thought.

I would have liked to have seen, for example, a more extensive discussion of the personnel that operate the various legal institutions. In the legal system as well as in other fields, China has only a limited number of skilled and qualified workers; thus, conscious decisions must be made as to the allocation of training resources and the assignment of trained personnel. These decisions help explain many features of the operation of the legal system and the interrelations of the various organs engaged in legal work. For instance, it appears that the police received the highest priority on personnel, and were assigned large numbers of the best people. As a result, the police took on a particularly large portion of the legal work, and also tended to have considerable influence over the procuracy and the courts. The procuracy, on the other hand, seemed to be very low on the priority list, and this lack of capable personnel may explain why it did hardly any work at all. The legal profession probably had the lowest priority; indeed, one did not need any legal training to become a lawyer. It is not surprising, therefore, that the "people's lawyers" resembled lobbyist-scribes more than practicing attorneys.

Without going into too great detail, one illustration of the problems of personnel might be helpful. During the 1952 judicial reform campaign, many of the former Kuomintang judges who had been kept on after Liberation were purged. They were replaced by persons selected for their ideological purity or for past services rendered rather than for ability to handle judicial work. Very few of the new judges had any legal training; indeed, one is tempted to question not their legal skill, but their literacy. The following item by a county court judge is representative of a number of similar articles that appeared at that time:

> I studied only three years at a primary school, and never read anything called *The Complete Book of the Six Laws*. While in the old society, I did not know what law was. Since I started working, for a long period of time I have been employed in the village, and therefore I have seldom heard the term "court of law."
>
> In 1949 my superiors transferred me to judicial work. In the beginning I was afraid that I would be unable to fulfill my duties because I had no knowledge of law. Later, after being repeatedly mobilized by my superiors, I eventually straightened out my thoughts.[26]

I am sure that the author of this excerpt intended his article to show how a lowly person could rise to an eminent position in the new

26. Cheng Kuang, *Preliminary Scouting of My Old Law Viewpoints*, Kuang-ming Daily, Sept. 1952.

society through diligent effort. An outside observer must wonder, however, how such a man could ever handle a judge's work. In view of the personnel of the judiciary, is it any surprise that the Chinese legal system is very simple? Is it not quite natural that the police would come to dominate the judiciary, and that the influence and role of the courts would drastically decline?

I feel that the most serious difficulty with Professor Cohen's description of the Chinese legal system is that the treatment is too neat and orderly. We are presented with a series of statutes and other promulgations which create various legal and quasi-legal bodies, define criminal conduct, prescribe sanctions for offenses, and describe the processes by which offenders are to be handled. Following the statutes are materials which illustrate in detail how each provision works. After carefully going through these materials, one feels that he has a fairly good idea of how each statute—and even the entire criminal process—operates. Given a particular fact situation, one thinks he knows what rules would apply.

But how much do these statutes and promulgations really tell us about what will happen? As Professor Cohen states, and as other interviews bear out, both the substantive and the procedural provisions of the statutes are ignored quite frequently. In addition, these statutes deal only with certain limited areas of law, and little is said about many other important matters. For example, the common crimes are nowhere defined. Even in the areas covered by the statutes, the proper disposition of a case is not always clear. The statutes usually consist of a series of very minute and limited provisions, with a broad catch-all clause at the end.[27] Thus, unless the facts happen to fit one of the specific provisions exactly, the administrator has considerable leeway in deciding what actions to take.

V. A Model of the Chinese Criminal Justice System

Students of contemporary China are just beginning to recover from the surprise of the Cultural Revolution. Obviously, they are also undertaking to reformulate their models of pre-Cultural Revolution China in the light of what has been happening during the past three years. Along this line, let me suggest a model for the Chinese legal process that differs somewhat from that offered by Professor Cohen, although admittedly the difference is only one of degree and not one of kind. Although I will refer mainly to the post-1957 period,

27. *E.g.*, Security Administration Punishment Act art. 31 (1957) (reprinted in J. Cohen 220):

> Acts which violate security administration but which are not enumerated in this Act may, by comparison with the most similar [acts enumerated in the] clauses of Articles 5 to 15 of this Act, be punished by city or county public security bureaus. However, such action shall be subject to the approval of the city or county people's council.

I also believe that much of what I say applies in principle even to the earlier years.

The Chinese legal system can be characterized as one where great discretion—almost unbridled discretion—deliberately and knowingly is given to the administrators at the local levels. The published regulations and directives that filter down from the higher to the lower levels are few in number, and in general contain only broad guidelines for action. For example, a local administrator would be hard put to know how to handle many of the counterrevolutionary cases merely from studying the "Act of the People's Republic of China for Punishment of Counter-revolution."[28] While this act purports to cover all counterrevolutionary crimes, in fact it deals only with the most serious ones. It contains no discussion of the lesser kinds of counterrevolutionary activity such as the fairly common offense of "sabotage of production." In addition, many of the terms in the statute are quite vague: What kinds of activity would be encompassed by the phrases "provoking dissension . . . between the people and the government" and "conducting counter-revolutionary propaganda and agitation"?[29]

A person trying to administer the Security Administration Punishment Act (SAPA)[30]—a kind of misdemeanor law—would encounter similar problems. There are many minor infractions, such as invasion of privacy, that are not covered by SAPA. As before, the provisions are very specific and limited: Article 9(8) provides for detention of up to five days for "struggling to be first to board a ferry, in disregard of an order to stop, or coercing a ferry pilot to overload in the course of providing ferry service."[31] There are also problems of interpreting the statutory language. What do "gang fighting"[32] and "beating up others"[33] mean? At what point do such acts become criminal offenses rather than mere violations of security administration?

Interviews indicate that there is also a considerable number of internal directives to supplement the published materials, but we do not know much about the contents of these directives. As best I can find out at this time, they are very similar in style to the published directives. They contain some very broad guidelines, a list of very specific precepts, and an exhortation to work diligently and conscientiously.

Thus it appears that the low-level administrators, the men who

28. Reprinted in J. COHEN 298-307.
29. Act of the People's Republic of China for Punishment of Counterrevolution arts. 10(2), 10(3) (reprinted in J. COHEN 301).
30. Reprinted in J. COHEN 200-37.
31. *Id.* at 217.
32. SAPA art.5(1) (J. COHEN 214).
33. SAPA art. 10(2) (J. COHEN 217).

must actually handle specific cases, are not given much guidance on what to do; the directives they receive are at once too broad and too narrow. A great deal of discretion must be exercised in applying the broad principles, expanding by analogy the specific precepts and interpreting the vague language. It seems to me that the central authorities probably created this local discretion intentionally, and that the directives are not designed to be anything more than general exhortations plus some suggested examples of what might be done. This view is supported by the fact that although there are many examples of overt departures from the rules stated in the directives, these departures are seldom criticized.[34] There are a variety of possible reasons for this: a recognition that a single unified system of law would not be feasible in China given the great diversity in economic and social conditions; a commitment to the guerilla-band ideal in which local groups took care of all local problems with a minimum of participation by the central authorities; a preoccupation by the higher levels of government with more important political, economic, and social problems; or, even a disdain on the part of higher level officials to become involved in the dirty and humdrum business of maintaining public order. Whatever the cause, the result is that the higher levels of government participate only minimally in the work of handling ordinary criminal activity; the bulk of this work, along with the responsibility and the power, is left to the local officials.

