LAW AND MODERNIZATION IN CHINA: THE JURIDICAL BEHAVIOR OF THE CHINESE COMMUNISTS

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With the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple.

— Louis D. Brandeis¹

Where do correct ideas come from? Do they drop from the skies? No. Are they innate in the mind? No. They come from social practice, and from it alone . . . .

— Mao Tse-tung²

I. INTRODUCTION

The death of Chairman Mao Tse-tung signals the end of an era of Chinese and world history. Because of the immense, incalculable impact that his life had and will continue to have on China—and therefore on the world—his passing symbolizes a transition which should occasion intelligent reflection on the social processes and institutions which comprise contemporary China.

This article is an attempt to place some perspective on the nature of the Chinese Communist legal process and to suggest its significance for modern theories of law and modernization. As a comparative legal analysis, such an effort suffers severe disadvantages in the form of limited access to primary source materials,³ and of the relative novelty of Chinese Communist law as a serious subject of com-

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³ The paucity of Chinese source materials is complemented by the language barrier which has precluded all but a handful of comparative lawyers from devoting serious attention to Chinese law. The result has been not only a lack of fundamental understanding but also the failure to include China — a country comprising one-quarter of mankind — in most modern comparative legal studies in any detailed fashion. See, e.g., J. HAZARD, COMMUNISTS AND THEIR LAW (1969) [hereinafter cited as HAZARD]; D. RUESCHEMEYER, LAWYERS AND THEIR SOCIETY 1-2 (1973). For a survey of Chinese Communist legal monographs and other publications, see Hsia, CHINESE LEGAL PUBLICATIONS: AN APPRAISAL, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 20 (J.A. Cohen ed. 1970) [hereinafter cited as CONTEMPORARY CHINESE LAW].
parative and international legal research.¹ That is not to say that excellent and illuminating studies have not been done, but rather that much scholarship has sought to apply traditional Western typologies of law and justice to the quite different Chinese context. Western categories of legal thought, however, are often inapposite to Chinese legal processes, and an attempt to make Chinese institutions and processes fit theories and paradigms evolved in different cultural settings is likely to obscure the fundamental norms, assumptions, and purposes of Chinese law. This conceptual problem implies that comparative lawyers must acquire a firm knowledge of traditional Chinese legal processes, the Confucian legal theory and practice which supported them for over two millenia, and Marxist-Leninist-Maoist legal and social theory before their study of contemporary Chinese law will bear fruit. It is not surprising, therefore, that few studies hitherto published have been able to combine serious sinological expertise with broad comparative perspective. The continuing necessity for comparative lawyers to rely upon basic skills of the social scientists has also inhibited the development of more specialized postulates and theorems within the discipline of comparative law.

The intricate and complex relationships between Chinese social and legal processes, however, serve to remind comparative lawyers

¹ The Program in East Asian Legal Studies at Harvard Law School, for example, was begun only in 1964, and the Harvard University Press began its “Studies in East Asian Law” series only in 1967. See Harvard Today, Spring 1976, at 9, col. 2.

In fairness, it should be stated that international legal scholarship and research has suffered fewer limitations and enjoyed greater success than comparative legal research. Of course, analysis of China’s behavior in both the public and private international law systems has been much more susceptible to empirical evaluation than internal Chinese law. Accordingly, international legal studies of China have become relatively detailed and sophisticated. See, e.g., CHINA’S PRACTICE OF INTERNATIONAL LAW (J.A. Cohen ed. 1973), reviewed in Hoffheimer, Book Review, HARV. POL. REV., Summer 1973, at 27; Bayar, The Blocked Chinese Assets: Present Status and Future Disposition, 15 VA. J. INT’L L. 959 (1975), reprinted in U.S.-CHINA BUS. REv., 31 (1975); Lubman, Trade Between the United States and the People’s Republic of China: Practice, Policy and Law, 8 LAW & POL. INT’L BUS. 1 (1976). On the other hand, first hand, empirical analysis of the internal Chinese legal process has been circumscribed, as the leading scholars and comparative lawyers admit. Cohen, Chinese Law: At the Crossroads, 59 A.B.A.J. 42 (1973); Garbus, Justice Without Courts: A Report on China Today, 60 JUDICATURE 395 (1977). Only one United States citizen, for example, has ever had the opportunity to meet with Chinese judges and discuss details of the legal process. Id. at 395.

that one of the great contributions of modern sociology of law has been the emphasis on and analysis of the continuities between law and the society of which it is a part. The ability to study the legal system as a constituent social process has been somewhat stifled, among other reasons, by the influence which systems and organizational theory have had in all of the social sciences since the writings of Max Weber. Because Chinese law emerges from an entirely different and autochthonous culture, the study of Chinese law serves to refocus Western attention on the behavioral foundations of the legal process and to deemphasize the less significant and often misleading structural aspects. In comparative perspective, moreover, an understanding of Chinese law offers valuable insight into modern Western law and into the function of law in the broader social fabric.

Chinese Communist law is not the product of legislated codes, as in civil law countries, or of jurisdictional expansion and stare decisis.


Professor Harold J. Berman has recently underscored this confluence of the legal system with other social systems by examining the origins of Western legal science as a distinct ideology. "The term legal system," Berman explains, "is used here to mean something more narrow and more specific than a legal order." Berman, The Origins of Western Legal Science, 90 Harv. L. Rev. 895 (1977). Berman elaborates the emergence in Western Europe during the eleventh and twelfth centuries of the concept of law and the legal system as autochthonous from the social order—including the proliferation of law schools, legal treatises, and legal rules and procedures. He views this development of a distinct legal system primarily as the result of the Papal Revolution, the secular response to revolutionary change within the Catholic Church, and the evolution of feudal society. Id. at 896-98, 941-43. While emphasizing the formal changes in the nature of Western law, Berman is quick to argue that they reflect the fundamental moral and intellectual transformation of the Western vision of man's destiny which accompanied the waning of the Middle Ages. Id. at 943. See also R. Unger, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). By comparison, the author of the present article has elsewhere reviewed the interrelationship of patterns of thought in Chinese science and cosmology with the broader concerns of Chinese social thought. See Hoffheimer, Science and Symbolism in Chinese Astronomy, 1 Synthesis, Jan. 1974, at 24, 32. ("Chinese astronomy suggests that objective paradigms of physical reality are rather meaningless outside the social context.") But cf. Letter from Nathan Sivin to the Editor, 2 Synthesis, Mar. 1974, at 4, 5. Likewise, Chinese law has never emerged as a distinct "system" or "science" to the degree it has in the West.

7 It may be noted parenthetically that political science and economics, as well as most other social sciences, have not lagged behind as legal science has in analyzing the interrelationships of the various social systems. See, e.g., K. Deutsch, The Nerves of Government: Models of Political Communication and Control (1963); S. Huntington, Political Order in Changing Societies (1968); B. Moore, Political Power and Social Theory (1962); J. Robinson, Economic Philosophy (1962).
as in the common law; it is instead the creation of the Chinese revolution and internal war, a mass political upheaval which has been legitimized primarily by an ideology derived from Marxism-Leninism. This fact cannot be ignored in an attempt to understand the Chinese legal process. Analysis of legal behavior must begin and end with an understanding of the interplay between ideology and history in Chinese communism. Static frameworks of legal analysis interfere with an understanding of the relationship of law to social change. Because law is inherently purposive and part of a dynamic process of human behavior, a functional approach which foregoes efforts at defining Chinese law and aims instead at examining the goals and dynamics of the legal process is far more likely to clarify jural postulates, legal behavior and basic social values.

This essay proposes a two-fold thesis. First, it will be argued that the Chinese Communist legal process was evolved prior to the communist victory in 1949 as a process integral to efforts at popular mobilization, political development and social transformation in the hinterland. While one does not have to believe all Chinese ideological postulates at their face value, it would be fundamentally wrong to assume that Chinese revolutionary theory is not taken quite seriously by the Chinese themselves. The pre-1949 period of the revolution, therefore, continues to serve as a source of experience and values for the ongoing progress toward the Communists' broader vision of socialist and communist society, including the legal order. A constituent part of the pre-1949 heritage is the distinctive Chinese legal process. Because this process was fairly well established in the early 1940's before the transition from the New Democratic revolution to the dictatorship of the proletariat—before

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the establishment of the People’s Republic of China—the Chinese legal process offers significant insight into the role of law in revolutionary Marxian socialist societies. As a distinct alternative to bourgeois theories of law in more stable “developed” western societies, in the Chinese experience the legal process offers important qualifications to commonly held western theories. Second, this essay will attempt to sketch some salient contributions which the distinctive Chinese legal process offers for modern theories of the relationship of law to social change and modernization.

