

1972

## Continuity and Change in China: Some "Law Day" Thoughts

Jerome A. Cohen  
*Harvard Law School*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jerome Alan Cohen, Continuity and Change in China: Some "Law Day" Thoughts, 24 S. C. L. Rev. 3 (1971).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

## **CONTINUITY AND CHANGE IN CHINA: SOME "LAW DAY" THOUGHTS**

**Jerome Alan Cohen\***

Law Day is a time to take a fresh look at our legal system. What we see can hardly make us feel smug. We are now in the midst of one of those recurring periods when not only judges, lawyers, law students, and law teachers but all elements of our society have become increasingly aware of the large gap between theory and practice.

In recent decades we have made so much progress toward our goal of the "rule of law" that it is discouraging to note how much remains to be done. I will not burden you with a recitation of our system's shortcomings. But today we seek to acquire some perspective upon domestic legal developments by examining the experiences of our country's two foremost rivals in ideology and power politics. When embarking on so politically sensitive and intellectually demanding an enterprise, it is essential to bear in mind our system's unfulfilled promises.

We have not, for example, met the legal needs of the rural and urban poor or succeeded in granting prompt, equal and fair treatment to all persons who become embroiled in the administration of civil or criminal justice. Nor can we delude ourselves that phenomena such as widespread surveillance of the population, lengthy imprisonment of suspects without trial, and political interference with the judiciary do not occur in this country. The worst kind of comparative law exercise is that which compares our ideals to other countries' realities.

### **I**

On the eve of the Great Proletarian Cultural Revolution of 1966-69, I interviewed a former Chinese official who had recently left Shanghai. When I asked him to tell me what he knew about lawyers in China's largest city, he replied with some impatience: "Lawyers in Shanghai? What do you think China is—the Soviet Union?"

---

\*Jerome Alan Cohen is Professor of Law and Director of East Asian Legal Studies at Harvard Law School. He is the author and editor of a number of books on Chinese law and politics and is spending academic year 1971-72 in Japan on a Guggenheim Fellowship.

My informant's incredulity was understandable, of course, at least to those familiar with the Chinese legal system. The fact is that, even before the Cultural Revolution, there had been virtually no lawyers practicing in China for almost a decade. In the Soviet Union, on the other hand, some 13,000 advocates, although placed under rather severe organizational restraints, have proved to be essential to the functioning of the Soviet social order.

This stark contrast symbolizes important differences in the development of the legal institutions of the world's two major Communist states. That these differences are likely to persist is suggested by China's new draft Constitution.<sup>1</sup> It pointedly omits a number of basic protections that are enshrined in the Chinese Constitution of 1954 and that derived from the Soviet Constitution of 1936. For example, if the draft Constitution is promulgated, no longer will there be requirements that "people's assessors" (lay judges) participate in judicial proceedings along with a career judge, that cases be heard in public except when otherwise provided for by law, or that people's courts be independent in administering justice, subject only to the law. Indeed, the draft even fails to reiterate that the accused has the right to defense. In lieu of these guarantees, it substitutes the "mass line." Article 25 of the draft provides in pertinent part:

The exercise of procuratorial and trial authority shall follow the mass line. Mass discussion and criticism are to be conducted in serious counter-revolutionary and criminal cases.

This formally endorses China's rejection of the Soviet legal model, a rejection that actually took place during the "anti-rightist" movement of mid-1957 but that continued to be a major source of tension among the leadership until the Cultural Revolution.

The draft Constitution reflects the triumph during the Cultural Revolution of the Maoist revolutionary line of the dictatorship of the proletariat over what Red Guard pamphlets

---

1. "Draft of the Revised Constitution of the People's Republic of China", Background on China, B. 70-81 (November 4, 1970, Chinese Information Service, 100 West 32nd St., New York). For an English translation of the existing Constitution of the People's Republic of China, adopted in 1954, see A. P. BLAUSTEIN (ed.), *FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA* 1 (1962).

called the Liuist bureaucratic line of the dictatorship of the bourgeoisie. The "handful of top capitalist roaders within the Party headed by Liu Shao-ch'i" was charged with seeking to set up "the so-called 'comprehensive legal system' in order to use bourgeois legalism to oppose the reliance on mass dictatorship as well as to abolish mass revolutionary movements." The Red Guards accused Liu and his chief collaborators in charge of the legal system, Peng Chen and Lo Jui-ch'ing, of making "every effort to inherit the puppet legal system [of the predecessor Chiang Kai-shek regime] and push through the feudal, capitalist and revisionist legal systems."<sup>2</sup> The repeated Red Guard attacks lumping "revisionism" with feudalism and capitalism made explicit what had usually been left implicit during the anti-rightist movement a decade earlier—that new China had come to scorn the Soviet legal model as indistinguishable from the bourgeois legal dictatorship of Generalissimo Chiang.

