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CHINESE CRIMINAL LAW UNDER MANCHUS AND MARXISTS

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Introduction

Some scholars see the new Chinese criminal legal system primarily in terms of Soviet influence.¹ The thesis of this article, however, is that the new system owes rather more to the Chinese legal heritage. This will be demonstrated by focusing on comparisons and contrasts between the pre-Republican legal system and the system which has arisen since Mao's death in 1976.

Such a focus immediately evokes the obvious question: why leave an historical gap of seventy years in the analysis? By confining ourselves to the Qing and Deng legal systems we perforce leave untouched both the codification and the practice of the early Republican period, the Kuomintang period, the legal systems of the pre-1949 Communist base areas, and even the several distinct legal periods occurring between 1949 and 1976. Each of these areas constitutes a legitimate area of inquiry in its own right. Several monographs and articles dealing with these earlier periods have long been in existence² and scholars new to the field are continuing with such research.

However, the purpose of this article is not to provide an historical overview of how the Chinese legal system evolved stage by stage from its dynastic form to its present form. Rather, the aim is to examine the contemporary Chinese criminal justice system against the background of that which existed until 1911 in order to ascertain just what degree of evolution or continuity there has been through the several intervening legal epochs.

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¹ W. Butler, "China in the Family of Socialist Legal Systems" (July/Aug. 1980) 91 *China Now* II.

² See especially J. Escarra, *Le Droit Chinois* (1936). Translated into English by G. Brown as *Chinese Law* (1962).

This approach accentuates a proximity between the ancient and contemporary Chinese legal systems which has no counterpart among western nations. For legal academics a thorough grounding in classical Roman law may be an indispensable tool for the analysis of contemporary western legal systems, but there is little likelihood that hard-headed practitioners could be persuaded of its efficacy. Though the roots of British, French and German law may be in Rome, these systems have metamorphozed to the point that the relevance of the root is often difficult to demonstrate. In the case of China, the connection is much clearer, and modern practitioners intending to have regular contact with the Chinese ignore the classical legal system at their peril. The general form and content of Chinese law survived intact from the enacting of the *Tang Code* in 653 to the demise of the Qing Dynasty in 1911.³ Subsequently, two factors served to perpetuate the legal thinking of the past millennium. First, the political and economic chaos endemic from 1911 to 1949 prevented the various codes and court systems of this period from exercising much influence. Second, though in an overall sense there were remarkable innovations in the Republican period, the codes introduced after 1911 also contain many equally remarkable vestiges of the old system. Some of the most outstanding and controversial features of the old *Qing Code* have either survived or have been resuscitated in the new Chinese *Criminal Code* and practice.

In order to understand the actual relevance that Chinese legal tradition bears to contemporary law, one might try to imagine that the Roman Empire had survived until only a century ago and that all contemporary western legal systems were currently in the process of reconstruction on the foundation of the Roman system. To cite only the most obvious example, and one which will be considered more fully below, Article 79 of China's new *Criminal Code* provides that accused persons may be convicted and sentenced for alleged "offences" which are not to be found in the *Criminal Code* at all. Such a concept is absolutely anathema to western jurist and layman alike and would be utterly incomprehensible unless one is aware that sentencing for unlisted offences on the basis of "analogy" to listed ones has always been a Chinese legal practice. This provision of the *Criminal Code* does not thereby become "good", "just", "accept-

³ 1911 is used here for the obvious reason that it marks a clear historical watershed and the legal system continued intact until *almost* that year. Technically, however, as M. Meijer has shown in his work, *The Introduction of Modern Criminal Law in China*, 2nd ed. (1967), a series of legal reforms inspired by the West were introduced in the several years immediately prior to 1911.

able" or "rational". However, it is important that we understand it not as a manifestation of caprice on the part of the present leadership but rather as an inherently Chinese notion which, though incompatible with the new legal values the present government purports to promote, is likely to prove difficult to eradicate.⁴

In China today brand new western-looking codes have been introduced by, and are being administered by, personnel who have no experience in the administration of *any* code. In such circumstances the huge weight of the Chinese legal tradition looms as such an overwhelming influence that it will almost certainly prove impossible for leadership and judicial workers to avoid falling back on traditional attitudes, definitions, values and practices. Hence, when predicting how analogy will be applied in practice or (given the quasi-criminal nature of family law in China) how legal marital issues will be disposed of, or even how business contracts will be interpreted, a knowledge of the old system is absolutely indispensable.