II. IDEOLOGICAL DETERMINANTS OF CHINESE LAW

A. Ideology and Modernization Under Socialism

Chinese legal processes are first and foremost servants of Marxism-Leninism in its Chinese synthesis. Nonideological definitions of communism, those which see ideology merely as a conscious tool for economic development and modernization manipulated by an elite, ignore that at the founding of the Chinese Communist Party (CCP) in 1921, Chinese revolutionaries were not setting out on a path of Stalinist industrialization any more than Max Weber’s Calvinists were consciously planning the evolution of capitalism. The rather dogmatic ideology proclaimed at the First Party Congress in 1921 is not that which in 1977 sends urban workers out to the countryside to learn from the poor peasants how to be proletarian revolutionaries! It cannot be asserted that Chinese communism represents a monolithic set of goals and norms which has maintained dogmatic coherence over time. The unity of theory and practice, however, does not proscribe the flexible application of doctrine to specific historical circumstances, but the results of applied theory certainly bear dialectical implications for the nature of the original theory itself.

The creation of a socialist society, before or after the establishment of the dictatorship of the proletariat, becomes intimately in-


14 After the death of Premier Chou En-lai and during the power struggle which led to the temporary downfall of Teng Hsiao-p’ing as Chou’s successor, rioting occurred in Peking's T’ien An Men Square which overstepped official sanction. As a result, some rioters were sentenced by “struggle meetings” to years of “re-education through manual labor.” Wash. Post, May 20, 1976, at A20, col. 1.

volved with the administration of the state in the process of development. It would be erroneous to assume, however, that "Maoism" is simply an ideology oriented toward the achievement of "modernity" as reflected in the developed capitalist states and that the legal system serves simply to further this goal. Rather, Chinese Communists, with nationalism as but one aspect, have in the process of revolution evolved a revolutionary political culture and have resisted the static, procedural, and bureaucratic functions of the state as the ideal type of a government oriented toward growth and development. It would seem fair to say that Mao, like Weber, sees a fundamental conflict between bureaucratic rationality and moral values.\(^6\) Mao’s attempts to continue the revolution after 1949 in all social processes are an indication that he and his successors have not been willing to sacrifice basic values to the formal rationality prevalent in developed states, and, one might add, in the Soviet Union.

The development process in China, therefore, is inextricably related to the class struggle. Attempts to create socialism involved the proletarianization of the society, as well as its economic development. The socialist state, in the Maoist view, constitutes a society in the process of formation, not a static regime but a continuing revolution in which social contradictions are lessened through the political and legal process as the Chinese people approach a condition of spiritual liberation. Class struggle, in short, serves as an integral process in the evolution of socialist society.

No one, including the Chinese, has yet proven whether Mao’s vision for China is completely compatible with modernization as generally understood in western social science. Advanced industrialized states, with their economies geared firmly toward economic growth, appear to fit the "developing" category more literally than China with her vicissitudes of revolution, Great Leaps and Cultural Revolution. The very concept of "modern" itself as a condition of society, moreover, is also subject to challenge.\(^7\) Mao and his colleagues have, however, evolved an alternative vision of society and revolutionary modernization. The Chinese legal process is a significant aspect of this vision. In some ways this vision resembles the values accepted as prerequisites of development in the West. Mao’s assertion of ascetic values of hard work, self-sacrifice and egalitari-


anism, for example, may indeed create attitudes compatible with a modern, more equitable society.\footnote{Andors, Revolution and Modernization: Man and Machine in Industrializing Societies, The Chinese Case, in America's Asia: Dissenting Essays on Asian-American Relations 393, 401 (E. Friedman & M. Selden eds. 1971).} The hsia fang system of sending workers, and especially bureaucrats, to the communes would certainly seem to foster values of labor, productivity and equality, as well as to prevent bureaucratic style, individualistic and elite interests, and wasted manpower resources. The legal process' resolution of disputes also contributes to broader social goals. Yet while it shares certain aspects of modernization experienced and advocated in the West, the Chinese experience offers alternatives as well.

B. The Context of the Chinese Revolution

The Chinese revolution destroyed the Confucian ethos which had provided the Confucian polity with its legitimacy for millenia. The fundamental problem of Chinese politics and the central concern of Chinese intellectuals for the past century has been, therefore, the creation of a new raison d'\text{\^e}tat. The Russian revolution was quickly able to discard the inefficient and inequitable tsarist autocracy and, after several years of civil war, establish the Soviet state. In contrast, the Chinese revolution was a more complex process of salvaging an entire civilization in danger of obliteration from external encroachment and internal decay.

Ch'en Tu-hsiu and Li Ta-chao, the two leading founders of the Chinese Communist Party, carried on the efforts begun in the nineteenth century to create a new foundation for Chinese civilization. The demise of the old Chinese world order had forced China to find a place in the multistate international system which had spread out from Europe after the fragmentation of Christendom.\footnote{Schwartz, The Chinese Perception of the World Order, Past and Present, in The Chinese World Order 284 (J. Fairbank ed. 1968).} The problem was not merely one of establishing a state structure, but of creating a new political and legal culture with integral ideological, sociological, and legal constituents. Ch'en said in 1914 that the creation of a state depended upon the patriotic support and participation of its people. Revolution demanded not merely a coup d'\text{\^e}tat but the creation of a modern society.\footnote{H. d'Encausse & S. Schram, Marxism and Asia 204-06, 220 (1969) [hereinafter cited as d'Encausse & Schram].}

Chinese revolutionaries, however, did not seize Marxism-Leninism simply as a rationalization for political power and as a
means of administering national development. Unlike Christianity, for example, with its cultural relativism serving poorly to evangelize a religious absolute, Marxism-Leninism succeeded in syncretizing with the Chinese revolution because it offered an absolute, totalistic doctrine based on a modern scientific critique of western imperialism taken from the West itself. Both Sun Yat-sen and Chiang K’ai-shek were dedicated to the establishment of national unity through resistance to imperialism, the eradication of warlordism and political development. Mao Tse-tung, of course, shared these sentiments but was more impressed than they were with the example of the October Revolution, the “salvos” of which had originally brought Marxism, in its Leninist form, to China.

While the yellow peril was an unfounded myth, the white peril in China was a painful fact of history. Lenin’s theory of imperialism provided not only a convenient explanation with which Chinese Communists could manipulate symbols of anti-imperialism and nationalism, but it articulated in a comprehensive Weltanschauung the salient facts of China’s predicament. Fifteen years before Lenin’s Imperialism, in fact, Liang Ch’i-ch’ao had carefully defined imperialism as “the industrial power of the citizens of a nation [which] has been fully developed domestically and must flow to the outside . . . .”

The Leninist conspiratorial party organization provided Chinese Marxists with an instrument for putting their nationalism and socialist aspirations into practice. Chinese rebellions in the past, they realized, had failed because of insufficient organization. Even the largest rebellion in world history, that of the T’ai-p’ings in the nineteenth century, had been crushed by the decrepit Ch’ing regional armies because of its failure to institute effective organization. The Leninist party, therefore, provided both the organizational power for the politically conscious leadership and the rudiments of legitimation for revolutionary authority. Theoretically, the Chinese Communist Party would have educated the workers and led them to

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24 Liang Ch’i-ch’ao, The Renovation of the People (1902), translated in China’s Response to the West 221 (S. Teng & J. Fairbank eds. 1954).
victory over the counterrevolutionary classes.