It should be emphasized that the draft Constitution has not been promulgated, and it is possible that it never will be. According to intelligence sources of Chiang's rival government in Taiwan, the draft is the product of the second plenary session of the Ninth Central Committee of the Chinese Communist Party, which was held from August 23 to September 6, 1970. The communique of that plenum, however, did not mention the existence of any such draft but merely expressed "the fervent desire of the people of the whole country to convene the Fourth National People's Congress" (NPC) and proposed that the Standing Committee of the NPC prepare to convene its parent body "at an appropriate time."<sup>3</sup> Foreign observers have anticipated that one of the tasks of the new NPC session will be to approve revision of the Constitution. But, although there were indications that the NPC was about to be convened, first in the fall of 1970, and then in 1971, it has yet to meet.

In these circumstances one inevitably suspects that the triumph of the mass line may not be complete. China's very

2. See, "Completely Smash the Feudal, Capitalist and Revisionist Legal System," *Fan P'eng Lo hei-hsien*, No. 2 (July 1968), English translation in SCMM [Selections from China Mainland Magazines] No. 625 (3 September 1968) 23-28.

3. American Consulate General Hong Kong, SURVEY OF CHINA MAINLAND PRESS 20 (September, 1970) (CMP SCMP 70 38).

recent return to a foreign policy of moderation toward bourgeois countries, including the United States, may strengthen the position of those leaders who appear to be resisting adoption of the draft Constitution. This would not be the first time that moderation in contemporary China's domestic affairs accompanied moderation in its international affairs. We should recall that the 1954 Constitution was an early product of the era of peaceful coexistence that the Chinese Communists sought to introduce not long after the end of hostilities in Korea. It served to confer legitimacy upon the still young revolutionary regime in the eyes of not only the Chinese people but also much of the world.

Nevertheless, if only for cosmetic reasons, one should not expect any subsequent revisions of the draft Constitution to reflect many features associated with the Soviet legal model. Moreover, whatever new constitutional formulations may eventually be adopted, it is unlikely that the dramatic differences between the Soviet and Chinese legal systems that have existed in practice since 1957 will soon disappear.

## II

Why has the administration of justice—one of the touchstones of the quality of any society—evolved along divergent lines in the two major Communist states? Western scholars have only begun to wrestle with this problem, and we know little more today than we did six years ago when I first raised the question.<sup>4</sup> Does the divergence reflect other factors than the relatively immediate political pressures that gave rise to de-Stalinization in Russia and to the anti-rightist movement in China? What, for example, is the bearing of history upon this problem? Are there revealing differences in the authoritarian traditions of the two countries? Both in basic assumptions and in institutions and practices judicial administration in contemporary China displays some striking resemblances to its Manchu predecessor. Indeed, Max Weber's characterization of the administration of justice in traditional China as "a type of patriarchal obliteration of the line between justice and administration"<sup>5</sup> might also be applied to the contemporary sys-

4. See, J. A. Cohen, "The Criminal Process in China," in D. TREADGOLD (ed.), *SOVIET AND CHINESE COMMUNISM* 107-43 (1967).

5. M. WEBER, *LAW IN ECONOMY AND SOCIETY* 264-65 (trans. E. A. Shils and Max Rheinstein, IV; Cambridge, Mass., 1954).

tem. What can be said on the Russian side? Did the efforts from 1864 to 1917 to westernize the Russian legal system and to build up a professional lawyer class leave a more indelible mark than comparable efforts to westernize Chinese justice during the half century prior to 1949?

Is an explanation to be found not so much in history as in contemporary political, economic, and social disparities between the two countries? Of what relevance is it, for example, that in China the revolution is younger, the economy less advanced, and the people more backward and far more numerous than in Russia? It is sometimes said that any regime that embarked upon the unprecedented task of not merely controlling but also mobilizing and modernizing 750 million Chinese could not be expected to demonstrate great sensitivity to Western legal values. But are Soviet conditions different enough to produce greater receptivity to those values?

