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THE ROLE OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA AS REFLECTING MAO TSE-TUNG'S INFLUENCE

SHAO-CHUAN LENG

During the heyday of the Cultural Revolution (1966-69) in the People's Republic of China, Mao Tse-tung called for the "smashing of Kung-chien-fa (public security, procuratorate, and judicial organs)"¹ and he was also quoted as saying: "Depend on the rule of man, not the rule of law."² However, at the time of the adoption of the 1975 Constitution of the PRC, a statement made by Mao in 1954 received special emphasis from Chinese spokesmen: "An organization must have rules, and a state also must have rules; the Constitution is a set of general rules and is a fundamental charter."³ Moreover, following Mao's recent death, the new Chinese leadership has frequently cited the late Chairman's words to stress unity, discipline, law and order.⁴

¹ Mao Tse-tung's 1967 instruction in CHUNG-KUNG WEN-HUA TA-KE-MING CHUNG-YAO WEN-CHIEN HUI-PIEN (Important Chinese Communist documents issued during the Great Cultural Revolution) 209 (1973).

² *Completely Smash the Feudal, Capitalist and Revisionist Legal System*, Canton Fan-Peng-Lo hei-hsien (Anti-Peng and Lo's Black line) (No. 2., 1968). English translation can be found in U.S. Consulate-General, Hong Kong, SELECTIONS FROM CHINA MAINLAND MAGAZINE (S.C.M.M.), 23 (No. 625, 1968) [hereinafter cited as S.C.M.M.].

³ See, e.g., Chang Chun-chiao, *Report of the Revision of the Constitution*, DOCUMENTS OF THE FIRST SESSION OF THE FOURTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 33 (1975).

⁴ In a speech eulogizing Mao on September 18, 1976, Hua Kuo-feng urged the whole country to follow the late Chairman's often-heard "three do's and three don'ts" instruction: "Practice Marxism, and not revisionism; unite, and don't split; be open and aboveboard, and don't intrigue and conspire." *Memorial speech by Comrade Hua Kuo-feng*, 19 PEKING REV. 16 (No. 39, 1976). The same admonition of Mao was repeated in a joint editorial of the People's Daily, the Liberation Army Daily, and the Red Flag on October 10, 1976, to underline the appeal of "upholding the unity and unification of the Party, strengthening sense of organization and discipline, and obeying the Party Central Committee headed by Comrade Hua Kuo-feng." *Common Aspirations of Hundreds of Millions of People*, Jen-min jih-pao (People's Daily) (Peking) Oct. 10, 1976, at 1 [hereinafter

Whatever the reasons for Mao's statements, and whatever the reasons for others to quote them, there is little doubt about the magnitude of Mao's impact on the Chinese legal system. This paper will attempt to examine the extent to which Mao has influenced the Chinese legal system. This influence will be examined in terms of the competition of two models of law, the class nature of people's justice, law as an instrument for social engineering, the implications of the Anti-Confucian and Pro-Legalist Campaign, and trends for the future.⁵

COMPETITION OF TWO MODELS OF LAW

Two models of law have coexisted and competed with each other in the People's Republic of China. One may be called the jural (formal) model, and the other the societal (informal) model.⁶ Just as *Fa* (positive law) and *Li* (moral code) coexisted in traditional China to regulate human behavior and social order, so do the jural and societal models of law coexist in contemporary China. Moreover, formal rules

cited as J.M.J.P.J.]. The authorities in Hunan Province (Mao's native province) are also reported to have called on the populace to sing a song entitled "The Three Main Rules of Discipline and Eight Points for Attention." The song represents the "iron discipline" worked out by Mao for the Red Army in the early years of revolution. N.Y. Times, Oct. 1, 1976, at A 10, col. 1.

⁵ My sources consist of documentary materials and interviews with recent Chinese emigres, some of whom were former Communist cadres and others of whom had some personal experience with people's justice.

⁶ Most authors seem to agree on the existence of two models of law in the PRC, although using different labels to describe them. See, e.g., J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* (1968); SHAO-CHUAN LENG, *JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE'S REPUBLIC* (1967) [hereinafter cited as LENG]; Li, *The Role of Law in Communist China*, 1970 CHINA Q. 66 (No. 44); Lubman, *Form and Function in the Chinese Criminal Process*, 69 COLUM. L. REV. 535 (1969); Lung-Sheng Tao, *Politics and Law Enforcement in China: 1949-1970*, 22 AM. J. COMP. L. 713 (1974).

have played a secondary role in each instance.⁷ Reflecting Soviet and Western influence, the jural model stands for formal, elaborate, and codified rules enforced by a centralized and institutionalized bureaucracy. The societal model, on the other hand, focuses on socially approved norms and values, implemented by political socialization and enforced by social pressures.

Although labelled the Communist Chinese equivalent of Confucian *Li*, the informal model represents a distinctly Maoist approach to law. The proper modes of conduct based on the collective ethics of an egalitarian society are communicated to the people through education and mass participation in the political-legal process. Compliance is secured by the individual's internalization of social norms and by community pressure and coercion. The formal sanctioning process of the state comes into play only in serious cases of deviance.

Because of his anti-bureaucratic bias and mass-line orientation, Mao preferred informality and flexibility in handling political and legal issues.⁸ While recognizing the need for a legal system in a society, he nevertheless considered law merely as a useful tool to political ends and would not let formal rules and procedures hinder the interest of the revolution. As early as 1926, he articulated his mass revolutionary method by saying that "proper limits have to

be exceeded in order to right a wrong, or else the wrong cannot be righted."⁹ During the Kiangsi Soviet period of 1931-1934, the Chinese Soviet Republic under the direction of the Moscow-oriented "returned students group" enacted a number of basic laws and established a system of "people's courts" including some elaborate judicial procedures.¹⁰ As the Kuomintang threat increased in 1933, both Mao Tse-tung and Chang Wen-t'ien maintained that local authorities should have more freedom and power in dealing with counter revolutionaries. Chang expressed this view in an essay advising judicial cadres not to be concerned with the "niceties of legal procedures and provisions" but with the "creation of our laws according to revolutionary needs in the course of brutal class struggle."¹¹ During the Yen'an period, when the Chinese Communist Party was under Mao's undisputed leadership, there appeared, on the one hand, a tendency in the Communist-held area to regularize the judicial structure and process. On the other hand, there were moves to refine and popularize mass line techniques in applying sanctions and settling disputes. These techniques included on-the-spot trials and mass trials to mobilize and educate the masses and also the development of mediation as an effective means for resolving civil and minor criminal cases.¹²

In the years immediately following the founding of the Chinese People's Republic in 1949, the dual models of law continued to operate in a complementary yet competitive manner. A uniform, nation-wide court system was being developed along with the promulgation of such statutes as the Land Reform Law and the Marriage Law. At the same time, justice was often carried out by *ad hoc* people's tribunals, mass trials, or public security organs (the police) in the form of large scale political

⁷ For a discussion of law in traditional China, see D. BODDS & C. MORRIS, *LAW IN IMPERIAL CHINA* (1967); CHU TUNG-TSU, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961); S. VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MAINLAND CHINA* (1962).

⁸ The mass line is a fundamental Party principle of leadership, expounded by Mao, requiring party cadres to be integrated with the masses and to lead the masses in implementing the Party's policy. Epitomized by the phrase "from the masses, to the masses," it prescribes a process of learning the masses' views, "concentrating" them into policy decisions, and bringing those decisions back to the masses for implementation. Mao Tse-tung, *Some Questions Concerning Methods of Leadership*, 3 *SELECTED WORKS OF MAO TSE-TUNG* 117-22 (1967). In terms of work style, the mass line embodies the Maoist preference for mobilizing mass participation in policy execution through nongovernmental organization and activities. The emphasis is on direct popular action rather than bureaucratic administration. For a good discussion of the mass line, see J. LEWIS, *LEADERSHIP IN COMMUNIST CHINA*, 70-100 (1964); J. TOWNSEND, *POLITICAL PARTICIPATION IN COMMUNIST CHINA* 72-74 (1967). Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 *CALIF. L. REV.* 1303-05 (1967).

⁹ *Report on the Investigation of the Peasant Movement*, 1 *SELECTED WORKS OF MAO TSE-TUNG* 27 (1954).

¹⁰ LENG, *supra* note 6, at 3-5.

¹¹ Lo Fu (Chang Wen-t'ien), *Be Merciless Toward Our Class Enemies*, *TOU-CHENG (Struggle)* 3 (No. 49, March 2, 1934). For a detailed discussion of the work of suppressing counterrevolutionaries in the Kiangsi Soviets, see P. GRIFFIN, *THE CHINESE COMMUNIST TREATMENT OF COUNTERREVOLUTIONARIES: 1924-1949* 11 (1976) and TSAO PO-I, *KIANGSI SU-WEI-AI CHIH CHIEN-LI CHI CH'I PENG-KUEI (The rise and fall of the Chinese Soviet in Kiangsi)* 394-51 (1969).

¹² LENG, *supra* note 6, at 15-19; GRIFFIN, *supra* note 11, at 88-92.

campaigns.¹³ As China adopted the Soviet style of economic development in 1953, there was a general swing toward institutionalization and bureaucratic normalization. In what may be called the era of the PRC's constitutional experiment, 1954-1957, the ascendancy of the jural model was marked by the adoption of a constitution, organic legislation for the courts and procuracy, and a series of substantive and procedural laws and regulations. Equality before the law, the right of legal defense, protection against arbitrary arrest, and independence of the judiciary were guaranteed by the Constitution and other documents. Efforts were also made to draft civil, criminal, and procedural codes.¹⁴ It is true that even in this period there was a continued informalization and politicization of the legal work.¹⁵ But an important trend was started toward more regularity and institutionalization. At the Eighth National Congress of the Chinese Communist Party in September 1956, Liu Shao-ch'i, then Vice Chairman of the Chinese Communist Party Central Committee, spoke of the reasons for regularizing the legal system. He said, "now . . . 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."¹⁶ Similarly, the speech given by Tung Pi-wu, then President of the Supreme

People's Court, and the resolution adopted by the Central Committee at the Eighth Congress emphasized the need for codification and for observance of the law.¹⁷ Mao Tse-tung, nevertheless, appeared to be less enthusiastic. In his speech before the same Congress he warned his party of the evil of bureaucratism and the danger of becoming isolated from the masses.¹⁸

China's progress toward a stable legal order came to an abrupt end in 1957 when the Communist elites launched an Anti-Rightist campaign as a counter attack against strong criticisms of the Party evoked by the Hundred Flowers Movement.¹⁹ Even more far-reaching was the PRC's decision to abandon the Soviet model in favor of the Maoist developmental strategy (the Great Leap Forward) that stressed mass mobilization and "politics in command."²⁰ The impact on the legal field was a decisive shift from the jural model to the societal model. During the retrenchment years of the early 1960's, when Liu Shao-ch'i was the head of state, there was an occasional reappearance of legal discussions in juridical circles.²¹ On the

¹⁷ *Speech by Comrade Tung Pi-wu*, 2 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 87 (1962) (Speeches); *Resolution of the Eighth National Congress of the Communist Party of China on the Political Report of the Central Committee*, 1 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 128-29 (1962) (Documents).