Needless to say, the progressive proletariat did not exist in China in any significant numbers. Marx's theory of history provided a unique category for Asia in order to explain the lack of capitalist development there. The Asiatic mode of production, nevertheless, was a moribund phase, for capitalism, carried through colonialism, was destined to extinguish all other modes of production. Chinese Communists have paid little attention to Marx's Asiatic mode; they have instead explained the retarded development of capitalism primarily with his European model: the persistence of "feudalism" from traditional society and, later, the inhibiting effects on native capitalism of foreign imperialism—supported by Lenin's theory. This is indeed ironic, considering Marx's belief in the necessity of colonialism to break through the Asiatic mode's static equilibrium. The Chinese have thus been able to ignore the Europocentric, culturally biased implications of Marx's theory. There is a profound ambivalence between the Asiatic mode's retarded development and Marx's romantic yearning to see at least a modicum of initiative in the less "progressive," yet still potentially revolutionary, forces of the oppressed Russian and Chinese peasantry. In contradiction to his general theory, he seemed at times to imply that countries like China with little indigenous capitalism might be able to bypass its capitalist stage through preemptive revolution against it.

There can be little dispute that both Russian and Chinese Marxists have seized upon this latter voluntarist strain in Marx, to various degrees, in their interpretations and applications of Marxism. Lenin concluded that Russia would traverse the path of "non-capitalist development," and Mao went so far as to uphold the advantages of China's peasants being "poor and blank" as a force for development and revolution. But the lack of spontaneous mass consciousness and the failure of Marx to foresee the problems of political power and leadership led to an extraordinary problem in the orthodox practice of the Chinese revolution. Some center of political leadership was required for the seizure of power on behalf of the proletariat and for the creation of the economic base for socialism and communism.

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27 D'ENCAUSSE & SCHRAM, supra note 20, at 10-11; PEKING REV., June 10, 1958, at 6.
III. THE ECOLOGY OF THE CHINESE COMMUNIST LEGAL PROCESS

A. Agrarian Revolution

Chiang K’ai-shek’s “white terror” of 1927 destroyed the hopes that the CCP might establish an urban power base, and Stalin’s belated order of June 1, 1927, for the Communists to break completely with the Chinese Nationalist Party (Kuomintang) alliance and to establish independent soviets—the policy Trotsky had, in a less adventurist manner, advised all along—ended in the almost complete annihilation of the CCP. This failure of both Stalinist alliances and the Trotskyite version of “permanent revolution” in China signaled the beginning of the Chinese revolutionary civil war, a guerrilla struggle in which the Party of the proletariat was forced out of the cities into the hinterland. It was among China’s huge agrarian population, ironically, that the CCP was to build the socialist revolution and to fuse it with the development of modern Chinese legal and social processes.

After 1927, circumstances created what Eduard Bernstein had sought in Europe; the separation of the Party from its class base. Covertly, in the Kuomintang-controlled cities, the CCP leadership continued for almost a decade to follow the line handed down from Moscow. But Stalin’s fantasies were by now irrelevant to China; his orders to the powerless Central Committee of the CCP could not be implemented without a power base and led only to a series of ill-fated putsches and subsequent purges of CCP leaders. The one percent of the Chinese population which made up the proletariat, moreover, was hardly enthusiastic about organizing with the CCP in the face of severe Kuomintang repression.

Forced into the wilderness of Kiangsi province, Mao and the remaining forces of the CCP had no choice but to respond creatively to the facts of their situation. Even before Chiang’s coup, Mao had foreseen the essentially agrarian nature of the Chinese revolution. In his 1926 article Mao made no mention of the proletariat as the necessary leader of the national revolution; only in the 1951 edition of his Selected Works was reference to the “hegemony of the proletariat” inserted. Thirty years later, however, this article was upheld as the first statement which “correctly solved all the fundamental

24 C. Brandt, Stalin’s Failure in China 117-78 (1958).
25 B. Schwartz, Chinese Communism and the Rise of Mao 144-64 (1951).
problems of the Chinese Revolution." In March 1927, still prior to Chiang's coup, Mao had reported from his investigation of the peasant movement in Hunan that "leadership by the poor peasants is absolutely necessary. Without poor peasants there would be no revolution." This was a far cry from the First Party Congress' exclusive mention of the proletariat as the revolutionary class, but it was in far greater touch with the realities of rural China.

As the military forces of the CCP retreated into the hills, they came into close contact with the one group which could be said to represent the masses of China. In order to maintain their Leninist, organizational existence, the Party had no choice but to rely, paradoxically, on the peasant masses, particularly as a source of manpower for the Red Army, the Party's chief defense against Kuomintang encirclement. To Trotsky and other "orthodox" Marxists this was seen as an indication that the greater proportion of the CCP had ceased to be real Communists at all, but circumstances left the CCP little choice but to emphasize political alignments rather than economic or social origins.

Was this an abdication of the class struggle? Lenin's theory of imperialism had demanded national liberation as a prerequisite to socialist revolution. His dispute with Rosa Luxemburg had been largely a defense of the need for communist parties in colonial countries to ally with the national bourgeoisie and the peasantry. The revolutionary guerrilla struggle against the Kuomintang was one step in this fight for national liberation. Stalin, in one of his more accurate and even Leninist characterizations, described the nature that a revolutionary government would assume in China as being generally similar to the government "that was being talked about" in Russia in 1905, that is, a "democratic dictatorship of the proletariat and peasantry—but with the difference that in China it would have to be first and foremost an anti-imperialist government." The Party's isolation from its own class base and the need for political

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33 Mao Tse-Tung, Report on An Investigation of the Peasant Movement in Hunan, in 1 Selected Works, supra note 22, at 33.
37 D'Encausse & Schram, supra note 20, at 145.
38 Id. at 227.
alliances were quite easily legitimized by Lenin’s theory of imperialism.

B. The New Democracy

The excruciating dilemma of the Comintern in the 1930’s, whether to emphasize class struggle or unified national resistance to imperialism, was not really relevant to China. From Stalin’s policy of the “four class bloc” it was but a subtle and relatively natural shift to Mao’s 1935 speech “On New Democracy” which candidly summarized the realities of class relations in China. It legitimized for China the united front of all patriotic classes in the dialectical development of society in the face of foreign encroachment. Anticipating the Japanese invasion of 1937, the New Democracy created both the class alliance for a united front and even the alliance of the CCP with Kuomintang.

The united front theory of the New Democracy served, therefore, not only as an ideology of struggle against an external foe, but also as a legitimation for domestic social development in the Communist-controlled rural areas. It required the mobilization of the masses in national defense and national development and thereby facilitated the integration of all classes into the nation. With the national revolution theoretically part of the proletarian revolution, the peasants were able to make the “qualitative leap” from Nationalists to Socialists under the guidance of the CCP. Anti-imperialism, nation-building, and socialist revolution tended to merge, in practice as well as theory. It is not surprising, therefore, that the New Democracy has now come to symbolize the entire period from the May Fourth Movement in 1919 to the seizure of power in 1949.

C. The Chinese Communists in Yenan

By the Long March of 1935 to northwest China, the CCP temporarily escaped the attacks of the Kuomintang and settled into an extremely backward region of China, with their capital in Yenan, Shensi province. Under the ideological banner of the New Democ-

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39 Id. at 251.
40 MAO TSE-TUNG, On New Democracy, in 2 SELECTED WORKS, supra note 22, at 341.
42 One communist leader told Edgar Snow: “[T]his is culturally one of the darkest places on earth . . . . We have to start everything from the beginning. Our material resources are very limited.” E. SNOW, RED STAR OVER CHINA 253-54 (1938).
racy, the CCP faced the task of governing and mobilizing 90 million people in the united front, and later against the Kuomintang. The Communist experience in Yenan, however, was far more than just an anti-imperialist war; it became a process of economic and political development in which much of the style of government later applied in the People's Republic of China after 1949 was evolved and institutionalized.