Are there relevant distinctions between the Communist parties of the two countries? Can one account for differences in the administration of justice by reference to the fact that the methods the Chinese Party has employed to dominate the State apparatus have curbed professionalization in all spheres to a greater degree than have those employed by the Soviet Party? What is the impact of the Chinese Communists' twenty-year experience—an experience that has no Soviet analogue—in applying primitive legal controls amid the rudimentary conditions of life in the "liberated areas" prior to 1949?

Are the Chinese leaders less sophisticated than the Soviet leaders in understanding the uses of law? If only to a relatively modest extent, Stalin's heirs have acted upon the assumption that essential to the successful functioning of a highly industrialized society is the enlistment of the creative energies and individual initiative of its people and that this requires a legal system that will minimize popular feelings of fear and hostility and will instill a sense of security in the social order. The currently dominant Chinese leaders, on the other hand, regard the risks of implementing Soviet-style legality as far graver than the gains that might possibly be derived. It is unclear to what extent their judgment rests on the premise that, at least at the present stage of China's industrialization, economic advances are most likely to be achieved in an atmosphere of personal insecurity. Their dis-

trust of legal formality and any degree of legal autonomy may be predicated in part upon simplistic notions about the nature of law and the degree to which it frustrates rather than facilitates the attainment of political goals. Would things be significantly different today if Mao, like Lenin, had gone to law school, as he was briefly tempted to do in order to secure a bright future as a “jurist and Mandarin”?<sup>6</sup>

Time would not permit even a cursory attempt to answer such questions, even if I possessed the broad and deep knowledge of comparative law, history and social sciences that is required. The most that can be done here is to make some preliminary comments upon the impact of tradition, one of the factors that may have influenced what is obviously an autochthonously Chinese course of development.

### III

As China has become more clearly differentiated from the Soviet Union, students of contemporary China have begun to take history more seriously. Yet historians have not been unanimous in asserting the importance of their subject to contemporary understanding. Over a decade ago, when I started to study Chinese law, several historian friends cautioned against being seduced by those of their brethren who tended to see People’s China as imperial China in proletarian garb. That unfortunate breed, whom my friends often lumped with “sinologists”—a group they plainly regarded as antiquarians, failed to comprehend that the Chinese Communists had made a sharp break with tradition and that knowledge of the past was largely unimportant to contemporary understanding. It was said that, in order to avoid obsolescence, these historians of the “eternal China” school and their sinologist allies would have to “reform themselves into new men,” as the Communists might put it, and don fresh spectacles. Otherwise, it was predicted, they would persist in viewing Mao’s China through distorting lenses because of their predilection for seeking, finding and magnifying evidence of continuity with the past.

It seemed sound to me then and seems so now to resist the notion that the contemporary regime is really another dynasty. It hardly follows, however, that in no respect is the impact of the past significant. Rather than debate in “either/or” terms

---

6. STUART SCHRAM, MAO TSE-TUNG 30-31 (1967).

that require a sweeping answer to the large and complex question of continuity and change, it would seem more useful to engage in particularistic analysis. Certain aspects of contemporary Chinese life may reveal a high degree of continuity with the past, while many others may reveal none whatever.

I am a lawyer, not an historian. Thus it is more than ritualistic Chinese modesty that leads me to confess my trepidation at venturing down the slippery slope of history. Yet, if we are to get on with the task of examining the impact of the past upon specific aspects of Chinese life, we cannot omit the law, for even in countries like China that have traditionally held law in low regard, its role has been and continues to be of considerable importance. Until the 1960's, when several distinguished works by sinologists and social scientists appeared, Chinese legal history was rather neglected in the world of Anglo-American scholarship.<sup>7</sup> We lawyers have only recently begun to take an interest in the subject, hoping to enlighten our efforts to fathom contemporary legal developments.

At least at this early stage of scholarship, continuity and change in Chinese law is itself too broad a topic. We know far too little about all fields of law and all eras. Moreover, there may be much continuity in one field and little in another. Because this conference celebrates liberty under law, it is peculiarly appropriate to consider the impact of the past upon criminal procedure, for, as one of the greatest American judges has emphasized, "the history of liberty has largely been the history of observance of procedural safeguards."<sup>8</sup> I would especially like to discuss perhaps the most fundamental aspect of the criminal process in any society—the extent to which an accused may resort to competent counsel to defend himself.

