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FORM AND FUNCTION IN THE CHINESE CRIMINAL PROCESS†

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... [B]iases in research have no relation to superficiality per se. They emanate from the influence exerted by society, from our personal involvement in what we are studying, and from our tendency to apply approaches with which we are familiar to environments that are radically different.

Gunnar Myrdal

1 Asian Drama, An Inquiry into
the Poverty of Nations 18 (1968)

This article considers some of the formidable intellectual problems involved in studying the Chinese criminal process. Much can be learned about another country by studying its legal institutions; a study of sanctioning institutions promises insight into a society's view of order, deviance, individual rights, and the allocation and application of punishment. But *how* can foreign institutions most perceptively be studied? Only rather recently has analysis of the American criminal process become notably more sophisticated.¹ Our own

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This article, the second in a series on Chinese law and administration (see Lubman, *Mao & Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967)) is drawn from a larger study, tentatively entitled *POLICIES AND INSTITUTIONS IN THE CHINESE CRIMINAL PROCESS, 1949-1965*, now in preparation.

This article relies on documentary sources and on interviews conducted by the author with fifty Chinese émigrés in Hong Kong from 1965 through 1967. Wherever possible, citations of documentary sources note English translations. Among the émigrés interviewed, the most important for purposes of this article were eight men who had formerly served in the Public Security (police) hierarchy, mostly in low-level posts in South China for varying periods of time; and four graduates of Chinese law schools, including several who had worked in courts in various capacities. Approximately one-fourth of the émigrés interviewed were former members of the Communist Party or the Young Communist League.

I have compared and supplemented my findings with information in unpublished interviews conducted by Professor Ezra Vogel of the Department of Social Relations and the East Asian Research Center of Harvard University and Professor Victor Li of the Law School of the University of Michigan, to whom I am grateful for generously making available the records of their interviews. Accounts of my own émigré interviews are maintained in my files.

1. See, e.g., Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-*

inexperience coupled with China's alienness and the lack of accurate information threaten to impede perceptive studies of Chinese institutions. But the problem is pressing and scholarship may moderate the distorted perceptions which the People's Republic and the United States now have of each other.

This article suggests that we can best study Communist Chinese legal institutions by defining their functions in Chinese society and examining their relation to their bureaucratic and political environment. We stand to gain not only better understanding of the complex revolutionary Chinese nation, but insight into the way American lawyers view other non-Western nations. The student of Chinese legal institutions must cross not only obvious cultural frontiers, but also more subtle frontiers of methodology and imagination. Unless successful in making this transition, American inquiries into non-Western legal institutions may distort the subject of study.

This article reviews the institutions which comprised the Chinese criminal process before the onset of the "Great Proletarian Cultural Revolution" in 1965 and traces some of the major changes in Communist Party policy toward those institutions. (Because they may not survive the Cultural Revolution or may be drastically reconstituted in the future, they are discussed in the *past tense*.) Study of the Chinese criminal process may be particularly fruitful in leading to insights into Chinese legal and administrative processes generally. Since the People's Republic was established in 1949, criminal law has been the most frequently discussed legal subject. Also Chinese Communist attitudes toward criminal law clearly reflect their attitudes towards social control, coercion and political leadership generally. As a first step in defining the perspectives needed to study these matters, I will discuss some possibly helpful readjustments in research outlook, in particular the importance of studying Chinese legal institutions as they have been shaped by extra-legal forces such as Communist policies toward the role of bureaucracy in revolutionary and post-revolutionary China. The article concludes by applying a functional approach to the problems of defining the most important influences on the operation of the Chinese criminal process, and by suggesting the kinds of insights into Chinese society which studying the process may provide.

I. FORMAL AND INFORMAL SANCTIONING IN CHINA, 1949-1965; AN OVERVIEW²

A. *The Pre-1949 Revolutionary Heritage*

Chinese institutions of control, legal or otherwise, bear the stamp of the two apprenticeships which the Chinese Communist Party served during its

Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543 (1960); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); *STUDIES ON BAIL* (C.Foote ed. 1966).

2. Another summary is J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUB-*

long rise to power, first in the Kiangsi Soviet which lasted only three years before it was overrun by the Nationalists in 1934, and then in large areas of Northern China from 1935 to 1949. Unlike its Soviet counterpart, the Chinese Party gained much experience in ruling large numbers of people before it achieved victory. By 1946, it has been estimated, the Chinese Communists ruled some 90,000,000 people.³ Among the characteristic techniques of Chinese Communist rule of the "liberated areas" were mobilizational "campaigns" to arouse mass enthusiasm and loyalty, and a host of devices to "heighten the political consciousness" of the masses by political "study," intensive persuasion and propaganda.⁴ These means were manipulated by the elite of professional revolutionaries in the Party to arouse and guide mass sentiment and action. Party members and full-time workers (whether or not Party members) in the formal government hierarchy (such as judges or policemen) and in the "mass organizations" created to mobilize the support of particular groups such as peasants, workers, women, youth and intellectuals constituted a basic core of "cadres." These cadres were supplemented by "activists," volunteers willing to act as propagandists and assistants. In mobilizing millions of Chinese to resist the Japanese and oppose the Nationalists, the Communist Party adapted Soviet concepts such as the principle of absolute Party leadership, "the use of all forms of social organization as agencies for carrying out Party objectives,"⁵ and belief in the need to raise the "political consciousness" of the masses through participation in actions endowed with political significance. To these notions was added what became a characteristic Maoist emphasis on leadership through mass mobilization, the famous "mass line."

Mao has defined the mass line in stating that "correct leadership . . . means: take the ideas of the masses (scattered and unsystematic ideas) and concentrate them . . . then go to the masses and propagate and explain these

LIC OF CHINA, 1949-1963: AN INTRODUCTION 9-18 (1968). Cohen's book, the first major scholarly work on the Chinese criminal process, is an excellent collection of documentary sources and émigré interviews which illustrate many of the points mentioned in this article. My own interpretations differ from Cohen's in a number of respects, in stressing as a formative influence on Chinese Communist legal institutions the Communists' experience in ruling many millions of people before they gained power over the entire country; in downgrading the practical importance and the real influence of Soviet models during the years (1954-1957) when the Chinese were supposedly looking to such models; in emphasizing the disorderliness of police-administered sanctions; in greater hesitancy to find direct continuities between traditional and Communist Chinese legal institutions; and in reluctance to treat Communist policies toward legal institutions separately from other bureaucratic institutions.

It should be noted that Cohen's interpretations were put forward tentatively (as are mine) in what he himself called an "overview," which does not purport to cover the years immediately prior to the Cultural Revolution, and which was written before that tumultuous upheaval yielded further evidence about earlier trends.

3. J. LEWIS, *LEADERSHIP IN COMMUNIST CHINA*, 116 (1964).

4. On these techniques, see generally J. TOWNSEND, *POLITICAL PARTICIPATION IN COMMUNIST CHINA* (1967); J. LEWIS, *supra* note 3; B. SCHWARTZ, *CHINESE COMMUNISM AND THE RISE OF MAO* (1951); S. SCHRAM, *THE POLITICAL THOUGHT OF MAO TSE-TUNG* (1963); MU FU-SHENG, *THE WILTING OF THE HUNDRED FLOWERS* (1962).

5. J. TOWNSEND, *supra* note 4, at 64.

ideas until the masses embrace them as their own, hold fast to them and translate them into action."⁶ Mass action assists the Party to carry out policy which it could not implement alone, and the mass line thus expresses the Party's dependence on the masses to accomplish desired objectives.⁷ It also "directs the cadres' attention to the need for ascertaining, articulating, and aggregating the interests of the masses."⁸ The Party uses the mass line to manipulate the populace, of course, because "the Party is guided in its decisions that it alone understands the long-run collective interests of the people."⁹ Importantly, the mass line expresses the Maoist insistence on face-to-face leadership by persuasion, and on maintaining a solidarity between Party and people that is based on hard work and joint struggle.

The notions of leadership embodied in the mass line have important implications for the study of any Chinese decision-making process. The mass line aims at mass participation in the execution (but not the formulation) of policy. Furthermore, the mass line often causes blurring and sometimes temporary obscuring of the distinction between governmental and nongovernmental organizations and activities, since the Party uses the state apparatus as only one means for transmitting and implementing policy. Information media, face-to-face persuasion in cadre and activist-led small groups, and mass organization such as associations of youth, women, students, intellectuals, workers, and peasants are also used to elicit the emotional mass response at which the mass line aims.

During the Party's rise to power, the leadership applied mass line styles of leadership and organization to all areas of activity, including the law. A report on judicial work¹⁰ delivered at a meeting of cadres in 1946 in an area of Northern China which had been under Communist rule for a number of years is illustrative. It emphasized that law and regulation were to be flexible and responsive to policy, and that law enforcement was to aim at mobilizing mass support for the Party. Accordingly, judicial cadres were instructed to stress leniency and "reeducation" in punishing criminals rather than harsh retribution, so that support for the Communist government might be enhanced; mass participation and cadre education alike would be served if criminal cases were investigated by cadres who went to the countryside; criminal cases should be disposed of so that decisions would "protect the in-

6. Mao Tse-Tung, *Some Questions Concerning Methods of Leadership*, 3 *SELECTED WORKS* 117, 119 (Peking ed. 1965).

7. J. TOWNSEND, *supra* note 4, at 72. On the mass line generally, *see id.* at 72-74 and J. LEWIS, *supra* note 3, at 70-100.

8. Tsou, *Revolution, Reintegration, and Crisis in Communist China: A Framework for Analysis*, 1 *CHINA IN CRISIS: CHINA'S HERITAGE AND THE COMMUNIST POLITICAL SYSTEM* (Book One) 277, 305 (P. Ho & T. Tsou eds. 1968).

9. J. TOWNSEND, *supra* note 4, at 73.

10. T'AI-HANG CH'Ü SSU-FA K'UNG-TSO KAI-K'UANG (REPORT ON THE GENERAL SITUATION IN JUDICIAL WORK IN T'AI HANG DISTRICT) (1946). The balance of this paragraph is based on pp. 20-21, 23-24, 30 of the Tai-hang report.

terests of the masses" and publicize current policies and general Communist leniency; the masses themselves had to be charged with reeducating criminals.

In their years in the "liberated areas" the Chinese Communists did not altogether ignore the need to regularize the criminal process. Policy documents proposed the promulgation of a more complete codification of law. Court personnel were instructed to study prior decisions, to streamline procedures, and to guard against arbitrary arrest and detention while increasing production through the use of convict labor. Cadres were also told to examine minutely the details of all cases, in cooperation with the masses, and to strengthen their political-legal education.¹¹ However, Party policy also generally pressed the application of "mass line" techniques to judicial work.¹² Among the devices which expressed the mass line and the general politicization of law were the organization in villages of small groups of activists to aid the police in detecting traitors and in maintaining public order;¹³ the use of mediational forms of dispute settlement to indoctrinate peasants;¹⁴ the allocation of criminal cases with political aspects to politically reliable cadres;¹⁵ and the blending of adjudication with mobilizational tactics such as mass meetings and rallies. Cadres were enjoined not to fear using mass meetings as fora for punishing bad men and educating the masses:

[T]he masses demand that the government immediately announce a punishment of the offenders according to the law. But we have some comrades who have a fixed rule in their thought. They think that the only way to decide a case is by having a trial in court. Sometimes, we still don't understand that a big mass meeting, where the complainant makes his accusations, the witnesses testify, and the accused answers and defends, is merely the holding of a big public session of court.¹⁶

The intensity with which these tactics were used to politicize judicial work increased during the last years of sharp struggle with the Nationalists (1946-1949). During those years it has been said:

In the enforcement of land reform and the punishment of "despots" and counter-revolutionaries, the class justice as administered by special people's tribunals usually took the form of mass trials, struggle meetings, and accusation rallies. Carefully planned and skillfully manipulated by party cadres, these revolutionary ju-

11. S. LENG, *JUSTICE IN COMMUNIST CHINA* 18-19 (1967).

12. This has been characterized as the "most prominent feature" of the Yenian period. *Id.* at 15.

13. Work Program for Village Small Groups for the Liquidation of Traitors, 1 COLLECTION OF CURRENT LAWS AND DECREES 345 (1946) [Shansi-Chah-ar-Hopei Border Region Administrative Committee, HSIEN-HSING FA-LING HUI-CHI, hereinafter cited as HHFLHC].

14. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1307 (1967).

15. Decision on the Handling of Arrests, Search, and Investigation of Criminals and Special Criminals, art. 19, 1 HHFLHC 258, 363.

16. T'AI-HANG CH'Ü SSÜ-FA KUNG-TSO KAI-K'UANG, *supra* note 10, at 18.

dicial devices of the Kiangsi days became powerful weapons in the postwar period to mobilize the broad masses against the landlords, "war criminals," and other hostile elements.¹⁷

When the Chinese Communist Party came to power in 1949, then, "political-legal work," as the Communists refer to formal sanctioning activities in which judicial cadres participate, had been stamped with the mass line and had been highly politicized. At the same time, the Chinese Communists realized that they had to assure some orderliness in procedure and provide methods for reviewing cadres' exercise of discretion in applying the flexible policies which indicated only generally prohibited conduct.¹⁸ Thus, before the founding of the People's Republic, political-legal work already contained contrasting emphasis on the mass line and regularity. Conflict between them, nascent in 1949, was to sharpen over the years.

B. 1949-1953: "Campaigns" and the Restructuring of Society

The first four years of Communist rule (1949-1953) were marked by the Party's application of its proved revolutionary techniques to restructuring Chinese society. The Party sought in a succession of violent mass movements to redistribute land and shatter the power of rural landholders, eliminate "counter-revolutionaries," and break the power of the urban bourgeoisie in the guise of punishing them for "corruption" and defrauding the People's Government.¹⁹

1. *Early Neglect of the Formal Legal System.* During this period, the Communists placed little reliance on a formal legal system. They abolished the Nationalist codes and made no move to substitute new ones; some penal norms punishing counter-revolutionary activity and corruption were adopted in the course of campaigns,²⁰ but they were broad and imprecise. Although regulations establishing formal judicial and procuratorial hierarchies were established,²¹ the regular courts were either not set up at all at the lower

17. S. LENG, *supra* note 11, at 20.

18. See, e.g., an instruction on judicial work which criticized judicial cadres for their "guerrilla mannerisms," for fearing appeals from their decisions, and for deciding cases casually on the assumption that errors would be corrected by higher-level authorities. Instructions on Matters Concerning the Execution of the New Trial System (May 23, 1946), COLLECTION OF IMPORTANT DOCUMENTS FOR 1946 [in T'AI-HANG CH'Ü] 143 (1946) [1946 NIEN CHUNG-YAO WEN-CHIEN HUI-CHI].