¹⁸ Mao Tse-tung, *Opening Address at the Eighth National Congress of the Communist Party of China*, 1 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 9 (1956) (Speeches).

¹⁹ For a general discussion of the Hundred Flowers Movement, see M. GOLDMAN, *LITERARY DISSENT IN COMMUNIST CHINA*, 152-202 (1967); *THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS* (R. MacFarquhar ed. 1960). For a discussion of the criticism of the PRC's legal system by Chinese jurists, see SHAO-CHUAN LENG, *supra* note 6 at 57-63.

²⁰ The Great Leap Forward was designed to accelerate economic growth and socialist transformation by stressing the mass line approach and the strategy of "walking on two legs"—simultaneous development of agriculture and industry and of indigeneous (labor intensive) and modern (capital intensive) projects. See A. ECKSTEIN, *COMMUNIST CHINA'S ECONOMIC GROWTH AND FOREIGN TRADE*, 29-37 (1966); J. PRYBYLA, *THE POLITICAL ECONOMY OF COMMUNIST CHINA* 256-340 (1970); F. SHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA*, 464-500 (1968).

²¹ For instance, in the early 1960's legal forums were held, and books and articles were written on such subjects as "philosophy of law," "state and legal theories," "history of Chinese law," etc. The 1962 issues of chen-fa yen-chiu (Political-legal studies), Peking [hereinafter cited as C.F.Y.C.] in particular,

¹³ The Land Reform Three-Anti, Five-Anti, and Suppression of Counterrevolutionaries Movements were among those nation-wide mass campaigns launched during 1950-1952. See LENG, *supra* note 6, at 35-39 and Tao, *supra* note 6, at 715-20.

¹⁴ For details of the PRC's constitutional experiment in the 1950's, see COHEN, *supra* note 6, at 10-14; LENG, *supra* note 6, at 47-54; TAO-TAI HSIA, *GUIDE TO SELECTED SOURCES OF MAINLAND CHINA* 1-76 (1967). English text of the 1954 Constitution is in *CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA* (1954). Articles 73 to 103 contained provisions for the courts, procuracy and rights of the people.

¹⁵ Cohen, *The Chinese Communist Party and Judicial Independence: 1949-1959*, 82 HARV. L. REV. 967 (1969); Li, *supra* note 6, at 80-88; Lubman, *supra* note 6, at 546-51.

¹⁶ Liu Shao-ch'i, *The Political Report of the Central Committee 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 (1962) (Documents).

whole, however, the post 1957 trend continued to show the decline of the judiciary and procuracy in importance and the ever-expanding role of Party committees and public security organs in law enforcement.²²

The jural model suffered another serious setback during the Cultural Revolution (1966-69). The Cultural Revolution was initiated by Mao largely to revolutionize the bureaucratic establishment and to inculcate socialist values and beliefs. One of the targets under attack was the existing legal structure, which the Red Guards labelled as a counterrevolutionary creation of Liu Shao-ch'i and his fellow "capitalist roaders." Among others, the Maoists criticized Liu's group for supporting the "bourgeois" systems of "equal justice" and "defense counsel" and for resisting "leadership of the Party over legal work."²³ Following Mao's instruction to "smash Kung-chien-fu (Police, procuracy, and courts)," the Red Guards singled out the public security for special denouncement.²⁴ The latter

contained many serious articles on legal questions. LENG, *supra* note 6, at 72-73: A former prominent Chinese lawyer told the author that he was asked in 1954 by the Ministry of Communications to prepare a draft on maritime law. He completed the final draft in the early 1960's as a member of the Codification Committee. The entire project ended when the Cultural Revolution was launched in 1966. However, his lectures on maritime law were published by the People's Publishing House in the 1960's for internal circulation among organs concerned with shipping.

²² For an illustration of the Party-controlled and police-administered sanctioning process during the period between the late 1950's and the mid-1960's, see A. BARNETT, CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA, 219-44 (1967); J. COHEN, *supra* note 6, at 23-46; BAO RUO-WANG (J. Pasqualini) & R. CHELMINSKI, PRISONER OF MAO (1973).

²³ *Completely Smash the Feudal, Capitalist, and Revisionist Legal Systems*, *supra* note 23-28. See also L. DITTMER, LIU SHAO-CH'I AND THE CHINESE CULTURAL REVOLUTION 222-23 (1974); Tao-tai Hsia, *The Tenth Party Congress and Future Development of Law in China*, in HOUSE COMM. FOR FOREIGN AFFAIRS, OIL AND ASIAN RIVALS, SINO-SOVIET CONFLICT—JAPAN AND THE OIL CRISIS, HEARINGS BEFORE SUB-COMM. ON ASIAN AND PACIFIC AFFAIRS, 93rd Cong., 1st & 2nd Sess. (1973-74); Li, *supra* note 6, at 104-09.

²⁴ Mao's instructions issued in 1967 in CHUNG-KUNG WEN HUA TA-KE-MING CHUNG-TAO WEN-CHIEN HIU-PIEN, *supra* note 1, at 209. Chiang ching, Mao's wife, is reported to have demanded in 1968 that the three organs, especially the public security, be completely smashed. S.C.M.M. 16 (No. 625, 1968); SURVEY OF CHINA MAINLAND PRESS 9 (No. 4182, 1968) (U.S. Consulate Hong Kong) [hereinafter cited as S.C.M.P.].

was attacked for abuse of power and for taking a reactionary stand. Moreover, its cadres were accused of failing to carry out the mass line according to the teachings of Mao Tse-tung.²⁵ In an editorial titled "In Praise of Lawlessness," the *People's Daily* called for the complete destruction of the "bourgeois" law so that the proletarian legal order could be established.²⁶

To achieve the transformation of political-legal organs, Mao proceeded to have a large number of cadres purged without resort to any formal process. Among many law enforcement personnel removed from office were Yang Hsiu-feng, President of the Supreme People's Court, Chang Ting-cheng, the Chief Procurator, and Hsiu Tzu-jung, the First Deputy Minister of Public Security.²⁷ Liu Shao-ch'i, the primary target of the Cultural Revolution, was deprived of his post as the Chairman of the People's Republic of China by the decision of the Central Committee of the Chinese Communist Party in disregard of constitutional procedure.²⁸

The reform of the law enforcement apparatus during the Cultural Revolution was also accomplished through the wider use of mass line devices and the imposition of military control over "Kung-chien-fa" by the People's Liberation Army (PLA).²⁹ The courts still existed

²⁵ *Comrade Hsieh Fu-chieh Important Speech* (excerpts), Canton Chiu-P'eng-Lo Chan-Po (Drag-out P'eng-Lo Combat News), (No. 3, Feb. 1968) in S.C.M.P. 5-7 (No. 4138, 1968); *Suppression of the Masses is Bourgeois Dictatorship*, Shanghai Wen-hui Pao, June 5, 1968, in S.C.M.P., 1-7 (No. 4210, 1968).

²⁶ S.C.M.P. 13 (No. 3879, 1967).

²⁷ S.C.M.P. 1 (No. 4181, 1968); S.C.M.P. 1 (No. 4182, 1968); Hungdah Chiu, *The Judicial System under the PRC Constitution*, in THE NEW CONSTITUTION OF COMMUNIST CHINA: COMPARATIVE ANALYSES 86 (M. Lindsay ed. 1976); CHANG CHING-WEI, KUNG-FEI CHENG-CHIH WEN-TI LUN-CHI (Collection of essays on Chinese Communist political problems), 158-59, 327-28 (1965).

²⁸ Liu was expelled from the CCP "for all time" and stripped of all his state posts by the decision of the Party. See *Communique of the Twelfth Enlarged Plenum of the Eighth CC of the CCP*, Oct. 31, 1968, in J.M.J.P. Nov. 2, 1968, at 1. However, the right to remove the head of state was reserved to the National People's Congress by Article 28 of the 1954 Constitution of the PRC.

²⁹ The PLA began its intervention in early 1967 by taking over the public security bureaus. See, e.g., *Notice of the Public Security Ministry and the Peking Garrison Command of the PLA on Taking over Control of the Peking Municipal Public Security Bureau by the Peking Garrison Command of the PLA*, Feb. 11, 1967, CURRENT

but functioned only sparingly. There were occasional reports of participation of the people's courts in the judicial process.³⁰ More often there were reports of public judgment meetings or mass trials held against counterrevolutionaries, class enemies, or common criminals, where judgments were rendered and sanctions imposed by "political and legal organs,"³¹ "organs of dictatorship,"³² "revolutionary committees,"³³ "police-procurate-court organs"³⁴ or "military control committees."³⁵

Available evidence indicates that the PLA's supervision of the administration of justice continued beyond 1969. It was only between 1970 and 1973 that military control over law enforcement gradually receded, although the pace varied from region to region and from agency to agency. For instance, public notices announcing sentences against criminals were issued in 1971 by the military control committees of the PLA for the police, procuracy and courts

in various parts of Yunnan province,³⁶ while at reported trials in Peking and Canton in 1970, people's courts passed sentences.³⁷ Public security organs are reported to have resumed their duties in 1971 in large cities,³⁸ but two documents, dated August 1972 and March 1973, show that the PLA still exercised military control over police in Yunnan.³⁹ In general, "normalcy" appears to have been restored to the legal field by 1973. The courts thus appear to have survived the Cultural Revolution. Less fortunate was the procuracy, which was abolished, its functions and powers having been transferred to the public security agency.⁴⁰

What has emerged from the Cultural Revolution is the ascendancy of the societal model of law over the jural model and the more explicit dominance of the Party and the police in the administration of justice.⁴¹ In a larger context, the balancing of the two competing lines—institutionalization and the mass line—is evident in the new Constitution adopted in

BACKGROUND 124 (No. 852, 1968) (U.S. Consulate-General, Hong Kong) [hereinafter cited as C.B.J.]. Later Military control was extended to "all organs of dictatorship." See *Vice Premier Hsieh Fu-chih's Talk at the Supreme People's Court* (Excerpts), Hung tien hsien (Red Telegraph Dispatch), March 27, 1968 (No. 3), in S.C.M.P. 4 (No 4157, 1968).

³⁰ E.g., Kwangtung People's Broadcasting Station, November 10, 1967, reported that the Kwangtung Provincial Higher People's Court and the Canton Municipal Higher People's Court sentenced twelve counterrevolutionaries to death or imprisonment; New China News Agency (N.C.N.A.) Sept. 12, 1967 [hereinafter cited as N.C.N.A.], reported a Peking Intermediate People's Court sentenced four criminals to death. According to both reports, the death sentences were approved by the Supreme People's Court. This procedure was also followed after the Chengchou Municipal Military Control Committee of the Public Security Organ had sentenced several individuals to death (Hunan People's Broadcasting Station, May 12, 1968).