In the United States the scope of the role of defense counsel raises the most controversial and complex issues now confronting the administration of justice. Yet to all participants in the controversy it is common ground that

[T]he alleged criminal is not merely an object to be acted upon, but an independent entity in the [criminal] process who may . . . force the operators of the process to demonstrate to an independent authority

7. For discussion of the evolution of scholarship in the field of Chinese law generally, see Introduction to J. A. COHEN (ed.), *CONTEMPORARY CHINESE LAW* 1-4 (1970).

8. Supreme Court Associate Justice Felix Frankfurter, in *McNabb v. United States*, 318 U.S. 332, 347 (1943).



(judge and jury) that he is guilty of the charges against him . . . [This assumption] permits the accused, acting by himself or through his own agent, to play an active role in the process; by virtue of that fact the process becomes or has the capacity to become a contest between, if not equals, at least independent actors . . . [T]he process has, for everyone subjected to it, at least the potentiality of becoming to some extent an adversary struggle.<sup>9</sup>

Much the same can be said today, *mutatis mutandis*, about the criminal process in other democratic countries. At least the trial, if not the more crucial preliminary investigation, is an adversary proceeding, and attorneys are there permitted to provide the professional assistance that is almost always needed by an accused who wishes to put the government to its proof.

In the Soviet Union, even during the darkest days of Stalinism, in non-political cases advocates often managed to defend the accused effectively. Since Stalin's death, despite continuing official control and suspicion, they have made substantial progress. According to a 1965 appraisal of contemporary Soviet lawyers:

In the eyes of rank-and-file Soviet citizens, members of the bar occupy a position of great prestige and respect. The reason for this is simply that it is to the professional attorney that the individual citizen accused of violating the law must look for the protection of his rights and interests against the overwhelming power of the state. While official doctrine enjoins attorneys not to place their obligation to a client above their duty to the state and socialist society, this has not deterred them from acting in accord with the humanitarian dictates of conscience and exerting themselves to the utmost on behalf of those they defend.<sup>10</sup>

Another objective foreign observer reported in 1970 that Soviet advocates "defend dissidents in the face of official scorn for the accused and for their lawyers."<sup>11</sup> Furthermore, there has been continuing, if unsuccessful, agitation by members of the Soviet legal profession to permit defense counsel access to the accused at the beginning of pre-trial investigation rather than at its completion.

---

9. H. L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 8-9 (1964).

10. A. Bilinski, *The Lawyer and Soviet Society*, 14 PROBLEMS OF COMMUNISM 62, 70 (March-April 1965).

11. B. Gwertzman, *Soviet Defense Lawyers' Rights Backed*, N. Y. Times, Jan. 8, 1970, at 3, col. 4.

In China the situation is radically different. Criminal procedure is normally secret and inquisitorial, not only during pre-trial investigation, but also during the interrogation of the accused that is euphemistically referred to as the "trial." There is no place for defense counsel in such proceedings. Although people identified as advocates have occasionally appeared at public rallies at which sentence has been pronounced, their role has been nominal. Thus, at every stage of the contemporary criminal process the fate of the accused depends entirely on the degree of conscientiousness and ability of his official captors. The process has no place for independent actors who can defend the accused against abuses committed by those who administer it. To no extent can the adversary system be said to exist. This is a major reason why, as the Chinese admitted to certain foreign visitors as early as 1959, only a handful of practicing lawyers could be found in the largest cities even before the Cultural Revolution; and, although competent to handle civil as well as criminal matters, most of them were only kept busy on a part-time basis.<sup>12</sup>

Lawyers and accused have not always fared quite so badly in the People's Republic. To be sure, upon assuming power in 1949, the Communists abolished the existing bar along with the rest of the legal apparatus of the predecessor Nationalist Government. In 1952-53, as part of the campaign to "reform the judiciary" by purging it of unreliable elements, they took vigorous measures to stamp out the illegal activities of the former lawyers, who had continued to practice "underground" through a variety of subterfuges. Yet, by September 1954, when the Constitution was enacted on the Soviet model, the regime had revamped legal education and had begun to train fairly large numbers of "people's lawyers" who were destined to practice in Soviet-type collective law offices. By 1956 such legal advisory offices were established in large and medium-sized cities, and there were experiments with public trials in which a defense attorney, as well as the court and the prosecutor, sought to act according to tentative rules of procedure that closely resembled those in force in the Soviet Union.