19. On the events of the first years, see A. D. BARNETT, COMMUNIST CHINA: THE EARLY YEARS, 1949-1955 (1964).

20. Directive of the Government Administration Council and Supreme People's Court Concerning the Suppression of Counter-Revolutionary Activities, 1949-1950 CHUNG-YANG CHENG-FU FA-LING HUI-PIEN [hereinafter cited as FLHP] (Part 1) 175, New China News Agency [hereinafter cited as NCNA] (Peking), July 23, 1950, English translation in American Consulate General, Hong Kong, CURRENT BACKGROUND No. 101, 4 [hereinafter cited as CB]; Regulations on Penalties for Corruption in the People's Republic of China, promulgated Aug. 21, 1952, People's Daily (Peking) [hereinafter cited as People's Daily], Aug. 22, 1952, 1952 FLHP 25, English translation in JOINT PUBLICATIONS RESEARCH SERVICE DC-140, 7 [hereinafter cited as JPRS].

21. Provisional Regulations Governing the Organization of People's Courts in the People's Republic of China; 1951 FLHP 79 (1953), English translation in CB No. 183, 10.

levels, or were used to implement specific campaigns, or were displaced by special tribunals.²² Indeed, in 1952-1953, a nationwide campaign to "reform law" purged most of the considerable number of law-trained judges and clerks who had previously worked for the overthrown Nationalist regime²³ and replaced them with politically reliable cadres.²⁴ During the campaign, the role of law as an instrument of class warfare was stressed and the purged judges criticized for their unwillingness to wage such warfare against enemies of the people.²⁵ Significantly, the "reform law" campaign also attacked "legal procedures," which were denounced as tools of reaction. Procedural and substantive rules and principles, such as *nulla poena* and even the notion that cases should be decided "on the merits" were directly and sharply criticized.²⁶ The role of courts in mobilizing the masses was reaffirmed.²⁷

2. *Classification of the Population.* During the first years of rule the Communists classified all adults by "class origin," a designation indicating the economic position of each family and its affiliation with the Nationalists at the time of Communist victory. Some persons—and their children—were permanently stigmatized as "counter-revolutionary," "landlord," "bourgeoisie" or (former Nationalist) "bureaucrat," while most were denominated "poor peasants" or "workers." In addition, a supplementary classification stigmatized persons as members of "other groups which, while not class groups in any strict, traditional sense, were nevertheless identifiable opponents of the regime or were considered by the Communists to be undesirable elements for a variety of reasons."²⁸ Often grouped together in the "four bad elements"

22. See, e.g., Regulations on Organization of People's Tribunals, 1949-1950 FLHP (Part 1) 71, NCNA (Peking), July 21, 1950, English translation in CB No. 151, 4; Hsien and Ch'ü *People's Tribunals Universally Established in Agrarian Reform Area of Central-South*, NCNA (Hankow), July 20, 1951, English translation in CB No. 151, 10; Government Administration Council Provisions Governing Establishment of Peoples Tribunals During 5-AntiCampaigns, 1952 FLHP 18, NCNA (Peking), Mar. 24, 1952, English Translation in American Consulate General, Hong Kong, SURVEY OF CHINA MAINLAND PRESS No. 302, 8 [hereinafter cited as SCMP]; Government Administration Council Provisions Governing Establishment of People's Tribunals During 3 Anti-Campaign, People's Daily (Peking) [hereinafter cited as People's Daily], Mar. 30, 1952, 1952 FLHP 20, English translation in SCMP No. 306, 20.

23. See, e.g., *Judicial Work Must Be Thoroughly Reformed*, People's Daily (editorial), Aug. 17, 1952, English translation in SCMP No. 401, 19; *Reform of Judicial Work Under Planning By All Judicial Organs*, NCNA (Peking), Aug. 17, 1952, English translation in SCMP No. 401, 17, 18; Li Kuang-ts'an & Wang Shui, *Critique of the Old Legal Viewpoint in People's Legal Work*, 1952 (No. 7) HSUEH-HSI [STUDY].

24. See, e.g., *Phenomena of Serious Organizational and Ideological Impurity Discovered in Kwangtung Provincial People's Court and Canton Municipal People's Court*, Nan-fang jih-pao (Southern Daily, Canton), [hereinafter cited as Southern Daily], Sept. 10, 1952, English translation in SCMP No. 454, 20; the first half of the Chinese article appears under the title, *Phenomena of Serious Organic and Ideological Impurity Discovered in Kwangtung Provincial People's Court*, *id.* at 24.

25. *Reform of Judicial Work Under Planning By All Judicial Organs*, *supra* note 23; *Phenomena of Serious Organizational and Ideological Impurity Discovered in Kwangtung Provincial People's Court and Canton Municipal People's Court*, *supra* note 24.

26. *Reform of Judicial Work Under Planning By All Judicial Organs*, *supra* note 23.

27. See, e.g., Shih Liang (Minister of Justice), *Achievements in the People's Judicial Work in the Past Three Years*, Chieh-fang jih-pao [Liberation Daily, Shanghai], Sept. 23, 1952, English translation in CB No. 218, 31, 32-33.

28. A. D. BARNETT, CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA 405 (1967).

have been "landlords," "rich peasants," "counter-revolutionaries," and ambiguously (and redundantly) "bad elements." These classifications, noted in each person's dossier and expressing his loyalty and reliability, have remained critically important in the operation of all sanctioning schemes developed by the Communist Party.

3. *Creation of Police and Party Networks of Control.* During the early years the Party also created an elaborate apparatus for surveillance, control, and sanctioning. The Public Security hierarchy was organized from Peking downward to local, rural and municipal neighborhood police stations.²⁹ These organizations were functionally divided to reflect significant Communist concerns. Units charged with investigating and disposing of political crimes, espionage and other matters deemed to involve political security were manned by particularly reliable cadres and made distinct from units charged with investigation, interrogation and disposition in nonpolitical criminal cases. A third functional classification of police activity included all other matters related to "public order," such as maintaining the extensive system for registration of persons;³⁰ issuing permits to travel abroad and residence permits to persons newly arrived; keeping under surveillance former landlords, counter-revolutionaries and members of the "four bad elements"; investigating and reporting on non-criminal cases; and disposing of minor cases such as petty thefts and fights.

Public Security control was augmented by "security defense committees" of activists who reported to the police suspicious activities of fellow residents.³¹ Other activists headed "mediation committees," urban "residents' committees," and "residents' small groups" (to which all urban residents belonged), and carried out propaganda and organizational work in such mass organizations as the Young Communist League and the China Women's Association.³² The Public Security apparatus extended to such functional units as govern-

29. The discussion in this paragraph is based on interviews with eight former police cadres, and on a source published in Taiwan by a Chinese Nationalist government agency, KUNG-FEI KUNG-AN TSU-CHIH YÜ JEN-MIN CHING-CH'Ä CHIH YEN-CHIU [RESEARCH ON COMMUNIST BANDIT PUBLIC SECURITY ORGANIZATION AND THE PEOPLE'S POLICE], particularly the tables of organization at 66, 67, 70 and opposite 64, 148.

30. See, e.g., Provisional Regulations Governing Urban Population (promulgated by the Ministry of Public Security, July 16, 1951), English translation in SCMP No. 137, 7; Provisional Rules for Control of Hotels and Lodging Houses (promulgated by the Ministry of Public Security, Aug. 4, 1951), English translation in SCMP No. 149, 25; Provisional Rules Governing Census Control in East China (promulgated by the Public Security Department of East China Military Control Commission), English translation in SMP No. 331, 18; Regulations of the People's Republic of China Governing Household Registration, 1958 COMPENDIUM OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA [CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN herein-after cited as FKHP] 204, English translation in SCMP No. 1695, 1.

31. The security defense committees were organized under the Temporary Regulations on the Organization of Security Defense Committees, Aug. 11, 1952, 1952 FKHP 56, English translation in SCMP No. 393, 11, and J. COHEN, *supra* note 2, at 115.

32. Urban neighborhood organization is described more fully in Lubman, *supra* note 14, at 1309-13. The operation of the urban neighborhood control network is illustrated by translated Chinese sources and émigré interviews in J. COHEN, *supra* note 2, at 106-70.

ment bureaus, economic and commercial enterprises, and schools. And, of course, Communist Party branches and cells were embedded in police and other government units, and in the mass organizations; policy implementation in all territorial and functional units was guided by a vast Party hierarchy which was at all times parallel to but distinct from other organizations.

During the early years, the police, dominated by the Party, administered serious "criminal" sanctions, ranging from confinement in police-run "labor reform" camps³³ to the death sentence. Trials were usually not held unless a campaign was in progress and Party officials felt that a public trial possessed particular educational importance. Other police-controlled sanctions included minor fines and short periods of confinement in police-run "detention centers" for less serious offences,³⁴ and a regime of "control" first applied to former landlords and minor counter-revolutionaries who had not been linked with serious crimes,³⁵ and then extended to other persons deemed to deserve punishment and surveillance without prison confinement.³⁶ In every economic, educational and government unit, police and Party cadres handled "personnel" and "security" matters and labor discipline, and applied "administrative" sanctions such as dismissal, demotion, entry of demerits in dossiers, reductions in salary and job assignments.³⁷ The Communist Party and its adjunct, the Young Communist League, created their own internal mechanisms for discipline.³⁸ And, finally, in every urban street and less effectively in the vast Chinese countryside, the activist-augmented cadre apparatus directly con-

33. See, e.g., Lo Jui-ch'ing, *The Mighty Movement for the Suppression of Counter-Revolutionaries*, People's Daily, Oct. 11, 1951, English translation in CB No. 171, 1; *Peking Public Security Bureau Achieves Success in Educating Counter-Revolutionary Criminals Through Labor*, NCCA (Peking), Oct. 18, 1951, English translation in CB No. 171, 4; *Corrective Labor in the Canton Area*, Ta Kung Pao (Hong Kong) and Wen Hui Pao (Hong Kong), Dec. 15, 1951, English translation in CB No. 171, 10. A generalized normative expression of the labor reform sanction was not promulgated until 1954, when the Act of the People's Republic of China for Reform Through Labor appeared, 1954 FLHP 33, English translation in CB No. 293, 3, J. COHEN, *supra* note 2, at 589.

34. General provisions for short-term police detention were not made in promulgated legislation until October, 1957. See text accompanying note 103 *infra*. However, émigré interviews and occasional documentary sources indicate that the practice was common before then. See, e.g., *Does Detention by the Public Security Organization Constitute a 'Criminal Sentence'?*, Worker's Daily (Peking), Apr. 4, 1957 which contains an inquiry from a man whose relative was detained by a Public Security Bureau for intentionally damaging a car, and then was released; the letter inquired whether the detention constituted a "criminal sentence," in which case the man released would not be paid lost wages by his work unit. The response stated that only a person sentenced by a court could be regarded as being punished by a "criminal sentence." It added "even the punishment of detention which the public security organization uses in the case of citizens who disturb the public peace or violate administrative regulations is only an administrative punishment and not a criminal punishment."

35. See Provisional Measures for Control of Counter-revolutionaries (approved by the Government Administration Council, June 27, 1952), 1952 FLHP 53 (1954); English translation in CB No. 193, 1, J. COHEN, *supra* note 2, at 277.

36. See, e.g., Sung Hai, *What is the System of "Control by Organ"*, Wen-Hui Pao (Hong Kong), Mar. 27, 1952, English translation in SCMP No. 306, 22.

37. See, e.g., A.D. BARNETT, *CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA* 145-46 (1967).

38. *Id.*

trolled or influenced application of an assortment of informal punishments, such as public criticism of varying intensity in small or large groups.³⁹

Courts and Procuracy figured little in decision-making and were used chiefly to formalize the most serious punishments in order to propagandize Party policies and educate the masses on desired behavior. Although the first turbulent years of Communist rule were characterized by the extensive use of mobilizational devices to manipulate mass action in order to achieve policy goals, some regularization took place. Emigré interviews suggest that within the police hierarchy internal modes of review were established, particularly for cases in which the punishment could be serious. Also, and of increasing importance, some faint signs of competition between different administrative styles can be discerned. Faced with an enormous manpower shortage, Party leaders initiated programs to train cadres into what have aptly been called "semi-bureaucrats."⁴⁰ Tendencies to bureaucratize legal work are less noticeable, but occasionally admonitions to cadres were published urging them to use care in their work, to avoid subjective decisions based principally on a suspect's "class status," and to refrain from coercing confessions.⁴¹ On the other hand, legal cadres were constantly reminded that they had to maintain the links between ideology and legal work,⁴² and were criticized for undue use of formal procedures.⁴³ Generally, the Chinese leadership showed some concern with the impediments encountered in meshing legal institutions into programs of social change. To the extent that judicial activity was regularized it might become a matter for experts and thus incompatible with mass line notions of political leadership. These must have been the concerns prompting the "judicial reform" campaign, which coupled the courts with the mass line in a direct attack against professionalism. The conflict between regularity and the mass line was to become more explicit in ensuing years.

C. 1953-1957: Tentative Regularization Overcome by Mass Line Politics

1. *Legality as Discipline; Law and Politics.* By 1953 the Chinese Communist leadership had consolidated its control and the leadership shifted its

39. The use of criticism stems from basic Maoist ideological tenets. On the Maoist concern with transforming the thought of individual men, see S. SCHRAM, *supra* note 4, at 52; SCHWARTZ, *Modernisation and the Maoist Vision—Some Reflections on Chinese Communist Goals*, 21 CHINA Q. 3, 11-12 (1965); on thought reform, see R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF "BRAINWASHING" IN CHINA* (1961); on the use of criticism as a sanctioning device, see MU FU-SHENG, *supra* note 4, at 208-47; some Chinese discussions of criticism and persuasion as sanctions are excerpted and collected in J. COHEN, *supra* note 2, at 153-55, 157-60.

