

The Judiciary in Post-Cultural Revolution China

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I. Introduction

Foreign visitors to mainland China usually report how safe they were there. They can tour the country without even locking their hotel room or fearing for their wallet. Some have even reported that their used razor blades were collected and returned to them when they left the country. But the widespread admiration for foreigners' safety in China and Chinese honesty has tended to obscure the true picture of the Chinese society where crimes and other law-breaking acts, as in other societies, remain a problem for the authorities.¹

While crimes against foreigners are few,² crimes among the

¹ *E.g.*, see John Burns, "Street Crime Up in Chinese Cities," *The New York Times*, January 11, 1974, p. 7. Only a few Western correspondents have reported the crime situation in mainland China.

² Chinese committing offenses against foreigners have been severely punished by the PRC authorities. On April 29, 1966, a nineteen-year old youth Yang Kuo-ching broke into the Peking Friendship Store with a kitchen knife and wounded Bakari Traore, head of the Malian Journalists' Delegation. The youth wounded Bakari in the neck and then wounded the wife of First Secretary Muhlow of the Embassy of the German Democratic Republic in the face. Yang was sentenced to death on June 13, 1966 by the Supreme People's Court. See *Jen-min jih-pao* (People's Daily), June 14, 1966 and see Jerome Alan Cohen and Hungdah Chiu, *People's China and International*

Chinese themselves are a part of daily life. In all places open to foreign visitors, one sees barred windows, walls with spikes on the top, crops guarded by barbed wire, watchmen on duty, and locked bicycles—the most common means of transportation. These precautions all indicate that some Chinese, not being yet transmuted into Mao Tse-tung's New Man, do steal from each other.

Other evidence of crime in mainland China comes from a number of official documents published by the People's Republic's public security organs, local broadcasts, court judgments smuggled out of China, and information supplied by former residents of the mainland, among other sources. The types of crimes disclosed in this manner include murder, rape, robbery, bribery, theft, blackmarketeering, speculating, counterfeiting official documents, illegal selling of food or clothes coupons, adultery, counterrevolutionary activities, and many others.

Despite the voluminous publications authored by foreign visitors to mainland China since 1971, there have been only a few reports on crimes in mainland China and the closely related subject of the Chinese Judicial system.³ The reason for the paucity of reports in this area is primarily the reluctance of Chinese officials to discuss their country's judicial system, the refusal of Chinese authorities to permit visits to people's courts, and the close of the law schools in mainland China until at least 1974. Foreign visitors requesting detailed explanation of the judicial system have usually met with the reply that those

Law: A Documentary Study (Princeton, N.J.: Princeton University Press), 1974, Vol. II, pp. 995-998. In late 1974, a Frenchwoman walking on a street in Peking was seriously wounded by a Chinese wielding a meat-cleaver. The assailant was reliably reported to have been caught and speedily executed. See B. Michael Frolic, "Wide-eyed in Peking: A Diplomat's Diary," *The New York Times Magazine*, January 11, 1976, p. 17.

³ Jerome Alan Cohen, "Chinese Law: At the Crossroads," *American Bar Association Journal*, Vol. 59 (January 1973), pp. 42-44; Gred Ruge, "Chinas Richter unteilen aus revolutionera Erfahrung," (Chinese judges judge from revolutionary experience), *Die Welt*, Hamburg, May 20, 1974, and Cheng Huan, "Law in China: Will the People Please Take the Stand?" *Far Eastern Economic Review*, Vol. 85, No. 4 (January 22, 1972), pp. 14-15, are among the few reports on law in mainland China. None of the authors of these accounts, however, was permitted to visit a people's court.

Chinese experts who might have explained it happened to be "unavailable" at that time.

In the academic world, although Chinese law courses are now being taught in at least six law schools in the United States,⁴ there has been almost no discussion of or publications on the current judicial system of the People's Republic of China (PRC), which remains a mystery to most outsiders. This paper attempts to provide a general picture of the current PRC judicial system,⁵ beginning with a summary of the PRC's theory of law and its judicial system before the Cultural Revolution.

II. The Role of Law in the PRC

In the PRC, the primary role of law is to carry out the state policy of suppressing the reactionary class (the enemy of the people) although Chairman Mao acknowledges that law also plays an important role in settling disputes among the people. When the Chinese Communists use the term people, they do not mean all the people; they mean the so-called five categories of red elements (紅五類份子 *Hung wu-lei fen-tzu*): workers, poor and lower middle peasants, revolutionary cadres, Liberation Army men, and family members of revolutionary martyrs. Democracy only exists among the people, while the enemy of the people are totally excluded from the decision-making process of the state. The enemy are the object of dictatorship. Who are the enemies of the people in mainland China today? Before the Cultural Revolution in 1966 they were the so-called five black elements: former landlords, former rich peasants, counterrevolutionaries, rightists and bad elements. Now two more elements have been added to the enemy of the people: those who are taking the capitalist road and revisionists. Nobody knows exactly how many individuals

⁴ Harvard, Columbia, University of Maryland, Washington University (St. Louis), University of California (Berkeley), and Stanford.

⁵ For a more comprehensive discussion of the subject, see Hungdah Chiu, "The Judicial System Under the New PRC Constitution," in Michael Lindsay, editor, *The New Constitution of Communist China: Comparative Analysis* (Taipei: Institute of International Relations, 1976), pp. 63-121, and a forthcoming book on the subject by Shao-chuan Leng and Hungdah Chiu.

are classified within the above mentioned seven elements, but Mao Tse-tung once disclosed that there are five percent of them among the Chinese population,⁶ that is, about forty million, assuming that China has a population of 800 million.

Another interesting aspect of the meaning of "people" is that the "concept of the people has different meanings in different countries, and in different historical periods in each country."⁷ In other words, today one may be classified as "people," but tomorrow one may be considered as not belonging to the category of the people. Theoretically, a member of one of the black elements can be reformed and elevated to the category of the people, but this rarely seems to happen. It is more likely that a member of the people, by being bought over and utilized by the enemy or corrupted by bourgeois ideology, will degenerate into one of the categories of the seven black elements.