1. Mobilization and Participation

Popular mobilization was the single greatest task undertaken by the CCP. The New Democracy legitimized the conscription of all classes in the united front. Expanding the techniques learned before the Long March in Kiangsi and combining them with new ones, the process of mobilization followed complex and diverse patterns. In some areas the Japanese intrusions decisively affected the political interests of the peasantry and led to the development of spontaneous "peasant nationalism." Elsewhere, the Communists' redistribution of land and the alleviation of tenancy rallied the peasants either to the ranks of the army or to industrial and agricultural production. Above all, the Party's organizational presence, its ability to maintain a relatively stable rule of law in base areas, and its capacity to expand—more than the peasants had ever experienced from any Chinese government—quite naturally coopted their support. With the Party divorced from the proletariat, the army and Party took on the task of preserving and perpetuating its consciousness. "After receiving political education," Mao had said in Kiangsi, "the Red Army soldiers have become class conscious, . . . and they know they are fighting for themselves, for the working class, and for the peasantry." The recruitment of the soldiers into the CCP elite,

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43 Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 CALIF. L. REV. 1284, 1306 (1967) [hereinafter cited as Lubman].
45 C. Johnson, Peasant Nationalism and Communist Power: The Emergence of Revolutionary China 69 (1963).
46 MAO TSE-TUNG, The Tasks of the Chinese Communist Party in the Period of Resistance to Japan, in 1 SELECTED WORKS, supra note 22, at 267-70.
48 MAO TSE-TUNG, The Struggle in the Chingkang Mountains, in 1 SELECTED WORKS, supra note 22, at 81.
49 North & de Sola Pool, Kuomintang and Chinese Communist Elites, in WORLD REVOLU-
especially from among the tenant farmers and éléments déclassés, not only broadened and democratized the Party, but began the task of reintegrating the Chinese countryside which had undergone severe "social erosion" since the T'ai-p'ing rebellion. Unlike the Kuomintang armies which remained largely isolated in China's modern urban fringe, the Red Army took the lead in what was less a military strategy than a political process. Instead of emphasizing technical expertise, Mao, like Stalin, emphasized mobilization, integration and social participation as key elements in the economy, polity and society.

Both to legitimize Party rule and to co-opt the people into the New Democracy, village elections became an important means of giving people a voice and a stake in the government. Where they were illiterate and backward, "the only method," said Mao, was "to intensify political training, so as to effect a qualitative change in the elements." By 1941 village councils included at least 45 percent and often 85 percent non-party members; on the average 60 percent of the council seats went to the poor peasants and 20 percent to the middle peasants. Under the "Three-Thirds" system, neither Kuomintang nor patriotic landlords were excluded from participation. Electoral politics became, therefore, one of the most important means of educating and informing the illiterate masses. The proliferation of newspapers and the expansion of the school system also served to increase informed participation in the emerging political system. Increasing initiative and responsibility became both an index and an agent of social change and development.

The evolution of a politically conscious people demanded, in addition to the development of an organizational infrastructure, including schools, elections and newspapers, the psychological transformation, of traditional attitudes and habits. Hesitancy in approaching authority and traditional Chinese fears of legal authority, administrative, and political power not only made more dif-

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50 Fei Hsiao-t'ung, China's Gentry: Essays in Rural-Urban Relations 127 (1953).
52 Mao Tse-tung, The Struggle in the Chingkang Mountains, in 1 Selected Works, supra note 22, at 81-82.
53 M. Selden, The Yenan Way in Revolutionary China 135, 168 (1971) [hereinafter cited as Selden].
54 Hofheinz, supra note 35, at 41, 43.
56 R. Solomon, Mao's Revolution and the Chinese Political Culture 120 (1971).
difficult the creation of a dynamic regime which must ultimately depend on the enthusiasm of its citizens, but also seriously interfered with the CCP's struggle against Japan. The resolution of legal disputes, village participation meetings, confrontation between peasants and their erstwhile landlords, and group psychological pressure and conflict served to mobilize popular participation in and support of the regime. Activist cadres not only acted as mediators in legal disputes and generally as an organizational link between the Party leadership and the people, but, by leading them in *su k'u* ("speak bitterness") meetings of criticism and self-criticism, cadres manipulated private conflict for public purposes and mobilized political consciousness for developmental goals. Sociologists have argued persuasively that organized public conflict of this sort can act as a stimulus for the establishment of new rules and norms within the legal process and in other social systems. It is, rather, the absence of institutionalized conflict and the internalization of disputes which, by permitting no outlet for grievances, ultimately tends to produce radical cleavages. Mao sociologized law and politics, and he thereby emphasized class struggle within a broader context of developing shared social values and aspirations, thus producing a higher degree of consensus.

2. *Production and Development*

The Communists built on the developing peasant initiative for carrying out the central task of any Chinese government: the administration of production in a huge agrarian society. All other CCP goals, including the defense against Japan, depended upon successful production. "What is Democracy?" asked one CCP leader. "The first condition is that the peasants have plenty of millet, that is, the people must eat well and be well clothed." Under the New Democracy, this meant a moderate policy toward middle and rich peasants. So long as they worked the land, they were not ordinarily expropriated. Landlords, after confrontation with their tenants in People's Courts and struggle meetings, were allowed to have land

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so long as they tilled it themselves.\(^{41}\) In Yenan the CCP did not attempt to form cooperatives beyond a primitive level.

In industry the CCP had to start from scratch, but by the beginning of the *cheng feng* Party rectification movement in 1942, they had arrived at substantive policies for industrial development. Campaigns for production and the 1943 "production war" were, of course, reactions to the critical economic circumstances in the face of the Japanese, but they were also a rational synthesis of approaches to the development of rural China.\(^ {42}\) Guerrilla war taught Mao the need for decentralized management and flexibility in administration.\(^ {43}\) Unlike the Soviet Union, therefore, dual rule rather than industrial-branch management was implemented. Production was decentralized to take full advantage of the *min pan* concept—-institutions run by and for the local people. While these approaches failed to follow certain formally rational principles, such as more uniform mass production and specialized technology, they did take advantage of reduced transportation costs and, most importantly, the initiative and participation of the inexhaustible masses.\(^ {44}\) Based on Chinese realities, and with no similar Soviet or other experience to guide them, the CCP had begun a new departure in approaches to development and modernization. "We have," the Communists explained,

> created a new model for the national economy. This is a new form since it is neither the old Bismarckian form of national economy nor the Soviet Union's newest form of national economy; rather it is a New Democratic or Three People's Principles national economy . . . . The people's needs can as yet only be met through the impetus to organize provided by the Party and government and by the action of the masses themselves.\(^ {45}\)

If the social wealth for transition to socialism were not yet extant, the Party had in theory mobilized and organized society toward that goal.

3. **The Mass Line**

Neither Marx, Lenin, nor Stalin had ever faced or foreseen such

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\(^{41}\) *Mao Tse-Tung, On New Democracy*, in *2 Selected Works*, *supra* note 22, at 341-42.

\(^{42}\) *Selden, supra* note 53, at 264.


\(^{45}\) *5 Hung Ch'i* 99 (1942), quoted in *Selden, supra* note 53, at 143.
an exigency where an established Communist government would establish governmental authority and organize development over vast expanses of territory simultaneously with the continuing revo-

tion. Lenin had withdrawn Russia from World War I and crushed the civil war before embarking on the New Economic Policy, and Stalin had thereafter hastened to establish a rational, bureaucratic, post-revolutionary state to dictate the policies of socialist construction. He had even declared the end of capitalist remnants in Soviet society. Traditional Chinese government had had weak vertical linkages between the political and legal bureaucracies and fundamental social processes. It was, in theory, a sign of good government to have a minimum of contact between the state and the people through formal government apparatus. Ideally, imperial virtue was sufficient to perpetuate authority and keep social relationships and production running smoothly. The intricate relations between officialdom and the people were most commonly carried on by way of informal channels of communication, especially through the local gentry.