40. Vogel, *From Revolutionary to Semi-Bureaucrat: The "Regularisation" of Cadres*, 29 CHINA Q. 36 (1967).

41. See, e.g., Liu K'un-lin, *Resolve to Oppose Subjectivism in the Holding of Hearings*, Ch'ang-chiang jih-pao [Yangtze Daily, Hankow], July 15, 1950. This article was published before the campaign against counter-revolutionaries, which was the first of a series that heavily politicized legal work.

42. *Further Strengthen and Develop the People's Democratic Dictatorship*, People's Daily (editorial), May 29, 1951, English translation in CB No. 91, 10, 11.

43. *Id.*

aim to industrialization under Soviet-style five-year plans. At the same time, it showed greater interest in a formal judicial system, and professed adherence to the more regularized Soviet models. To Western eyes, Stalinist legal institutions hardly seem regular, but they did present a more bureaucratic contrast to previous Chinese practices. The chief thrust of the emphasis on building new legal institutions was consistent with the Stalinist inspiration because it stressed not legality but the *discipline* which was needed in the drive for "economic construction."

Although articles in *Political-Legal Research* stressed the importance of legal institutions,⁴⁴ cadres were cautioned against thinking that law was above class and that law could restrain the revolution. One author noted that some cadres said:

"Henceforth no one can bother us"—this deviant error on the independence of adjudication must be criticized. Naturally, to understand the independence of adjudication [as meaning] that when adjudication work is being done the masses do not have to be depended on, that there are no contacts with relevant departments, and that cases are handled in isolation [i.e., without reference to current policies], is extremely erroneous.⁴⁵

Cadres were frequently reminded that law must serve policy, which included deciding cases so that they promoted specific short-term goals such as reducing industrial accidents⁴⁶ and fulfilling quotas for the purchase of grain from peasants.⁴⁷ There was never any doubt that the newly regularized institutions had to serve the construction of socialism.

2. *Formal Regularizing Steps.* In 1954, a constitution was adopted;⁴⁸ organizational legislation was promulgated for the courts⁴⁹ and a Procuracy,⁵⁰ and rules on arrest and detention were established.⁵¹ New policies on law

44. See, e.g., Yang Yu-Ch'ing, *On Observing the Law*, 3 CHENG-FA YEN-CHU [hereinafter cited as *POLITICAL-LEGAL RESEARCH*] 31 (1954); Chang Chih-jang, *The People's Courts After the Promulgation of the Constitution*, 4 *POLITICAL-LEGAL RESEARCH* 11 (1954); Wei Wen-po, *Basic Knowledge About the Organizational Law of the People's Courts*, 1 *POLITICAL-LEGAL RESEARCH* 1 (1955); Sun Kuo-hua, *The Function of Our Country's Democratic Legal System During Socialist Construction*, 1 *POLITICAL-LEGAL RESEARCH* 20 (1955).

45. Ho Shang-kao, *Strive to Build a Complete Revolutionary System*, Kuang-ming Daily (Peking), Mar. 27, 1955.

46. Shih Liang *Speaks on Judicial Work at National People's Congress*, NCNA (Peking), Sept. 24, 1954, English translation in SCMP No. 899, 10, 11-12.

47. Main Tasks of Political and Legal Work in 1954 (Formulated by GAC Committee of Political and Legal Affairs), NCNA (Peking), Mar. 29, 1954, English translation in SCMP No. 782, 8-9.

48. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Sept. 20, 1954, English translation in *FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA* 1 (A. BLAUSTEIN ed. 1962) [hereinafter cited as *BLAUSTEIN*].

49. The Organizational Law of the People's Courts of the Chinese People's Republic, Sept. 21, 1954, 1 FKHP 123, English translation in *BLAUSTEIN*, *supra* note 48, at 131, CB No. 303, 1.

50. Organizational Law of the People's Procuratorates of the People's Republic of China, Sept. 21, 1954, 1 FKHP 133, English translation in *BLAUSTEIN*, *supra* note 48, at 144 and CB No. 303, 8.

51. Regulations on Arrest and Detention of the People's Republic of China 1 FKHP

administration were evidenced by a tripartite division of functions, at least in form.⁵² The police were to investigate suspected offenses and make arrests approved by the Procuracy; the Procuracy, made formally independent as in the Soviet Union, rather than attached to the courts as in the Nationalist system and in Kiangsi, was not only to approve arrests but to verify evidence and make formal accusations; and the courts were to determine guilt in public trials before one judge and two citizens acting as "people's jurors" in which the accused had a "right to defense." At various times during the period 1954-1957 sporadic attempts were made to implement these new measures. Law schools and university law departments were established or expanded;⁵³ procuratorial offices were opened or enlarged⁵⁴ and modest numbers of cadres trained,⁵⁵ the courts were enlarged; small lawyers' offices patterned after Soviet lawyers' collectives were opened, usually in large cities;⁵⁶ and experiments were conducted by the Ministry of Justice and the Supreme People's Court in administering trials under uniform rules of civil and criminal procedure.⁵⁷ In 1957, under circumstances and with results described below, experiments with a formal criminal process were abruptly ended. The fate of these experiments illustrates important tensions in Chinese Communist attitudes toward formal legal institutions.

3. *Continued Politicization of Formal Sanctioning; Police and Party Disregard of Adjudication.* Chinese commitment to socialist legality was far from total, and the steps taken to regularize the system were, as Cohen has stated, but "modest beginnings."⁵⁸ Soon after the initial regularizing measures were taken, China was plunged into further political campaigns which approached the intensity, although not the violence, of the early campaigns. In 1955 and early 1956 these campaigns, particularly one to suppress counter-revolutionaries, involved mass action and direct police and Party sanctioning, principally through ad hoc teams of cadres and activists formed throughout the country. Moreover, throughout 1954-1957, the activity of the courts was constantly linked to promoting specific policies. For example, courts were directed to "expedite" cases involving violations of government decrees on

239 (1954), Dec. 20, 1954, English translation in SCMP No. 953, 8 and J. COHEN, *supra* note 2, at 360.

52. See, e.g., *Strengthen Procuratorial Work; Protect National Construction*, People's Daily, May 21, 1954, English translation in SCMP No. 821, 20.

53. The developments are summarized in C. CHENG, *SCIENTIFIC AND ENGINEERING MANPOWER IN COMMUNIST CHINA, 1949-1963*, 253-54 (1965).

54. See, e.g., *This Province's Procuratorial Offices All Established*, Fukien Daily, Apr. 20, 1955.

55. See, e.g., *Shansi People's Procuratorate Establishes Two Cadres' Training Classes*, Kuang-ming Daily, June 4, 1955.

56. See, e.g., *People's Courts Throughout the County Progressively Strengthen Legal Defense System*, People's Daily, Mar. 24, 1955, English translation in SCMP No. 1018, 14.

57. See, e.g., *Answering Questions from Readers: On Trial Practice in Criminal Cases*, Kuang-ming Daily, Mar. 11, 1955, English translation in J. COHEN, *supra* note 2, at 429-30, 444-45.

58. J. COHEN, *supra* note 2, at 14.

grain purchases from peasants;⁵⁹ "thieves and swindlers" had to be severely dealt with;⁶⁰ persons who opposed agricultural collectivization had to be persuaded or punished.⁶¹ Not until mid-1956, and continuing only until July, 1957, was criminal procedure briefly and tentatively regularized, probably only in China's largest cities; and unevenly even there.

It appears that the formal criminal process as administered was adjudicatory only in form and continued to be dominated by the police and by Party officials within the "political-legal" system, as the three organs of police, Procuracy and courts were called.⁶² In most cases, the Procuracy and courts confirmed the police recommendation for disposition of the case. Although the official model of the process stressed procuratorial interrogation and public trials, in most cases Procuracy and courts relied on the file in the case.⁶³ Impressionistic evidence based on émigré interviewing suggests that in perhaps some 15% of all cases the three organizations which processed cases disagreed; these differences were resolved by informal consultations between the organizations involved, sometimes with the participation of Party officials (Party Committees had "political-legal departments" to oversee the work of police, Procuracy, and courts). According to émigré interviews, only "important" cases were reviewed as a matter of course. These involved counter-revolutionary crimes, homicides, large-scale thefts, or cadre misdeeds. The public trial, if held, confirmed the antecedent decisions by police and Procuracy and was generally intended to serve as an educational demonstration of defendant's guilt. "Innocence was not seriously at issue because, if pretrial

59. Main Tasks of Political and Legal Work in 1954 (Formulated by GAC Committee of Political and Legal Affairs), NCNA (Peking), Mar. 29, 1954, English translation in SCMP No. 782, 8.

60. *Shih Liang Speaks on Judicial Work at National People's Congress*, NCNA (Peking), Sept. 24, 1954, English translation in SCMP No. 899, 10; *Further Implement the Policy of Judicial Work Serving the Task of Socialist Construction*, Kuang-ming Daily (editorial), Mar. 2, 1955.

61. *E.g., Judicial Work Must Protect the Successful Development of the Mutual Aid and Cooperativization Movement*, Kuang-ming Daily, Mar. 15, 1955.

62. The following paragraph is based partly on criticism of the legal system published in China during the brief period in 1956-1957 when such open criticism of the Party was tolerated, and partly on émigré interviews which will be set forth in greater detail when the larger work from which this article is drawn is published. To a considerable extent, Cohen's interpretations are similar (*see, e.g.,* J. COHEN, *supra* note 2, at 13), although I am inclined to be more skeptical regarding the advances made in regularizing criminal procedure. A recent examination of tensions in relations between the Party and the courts in 1954-57, stressing an increase in judicial autonomy is Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 961, 979-89 (1969).

63. A report issued after a conference on procuratorial work in mid-1956 indicated that procuratorial investigation—as opposed, presumably, to reliance on the police-assembled file—had generally been conducted only in certain types of cases, including subversion of the agricultural cooperativization movement, embezzlement, larceny, and serious accidents. *Supreme People's Procuratorate Calls Investigation Work Conference*, Kuang-ming Daily, Aug. 8, 1956, English translation in SCMP No. 1354, 2. On careless judicial reliance on police and Procuracy investigation, *see, e.g.,* Chuang Hui-ch'ên, *Problem of the Relation in Criminal Trials Between Judgment, Investigation and Accusation*, 3 POLITICAL-LEGAL RESEARCH 28 (1956); for criticism of frequent judicial failure to follow established procedure, *see* Wang Chi-ch'ao, *Discussion of Some Problems in Trial Procedure in Criminal and Civil Cases*, 4 POLITICAL-LEGAL RESEARCH 39 (1957).

judicial screening found proof of criminality to be insufficient, the case was not set down for public trial but was either dismissed or returned to the procuracy or police for further investigation."⁶⁴ Defendants were entitled to be represented at their trials by defense counsel, but the lawyers' offices which were opened intermittently in 1955-1957 remained very small.⁶⁵ Defense lawyers were widely distrusted by cadres such as judges, who linked them with the "enemies" who were the objects of the criminal process. After conviction, defendants could theoretically appeal, but very few did; much review of convictions, however, was conducted by the trial court itself, higher-level courts, the Ministry of Justice, and the police.

Emigré interviews suggest that the formal patterns established by the legislation of 1954 for processing suspects and resolving disagreements among the police, Procuracy and courts on the disposition of cases were largely disregarded. Disagreements were resolved through consultations which crossed the often-blurred lines between Party and government; local Party secretaries exercised considerable power on these occasions. Similar disregard of formally constituted procedures is suggested by interviews with former police cadres, who have stated that within their bureaus, especially after campaigns such as that against counter-revolutionaries in 1955-1956, special cadre groups were formed to investigate cases of men who had recently been sent to labor camps. If errors were disclosed by the investigation, which although ad hoc were often very thorough, the prisoners involved would be released by orders transmitted through the policy apparatus, sometimes with the formal assent of the courts.

Available sources strongly suggest that the Chinese Communists, from the leadership to legal cadres, were ambivalent about the formal criminal process. The leadership does not appear to have been greatly concerned with maintaining fidelity to their Soviet models. Mao himself, complaining of the reluctance of rural cadres to accelerate agricultural cooperativization in 1955, said, "What we should not do is to allow some of our comrades to cover up their dilatoriness by quoting the experience of the Soviet Union";⁶⁶ perhaps these attitudes were held toward judicial cadres who seemed to have become more concerned with following bureaucratic Soviet models than with punishing "enemies." Low level cadres also had little commitment to legality. Many lacked education and most lacked legal training. Even legal education was curiously abstract and well into 1956 seemed to consist of little more than mechanical teaching about the Soviet Union with little attempt to apply So-

64. J. COHEN, *supra* note 2, at 13.

65. By October, 1956, Peking had four and Shanghai five "lawyers advisory offices." *Lawyers Advisory Offices in Peking and Shanghai are Welcomed by the Cities' People*, Kuang-ming Daily, Oct. 18, 1956.

66. Mao Tse-tung, *The Question of Agricultural Cooperation*, COMMUNIST CHINA, 1955-1959, 101 (Harvard Center for International Affairs & East Asian Research Center eds. 1962) [hereinafter cited as COMMUNIST CHINA].

viet experience to China.⁶⁷ The police, who had administered sanctions without meaningful judicial or procuratorial interference during the first years of Communist rule, resented the creation of limitations on their power. Moreover, they continued, throughout the period of experimentation, to exercise their considerable power to punish violations of "public order."⁶⁸ Indeed, these powers were augmented during 1955-1957 as the police responded to large-scale peasant migrations into the cities by rounding up "vagrants" and putting them to work at selected work sites.⁶⁹ As for the Procurators, many were ex-policemen who shared the views of their former colleagues. Judicial cadres were not only aware of police dominance of sanctions and of Party primacy, but remembered the "judicial reform" movement of 1952, which had discredited professionalization. Reflecting Party officials' continued distrust of legal professionals, only a small percentage of law school graduates were assigned to the courts as judges after they were graduated. Most were put to work as court clerks, teachers, Procurators, or administrative cadres in ministries.