Of course, the local officials must report regularly to their superiors, but in the finest Chinese tradition, the superiors do not act if peace prevails in the local district. Typically, they interfere only when compelled to do so by the importance or notoriety of a particular case. Supervision of the local administrators is conducted by officials of the same level: the police, procuracy, and court check on each other, and the Party keeps an eye on everyone. The procuracy was originally designed to provide an independent check by the central authorities on local activities, but, as indicated earlier, the procuracy appears to do very little of anything. The Ministry of Supervision might also have served this function, but it was abolished in 1959,[35] and even before then its subordinate supervision committees tended to be dominated by local forces.

One consequence of this enhancement of local autonomy is that there is a blurring of the clear separation of functions. In effect, the entire local officialdom is responsible for all the affairs of the local area. They check on each other's work and render assistance to each

34. *E.g.*, the approval by the city or county people's council required under SAPA art. 31 (*supra* note 27) before a crime-by-analogy may be punished is often simply never requested or obtained, and no criticism is made.

35. F. SCHURMANN, *supra* note 7, at 315-21.

other whenever necessary. By the same token, complaints against officials and official actions are handled locally. An aggrieved individual would not appeal to higher level authorities, since that probably would be both risky and fruitless; instead, he would seek relief by approaching any of a number of low-level officials who participate in the local decision-making processes.

I have little doubt that the local officials originally welcomed the grant of discretion. Not only were their power and freedom increased, but also they became less vulnerable to charges of improper performance of duty. So long as clear rules exist, any failure to adhere to them is easily spotted and criticized. There is much more room for argument and maneuvering, however, when the criterion is whether or not one has properly exercised his discretion.

The effect of accepting this model can be illustrated in part by re-examining the roles of three administrative punishments: reprimand or detention under SAPA, rehabilitation through labor,[36] and supervised labor, a sanction under which one continues to live at home and work at his regular job, but must be on exceptionally good behavior and must undertake extra work assignments which usually consist of all the dirty details around the neighborhood, such as cleaning the public lavatories or collecting fuel.[37] Professor Cohen suggests that SAPA is used to handle minor infractions and rehabilitation through labor for important offenses. But he seems to feel that supervised labor plays only a limited role, usually involving the control of vagrants and other unsavory elements who have not committed any specific offense.

A good case can be made, however, for the proposition that supervised labor has emerged as the major administrative punishment, taking over most of the functions of the other two sanctions. SAPA, rehabilitation through labor, and supervised labor have several common characteristics: they enable the police to impose punishments, often severe ones, without procuratorial or judicial participation, and thus they give local authorities a considerable amount of power. Supervised labor, however, is by far the most flexible of the three. There are only slight limitations on the kinds of undesirable conduct against which it may be directed, or on the quantity or type of punishments that may be imposed. A person who is in disfavor with the local police or other local officials for any reason can be placed under supervised labor, and can receive a punishment tailored to his particular case. Moreover, supervised labor can be imposed without citing specific statutory provisions or following certain procedural requirements, such as submitting the case to higher authorities for review. Indeed, a person may be placed under close scrutiny and told

36. *See* p. 182 *supra.*
37. J. COHEN 286-95.

to do extra work without having been formally declared to be under supervised labor. This flexibility not only reduces paper work and lessens the chance of interference by higher authorities, but also gives the local administrator greater protection against possible charges of malfeasance.

Before leaving the subject of criminal law in the People's Republic of China, several observations should be made. First of all, for whatever faults the Chinese legal system may have, and it has many, it nevertheless seems to work quite well. For most of the people most of the time, it provides an adequate degree of order, security, and protection. Breakdowns which occur periodically in Chinese society are due primarily to failures in the political process rather than to shortcomings in the legal process. Second, despite our political and ideological differences, we can learn a great deal from some of the things the Chinese do. One of the greatest achievements of the present Chinese regime, for example, is that despite limited resources and communications difficulties, it has managed to get its message across to a huge, backward population. While I do not suggest that we emulate the People's Republic by mounting loudspeakers on every street corner, we would do well at least to ask whether the Chinese have developed techniques which we might adopt for reaching some of the alienated segments of our population. Similarly, one of our most serious problems is the breakdown of communications and rapport between the power structures and the people. There are few feelings of helplessness more acute than that felt by an individual who tries to penetrate a faceless and indifferent bureaucracy. The Chinese have been quite successful in keeping their bureaucracy accessible and responsive to the people. Perhaps New York's "little city halls" and Puerto Rico's "complaint night"[38] are steps toward developing an institution like the "people's reception," but we have a long way to go before we can feel satisfied with our system.

VI. The Significance of Chinese Legal History

Law in Imperial China examines the formal legal system that existed in China before the establishment of a republican government in 1911. It deals primarily with the early nineteenth century, but given the relatively static nature of the traditional Chinese legal system, the descriptions probably also apply to the T'ang, Sung, and Ming dynasties with a high degree of accuracy.[39] While my own

38. *See* N.Y. Times, Nov. 19, 1967, at 35, col. 3.

39. A. Hulsewe, Remnants of Han Law (Leiden, 1955); J. Needham, 2 Science and Civilisation in China (1956); T'ang-yin-pi-shih, "Parallel Cases From Under the Pear-tree," A 13th-Century Manual of Jurisprudence and Detection (R. van Gulik, tr., Leiden 1956); *The "Hsi Yüan Lu" or Instructions to Coroners*, 17 Proceedings of

interest is contemporary China, I must admit a great deal of pleasure in seeing work done on Chinese legal history. The growing public and scholarly interest in the People's Republic of China is perfectly understandable in view of the current world situation. It would be regrettable, however, if the concentration on the current situation results in the neglect of the events and conditions which led to the formulation of the present system.

Indeed, the gradual and general demise of the study of legal history in law schools throughout this country is unfortunate. The production of lawyers who have only scant knowledge of their "professional cultures" threatens a proliferation of mere legal technicians. The study of legal history is even more important in the Chinese context. In speaking of Chinese legal history or imperial law, we are discussing a system that operated as recently as half a century ago, instead of dealing with obscure writs which existed half a millennium ago and are of interest today mainly as curiosities. Mao Tse-tung, Chiang Kai-shek, and all of the other revolutionaries wanted to overturn the old system and establish a new one, but they were not writing on a completely blank slate after the fall of the Ch'ing dynasty. These men, after all, were themselves products of the old system.[40] Their world view was very much affected by the events of the nineteenth century; their methods and categories of thought were greatly influenced by their early education under the imperial system and by the omnipresent influence of the Chinese cultural tradition. It is only by examining the old order that we can come to understand what the revolutionaries wanted to change, how they thought the change might be accomplished, and what they envisioned as the ideal new system.