Chinese society followed this largely static equilibrium longer than any other society, with periodic cleavages being resolved in favor of stability. Kuomintang tutelage in the early twentieth century had continued this tradition of divorcing the state from the people. Isolated in the cities, the Kuomintang regime mistook its own stability for the welfare of the people. The CCP, on the other hand, living among the people, could ignore neither the demands of the peasants, nor the need for profound social change. The united front with the Kuomintang and the CCP's transformation from rebels to rulers in Yenan spawned an entirely new form of leadership and communication between the governors and governed. This was true in law as well as politics. The politically conscious Party leadership, in attempting to ameliorate the illiteracy and inarticulateness of the general population, placed itself into intimate contact with the masses. This intimate contact came to be known as the "mass line." Unlike the endemic distrust of the masses by leadership in the Soviet Union, the mass line institutionalized the initiative of the people, guided by the Party representing, in theory, the long-range interests of society. It thereby coopted them into participation, ar-

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64 Van der Sprenkel, supra note 5, at 29.
66 Cavendish, The "New China" of the Kuomintang, in Modern China's Search for a Political Form 185-86 (J. Gray ed. 1969).
articulated and aggregated their interests, and mobilized them in policy formulation and implementation. “In all the practical work of our Party,” Mao said,

all correct leadership is necessarily from the masses to the masses. This means: take the ideas of the masses (scattered and unsystematic ideas) and concentrate them . . . . [T]hen go to the masses and propagate and explain these ideas until the masses embrace them as their own . . . and test the correctness of these ideas in . . . action. Then once again concentrate ideas from the masses . . . and so on, over and over again in an endless spiral . . . such is the Marxist-Leninist theory of knowledge. 49

In this way, for the first time in Chinese history, government became something that the peasant could “touch, shake by the hand, or even slap in the face.” 70

From traditional China, then, the CCP adopted an informal administrative infrastructure through which information and policies can flow and by which all social processes can be monitored and manipulated. Such informality acts as a democratizing process by legitimizing pluralist interests71 among the people within a framework of shared social norms and by giving the people a role in decisionmaking and responsibility in administration. The absence of many formally rational Weberian principles, such as formal rules of village government, institutionalized judicial organs, or laws regulating the conduct of officials, does not make the Chinese mass line “model” any less substantively rational. A flexible approach was peculiarly suited to the Chinese Communists’ revolutionary situation and ideology. It served, furthermore, to bring political, economic and legal process to a society which had long relied upon village leaders, clan, and family groups for the regulation of social conduct. 72 The mass line was more than a mobilization style of leadership; it constituted a basic approach to revolution and social interaction. Integral to the mass line was the participation of the people in the legal process.

49 MAO TSE-TUNG, Some Questions Concerning Methods of Leadership, in 3 SELECTED WORKS, supra note 22, at 119.
4. The Cheng Feng Movement

The success of mass line politics in developing the Yenan legal and political systems also led to a twenty-fold increase in the CCP membership between 1937 and 1941.\(^7\) Massive recruitment required consolidation and the *cheng feng* movement of 1942-1944 was the first intense attempt to consolidate the CCP’s gains and reaffirm the unity of theory and practice through Party indoctrination. As such it was not only an admission of the separation of the Party from its class base and from Soviet influence, but also an effort to bring under control the natural tendencies of the Party and government toward formal, elitist, bureaucratic styles of leadership which interfered with the policy of the mass line.\(^7\)

The first aspect of the *cheng feng* movement was criticism and self-criticism. Essentially it was a process in which the masses were co-opted into the process of dispute resolution, particularly in the area of ideology — and disputes arising from unorthodox ideology. Unlike Stalin’s purges, there were no known cases of imprisonment or even expulsion from the Party.\(^7\) Instead, the CCP’s emphasis was on the reformation of thought, confession of past wrongs, and a willingness to *fan shen*, to “turn over” a new leaf and try again. Criticism and self-criticism did not take the form of third-party adjudication, but rather collegial negotiation and struggle.

The second salient theme of the *cheng feng* movement followed upon the efforts to eradicate bureaucratic and elitist attitudes and involved the reduction in status of personnel in all bureaucracies, including the army.\(^7\) In contrast to Stalinist and later developments, where a separate Kontrol hierarchy was utilized to supervise administration in the Soviet Union, the CCP employed overlapping, dual roles for Party members in other administrative apparatuses.\(^7\) Furthermore, by sending bureaucrats to the villages in the *hsia hsiang* (later, *hsia fang*) campaigns to participate in manual labor, the CCP attempted to reduce the social conflict resulting from inequality of status and authority, as well as to prevent waste of re-

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\(^7\) Selden, *supra* note 53, at 190.
\(^7\) Selden, *supra* note 53, at 196.
\(^7\) *Id.* at 110.
sources and foster economic development. The development of a separate legal system, with judges and lawyers, was actively discouraged.

Even formalistic and lip-service devotion to Soviet models had proven irrelevant to China, and the cheng feng movement represented a thorough sinification of Marxism-Leninism to reflect the achievements of the Yenan social revolution. “Chinese Communists are Marxian internationalists,” Mao said, “but Marxism must be expressed in national form for practical realization.” As an historical materialist, he asserted that “there is no such thing as abstract Marxism, only concrete Marxism.” By 1945, Liu Shao-ch’i had elevated Mao’s insights as “an admirable model for the nationalization of Marxism” in other colonial countries.

5. The Yenan Society

The cheng feng movement marked the consolidation of a modern Chinese political culture over a vast population and territory. This new culture contained the salient features of social relations and intrasocial processes which would dominate, at least intermittently, Chinese social life until the present. By 1942 the CCP had established in the hinterland during a revolution the foundations of a “nation-state” by most criteria of Western political science, and they had merged the processes of national development and dispute resolution with a sinified ideology which preserved dynamic and revolutionary values as the basis of social behavior. From the micro-societal level the Communists had broken down the “feudal” state through externalized conflict and struggle, and reintegrated the various social systems into a new cohesive whole. To a large extent this struggle may be seen as the purpose of the Chinese legal process. Karl W. Deutsch has elaborated the two fundamental stages of social mobilization for political development as: (1) the destruction of old habits, political alignments and attitudes; and (2) the induction of the politically conscious masses into new patterns of community, social norms and organizational commitment. The legal process was a constituent means of reaching these goals.

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In summary, Mao's New Democracy succeeded in realizing the principles expounded by its semantic forebearer, Liang Ch'i-ch'ao's *New People* of 1902: "A state must be formed by the assembly of its people."\(^81\) The Communists' breakthrough in successful nation-building in Yan'an was, above all, the result of the Party leadership's own behavior and their astute manipulation of social processes, including law. The manner in which the CCP responded to the crisis of the Japanese invasion and the backwardness of the Chinese populace perpetuated and strengthened the Party's mandate. The New Democracy's emphasis on political alignments over class origins was instrumental in the early stages of mobilization and integration of various social groups into a larger social community. On the micro-societal level, the mass line served as an ideological rationalization for the compromise, mediation and resolution of disputes. It would, of course, be erroneous to view the New Democracy and the Yan'an social development and legal process it legitimized as the ultimate goal of the Communists.\(^82\) It is true that the CCP established patterns of behavior and development which closely resembled the ideals of "nation-building" and "modernization" dear to Western social scientists. However, it is now obvious that Yan'an was but one step in a continuing revolution which would lead to the People's Democratic Dictatorship, the Dictatorship of the Proletariat, Collectivization, Great Leaps, a Cultural Revolution, and numerous other campaigns. Nevertheless, the basic patterns of the Yan'an social process, including law have provided a wealth of experience for the Chinese.\(^83\)

IV. **THE CHINESE LEGAL PROCESS**

A. **Law in the Context of Revolution**

The discussion above provides a background necessary for a survey of the Chinese legal process which was consolidated in the Yan'an period. What is here labeled the "Yenan legal process" ac-

\(^81\) Liang Ch'i-ch'ao, *supra* note 24, at 220.


tually began its evolution in the hills of Kiangsi province in South China before the Long March of 1935 and has continued to provide basic aspects of the legal process in the People's Republic of China, sometimes alternating with periods which have emphasized more formally rational, bureaucratic and institutionalized legal procedures and structures. Repeatedly since 1949, however, the Chinese have hailed the Yenan period as the formative period in the development of the Chinese legal process, referred to as "people's mediation work." In view of the Chinese adherence to the principles of Yenan justice, it is surprising that a number of studies of Chinese Communist law have made only passing reference to the period and have instead focused attention on the systemic and institutional aspects of the legal system, often ignoring the influence of informal lines of authority and communication and the extent to which law is defined by politics and other intrasocietal processes. Henceforth an effort will be made to emphasize the behavioral aspects of the Chinese legal culture and its continuity with the revolutionary ideology and social development discussed above.

The lesser importance which formally rational legal institutions, such as courts, the judiciary and statutory law, has assumed in China better enables the student of comparative law to examine the dynamics of the normative and behavioral aspects of the legal process. In modern Western societies, the formal institutions have developed over many years and, protected by precedent and an organized legal profession, have often served to distort and obscure the student's understanding of basic values.