Innocence was not seriously at issue in these experiments; if pre-trial judicial screening—from which defense counsel was excluded—found proof of criminality to be insufficient,

---

12. This section draws upon J. A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* 9-18 (1968).

the case was not set down for public trial but was either dismissed or returned to the police for further investigation. Initially these experiments only constituted carefully staged morality plays. But later public trials were often authentic attempts to determine the degree of the defendant's guilt and the appropriate punishment, and it was not unusual for defense counsel to argue with spirit and ability for conviction of a lesser crime than that charged or for mitigation of punishment. By 1957 the seeds of a professional bar were clearly sown, and the right to make a defense that the Constitution had conferred upon the accused was beginning to become reality.

During this period lawyers and legal scholars did their best to explain the desirability of the adversary system of criminal adjudication and the need for professional defense counsel to implement it.<sup>13</sup> They were met with doubts, disagreement and even contempt. What need does a Communist regime have for lawyers? Why should a lawyer be permitted to defend someone whom both the police and the prosecutor had already investigated and believed guilty of crime? Hasn't a lawyer who takes such a case lost his "political standpoint"? Don't defense counsel drag out trials unnecessarily? Such questions were asked not only by the ignorant masses but also by Party members, police, prosecutors, and even members of the judiciary.

The answers given, with the aid of Soviet textbooks, recited arguments that are familiar to us. The adversary system helps the court reach a correct decision. If a court merely listens to the prosecutor and his witnesses, it too easily slips into a one-sided and often mistaken view of both the facts and the law. Only by allowing the defendant actively to present his side of the case can the court thoroughly and comprehensively analyze it. The accused, however, cannot conduct his own defense, because he is often confined pending trial and is generally too uneducated and afraid to speak up in his own behalf. Although Chinese legislation permits a close relative or a representative of a mass organization to defend the accused, full implementation of the adversary system requires his defender to be a lawyer. Lawyers alone have the legal knowledge and professional experience necessary to handle a crim-

---

13. See, for example, *Wo-kuo jen-min lü-shih chih-tu* (Our country's system of people's lawyers) (Canton: Kuang-tung jen-min ch'u-pan-she, 1956).

inal case. Also, because they understand better than laymen the significance of the right to make a defense, only they have the courage to risk charges that they have lost their "political standpoint" by making a vigorous courtroom presentation and by appealing an erroneous decision of the trial court. Moreover, the knowledge that lawyers will be participating in criminal litigation itself stimulates police and prosecutors to prepare their cases better and causes judges to act with circumspection.

The budding adversary system and professional bar were swept away in the summer of 1957. Just prior to that time, during the movement to "let a hundred flowers bloom, let a hundred schools contend," when Chairman Mao induced the intellectuals to help "rectify" the Party by offering criticisms, some legal scholars had castigated it on a variety of grounds. Legal specialists were not the only intellectuals who had responded to the invitation to help "rectify" the Party. The depth and scope of the criticism apparently exceeded anything Party leaders had expected and made it clear that intellectuals desired democratic reforms, including more drastic reform of the criminal process, that would end the Party's monopoly of political power and fundamentally alter China's political structure. After a brief period of stunned inaction, the response of the Party was to initiate the "anti-rightist" movement that savagely struck back at critics both inside and outside Party ranks, and that radically transformed China's political climate.

Even before the revelations of the Cultural Revolution and the attacks upon Liu Shao-ch'i and company, it was apparent that some of the most powerful Party leaders had never felt comfortable about the decision to import the formal Soviet judicial model, which they regarded as an essentially Western product. As a result of the "hundred flowers" debacle they came to fear that full implementation of this system would unduly curb the power of the Party and reintroduce the bourgeois law and values that China had ostensibly overthrown in 1949. Therefore, during the second half of 1957 and 1958, while de-Stalinization was culminating in a series of reforms that brought Soviet criminal law and procedure closer to Western systems, in China principles of Western justice, such as the right of an accused to defend himself effectively, were systematically denounced.