A significant proportion of the ideas and institutions that exist in the People's Republic of China today is a direct or indirect product of the old system. Some concepts are reactions against real or imagined deficiencies in the old system, as, for example, the insistence upon mass participation, the distrust of bureaucrats and intellectuals, and the belief in the curative and reformatory effects of physical labor. Other contemporary notions, however, are simply continuations of traditional concepts and methods under a new form and new ideology: the reliance upon a small elite group, the vast capacity for bureaucratic government, and the use of behavior models as a principal means of defining and teaching proper conduct all have antecedents that are deeply rooted in the Chinese past. Per-

THE ROYAL SOCIETY OF MEDICINE 59-107 (H. Giles, tr., 1924); G. STAUNTON, TA TSING LEU LEE; BEING THE FUNDAMENTAL LAWS, AND A SELECTION FROM THE SUPPLEMENTARY STATUTES, OF THE PENAL CODE OF CHINA (London 1810).

40. For biographical studies, *see* J. CHEN, MAO AND THE CHINESE REVOLUTION (1967); S. SCHRAM, MAO TSE-TUNG (1966). *See also* B. SCHWARTZ, CHINESE COMMUNISM AND THE RISE OF MAO (1951).

haps the most striking reversion to traditional practice is the rejection after 1957 of written law as a desirable means of defining and publicizing rules of conduct for the masses and the bureaucracy.[41] After fifty years of the "rule of law," the Communist leaders have gone back to the old idea of reliance on morality rather than law, although this time it is socialist morality.[42]

VII. The Available Materials

Law in Imperial China contains a long essay by Professor Bodde on the traditional legal system and concepts of law, and a shorter essay by Professor Morris on statutory interpretation. These are written with clarity and insight, and probably are the best general descriptions of traditional law that have been produced to date. The authors avoid the benumbing minutiae of legal regulations, and instead look at underlying principles and at the role played by the judicial organs in the administration of justice. Law is presented not as a set of rules, but rather as a viable institution which embodies philosophical concepts and reflects social realities. As a result, this work is of interest not only to lawyers, but also to scholars in other disciplines who study traditional China.

The heart of the book is "case report" material translated by Professor Bodde. The 190 cases presented were selected from over 7,600 cases in the *Hsing-an Hui-lan,* a "casebook" of past precedents, edicts, and directives gathered from the archives of the Board of Punishments to provide guidance for judicial personnel.[43] The bases on which these cases were chosen are not entirely clear; ease of translation appears to have been one important consideration. Be that as it may, the work of translation was a monumental task, as anyone who has worked with unpunctuated classical Chinese texts can attest. The translation difficulties were further compounded by the Chinese version of "legalese" and by the inherent complexity of legal writing. Fortunately, Professor Bodde has inserted many helpful explanations, comments, and references into the text. We owe Professor Bodde a great debt of gratitude for making available significant and exciting new data on the traditional legal system.

41. *See* text accompanying note 25 *supra.*

42. *Cf.* J. Cohen 4:

> "The trouble with you Westerners," the man said, wagging his finger at me before I could sit down, "is that you've never got beyond that primitive stage you call the 'rule of law.' You're all preoccupied with the 'rule of law.' China has always known that law is not enough to govern a society. She knew it twenty-five hundred years ago, and she knows it today." The man, interestingly enough, was a London-educated Chinese barrister who practices in Hong Kong and is known there as a principal, if unofficial, spokesman of the People's Republic of China.

43. The Board of Punishments was a "cabinet level" government department that was part high-level appellate court and part Ministry of Justice. It was in charge of judicial administration, and also reviewed all serious or complex cases.

The cases are absolutely fascinating. They tell a great deal not only about the law, but also about the social conditions and the modes of thinking of imperial times. These cases are not the idealistic theorizing of the literati, nor the confused and fanciful stories of the oral tradition. These cases are real: each involves a person with a name to whom something has happened and will happen; each is written by an administrator of the judicial system who had to process the case and make a disposition. I realize that it is dangerous to attempt to generalize about the actual functioning of the traditional legal system on the basis of these "appellate opinions." They are very limited in number; moreover, they are by their very nature already highly distilled versions of what in fact occurred. Nevertheless, the Bodde cases constitute another important source of information, and must be taken into account in any study of the traditional legal system.

VIII. The Traditional Legal System: Some Generalities Reconsidered

With the above caveat in mind, a comparison of these materials with the scholarly writings on traditional law reveals that many of the usual clichés and generalities, including some repeated by Professor Bodde, are not supported by the cases. For example, it is often said that traditional law was entirely criminal in nature, and that there was no civil litigation. This is true in the sense that the code was phrased in penal form—that is, the imperial code provided that if one did *X* act, he should receive *Y* punishment.[44] Many of the proscribed acts, however, were essentially civil. There were code sections dealing with matters ranging from appointment of an heir, to mortgage and sale of land and regulation of money lending.[45] There were also some provisions for compensation to victims of criminal or tortious acts.[46]

The assertion that there was no civil litigation is even less supportable if it is meant to imply that the people did not make use of the courts in their management of their personal affairs. It is likely that the quantity of civil litigation was relatively small; in the simple, illiterate, and immobile society of traditional China, a court often was not the most suitable place for resolving private disagreements. Litigation was costly and could bring financial ruin to both the winner and the loser.[47] The magistrate and his law were from a

44. For a description of the structure of the code, *see* D. Bodde & C. Morris 52-75 (1967); S. van der Sprenkel, *supra* note 6, ch. 5; J. Wigmore, Panorama of the World's Legal Systems 152-93 (1936).

45. D. Bodde & C. Morris 60-61, 203-11. *See generally* G. Jamieson, Chinese Family and Commercial Law (Shanghai, 1921).

46. D. Bodde & C. Morris 79-80, 249-51 (case 50.1), 338-41 (cases 166.1 & 166.2).

47. There is a Chinese saying "Win your lawsuit, and lose your money." S. van

totally different cultural background than the masses of the people; fear of the unknown together with dread of the harsh judicial interrogation procedure kept many people away from the courts.[48] Equally important was the fact that, in an immobile society, the disputants had to continue to live together and deal with each other after the dispute was resolved. In such a situation, it often was more vital to preserve the ongoing relationship, or at least not to render impossible the re-establishment of a good relationship, than to assert one's "rights" to the limit in each instance. One might call this "yielding" by the winner, or "face" for the loser, but the inclination to adjust rather than to adjudicate differences reflected a need to protect and maintain long-standing personal relationships. Indeed, perhaps the last thing one would want in such circumstances was to have disputes settled by a court in which the antagonistic positions of the two parties were crystallized and strengthened, and where the declaration that one side was "right" and the other "wrong" hindered the restoration of friendly feelings.