There was considerable difference of opinion about the irregularities in the work of the courts. Early in 1956 the Vice-President of the Supreme People's Court criticized "some cadres" who thought that timeliness and legality in deciding cases were inconsistent, because it took too much time to deal with enemies according to the law.⁷⁰ On the other hand, in October, 1956, two professors at Peking University criticized judges who refused to follow the mass line and make on-the-spot investigations and instead "rely on their own 'seasoned' experience, take a look at the files, and listen to what the concerned parties have to say."⁷¹ In partial reply, an appellate judge wrote that "in handling cases [judges] cannot be divorced from the masses, but judges ought to know, that in some circumstances, the things generally recognized by the masses are not necessarily all true. . . ."⁷²

That China's leaders did not all share the values essential to a regularized legal system is suggested by their speeches at the Eighth Congress of the Communist Party in September, 1956, even though that Congress signalled a new emphasis on legality. Mao himself, in a brief speech, complained of

67. In April, 1957, a critic of the rigid and dogmatic teaching in Chinese law schools complained, "In the class, the teacher reads the Soviet textbook word by word and students takes notes accordingly. Some students suggested that the teacher was like a recording machine and the students like a typewriter." Kuang-ning Daily, April 30, 1957, quoted in C. Cheng, *supra* note 53, at 256.

68. See, e.g., the article cited *supra* note 34.

69. See, e.g., Ministry of Internal Affairs Directive on Provisions for Vagrants, NCNA (Peking), July 24, 1956, English translation in SCMP No. 1345, 2.

70. Ma Hsi-wu, *On Several Problems in Adjudication Work at the Present Time*, 1 POLITICAL-LEGAL RESEARCH 3 (1956).

71. Shao Yung-ch'ing & Shen Tsung-ling, *People's Court Judgment Based on Facts and Law*, Kuang-ming Daily, Oct. 18, 1956, English translation in SCMP No. 1404, 2.

72. Pao T'ing-kan, *My Understanding of "Facts as Basis"*, Kuang-ming Daily, Oct. 28, 1956.

bureaucratism and repeatedly stressed the need to preserve the unity of the Party with the people.⁷³ In contrast, Liu Shao-ch'i (then Premier) who was also concerned with excessive bureaucratization, looked for greater Party control over state organs and increased bureaucratic regularity. In this context Liu juxtaposed emphasis on legal institutions with the most explicit departure from the mass line by a high-ranking Party leader up to that time. He stated that "the period of revolutionary storm and stress is past . . . and a complete legal system becomes an absolute necessity."⁷⁴ Even more interesting, Tung Pi-wu (then Chief Justice of the Supreme People's Court) not only called for criminal, civil and procedural codes,⁷⁵ but specifically addressed himself to the "serious question," that

a few of our Party members and government personnel do not attach much importance to the legal system of the state, or do not observe its provisions. At the same time, Party committees at various levels have not yet paid sufficient attention to exposure and correction of this state of affairs.⁷⁶

Tung criticized Party committees which made no distinction between the Party and the government, some Party members who considered "that they themselves were over and *above* the law,"⁷⁷ the failure to "[see] that legal procedure is strictly observed,"⁷⁸ and the absence of "a single fairly good book explaining the legal system of our country."⁷⁹ Then, after criticizing those who "say that the state's legal system is a formality, or that it creates too much trouble, and its practice hinders work,"⁸⁰ Tung traced the origins of this disregard for law to the Party's long past as an outlawed revolutionary party, its hatred for the old legal system, and the mass movements of the early years of Communist rule, which had encouraged "an indiscriminate disregard for all legal systems."⁸¹ He concluded by calling for the drafting of more laws, and for seriously observing them. Liu Shao-ch'i's call for a more complete legal system and Tung's speech signalled the ascendancy of views more explicitly tolerant of bureaucratic regularity. Thereafter, from the fall of 1956 until June, 1957, the regularity of the legal system was increased with

73. Mao Tse-tung, *Opening Address at the Eighth National Congress of the Communist Party of China*, I EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA: DOCUMENTS 5, 8, 9 (1956).

74. 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*, delivered on Sept. 15, 1956, *id.* at 15, 82.

75. Speech by Comrade Tung Pi-wu, in II EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA: SPEECHES 79, 87 (1956).

76. *Id.* at 88.

77. *Id.* at 89.

78. *Id.* at 90.

79. *Id.*

80. *Id.*

81. *Id.* at 92.

official approval. A new stress on the legal system, which was defined as including "serious observance of the law"⁸² was evidence in the press. Furthermore, through the winter of 1956 and the spring of 1957, with increasing intensity, criticisms were raised against the lack of promulgated and coherent legal rules,⁸³ Party supremacy over law,⁸⁴ the inferior position of the courts vis-à-vis the police,⁸⁵ and general carelessness, prejudice and reliance on suspects' "class status" by courts and police alike.⁸⁶

The change in policy toward law was only part of a more important decision to liberalize the entire political life of the nation. Adherence to legality and institutionalization of an adjudicatory model of the criminal process were most emphasized from mid-1956 until mid-1957, a period also characterized by indecision over the future course of China's revolution and industrialization.⁸⁷ In the face of widespread nationwide fatigue and restiveness from successive political convulsions, the Chinese leadership made some explicit concessions. In the spring of 1956, the government announced a new policy of leniency to persons accused as "counter-revolutionaries."⁸⁸ At the same time intellectuals were told that thenceforth "freedom of independent thinking, of debate, of creative work; freedom to criticize and freedom to express, maintain and reserve one's opinion" would be permitted.⁸⁹ Even before the Eighth Party Congress, in the newly relaxed political atmosphere, criticism of the operation of legal institutions began to appear which indicated that regularization of the legal system had not progressed very far.⁹⁰ The Eighth Party Congress endorsed these criticisms and signalled a significant change in policy.

82. *What is the "Legal System?"*; Worker's Daily (Peking), Dec. 20, 1956.

83. E.g., Wen Hung-chün & T'ang Tsung shun, *Strive to Strengthen the Construction of Our Country's Legal System*, 99 HSIN CHEN-SHE (NEW CONSTRUCTION) 7 (1956).

84. See, e.g., the criticism reproduced in THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS 111-12, 114-16 (R. MacFarquhar ed. 1960) and LENG, *supra* note 11, at 61-63.

85. See, e.g., Tai Ching-ch'un, *The Three Organs of Public Security, Procuracy and the Courts Ought to Further Implement the System of Division of Labor, Responsibility and Mutual Restraint*, Kuang-ming Daily, Feb. 12, 1957.

86. See, e.g., I Kuang, *Overcome Subjectivist Ideology, Raise the Quality of the Investigation of Cases*, Kuang-ming Daily, Apr. 15, 1957.

87. The debates, doubts and hesitant liberalization of this period have been well-documented. See, e.g., COMMUNIST CHINA, *supra* note 66, at 7-10; Townsend, *Internal Politics Since 1956*, 22 BULL. ATOM. SCIENTISTS 58 (June 1966).

88. See, e.g., *Supreme People's Court and Ministry of Justice Hold 3d National Conference on Judicial Work*, NCNA (Peking), Apr. 7, 1956, English translation in SCMP No. 1272, 3.

89. Lu Ting-yi, *Let a Hundred Flowers Blossom, a Hundred Schools of Thought Contend!*, in COMMUNIST CHINA, *supra* note 66, at 153.

90. Speech by Tung Pi-wu, *Judicial Work in China in the Past Year*, delivered on June 25, 1956, to the third session of the First National People's Congress, NCNA (Peking), June 25, 1956, English translation in CB No. 394, 20; Ma Hsi-wu, *On Several Problems in Adjudication Work at the Present Time*, 1 POLITICAL-LEGAL RESEARCH 3 (1956).

D. 1957-1965: *The Abandonment of Regularization and the Revival of the Mass Line*

Liberalization and the resulting formalization of the legal system did not last long. Public criticism of the Party reached such a height by June, 1957, that

... the movement had gotten out of hand. Not only was some criticism far too pointed for the [Party's] point of view, but unruly demonstrations had erupted and there were signs of a developing anti-Party movement among the students. Debate was abruptly shut off, the severest critics were denounced, and an "anti-rightist" campaign followed during the summer of 1957.⁹¹

A prominent casualty of the Party's response to "rightism" was the formal criminal process in which some differentiation of police, Procuracy and judicial function had become discernible. During the anti-rightist campaigns of 1957-1958,⁹² procurators who had refused to approve arrests and detentions in previous years were severely criticized,⁹³ defense lawyers were criticized for losing their "standpoint"⁹⁴ and their offices were largely disbanded. Close cooperation among courts, Procuracy and police was urged, insistence on following formal rules and procedures sharply criticized, Party supremacy reaffirmed. After 1958, the three agencies which administered the criminal process were "in fact . . . constituent units of a single administrative structure."⁹⁵

During the Great Leap Forward of 1958-1960, many cases were disposed of by teams of cadres from the three agencies working together; public trials were again used to heighten ideological fervor. However, during the ensuing "three bad years" (1960-1962), while China recovered from the Great Leap, the combination of police, procuratorial and judicial cadres ebbed, and the separate hierarchies reappeared, although inter-agency consultation increased.

Since 1957, official policy has generally stressed the role of law in serving policy.⁹⁶ However, variations are apparent. Some articles published in 1962, for instance, reflected official tolerance of less uncompromising views than

91. Townsend, *supra* note 87, at 61.

92. The developments summarized in this and the following sentence are described in greater detail in J. COHEN, *supra* note 2, at 15-18; S. LENG, *supra* note 11, at 63-68.

93. See, e.g., Wang Shui & Tsai Yu, *Manifest the Powers of the People's Legal System*, 9 CHENG-CHIH HSUEH-HSI (1957), English translation in American Consulate General, Hong Kong, EXTRACTS FROM CHINESE MAINLAND MAGAZINES [hereinafter cited as ECMM] No. 114, 30; *Increase Education on Legality in the Countryside*, Ta Kung Pao (Peking), Aug. 27, 1957; Yü Ming, *Rightist Thought Hampers Progress of Political and Legal Work*, People's Daily, Oct. 14, 1957, English translation in SCMP No. 1638, 7.

94. See, e.g., Lin Tzu-ch'iang, *To Thoroughly Criticize the Bourgeois Ideology in the Work of People's Lawyers*, 1 FA-HSUEH [JURISPRUDENCE], Feb. 16, 1958, English translation in 10 UNION RESEARCH SERVICE No. 24, 372.

95. J. COHEN, *supra* note 2, at 48.

96. See, e.g., Shih Huai-pi, *Correctly Understand and Apply the Law*, Kuang-ming Daily, Apr. 13, 1958; Chang Yu-yü, *How About Studying a Little Law?*, People's Daily, May 27, 1958.

those current immediately after the anti-rightist campaign. Briefly in 1962, emphasis was placed on the need to reform rather than punish,⁹⁷ the need for all, including cadres, to obey the law,⁹⁸ and the need for greater care and objectivity in administering the criminal process.⁹⁹ However, soon thereafter a harsher line was asserted. From late 1962 to the beginning of the Cultural Revolution, articles on law have reasserted emphasis on class warfare,¹⁰⁰ on applying the mass line to legal work,¹⁰¹ and on the subservience of law to policy.¹⁰² Two aspects of legal practice which reflect important policy trends deserve special attention; these are the use of police-administered sanctions, followed by the reassertion of mass line methods and the open reintroduction of direct Party sanctioning in the context of campaigns.

1. *The Formalization of Police-Administered Sanctions.* Party leaders responded to criticism by undoing the regularization that had been accomplished. Judicial power was negated and the role of the police increased greatly. Two statutes promulgated in 1957 declared the power of the police to administer minor punishments such as fines, warnings, and short periods of confinement for minor breaches of "public order,"¹⁰³ and to confine to labor camps for indeterminate periods of "labor rehabilitation" a variety of anti-social persons, including those who "do not engage in proper employment . . . hooligans . . . [petty criminals] whom repeated education fails to change . . . counter-revolutionaries and anti-socialist reactionaries [expelled from their school or place of employment] . . ." and persons who refused to work or who refused labor assignments.¹⁰⁴

The statute on police-administered sanctions is the closest the Chinese

97. Wang Chao-shen, *Strengthen the Work of Social Supervision and Reform, Further Consolidate the People's Democratic Dictatorship*, 1 POLITICAL-LEGAL RESEARCH 41 (1962), English translation in JPRS No. 15,722, 9 (1962).

98. See, e.g., Szu Chin, *Chinese Socialist Law*, 4 POLITICAL-LEGAL RESEARCH 5 (1962), English translation in JPRS No. 19,646, 1 (1963).

99. See, e.g., Chang Tzu-p'ei, *Several Problems Relating to the Use of Evidence to Determine the Facts of a Case in Criminal Litigation*, 4 POLITICAL-LEGAL RESEARCH 11 (1962), English translation in JPRS No. 19,646, 47, partial English translation in J. COHEN, *supra* note 2, at 392-94, 399-403, 404-05.

100. Pien Hsin-wen, *Grasp the Laws of Class Struggle During the Period of Transition*, 1 POLITICAL-LEGAL RESEARCH 1 (1963), English translation in JPRS 21,017, 1, 5 (1963); Chou Hsin-min, *Law is a Sharp Weapon of Class Struggle*, People's Daily, Oct. 28, 1964, English translation in JPRS No. 22,982, 1; Feng Ch'i-hsun, *Learn How to Handle Problems from the Viewpoint of Class Struggle*, 1 POLITICAL-LEGAL RESEARCH 46 (1965).

101. See, e.g., Chao-I-fu, *My Understanding of the Policy of Combining the Specialized Work of Judicial Organs and Mass Struggle*, 2 POLITICAL-LEGAL RESEARCH 27 (1965).

102. See, e.g., Shih Chien-ju, *How Shall a Legal Worker Serve Socialist Work*, 1 POLITICAL-LEGAL RESEARCH 56 (1965).

103. Security Administration Punishment Act of the PRC, Oct. 22, 1957, 6 FKHP 245, English translation in SCMP No. 1646, 1, J. COHEN, *supra* note 2, interspersed with other material at 205-37. The Chinese term *chih-an* is rendered by Cohen as "security administration"; I prefer the freer but more descriptive "public order."

104. Decision of the State Council of the PRC Relating to Problems of Rehabilitation Through Labor, Aug. 1, 1957, 6 FKHP 243, English translation in J. COHEN, *supra* note 2, at 249-50.

Communists have ever come to promulgating a criminal code. However, it would probably be a mistake to conclude that the promulgated statute furnished the criteria for police punishment of petty crimes for any considerable length of time after it was promulgated in 1957. One would probably also be mistaken to conclude, as Cohen seems to suggest in speculation written before we learned more about events of the years immediately prior to the Cultural Revolution,¹⁰⁵ that police-administered sanctions under the statute have been carefully integrated into a scheme which has remained fairly constant since 1957. It is true that since 1957, when police power was formally augmented, the Chinese Communists have not promulgated any other significant major norms regarding sanctions. But fragmentary evidence suggests that police-administered sanctions have not remained stable and have been subject to the politicization that has touched most aspects of Chinese life.