B. Mediation and the Mass Line

As discussed above, the CCP developed its fundamental approach to mobilization and social integration through the mass line which

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87 Cf. Tao, supra note 86, at 713.
88 For an articulation of this view, see E.A. Hoerbel, supra note 10, at 6-9, 280, 333.
became the essential foundation of the Communists' legal process in Yenan, and has since remained a salient feature. In particular, the mass line style served the distinctively legal goals of manipulating and controlling interpersonal conflict on the microsocietal level through "people's mediation work." Dispute settlement through mediation had in China traditionally been considered morally and practically superior to formal adjudication. Confucianism had viewed the legal process as one of the regrettable necessities of society, whereas the Communists in Yenan wholly revolutionized the style and content of mediation and transformed it into a process for change and a positive tool for social integration.

1. The Positive Functions of Conflict

One salient function of mediation is the settlement of private disputes. Traditionally, dispute settlement was a function of family and village leaders, the clan, the guild, and, only as last resort, the imperial magistrate and the courts. Conflict and lawsuits were viewed as disruptive of Confucian harmony and strongly discouraged. It was "better to be vexed to death," according to a Chinese proverb, "than to bring a lawsuit." The Communists in Yenan re-

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89 See Lubman, supra note 43, at 1285-87.
90 S. Leng, Justice in Communist China 1-26 (1967) [hereinafter cited as Leng]; Tao, supra note 86, at 753-55.
94 For a general overview of Chinese Communist mediation theory, see Cohen, supra note 92, at 1201-06; Lubman, supra note 43, at 1284-1309.
96 See generally VAN DER SPRENKEL, supra note 5.
97 See Cohen, supra note 92, at 1206-09.
jected the static philosophy of Confucian harmony for a vital process which served to place positive value on public displays of social conflict. By making mediation a public process through the mass line style, local level organizations, party committees, struggle meetings, su k’u, and the cheng feng, the CCP made government visible and accessible to the people. Justice, therefore, assumed a purposive value, not something to be shunned.

Conflict also served the function of accentuating the class struggle and thereby serving the longer-range ideological goals of the leadership. The mediation of peasant-landlord disputes in Yenan, for example, linked the ordinary resolution of individual disputes with the ideological emphasis of the Party’s class base—the “proletariat” of the future. Thus, soon after 1949, the CCP was able to move beyond the New Democracy to the People’s Democratic Dictatorship and the Dictatorship of the Proletariat by manipulating conflict within and between different classes. Visible public mediation in Yenan served to focus peasant hatred upon exploitive landlords and facilitate and legitimize the redistribution of land and capital, such redistribution being necessary for the increased production required by the war against Japan. Individual mediation politicized private disputes and brought Party mediators to the administration of justice at the “lawsuit level,” thereby enabling the leadership, through persuasion, education, and controlled coercion, to expand the new Communist ethos, with its new political and legal culture. Individual justice, in short, served primarily not to preserve social equilibrium but to destroy the old equilibrium and replace it with new norms compatible with the Maoist vision.

2. Reformation of Thought and Ideology

The Party’s use of mediation brought the educated leaders into close contact with the masses on a continuing basis. This closeness was a prerequisite to any propaganda effort or even rudimentary education. In Yenan, such communication was necessary to foster basic learning skills in order to increase crop yield and production. Dispute resolution and the legal process served as a cybernetic infrastructure for socialist education. “Contradictions among the people,” later developed into a broader Maoist theory, even in its rudimentary Yenan form, offered a theory which legitimized and

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proselytized the new ideology and discredited the traditional, holistic conceptions of Confucianism. Even the basic notions of a class system and class conflict were new to the Chinese peasant. Such notions would be essential to the future creation of socialism, and the Yenan legal process served to emphasize the importance of correct thought and ideology in individual interpersonal conflicts.  

Mediation served not only to educate the masses but also to rectify the ideology of Party members. The cheng feng rectification movement of 1942-1944 served, above all, to adapt Marxism-Leninism to its Chinese environment and to preserve its significance in the face of peasant backwardness. The movement constituted a massive effort at dispute settlement within the Party, government, and army bureaucracies in an effort to make social processes serve Yenan development.

3. Mobilization and Participation

People's mediation work served to create attitudes of participation in the Communist political system by providing easy access to a system of justice for the masses. Mediation supplemented the more formal state and Party apparatuses by keeping the people aware of their relationships with the Communists and of the positive role which government could play in providing simple justice. Mass trials, struggle meetings and the like mobilized the people toward the social goals developed and implemented through the mass line. More than anything else, the mediation process taught the people that law was not an evil to be avoided, but was a positive instrument of progress.

4. Institutionalization of Informality

Informal methods of dispute settlement are often seen as irrational and ever approaching the ideal of formal rationality without which there can be no guaranteed rule of law. Adjudication is frequently contrasted with and viewed as superior to mediation as an institutionalized aspect of the legal process. The Chinese Communist mass line justice developed in Yenan, however, reveals distinct advantages of informal methods of the legal process which are

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100 See generally MAO'S CHINA: PARTY REFORM DOCUMENTS, 1942-1944, supra note 79.
101 LENG, supra note 90, at 20.
perhaps "formally irrational," yet "substantially rational," in Weber's typology.\textsuperscript{13} The manipulation and ordered facilitation of conflict in the Yenan legal process also served the rational goals both of conserving scarce personnel resources and of emphasizing the initiative of individuals over institutions. Such initiative was keenly prized under revolutionary conditions when national self-defense was a prerequisite to all other social and ideological goals. The combination of judicial, administrative and political functions through mediation reduced the bureaucratic mechanisms otherwise necessary where governmental resources are more plentiful and institutions are more functionally specialized.

The value assigned to transinstitutional authority in people's mediation work is clearly reflected in the campaigns against bureaucratism which pervaded the Yenan period, particularly in the cheng feng movement.\textsuperscript{14} Once again, the use of informality in the legal process served to prevent the alienation of legal institutions into a relatively autonomous system, and the CCP thereby was able to retain greater unified control over all social processes—control absolutely essential to the continuing revolution. Not surprisingly, therefore, mediation has been of continuing value to Chinese society up to the present day.\textsuperscript{15}

C. Mediation in Contemporary China—A Sketch\textsuperscript{16}

Because the purpose of this article is to suggest some of the

\textsuperscript{13} Eisenberg, supra note 6, at 645. Even where it is not explicitly stated, adjudication is often assumed to be the fulcrum of a stable legal order. See, e.g., J. Rawls, A Theory of Justice 235 (1971).

\textsuperscript{14} See note 100 supra.


broader behavioral characteristics and ideological and historical origins of the contemporary Chinese legal process, no attempt is made to set forth a detailed description of the actual operations of people's mediation work. In any event, such an effort would be profoundly frustrated by the unavailability of significant empirical data. Nevertheless, a bare outline based upon available accounts is instructive.

Prior to the Cultural Revolution in 1966, some foreigners had limited opportunities to observe Chinese courts and legal procedures in action. During the early years of the People's Republic, the rudiments of a formal legal system based upon the Soviet model were established. Law schools, including the prestigious Institute of Law of the Chinese Academy of Sciences and the Peking University Law Faculty, graduated judges and lawyers trained in law, and a legal profession appeared to be developing. The Cultural Revolution closed the law schools and curtailed formal legal education. Lawyers were sent to work on the rural communes. Only recently have Western lawyers had an insight into the present direction of legal education. As in Yenan, the focus is upon the purposive function of law in building a socialist society. For example, a 1974 statement of several Chinese law professors of Peking University, made to United States lawyers, stated:

We think that people's law should aim at attacking the people's enemy, and defending the people's interests. In order to train judicial workers or legal workers, we have to educate them how to attack the people's enemy and how to defend the people's interests in a better way.\textsuperscript{107}

These same professors stated that legal education is in a state of transition, but the trend is clearly away from an organized bar, even such as that in the Soviet Union.

In the early 1950's, a system of courts was established, again based upon the Soviet model. The court system has remained formally intact, but its operation and importance in the overall administration of justice—even during the periods of pro-Soviet attitudes—has been far less significant than informal methods. The formal judicial structure is based upon four levels of courts. Under the Supreme People's Court in Peking are intermediate regional courts, and under them are the provincial and local district courts. The pyramidal structure is not unlike that established in imperial

\textsuperscript{107} Quoted in Brown, supra note 106, at 476.
China and under the Republic, but as with those formal systems, informal legal processes are far more significant. Little is known about the actual procedure in and operation of these courts. Very few foreigners have ever seen the courts in session or had the opportunity to meet with the judges who sit on these courts. According to the Peking University Law Faculty, there is presently a formal trial procedure in China. Their description of it, however, reveals that the purpose of a criminal trial is not simply the determination of guilt or innocence, which will in most cases be known before the time, expense, and publicity of a trial is expended. Rather, the "principle is to serve the dictatorship of the proletariat."