Despite all the yielding and kind intentions, many disputes did arise which could not be resolved by the parties themselves, and such cases were handled by a wide variety of informal and quasi-formal methods and institutions. These procedures for resolving disputes included reliance upon third party mediation by a mutual friend or by a person of standing in the community, and the use of clan and guild tribunals.[49] Yet there must have been many disputants who were not deterred by fear of the legal process, who were desperate and had no other remedy available, or who had no ongoing personal relationships at stake. When these factors were present, one might expect that private litigants would resort to the courts.[50]

With the very limited quantity and kinds of data available to us, it would be impossible to demonstrate that the courts of imperial

DER SPRENKEL, *supra* note 6, at 135. *See also* D. BODDE & C. MORRIS 416 (Imperial Edict 203.7): "The victims of these false accusations, once they have been dragged in, remain entrapped and their livelihood is gone. Even should they have the luck to be completely exonerated as a result of the trial, their families will by then have become ruined." For a description of a lawsuit and the costs involved, *see* Y. LIN, THE GOLDEN WING 25-44 (1947).

48. Professor Bodde translated three cases in which a person committed suicide over fear of becoming involved in a lawsuit (cases 201.6, 201.7, and 201.9, pp. 409-15). *See also* cases 248.2, 248.3 and 259.2, pp. 450-52 and 458-60, in which harsh treatment by prison and judicial officials is described.

49. For detailed studies of the informal means of dispute resolution, *see* S. VAN DER SPRENKEL, *supra* note 6; Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1968).

50. In *The Golden Wing* lawsuit, *supra* note 47, the antagonists were from different clans and villages, and had no ongoing relationship. In addition, there was no dispute-resolution body such as a clan, guild, or village tribunal which had "jurisdiction" over both parties. The principal complainant brought suit when he was angered by his opponent's attempt at intimidation, yet lacked the physical power to obtain redress through self-help.

China frequently handled disagreements of an essentially civil and private nature. Nevertheless, the Bodde cases contain many suggestions that individuals resorted to the courts fairly frequently, and that the work of the courts was not confined to handling those criminal cases which were so serious and notorious that they could not be hushed up. However, only a few of the 190 cases translated by Professor Bodde are "civil" cases; most involve common crimes or public law. This is not surprising since the *Hsing-an Hui-lan*—Bodde's source—is a collection of "supreme court" decisions; only the most important cases reached that level. Professor Bodde suggests that civil cases, which were usually relatively minor compared to criminal cases, ordinarily were terminated at the provincial level.[51] Despite the lack of civil litigation, a close reading of the Bodde cases reveals that people in traditional China were quite willing to resort to the courts on a wide variety of matters. For example, one case involved a homicide during an affray—a commonplace criminal case. The killing occurred, however, when an orchard owner "tried to drag [a thirteen year old boy] to court" for stealing three pears from the orchard, and a fight ensued.[52] There are also two cases of attempted extortion involving the threat of instituting a lawsuit, two cases of bringing false charges against another person out of personal spite, and a case of a debtor charging his creditor with violation of the code provisions on usury.[53] Perhaps the most interesting case of all is the following, given in its entirety, which concerns the prosecution of a son for causing the death of his parent:

> The governor-general of Szechuan has reported a case in which Ch'en Yü-mei, after vainly trying to borrow money from P'eng Tsung-ming, carried his father's coffin to the rear of P'eng's house and there buried it. P'eng thereupon *lodged a complaint with the authorities,* causing Ch'en's mother such worry over the possibility of becoming legally involved that she killed herself.
>
> Granted that the son was not guilty of any act of moral turpitude or theft, his becoming involved in a court action with P'eng nevertheless was the cause in the last analysis of his mother's death.
>
> Ch'en Yü-mei, therefore, is now sentenced to maximum exile by analogy to the sub-statute on a son whose poverty makes him unable to support his parents, so that they commit suicide.[54]

This very brief account raises a number of intriguing factual and legal questions: What was Ch'en's purpose in burying his father's coffin in P'eng's yard? Was this not a rather drastic way to protest

51. D. Bodde & C. Morris 118-19.

52. *Id.* at 251-54 (case 51.1).

53. *Id.* at 218-20 (case 8.1), 304-05 (case 148.7), 405-08 (cases 200.2 and 200.4), 261-62 (case 82.6).

54. *Id.* at 409-10 (case 201.6) (emphasis added).

the refusal of a loan? In what way could Ch'en be held liable for such a remote consequence of his act? How could the cited sub-statute be analogically applied to Ch'en's case? The point of greatest present interest, however, is the fact that P'eng, like the orchard owner, sought relief by lodging a "complaint" (presumably the initiation of litigation to have the coffin removed and Ch'en chastised) with the "authorities" (presumably the local magistrate). We are told nothing about the social standing of the parties; we do not know whether P'eng had tried unsuccessfully to obtain relief through third party mediators and the clan, or whether he went directly to the magistrate. In either instance, this case suggests that people did turn to the courts for assistance in a wide variety of matters when self-help was not feasible or when the extrajudicial means of dispute resolution were ineffective.

The proposition that the courts were used to some degree for the settlement of private disputes is further supported by the fact that a "halt was placed upon the hearing of civil suits—which were regarded as less urgent—during the period of greatest agricultural activity."[55] The number of lawsuits brought by private persons might even have been considerable. In 1820, the Chia-ch'ing emperor found it necessary to complain that:

> The multiplication of lawsuits among the people brings much harm to rural communities, and the machinations of the litigation tricksters are what produce all the inconsequential verbiage going helter skelter into these accusations. These rascally fellows entrap people for the sake of profit. They fabricate empty words and heap up false charges. At their bidding plaintiffs are induced to bring up stupid nonsense in their accusations whose empty falsity, when exposed at the trial, brings blame upon the plaintiffs themselves while the litigation tricksters stand to one side.[56]

Another assertion that is commonly made about the traditional legal system is that the administrators of the system, particularly the local magistrates, were not skilled in law. These men, it is said, usually attained public office through passing civil service examinations which tested their knowledge of the Confucian classics and their literary skill. As a result, they supposedly knew very little about the intricacies of law and legal procedure, and had to rely heavily upon their legal secretaries for advice.