So far as the judiciary is concerned, if an enemy of the people gets involved in a law case, he or she usually will be on the losing side, receiving a more severe punishment than a member of the people who might commit the same offense. Information gathered from interviews also indicates that even in some serious criminal cases such as rape, if the victim is a landlord's wife or daughter, the offender, if he is of good class background, will usually receive no criminal punishment, but only administrative sanctions.⁸ The PRC's judicial practice

⁶ The figure was disclosed in a talk by Mao on February 3, 1967, in *Mao Tse-tung ssu-hsiang wan-sui* (Long Live Mao Tse-tung Thought), n.p., n.d., edited in August 1969, p. 666 (This book was used for internal study in the People's Republic of China and was reprinted by the Institute of International Relations in 1975).

⁷ See Mao Tse-tung, "Problems Relating to the Correct Handling of Contradictions Among the People," (February 27, 1957), cited in Jerome Alan Cohen, *The Criminal Process in the People's Republic of China, 1949-1963, An Introduction* (Cambridge, Mass.: Harvard University Press, 1968), p. 84.

⁸ Professor Cohen reported the following interview:

Ho was a member of the people's militia of an administrative village in the suburbs of Canton. One night in 1958 he went to the house of a local landlord element named Liu to seduce Liu's attractive daughter. Despite the fact that he had no authority to do so, in order to gain entry into the house he announced that he had come for the purpose of

has made it clear that it categorically rejects the bourgeois theory of universal equality before the law.

checking household registration. Liu was too frightened not to admit Ho to the house. But when his daughter resisted Ho's advances and Ho began to exert force, Liu intervened, and Ho beat him up rather badly. He left without achieving his goal, however, since the fight had awakened the neighbors.

The next morning Liu went to the suburban public security station and reported the incident. The station chief subsequently summoned Ho for questioning. At first Ho denied the whole affair, even after the chief confronted him with Liu. But after the chief threatened to detain him if he persisted in lying, Ho became frightened and admitted the facts related by Liu. The station chief told Ho that he had better compensate Liu for the injuries that Ho had inflicted upon him, and Ho agreed to do so. No sanction was mentioned at the time.

Shortly afterward, Wang, the leader of the production brigade of the advanced agricultural producers' cooperative in which Ho and Liu both worked, went to the public security station to urge that Ho be punished. Wang and Ho had been unfriendly to one another for some time prior to the incident. Since militiamen often went unpunished for misconduct toward landlord elements and their daughters, Wang knew that unless he made an effort the public security station would probably let the matter drop. In his talk with the station chief he argued that Ho could not go unpunished, because he had unlawfully claimed that he was checking on household registration, had attempted rape, and had severely beaten the girl's father. If the public security forces tolerated behavior like Ho's, he said, everyone would feel free to violate the person of the members of landlord families, and social order would disintegrate.

If Liu had been an ordinary peasant, Ho might have been sentenced to five to seven years in prison. But the station chief did not like the idea of punishing a "good person" such as a militiaman for misconduct toward a "bad person" such as a landlord. Yet he felt that some action had to be taken against Ho in order to settle the matter. He finally decided to recommend that Ho be sent to rehabilitation through labor, and the public security subbureau approved this recommendation. Cohen, *Criminal Process*, *supra*, note 7, pp. 266-267.

Professor Sato Shinichiro of Tokushoku University (Tokyo) reported the following interview:

A militiaman, during a stormy night in 1961 under the pretext of investigation, broke into the house of a former landlord and dragged his wife, aged thirty-one, to a barn in an attempt to rape her. Meeting with desperate resistance, the rapist was not at first successful. However, at that critical moment, he drew a revolver and fired two shots. The terrified woman was finally raped. But another militiaman saw what had happened. Next morning the rapist claimed that the woman had seduced him. He tied her hands and drove her to the production brigade ready

Another peculiar aspect of the Chinese judiciary is that the judicial process is apparently not applicable to the purge of high governmental or party officials. High officials, such as former Chairman Liu Shao-ch'i and former Defense Minister P'eng Teh-huai, were denounced in party newspapers or in other publications and later simply disappeared. They have never been brought to judicial trial and their alleged crimes have never been adjudicated by the people's court. Similarly, the rehabilitations of the purged high officials have apparently not gone through judicial process. To a certain extent, the practice is similar to the imperial practice of ordering a high official to commit suicide (賜死 *Tz'u-szu* or 賜令自盡 *Tz'u-ling tsu-chin*), instead of subjecting him to judicial process and execution.⁹

III. Judicial System Before the Cultural Revolution

Before the formal inauguration of the People's Republic of China on October 1, 1949, the Chinese People's Political Consultative Conference (CPPCC) adopted the Common Program which served as a provisional constitution until the adoption of a formal constitution on September 20, 1954. The period

to be struggled against with the result that the woman was shown naked in six villages. It happened that when the other militiaman returned to his hometown and witnessed what was going on, he felt repulsed at the cruel way the woman was struggled against. So he went to see the magistrate and requested that an investigation into the case be made. The investigation revealed the guilt of the militiaman since the victim's clothes were torn up and the militiaman's bullets were found nearby. For all this, the case was categorized as "a contradiction within the people," and no serious punishment was meted out to the wrongdoer. Nevertheless, he was so brutalized in his people's commune... that he had to be hospitalized. He was condemned as a "corrupt element" subject to control by the commune. The victim killed herself. (With editorial changes by the author.) "A Report of the Production Team: A Personal Investigation," *Issues & Studies*, Vol. XI, No. 3 (March 1975), pp. 88-89.

⁹ E.g., three high officials involved in the 1900 Boxer Rebellion, including Minister of the Board of Punishment Chao Shu-ch'iao, were ordered to commit suicide. See Huang Cheng-ming, *Chung-kuo wai-chiao shih* (A Diplomatic History of China), (Taipei: Cheng-chung shu-ch'u, 5th printing, 1969), p. 208.

of the Common Program was one of internal consolidation and reorganization. In many respects it resembled the early years of Soviet Russia, when the Cheka and revolutionary tribunals ruthlessly enforced the Red Terror to eliminate class enemies and to establish new order. Professor J. A. Cohen described the criminal justice of this period as follows:

From 1949 to 1953 was a period of economic reconstruction and consolidation of political control, roughly comparable to the period of War Communism in the earliest days of the Soviet Union (1917-1921). During this period the criminal process served as a blunt instrument of terror, as the Chinese Communist Party proceeded relentlessly to crush all sources of political opposition and to rid society of apolitical but antisocial elements who plagued public order. The Nationalist legal apparatus, including the bar, was formally abolished at the outset, yet it was not immediately replaced by a well-regulated system of criminal justice. Although the Communist government created a judicial structure, much criminal punishment during these years was administered outside the regular courts; it was not until the "judicial reform" of 1952-1953 that the courts were sufficiently purged of holdovers from the Nationalist government to inspire the confidence of the Communist Party. In many kinds of cases the police had unfettered power to investigate, detain, prosecute, and convict. The police also conducted large-scale "administrative" roundups of petty thieves, gamblers, opium addicts, whores, pimps, vagrants, and other dregs of the old society, and subjected them to "noncriminal" reform measures during the course of long confinement. Military control commissions continued to function and to administer punishment in large areas of the country. During the regime-sponsored "mass movements" or campaigns that swept the country, such as those instigated to carry out the land reform, to suppress counterrevolution, and to eradicate official corruption and related illegal activities in the business community. . . , ad hoc "people's tribunals," which were thinly veiled kangaroo courts, dispensed their own brand

of justice.

Although these various criminal processes usually functioned in secret, in major cases the last phase of the process was often conducted in the form of a "mass trial" convened before a horde of onlookers. Hundreds of thousands of class enemies were sentenced to death in such trials, and many more were sent to long terms of "reform through labor." In short, the army, the police, and the regular and irregular courts implemented the directive of Chairman Mao to serve as instruments for oppressing the hostile classes and for inflicting "legalized" violence and lesser sanctions upon all those who were deemed to be "reactionaries" and "bad elements."¹⁰

So far as the court system is concerned, the PRC in 1951 set up a three-level, two-trial (one appeal) system of people's courts: County court, Provincial court, and the Supreme People's Court. All people's courts were organic parts of the people's governments of the corresponding level.¹¹ A people's procuratorate (prosecutor) was also established in the corresponding level of the people's court and it was at the same time a component part of the people's government at the same level.¹² As a result, both the courts and the procuracy were under the control of the government and there was no separation of powers among them.

The Common Program did not have a provision for the independence of the judiciary and the PRC authorities also made no pretense of having an independent judiciary free of political control. The Common Program also abolished all former Republic of China laws, but the PRC did not itself

¹⁰ Cohen, *Criminal Process*, *supra*, note 7, pp. 9-10.

¹¹ Article 10 of the Provisional Organic Regulations of People's Courts in the People's Republic of China, Promulgated on September 4, 1951. Text of the Regulations in *Chung-yang jen-min cheng-fu fa-ling hui-pien* (Collection of laws and decrees of the Central People's Government), (Peking: *Jen-min ch'u-pan she*, 1953), Vol. 2 (1951), pp. 79-82.

¹² Article 6 of General Rules Governing the Office of the Local People's Procurators at Various Level, promulgated on September 4, 1951. Text in *id.*, pp. 86-87.

enact comprehensive civil and criminal codes to replace the old ones. The only important criminal legislation enacted after the establishment of the regime was the Regulations for the Punishment of Counterrevolutionaries, promulgated on February 21, 1951.¹³ By that time, the people's courts had already rendered numerous judgments, including death sentences, on counterrevolutionaries and other criminals. Two articles of the Regulations deserve special attention. Article 18 made the Regulations retroactive to cover "preliberation" activities. Article 16 set forth the principle of crime by analogy: "Persons who have committed other crimes with counterrevolutionary intent that are not specified in the law shall be punished according to analogous specified crimes in these Regulations."

The lack of comprehensive codes and detailed statutes did not hamper the work of the people's courts since they were frequently told to follow orders or policies of the government in cases not covered by existing law. Moreover, as pointed out by Professor Cohen, both the police and the military control commissions were also engaged in the administration of justice during this period.

On September 20, 1954, the PRC promulgated a formal constitution and its provisions concerning the judiciary and people's rights indicated a tendency to follow the Soviet model for establishing a stable legal order and a permanent judicial structure. The constitution guarantees, among other things, equality before the law and specifically provides protection against arbitrary arrest. It also provides for a four-level two-trial (one appeal) court system. Below the Supreme People's Court, local courts were divided into higher people's courts, intermediate people's courts, and basic people's courts. In 1962, it was reported that there were thirty higher courts, 200 intermediate courts, and about 2,000 or 3,000 basic courts.

The constitution and the laws subsequently enacted introduced a number of democratic features to the new judicial system

¹³ For an English translation of the law, see A. P. Blaustein, editor, *Fundamental Legal Documents of Communist China* (South Hackensack, N.J.: Fred B. Rothman & Co., 1962), pp. 215-221 and Cohen, *Criminal Process*, *supra*, note 7, pp. 299-302.

such as the right of legal defense, the principle of public trial, and the concept of judicial independence. Article 80 of the constitution also provided that the courts should be responsible to people's congresses at corresponding levels and should report to them. This was in clear contrast with the earlier laws which required the subordination of the courts to the leadership of the people's government at each corresponding level.

However, people's rights and judicial independence under the new constitution remained qualified. The people's rights guaranteed by the constitution were not applicable to all individuals within the country. "Reactionaries" or "class enemies" had no right whatever under the constitution. Moreover, the constitutional guarantee of equality before the law did not mean that the law in the PRC would lose its class character. As one writer pointed out, such equality did not mean "when the state enacts law, it would treat individuals from different classes equally in legislation."¹⁴

Another indication of the tendency to establish a stable legal system in the post-constitutional period was the effort to enact criminal and civil codes, these codes, however, never came into being. However, information gathered from interviews indicates that there do exist unpublished regulations defining murder, rape, arson, and many other common crimes and setting forth the maximum and minimum penalties for each.¹⁵

During the period of 1956-1957, the PRC announced the so-called policy of "letting one hundred flowers blossom and one hundred schools contend."¹⁶ Many jurists and scholars took the advantage of this opportunity to criticize the government for the lack of basic laws and the defective administration of justice. Suggestions were made to restore certain legal concepts such as the presumption of innocence and the

¹⁴ Li Kuang-ts'an, *Wo-kuo kung-min ti chi-pen ch'uan-li ho i-wu* (The fundamental rights and duties of the citizens of our country), (Peking: *Jen-min ch'u-pan she*, 1956), p. 13.

¹⁵ See Cohen, *Criminal Process*, *supra*, note 7, p. 317.