We have two trials. The second trial will be the final trial. For instance, in any case that has been through the basic court . . . if the defendant does not submit to the sentence, he can appeal to the higher court, but the decision of the higher court is final . . . . If he is not satisfied with the decision, he can appeal to a higher court or any authorities concerned, but he has to serve the sentence during that period.

Only the People's Court has the competence to enter a verdict in the formal court system. Even in this formal adjudicative process, however, the purpose of the proceedings is to "carry on the mass line, so in working out the sentence of the verdict we have to pay all the more attention to relying on the masses." Thus, the aim of formal third-party adjudication, especially in the criminal process, is not revenge or only individual justice, but rather the public education of the masses and the transformation of incorrect ideology. The types of sentences accorded even the most serious crimes—primarily manual labor combined with the diligent study of Marx, Lenin and Mao—support the public function of law as a developmental process. In a word, the formal legal system is employed in exceptional cases as legal theater for the benefit of political and social goals.

Civil law, as well as criminal law, is an appropriate subject for formal proceedings only in exceptional cases, such as where impor-

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108 Garbus, supra note 106, at 395. In November 1976, Mr. Garbus met with several judges of the Peking and Shanghai courts. He was apparently the first United States citizen to participate in such a conference, at least since the Cultural Revolution. See also Cohen, supra note 106, at 42.

109 Quoted in Brown, supra note 106, at 476. See also Garbus, supra note 106, at 400-01.

110 Quoted in Brown, supra note 106, at 477.
tant and fundamental principles of socialist ideology are at issue. In the words of the Peking professors, "Civil law is an important component in our socialist system . . . . Our law is to protect socialist property . . . . Civil law in China also protects the legal rights of the Chinese citizen—to protect the 'means of consumption,' not the 'means of production.'" This principle applies equally to wills, accident cases, divorces and contract disputes.

The formal legislative process has also played a secondary role to informal legal rules since 1949. On September 27, 1949, the Chinese People's Political Consultative Congress adopted an Organic Law for the People's Republic. This law has not proved to be nearly as vital a legal document as the writings of Chairman Mao. Few other statutes have been enacted. One significant statute, however, has been the Marriage Law of 1950. It continues to provide the basic framework for the liberation of women and children from traditional oppression and repressive customs inherited from traditional Chinese society. Among other provisions, it assures freedom of choice in marriage and equality of rights between spouses. However, the dynamic application of the law is to be found in the operation of the neighborhood committees and informal mediation, not in statutory construction.

Despite the formal attributes of the legal system in the People's Republic, mediation and transinstitutional legal processes provide the greater part of justice in contemporary China just as they did in Yenan. "Most of the civil cases in China," said the Peking Law Faculty in 1974, "can be settled by mediation without going to court because there is a mediation committee in the local neighborhood and also in the people's commune." These committees take various forms, but generally they appear to be comprised of workers, peasants, retired people, housewives and party cadres—a cross section of society similar to an American jury. They are extrajudicial institutions which, as in Yenan, employ collegial negotiation and mediation, rather than third-party adjudication. The subject matter jurisdiction of these committees is for the most part unlimited, except for serious criminal or civil cases which are handled by the public security organization and the courts. Disputes such as divorces, breach of contract, disagreements concerning the use and enjoyment of scarce resources, and a plethora of other cases are

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111 Id.
112 Id. at 479.
handled by the mediation committees. Grievances are brought out in the open, issues are clarified and compromises are reached with the persuasion of the committee and after sessions of study of the applicable ideological principles. As in Yenan, the mediation process serves to conserve scarce governmental resources in a developing economy, to publicize and promulgate communist ideology, to place responsibility for the administration of justice with the people themselves, and to provide a ready, inexpensive and convenient means of private dispute resolution which is entirely consistent with the overriding and long-range objectives of the Chinese political system.

D. Mediation and Modern Legal Theory

In the Yenan legal process and the people's mediation work developed from it, justice and politics are inseparable; they cohere through the mass line. Despite the formal aspects of the system, such as courts, statutes, people's tribunals, and some specialized judicial or mediation officials, the administration of justice remains a flexible instrument subject to the overriding considerations of: (1) the revolutionary circumstances and (2) the ideological goals determined by the Party.

The simplest explanation for the informality and structural "deficiency" of Chinese legal institutions is also the most obvious and superficial: that politics is supreme and that constantly changing revolutionary policies inhibit the development of regularized rulemaking and dispute settlement institutions. Such a narrow perspective degenerates into a mere power theory of law which views all Chinese social processes as the result of totalitarian control. That powerful leadership is a salient characteristic of all Marxist states is hardly to be doubted; totalitarian control, at least of governmental functions, was also the ideal of imperial China and the Roman Empire. It is, however, too simplistic a view of the

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116 Hazard, supra note 3, at 19.


118 J. Bryce, The Holy Roman Empire 4-11 (rev. ed. 1886).
legal process to focus upon power at the top and ideal types. The Communists in Yenan decidedly were not in total control of local behavior, and it is certain that in a country the size of contemporary China many facets of behavior on the micro-societal level continue to escape governmental control. More importantly, the persistence and, indeed, the refinement of the Yenan legal process in contemporary China indicates that the Chinese legal process is not limited to any single stage of the Chinese Revolution. It has, with flexibility, thrived in circumstances as diverse as the war against Japan and the Cultural Revolution.

An alternative explanation for the Yenan legal process would emphasize the Communist revolutionary goals and circumstances, albeit changing over time, and the functional value which informal mechanisms have played in fulfilling Chinese Communist revolutionary goals during different periods. Such a perspective puts Chinese mediation as a system of justice and social control in a more accurate light.

It may, therefore, be suggested that the Chinese legal process serves rather well to fulfill the two major functions of any legal system: the settlement of disputes arising from past conduct and the formulation of rules from past experience to serve in the regulation of future behavior by individuals and groups. For reasons outlined above, the informality and flexibility of the mass line placed the initiative for achieving legal results on the people themselves. Trials by neighborhood committee, su k'u meetings, and the public use of conflict is integral to the Party’s overriding concern for popular mobilization and participation in the continuing Chinese revolution. Such controlled spontaneity, furthermore, minimizes the externality and authoritarian impositions of the Communist minority which would not have been possible if formalized third-party adjudication were exclusively employed. Peasants and workers were thus not cast in the role of inferiors in the judicial process as they had been traditionally. Peer pressure and persuasive mechanisms were better able to contribute to the enforcement of desired social behavior and to the internalization of new values.

Although dispute settlement and informal, formally irrational,

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118 See Eisenberg, supra note 6, at 637.
120 Cf. A. Epstein, supra note 95, at 12.
119 See M. Gluckman, Politics, Law and Ritual in Tribal Society 101-02 (1965); Eisenberg, supra note 6, at 655.
types of rulemaking are often viewed as static and free of normative implications,\textsuperscript{123} the Chinese legal process belies these conclusions. Despite the widely held view that formal legal institutions are the highest achievement of the Western social order, a new perspective\textsuperscript{124} is induced by the Yenan experience and its continuing validity which emphasizes social objectives over adherence to legal doctrine and functional, fundamental social change over devotion to structure and stability. There is little doubt that this legal process served the revolutionary and developmental goals of Yenan society, and it appears to be of contemporary value to the Chinese. It should also remind us of the basic concerns of our own system of justice in which the legal process serves not merely to resolve atomistic disputes but as a mechanism for change. The ideals served by mass line justice are underlying moral conditions of Western capitalist legal culture as well.\textsuperscript{125} The Yenan legal process, in particular, poignantly reminds us that legal processes which emphasize conflict rather than consensus may better serve broader social goals.\textsuperscript{126}

V. The Mass Line and Modernization

Western lawyers have been too quick to confuse functional concepts of law with structural regularity.\textsuperscript{127} Western typologies of law generally focus on the micro-societal relationships between government on the one hand and individual behavior on the other.\textsuperscript{128} The result has been too heavy an emphasis in comparative analysis on the effects of law upon individual rights, the individual’s capacity to predict and control the actions of government, his ability to use the legal process to protect his interests, and his capacity to regulate his relationship vis-à-vis his fellows under the law. Such a framework is a relatively accurate means of evaluating the function of law in many developed states, particularly the constitutional democracies of the West. Comparative lawyers and social scientists, however, may fall into error in applying such models of the legal system.