Here as before, Professor Bodde's translations cast some doubt upon the prevailing generalities. One is struck by the high level of legal expertise shown by the personnel of the Board of Punishments in handling the reported cases. In case after case these men displayed an intimate knowledge of code provisions, judicial prece-

55. *Id.* at 119.
56. *Id.* at 416 (Imperial Edict 203.7).

dents, and scholarly commentaries. This is not surprising since most members of the Board of Punishments had been involved in legal work for many years. But the degree of expertise appears to have been equally high at the provincial level; in only a few cases were the provincial courts and governors grossly incorrect. The provincial judicial personnel usually either handled the case correctly or posed questions to the Board that demonstrated a clear understanding of the issues of law and fact involved. Almost nothing is said in these translations of "appellate opinions" about the work done by the lower level prefecture and *hsien* magistrates. Nevertheless, one may surmise that these persons also were quite skilled and knowledgeable in law. While they may have lacked expertise at first, they probably acquired it rather quickly, perhaps during the period between passing the civil service examinations and the appointment to an office. Certainly, skill in handling legal affairs must have increased with experience on the job. Such expertise was vital to the proper performance of a magistrate's duties, and hence to his advancement or demotion. His efforts constantly were reviewed and graded by his superiors at the provincial courts and the Board of Punishments. In addition to the Great Reckoning that took place every three years,[57] all but the most minor cases handled by the magistrate were sent up to higher courts for review or approval. Moreover, all cases involving the use of analogy—that is, the application of the most closely analogous code provision when there was no code section precisely on point—had to be approved by the Board of Punishments.[58] Exposed to so much scrutiny, the lower court judges not only had to exercise great care in carrying out their work, but also had to attain a degree of legal competence that would satisfy the critical and skilled examinations of the higher court judges.[59]

Besides employing skilled personnel, there were other institutional means of assuring the proper functioning of the legal system. For example, in every case the judge was required to cite the precise code provision upon which his decision was based.[60] This spot-

57. C. HUCKER, THE CENSORIAL SYSTEM OF MING CHINA 96 (1966).

58. *See id.* at 117, 173-78.

59. C. HUCKER, *supra* note 57, at 89. In addition, Professor Hucker states that during the Ming, part of the duties of the censor included the interrogations of local magistrates "to see that every official properly understood both the general laws and the particular regulations pertaining to his office." *Id.* at 89. There is no reason to believe that this practice did not continue under the Ch'ing.

The Ch'ing code provided:

> At the close of every year, the officers and other persons employed by government, in every one of the exterior and interior departments, shall undergo examination on this subject before their respective superiors, and if they are found in any respect incompetent to explain the nature, or to comprehend the several objects, of the laws, they shall forfeit one month's salary when holding official, and receive 40 blows when holding any of the inferior, situations.

G. STANTON, *supra* note 39, at 64.

60. D. BODDE & C. MORRIS 174.

lighting technique guarded against carelessness and provided additional protection against improper application of the law. The citation of the wrong provision of law resulted in a bad mark on a judge's record, and could lead to a fine, demotion, or physical punishment. Even more striking to Western eyes is the tremendous amount of time, effort, and expense that went into the handling of each case—even one of a relatively commonplace nature. In addition to the practice of reviewing cases in which an aggrieved party appealed or the principle of analogy was applied, there was an extremely elaborate system of review as a matter of course by higher courts. A case involving the penalty of exile, for example, would be investigated by the *hsien* court, transmitted to the prefectural court for checking, tried by the provincial court, confirmed by the provincial governor, reviewed by the department of the Board of Punishments for that province, and finally approved by the entire Directorate of the Board—a total of six bodies handling the case.[61] Capital cases had to go still higher: first to the "Three High Courts" composed of the Board of Punishments, the Censorate, and the Court of Revision, and finally, for confirmation, to the emperor himself.[62] If there were reversals along the way, the entire process had to be repeated. In addition, if the Board felt that a more severe punishment should be imposed, the case was remanded to the provincial courts for retrial; there was no retrial, however, when the penalty was reduced by the Board.[63]

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61. *Id.* at 116-18.

62. *Id.* at 131-34.

63. The degree of effort and care that went into the operation of the legal system can be seen in one case involving a monk who struck and killed his disciple. *Id.* at 366-68 (case 183.1). The governor—already the fourth level of handling—memorialized the emperor inquiring whether a monk below the age of forty could accept disciples. The emperor answered in the negative, and instructed the Board to determine whether the case should be treated as an ordinary killing of one layman by another, or as a killing of a disciple by his master. The Board decided that the monk should be treated as a layman, since he was too young to be entitled to accept disciples and hence no proper master-disciple relationship had been established. On remand to the governor for retrial, the monk was sentenced to strangulation after the assizes under the code provision which punished monks who beat to death disobedient disciples. Upon reviewing the case, the Board found the governor's decision to be erroneous since the monk should have been treated as a layman guilty of the same act. He therefore was re-sentenced under the code provision for killing during an affray—the punishment for which was *also* strangulation after the assizes. Being a capital case, presumably the decision of the Board still had to be reviewed by the Three High Courts and confirmed by the emperor, thus requiring a total of ten levels of handling, including two instances of participation by the emperor. Even then, the monk would not be executed immediately. His case would be reviewed again by the assize courts, where sentences of strangulation after the assizes usually were reduced to exile. This reprimand of the governor for applying the wrong provision of law, even though the same result was reached, is illustrative of the Board's concern for correctness and precision. In a similar vein, the Board continued to deliberate on the proper punishment even after the defendant had already died. *Id.* at 313-15 (case 157.4), 330-33 (case 164.1), 421-23 (case 208.5).

This concern for correctness and precision was attributable in part to the bureaucratic mentality which strove for strict adherence to fixed rules. A more important factor, however, was that the Board, and to a lesser extent the entire judiciary, had a professional interest in seeing that the legal system and the bureaucratic legal organization functioned properly. The result was a development of higher standards of competence and conscientiousness, which in turn led to the improved operation of the legal system. The pervasive sense of professional commitment is clearly reflected throughout Professor Bodde's translations. In many of the cases, the Board expended a great deal of effort to find the appropriate judicial precedents and statutory guidelines, to determine the policies underlying statutory enactments, and to examine evidence presented by the lower courts. In addition, the Board appeared to be very conscious of its role as a dispenser of justice. The strict rules of law sometimes were bent to lighten the penalty for a deserving defendant, particularly one who was guilty of only a technical violation. Similarly, ways were found to increase the punishment meted out to troublesome scoundrels.

I do not mean to imply by the above discussion that the Chinese judicial officers were all upright and learned men devoted to the cause of justice. Indeed, tales of corruption, ineptitude, and oppression are myriad in both scholarly and popular writings. Professor Bodde's translations include several cases which were grossly mishandled by the lower courts. For example, Chang Chün-hsi was punished by the governor of Honan for falsely accusing his neighbors of causing his mother's death.[64] Feeling aggrieved, Chang journeyed to Peking and filed another complaint directly with the Board of Punishments. After investigating the matter, the Board said:

> The disposition of this case has been hasty and devious. . . . Our investigation has already revealed that there is truth in his charges. From all this it naturally follows that his conviction should be voided. Yet the governor, while sentencing Chang to the maximum bambooing under the statute on making false accusations, has failed to make any investigation of the clerk and police officer accused by Chang of malfeasance. This Board finds it impossible to go along with this. The governor should be commanded to conduct a new trial in order to determine the precise facts and then, in accordance with law, to render a judgment which may be submitted to us for renewed consideration.
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> . . . .
>
> Of the accusations which reach Peking from the provinces, eight or nine in ten have to do with corrupt clerks. Although many are no doubt trumped up, yet genuine cases of injustice are also not uncommon. If the governors-general and governors would really handle cases conscientiously and straightforwardly, lawsuits would naturally

64. *Id.* at 461-68 (case 260.1).