³¹ E.g., Shangtung People's Broadcasting Station, Sept. 5, 1957; Yunnan People's Broadcasting Station, March 15, 1968.

³² E.g., Hunan People's Broadcasting Station, Nov. 8, 1967; Tsingtao People's Broadcasting Station, March 5, 1968.

³³ E.g., Kwangtung People's Broadcasting Station, March 15, 1968; Checkiang People's Broadcasting Station, Aug. 31, 1968.

³⁴ E.g., Shanghai People's Broadcasting Station, May 14, 1968.

³⁵ Inner Mongolia People's Broadcasting Station, April 27, 1968; Kiangsi People's Broadcasting Station, May 14, 1968; Honan People's Broadcasting Station, May 12, 1968.

³⁶ January 16 Notice by the Military Control Committee of Kunmin City, January 26 Notice by the Military Control Committee of Chinghung County, and February 12 Notice by the Military Control Team of Pan-lung District. Copies of these unpublished documents are in the possession of the author.

³⁷ For radio reports and witnesses' accounts of a mass trial held in Peking in January 1970 and two other trials held in Canton in May 1970, see *Trial by Jury—Mainland Style*, Hong Kong Standard, Aug. 23, 1970, at 6.

³⁸ This is true especially in such cities as Peking and Canton. See *Security Returns to Its Duties*, South China Morning Post (Hong Kong), April 8, 1971, at 15. This was confirmed by several Chinese informants who left China after 1973.

³⁹ Notice of the Chinese People's Liberation Army Military Control Section of the Public Security Organs of Meng-lien County in Yunnan Province (Aug. 8, 1972) and Notice of the Chinese PLA Military Control Committee of Szu-Mao Region in Yunnan Province (March 5, 1973). Copies of both documents, which pronounced sentences upon a number of class enemies, are in the possession of the author. English translation of the first document is in Hungdah Chiu, *supra* note 27, at 108-10.

⁴⁰ *Id.* at 91-92. According to Chinese spokesmen, the procuracy was abolished in order "to simplify, improve and transform the superstructure which was not suitable to socialist economic basis, and to simplify the procedure in the jurisdictional sphere for the convenience of the masses." Ruge, *An Interview with Chinese Legal Officials*, 1975 CHINA Q. 120 (No. 61).

⁴¹ For a comprehensive treatment of China's legal development in the post-1966 period, see a forthcoming study by Shao-chuan Leng and Hungdah Chiu.

1975.⁴² On the one hand, the Constitution contains provisions weighted toward discipline and orderly economic development.⁴³ On the other, it includes statements reflecting unequivocally Mao Tse-tung's mass politics and anti-bureaucratism.⁴⁴

As far as law is concerned, the new Constitution clearly confirms the political reality of the consistent decline of the jural model in China since 1957. There is a drastic reduction in the number of the provisions concerning citizens' fundamental rights, from 19 articles (Articles 85-103) in the 1954 Constitution to 4 articles (Articles 26-29) in the 1975 Constitution.⁴⁵ Even more dramatic is the reduction in the coverage of the judicial system, from 12 articles (Articles 73-84) in the old Constitution to one article (Article 25) in the present Constitution. Eliminated are provisions containing such "bourgeois" concepts of due process as equality before the law, public trials, right to defense, and protection against arbitrary arrest.⁴⁶ Also dropped was the controversial provision providing for judicial independence.⁴⁷ Underscor-

ing the prevailing trend toward politicization and informalization of the legal order, Article 25 of the 1975 Constitution calls for the subjection of the people's courts to the control of local political leadership (the revolutionary committees) at corresponding levels and the application of the mass line as the operational principle for procuratorial and trial work.⁴⁸ It further legitimizes the dominant position of the police in law enforcement by providing that "the functions and powers of procuratorial organs are exercised by the organs of public security at various levels."

Despite the apparent recision of many provisions of the 1954 Organic Law of the People's Courts by the current Constitution, the four-level court structure and the two-trial system continue to function.⁴⁹ The role of the courts, nevertheless, is quite modest. A great many cases of anti-social behavior are handled by public security organs. An even greater number of conflicts are resolved by basic-level administrative units and mass organizations. The courts appear to be involved only in serious criminal cases and divorce litigations.

As the extrajudicial process of law enforcement and dispute resolution now receives more emphasis than before the Cultural Revolution, it is important to identify the major participants in the process. The basic level of government

⁴² The text of the 1975 Constitution can be found in DOCUMENTS OF THE FIRST SESSION OF THE FOURTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 3, at 5-29. For a detailed analysis of the Constitution, see Lindsay, *supra* note 27; TAO-TAI HSIA AND K. HAUN, *THE 1975 REVISED CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA* (1975).

⁴³ *E.g.*, Articles 7, 8, 9, and 10 on the economy and the last part of Article 13 referring to "both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness."

⁴⁴ *E.g.*, Article 11 stressing proletarian politics, the mass line, and the principle of efficient and simple administration; Article 13 permitting the masses "speaking out freely, airing views fully, holding great debates and writing big-character posters." It was reported that the inclusion of the freedom to strike in Article 28 was done at Mao Tse-tung's personal insistence. Chang Chun-chiao, *supra* note 3, at 39-40.

⁴⁵ Text of the 1954 Constitution is in CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 14.

⁴⁶ *E.g.*, Articles 76 and 85 of the 1954 Constitution. Article 89 of the 1954 Constitution that stipulated "no citizen may be arrested except by decision of a people's court or with the sanction of a people's procuratorate" is now replaced by Article 28 of the 1975 Constitution that provides "no citizen may be arrested except by decision of a people's court or with the sanction of a public security organ." This actually means no restriction on the arrest power of the police.

⁴⁷ Article 78 of the 1954 Constitution.

⁴⁸ The first paragraph of Article 25 states "The people's courts are responsible and 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 congress at the corresponding levels." According to Article 22, the permanent organs of the people's congresses at local levels are the local revolutionary committees which serve as the local government. The control of the Party over the state apparatus and the PLA are explicitly stated in Articles 2, 15, 16 and 117 of the Constitution. For a discussion of the supremacy of the CCP, see Chang, *A Comparative Study of the 1954 and 1975 State Constitutions of Communist China*, in Lindsay, *supra* note 27, at 52-54; TAO-TAI HSIA & K. HAUN, *supra* note 42, at 36-39.

⁴⁹ The four levels are the Supreme People's Court, high courts, intermediate courts and basic courts. Under the two-trial system a judgment of the court of first instance can be appealed once to the court of the next higher level. The continuing operation of this system is confirmed by Chinese Spokesmen. See *Chinese Aide Gives Description of Public Execution*, N.Y. Times, Aug. 13, 1975, at 8 col. 2; Ruge, *An Interview with Chinese Legal Officials*, 1975 CHINA Q. 119-20 (No. 61).

is the street revolutionary committee in an urban area and the commune revolutionary committee in the countryside. Below the street revolutionary committee are quasi-official residents committees, which are in turn subdivided into residents groups; below the commune revolutionary committee are quasi-official production brigade committees, which are in turn subdivided into production team committees.⁵⁰ Parallel to the administrative structure, both the Communist Party and the public security apparatus are organized in hierarchies extending down to the lowest level. In addition, security protection committees, mediating committees, the Young Communist League, the Women's Association, and other activist networks are formed in residential, production and occupational units.⁵¹

Under the overall direction of the Party, these official, quasi-official, and mass organi-

⁵⁰ Except for the substitution of the revolutionary committee as the local government (Article 22 of the Constitution), the basic-level administrative structure is essentially the same as that before the Cultural Revolution. See *Regulations Governing the Organization of Street Administrative Offices and City Residents Committees*, 1 CHUNG-HUA JEN-MIN KUO-HO-KUO FA-KUEI HUI-PIEU (Collection of Laws and Regulations of the People's Republic of China) 171-75 (1955) [hereinafter cited as F.K.H.P.]; A. BARNETT, *supra* note 22, at 339-62; Cohen, *Chinese Law: At the Crossroads*, 59 A.B.A. J. 42-44 (1973); Crook, *The Commune System in the People's Republic of China*, 1963-74, in CHINA: A REASSESSMENT OF THE ECONOMY 366-410 (1975).

⁵¹ For charts outlining the interrelationship of these organizations and Party and state apparatuses before the Cultural Revolution, see J. COHEN, *supra* note 6, at 140-41 and Lubman, *supra* note 8, at 1313, 1331. Whatever disruptions occurred during the Cultural Revolution, these activist networks are now back in operation with greater vigor. For instance, the mediation committees are reported to have been active in settling civil disputes, with a network set up at the production brigade level in the countryside and the street committee level in urban areas. Stewart, *Divorces in China Decided by Peers*, N.Y. Times Nov. 11, 1973, at 5, col. 1. The security protection committees, originally organized in 1952 as extensions of the police, have also been revitalized since the Cultural Revolution. A 1972 document of the Public Security Ministry provides for the establishment of the security protection committees, composed of three to eleven members each, in production brigades or teams, street committees, factories, mines, enterprises, and schools. The main tasks of these committees are to assist public security organs "first to conduct among the masses propaganda-education to heighten their revolutionary consciousness, and to teach them in the observance of state policies and laws" and "secondly to organize the masses to guard against counterrevolutionaries, enemy special

zations are the primary extra-judicial institutions settling civil disputes and disposing of minor criminal cases. When conflict arises, the informal resolution process is conducted by cadres and activists in those basic-level units along with friends, relatives, neighbors, and co-workers of the parties involved. From the outset, it must be determined whether any given situation involves "antagonistic" or "non-antagonistic" contradictions, as prescribed by Mao.⁵² For instance, mediation and persuasion are employed by individuals or a small group to resolve disputes between neighbors or spouses. Struggle, criticism, and self-criticism before a group are used to deal with minor cases of misbehavior, such as gambling and petty theft. For more serious wrongdoings or repeat offenders, "administrative" sanctions, including detention and supervised or compulsory labor, are imposed by public security organs.⁵³

The activities of extra-judicial units at the "grass roots" level take care of most of the civil disputes and minor criminal offenses. Only after the "exhaustion of local remedies" are a few civil disputes, usually divorce cases, referred to the courts, where mediation efforts are again undertaken, before there will be an

agents, fire, and natural disasters." Articles 2 and 18 of *Chin-an pao-wei wei-yuan hui kung-tso hsi-tse (shih-hsing ts'ao-an)* [Detailed Works for the Security Protection Committee (experimental draft)], issued on November 25, 1972 by the Public Security Ministry of the PRC. The document is on file at the Institute of Mainland China Affairs, Taipei, Taiwan.

⁵² In a speech given early in 1957, *On the Correct Handling of Contradictions Among the People*, Mao differentiates between "contradictions between ourselves and the enemy" and "contradictions among the people." English text of his speech can be found in *Supplement to People's China* 3-27 (No. 13, 1957). The implications of this particular speech will be analyzed later in this article.