¹⁶ For information on this period, see generally, Roderick MacFarguhar, *The Hundred Flowers Campaign and the Chinese Intellectuals* (New York: Praeger, 1960).

benefit of the doubt for the accused.¹⁷

Alarmed at the strong criticisms evoked by the "Blooming and Contending" Movement, the PRC launched an Anti-Rightist Campaign in the summer of 1957 to counterattack its outspoken critics. So far as the judicial system is concerned, this meant a serious setback for the development of a stable and less arbitrary system of justice. The class nature of the law was emphasized, the independence of the judiciary was interpreted as subject to party control, and the principle of the presumption of innocence was pointedly attacked as incompatible with the socialist judicial system. It was said that the last mentioned principle would put the interest of the accused above the interest of the people and in effect would mean the restriction of the freedom of the judicial organs and the masses in their fight against counterrevolutionary and other criminal elements. During this period, many leading jurists and even four judges of the Supreme People's Court were purged as "rightists."

The public security organs and other administrative organs were again given significant power in the administration of justice. The Security Administration Punishment Act of the PRC promulgated on October 22, 1957,¹⁸ authorized the public security organ to send "persons who are habitual loafers, who do not engage in proper employment and who repeatedly violate security administration" to rehabilitation through labor, which in a certain way does not differ greatly from the criminal sanction of reform through labor. An earlier decision of the State Council¹⁹ also authorized certain administrative organs to send rightists, persons not engaged in proper employment, persons who do not obey work assignments or job transfer orders, and others to rehabilitation through labor.

Between 1958 and 1966 when the Cultural Revolution broke

¹⁷ For a summary of these criticisms, see Shao-chuan Leng, *Justice in Communist China* (New York: Oceana, 1967), pp. 57-63.

¹⁸ Text in *Chung-hua jen-min kung-ho kuo fa-kuei hui-pien* (Collection of laws and regulations of the PRC), Vol. 6 (July-December, 1957), pp. 245-254.

¹⁹ Decision of the State Council of the PRC Relating to Problems of Rehabilitation Through Labor, promulgated on August 3, 1957, in *id.*, pp. 243-244; translated in Cohen, *Criminal Process*, *supra*, note 7, pp. 249-250.

out, the PRC's judiciary appeared to regress to its earlier practice, while the public security organs played a growing role at the expense of the procuracy and the courts. An interesting case vividly describing the Chinese judicial practice after the 1957 Anti-Rightist Movement can be found in Bao Rue-Wang's *Prisoner of Mao*²⁰ (1973).

IV. The Cultural Revolution

Although law reform was not one of the major revolutionary targets at the beginning of the Cultural Revolution in 1966, legal institutions were no exception to the ensuing destruction of the "establishments".²¹ An article entitled "In Praise of 'Lawlessness'" appearing in the authoritative *Jen-min jih-pao* (People's Daily) on January 31, 1967, bluntly advocated the elimination of the so-called bourgeois law:

"You are lawless." Some bureaucrats in power who take the capitalist road, ranting and raving, heap this abuse on us revolutionary rebels.

What you said is right: To you, we are indeed "lawless."

Your so-called "law" is bourgeois "law." Your so-called "world" is the capitalist "world." Your "law" is designed to suppress and persecute the people. Your "world" is a corrupt and decadent one.

To destroy the bourgeois "law" and the capitalist "world" is precisely the revolutionary goal of all proletarian revolutionaries. Like the Monkey King who turns the heavenly palace upside down, we will destroy your "law," smash your "world," rebel against you, and seize your power.

²⁰ Published by Coward, McCann & Geoghegan, New York, 1973.

²¹ For a summary of the important events concerning the judiciary during the cultural revolutionary period, see Tao-tai Hsia, "The Tenth Party Congress and the Future? Development of Law in China," in *Oil and Asian Rivals* (Washington, D.C.: U.S. Government Printing Office, 1974), pp. 390-405. For details, see a forthcoming study by Shao-chuan Leng and Hungdah Chiu.

"Lawlessness" implies the greatest contempt for capitalist and revisionist old order. All "bourgeois" and "revisionist" things must be done away with; all "bourgeois" and "revisionist" lords must be pulled down.

"Lawlessness"—this is the most thoroughgoing revolutionary rebel spirit. Unafraid of the heaven, the earth, repression, oppression, demons and monsters, "we are willing to suffer a thousand cuts and dare to unhorse the emperor." However old your standing and however high your position, we will seize your power as long as you take the capitalist road.²²

Many high officials, including the President of the Supreme People's Court, Yang Hsiu-feng, were purged without resort to judicial process. In October 1968, Liu Shao-ch'i was removed from his position as the Chairman of the People's Republic of China by a decision of the Communist Party of China. Article 28 of the 1954 Constitution providing for the removal of the Chairman by the National People's Congress was totally disregarded.

During the ensuing power struggle Mao Tse-tung even called upon the people to "smash Kung-chien-fa (police, procuracy, and court)."²³ An interesting Red Guards document entitled "Completely Smash the Feudal, Capitalist and Revisionist Legal System" appeared in July 1968 in Canton.²⁴ The document alleged that Mao said, "Depend on the rule of man, not the rule of law."

The document attacked, among other things, the alleged rightist attempt to deny the class character of justice by advo-

²² Translated in *Survey of China Mainland Press*, No. 3879, p.13.

²³ Chinese text in *Chung-kung wen-hua ta-ke-ming chung-yao wen-chien hui-pien* (Important Chinese Communist documents issued during the Great Cultural Revolution), (Taipei: The Institute for the Study of Chinese Communist Problems, 1973), p. 209. The exact date of Mao's instruction cannot be determined, but it was issued in 1967.

²⁴ Canton *Fan Peng-Lo hei-hsien* (Anti-Peng and Lo's black line), No. 2 (July 1968); English translation in *Selections from China Mainland Magazine*, Hong Kong: U. S. Consulate-General, No. 625, September 3, 1968, pp. 23-28.

cating equality of all before the law; failure to maintain the distinction between the enemy and the people by urging that the rights of counterrevolutionaries under prosecution be respected; the unnecessary cumbersomeness of the division of functions among the three legal organs (police, procuracy, and court); the delay and complication of judicial proceedings caused by implementing the system of counsel for defense; the judicial cadres' worshipful attitude toward things foreign and ancient; and advocating that organs of dictatorship "obey only law" to oppose the leadership of the party.