> diminish and there would be nothing like the number of accusations which in recent years have come to Peking from the provinces. Of the cases reported to us, hardly one in ten has been thoroughly investigated in advance so as to determine the truth or falsity of the charges.[65]

Despite these severe criticisms, I think it would be incorrect to conclude that the traditional Chinese courts generally tended to operate in an arbitrary and capricious manner. In the last analysis, we do not have sufficient information to know how effective the legal system really was. What can be said, however, is that the almost legendary image of corruption and unfairness in the courts must be tempered by the data contained in the Bodde material which, on its face, presents a picture of experienced and knowledgeable men who conscientiously attempted to implement a sophisticated and thorough system of law.

It is possible to go on almost indefinitely comparing the stereotyped view of traditional Chinese society with the society reflected in Professor Bodde's cases (although, again, one must remember that these cases constitute a special and limited kind of data). For instance, one wonders about the prevalence of the Confucian virtue of filial piety, *hsiao*, when sons would revile fathers,[66] brothers would lodge false accusations against each other,[67] and the aforementioned Mr. Ch'en would use his father's coffin as a tool for harassing his neighbor.[68] Similarly, the cases seem to display a distinct lack of another important Confucian virtue, that of *jang*, or yielding. Violence resulted from extremely trivial provocations; people fought and died over a garter,[69] three pears,[70] or some tree branches.[71] Lastly, perhaps no one ever believed that the Chinese were as puritanical in their sexual behavior as their writers indicated, and hence there should be no surprise over the large number of adultery cases.[72]

The essays by Professors Bodde and Morris discuss a wide and interesting variety of subjects. There are, however, several major

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65. *Id.* at 464, 466.
66. *Id.* at 389-91 (case 191.1).
67. *Id.* at 405-08 (case 200.2).
68. *Id.* at 409-10 (case 201.6).
69. *Id.* at 419-20 (case 206.19).
70. *Id.* at 251-54 (case 51.1).
71. *Id.* at 298-300 (case 147.2).
72. At least 15 of the 190 translated cases involved an adulterous relationship. If the point is still in doubt, however, the following case should be considered:

> . . . Mrs. Li née Chang, after having been widowed for many years, happened to hear of someone getting married in her neighborhood, which so aroused licentious thoughts in her that she enticed Li Ming-tse, a son of her deceased husband through a former marriage, to have sex relations with her.

Id. at 433 (case 224.22). *See also* case 228.2, *id.* at 433, where a Taoist monk seduced a woman—not an extremely unusual or surprising situation, except that the monk was over 70 years old.

problems that are not fully treated. What, for example, was the traditional concept of legal causation? A few cases used a test of foreseeability to determine liability for the consequences of one's acts[73] —something an American lawyer would find very familiar. On the other hand, many cases discuss neither foreseeability nor intent, and impose liability for consequences which an American lawyer would find far too "remote." For example, "Liang Ya-ju dirtied the clothing of Liang Ts'ai-hsien with unclean water, for which he was upbraided by the latter. Thereupon he retaliated with such foul language that Liang Ts'ai-hsien, in a state of shame and rage, killed himself."[74] For having thus induced another to commit suicide through the use of foul language, Liang Ya-ju was sentenced to three years of penal servitude. Even more unusual is the case in which "Li Wen-ch'ing, wishing to develop a coal enterprise, rented out some of his land to finance the project. His mother became so afraid that the project might fail and leave them destitute that she stopped eating and in melancholy anxiety committed suicide."[75] For his dastardly actions, Li Wen-ch'ing was sentenced to life exile.

Most Western observers would probably disagree with the results of these cases. Western legal thought is somewhat reluctant to accept the idea of multiple causation; of the myriad factors which act to bring about an event, only the most obvious and striking ones are deemed to be the "legal causes." On the other hand, the Chinese in their philosophy and their law readily accept the view that both action and inaction are the results of a great many forces operating simultaneously, and often subtly. To oversimplify, if one pictorially describes the Western concept of legal causation as being of the "billiard ball" variety, where the cause and effect relationships of collision and carom are direct, clear, simple, and predictable, one might liken the Chinese view to a ball suspended within a circular frame by a number of rubber bands of varying sizes. Each band exerts a force on the ball, and the equilibrium of forces holds the ball in a fixed position. When any of the bands, no matter how small, is removed, the entire equilibrium is altered and the ball shifts to a new position, and the removal of that band can be said to have caused the movement of the ball, as well as the disturbance of all the other bands.[76] Thus, in the "inducing to suicide" case of Liang Ya-ju, many psychological, social, and other considerations entered into the commission of the suicide. Liang's foul language was a contributing factor, although perhaps not the most important one; so,

73. *Id.* at 262-64 (case 83.1), 351-52 (case 170.2), 436-37 (case 235.1), 438-40 (case 236.1).

74. *Id.* at 232 (case (17.1).

75. *Id.* at 411 (case 201.8). *See also* Ch'en Yü-mei's case, text accompanying note 54 *supra.*

76. For a more elaborate discussion of this idea, *see* Y. LIN, *supra* note 47, at 223-29.

instead of the usual punishment of death for having caused the death of another, Liang was sentenced to three years of imprisonment—his "share" of the blame for the suicide.[77]

The essays by Professor Bodde and Morris also leave unanswered many questions about the role and purpose of the criminal justice system in traditional Chinese society. Whatever the theoretical ideal might have been, there is little doubt that, in fact, it was not a function of the formal criminal law to inform the public as to the limits of permissible conduct.[78] Given the high rate of illiteracy, the abstruseness of the language in which the code and commentaries were written, the complexity of the technical legal requirements, and the scarcity of copies of the code, it is not surprising that the common people seldom, if ever, consulted the law. Furthermore, many of the code provisions dealt with the common crimes and other acts normally categorized as *malum in se;* other provisions, particularly those relating to family law, were reflections of Confucian mores. In both instances, the law did not create new norms or practices, but rather confirmed and gave official sanction to existing ones. A person learned these rules of conduct through his socialization process or as part of his general knowledge, and not through the study of law or reference to explicit legal provisions.

A corollary of the proposition that law played a minor role in

77. It is extremely difficult to assess the degree to which traditional attitudes of causation and responsibility have persisted in the People's Republic of China, although such an assessment would greatly facilitate the interpreting of Chinese actions and statements for the purpose of planning Western moves toward China. THE INSTITUTE OF CIVIL LAW CENTRAL POLITICAL-JUDICIAL CADRES' SCHOOL, BASIC PROBLEMS IN THE CIVIL LAW OF CHINA (JPRS transl. 1961) discusses the following, presumably an actual case, whose unusual reasoning and result are reminiscent of some of the cases translated by Professor Bodde:

> . . . A was in love with B. One day, A sent B a letter to make a date. B needed a new suit. However, B was short of money and stole fifty yuan from a neighbor, C. Later, C discovered it and started a lawsuit in the court for compensation. Being ashamed of her act, B attempted to take her own life by jumping into a river. The court decided that A should repay C the fifty yuan, and in addition, he should pay medical expenses for B.