⁵³ The description of the informal process of law enforcement and dispute resolution is based on emigré accounts and reports of visitors. For the latter, see Cohen, *supra* note 50, at 43; Crockett, *Criminal Justice in China*, 59 JUDICATURE 239 (1975). According to information from former cadres, the public security organs can impose three types of "labor sanctions": "supervised labor" in the old place of work with no fixed period, "compulsory labor" in a farm for two or three years, and "rehabilitation through labor" in a designated camp for four to six years. Compare this with the discussions in J. COHEN, *supra* note 6, at 20-21 and in Ch'iu K'ung-yuan, *Social Disorders under the Maoist Hierarchy*, 12 ISSUES & STUDIES 14-15 (No. 5, 1976).

adjudication.⁵⁴ Serious crimes, *i.e.*, rape, robbery, corruption, embezzlement, and "counter-revolutionary activities" are also brought to the courts for disposition.

As provided in Article 25 of the Constitution, the courts follow Mao's mass line in approaching judicial work. One method for implementing this approach is to bring the courts to the people by holding trials in a factory, store, or commune.⁵⁵ Another is for judicial workers to go to the masses to make the investigation and to seek out the views of the people. Still another is to disseminate materials on cases of political or educational value among the public for consideration in small group discussions. Opinions and suggestions resulting from such discussions are supposed to be consulted by the courts in reaching final judgments.⁵⁶ Finally, mass trials may be held for cases of special political significance, particularly those involving class enemies and counterrevolutionaries.⁵⁷

⁵⁴ Visitors' reports and emigre accounts all confirm this practice. See, *e.g.*, Pestana, *Law in the People's Republic of China*, 1 OCCASIONAL REPORT—ASIAN STUDIES, ARIZONA STATE UNIVERSITY 2 (1975); Lubman, *A Divorce Trial—Peking Style*, Wall St. J., June 5, 1973, at 22, col. 4. According to an informant, most of the civil disputes handled by the intermediate court of Ichang in Hupei have been divorce cases, sometimes as high as two hundred a month.

⁵⁵ Pestana, *supra* note 54 at 2-3; Lamb, *An Interview with Chinese Legal Officials*, 1976 CHINA Q. 324 (No. 66).

⁵⁶ Ruge, *supra* note 49, at 121-22. Interviews with former cadres and residents in China indicate that in important cases of a political nature the public is usually given brief, conclusory materials referring to the offenses as "viciously attacking socialism," "arousing the great anger of the masses," etc. As a rule, the people follow the guidance of these documents and party leaders in making suggestions about punishment at small group discussions. In less important cases, however, there appears to be more leeway for the people to express their views. One informant said that he was once saved from imprisonment for an alleged attempt to escape to Hong Kong by the strong defense of his innocence received from his co-workers in an organization. A recent report by foreign travellers in Sian described an unusual poster campaign conducted by "the masses" concerning an alleged case of rape. Apparently with official approval, the posters protested to the Provincial Revolutionary Committee of Shensi, the unjust condemnation of a young worker, named Wang, to twenty years imprisonment for the "rape." Among other complaints, the posters said that the judicial authorities never consulted "the masses," specifically the workers at Wang's factory. *China's 'Masses' Hit Authorities Over Rape Case*, The Washington Post, Aug. 16, 1976, at A8, col. 2.

⁵⁷ There were frequent reports on mass trials and

Throughout the judicial process, the courts work closely with the public security apparatus.⁵⁸ All important decisions, of course, have to be cleared with the revolutionary committees and Party committees of corresponding levels.⁵⁹ However, the judiciary does provide these decisions with a stamp of legitimacy and continues to play a limited but useful role in the PRC's entire law enforcement framework.

CLASS NATURE OF PEOPLE'S JUSTICE

The class nature of law is an essential component of Communist jurisprudence, as evidenced by statements of Marx, Lenin and others.⁶⁰ In the PRC, Mao Tse-tung also expounded the concept of class justice by saying, "Such state apparatus as the army, the police and the courts are instruments with which one class oppresses another. As far as the hostile classes are concerned these are instruments of

judgment-pronouncing rallies during and shortly after the Cultural Revolution. For more recent reports on the practice of mass trials, see *The Provincial Science in China*, China News Summary, May 12, 1976 (No. 613)(Hong Kong), at 1.

⁵⁸ According to one source, members of the court and of the public security bureau work together in a legal subcommittee appointed by the revolutionary committee. Cheng Huan, *Law in China*, 4 FAR EASTERN ECON. REV. 14 (1972). More often, it appears that judicial and police personnel coordinate their work informally through close contacts. Visitors and emigres have seen the signs of the court and the public security organ hung in the same building.

⁵⁹ American visiting lawyers were surprised to learn of this. See Crockett, *supra* note 53, at 245. In posters reportedly appearing in Canton at the end of 1974, demobilized veterans of Kwangtung urged the Provincial Party Committee and the Provincial Higher People's Court to handle promptly the complaint against the illegal beating of some veterans by personnel of public security and workers provost corps on November 24, 1974. According to the posters, when representatives of the veterans went to the Higher Court to inquire about the lack of response to their written complaint, they were told that the complaint had been sent up to the Provincial Party Committee for disposition since the court could not independently handle the case without the written guidance of the Party Committee. MING PAO MONTHLY 98-99 (No. 112, 1975).

⁶⁰ According to Marx and Engels, legal institutions are parts of the superstructure on an economic base; they are tools of class rule, designed to promote the interest of the ruling class. Lenin and A.Y. Vishinsky also emphasized the class nature of law in suppressing the counterrevolutionaries. J. HAGARD, COMMUNISTS AND THEIR LAW 69-70 (1969); H. Kelsen, THE COMMUNIST THEORY OF LAW 1, 31, 51, 128 (1955); LENG, *supra* note 6, at xi-xii.

oppression. They are violent and certainly not 'benevolent things.'⁶¹ In the words of a Chinese jurist, the socialist law in China is "a sharp weapon for carrying out class struggle in the hands of the broad masses of laboring people led by the proletariat," used primarily to suppress the enemy, protect the revolutionary order, and insure the success of socialism.⁶²

Using the class line approach, Mao provided a theoretical framework for differentiating and resolving social conflicts with his famous 1957 speech "On the Correct Handling of Contradictions Among the People." In the speech, he drew a basic distinction between two types of contradictions: "Contradictions between ourselves and the enemy" (antagonistic contradictions) and "contradictions among the people" (non-antagonistic contradictions). Mao defined in broad terms "the people" as "the classes, strata, and social groups which approve, support and work for the cause of socialist construction" and "the enemy" as "the social forces and groups which resist the socialist revolution, and are hostile and try to wreck socialist construction."⁶³

As the two contradictions are fundamentally different, the methods for solving them also differ. According to Mao, conflicts among the people are to be dealt with by the "method of democracy" and conflicts with the enemy by the "method of dictatorship." In settling "questions between right and wrong among the people," reliance should be placed on education and persuasion. In dealing with "reactionaries, exploiters, counterrevolutionaries, landlords, bureaucrats, capitalists, robbers, swindlers, murderers, arsonists, hooligans, and other scoundrels who seriously disrupt social order," measures of dictatorship and severe sanctions must be employed.⁶⁴

⁶¹ MAO TSE-TUNG, ON PEOPLE'S DEMOCRATIC DICTATORSHIP 17 (1951).

⁶² Chou Hsiu-min, *Law is a Sharp Weapon of Class Struggle*, J.M.J.P., Oct. 28, 1964, at 2.

⁶³ Mao Tse-tung, *On the Correct Handling of Contradictions among the People*, *supra*, note 52, at 4. For Mao's earlier writings on related subjects, see *Analysis of the Classes in Chinese Society*, March 1926 and *On Contradictions*, 1 SELECTED WORKS OF MAO TSE-TUNG 13-19, 311-16 (1967).

⁶⁴ Mao, *On the Correct Handling of Contradictions*, *supra*, note 52, at 4-6. This is essentially consistent with his earlier thesis about "democracy for the people and dictatorship for the reactionaries." In an important essay written in 1949, Mao advocated a

Mao's theoretical formulation on contradictions has since become a most frequently cited guideline for law enforcement in China and is incorporated into the preamble of the 1975 Constitution. In order to correctly distinguish antagonistic from non-antagonistic contradictions, it is imperative for judicial and public security personnel to use a class stand point to determine the nature of a problem.⁶⁵ From a class viewpoint, the so-called "five black elements" (landlords, rich peasants, counterrevolutionaries, rightists, and other bad elements) are considered "the enemy."⁶⁶

All persons labelled as "five black elements" are treated as political outcasts and potential criminals. "They are held up," says one observer, "as 'negative examples' and as living symbols of what happens to enemies of the regime."⁶⁷ When crimes are committed, such persons usually receive harsher sanctions for the same offense than those among "the people."⁶⁸ This is particularly true during a politi-

policy of benevolence and persuasion toward the people but a violent and oppressive policy toward the reactionaries and counterrevolutionaries. MAO TSE-TUNG, ON PEOPLE'S DEMOCRATIC DICTATORSHIP, *supra* note 61, at 16-18.

⁶⁵ *Report on the Work of the Supreme People's Court by its President Hsieh Chueh-tsai*, N.C.N.A., Dec. 26, 1964; Ho Chin-Ching and Wu Chien-fan, *How to Distinguish Strictly the Two Types of Contradictions and the Two Different Methods of Dealing with Them in Political and Legal Work*, C.F.Y.C. 28 (No. 2, 1963).

⁶⁶ According to Mao Tse-tung, the term "the people" has different meanings in different countries and in different historical periods in each country. In 1957 "the people" he referred to included the workers, peasants, petty bourgeoisie, and national bourgeoisie. Mao, *On the Correct Handling of Contradictions*, *supra* note 52, at 3-4. However, the bourgeoisie has since been dropped from "the people." The 1975 constitution only mentions the workers, peasants, and non-agricultural individual laborers in the Chinese body politic (Articles 1 and 5). Article 14 of the Constitution also deprives the political rights of the following enemy groups: "the landlords, rich peasants, reactionary capitalists, and other bad elements."

⁶⁷ A. BARNETT, *supra* note 22, at 404.

⁶⁸ In a violent dispute involving forty-odd men in the outskirts of Canton in late 1955, the public security cadres singled out one man who had a "counterrevolutionary" history for prosecution. He was arrested, convicted, and sentenced to five years of reform through labor. J. COHEN, *supra* note 6, at 511-12. Similar cases of this nature have been reported by recent emigrés. In one adultery case occurring in Amoy in 1971, the man was a factory worker and the woman's father was a former KMT official.

cal campaign when members of the "black elements" often provide convenient targets for class hostility and abuse.⁶⁹ On the other hand, persons of good class background are reported to have received lenient treatment even in serious cases such as rape.⁷⁰

The strong class character of Chinese criminal law is clearly stated in an official textbook. "The criminal law of our country primarily deals blows to the counterrevolutionaries, to the criminals of homicide, arson, burglary, fraud, rape, and other offenses seriously obstructing social order and socialist construction. It must be understood that the point of our criminal law is chiefly directed toward the enemies of socialism."⁷¹ Consequently, when case materials are disseminated among the public for discussion, they outline, among other things, the nature and gravity of the offense,

Because of different class backgrounds, he was sentenced to one year of imprisonment while she received a two-year prison term.