2. *The Revival of Mass Line Methods in the Countryside, 1962-1965.* From late 1962 until the beginning of the Great Proletarian Cultural Revolution in 1965, police-administered sanctions in the countryside to a considerable degree gave way to direct mass action—criticism and denunciation meetings—and intraorganizational sanctions (*i.e.*, punishments within communes) which were controlled primarily by local Party officials. It seems possible that although the police helped administer these sanctions, they did so in the course of cooperating with local officials rather than as primary enforcers of a statutory scheme.¹⁰⁶ The renewed emphasis on mass movements as instruments of policy and social control was manifested in nationwide "Socialist Education Campaigns" proclaimed in Peking from 1962 to 1965.¹⁰⁷ The directives during the time are in part concerned with sanctioning conduct deemed to be detrimental to the Chinese Revolution. It is significant that, although the offensive conduct could have been sanctioned under existing procedures for police-imposed punishment, the sanctions were imposed by means of mobilizational devices and administrative methods within communes. For example, files of the Communist Party headquarters in Lienchiang *hsien* in Fukien indicate that in 1962-1963 a campaign produced a drive against petty crime, corruption and misuse of commune assets by peasants and cadres alike.¹⁰⁸ Although much of the conduct, such as gambling, disorderly conduct, and embezzling, could have been sanctioned under existing statutes,

105. J. COHEN, *supra* note 2, at 18.

106. See notes 116-19 *infra* and accompanying text.

107. On the background of the Socialist Education Campaigns and the campaigns themselves see Neuhauser, *The Chinese Communist Party in the 1960's: Prelude to the Cultural Revolution*, 32 CHINA Q. 3 (1967); Ssu-CH'ING, *THE SOCIALIST EDUCATION MOVEMENT OF 1962-1966* (China Research Monograph No. 2, R. Baum & F. Teiwes eds. 1968) [hereinafter cited as BAUM & TEIWES].

108. Untitled English translation of documents in author's possession; Chinese original entitled FU-CHIEN LIEN-CHIANG HSIEN FEI-FAN WEN-CHIEN CHI CH'I YAN-HSI [DOCUMENTS OF THE BANDIT AUTHORITIES OF LIENCHIANG HSIEN, FUKIEN AND THEIR ANALYSIS (Taipei, 1964)].

the documents make clear the secondary nature of the formal apparatus of law enforcement:

The extremely bad elements should be dealt according to the law, but this will involve only extreme cases whose numbers will be very small. The others should be handled by ideological struggle, but the ideological struggle should also be applied to those who have to be dealt with according to the law.¹⁰⁹

The sanctions imposed were criticism and self-criticism, and restitution of unlawfully obtained property. Only those who were beyond reform were confined, with or without formal arrest. The preexisting framework for defining offences and for police-administered sanctions was unmentioned in the documents, and apparently was bypassed by mass line methods aimed mainly at correcting the ideological backwardness considered to cause the offensive behavior. The Chinese Communists have frequently emphasized that "punishment by law," *i.e.*, involving the formal criminal process, should be limited to acts which are particularly socially dangerous.¹¹⁰ However, it appears that the entire "political-legal" apparatus, not merely the courts but quasi-codified police sanctions as well, were disregarded in 1962 in Lienchiang.

I hazard that displacement of more formal administrative or adjudicatory sanctions was not isolated to this one South Chinese *hsien*, but became a distinctive feature of the Chinese countryside. From late 1962 to 1965 nationwide campaigns were launched in the course of which sanctions were meted out for offenses that could have been characterized as crimes under existing legislation. Because of the ideological thrust of the campaigns, the boundaries between offenses lacking great political significance and those with a counter-revolutionary import became quite blurred.

Directives of the Central Committee of the Chinese Communist Party in May and September of 1963 and September 1964¹¹¹ reflect a desire to rekindle revolutionary ardor by focusing the attention of the masses on "class enemies" in their midst. These directives stressed that cadres who had com-

109. *Id.* at 201-03.

110. *See, e.g.*, Central Political-Legal Cadres' School, Institute of Criminal Law Research, General Principles of Criminal Law in the People's Republic of China 21 (JPRS No. 13,331, 1962), English translation of Chung-yang cheng-fa kan-pu hsiieh-hsiao hsing-fa yen-chiu shih, chung-hua jen-min kung-ho-kuo hsing-fa tsung-tse Chiang-i (1957).

111. Chung-kung chung-yang kuan-yü mu-ch'ien nung-ts'un kung-tso-chung jo-kan wen-t'i ti ch'ieh-ting (Ts'ao-an) (Draft Resolution of the Central Committee of the Chinese Communist Party on Some Problems in Current Rural Work) May 20, 1963, English translation in BAUM & TIEWES, *supra* note 107, at 58; Chung-kung chung-yang kuan-yü nung-ts'un she-hui chiao-yü yün-tung-chung i-hsüeh chü-t'i cheng-ts'e ti kuei-ting (Hsiu-cheng ts'ao-an) (Some Concrete Policy Formulations of the Central Committee of the Chinese Communist Party in the Rural Socialist Education Movement, Revised Draft), Sept., 1963, English translation in BAUM & TIEWES, *supra* note 107, at 72; Chung-kung chung-yang kuan-yü nung-ts'un she-hui chu-i chiao-yü yün-tung-chung i-hsüeh chü-t'i cheng-ts'e ti kuei-ting (Hsiu-cheng ts'ao-an) (Some Concrete Policy Formulations of the Central Committee of the Chinese Communist Party in the Rural Socialist Education Movement, Revised Draft), Sept. 10, 1964, English translation in BAUM & TIEWES, *supra* note 107, at 102.

mitted economic crimes should not be punished if they had confessed and "made reimbursement or compensation,"¹¹² more serious offenders should be "sentenced to labor under the supervision of the masses."¹¹³ As for "enemies" discovered by the masses, namely "landlords, rich peasants, counter-revolutionaries, and various types of bad elements," the decisions urge "we should mobilize the masses . . . , and through the power of the masses, [subject them] to dictatorial treatment with the view to making the great majority of them 'new men.'"¹¹⁴ Only the relatively few who "have committed violence in revenge, killing, pillaging, arson, and poisoning . . . should be arrested and punished according to law immediately."¹¹⁵

The obscuring of preexisting rules for police-administered sanctions does not mean that the police were unimportant. On the contrary, during the current Cultural Revolution the police have come under heavy criticism from the Maoists who claim that some of Mao's opponents have used the police to buttress their own personal power. Liu Shao-chi, the principal target of the Cultural Revolution, is claimed to have wanted an "independent police which could be used to aid a coup d'etat."¹¹⁶ Most significantly, local Party leaders are claimed to have used the police to consolidate their own strength; the Vice-Governor of one province was dismissed in 1966 for allegedly trying to use the Provincial Party Committee's political-legal department (which coordinated all political-legal work) as an "independent kingdom."¹¹⁷ In the large South-Western province of Szechuan, the local Party boss is accused by the Maoists of using the police and other political-legal organs to buttress his personal control and oppose the Cultural Revolution.¹¹⁸ Confirmation of strong police links with many local Party leaders is provided by the accusation that the police in some places have actively opposed the Maoists by force,¹¹⁹ and by the noticeable absence of police officials from the lists of members of the Revolutionary Committees which rule China's provinces today. This evidence suggests that during the 1960's the police exercised their power independent of promulgated norms.

Since the beginning of the Cultural Revolution in 1965, the level of disorder and violence in China, due to both clashes between conflicting groups¹²⁰

112. BAUM & TIEWES, *supra* note 107, at 114.

113. *Id.*

114. *Id.* at 116.

115. *Id.*

116. *Drag Out Liu Shao-ch'i and Show Him to the Public*, Ching-kang-shan (Peking) April 18, 1967, English translation in SCMP No. 3946, 1, 9.

117. *Bourgeois Rightist Ch'en I-hsin Dragged Out from Organ Under Direct Control of Hupeh Provincial Authorities*, Hung-wei-pao (Canton), Sept. 13, 1966, English translation in SCMP No. 3789, 9, 13.

118. Radio Kunming, Aug. 20, 1967.

119. See, e.g., *Facts About the Meeting in Wuhan Military District*, Ming Pao (Hong Kong), July 31, 1967, English translation in SCMP No. 3993, 8; *Turning Proletarian Dictatorship into Bourgeois Dictatorship Prohibited*, Kuang-chou hung-ssu (Canton), July 19, 1967, English translation in SCMP No. 4229, 1.

120. See, e.g., *May Bloodshed in K'ai-feng City*, Ehr-ch'i Chan-pao (Peking), June 3, 1967, English translation in SCMP No. 4012, 1.

and the general breakdown of public control¹²¹ has been very high. The formal sanctioning apparatus of police, Procuracy and courts has been largely ignored. Many police bureaus have been taken over by the army.¹²² New mass organizations to maintain public order have appeared.¹²³ Mass public trials have reappeared, such as the "public judgment rally" in Shanghai last year at which a number of counter-revolutionaries were sentenced to death before 10,000 people and immediately executed.¹²⁴ Finally, in March, 1968, it was announced that the "organs of dictatorship" would be taken over by the army, and that the Supreme People's Court and the Supreme People's Procuratorate would be run by "three-way" alliances of army, "revolutionary cadres" and the "masses."¹²⁵

The permanent contours of the institutions of social control which will arise or reemerge in China cannot yet be predicted. As part of the effort to understand Chinese society, however, we must confront the methodological problems inherent in studying seemingly alien Chinese institutions and events. The balance of this article is addressed to the adjustments which we must make in our own thoughts if we are to understand the confusing institutions here summarized.

II. MODIFICATIONS IN RESEARCH ASSUMPTIONS

Many problems confront the Western student who seeks explanations for the operation of Chinese legal institutions and the changes in policy regarding those institutions. The American lawyer is often too prone to expect in other nations the orderliness and legality that he at least hopes for in his own system. He may also assume that the institutions elsewhere denominated as "legal" are analogous to "legal" institutions in the United States, and moreover that they comprise a "legal system" occupying a position analogous to that of the "legal system" in American society. But to approach China relying on assumptions based on American institutions is to court the danger of misunderstanding Chinese institutions. Americans studying China must attempt to understand patterns which are more fluid than those to which they are accustomed. If we can adjust our expectations about the Chinese legal

121. See, e.g., *Resolutely Shatter Black Wind of Beating, Smashing and Looting*, Southern Daily, July 10, 1968, English translation in SCMP No. 4229, 1.

122. See, e.g., Notice of the Public Security Ministry and the Peking Garrison Command of the PLA [People's Liberation Army] on Taking Over Control of the Peking Municipal Public Security Bureau by the Peking Garrison Command of the PLA, Feb. 11, 1967, English translation in CB No. 852, at 124.

123. *A Thunderous Song of Triumph Composed with Words of Loyalty*, Kung-jen Mao-tse-tung szu-hsiang hsüan-ch'üan-yüan (Canton), English translation in SCMP No. 4269, 17; *Extensive Mass Dictatorship in Shanghai Encloses Class Enemy*, Wen-hui pao (Shanghai), May 19, 1968, English translation in SCMP No. 4198, 1.

124. *Shanghai Holds Public Judgment Meeting to Suppress Active Counter-Revolutionaries*, Wen-hui Pao (Shanghai), Apr. 28, 1968, English translation in SCMP No. 4187, 5.

125. *Vice Premier Hsieh Fu-Chih's Talk at the Supreme People's Court* (Excerpts), Hung-tien-hsien (Canton?), Mar. 27, 1968, English translation in SCMP No. 4157, 4.

system in particular and non-Western systems in general, we may better understand the essential dynamics of those systems and the policies behind their institutions.

A. *Assumptions about the Function of Norms*

The Chinese Communists have utilized formal norms such as statutes and regulations to express policies and direct the conduct of cadres and populace. By Western standards these norms have often been quite vague. For instance, a "provisional measure" promulgated in 1952 provided that if the "evil acts" of "counter-revolutionaries" such as "backbone elements of reactionary parties . . . , does not require that they be arrested and sentenced," then they could be subjected to the regime of "control;"¹²⁶ the 1957 statute on "labor rehabilitation" punished, *inter alia*, "those counter-revolutionaries and anti-socialist reactionaries who, because their errors are minor, are not pursued for criminal responsibility [and are expelled from an educational or work unit]."¹²⁷

It is not possible to analyze the drafting of Chinese norms on the assumption that they can be studied like apparently analogous American directives. Much Chinese practice suggests that the functions of Chinese and American norms differ considerably. The Chinese Communists have utilized statutes less as specific guides or prescriptions than as general and exhortative policy statements. The purpose of Chinese statutes is not merely to define the rights and duties of the persons affected by them. They may be used to summarize policy decisions already made¹²⁸ and to stimulate action by lower-level officials or the populace. Leaders may expect only partial compliance and may be prepared to abandon the norm if the policy to which it was aimed loses priority.

The fluidity of norms may be illustrated by an example drawn from a less politically sensitive area than sanctions. An architect who worked in a municipal housing construction bureau in the late 1950's and early 1960's, told in a Hong Kong interview how he had been criticized at a meeting for "looking down on" workers, because workers who lived in a building he had designed according to standard specifications complained that the corridors

126. Provisional Measures of the PRC for Control of Counter-Revolutionaries, art. 3 (approved by the Government Administrative Council June 27, 1952), 1952 FLHP 53, English translation in CB No. 193, 1, J. COHEN, *supra* note 2, at 277.

127. Decision of the State Council of the PRC Relating to Problems of Rehabilitation Through Labor, art. 1(2), Aug. 1, 1957, English translation in COHEN, *supra* note 2, at 249.

128. See, e.g., Act of the People's Republic of China for Punishment of Corruption, Apr. 18, 1952, English translation in SCMP No. 320, 12, J. COHEN, *supra* note 2, at 308, and the report of P'eng Chen (then Deputy Chairman of the Political-Legal Committee of the Government Administration Council of the Central People's Government) on the Act, discussing the campaigns it followed. P'eng Chen, *Explanation of the Draft Act of the PRC for Punishment of Corruption*, English translation in SCMP No. 320, 15, J. COHEN, *supra* note 2, at 312.

were too narrow. When he designed another building, the architect departed from the specifications and widened the corridors. He was subsequently criticized for "looking down on" the workers, because the widened corridors reduced the size of living areas. This anecdote speaks for itself in reminding us that we should not expect consistent compliance with norms.