Id. at 335. This decision was criticized by the authors. Nevertheless, some judge apparently did make such a disposition; the inclusion of this case in an important law school textbook may indicate that decisions of this kind are not uncommon. Moreover, with the decline of the professionally trained lawyers after 1957, it is possible that their views of liability also declined.

78. I do not mean to suggest that law served completely different functions in Chinese society and in Western society. On the contrary, the differences, where they exist, are in degree and not in kind. Western law, both traditional and modern, also tends to be secret, known only to members of the legal profession and their associates. A person in the West has greater opportunities than his Chinese counterpart to learn the rules of law, and to press complaints and obtain relief against officials and official acts. Nevertheless, these opportunities are still fairly limited, and can be used only through considerable expenditures of money and effort. Similarly, Western law is not overly successful in deterring crime or reforming criminals. As in the Chinese case, a basic function of Western law is to provide means by which the bureaucracy can regulate itself.

shaping people's conduct is the hypothesis that law did not serve as a means by which the masses could control or check the officialdom. If the masses knew almost nothing about law and had very little to do with legal matters, then either there was no remedy against improper official acts, or else extralegal methods of obtaining relief had to be employed. By the same token, law was of only limited usefulness in deterring criminal conduct. A person knew that if he acted in an undesirable manner, a variety of dire and unhappy consequences would ensue. Being estranged from the law, however, the individual would not be primarily concerned with the legal consequences of his acts. Nor was it a function of the criminal law to attempt to reform those who had gone astray. No effort was made to rehabilitate criminals, or even to convince them of the error of their ways. On the contrary, punishments of beating with a bamboo rod, branding, and long-term exile tended to alienate the criminal even further and make more difficult his return to normal society. There were some provisions for monetary redemption and mitigation of punishment, but these were based on considerations such as sex, age, or official status and not on a desire to reintegrate into society persons who were no longer dangerous.[79] In addition, anyone who violated a provision of law was punished, irrespective of his motives or circumstances. In one case, for example, an official had purchased rice to feed soldiers who were engaged in important public construction work. He was punished for exceeding the legal limit on rice purchases, even though the Board of Punishments recognized that the purpose of the statute was to prevent illegal trafficking in rice and that this official's act was intended to further the public good.[80]

It is difficult to reconcile this nonrehabilitational treatment of crime and criminals with the Confucian view that man could be taught proper behavior through correct education and exposure to good models and examples. The law seemed to regard *all* violators as having fallen from grace, and thus as either not worth saving or as unsalvageable. Professor Bodde suggests that a partial explanation for this attitude lies in "a very ancient concept, according to which a criminal act is not merely a violation of the human order, but also ipso facto of the total cosmic order of which the human order forms

79. Monetary redemption was possible in some, but not all, cases where the defendant was over 70 or under 15, physically or mentally infirm, an official, a Manchu, or a woman. *See* D. BODDE & C. MORRIS 42, 79, 170-73. *Cf.* the provision for commuting sentences of death or imprisonment to bambooing where the defendant was the only surviving son of aged parents. *Id.* at 223.

80. *Id.* at 264-66 (case 86.2). In another case, an official had failed to dismount from his sedan chair before entering the Temple of Confucius because his chair bearers wrongfully carried him past the gate, and he failed to notice since the curtains of the chair were closed to keep out a heavy rain. Despite the circumstances, the official was sentenced to 100 blows of the heavy bamboo and dismissed from office. *Id.* at 276-78 (case 93.2).

part."[81] Thus, for every violation a corresponding punishment must be imposed on the offender in order to balance his offense and restore the original harmony of the cosmic order. This concept was expressed most clearly in the laws regarding *ti-ming*, life-requital, in which the death of one person had to be balanced by the death of another.[82]

Professor Bodde warns that he "would not want to suggest that [the cosmic harmony] concept was consciously sensed or expressed by the jurists of the Ch'ing dynasty, but merely that it lies behind certain features of Chinese law continuing into Ch'ing times."[83] He adds that the life-for-a-life requirement did not hold true for very many situations.[84] Nevertheless, both he and Professor Morris repeatedly refer to this concept, and in doing so perhaps they impart to it more importance than it deserves. However intriguing the idea of cosmic harmony may be, its influence on the legal system was probably quite small. As a theoretical matter, the issue of whether a particular act should be deemed "criminal" is entirely separate from the question of whether there is a need to restore the cosmic balance after it has been upset by a "crime." For example, it is possible to hold that killing in self-defense is not a "crime" and hence causes no disturbance of the cosmic order, despite the fact that a death had occurred. Similarly, a *mens rea* requirement for all crimes might be introduced without affecting the harmony principle in any way. In other words, the concept of restoring cosmic order required that the commission of a forbidden act must be punished in some way, but it did not determine what acts were forbidden or define what constituted "commission." On a more practical level, it has already been pointed out that a life-for-a-life exchange was not demanded in many instances. Moreover, the requital principle apparently did not apply to nonhomicide cases, although it seems clear that a robbery or an assault also should have disturbed the cosmic order. Even in the designation of penalties for the various crimes, the early Legalists had sought to fix such severe sanctions that the people would be too afraid to violate the law; they were not attempting to provide a means for redress of cosmic imbalances.

I have no doubt that, at one time, maintaining cosmic harmony was a real and important concern, and did help to shape the legal system. With the passage of centuries, however, its influence faded,

81. *Id.* at 181-82.

82. *See id.* at 182-83, 330-34 (cases 164.1 and 164.2).

83. *Id.* at 182.

84. The life-for-a-life requirement was not enforced in cases such as inducing another to commit suicide (*see* text accompanying note 77 *supra*), killing of a child who was disobedient or disrespectful to his parent (cases 167.5, 191.1, 191.2, at 343-45 and 389-94), accidental homicide (case 166.3, at 342-43), negligent homicide (case 170.2, at 351-52), and killing with some justification (case 239.7, at 442-43). In addition, it was possible for one death to requite several deaths (case 164.2, at 333-34).

and the law developed a life of its own. Philosophical and magical considerations were replaced by the more practical needs of preserving public order, implementing official policies, and controlling socially undesirable persons and actions. Additional rules and procedures were established to assure the proper operation of the legal system. Some old forms and terms were retained, but these took on new content and meaning. Thus, although the law did tend to impose punishment without regard to the intent of the offender or to extenuating circumstances, this condition probably was due to the fact that the formal legal system was not sufficiently developed to be able to cope with complex problems involving discretionary power, rather than being the result of a belief that only consequences mattered or that acts, not actors, were the subjects of punishment. The exercise of discretion was controlled—and the integrity of the legal system thereby protected—by requiring very strict and literal interpretation of the terms of a statute and by imposing mandatory review on actions of a discretionary nature.[85]

In many ways, traditional Chinese law resembled an expensive game where the insiders—the bureaucracy—knew the rules, but the public had only a vague idea of how the game was played and the outcome decided.[86] A member of the public would avoid joining this game unless he had no choice, or unless he felt that he knew enough to play it to his own advantage. Otherwise, he would resort to the informal methods of dispute resolution, where he was familiar with both the rules and the players. This quality of secrecy limited the law's usefulness, but it did not render the law arbitrary, capricious, or useless. Although the public did not know the rules, an official's colleagues and superiors did; there were constant checks and evaluations to guard against improper application of the rules. Among the most important functions served by the legal system were providing guidelines and standards upon which an official could base his actions and against which his work could be measured, and establishing a self-operating institutionalized means of supervising the officialdom.