⁶⁹ It is during political campaigns that many persons are either classified for the first time or "capped" again as members of the "five black elements." It is also in political campaigns that harsh sanctions against class enemies are used and publicized to serve the purpose of "killing chickens to scare monkeys." The Suppression of Counterrevolutionaries Movement of the 1960's and the Cultural Revolution of the 1960's were marked with mass trials and revolutionary excesses. Even in the milder Anti-Lin Piao and Anti-Confucius Campaign of the early 1970's, there were occasional reports of public executions connected with this drive. See, e.g., *30 Reported Executed in China; Deaths Linked to Anti-Confucius Drive*, The Baltimore Sun, April 18, 1974, at A6.

⁷⁰ Two cases based on interviews may be cited here as illustrations. In a 1958 case that occurred in a village near Canton, a militiaman unsuccessfully attempted to rape a landlord's daughter and beat the father up rather badly. The public security station chief did not want to punish a "good person" such as the militiaman for misconduct toward a "bad person" such as a landlord. Consequently, the militiaman was sent to rehabilitation through labor instead of being sentenced to five to seven years in prison. J. COHEN, *supra* note 6, at 266-67. In a 1961 case occurring in Enping County, Kwangtung, a militiaman raped a former landlord's wife at gun point and claimed that she had seduced him. Even after the true facts were established, the case was categorized as a "contradiction within the people" and no serious punishment was meted out to the wrongdoer. Shinichino, *A Report of the Production Team: A Personal Interview*, 11 ISSUES AND STUDIES 88-89 (No. 3, 1975).

⁷¹ CENTRAL POLITICAL-JUDICIAL CADRES' SCHOOL, LECTURES ON THE GENERAL PRINCIPLES OF CRIMINAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA (1957), translated in J.P.R.S. 18 (No. 1331, 1962).

the social origin of the offender, his personal background, class stand, and political attitude and motivation. Members of small discussion groups invariably follow the tone of the distributed documents and use the class line as the criterion to suggest punishment. If in doubt, they always find it prudent to take the position of the left rather than the right.⁷²

Political considerations are not only applied to the sanctioning process in the PRC. Even in dealing with a civil dispute, a firm class viewpoint is also required.⁷³ The concept of equality before the law for all persons certainly has no place in people's justice. Those few Chinese leaders in favor of such a bourgeois concept have been severely attacked by the Maoists.

Class and class struggle is a great revolutionary magic weapon of Marxism-Leninism and the thought of Mao Tse-tung . . . However, the handful of top capitalist readers within the Party vainly attempted to wipe out fundamentally the dictatorship of the proletariat by means of law. .

Counterrevolutionary revisionist P'eng Chen even openly jumped forth to set the tune saying: "All citizens of ours can become equal and must be equal before the law." He advocated "equal treatment" and stated that "there is no need to adopt a class viewpoint in addition to law." He rejected the class character of law, thus overthrowing the proletarian dictatorship. In this way, the public security organs, procuratorates, law courts and armed forces became ordinary organs instead of instruments of the dictatorship. The question of who should be defended or suppressed was obliterated at one stroke, and with no dividing line drawn between the enemy and ourselves, how could revolution be carried out? If such peaceful evolution were permitted to go on, our proletarian regime would not take long to end in capitalist restoration.⁷⁴

⁷² Information supplied by recent emigres. Their description of standards and contents of distributed case materials is the format confirmed by a Chinese document in the author's possession, *Strengthen War Preparation, Strengthen Struggle Against the Enemy, and Strengthen the Dictatorship of the Proletariat*, issued by the People's Security Group of the Yunnan Provincial Revolutionary Committee, on January 21, 1970 (13 pages).

⁷³ LENG, *supra* note 6, at 174. For a discussion of politicization of dispute resolution, see Lubman, *supra* note 8, at 1339-46.

⁷⁴ *Completely Smash the Feudal, Capitalist and Revisionist Legal System*, *supra* note 2, at 23-24. Until his ouster during the Cultural Revolution, P'eng Chen

It should be noted, however, that the class line is not a rigid but a flexible tool of the Party. According to Mao Tse-tung, a person's class status is not only determined by his social origin and class background but, more importantly, by his political attitudes and behavior.⁷⁵ Consequently, a serious deviant act can cause the change of an individual's label from a member of the people to the category of the enemy. By the same token, it is at least technically feasible for a member of the "five (black) elements" to be elevated to the category of the people through evidence of good conduct and ideological transformation.

In fact, the Communist authorities in China have occasionally taken a relatively "soft" stand toward the political outcasts and their relatives by giving them some hope of changing their class status. This tactic is in line with Mao's teaching of "winning over the majority and opposing the minority."⁷⁶ At times, law enforcement cadres have publicized the following policy line:

Class background is a very important criterion but not the sole determinant for treatment; emphasis must be placed on political performance. Members of the "five (black) elements" are told to reform themselves and establish merits so they can be "uncapped" and have their class status changed.⁷⁷

Special appeal is often directed to the children of the "five (black) elements," who are urged to draw a sharp demarcation between themselves and their reactionary families and to come to the side of the revolution.⁷⁸ Some

of them have even been absorbed into the ranks of cadres to serve as "positive samples".⁷⁹

LAW AS AN INSTRUMENT OF SOCIAL ENGINEERING

Two concepts have conditioned the Chinese perception of the role of law in their revolutionary scheme. One is the Marxist-Leninist theory that considers law as a political tool to implement Party policy.⁸⁰ The other is Mao's idea of "uninterrupted revolution" that called for a continuous effort to mold and remold human nature.⁸¹ These two conceptions have combined to provide the Chinese elites with a theoretical framework to view law as an instrument of social engineering, to be used for the transformation of Chinese society and its members in accordance with the revolutionary ideology. Either in a formal or informal style, law is seen as an important agent of political socialization and mobilization to inculcate the people with the new socialist morality. Consequently, there has been much stress in the PRC on the educational functions of the courts, popular participation in rule enforcement, reformative aspects of penal policy, and flexibility rather than rigidity in the application of law.

Despite the Chinese emphasis on the informality of law, a large body of substantive laws and regulations have been promulgated by the PRC.⁸² Many of them have been concerned with the implementation of the Communist elites' policy of systemic transformation. For instance, the Land Reform Law and the Marriage Law were enacted in 1950 to change fundamentally China's land and family sys-

was the mayor of Peking and a close associate of Liu Shao-ch'i.

⁷⁵ For a discussion of the question of class in Mao Tse-tung's thought, see B. SCHWARTZ, *COMMUNISM AND CHINA: IDEOLOGY IN FLUX* (1968) and Starr, *Conceptual Foundations of Mao Tse-tung's Theory of Continuous Revolution*, 11 *ASIAN SURVEY* 620 (1971).

⁷⁶ This is an often-quoted Maoist dictum to isolate and annihilate the enemy. Mao stated in 1962 and again in 1967 that the "five bad elements" only constituted five percent of the Chinese population. MAO TSE-TUNG SSU-HSIANG WAN-SIU (Long live Mao Tse-tung's Thought) 419, 666 (1969).

⁷⁷ Emigré accounts of the policy pursued in early 1973 by the public security organ of Ch'aoyang, Kwangtung; PEOPLE'S SECURITY GROUP OF THE YUNNAN PROVINCIAL REVOLUTIONARY COMM., PAO-WEI KUNG-TSO CHING-YEN (Experience from security work) 1-13 (1970).

⁷⁸ *Id.*, at 3-4, 13-15; also emigré reports of the policy adopted by the Canton authorities in 1973.

⁷⁹ As reported by several former cadres.

⁸⁰ Lenin said: "Law is a political instrument. It is politics." J. HAZARD, *supra* note 60, at 69.

⁸¹ For relevant discussion of Mao's theory of continuous (uninterrupted) revolution and his belief in the malleability of human nature, see Schram, *Mao Tse-tung and the Theory of Permanent Revolution, 1958-1969*, 1971 *CHINA Q.* 221 (No. 46); Munro, *The Malleability of Man in Chinese Marxism*, 1971 *CHINA Q.* 609 (No. 48).

⁸² According to an editorial in the *People's Daily*, 4,072 laws and regulations were passed during the first eight years of the PRC. J.M.J.P. Oct. 9, 1957, at 1. There are altogether 1,670 documents contained in the two basic statutory collections published by the PRC: CHUNG-YANG JEN-MIN CHENG-FU FA-LING HUI-PIEN (Collection of Laws and Decrees of the Central People's Government, 1952-55) (5 vols.) [hereinafter cited as F.L.H.P.] and F.K.H.P., *supra* note 50 (1956-64) (13 vols.).

tems and to release the social energy of the people.⁸³ A host of regulations and measures were also adopted during the 1950's for economic modernization and industrialization, nationalization of enterprises, and collectivization of agriculture.⁸⁴ In the meantime, a number of other acts were issued to suppress counterrevolutionaries and to punish corruption and other anti-social activities.⁸⁵ During 1966-67, various resolutions and directives were adopted to carry out Mao's Cultural Revolution, with one principal aim being the socialization of the thought and behavior of the people.⁸⁶

Many of these laws, regulations, and decisions have been implemented and publicized by nation-wide campaigns and movements, designed to arouse mass enthusiasm and eliminate opposition.⁸⁷ It is during such campaigns that mass trials and public judgment meetings have been used to dispense people's justice, which perform not only a deterrent function but a propaganda-education function of heightening the people's political awareness.⁸⁸ For instance, in two mass trials held in Shansi Province in 1970 involving 50,000 people, it was reported that the broad masses of the revolutionary people had learned a valuable lesson and vowed

to follow Chairman Mao's instruction to protect the great achievements of the Cultural Revolution, to strike against a handful of counter-revolutionary and other criminal elements, and to consolidate the dictatorship of the proletariat.⁸⁹ The educational function of the judiciary is also realized through such mass line devices as bringing the courts to the people and distributing case materials for small group discussions. According to one witness, following a trial held at a factory concerning the stealing of goods by a worker, the two hundred co-workers present said that "they had been educated regarding the struggle against their corruption by bourgeois ideas, and raised their understanding of the two lines and revisionism."⁹⁰ Likewise, in handling civil disputes, mostly divorce cases, the courts conduct propaganda and education among both the parties involved and the public at large. The overriding objectives are to settle internal contradictions by mediation, to uphold law and discipline, to strengthen the unity of the people, and to promote the development of socialist virtues.⁹¹

Educational functions are generally performed by the societal model of law and by the entire political-legal socialization process. Discussed above was popular participation in the extra-judicial activities of law enforcement and dispute resolution at the "grass roots" level. In addition, it should be noted that laws, policies, and other norms are usually communicated to and internalized by the people through the media, schools, and study sessions of small groups organized on the basis of residence or work.⁹² Subjects of study sessions vary from

⁸³ Text of the Marriage Law in 1 F.L.H.P. 32-36; Agrarian Reform Law in *id.*, at 43-49. For a comprehensive analysis of the Marriage Law, see M. MEIJER, MARRIAGE LAW AND POLICY IN THE CHINESE PEOPLE'S REPUBLIC (1971).