One of the main target of criticism, Kao K'un-feng, President of the Intermediate People's Court of Canton City, was accused of retaining a former Nationalist judge as his legal adviser and of keeping many capitalist and revisionist codes, including a copy of the Nationalist "Six Codes in One Volume" (六法全書 *Liu-fa ch'uan-shu*).

All available evidence seems to indicate that during the Cultural Revolution period, the courts' function was seriously disrupted or taken over by some vaguely described organs from 1967 to the early 1970s. In some areas, judgment against individuals ranging from imprisonment for a limited period to the death sentence were rendered by "political and legal organs," "revolutionary committee," "military control committee of the public security organ," or "police, procurate, and court organ." Nevertheless, at least in 1968, the participation of people's courts in the judicial process was occasionally reported, but only for a few cases.

After the People's Liberation Army (PLA) intervened in various places in China to restore order to the chaos created by the Cultural Revolution, many cases were handled by the PLA without the participation of the courts. Fortunately, there are several PLA documents on administration of justice in Yunnan Province available for study. To give an example, a "Notice" was issued by the PLA "Military Control Section of the Public Security Organ of Meng-lien County in Yunnan Province" dated August 8, 1972.²⁵

²⁵ Partial translation of the text can be found in Hungdah Chiu, *supra*, note 5, pp. 108-110.

On the top of the "Notice" is a quotation from Mao Tse-tung which reads, "resolutely suppress all counterrevolutionary elements." After a brief preamble on the determination of the revolutionary people to suppress the class enemies, it then listed the names of five persons sentenced to terms from five to twenty years imprisonment. Three of them, including a woman, were charged with being "Chiang spies," and two were charged with killing their wives. Despite the fact that they were described in the "notice" as all sentenced to imprisonment "according to law," no law was cited to support the conviction.

In this notice, the party policy of "dealing leniently with those who confess and severely with those who resist" was cited several times as the ground for reducing the sentences of one woman "spy" and two murderers who had killed their wives.

Although available materials are far from conclusive evidence of the nature of administration of justice under the PLA, they do suggest that the military also disliked the more stable and less arbitrary legal system created by the 1954 constitution, together with laws enacted immediately thereafter, and totally disregarded them in handling cases.

Despite the virtual suspension of the people's courts during the Cultural Revolution and the subsequent intervention by the PLA in the administration of justice, the Courts as an institution had not yet been abolished. In an interview of an official of the Amoy Public Security Bureau in early 1972 by an assistant editor of the *Far Eastern Economic Review*, the official acknowledged that people's courts "now rarely meet," although they still exist, and that it was the public security bureau that usually handled criminal cases.²⁶

While the courts, as an institution, survived the turmoil of the Cultural Revolution, the procuracy was not so fortunate. According to reliable information, the function of the procuracy was taken over by the public security organ and in 1969

²⁶ See Chen Huan, *supra*, note 4, pp. 14-15.

the procuratorial organ was abolished.²⁷

V. People's Courts After the Cultural Revolution

With the gradual subsidence of the Cultural Revolution and the PLA's military control, the people's courts also gradually resumed their activities. Available evidence indicates that courts at least in some areas began to resume their activities in 1973. Several interesting court judgments were made available to this author. One is a "notice" issued by the Tientsin Intermediate People's Court dated August 5, 1973.²⁸

The "notice" reports the sentencing of twenty-nine persons to terms ranging from ten years imprisonment to life imprisonment or to immediate death. Most of the crimes described involved sexual offenses against educated female youths sent down to the countryside to participate in labor. It gives no account of trial proceedings. Those sentenced to immediate death apparently were not given a chance to appeal according to Article 11 of the 1954 Organic Law of the People's Court, nor were the death sentences approved by the Supreme People's Court in accordance with a 1957 resolution of the Standing Committee of the National People's Congress.

Another interesting point revealed by this document is the absence of any prosecutor in the proceedings; this implies the abrogation of the procuracy system.

Like the PRC's pre-1967 judicial judgments, this "notice" does

²⁷ The New China News Agency's (Hsinhua) report on annual National Day activities failed to mention the participation of responsible officials from the Office of the Supreme People's Procuratorate since October 1, 1969. The take over of the Procuratorate's function by the public security organ is confirmed in Article 25 of the 1970 Draft Constitution of the PRC. For text of the Draft Constitution, see Lindsay, *supra*, note 5, pp. 312-320.

²⁸ Summary of the judgment and its photocopy were printed in *Chung-yang jih-pao* (Central Daily News), International edition, October 24, 1973, p. 4 and *Chung-kung yen-chiu* (Studies on Chinese Communism), Vol. 7, No. 10 (October 10, 1973), pp. 93-98. A summary translation of the judgment is available in *Issues & Studies*, Vol. X, No. 4 (January 1974), pp. 90-96. A literal translation of the partial text of the judgment can be found in Hungdah Chiu, *supra*, note 5, pp. 111-112.

not cite any statute as the legal basis of the punishment rendered against those who were alleged to have committed murder, rape, and other crimes.

The last part of the "notice" says that "the sentences of the twenty-nine criminals. . . have been ratified by the Revolutionary Committee of Tientsin City," thus indicating that the judiciary was under the control of the administrative organs and judicial independence was now even overtly nonexistent.

Another interesting document is also a "notice" issued by the Harbin Intermediate People's Court of Heilungkiang Province on November 17, 1973. The "notice" was posted in a wall of a street and was sighted by a Canadian Hockey Team while visiting that city.²⁹ The notice reported the sentencing of six persons to terms ranging from five years imprisonment to life imprisonment for committing the offenses of corruption, deceiving, and profiteering. One defendant, Luo Liang-yu, was not punished because he, after confessing, agreed to name other criminals and returned some 17,000 illegally acquired Jen-min-pi (people's dollars; one Jen-min-pi is about U.S.\$0.50).

The "notice" frankly acknowledged that the sentencing was done "in accordance with the party policy." The clemency toward Luo was said to follow the party policy of "leniency towards those who confess and severe punishments to those who resist." In other respects, the "notice" was similar to the Tientsin court's "notice" stated above. It gave no information on the court proceedings or the possibility of appeal, and was silent as to prosecution. Unlike the Tientsin Court's notice, it did not mention whether the judgment was ratified by the Harbin Revolutionary Committee.