In addition, American lawyers must not assume that somewhere in the sanctioning system there are explicit, if secret, directives that clearly explain the vague public norms. Many secret directives and regulations are undoubtedly used to guide cadre discretion, but scanty evidence such as émigré recollections suggests that the secret directives are usually just as ambiguous as the public ones. A number of American scholars who have engaged in émigré interviewing have discovered that cadres have complained about the lack of clarity of internal regulations. Published directives sometimes contain, in addition to very broad general directives, highly specific precepts directed to particular kinds of conduct without reflecting any general principle. But internal directives are apparently similar. One American student has said: "As best I can find out at this time, [internal directives] are very similar to the published directives. They contain some very broad guidelines, a list of very specific precepts, and an exhortation to work diligently and conscientiously."¹²⁹

B. *Assumptions about Rational Grading of Sanctions*

The classification of sanctions further illustrates the hazards of uncritically applying Western assumptions to a vastly different Chinese legal system. Penal legislation commonly aims at scaling criminal offenses and the consequences of their commissions. Most legal systems assume that there are legal and moral reasons for making punishments proportionate to crimes.¹³⁰ But, as the formulation and enforcement of Chinese sanctions indicate, not every system of criminal law is so concerned with rational gradation. Although not completely arbitrary, considerable evidence suggests that Chinese sanctions, even before the Cultural Revolution, remained disorderly.

Despite its disorder, the system needs to be analyzed. One approach is to define the range of sanctions. Professor Cohen, drawing on Chinese classification, has arranged Chinese sanctions in ascending order of severity and formality, beginning with the mildest of rebukes by a cadre mounting through more intense forms of group criticism, and extending to formal trial and the death sentence.¹³¹ Police-administered sanctions such as "control," short term detention, warnings, and fines for minor offenders and indeterminate confinement in labor camps for more serious offenders fall between non-judicial

129. Li, *Book Reviews*, 67 MICH. L. REV. 179, 191 (1968).

130. See, e.g., Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1122-23 (1952).

131. J. COHEN, *supra* note 2, at 20-21.

criticism in residential or work units and sentences imposed through the formal criminal process.

This arrangement of sanctions—informal, police, and formal adjudicatory—has only a limited analytical use, however. In practice, the Chinese criminal process has not imposed a well-graduated range of increasingly severe sanctions on distinct offenses. The application of sanctions has been considerably less measured than the analytical scheme might suggest. Classification of sanctions in terms of formality of procedure and severity of punishment obscures important features of the system.

It would be wrong to assume, for instance, that the consequences of informal sanctions may not be as severe as the consequences of more formal punishment. Interviews with émigrés in Hong Kong suggest that technicians and engineers have sometimes been less severely punished for crimes than ordinary workers would have been for the same offenses, because they were needed to perform vital tasks; but they were in fact just as stigmatized and limited in future career opportunities as persons sanctioned by more drastic means.¹³² Also, persons punished by "control" or "supervision by the masses"—a regime of surveillance and restriction at work or residential units much used during the years just prior to the Cultural Revolution—might seem to have been less disadvantaged than persons sent to labor camps. Actually, émigré accounts indicate that such persons often formed a class of political and legal pariahs. Their permanent stigmatization meant that they were frequently arrested, interrogated, and made to confess to crimes, because police cadres assumed that they were more crime-prone than members of "the people." The permanent effects of the punishments were just as drastic in one situation as in the other, and indeed "from the point of view of the regime the two are of comparable magnitude."¹³³

C. *The Importance of Politicized Standards for Decisions*

1. "*Class Background.*" The politicization of the Chinese criminal process has most contributed to its fluidity. One factor that has reduced the rationality of the sanctioning processes has been the identification of all persons in terms of their particular socio-economic class and their general attitude toward Communist rule. Persons stigmatized as "landlords," "bourgeoisie" or "rich peasants" have been regarded as putative enemies of the people and, therefore, as potential saboteurs and criminals. One study based on a commune in South China has stated:

One of the distinctive features of Chinese Communist rule at the village level, in fact, has been the policy of deliberately manipulating

132. The extent to which sanctioning officials might have wanted or been willing to treat technicians leniently would probably have varied according to whether current economic policy required their talents.

133. J. COHEN, *supra* note 2, at 27.

social tensions by the continued maintenance—more than a decade after the initial period of violent class struggle which eliminated landlordism—of sizable groups of clearly defined class enemies in the villages. These people, referred to at different times as either the “four [bad] elements” or the “five [bad] elements” are treated by the Communists as political outcasts and are discriminated against in a great many ways. They are regarded as social pariahs and provide concrete targets for class hostility and abuse by all other villagers. They are held up as “negative examples” and as living symbols of what happens to enemies of the regime.¹³⁴

During campaigns, such persons have often been selected as the logical targets for sanctions. For instance, a man identified as a “landlord” in 1949 remains characterized as a “landlord” even though he has long since been deprived of his land. If he stole grain during a period when no political campaign was underway he might have been criticized. If he committed his crime during campaigns to collectivize agriculture in 1955 and 1958 he might have been much more seriously punished. The “class background” of the individual and the level of mobilizational activity have thus interacted to determine the punishment.

2. *Campaigns.*¹³⁵ Even when campaigns have not specifically focused attention on “class background,” they have frequently disrupted the operation of sanctioning processes. Campaigns to “rectify” thought, for instance, such as those against “counter-revolution” in 1955 and against “rightists” in 1957, involved the formation within most organizations of ad hoc groups of Party members and activists, who selected persons to be criticized and a smaller number to be more severely sanctioned.¹³⁶ As indicated above, even minor campaigns could influence the operation of sanctioning institutions.¹³⁷ Since major campaigns have taken place almost every year in China since 1949, their disruptive influence on the “normal” sanctioning process must not be underestimated.

D. *Official Deviation from Norms*

If norms have different functions in China, and sanctioning processes have been heavily politicized, we should not be surprised to find a high degree of inconsistency between normative language and official conduct. Police-administered sanctions seem prime examples. Much police sanctioning has been done without formal authority, statutes structuring sanctions have repeatedly been disregarded and direct sanctions decided by ad hoc groups during political campaigns have often preempted police sanctions. Although

134. A.D. BARNETT, *CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA* 404-05 (1967). See also *id.* at 231-33.

135. On the use of campaigns, see generally *id.* at 32-35, 140-42.

136. See, e.g., *id.* at 32-35.

137. See text accompanying notes 59-61 *supra*.

police sanctions were formalized in a 1957 regulation,¹³⁸ evidence indicates that the police subsequently administered unauthorized punishment by imposing excessive fines and terms of detention¹³⁹ and by detaining mentally irresponsible persons in violation of the act's exemption of those who are "incapable of understanding their own acts."¹⁴⁰ Apparently, the police also punished conduct not specifically prohibited by the act.

We can learn more about police sanctions and the study of Chinese institutions by speculating about police conduct before the 1957 statute, the significance of police deviations from the statute, and the fate of the statute since 1957. During the turbulent early years following Communist takeover (1950-1953) the police dominated sanctioning processes, and the courts functioned either not at all or as police auxiliaries. But even after relative stabilization began in 1953-1954, the police exercised wide powers to punish. Several former policemen interviewed in Hong Kong during 1965-1967 stated that before the enactment of the statute in 1957, the police imposed the same punishments that were later given formal statutory expression. They regarded the act, in the words of a Chinese phrase readily understandable here, as "summarizing past experience."

There are other reasons not to assume that the statute authorizing police sanctions created a neatly arranged spectrum of sanctions. The Chinese appear to have tolerated much more disorder in their legal processes than Western lawyers might expect from a "totalitarian" regime. During the period of regularization (1954-1957) detention for more than 72 hours without procuratorial approval was prohibited in form, but often practiced;¹⁴¹ although judicial decision making was supposed to be public, it was generally conducted *ex parte* and *in camera*;¹⁴² convicted defendants were rarely allowed to exercise their statutory right to appeal.¹⁴³ Moreover, broader concerns over changing revolutionary priorities have frequently overridden statutory standards. Thus, counter-revolutionaries were thought to so threaten the People's Republic that a fierce campaign was mounted against them in 1955; by 1956, however, the struggle was abated and police power to sanction was curtailed;¹⁴⁴ by the next year, they were again declared to be such a threat that judicial power to punish them was greatly reduced and broadly defined police powers were put into effect.

These observations indicate that sanctioning institutions have had no

138. See note 103 *supra* and accompanying text.

139. See, e.g., J. COHEN, *supra* note 2, at 229-30.

140. See, e.g., note 103 *supra*.

141. See, e.g., J. COHEN, *supra* note 2, at 236.

142. See notes 33-43 and 62-64 *supra* and accompanying text.

143. See p. 548 *supra*.

144. Decision of the Standing Committee of the NPC of the PRC Relating to Control of Counterrevolutionaries in All Cases Being Decided Upon By Judgment of a People's Court, Nov. 16, 1956, English translation in J. COHEN, *supra* note 2, at 279. See notes 59-69 *supra* and accompanying text.

substantial autonomy, and have been suspended, altered or dismantled as a result of policy changes. They suggest that if we are going to understand Chinese society, we must be willing to accept an impermanence in institutions that exceeds what we are used to in studying even European communist legal systems.

I am not suggesting abandoning attempts to analyze disorderly institutions. The foregoing comments indicate at least one salient fact about Chinese legal institutions that ought to affect the methodology of those studying them; that they have been intimately connected with the politics of the Chinese Revolution. The balance of this article is devoted to tentative speculation about that relationship.

III. DEVELOPING RESEARCH STRATEGIES

Familiar legal concepts are not wholly irrelevant. Such abstract ideas as "the rule of law" do little more than cast in a moralistic tone the arbitrariness that has undoubtedly characterized the Chinese criminal process. But the Chinese criminal process has other characteristics besides arbitrariness, and some insights about our own legal system and its study can aid inquiry into them.

A. *The Criminal Process as a Decision-Making Process*

It has been suggested that the disposition of cases in the American criminal process can be understood better if conviction is viewed as only one of many equally important but less visible decisions, such as "the decision to search or seize or grant bail; prosecute; order a psychiatric examination; allow the defendant to stand trial; permit a plea of guilty, *nolo contendere* or not guilty; raise a particular defense such as insanity, self-defense, or provocation. . . ."¹⁴⁵ The principal decision maker in the Chinese Communist criminal process has been the police. In 1951-1954 sanctions were controlled by Party secretaries, the leaders of ad hoc teams formed during campaigns and police cadres. Although after 1954 ad hoc teams were less important, the police retained predominance over Procuracy and courts; during the period in 1954-1957, even when formal adjudication was intermittently stressed, police decisions remained paramount in disposing of suspected criminal offenders. Convincing proof is afforded by recalling that Procuracy and courts generally negotiated informally with the police rather than return a case for insufficient evidence.¹⁴⁶ Moreover, the police retained power to reinvestigate cases and release "erroneously" convicted persons. The release of many persons in 1956,¹⁴⁷ ostensibly consistent with legality, is also consistent with the con-

145. R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, *CRIMINAL LAW* 3 n.3 (1962).

146. See note 64 *supra* and accompanying text.

147. See, e.g., Liu Hsiu-Feng, *Report on the Work of the Court*, Shansi Daily, Dec.

tinued exercise of power by police officials to decide the length of confinement. Although much power has remained with the police, they have not always exercised it the same way. During the years prior to the Cultural Revolution, if criticism that has appeared during that upheaval is to be believed, the exercise of police power did not always satisfy some leaders in Peking.¹⁴⁸ Thus, we may conjecture that instead of fully complying with directives that stressed sanctioning corrupt cadres, local police may have cooperated with local Party officials in limiting the number of cadres actually punished.

The fact that Procuracy and courts generally operated to confirm antecedent police decisions suggests that procuratorial and judicial decisions were not viewed as differing greatly in function or nature. There is more to this than the plain artificiality and inapplicability, in the Chinese context, of such familiar labels as "pre-trial," "trial" and "post-conviction review;" of greater importance is the possibility that in China judicial decision-making was not permitted to differ essentially from police decision-making, in terms of purpose, doctrine, or style. That the work of all three agencies concerned with the administration of the formal criminal process was regarded as similar is strongly suggested by Chinese discussions of the work of those agencies. A leading Chinese judge, writing in 1956, characterized police, Procuracy and courts as "three workshops in one factory;"¹⁴⁹ and an article written in 1962 makes no distinction between police decisions that a suspect should be formally arrested, procuratorial review of the case, and adjudication of guilt.¹⁵⁰ These impressions suggest that in addition to being politicized by the Chinese Communists, law has been generally regarded by them as a kind of administration as well. The changes in policy which have been discussed above reflect changing perceptions of the nature of legal decision-making, which themselves derive from more fundamental problems.

B. *The Criminal Process as an Arena for Competing Values*

Professor Packer has postulated in the American criminal process an opposition between "crime control" and "due process."¹⁵¹ Analogous conflicts have occurred in China. During the period of liberalization in 1956, the

9, 1956; Liu Feng, *Report on the Work of the Liaoning Higher People's Court for 1965*, Liaoning Daily (Shenyang), Dec. 21, 1956, English translation in SCMP No. 1484, 24, 25; Ch'en Fu, *Report of the Work of the People's Court of Tientsin Since the First Session of the People's Congress*, Tientsin Daily, Dec. 26, 1956.

148. See notes 116-19 *supra* and accompanying text.

149. Ma Hsi-wu, *On Several Problems in Adjudication Work at the Present Time*, 1 POLITICAL-LEGAL RESEARCH 3 (1956).

150. See, e.g., Chang Tzu-p'ei, *Several Problems Relating to the Use of Evidence to Determine the Facts of a Case in Criminal Litigation*, 4 POLITICAL-LEGAL RESEARCH 11, 17-18 (1962), English translation in JPRS No. 19,646, 16, partial English translation in J. COHEN, *supra* note 2, at 404-405.

151. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). In a provocative article, Richard Pfeffer has used Packer's dichotomy to urge that we should not use an idealized "due process" model of the American criminal process when we study its Chinese analogue. Pfeffer, *Crime and Punishment: China and the United States*, XXI WORLD POLITICS 152, 163-73 (1968).

Chinese police were sometimes criticized for their readiness to arrest on suspicion persons whose only connection with an offense was that they were thought prone to anti-social conduct by reason of their "bad" class background.¹⁵² When Chinese lawyers briefly participated in the formal judicial process in 1955-1957, there was considerable public debate over whether they aided the courts to get at "truth" or impeded them from punishing bad men.¹⁵³ Packer has suggested that the difference between two models of the American criminal process can be epitomized in competing metaphors, one in which the process is an "assembly line," and the other in which it is an "obstacle course."¹⁵⁴ In the Chinese analogues of these different conceptions, many cadres seems to have regarded the criminal process as a routinized processing of putatively guilty suspects, while other cadres (especially in the Procuracy and the courts) attempted to build into the process checks which would prevent unjust convictions, even if they slowed administration.

The notion of the criminal process as an arena in which competing values contend is helpful, for it reminds the Western student that Chinese institutions are not monolithic, that they are staffed by men with differing conceptions of their roles and of the values they must promote, and that those values are subject to change. However, the opposition of values with regard to sanctions in China seems to derive less from notions about law than from competing ideological issues which are related to larger questions about the management and leadership of Chinese society itself.

C. Toward a Functional Approach

1. *Tentative Formulation.* If we want to study closely values which may have competed in the administration of the Chinese criminal process and the principles on which "legal" decisions have hinged, we must be prepared to go beyond formal legal institutions and look elsewhere in Chinese society, so that our questions are framed without assuming the existence of an autonomous legal system characterized by unique decision making and professionalization. This is so because Chinese legal institutions have reflected fundamental issues over the organization of Chinese society which have determined the extent to which legal institutions have been differentiated from other bureaucratic institutions and allowed to develop unique doctrine and decision-making processes. The formal legal hierarchy and the essential clash of values over its operation and function cannot be understood except in the larger context of the Chinese Communist struggle to adapt institutions and modes

152. See, e.g., I Kuang, *Overcome Subjectivist Ideology, Raise the Quality of the Investigation of Cases*, Kuang-ming Daily, Apr. 15, 1957.

153. See, e.g., *Why Should There be an Institution of Lawyers Now?*, Kuang-ming Daily, Feb. 1, 1955; Lui Wen-tao, *The Nature and Functions of the Work of People's Lawyers*, Kuang-ming Daily, Sept. 11, 1956, English translation in SCMP No. 1391, 5.

154. Packer, *supra* note 151, at 61.

of control developed during a revolution to the different task of administering a nation. In this larger context, much can be found to explain problems and patterns which might superficially seem to relate only to legal institutions.

A tentative formulation seems appropriate. Debates within the Communist Party about specialization and regularization of the criminal process stem from wider debates about bureaucratic organizations in the Chinese Revolution, which, although necessary, have been considered by some Chinese leaders, especially Mao himself, as threatening to dissipate revolutionary fervor. The Chinese have thus been concerned with the political as distinct from the regulatory *functions* of their bureaucratic institutions. A functional approach to these institutions would aim at defining the relevant participants in decision-making processes, their intended roles, their actual behavior, and the values they seek to further within particular organizations. This approach helps to explain the otherwise mystifying irrationality and anti-institutionalism which at times has overwhelmed the Chinese criminal process.

2. *Competing Functions: Mobilizational and Bureaucratic Models of Legal Institutions.*

(a) *Chinese Communist conflicts over bureaucratization.* The Chinese Communists owe much of their original success to the mobilizational tactics which they developed during their long struggle for power, especially the mass line.¹⁵⁵ But the means used to forge a great revolution are not necessarily appropriate to modernizing a nation; new tasks have called for new talents. The Communists soon found that daily administrative tasks required greater routinization than had the tasks of revolutionary mobilization; as a result, transformations occurred in the role of cadres. After victory, cadres

... spent less time with "the masses" and more with fellow officials. As the division of labour evolved, they were given a narrower range of responsibilities and were expected to acquire more specialized skills. . . . Revolutionaries who had been provoking disorders became functionaries preserving order. . . . The qualities required were no longer fearlessness and bravery, but literacy and administrative skill. The cadre, in short, was well on his way to becoming a bureaucrat.¹⁶⁰

Much in the working style of a bureaucrat differs from that of a revolutionary. The cadre making revolution by mobilizing the masses was supposed to live and work with them, share their hardships, and lead them by means of face-to-face encounters; a cadre-bureaucrat necessarily spends more time in an office away from the masses. The style of a cadre is that of a "combat leader, in intimate relationship with his followers. . . ."¹⁵⁷ The contrast in style with bureaucrats is evident:

155. See notes 11-17 *supra* and accompanying text.

156. Vogel, *From Revolutionary to Semi-Bureaucrat: The "Regularization" of Cadres*, 29 CHINA Q. 36, 37 (1967).

157. H. SCHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA* 162 (1966).

Bureaucrats strive for routinization, for the creation of stable predictable environments. Cadres . . . live in a changing world and accept change as the norm. . . . The manager thinks in terms of techniques, both technological and organizational; . . . he likes rules because he knows he can bend them to his will, to enforce compliance from his workers. The cadre, however, is a leader who thinks in terms of human solidarity. He knows how to "solidarize" men so that goals can be achieved; he can manipulate their thoughts and sentiments.

. . . ¹⁵⁸

As a result of these differences in style, bureaucratization has been perceived by some Chinese leaders, especially Mao himself, as a threat to the revolution because it interferes with the solidarity of Party and people.

Among the aspects of the conflict between mass mobilization and bureaucratic regularity relevant to studying Chinese legal processes is the long-standing controversy over the value which the Party should place on intellectuals, experts and technicians and the skills which they can contribute. Non-Party intellectuals and technicians have been suspect because most have come from bourgeois families; moreover, the leadership has disapproved of their lack of political commitment.¹⁵⁹

During periods of political consolidation, such as the Hundred Flowers, the leadership has offered concessions to China's intellectuals and technicians by deemphasizing the importance of political activism and by encouraging them to engage in research and debate in their fields of interest.¹⁶⁰ However, each period of relaxation has been followed by a reassertion of the primacy of political orthodoxy.¹⁶¹ Although the famous slogan "red and expert" balances the two clusters of opposed values,¹⁶² Party policy has generally prized "redness" over "expertness"¹⁶³ even at the cost of lost skills and

158. *Id.* at 166-67.

159. *See, e.g.,* Mao Tse-tung, *On the Correct Handling of Contradictions among the People*, COMMUNIST CHINA, *supra* note 66, at 286.

160. *See, e.g.,* Chou En-lai, *On the Question of Intellectuals*, COMMUNIST CHINA, *supra* note 66, at 133-36; Ch'en Yi, *Address Before the Graduates of Higher Institutes of Learning in Peking*, 1961 JEN-MIN SHOU-TS'E [PEOPLE'S HANDBOOK] 319, and Kuang-ming Daily, Sept. 3, 1961.

161. Thus the Hundred Flowers was followed by anti-rightist campaigns. *See, e.g.,* M. Goldman, *Party Policies Toward and Relationship With Intellectuals and Technical Specialists: The Unique "Blooming and Contending of" 1961-62*, 37 CHINA Q. 54 (1969).

162. Lewis, *Leader, Communist and Bureaucrat: The Chinese Political System in the Last Days of the Revolution*, 1 CHINA IN CRISIS: CHINA'S HERITAGE AND THE COMMUNIST POLITICAL SYSTEM (Book Two) 449, 466-67 (P. Ho & T. Tsou eds. 1968).

163. *See, e.g.,* A.D. BARNETT, CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST POWER 54 (1967) stating, with reference to cadre advancement in a Chinese ministry in the mid and late 1950's:

In theory the regime's ideal was to create a new elite that was both "red and expert"—that is, both politically reliable and technically competent. The emphasis placed on these criteria for success and advancement shifted from time to time, but at no time was the basic importance of political criteria overlooked. In "liberal periods," technical specialists were allowed to operate with reduced political control and interference, but the Party's organization men, and especially "old cadres," continued to dominate a high percentage of the key positions of power and authority. In recent years, however, technicians who are also Party members appear to have increased steadily in both numbers and influence.

increased bureaucratic irrationality. This is particularly so because as Chinese society becomes more complex, functional specialization increases. As a result, "[i]ndividuals working within these specialized groups may develop diverse viewpoints because of their different social origins, education, experience, and location in the political and economic system."¹⁶⁴ This development conflicts with the Maoist notion of the cadre as a revolutionary generalist. Both the erosion of mobilization by bureaucracy and the increase of functional specialization have been viewed by Mao as weakening the will of the masses and cadres to engage in revolutionary struggle and interfering with Party solidarity with the masses; these have become major issues in the Cultural Revolution.¹⁶⁵

These conflicts suggest two opposing conceptions of the criminal process. In one, a politicized criminal process was mobilizational, and therefore stressed disposing of cases as exercises in mass education in order to aid policy implementation and maintain revolutionary fervor. The competing model was of a routinized criminal process which stressed disposing of cases within the political-legal hierarchy in a manner less explicitly oriented toward policy considerations and more attentive to applying legal skills, increasing rationalism and reducing cadre arbitrariness.

The following examples indicate that the Chinese criminal process and changing Party policy toward it are best understood in the light of controversy over bureaucracy in Communist China generally.

(b) *Ambivalence in policy during regularization.* During the years when the Chinese experimented (intermittently) with Soviet-style institutions, public debate clearly illustrated the continuous conflict between mobilizational and bureaucratic models of the criminal process. Statements of policy varied considerably and reflected a marked ambivalence about legal institutions. Judges were urged to use care in convicting, but they were also instructed not to be bureaucratic and to follow the less orderly but more familiar mass line. Cadres were exhorted to go to the masses for participation in and supervision of judicial work.¹⁶⁶ In addition, the courts were used to support policies in both major and minor campaigns.¹⁶⁷

Cadres themselves were not convincingly asked to substitute legal-bureaucratic for revolutionary values.¹⁶⁸ Most judicial cadres lacked both

164. Tsou, *supra* note 8, at 316.

165. See, e.g., Vogel, *The Structure of Conflict, China in 1967*, in OKSENBURG, RISKIN, SCALOPINO & VOGEL, *THE CULTURAL REVOLUTION: 1967 IN REVIEW* 97 (Michigan Paper in Chinese Studies No. 2, 1968).

166. *Judicial Work Must Serve Economic Construction*, People's Daily, Sept. 4, 1954, NCNA (Peking), English translation in SCMP No. 885, 2.

167. See, e.g., *Basic Level Courts in the Pao Chi Area Promptly Adjudicate Cases of Obstruction of Summer Harvesting*, Kuang-ming Daily, July 8, 1956.

168. The views in this paragraph are based on interviews conducted in Hong Kong in 1965-1967 with eight former police cadres and four law school graduates, of whom two had first-hand experience in the courts. Recognizing the ambivalence in values but stressing the slow accretion and persistence of judicial professionalization, see Cohen, *The Chinese Communist Party and "Judicial Independence," 1949-1959*, 82 HARV. L. REV. 967 (1969).

formal education and allegiance to legal institutions. Veteran cadres had been schooled in revolution and class warfare, and younger cadres were often chosen for political activism. All were aware that the Party and the police retained decisive power over sanctions. All were familiar with mobilizational campaigns, while few were familiar with more regularized modes of sanctioning "bad men." All, too, knew not only of the Party's specific attack on legal professionalism in 1952-1953 and on "bureaucratism" in 1956, but about general anti-bureaucratic biases in the Party's ethos.¹⁶⁹ Indeed, some cadres simply ignored the new institutions because they were "inconvenient." In 1955, because so many cadres had not implemented new procedures, the Ministry of Justice took measures to set into motion practices which had been established on paper a year before.

The coexistence of the mass line with bureaucratized justice is strikingly illustrated by an attempt to harness them together in late 1955 in order to implement the organizational legislation of 1954. Especially striking is the choice, as the vehicle to implement the legislation, of a "campaign" to emulate a model court in Peking.¹⁷⁰ Justifying the use of a campaign in the courts, a newspaper article said that not only "production departments" possessed "advanced experience"; in other words, emulation campaigns were as appropriate for courts as for factories.¹⁷¹ The Hsüan-wu *ch'ü* (district) court in Peking was worthy of emulation because it had begun to use citizens as "people's jurors," it sent judges out of their courts to investigate cases where they had arisen, and it had generally improved the thoroughness of judicial work.¹⁷² But this campaign, like so many others, also developed counterproductive results,¹⁷³ and the Ministry of Justice finally terminated the campaign. A Ministry spokesman was quoted as admitting that "judicial work involves a high degree of thinking and policy and is different from production work in a factory or mine. If emulations are launched, careless conclusion of cases and decrease of quality of dealing with cases are very likely."¹⁷⁴ This campaign illustrates Chinese ambivalence about the extent to which courts could be considered different from other administrative units.

169. This was illustrated when cadres were criticized for moving too quickly to bureaucratic decision-making which neglected policy. Ho Sheng-Kao, *Strive to Build a Complete Revolutionary Legal System*, Kuang-ming Daily, Mar. 27, 1955.

170. The use of models and campaigns to exemplify values which the Party wishes to promote has been a fundamental characteristic of mass line administration. On the Chinese use of models, see Munro, *Dissent in Communist China*, IV CURRENT SCENE 13 (No. 11, 1966); for a discussion of one emulation campaign see Powell, *Commissars in the Economy: "Learn from the PLA" Movement in China*, V ASIAN SURVEY 125 (1965).

171. Wang wan-feng, *Advanced Experience in Judicial Work*, Kuang-ming Daily, Dec. 23, 1955.

172. *Id.*

173. Some courts were reported to be so overzealous that their work grew sloppier. *Extend Advanced Experience in Judicial Work, Solidly Protect the Quality of Handling Cases*, Kuang-ming Daily, Apr. 29, 1956.

174. *Question of Popularizing Advanced Experience in Judicial Work: Interviews with Responsible Officials of the Ministry of Justice*, Kuang-ming Daily, Aug. 8, 1956, English translation in SCMP No. 1354, 3, 5.

To Western eyes the campaign is striking because it involves an attempt to regularize and improve judicial work by a revolutionary-style and anti-bureaucratic device.