⁸⁴ Relevant laws and regulations can be found in the two statutory collections cited at *supra*, note 82. See also a special collection: SZU-YING KUNG-SHENG-YEH TI SHE-HUI CHU-I KAI-TSAO CHENG-TSE FA-LING HSUAN-PIEN (Selections of policies, laws, and regulations concerning the socialist transformation of privately-owned industry and commerce) (1957).

⁸⁵ E.g., the Act for Punishment of Counterrevolutionaries (1951), the Provisional Act for Punishment of Crimes That Endanger State Currency (1951), the Act for Punishment of Corruption (1952), and the Security Administration Punishment Act (1957).

⁸⁶ A useful collection of official documents on the Cultural Revolution is UNION RESEARCH INSTITUTE, CCP DOCUMENTS OF THE GREAT PROLETARIAN CULTURAL REVOLUTION, 1966-1967 (1968).

⁸⁷ Notably, the Agrarian Reform, Marriage Reform, and Suppression of Counterrevolutionaries campaigns as well as the Great Leap Forward and the Cultural Revolution. For a discussion of the PRC's use of campaign techniques, see Yu, *Campaigns, Communications and Development in Communist China in COMMUNICATION AND CHANGE IN THE DEVELOPING COUNTRIES* 195-215 (D. Lerner and W. Schram eds. 1967).

⁸⁸ LENG, *supra* note 6, at 35-39; Tao, *supra* note 6, at 715-20.

⁸⁹ Shansi People's Broadcasting Station, Feb. 17, 1970.

⁹⁰ Lamb, *supra* note 55, at 325.

⁹¹ Report of Hsieh Chueh-tsai (outgoing President of the Supreme People's Court in 1964), J.M.J.P. Jan. 1, 1965, at 1. A Chinese official has recently pointed out that divorce is not granted lightly and that disputes are generally resolved in a manner that takes more account of the welfare of the state rather than that of the individual, who is expected to place his social responsibilities before personal considerations. Stewart, *Divorces in China Decided by Peers*, N.Y. Times, Nov. 11, 1973, at 5, col. 1. This observation has been confirmed by a number of emigrés. The political nature of the PRC's divorce policy is examined by Meijer, *supra* note 82, at 211-25.

⁹² For a general discussion of the socialization process, see A. LIU, COMMUNICATIONS AND NATIONAL INTEGRATION IN COMMUNIST CHINA (1971); R. PRICE,

week to week in accordance with existing political situations. They may be Mao's speeches or *People's Daily's* editorials. Cadres who serve as group leaders are often guided by internal directives that focus on specific issues of a given moment, [e.g., *Compiled Material of the Mass Rallies for Protecting the Railway Security and for Criticizing, Struggling Against and Disposing of the Criminal Elements* (issued by the Bureau of Public Security of Yunnan Province, the Higher People's Court of Yunnan Province, and the Revolutionary Committee of Kunming Railway Bureau, April, 1975),⁹³ *Study Material for Public Security Work* (Supplement) (issued by the Bureau of Public Security of Yunnan Province, Feb., 1974),⁹⁴ and *Detailed Regulations for Work of the Security Protection Committee* (issued by the Public Security Ministry, Nov., 1972).⁹⁵] Statutes are interpreted to the public by cadres according to the policy demands of the day. The Marriage Law of 1950, for instance, remains effective today and is frequently cited in divorce judgments.⁹⁶ Yet its provision on the marriageable age (20 years of age for the man and 18 for the woman) has been modified by the Party policy favoring late marriage. Article 4 of the Marriage Law notwithstanding, marriage is now generally discouraged for men below thirty and for women below twenty-five years of age.⁹⁷

EDUCATION IN COMMUNIST CHINA (1970); C. RIDLEY, P. GODWIN AND D. DEOLIN, *THE MAKING OF A MODEL CITIZEN IN COMMUNIST CHINA* (1971); F.T.C. YU, *MASS PERSUASION IN COMMUNIST CHINA* (1964).

⁹³ Chinese text and its English translation are in 11 *ISSUES AND STUDIES* 77-84 (No. 3, 1975).

⁹⁴ A copy of the document is in the author's possession.

⁹⁵ See note 51 *supra*.

⁹⁶ In a judgment rendered on March 22, 1973 [Fa-tzu (73) No. 1], the People's Court of Swatow, Kwangtung, stated that it had followed the spirit of Articles 8, 17 and 20 of the Marriage Law to decide on the granting of divorce, property arrangements and custody of the children. In another divorce judgment rendered on May 23, 1974 [Min-tzu (74) No. 21], the People's Court of Paoan, Kwangtung, also cited the provision of Article 17 of the Marriage Law to support its decision. Copies of both judgments are in the possession of the author.

⁹⁷ Meijer, *supra* note 82, at 80; *New Trend for Late Marriage*, J.M.J.P. June 12, 1973, at 3; *Why Have We Delayed Our Marriage?*, Ta-kung pao (The Impartial), March 9, 1973, at 8. Reports from informants indicate, however, that the late marriage policy has been enforced less vigorously in the rural areas than in the cities.

The concept of law as an instrument of education and ideological indoctrination is also manifested in the emphasis placed on thought reform by PRC penal measures. Peking's policy of combining leniency with punishment and reform through labor with education has its origin in the years of Kiangsi and Yenan.⁹⁸ Its theoretical basis again has been provided by the writings of Mao Tse-tung. In a 1934 report to the Second Soviet Congress, Mao stressed the educational functions of the labor reform institutions in the Kiangsi Soviet.⁹⁹ Writing *On People's Democratic Dictatorship* in 1949, he promised that members of reactionary classes who gave up counterrevolutionary activities would be granted the opportunity to work and to reform themselves through labor so as to become new men.¹⁰⁰ In a report on "the ten major relationships" in 1956, he emphasized the reform through labor rather than execution of counterrevolutionaries, in order to convert "worthless things into useful ones" and to avoid making "irretrievable mistakes."¹⁰¹ Discussing how to deal with the enemy in his 1957 speech on contradictions, Mao suggested that the method of dictatorship be used to compel them to obey the law of the people's government and to engage in labor and, through labor, transform themselves into new men.¹⁰²

There is a hierarchy of sanctions in the PRC that puts offenders through the reform process. For lesser offenses, individuals may be placed under "control" or sentenced to performing "supervised labor" at the place of residence or work. For more serious crimes, offenders may be sent to camps to undergo rehabilitation through labor or reform through labor. The last two sanctions are governed by the following two major statutes: 1954 Act for Reform Through Labor and 1957 Decision of the State Council on Education and Rehabilitation Through Labor.¹⁰³

⁹⁸ LENG, *supra* note 6, at 9, 13; P. GRIFFIN, *supra* note 11, at 128-29.

⁹⁹ V. YAKKONTOFF, *THE CHINESE SOVIETS* 262 (1934).

¹⁰⁰ MAO TSE-TUNG, *supra* note 61, at 18.

¹⁰¹ He also said that his policy would be beneficial to both China's domestic affairs and international influence. MAO TSE-TUNG SSU-HSIANG WAN-SUI, *supra* note 76, at 75.

¹⁰² Mao, *On the Correct Handling of Contradictions*, *supra* note 52, at 8.

¹⁰³ Text of the Act is in 5 F.L.H.P. 34-44 and text of the Decision is in 6 F.K.H.P. 243-44. Rehabilitation

The principal aim of the corrective measures, according to Chinese spokesmen, is reeducation rather than punishment. Physical labor is an important part of the reform process, because it eliminates the criminal's reactionary ideology of the exploiting class and enables him to learn productive skills to meet the needs of the society.¹⁰⁴ Devices for ideological reform include self-criticism and criticism in group meetings, preparation of lengthy written confessions, and exposure and denunciation of others' wrongdoings. Political education is also conducted in study sessions whereby the offenders learn about Marxism-Leninism, the thought of Mao Tse-tung, state laws, Party policies, and current affairs.¹⁰⁵ In the end, each individual is evaluated on the basis of his work performance, sincerity in repentance, diligence in study, and responsiveness to reform.¹⁰⁶ A system of rewards and sanctions is

used to influence individual behavior. The guiding principle is always "leniency to those who confess (cooperate) and severity to those who resist."¹⁰⁷

It is difficult to make a conclusive appraisal of Chinese corrective institutions. On the one hand, there have been enthusiastic claims of the humanitarian concern for the successful transformation of the criminals.¹⁰⁸ On the other hand, charges of cruelty and exploitation have been made against the Chinese system of "force labor."¹⁰⁹ One thing, however, seems clear: under Mao's guidance the PRC has developed elaborate thought reform techniques applicable to labor camps as well as society at large in an effort to transform human nature and to secure the general acceptance of goals and norms of the socialist system.¹¹⁰

IMPLICATIONS OF THE ANTI-CONFUCIAN AND PRO-LEGALIST CAMPAIGN

The campaign to denounce Confucianism and praise Legalism began in 1972, intensified during 1973-74, and faded away inconclusively

through labor is an "administrative" sanction while reform through labor (for all imprisonment) is a "criminal" and harsher sanction. For details as well as some translated statutes, see COHEN, *supra* note 6, chs. IV and XI.

¹⁰⁴ Statements by Chinese jurists to recent Western visitors can be found in Ruge, *supra* note 49, at 122 and in R. Brown, Law in Present Day China 12-13 (unpublished manuscript, 1975). See also Meng Chao-liang, *The Basic Situation in Reform Through Labor Work in the Last Nine Years*, C.F.Y.C. 66 (No. 5, 1958). A recent study by an American scholar indicates that the primary activity in corrective labor camps is labor in terms of time. Whyte, *Corrective Labor Camps in China*, 13 ASIAN SURVEY 253-69 (1973). Although beyond the scope of this article, one should not overlook the economic contribution of the compulsory labor systems to the construction of China's public works and development projects.

¹⁰⁵ Meng Chao-liang, *supra* note 104, at 67-68; Whyte, *supra* note 104, at 260-61. See also accounts in W. ALLYN AND A. RICKETT, PRISONERS OF LIBERATION (1957); BAO RUO-WANG (Jean Pasqualini) & R. CHELMINSKI, PRISONER OF MAO (1973); M. HARBERT, CAPTIVITY (1973); LAI YING, THE THIRTY-SIXTH WAY (1969); R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961).