It must be pointed out that in general courts do not always post their judgments on the street. Usually only those cases with education value are posted on the walls of a street to warn the so-called "class enemies," who ironically appear to be present everywhere despite the fact that China has been "liberated" for more than twenty-six years. Also, in such areas

²⁹ John Burns, "Racketeers Prey on China Systems," *The New York Times*, January 28, 1974, p. 5. For a partial translation of the judgment, see Hungdah Chiu, *supra*, note 5, pp. 113-114.

open to foreign visitors, even such judgments are not posted on the street. In the last part of the above mentioned Tientsin court judgment, it is stated that it is "not to be posted on the street corners."

With respect to the right of appeal by the accused, the situation is far from clear. Although in law the right of appeal does exist and the Chinese officials interviewed by Westerners confirm this,³⁰ the two notices described above suggest that under certain circumstances, this right may be suspended in serious or counterrevolutionary cases. A recent criminal case decided by the (Basic) People's Court of Meng-hai County of Yunnan Province on September 14, 1974,³¹ however, indicates that for common offender, the right of appeal still exists.

This case concerns a nineteen year old male youth of poor peasant family background. He tried to increase his private plot by cultivating the neighboring uncultivated land. In order to remove grasses and other bushes on the land, he set fire to the uncultivated land. The fire, however, spread to state forest land and destroyed 180,000 large and small trees there. He was sentenced to seven-year's imprisonment. The last part of the judgment, however, said that the accused can appeal to the Intermediate People's Court of Hsi-hsuan pan-na Chou within ten days.

Despite the existence of the right of appeal, whether it would be wise for the accused to invoke it, especially in criminal cases involving counterrevolutionary charges, is questionable. The Party policy of "leniency towards those who confess and severe punishment for those who resist," followed by the courts such as in the Harbin court case, would certainly

³⁰ *E.g.* Kao K'un-feng, who was believed to be President of the Intermediate People's Court of Canton City, told German correspondent Gerd Ruge: "There are procedures of appeal, if the accused is not convinced by the judgment. We have a two trial system. A case can be dealt with twice only and that is then the end of the case." The interview was first published in a German newspaper, see *supra*, note 4, and later translated into English and published in London, see Gerd Ruge, "An Interview with Chinese Legal Officials, *The China Quarterly*, No. 61 (March 1975), p. 119.

³¹ The file number of the case is ([19] 74) Hsin tzu No. 9, A photocopy of the original judgment is in the possession of the author.

discourage the accused from resorting to an appeal for fear of receiving a heavier punishment in the second trial. As a matter of fact, the right of appeal was rarely invoked by the accused in the PRC even before the Cultural Revolution.

In this connection, it would be helpful to explain briefly one peculiar aspect of the PRC's criminal justice. The PRC places great weight on the individual's confessing his crime. A confession is the main ingredient in determining the type of treatment one will receive and the severity of one's sentence. Those who confess are perceived as being honest in quality and should receive lenient treatment. Those who resist and refuse to confess are considered as being not truly repentant and should be subjected to severe punishment and harsh treatment to reform their reactionary thinking. However, a confession will not necessarily result in the total pardon of one's crime; it serves only as a key to leniency.

Recently, there was some evidence of people's court activities in civil matters, especially in divorce disputes. In the November 11, 1973 *New York Times*, it was reported that a PRC official Hsueh Pao-hua, identified as a graduate of the National Political Science and Law School in Peking and a senior judicial official of Kwangtung Province, said that a couple seeking divorce first should discuss the matter with a mediation committee in their place of residence. If the mediation committee decided against divorce, the spouse wanting divorce had the right to bring his request to court. A recent judgment of the [Basic] People's Court of Hung-chiao Borough of Tientsin City dated July 12, 1974 seems to support such a statement.³²

The judgment indicated that before the case came to the court for a decision, the dispute between the couples had been mediated by the organization (Party), street committee, and the court. The plaintiff's request for divorce was rejected, but the People's Court notified him that he could appeal to the Intermediate People's Court of Tientsin City within ten

³² The file number of the case is ([19]74) Chin hung fa, min pan tzu, No. 157. A photocopy of the original judgment is in the possession of the author.

days. Despite the existence of a marriage law in the PRC,³³ the Court did not cite any legal provisions to support its decision.

Another interesting divorce case was decided by the [Basic] People's Court of Swatow Suburb (Kwangtung Province) on March 22, 1973.³⁴ The plaintiff Ms. Chen Hsi-chüan requested the court to grant her a divorce because her husband Huang Shih-Sheng had disappeared and been missing since November 1968. The Marriage Law of the PRC makes no reference to this reason as a ground for granting divorce. However, the court rendered a judgment "in accordance with the spirit of Articles 8, 17, and 20 of the Marriage Law of the PRC"³⁵ and granted the divorce. This case indicates that occasionally the court may cite legal provisions to support its judgment.

It has not been possible to get court judgments on civil matters other than divorce cases. In mainland China today, there is no private ownership of "means of production," such as a factory or a farm (the status of the "private lot" of a peasant is far from clear). But there can be private ownership of "means of consumption," such as money saved, furniture, bicycles, radios, and other consumer goods. Most civil disputes are settled by mediation without going to people's courts because there is a mediation committee in the local neighborhood and also in the people's commune. However, according to information gathered from interviews of former residents of mainland China and foreign visitors, people's courts do handle some cases of civil disputes.

³³ *The Marriage Law of the People's Republic of China*, (promulgated on May 1, 1950), (Peking: Foreign Languages Press, 3rd printing, 1973).

³⁴ The file number of the case is ([19]73) Shan chiao fa tzu No. 1. A copied text is in the possession of the author.

³⁵ These provisions are as follows:

ARTICLE 8

Husband and wife are in duty bound to love, respect, assist and look after each other, to live in harmony, to engage in productive work, to care for their children and to strive jointly for the welfare of the family and for the building up of the new society.

ARTICLE 17

Divorce is granted when husband and wife both desire it. In the

The impact of the Cultural Revolution on lawyers and judges is an interesting question. On May 13, 1974, a German correspondent Gerd Ruge, interviewed five members of the Kwangtung Institute of Law and Political Science. According to Ruge, most of the information was supplied by Mr. Kao, whom he believed to be President of the Intermediate Court in Canton and who, ironically, was severely denounced by the Red Guard document "Completely Smash the Feudal, Capitalist and Revisionist Legal System" mentioned above. The Institute was described "as a mass organization for research into Law and for facilitating meetings with foreigners,"

event of either the husband or the wife alone insisting upon divorce, it may be granted only when mediation by the district people's government and the judicial organ has failed to bring about a reconciliation.