IX. Conclusion

Limitations of time and length preclude an investigation of the law of the Republic of China in this Review, although obviously any description of Chinese law would be incomplete without such a discussion.[87] The growth of law under the Republic raises many inter-

85. *See* text accompanying notes 60-63 *supra*.

86. There is another Chinese saying: "Of the ten reasons by which a magistrate may decide a case, nine are unknown to the public." S. VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA, A SOCIOLOGICAL ANALYSIS 135 (1962).

87. There is a considerable quantity of studies and translations of the law of the Republic of China. These include: J. ESCARRA, CHINESE LAW: CONCEPTION AND EVOLU-

esting issues concerning the transition from traditional to modern law. Beginning with the law reforms proposed at the turn of the century, efforts were made to "modernize" the law so that it would become acceptable to the Western powers and somehow bring about national salvation. With little consideration of whether Western legal forms and rules were suited to the Chinese situation, a series of legal codes were promulgated in the 1920's and 1930's which established a "modern"—that is, Western—legal system in China. The new system, however, did not penetrate very deeply into Chinese society. Its implementation was obstructed by continuous civil and foreign wars; in addition, almost no effort was made to educate the public about the new law. Thus, despite the changes, the people probably still regarded the law as mysterious and alien, and hence as something to be avoided. The lack of sufficient trained administrators hindered the extension of the new system. During the past twenty years, the Republican government on Taiwan has made considerable progress toward bridging this gap between theory and practice. There is still much that must be done, however, before attitudes and practices which have developed over centuries can be changed entirely.

Despite the important role played by the Republic of China in the development of Chinese law, the principal area of interest at present is the People's Republic of China. In conclusion, I would advance some suggestions and projections concerning the future evolution of law in the People's Republic of China. The struggle now going on in that country will determine the direction in which it will move in the future. The legal system of the immediate future, however, will be shaped to a considerable degree by factors which are independent of the outcome of this struggle. First of all, there is an almost total absence of professionally trained legal workers in China. Of those trained before Liberation or during the early years of the regime—always a small number—many were purged during the antirightist campaign and its aftermath. A number of law schools continued to operate after 1957, but they provided ideological indoctrination rather than professional legal education. Moreover, the concomitant shortage of qualified instructors will hamper the progress of any future training program unless drastic and unexpected steps are taken soon. As a consequence of the personnel problem, the legal system must be able to function during

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TION, LEGISLATIVE AND JUDICIAL INSTITUTIONS, SCIENCE AND TEACHING (G. Browne transl. 1961); M. MEIJER, THE INTRODUCTION OF MODERN CRIMINAL LAW IN CHINA (1949); M. VAN DER VALK, CONSERVATISM IN CHINESE FAMILY LAW (1956); Cheng, *A Sketch of the History, Philosophy, and Reform of Chinese Law*, in WASHINGTON FOREIGN LAW SOCIETY, STUDIES IN THE LAW OF THE FAR EAST AND SOUTHEAST ASIA 29 (1956); LAWS OF THE REPUBLIC OF CHINA (1st & 2d ser. 1961, 1962). *See also* KANG CHI-CH'AO, A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA (1967).

the immediate future without a body of trained specialists to act as administrators of the system or as advisors to the public. Hence, the law will be simple and straightforward, with a marked absence of complex rules and technical requirements. Procedure in particular will be extremely informal and flexible, and will vary considerably from one locale to another and from case to case.

The legal work-style will thus necessarily retain many aspects of the "mass line" approach. Through the practice of "people's reception," the masses probably will continue to have a means of registering complaints with and seeking assistance from the officials; at the same time, the officials will be subject to a degree of public supervision in order to ensure their responsiveness to public needs and wishes. Having received these benefits in the past, it is unlikely that the masses will settle for anything less in the future. Moreover, the state also has an interest in providing acceptable and controlled channels by which the masses can express dissatisfactions and obtain redress for grievances. Public participation in the work of local administration, dispute resolution, and preservation of order should continue to flourish. Such participation not only is ideologically correct according to Maoist doctrine, but also relieves the state of the burden of having to deal with many minor and routine matters.

Regardless of which faction prevails in the current power struggle, the low-level police and legal cadres will continue to exercise considerable independence in performing their duties. Replacement of one set of high officials by another group will not change the fact that the leaders at the top can issue only broad policy guidelines and correct only major deviations; to a large degree, the manner of implementing—or not implementing—these policies must be left to the discretion of the administrators at the bottom. At this stage of its political development, China's size and complexity prevent the implementation of a strong system of centralized control. In addition, as discussed earlier, the informality and flexibility of the legal system also will enhance the power of the low-level administrators. In the absence of clear and specific rules, complaints against the actions and decisions of local administrators must meet the vague and difficult test of abuse of discretion. The power of these officials will be checked not by vigorous legal or administrative review, but by periodic campaigns against equally vague offenses such as "bureaucratism," during which times the public will have an opportunity to criticize officials who act in a highhanded or unfair (though not necessarily "illegal") manner. As a result, even though these campaigns may be milder than the past rectification campaigns, government service will probably continue to be a somewhat uncertain and uncomfortable career.

Taking a perspective of a decade or more rather than a few years,

one can expect that a thorough and sophisticated legal system will evolve in China. With the passage of time, regularized procedures and practices will develop within the bureaucracy, and such practices will replace the present broad grants of discretionary power. This process will be aided by the growth of a professionally oriented body of administrators who acquired their skills through practical experience. Even more important, the initial flexibility of substantive and procedural rules will prove increasingly unsatisfactory as Chinese society becomes more industrialized and impersonalized. Particularly in the sphere of economic relations, planners and managers must be able to predict with some certainty the consequences of their actions, and to resolve efficiently any disagreements which may arise. The need for clearly defined rules of conduct and means of dispute resolution will result in a growing body of contract law and economic regulations. Finally, as the political situation normalizes, there will be fewer large-scale purges during which legal institutions are bypassed and legal norms ignored. At the same time, as the regime becomes stronger and more confident, it will be less fearful of enunciating rules within the confines of which it must operate.

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