\textsuperscript{123} V. Aubert, supra note 95, at 133-36; Gulliver, Case Studies of Law in Non-western Societies, in Law in Culture and Society 11, 18 (L. Nader ed. 1969). But see Berman, supra note 6, at 944; Kennedy, supra note 4, at 1685. See also R. Unger, Knowledge and Politics 88 (1975).

\textsuperscript{124} See O. Kahn-Freund, Comparative Law as an Academic Subject 9 (1965).

\textsuperscript{125} See, e.g., L. Fuller, The Morality of Law (1964).


\textsuperscript{127} E.g., M. Weber, General Economic History (F. Knight transl. 1927); M. Weber, supra note 102, at 13.

\textsuperscript{128} See generally, e.g., Government Under Law and the Individual (M. Katz ed. 1957).
to other societies. They tend to underemphasize the macro-societal function of the legal process both as an instrument for, and by-product of, social change. The modern Chinese legal process which grew out of Yenan in particular (as but one period of the unique Chinese legal culture over millenia) offers significant qualifications to common Western assumptions about the nature of law and its relationship to modernization.

The abused and confusing concept of modernization is, of course, often contrasted with the static, stable, yet abysmally impoverished and unjust social systems of the less developed world. Despite the confusion of the meanings and methods of modernization, social change appears to be one of the few contemporary notions which approaches universal ideological acceptance. Modern societies, whether capitalist or communist, are ideologically oriented toward change. The goals of change and methods of attaining those goals, vary tremendously and are often only vaguely comprehended by those who advocate them. This is true in "capitalist" America, as in "feudal" Spain, or in "communist" China.

This central, pervading ideology of change poses serious questions and dilemmas for societies which prize and advocate the legal system as a stabilizing equilibrium superstructure. The typologies of law which continue to uphold seemingly immutable principles of Weberian rationality should assume a new relativism in view of the dynamic—and successful—Chinese legal process. There is no doubt that Weber's typological approach and analytic genius have furthered the understanding of certain aspects of social life as much as Marx's ideas have enlightened other areas. Indeed, within Weber's own framework, one is tempted to view Chinese law as "substantively rational," even if "formally irrational." Weber's widely held assumptions that predictability and procedural and structural regularity are, of necessity, intimately connected to modernization, as reflected in the rise of capitalism, are now open to doubt. The bureaucratic development of Stalinist Russia seems amply to extrapolate Weber's bureaucratic theory to socialist states as well. The Soviets seem to have ignored the warning of the disillusioned German Social Democrat, Robert Michels, that "socialism is also an administrative problem, a problem of demo-

129 See Schwartz, On Attitudes Towards Law in China, in id. at 29.
130 See D. Hoffheimer, supra note 83, at 84-90; Friedman, supra note 9, at 38.
cracy; this is not in the technical and administrative sphere alone . . . .”132 While in theory holding that the state as a bureaucratic apparatus begins to wither away from the first day of the proletarian dictatorship,132 in practice the Soviet state has become a massive bureaucracy not too dissimilar in many respects from that in the United States. This is true in the legal system, as well as in other sectors. Thus, comparative lawyers and social theorists have often seen a Weberian “convergence” as an inevitable by-product of development and have tried to analyze the Chinese and other experiences within this framework.134

Whatever the merits of certain of Weber’s theories to the analysis of Soviet and United States experience, they are less applicable to Chinese social processes. Initially, one must recall that Weber viewed revolution as dysfunctional and irrational, something to be ended before development could begin. The continuing significance of the Yenan “model” to contemporary Chinese leaders indicates that the Weberian assumptions regarding revolution are not shared by the Maoists. The anti-bureaucratism and struggle campaigns which have recurrd throughout Chinese Communist history, particularly in the area of law,135 indicate that the Chinese have their own ideas of social theory. Simply because the Yenan model has competed with other forms of legal process since 1949 does not indicate the demise of its significance. The recent emphasis by the Peking Law Faculty on mediation confirms this conclusion.136

The CCP, despite successive factional clashes, appears to hold an alternative vision of the role of law in “modernization” which fits poorly within existing western theories. Most obviously, the Chinese legal process indicates the positive value which conflict and functional disequilibrium can serve in both development and in the continuing rule of law. This process may avoid the radical cleavages

136 See text at 106, note 114 supra.
which would otherwise result when fundamental social change is sought through rigid institutions. The Yenan legal process, in short, typifies the sort of transinstitutional behavior often observed in contemporary Chinese political institutions. The Chinese experience suggests that the conclusion of revolutionary conflict is not necessarily a prerequisite to modernization, but revolution may contribute to the establishment of new progressive intrasocietal processes. Until coherent frameworks which more accurately analyze the relationship of revolutionary behavior to legal processes appear, attempts to view Chinese law in comparative perspective are likely to remain inadequate.

The notion that Marxist-Leninists have history under their control is, of course, an enduring feature of communist movements. In retrospect, however, the coherent, goal-oriented appearance of the CCP's achievement appears exaggerated. The extent to which "Maoism" is a utopian dream or a fairly well-developed model for modernization is far from clear. At the very least, however, the Chinese legal process has better served Chinese development in less time than has the common or civil law served capitalist development in the West. This fact alone makes the Chinese legal process one which merits a more functional and sensitive approach to the study of legal behavior, and one which cannot be considered of relevance only to the Chinese.

VI. CONCLUSIONS

This rather cursory survey of the Chinese legal process developed from the mass line in Yenan has drawn conclusions about the nature of Chinese law which, although exceedingly general, suggest the need for a revision of certain assumptions commonly held by comparative lawyers. First, lawyers would benefit from broadening their perspectives to focus on human behavior as both the primary subject and object of the legal process. By looking through legal institutions, one is more likely to understand how those institutions affect broader social dynamics and to determine better when those institu-

137 See Lubman, supra note 114, at 256-60; Letter from Daniel J. Hoffheimer to the Editor, 78 Harv. Magazine, Jan. 1976, at 4-5.
139 For this view, see Moore, Utopian Themes in Marx and Mao: A Critique for Modern Revisionists, Dissent, Mar.-Apr. 1970. See also Tay, "Smash Permanent Rules: China as a Model for the Future, Sydney L. Rev. 400 (1976).
140 Selden, supra note 53; D. Hoffheimer, supra note 83.
tions do not reflect underlying values and thus actually inhibit change. The study of law in the context of social processes is not a new concept. It was advocated long ago by Oliver Wendell Holmes, among others, as well as by the Maoists. One might say that the *experience* of the Chinese legal process, and not the *logic* of its institutions, is what we mean by law.

Law does not simply exist; it is created purposively. In an era of rapid change, lawyers must pay less attention to the stabilizing effect of law, which can stifle change and promote radical social cleavages, and focus more upon the capacity of law to shape and promote progress. As confidence in age-old liberal notions of law and justice continue to erode, and as world history creates new "breakthroughs" like the Chinese revolution to which all others must respond with new adaptive capacity, Western lawyers become challenged to discover new paradigms to explain the role of law in society. It is perhaps not too bold to suggest that the Russian-American twentieth century will be followed by a Chinese twenty-first. Although it is unlikely that Mao or his successors alone will offer an entirely satisfactory substitution for systems of law and process now prevalent in the West, the world's oldest nation, which by the year A.D. 2000 will number over one-third of mankind, will undoubtedly have distinct contributions to make to world law.

The reluctance of Western lawyers to learn from the Chinese is hardly conducive to persuading the Chinese that they have something to learn from the West. At the very least, the efforts of Western lawyers to understand the social and political determinants which have shaped and will continue to shape Chinese law must avoid the simplistic and intellectually indolent tendency to analogize China's experience to that of the West.

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145 Cf. T. Kuhn, *The Structure of Scientific Revolutions* (1962). The theory of paradigms, however, must be used cautiously when applied to Chinese law and society. See Hoffheimer, *supra* note 6 at 32.