In cases where divorce is desired by both husband and wife, both parties should register with the district people's government in order to obtain divorce certificates. The district people's government, after establishing that divorce is desired by both parties and that appropriate measures have been taken for the care of children and property, should issue the divorce certificates without delay.

When one party insists on divorce, the district people's government may try to effect a reconciliation. If such mediation fails, it should, without delay, refer the case to the county or municipal people's court for decision. The district people's government should not attempt to prevent or to obstruct either party from appealing to the county or municipal people's court. In dealing with a divorce case, the county or municipal people's court should, in the first instance, try to bring about a reconciliation between the parties. In case such mediation fails, the court should render a decision without delay.

After divorce, if both husband and wife desire the resumption of marriage relations, they should apply to the district people's government for a registration of re-marriage. The district people's government should accept such a registration and issue certificates of re-marriage.

ARTICLE 20

The blood ties between parents and children are not ended by the divorce of the parents. No matter whether the father or the mother has the custody of the children, they remain the children of both parties.

After divorce, both parents continue to have the duty to support and educate their children.

After divorce, the guiding principle is to allow the mother to have the custody of a breast-fed infant. After the weaning of the child, if a dispute arises between the two parties over the guardianship and an agreement cannot be reached, the people's court should render a decision in accordance with the interests of the child.

and "it was compared to the law department of the Academy of Sciences in Peking which, however, was said to have more specialized sections than this provincial institute." The interviews shed some light on the impact of the Cultural Revolution.

The Chinese officials acknowledged the absence of defense lawyers in China, but explained that people can now defend themselves so lawyers are no longer needed. Those who are too old, or have physical defects, can ask a kinsman or relative or other persons to speak for them.³⁶ However, according to my interview with former city residents of mainland China, there are still a few hundred underground lawyers in big cities doing their business secretly.

On the question of professional judges, the Chinese officials said they were no longer called "judges" but "staff members of a court or judicial workers." They then explained the background, training, and appointment of the judicial workers:

The majority of judicial workers come from worker, peasant or military backgrounds. They are trained through daily revolutionary work, participation in struggle and practice. A small minority are university graduates from faculties of law. From the president of a court to any judicial worker in a given court they are all appointed by the governmental Revolutionary Committee of the same level.³⁷

A question closely related to the qualification of judges is legal education. As a result of the outbreak of the Cultural Revolution in 1966, legal education ceased to exist. In May, 1972, when Professor Cohen visited Peking University, he was told that twelve of its thirteen departments had reopened. The only department not yet reopened was the law school. When he visited Fu-tan University in Shanghai, he was told that its law school was no longer in existence. Professor Victor Li of Stanford University, who visited China in the same year, was

³⁶ Ruge, *supra*, note 30, pp. 120-121.

³⁷ *Id.*, p. 121.

informed that there are now six law schools or departments in the entire country but none of them was reopened at that time.³⁸

Law Schools seem to have resumed operation in 1974. In 1974 and 1975, several foreigners were permitted to visit Peking University and to have interview with several law professors there. The Chinese professors acknowledged that, as a whole, legal education in China is in a stage of transition. They were told that before the Cultural Revolution, legal education in the university was five years and students had to take a lot of courses. However, they were not taught much about how to master law to attack the people's enemy and to defend the people's interests. After the Cultural Revolution, legal education was shortened to three years and the number of courses was also greatly reduced. Major courses taught in the law school include Political Theory, History of the Chinese Communist Party, Theory of Dictatorship, Theory of the Nature of the State, Selected Works of Marx and Lenin, Investigation of Criminal Cases, the Constitution, and International Law. The students now come from worker, peasant, and soldier backgrounds. Foreign visitors, however, were not informed of the number of students.³⁹ It was also impossible for the foreigners to visit classes or to get copies of teaching materials.⁴⁰

VI. The New Constitution And the Future of Law in Mainland China

On January 17, 1975, the Fourth National People's Congress adopted a new constitution for the PRC. With regard to the judiciary, the new constitution confirmed the post-Cultural Revolutionary practice of putting the judiciary under the domination of the administrative organs. Article 25 of the constitution provides: "The people's courts are responsible and

³⁸ Jerome Alan Cohen, "Notes on Legal Education in China," *Lawasia*, Vol. 4, No. 1 (June 1973), p. 205.

³⁹ According to Professor Jerome Alan Cohen's information, there are more than one hundred law students in mainland China now. The PRC has also provided short-term legal training program for judicial workers now. It is believed that there are several hundred cadres who have received such simplified legal training.

⁴⁰ Information concerning PRC's legal education stated here was primarily supplied by Professor R. R. Edwards of Columbia University School of Law.

accountable to the people's congress and their permanent organs at the corresponding levels. The presidents of the people's courts are appointed and subject to removal by the permanent organs of the people's congresses at the corresponding levels."

Because Article 22 of the new constitution provides that "the local revolutionary committees at various levels are the permanent organs of the local people's congresses and at the same time the local people's governments at various levels," so in fact the local people's courts are responsible to the local revolutionary committee at the corresponding level. In other words, a local revolutionary committee appoints the president of a local people's court of the same level and also controls it, thus returning to the practice of the Common Program period (1949-1954).

In the case of the Supreme People's Court, the arrangement is somewhat different, because Article 18 of the new constitution provides that the Standing Committee of the National People's Congress, and not the State Council, is the permanent organ of the National People's Congress, so at least nominally the separation between the government and the judicial organ is maintained, though both, needless to say, are under the control of the Party.

The article on judicial independence (Article 78) provided in the 1954 constitution has been eliminated. Similarly, the independence of the local people's procuratorate in Article 83 and all other provisions for the procuratorate in the 1954 constitution are omitted. The new constitution provides in Article 25, paragraph 2 that "the functions and powers of procuratorial organs are exercised by the organs of public security at various levels." Since the public security organs are part of the people's government (revolutionary committee), under such an arrangement the procuratorial functions and powers are in fact exercised by the people's government at the corresponding levels.