¹⁰⁶ See, for example, Articles 68 and 69 of the 1954 Act for Reform through Labor. In a document issued in 1970 by the People's Security Group of the Yunnan Provincial Revolutionary Committee, the following criteria were used to evaluate the "five (bad) elements" under "control": (1) Whether they had used the thought of Mao Tse-tung to reform their thought; (2) Whether they had actively participated in productive labor to reform themselves; (3) Whether they had faithfully obeyed state laws and regulations and accepted the supervision of the mass; and (4) Whether they had been courageous to expose

and denounce bad elements and evil deeds. PAO-WEI KUNG-TSO CHING-YEN, *supra* note 77, at 12-15.

¹⁰⁷ Ruge, *supra* note 49, at 122. In the notices issued by the Chinese People's Liberation Army Military Control Section of the Public Security Organs of Meng-lien County in Yunnan Province (Aug. 8, 1972), and by the Intermediate People's Court of Harbin City of the Heilungkiang Province (Nov. 17, 1973), this principle was cited as grounds for sentencing the criminals. See Hungdah Chiu, *supra* note 27 at 110, 114.

¹⁰⁸ The Chinese have often cited the successful reform of Pu Yi, the last Manchu emperor, as an example. Pestana, *supra* note 54, at 4-5; R. Brown, *supra* note 104, at 13. In Dec., 1959 the Supreme People's Court granted amnesty to a group of KMT "war criminals," who reportedly were moved by the humanitarianism of the new society and called the Party and the government as their "reborn parents." Ku Fang-p'ing, *The Great Victory of the Policy of Reforming Criminals*, C.F.Y.C. 36-37 (No. 6, 1959). A similar theme was reported when another group of KMT "war criminals" was released in 1975. N.C.N.A. March 19, 1975. See also E. SNOW, THE OTHER SIDE OF THE RIVER 47-48 (1962).

¹⁰⁹ See, e.g., COMMISSION INTERNATIONALE CONTRE LE RÉGIME CONCENTRATIONNAIRE, WHITE BOOK ON FORCED LABOR AND CONCENTRATION CAMPS IN THE PEOPLE'S REPUBLIC OF CHINA (1957-58) (2 vols.); Kowen, *The Narration of a 'War Criminal'*, Shih-chieh jih-pao (World Journal) (New York), Oct. 1976-Present.

¹¹⁰ For an interesting discussion of the mechanism of social control in the PRC, see Vogel, *Voluntarism and Social Control*, in SOVIET AND CHINESE COMMUNISM: SIMILARITIES AND DIFFERENCES 168-84 (D. Treadgold ed. 1967).

in early 1975.¹¹¹ Recent revelations have confirmed the view previously held by analysts that the campaign was not a mere academic debate but a manifestation of factional and policy conflicts within the Party leadership.¹¹² The "radicals" initially launched the anti-Confucian campaign in an implicit yet unmistakable attack against Chou En-lai and his bureaucratic associates for their retreat from the Cultural Revolution and the rehabilitation of many purged officials, but the "moderates" subsequently succeeded in transforming the target of the campaign by linking anti-Confucianism with the movement against Lin Piao.¹¹³ Throughout the campaign the two groups manipulated historical figures and events to advance their respective policy lines. The "moderates" expounded the themes of stability, unity, institutionalization, and economic development, while the "radicals" argued for struggle and reform and argued against "the tide" and the Confucian-type "retrogression and restoration."

¹¹¹ The "radicals" attacked Teng Hsiao-ping and his associates for sabotaging the campaign. See, e.g., T'ing Liang, *Why Did Teng Hsiao-ping Ignore the Struggle between Confucianism and Legalism*, Hung-chi (Red Flag), (No. 10, 1976), at 64-65.

¹¹² Two of the representative analytical articles on the campaign are Goldman, *China's Anti-Confucian Campaign, 1973-74*, 1975 CHINA Q. 435 (No. 63) and Chang, *The Anti-Lin Piao and Confucius Campaign: Its Meaning and Purpose*, 14 ASIAN SURVEY 871-86 (1974). For detailed work on the subject, see WANG HSUEH-WEN, *LEGALISM AND ANTI-CONFUCIANISM IN MAOIST POLITICS* (1975).

¹¹³ In the current campaign against the "gang of four" (Chiang Ching, Chang Chun-chiao, Yao Wen-yuan, and Wang Hung-wen), PRC spokesmen accused the "radical" leaders and their supporters (those writing in the names of Liang Hsiao, Lo Szu-ting, etc.) of undermining the campaign through the following distortions: they claimed the continuation of the struggle between Confucianism and Legalism up to the present even within the Party is an open effort to tamper with the nature and program of the CCP; they used the criticism of Confucius to direct attack first on Chou En-lai and later on Hua Kuo-feng; they flaunted the banner of publicizing Legalism to embellish themselves in an attempt to usurp Party and state power; they glorified Empress Lu and Tse-tien for the purpose of making Chiang Ching China's empress of the 20th century. See Shih Kao, *Criticism of Confucianism and Praise of Legalism are False; Usurpation of Party and State Power is Real*, Hung-chi 108-12 (No. 1, 1977); Hsu Hsun, *Chiang Ching and Empress Lu*, 19 PEKING REV. 21-23 (No. 52, 1976); *The 'Gang of Four' who make a Mockery of History Have Been Punished by History*, Kuang-ming jih-pao (Enlightenment Daily) (Peking) Nov. 13, 1976 at 1.

One intriguing aspect of the campaign was its pro-Legalist position. In order to assess the possible implications for the role of law in contemporary China, we shall examine briefly what areas of Legalism and which Legalist figures received special attention in the campaign.¹¹⁴

In contrast to the "reactionary" features of Confucianism, Chinese writers in the campaign praised Legalism because of its stand for progress and reform, for law and order, for economic and scientific development, and for unification and centralization.¹¹⁵ Thus, Shang Yang and Han Fei of the Legalist school were pictured as representing the ideology of the newly rising landlord class during the Spring and Autumn Period and the Warring States Period. Their outlook was innovative and progressive, and the contention between them and the Confucians, "representative of the declining slave-owning class," was said to reflect a struggle between two lines of thought: "whether to promote the development of the new system, or to try to preserve the old system; whether to serve the needs of the newly rising class in accordance with historical development, or try to turn history back by following the examples of 'former sage-kings'; whether to advocate the rule of 'law' suited to the development of the new age, or stubbornly try to preserve the so-called rule of 'rites' in the old system."¹¹⁶ According to this theme, the struggle continued throughout Chinese history. In the Han dynasty it was between the materialist theory of knowledge represented by Wang Chung and the idealist apriorism preached by Tung Chung-shu.¹¹⁷ During the Sung dynasty, it was between the reformists headed by Wang An-shih and the "diehard big landlord ruling

¹¹⁴ A detailed examination of these issues will be presented in a paper by the author at the annual meeting of the Association for Asian Studies in March 1977.

¹¹⁵ In a popular book prepared by the Peking University, all these points except "law and order" were mentioned in its concluding observations. JU-FA TOU-CHENG SHIH KAI-KUANG (A general survey of the history of the struggle between Confucianism and Legalism) 144-45 (1975).

¹¹⁶ Yang Jung-kuo, *Struggle between the Two Lines in the Ideological Sphere during the Spring and Autumn Period and the Warring States Period*, 17 PEKING REV. 5 (No. 8, 1974) and 17 PEKING REV. 14 (No. 9, 1974).

¹¹⁷ Yang Jung-kuo, *The Struggle of Materialism against Idealist Apriorism during the Western and Eastern Han Dynasties*, 1 SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS 143-58 (1975).

clique" represented by Ssu-ma Kuang and other Confucianists.¹¹⁸

The Legalists' stand for "rule by law" received considerable acclaim from PRC authors. Shang Yang was cited for the statement that "punishment should be extended to all ranks of people," a statement interpreted as an actual criticism of the Confucian view that "punishment should not be extended to anyone in the rank of *ta fu* (senior officials) or higher."¹¹⁹ When Shang Yang's laws of reform, including group responsibility for a member's guilt, were violated, the offenders were severely punished.¹²⁰ As a result, "it is recorded that after the new laws 'had been enforced for ten years, the people of Chin were very happy,' 'order prevailed in town and countryside,' and 'even women and children talked about Shang Yang's laws.'" A bourgeois revolutionary, Chang Tai-yen was quoted as saying: "The World sees only the severity of Shang Yang's new law without considering its positive consequences."¹²¹ Han Fei was also praised for establishing laws and institutions to benefit the common people, because under the rule by law "high officials are not exempt from punishment for crimes while the common people are not denied rewards for good deeds."¹²² His advocacy of "severe punishment and harsh laws" was justified on his belief that, "if the law enforcement officers are firm, the country will be powerful. If they are weak, the country will be weak, too."¹²³

¹¹⁸ Lo Szu-ting, *Evolution of the Debate between the Confucians and Legalists as Seen from Wang An-shih's Reform*, 1 SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS, 185-211; Shih Shang-hui, *Wang An-shih's Legalist Ideas as viewed from the Three "Notes,"* Ta-kung pao, Oct., 1973, at 6.

¹¹⁹ Yang Jung-kuo, *Struggle between Two Lines*, PEKING REV. (No. 8), *supra* note 115, at 7.

¹²⁰ Lo Szu-ting, *Struggle between Restoration and Counter-Restoration in the Course of Founding the Ch'in Dynasty*, 1 SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS 113-15 (1975).

¹²¹ *Id.*, at 115. For other PRC writers' views, see Han-chu, *Shang Yang's Reform Measures Constituted a Profound Social Change*, and Liang Hsiao, *Comments on Shang Yang in LUN FA-CHIA HO JU-FA TOU-CHENG* (comments on the Legalist school and the struggle between Confucianism and Legalism) 53-71 (1974).

¹²² Yang Jung-kuo, *Struggle between Two Lines*, *supra* note 115; Yang Kuan, *The Progressive Function of Han Fei's Theory of "Rule of Law,"* LUN FA-CHIA HO JU-FA TOU-CHENG 104-05 (1974).