What has tradition got to do with all this very recent history? Before the Cultural Revolution suspended scholarly publication, most Chinese writers who discussed the problem of the extent to which China's pre-Communist heritage should be viewed as influencing contemporary legal development emphatically rejected the idea of the "inheritability" of the old law. (Soviet scholars still react strongly against the suggestion that Soviet law is importantly influenced by Russian history.) Yet certain Chinese publications did indicate interest in Chinese legal history and found traces of continuity between past and present. More particularly, in seeking to justify China's departure from the Soviet model, some writers argued that slavish application of Soviet criminal procedure in a country with "different national characteristics, historical conditions, class relations and revolutionary experience" would constitute dogmatism.<sup>14</sup>

Especially interesting were the oral explanations that, prior to the Cultural Revolution, Chinese legal authorities gave to visiting foreigners who expressed surprise at the virtual non-existence of Chinese lawyers. In Peking in 1959, for example, a group of Japanese lawyers and scholars met with Mr. Wu Te-feng, then Vice-President and First Secretary of the Chinese Political Science and Law Association and perennial greeter of delegations of foreign lawyers. In this interview Mr. Wu, who subsequently became Vice-President of the Supreme People's Court, attributed the miniscule number of professional lawyers in the People's Republic primarily to an historical factor that he said was not common to the history of all socialist countries. This was the extremely bad reputation of lawyers in "the old China." Traditionally lawyers were thought to be servants of the exploiting classes, who were cynical, mercenary and dishonest. Because of this, he said, following the Communist liberation of China, the people could not bring themselves to consult lawyers, and this has hindered development of the bar. In 1963 another group of Japanese lawyers received a similar explanation of why lawyers did not defend accused criminals.<sup>15</sup>

---

14. See, e.g., Jen Chen-to and Ho En-tào, "How to Establish China's New System of Criminal Litigation" 2 *Chi-lin ta-hsiieh jen-wen k'o-hsiieh hsiieh-pao* (Kirin University Journal of Humanistic Sciences) 123 (1959).

15. For references to these Japanese accounts, see Cohen, note 13 *supra*, p. 4, footnote 7.

When this Communist regime that has committed itself to smashing China's "semi-feudal" heritage defends its administration of justice by an appeal to history and to the low regard that Chinese are said to have traditionally held for lawyers, does this suggest that even the world's most totalitarian government has to accommodate to habits and attitudes that have become deeply ingrained over centuries? Or are the Communists cynically invoking the Muse as an excuse for adopting a system of criminal procedure better suited to enhance their political power? If the latter is the case, is the contemporary Chinese view of the criminal process itself the product of China's authoritarian tradition as well as of the more immediate political pressures that gave rise to the anti-rightist movement?

The Chinese explanation of the absence of lawyers may have been chosen as one likely to have especial appeal to Japanese visitors. After all, the *kujishi*, the Tokugawa precursor of the modern Japanese lawyer, had had a lowly reputation and status in the eyes of both the populace and the government, and scholars have noted this as a factor that may have retarded the growth of the Japanese legal profession. Pre-modern China, like Tokugawa Japan, had no professional bar and generally did not allow an accused to be represented by anyone at trial. There was in China, however, a rough counterpart to the *kujishi*. This was the *sung-kun*, the "litigation trickster," who surreptitiously drew up accusations and pleadings and acted as adviser outside the courtroom. These "tricksters" were often punished as persons who stirred up controversy for their own gain and corrupted human relations, and it is true that they were often poorly regarded by the people as well as the government.

It is also true that, after the last of the imperial dynasties was replaced by the Republic of China and a professional lawyer class was allowed to develop as part of the paraphernalia of modernization, its earliest members tended to vindicate the traditional belief that lawyers destroy rather than support community values. By 1922 China was so overrun by ill-trained, self-aggrandizing practitioners that a convention of important educators urged the abolition of all government law colleges, on the ground that they produced "disorderly graduates" and "case-multiplying lawyers." Such a radical measure was not taken, but for a period during 1922-23 the

government refused to issue lawyers' licenses except to those who had studied abroad and a few others, and it increased the license fee twenty-fold. After Chiang Kai-shek's Nationalist Party came to power in 1928, it improved legal education and imposed higher standards for admission to the bar. But neither on the mainland prior to 1949 nor after Chiang's flight to Taiwan can it be said that the tightly-controlled lawyers of supposedly "Free China" have earned popular esteem by vigorously defending the rights of dissidents. We know too little about "litigation tricksters" and Republican lawyers, but what we do know suggests that the Communist regime has not fabricated their unpopularity out of whole cloth.