With respect to procedural rights of the accused in a trial, provisions of the 1954 Constitution concerning the system of people's assessors in judicial proceedings (Article 75), public trial (not mass trial) for the accused and the latter's right of

defence (Article 76), and minority people's right to use their own language in judicial proceedings (Article 77) are all omitted from the new constitution. On the other hand, the constitution reintroduces the mass trials, practiced in the early years of the PRC and the Cultural Revolution period, of judicial proceedings with respect to the so-called "major counter-revolutionary criminal cases" (Article 25, paragraph 3).

In view of the foregoing analysis, it is clear that under the new constitution, legislative, administrative, and judicial powers at the provincial or an equivalent level and below are all under the control of the revolutionary committees (people's government) at the corresponding levels. The court is, in fact, nothing but one department of a revolutionary committee at the corresponding level and is legally unable to challenge the decision of that committee.

Article 28, paragraph 2, of the new constitution provides that citizens' "freedom of person and their homes shall be inviolable." However, the second part of this paragraph provides that "no citizen may be arrested except by decision of a people's court or with the sanction of a public security organ." It is common knowledge that in every country it is the public security organ that is most likely to infringe upon the personal freedom of citizens by way of arbitrary arrest, and almost all constitutions of the world, including those of the Soviet bloc countries, restrict the arrest power of the security organ by subjecting it to the scrutiny of an independent judiciary. By giving the public security organs the power to arrest citizens without judicial scrutiny, the provisions for personal freedom under the new constitution in fact also become meaningless.

It is difficult to predict with reasonable certainty in what direction the present PRC judicial system will move after the passing of Mao. This uncertainty is further complicated by the recent campaign in mainland China to denounce Confucianism and to praise Legalism. Ironically, it is Confucianism that is against the promulgation of written laws and making them known to the public, and it is Confucianism that espouses the inequality between common people and officials or intellectuals before the law, and that puts only secondary reliance on

law to maintain social order—a theory which the PRC now seems to follow in practice. Legalism, on the contrary, has always advocated the equality of all before the law, the promulgation of laws and making them known to the public, and the reliance on law as a principal instrument for maintaining social order—none of which seems to be practiced by the PRC.

The PRC now seems to be the only country in the world, with the possible exception of Cambodia, without a written civil or criminal code. It is questionable how long such a situation can continue in the future. During the 1957 “Hundred Flower” period, many intellectuals, officials, and students demanded the establishment of a more stable legal system. Recently, a big character poster, written jointly by some educated youths, entitled “Concerning Socialist Democracy and the Legal System—Dedicated to Chairman Mao and the Fourth National People’s Congress” appeared in Canton City on November 10, 1974, making a similar demand for a more stable legal system.⁴¹

⁴¹ Cf. the following excerpts of this big character poster:

What could be a more sacred pillar to support the “rule by rites” of the Lin Piao System than the principle of “Whoever opposes Mao Tse-tung Thought will be struck down”? In name, they are upholding the others; in fact, they are upholding themselves. If Lin Piao could rightfully step onto the stage and speak up, then would it not be “whoever opposes Lin Piao will be struck down (in reality, he had done just that)”? Furthermore, any one of the VIPs can become something sacred as long as he claims for himself the incarnation of Chairman Mao’s revolutionary line, whereas “the handful” of revolutionary masses who dared to affront his dignity will thus never be recognized as the objects which the law protects!

If we are not going to oppose this feudalist principle of the “system of rites” which stresses that “ruler-vassal and father-son, no one is allowed to be impertinent to his superior,” can we really carry out the rule by law of the dictatorship of the proletariat which emphasizes “suppressing the enemies; protecting the people”?. . . .

The “Fourth National People’s Congress” should stipulate in black and white that all the democratic rights which the masses of people deserve should be protected, and that dictatorship will be exercised over the criminals who committed murder, arson, gangsterism, robbery and theft and the elements who incited armed struggles and organized conspiratorial cliques.

Chinese text in *Chung-kung yen-chiu* (Studies on Chinese Communism), Vol. 9, No. 11 (November 1975), p. 129; translated in *Issues & Studies*, Vol. XII,

No. 1 (January 1976), pp. 142, 143.

A poster criticizing "Concerning the Socialist Democracy and Legal System" was put out on December 3, 1974, in Canton City. It severely criticized, among other things, the above quoted parts as follows:

Like liberty and democracy, the legal system also has a distinct class nature. The socialist legal system is to materialize the functioning of the people's democratic dictatorship, i.e., the dictatorship of the proletariat; this functioning is to exercise democracy over the people, while exercising dictatorship over the people's enemies. . . .

But the Li I-che "system" says that the Fourth National People's Congress should stipulate in black and white that dictatorship would only be exercised over criminals such as killers, arsonists, gangsters, thieves, robbers, and those who have incited armed struggle or engaged in organized plotting; that all the democratic rights which the masses of people deserve should be protected.

Worthy of attention is that among the targets of the "dictatorship" being listed by Li I-che, 1) the landlord class is missing; bureaucrat-capitalist class is missing; and the rich peasant class, the bourgeois rightists and the counterrevolutionaries are missing too. Of course, this is not an accidental omission. Otherwise, why could the people not find, in this big-character poster that is devoted to expounding the Li I-che "system" and which has talked at length about the "socialist" legal system, a single reference or single word about dictatorship over the landlords, rich peasants, counterrevolutionaries, bad elements and rightists. 2) Also omitted is the clause that the proletariat must exercise all-out dictatorship over the bourgeois class in the ideological sphere. Thus, all feudalist, bourgeois and revisionist ideologies, all anti-Party, anti-socialism, anti-Marxism-Leninism and anti-Mao Tse-tung Thought reactionary opinions can flow freely. As a matter of fact, this is something "carefully" worked out. From the point of view of the Li I-che "system," "democracy" and "liberty" should be granted to those who are attempting overthrow of the dictatorship of the proletariat, and who are attacking Marxism-Leninism-Mao Tse-tung Thought; dictatorship should not be exercised over them. On the contrary, protection of the "legal system" should be provided to these persons who are conducting subversive activities and spreading reactionary opinions. This is the essence of their alleged "democracy and legal system."

The new poster was believed to be prepared by the PRC authorities. Chinese text in *Chung-kung yen-chiu*, Vol. 9, No. 11, p. 140; translated in *Issues & Studies*, Vol. XII, No. 2 (February 1976), pp. 132, 133.

END