There were some who urged the development of greater functional differentiation and more orderliness within the criminal process. This is the thrust of two articles published in 1956, one urging greater differentiation of the courts from the other political agencies,¹⁷⁵ and the other suggesting the validity of decisions reached without mass participation.¹⁷⁶ The latter writer objected to comparing the political-legal organs to "three workshops in one factory," because this tended to demean the position of the defendant and reduced the importance of the court.¹⁷⁷ Others argued that the three organs must exercise the mutual "restraint" called for by the legislative schemes.¹⁷⁸

Simultaneously with the newly expressed interest in functional specialization, interest grew in improving the technical proficiency of legal cadres. A former judicial cadre has reported that during 1956 he led weekly discussions at his court concerning a textbook on criminal law.¹⁷⁹ In early 1957 reports were published of meetings of judicial cadres to discuss means of "improving the quality of trials" and implementing "adjudicatory institutions and legal procedures."¹⁸⁰ The debates about functional specialization and the emphasis on cadres' study ended when the Hundred Flowers wilted; they are important because they illustrate the open competition of different conceptions of legal institutions and the temporary ascendancy of one less suffused with the mass line.

However, evidence indicates that even when the Party leadership declared a commitment to emphasizing the role of law, Party cadres did not refrain from manipulating legal procedures for policy purposes. One well-publicized criminal trial is suggestive. Defendant, a worker in a store, was accused of stabbing the manager. The two men had shown animosity before the incident, and defendant claimed that he had thought that his victim was armed and intended to assault him. The published account of the proceedings might seem to indicate that the trial conformed to a high standard of procedural regu-

175. See note 72 *supra* and accompanying text.

176. See note 71 *supra* and accompanying text.

177. Chuang Hui-ch'en, *Problems of the Relationship Between Trial, Investigation and Prosecution in Criminal Procedure*, 3 POLITICAL-LEGAL RESEARCH 28 (1957).

178. See, e.g., *How do the Public Security, Procuratorial Organs and the Courts Divide Responsibility*, Wen-hui pao (Shanghai), Dec. 11, 1956; *The Three Organs of Public Security, Procuracy and the Courts Must Thoroughly Carry Out the System of Division of Labor and Responsibility and Mutual Restraint*, Kuang-ming Daily, Feb. 12, 1957.

179. The interviewed cadre has also stated that the textbook was almost identical with Central Political-Legal Cadres' School, Institute of Criminal Law Research, General Principles of Criminal Law in the People's Republic of China (JPRS No. 13,331, 1962), English translation of Chung-yang cheng-fa kan-pu hsüeh-hsiao hsing-fa yen-chiu shih, Chung-hua jen-min kung-huo-kuo hsing-fa tsung-tse Chiang i (1957).

180. See, e.g., *Raise the Quality of Adjudication, Extend Work Experience: Our Province Praises a Group of Advanced Legal Workers*, Liaoning Daily, Feb. 2, 1957.

larity.¹⁸¹ Yet several émigrés stated¹⁸² that this case and the publicity it attained were completely governed by political factors. According to the published account, critics urged the Party to demonstrate its fairness and sincerity by punishing a crime committed against a member of the bourgeoisie. The Party reacted by holding an open trial, which was publicized and which was noteworthy because the Procurator sternly accused defendant, an activist, for his crime against a member of the bourgeoisie. However, a few months later a small newspaper announcement reported that defendant was given a "warning"¹⁸³—a light punishment for wounding another—and was reinstated in his job.¹⁸⁴ The regularization of criminal procedure apparently illustrated by the original published account of the case thus seems to have been tactical and transitory.

(c) *Correlations between controversies over bureaucratization and legal institutions.* Enough has already been said to suggest that the uses to which the legal system was put by the Party directly reflected higher policy priorities. The criminal process was first neglected during the campaigns of 1950-1953, then formally reconstituted in 1954 after the First Five Year Plan was adopted and discipline rather than mobilization seemed called for only to be disregarded again during the campaigns of 1955-1956. Closer parallels in subsequent years are also discernible. Party policy shifted toward encouragement of intellectuals and specialists in 1956; in line with this change training

181. *A Procuracy's Bill of Prosecution and Hearing of the Szu-ming-t'ang Medicated Liquor Store Case*, Hsin-wen jih-pao (News Daily, Shanghai) June 4, 1957, English translation in J. COHEN, *supra* note 2, at 420-22, 445-48, respectively.

182. R. LOH, *ESCAPE FROM RED CHINA* 302-03 (1962):

The businessman had owned a pharmacy and his employees originally had been apprentices trained by him. During Five-Anti, the Communists used one of the ex-apprentices as the standard "accuser." The employee was rewarded with Party membership and later, under the Joint State-Private arrangement [i.e., when the business was taken over by the state], was put in charge of the pharmacy as the State Representative. Arrogant in his new status, the ex-employee tried to seduce the ex-owner's widowed daughter-in-law. Her resistance insulted the ex-apprentice, who took out his anger on the old man. This led to a quarrel in which the Communist attacked the old man with a knife, wounding him severely on the arm. The old man reported the incident to the Security Bureau but the police took no action when they learned that the assailant was a Party member. The old man appealed to one authority after another, but could get no one to listen to him, and meanwhile his attacker still ran the pharmacy. Finally, the old man approached J. P. [a friend of the author] and begged him for help. J. P. reviewed the case carefully and then used it for his "blossoming" [i.e., when he decided to voice his criticism of the party during the Hundred Flowers, under Party encouragement]. He pointed out that if a Party member was permitted to violate a civilized society's basic rules of law and order, then the "new" society was unjust and could not guarantee elementary security to the masses. J. P. spoke eloquently, and his arguments were forceful. Within 24 hours, the ex-apprentice was arrested.

Another émigré, a former Shanghai businessman, related substantially the same story in a Hong Kong interview.

183. *Hearing of the Szu-Ming-T'ang Case Concluded*, Chieh-fang jih-pao [Liberation Daily, Shanghai], Aug. 31, 1957, English translation in J. COHEN, *supra* note 2, at 514.

184. LOH, *supra* note 182, at 365.

of legal cadres was then accelerated.¹⁸⁵ Also, high level debate existed within the Party in 1956 over the extent to which national harmony rather than "‘antagonistic’ class struggle" should be the official line;¹⁸⁶ it is significant that discussion over whether the legal system could become more functionally specialized occurred when policy appeared to be veering away from emphasis on class struggle. But when the Party ended public criticism in 1957 and launched the anti-rightist campaign, it launched fierce attacks against law professors who had advocated such bourgeois notions as the "inheritability" of pre-Communist legal institutions.¹⁸⁷ When for a brief while in 1962 policies toward intellectuals relaxed,¹⁸⁸ the ideological harshness of articles on law also receded somewhat.¹⁸⁹ When class warfare was again reasserted, ideological harshness returned and the formal process was to some extent bypassed in practice.¹⁹⁰

These parallels clearly involve an alternation and competition of mass line and bureaucratic models. During the periods of relatively greater politicization official policy emphasized the links between the criminal process and implementing policy; the function of the process during such periods was to assist mobilization of the mass to carry out policy. During intervening periods of post-politicization consolidation, recovery or retrenchment, bureaucratic efficiency and the reduction of arbitrariness and mistakes have been stressed. Thus the two functions of the criminal process reflect stresses which were widespread in Chinese society and of fundamental importance to the Chinese leadership.

D. *Further Implications*

Thus far, this article has stressed the opposing effects on the criminal process of the mass line and bureaucratically more regular methods of administration. Emphasis on function suggests that a polarization of these two should be avoided, because the mass line serves different purposes. Thus, the Chinese Communists have tried (especially in the early days of their rule) to mobilize the masses by focusing preexisting sentiment on useful targets of mass hatred, as in land reform when public trials of landlords aroused the fervor for land redistribution; the mass line has also been an administrative device for using mass action to accomplish what cadres alone could not,

185. *Ministry of Justice Formulates a Plan to Train Cadres and Develop Legal Research Work*, Kuang-ming Daily (Peking), June 8, 1956.

186. See S. Schram, *The Party in Chinese Communist Ideology*, paper delivered at the Conference on the History of the Chinese Communist Party sponsored by the CHINA QUARTERLY, Ditchley Manor, Oxfordshire, July 7-13, 1968, at 13-19, and Tsou, *supra* note 8, analyzing statements by various leaders at the Eighth Party Congress in 1956 as reflecting the basic divisions which have come to light in the Cultural Revolution.

187. See, e.g., the criticisms reproduced in LENG, *supra* note 11, at 54-63.

188. See notes 89 and 90 *supra* and accompanying text.

189. See notes 96-102 *supra* and accompanying text.

190. See notes 107-110 *supra* and accompanying text.

as in the same public trials; in addition, it has been used to indoctrinate the populace in desired values; finally, but equally important, it has been inspirational in holding cadres up as leaders for the masses to emulate and in reminding the cadres that they must serve the people. Each of these four functions seems roughly distinguishable from the other.

One of the implications of this functional division is that some devices associated with the mass line can be used with little sacrifice of regularity. Thus, the courts could use "people's jurors" to participate in trials without reducing the regularity of trial procedure. However, some functions of the mass line are more disruptive than others. Judicial cadres can occasionally hold large public trials to indoctrinate the public without upsetting procedure in other less public deliberations; but if they go into the fields to demonstrate concern for the people, they do sacrifice much procedural orderliness.

In addition, the issues involved in regularizing the criminal process do not focus only on the contrast between the mass line and more orderly alternatives of decision-making and leadership. Another issue of great concern to the Chinese Communists has been the competition between two models of the state apparatus, one which stressed vertical rule in which "an agency has full policy and operational control over all units of organization within its jurisdiction," and a rival conception of *dual* rule in which an agency is subordinate "both to a higher echelon agency and to a coordinating [Party] committee."¹⁹¹ In fact, the reassertion in 1957 of Party control, dual rule, may have fostered routinization that has been tenacious despite the apparent dominance of the mass line. As noted above, Maoist criticism during the Cultural Revolution has been aimed at the link between the police and local Party leaders, who extended their power at the expense of obedience to Peking.¹⁹² This implies that at local levels, political-legal work was manipulated to serve other than its supposed interests. This does not suggest that legality was fostered, but that perhaps the use of more turbulent mass line devices was inhibited. When more is known about the roles and interrelationships of local Party and police officials the effects of routinization and bureaucratic compromise at local levels may be better understood.

The Chinese Communists have had considerable difficulty in linking the activity of the political-legal apparatus to the mass line, in preventing the rise of bureaucratic routinization, and in inhibiting the manipulation of the sanctioning agencies by those who staff them. These problems are reflected in the severe attacks on institutions hitherto regarded as essential by the leadership. The police have been criticized for overemphasizing the role of trained experts at the expense of the masses,¹⁹³ and for elitism in discriminating against

191. Schurmann, *supra* note 157 at 189.

192. See notes 116-19 *supra* and accompanying text.

193. See, e.g., N.Y. Times, July 11, 1968, at 7, col. 3, reporting a Shanghai newspaper criticism of Lo Jui-ch'ing, former Minister of Public Security.

cadres of worker and peasant origin.¹⁹⁴ There is pressure to replace many police cadres and some have been sent to the countryside to engage in manual labor.¹⁹⁵ As noted above, the long established sanctioning framework has in recent years frequently been ignored.¹⁹⁶ Mao himself is reported to have said of the police, Procuracy and courts, "People seem to think that these organizations are indispensable. But I shall be glad if they will collapse."¹⁹⁷

It may seem extraordinary that the architects of a revolution should seek to dismantle their instruments of power. Although formal sanctioning institutions have been used to legitimize Communist policies and power, they have not proven easily adaptable to policy demands. This conclusion amounts to more than that legal institutions are ill-adapted to revolutions or their turbulent aftermaths; the tentative analysis presented here suggests that this is so in China for particular reasons rooted in Chinese Communist notions of revolutionary and post-revolutionary leadership.

CONCLUSION

This article has speculated about approaches to the study of Chinese law that may help us better understand its operation. There is no reason to expect the development of precise principles of analysis, but anticipated imperfection need not bar the quest for precision. Emphasis on function, as distinguished from haste to stress the forms with which we are most familiar, is only a tentative beginning. From such a beginning may come additional useful speculation about the role of legal institutions in political and economic development, and about the attitude of elites in underdeveloped countries toward such institutions. Thus, the emphasis I am suggesting here may lead us to conduct not only inquiries which are natural ones for lawyers to make, such as study of judicial independence,¹⁹⁸ but more far-reaching investigation into the nature of judicial and administrative decision-making, which may in turn provoke newer perspectives on Asian legal institutions. Importantly, by stressing function, we may be able to locate in other sectors of Chinese society institutions which perform functions discharged in the West by courts. Bureaucratic regularity in the police and other non-judicial sanctioning organs, for instance,

194. See *Exposing the Towering Crime of a Handful of Party Capitalist Roaders in the Former Municipal Committee, Procuratorate and Law Courts in Opposing Chairman Mao's Policy of Sending Cadres to the Grassroots Level*, Fan-Peng-Lo hei-hsien (No. 2, July, 1968) English translation in ECMM No. 625, 17-18.

195. Radio Harbin, October 7, 1968, reported that on April 15th and September 15, 1968, 138 workers and staff members of the three provincial level political-legal organs in Heilungkiang Province were sent to a farm. Nanchang Radio October 12, 1968, reported a rally at which Kiangsi political-legal cadres "who had been approved for doing manual work in the countryside" were "congratulated."

196. See text at notes 91-94 *supra*.

197. Instructions Given by Chairman Mao During His Reception of Li Yuan and Other Comrades in Changsha, Cheng-fa hung-ch'i October 17, 1967, English translation in SCMP No. 4070, 10, 11.

198. See Cohen, *supra* note 168.

may have effects analogous to those achieved by courts administering standards of due process. Moreover, the emphasis suggested here may lead us to question the assumption of some that Western-type legal institutions are essential to the stability of developing nations.¹⁹⁹ In sum, not merely an old hope but a continuing necessity is expressed in the proposition that comparative legal study, not only of China but of other equally unfamiliar Asian systems, may gain in sophistication as it looks beyond legal institutions to the societies in which they operate.

199. See, e.g., Pye, *Law and the Dilemma of Stability and Change in the Modernization Process*, 17 VAND. L. REV. 15, 26 (1963).