It is far from clear, however, that the absence of contemporary "people's lawyers" should be attributed to this historical factor. Contemporary Japan has made great progress toward developing a vigorous, independent bar, despite a tradition that is similar to China's. Moreover, although in China, as in Japan, the traditional attitude toward lawyers undoubtedly carried over into the present era, there is evidence that the Communists could have overcome it, had the political will to do so existed. Certainly the Chinese press of the mid-1950's reported popular acclaim for the legal advisory offices being established in the cities. And in interviews in Hong Kong two lawyers who practiced in China during the period immediately preceding the anti-rightist campaign asserted that the Communist experiment with the bar had proved a popular success. They reported that on many occasions criminal accused who had initially mistrusted their counsel expressed satisfaction with his efforts at the conclusion of the public trial. Also, the masses who attended such trials were often enthusiastic about having someone able and willing to present the plight of a hapless accused and the views of the common people, especially in cases when they felt the prosecution was acting in a one-sided and high-handed fashion. Because their help to the public elicited warm appreciation, those who served as lawyers were developing a sense of mission and professional self-esteem. As one ex-lawyer told me with pride, "every day people formed lines to see us." These interviews suggest that, like urban Russians, urban Chinese might well have proven receptive to the new bar if it had been allowed to flourish.

It is in a continuity of governmental rather than popular attitudes that history appears to play a more significant role.

When during the 1957 anti-rightist movement the regime returned to the inquisitorial method of adjudication that necessarily excluded participation by defense counsel, it was building on deep roots. This, after all, is the way in which criminal justice was dispensed for centuries in China. During the Ch'ing dynasty (1644-1912) the accused was entirely at the mercy of the magistrate who tried him. Trial consisted of interrogation by the magistrate, who was legally authorized to torture the accused in court if he refused to confess. The tendency to use torture was reinforced by the rule that the accused could not be convicted unless he confessed. Forced to kneel abjectly before the magistrate's high bench, flanked by guards wielding bamboo staves, whips, and other instruments, precluded from presenting his own witnesses, and denied the services of a lawyer, the accused had no meaningful opportunity to defend himself.<sup>16</sup>

This Ch'ing procedure reflected the view that law and legal institutions serve principally as instruments for expanding the power of the state rather than for enhancing the sense of security of its citizens. In the traditional Chinese value system the interests of the state dwarfed those of the individual, and this value preference was expressed in the criminal process. Thus, it was assumed that the administration of justice is the exclusive preserve of the state and that no independent actors such as defense counsel should be allowed to intrude.

Plainly enough, this basic assumption and the concomitant absence of professional advocates suggest similarities with the criminal process not only in mainland China but also in Taiwan, where the participation of lawyers in the defense of political offenders is severely circumscribed. How should we interpret these similarities? Certainly one cannot say that there is a causal connection between the traditional system of administering justice and the contemporary systems. On the other hand, it seems clear that the past does not conflict with, but rather reinforces contemporary Chinese attitudes toward the criminal process. Can it be said to do more? Does it create a predisposition toward handling cases in the inquisitorial way? Does it constitute an unconscious barrier to the development of an independent legal profession?

One can conclude that this does seem to be one aspect of contemporary Chinese affairs in which there is a significant

---

16. *Id.*, pp. 5-7.



degree of continuity with the past. Perhaps one can also say that there may be a predisposition to maintain this continuity despite the intervention of other influences. Nevertheless, it seems unlikely that tradition would constitute a barrier to a regime that genuinely sought to overcome it. Why the Communist regime and to a large extent its Nationalist rival have refused to make the effort—why they and many other modernizing regimes in both East and West see an inconsistency between an independent legal profession and the achievement of national goals—deserves our further consideration, but surely tradition ought to be considered one of the factors that has contributed to this situation.

I only hope that this lengthy exposure to Chinese developments will enhance appreciation of our good fortune in being heirs to a tradition that facilitates rather than impedes efforts to attain the rule of law. To the extent that our efforts prove unsuccessful, surely we, unlike the Chinese, cannot invoke history in our defense.