¹²³ Tien Li, *Mencius—a Reactionary Thinker Who Sought to Restore the Slave System*, 2 SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS 32 (1975);

The Legalists were also lauded for their encouragement of economic, scientific, and technological development. For instance, both Shang Yang and Han Fei were shown to have attached great importance to farming and military affairs.¹²⁴ Hsun Tzu was cited for his idea of controlling nature. "Instead of obeying t'ien (Heaven) and praising it, why not control the rules of t'ien and use them?"¹²⁵ Sang Hung-yang of the Han dynasty expounded the policy of state monopoly of salt and iron so as to "insure the simultaneous growth of agriculture, handicrafts and trade."¹²⁶ In general, it was claimed, the Legalist school's "political line for progress and change and its materialist view on nature" helped stimulate the development of science and technology in old China.¹²⁷

Special emphasis in the campaign was placed on the concepts of unification and centralization advanced by the Legalists. Han Fei, for instance, was one of those credited with the development of the theory of "rule by law" on which to establish a centralized feudal state. From his examination of historical experience, Han Fei arrived at the conclusion that only by strengthening the "rule by law" (appointing officers according to ability, bestowing titles according to merits, etc.) could the ruler expect to build a rich and strong country, consolidate a centralized political system, and suppress the "restoration activities" of the slave-owning aristocracy.¹²⁸

The fact that the First Emperor of the Ch'in, aided by Prime Minister Li Ssu, succeeded in realizing the Legalist goals of unification and centralization appears to have been a primary reason for the glorification of Ch'in Shih Huang in the Anti-Confucian and Pro-Legalist campaign. Another reason was obviously the

Liang Ling-i, *The Consolidator of Pre-Ch'in Legalist Thoughts—Commenting on Han Fei Tzu*, Hung-chi (Red Flag), (No. 9, 1974), at 29-30.

¹²⁴ Lo Szu-ting, *Struggle between Restoration and Counter-Reformation*, *supra* note 119, at 113-14; Yang Jung-kuo, *Struggle between Two Lines*, PEKING REV. (No. 8), *supra* note 115, at 7-8.

¹²⁵ Chu I-ting, *An Outstanding Legalist in the Warring States Period—Hsun Tzu*, LUN FA-CHIA HO JU-FA TOU-CHENG 97 (1974).

¹²⁶ Liang Hsiao, *Reflections on the "Discourses on the State Control of Salt and Iron,"* 2 SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS 126-27 (1975).

¹²⁷ See, e.g., Li chung, *Struggle between Confucian and Legalist Schools and Ancient China's Science and Technology*, 17 PEKING REV. 8 (No. 47, 1974).

¹²⁸ Yang Kuan, *supra* note 121, at 103-06.

attempt to defend Mao Tse-tung and his rule in response to Lin Piao's denouncing Mao as the "contemporary Ch'in Shih Haung." In the "Outline of 571 Project," Lin allegedly attacked Mao as "the greatest feudal tyrant in Chinese history who dons Marxist-Leninist clothes but practices the laws of Ch'in Shih Huang."¹²⁹ One Chinese author in the campaign, for example, pointed out that "traitor Lin Piao, like reactionaries in history, insanely cursed Ch'in Shih Huang and attacked his laws as a disguise to attack the proletarian dictatorship and the revolutionary legal system of socialism."¹³⁰

In the literature published during the campaign Ch'in Shih Huang was presented as a strong and progressive ruler with several positive achievements.¹³¹ He unified China, by successfully conquering the six other states and building a unitary state. He established centralized authority, accomplished through the abrogation of the ducal state institutions, adoption of the prefecture-county system, and creation of an elaborate bureaucracy centered around the Emperor. He instituted reforms by introducing a uniform monetary system, standardizing weights, measures, vehicles, and the written language, and constructing postroads and canals. These were applauded as Ch'in Shih Huang's significant reform measures designed to promote economic and cultural development and consolidate the unification of the country. Finally, he suppressed the "restoration" movement. The laws of Ch'in were called an important weapon of the dictatorship over the slave-owning aristocratic class. Following the Legalist doctrine, the First Emperor

advocated the use of laws and decrees as teaching material and officials as teachers.¹³² His policy of "burning books and burying Confucian scholars alive" was defended as progressive and necessary in that it strengthened the centralized power by striking a severe blow at the restoration activities of the reactionaries who "used the past to oppose the present."¹³³

There is little doubt that the campaign to criticize Confucianism and to praise Legalism was basically political in nature. Historical figures and issues were manipulated to support present leaders and policies. Intentionally or not, the Legalists' advocacy of "rule by law" was given a great deal of attention. Despite official explanations to the contrary, such Legalist concepts as "fixed and promulgated laws" and "equality before the law" appear to be at variance with the PRC's current practice.¹³⁴

As a result of the campaign, original works of the Legalists in complete texts or in excerpts

¹³² Han Fei once said, "In the state of the intelligent ruler, there is no literature of books and records, but the laws serve as teachings. There are no sayings of the former kings, but the officials act as teachers." HAN FEI Tzu, ch. 49.

¹³³ It was pointed out that only a small number of reactionary scholars were killed and that books of a technical nature were exempted from destruction. Lo Szu-ting, *Struggle between Restoration and Counter-Restoration*, *supra* note 119, at 135-36 and Shih Ting, *supra* note 130, at 26-27. On May 8, 1958, Mao discussed Ch'in Shih Huang at the Second Plenary Session of the CCP's Central Committee in the following terms:

What was Ch'in Shih Huang anyway? He only buried four hundred and sixty scholars alive. We have buried forty-six thousand scholars alive. In our suppression of counterrevolutionaries, haven't we killed some reactionary intellectuals? I have argued with Democratic personnel: "You accuse us of being Ch'in Shih Huang. That is not right. We have surpassed Ch'in Shih Huang hundredfold. You curse us for being Ch'in Shih Huang, for being dictators. That we have always admitted. The pity is that you have not said enough, and we have found it necessary to make supplements." (roaring laughter)

MAO TSE-TUNG SSU-HSIANG WAN SUI 195 (1969).

¹³⁴ Some writers tried to reconcile the Legalist concepts with those of the present regime. One said that the laws of Ch'in Shih Huang meant not only the laws and regulations he promulgated but also all his political, economic, and cultural policies and decisions. Kung Cheng, *supra* note 129, at 120. Another said, "although the Legalists called their 'Law' 'public justice' and advocated punishment without regard to classes, their law actually was the manifestation of the class will of the newly-emerging landlord class." Chu I-ting, *supra* note 124, at 92.

¹²⁹ There are several translations of the "571" document. With slight changes, the citation here is based on that found in REPORT ON MAINLAND CHINA 6 (No. 26, 1972) (China Information Service).

¹³⁰ Kung Cheng, *Comments on the Laws of Ch'in Shih Huang*, LUN FA-CHIA HO JU-FA TOU-CHENG 119 (1974). It should be noted that until the recent reversal of their attitude, many PRC writers had made unfavorable comments on the first Emperor of Ch'in. Even Mao's attitude had been ambivalent. See Wang Hsueh-wen, *supra* note 111, at 153-63 and Li Yu-ning, *supra* note 111, at xxvii.

¹³¹ See, e.g., HUNG SHIH-TI, CH'IN SHIH HUANG (First Emperor of Ch'in) (1972); Lo Szu-ting, *Struggle between Restoration and Counter-Restoration*, *supra* note 119, at 124-42; Kung Chen, *supra* note 129, at 119-34; Shih Ting, *Clarifying "Burning Books and Burying Confucian Scholars Alive,"* 17 PEKING REV. 25-28 (No. 19, 1974); *Ch'in Shih Huang's Progressive Role in History*, N.C.N.A., June 5, 1974.

have become available to the public. This, along with the campaign literature, may have a far-reaching implication in the long run: the development of a greater respect for formal laws and procedures in the PRC.

CONCLUSIONS AND FUTURE PROSPECTS

From our discussion, we may conclude that the conventional approach of focusing on formal legal institutions is inadequate for understanding the legal system of the PRC. Chinese law must be examined in terms of both of its models (formal and informal) and from the perspective of its broad social functions in the context of China's revolutionary and developmental experience. What also appears clear is the strong impact on the Chinese legal development made by Mao Tse-tung, especially his skepticism about bureaucratization, his preference for the mass line, and his commitment to the concept of "uninterrupted revolution." Mao's influence is reflected in the PRC's emphasis on the societal model of law over the jural model, on flexibility rather than "rigidity" in the application of law, on the politicization of the entire legal process, and on the use of law as an instrument of social engineering to transform Chinese society as well as its members.

Despite Mao's dominant influence, however, there has been an undercurrent running toward more stable and regularized legal order. This was expressed by the intellectuals during the 1957 Hundred Flowers Campaign. In Canton wall posters displayed in late 1974, this undercurrent was manifested in the demands on the authorities to observe the law and protect the people's constitutional rights.¹³⁵ Furthermore, some members of the Communist elites seem to have differed with Mao over the role of law. Purged leaders such as Liu Shao-ch'i and P'eng Chen were denounced for their advocacy of the bourgeois legal system. Even Chou En-lai and Tung Pi-wu made occasional pleas for codification and regularization. In his

reports to the 1973 Tenth Party Congress and the 1975 Fourth National People's Congress, Chou En-lai managed to stress the importance of discipline, economic development, and rational rules and regulations.¹³⁶ During the movement against Confucianism, Chou's supporters apparently used the praise of Legalism to advance the themes of institutionalization and rule by law.

The passing of Mao from the scene has created a new situation in China. While the late Chairman continues to be quoted as a source of legitimacy, changes in the direction of Chinese political-legal patterns can be expected. Already, the "radical" elements are being purged, and Chou En-lai's plan for modernization and nationalization is emerging as state policy.¹³⁷ The swing toward institutionalization, specialization, and economic development (including foreign trade) is bound to affect the role of law in the PRC. Given the unique background and experience of the Chinese revolution and development, it is quite likely that many features of people's justice will remain relatively unchanged in the years to come. On the other hand, it is likely that in the future the jural model may achieve some parity with the societal model of law in China and that legal work may regain the kind of respectability it once enjoyed during the mid-1950's.

¹³⁶ THE TENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 34 (1973) (Documents); DOCUMENTS OF THE FOURTH NATIONAL PEOPLE'S CONGRESS, *supra* note 3, at 63-64.

¹³⁷ For instance, in a speech on December 25, 1976, Hua Kuo-feng said that "we must follow the policy of building our country and running all our enterprises diligently and thrifly, rely on the masses, systematize national rules and regulations, and improve and strengthen socialist economic management."

20 PEKING REV. 42 (No. 1, 1977.) The joint editorial of the People's Daily, The Red Flag, and the Liberation Army Daily on January 1, 1977 also stated,

We are certainly able to create a completely new situation in which there are political liveliness and economic prosperity, and in which a hundred schools of thought contend and hundred flowers blossom in science and culture, and the people's livelihood steadily improve on the basis of the development of production. We will certainly be able to achieve the magnificent goal of accomplishing the comprehensive modernization of agriculture, industry, national defense, and science and technology and build China into a powerful socialist country before the end of the century.

20 PEKING REV. 42 (No. 1, 1977), at 47.

¹³⁵ In a poster appearing at the end of 1974, a group of demobilized veterans made such demands on the provincial authorities of Kwangtung. MING PAO MONTHLY 99 (No. 112, 1975). In another poster appearing in November, 1974, some educated youths asked the Fourth National People's Congress to provide protection for "all the democratic rights which the masses of people deserve." *Concerning the Socialist Democracy and the Legal System—Dedicated to Chairman Mao and the Fourth National People's Congress*, 12 ISSUES & STUDIES 142-43 (No. 1, 1976).