None of the above statements should be taken to imply that the *content* of the new law need be, or is likely to be, similar to the old codes. In general, the content of the new laws marks a profound departure from the past;⁵ the real question is whether the new content can overcome hoary practices, values and interpretations. For example, inequality has always been a cornerstone of Chinese law.⁶ In the old society women were legally inferior to men, as were the young to their elders and commoners to officials. It is most unlikely that we shall ever again see these inequalities legally sanctioned in China. But the *principle* of inequality before the law, articulated in Mao Zedong's 1957 speech, "On the Correct Handling of Contradictions Among the People", constituted the very basis of

⁴ Many of the traditional legal attitudes which continue to hold the present architects of the *Criminal Code* captive are in fact in fundamental contradiction to the system they are trying to build. For example, the underlying value of the new system is supposedly certainty. But it is typically and profoundly Chinese that the current draftsmen seem utterly incapable of spelling out a stipulation and then leaving the courts to handle it for better or worse. The desired certainty is defeated not only by the presence of analogy (Article 79), but also by the frequent use of phrases such as "but in special cases". Over and over again we see a law spelled out clearly only to be undercut by an escape clause. It seems the draftsmen fear taking a final all-out plunge into legal certainty and continue to cling to ad hoc solutions as a kind of crutch.

⁵ Actually, much of the *Criminal Code* is taken from the draft criminal code written during the 1954-59 period but never implemented. There were said to be approximately 130 revisions of this draft up to 1965. We see the present *Code* as new only in the sense that it was never implemented before.

⁶ The Chinese principle of inequality before the law will be considered in detail below. See *infra*, text accompanying notes 60-77.

Communist Chinese criminal law until the new codes emerged after Mao's death. The very magnitude of the stress currently placed upon the principle of equality before the law is indicative of the pervasive and resilient quality of the opposite tendency.

*Distinctive Characteristics of the
Pre-Republican Chinese Legal Code*

At the forefront of any attempt by outside observers to truly comprehend the traditional legal system, not only in terms of its machinery but also in terms of its underlying philosophical premises and societal values, stand two major conceptual problems. The first concerns the classification of traditional Chinese law and, indeed, the question of whether it is in fact possible to classify it on any basis familiar to occidental lawyers. The second requires an understanding of the two main philosophical inputs which fused two centuries before Christ to produce the basis for the legal system which survived until the twentieth century. I refer, of course, to the legal values embodied in the classic notions of *fa* and *li*.

Among historians of China it is a virtual cliché that traditional China developed a highly sophisticated criminal code, but no civil code or civil law at all. Insofar as we refer specifically to a civil *code* this cliché is accurate in a strict sense, but it is highly misleading if not placed in proper perspective. Traditionally, China had only one codified body of law.⁷ Two points must be underscored with respect to that codified body. First, a huge corpus of law existed quite outside the code in the form of customary law administered by guild, clan organization and village.⁸ As we are concerned here only with criminal law, we shall not pursue this question except to make one important point in passing. The term "customary law" in the traditional Chinese context should on no account be equated with simple custom or be understood as a vague reference to some amorphous, ill-defined system operating in the absence of "real" law. Customary Chinese law was every bit as "real" as was the English common law. There is good reason to believe that parts of this largely unwritten law, particularly those dealing with family relations and succession, were as thoroughly familiar to traditional Chinese as are the contents

⁷ Each dynasty, of course, revised the *Code* and issued its own version. Hence we have in succession the *Tang, Song, Yuan, Ming, and Qing Codes*. In stating that China had only one codified body of law we mean that there never co-existed at any one time several bodies of law covering discrete categories.

⁸ The best account of this customary law is in S. van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* (1966).

of modern codes to the citizens of industrialized societies; perhaps more so.⁹ Moreover, some customary law was in fact written. The imperial legal system quite deliberately left large areas of "law", in the broadest sense, to village, guild and clan. The clan organizations often had their own well-developed laws and they were, for the most part, in writing.¹⁰ Second, the code itself cannot legitimately be defined as criminal if our distinction between criminal and civil is to retain any meaning.

In the eyes of some occidental legal scholars one objectionable characteristic of Chinese Communist law is the blurring or lack of distinction between criminal and civil areas. But this is a recognizably Chinese characteristic and not at all peculiar to the Chinese Communists.

The criminal/civil distinction has never existed in China. Whether we refer to the Qing Dynasty period or to that of the People's Republic, the question of whether an offence or dispute should be settled by the formal or informal judicial machinery depends on three related factors, none of which are relevant to occidental categorization. The first and most important consideration was whether the interests of government or society at large were seriously affected. Thus a theft,¹¹ an assault,¹² or in certain specific family situations, a killing,¹³ might not involve the formal legal machinery at all. Conversely, stirring up litigation¹⁴ or even reneging on a stated intention

⁹ For example, one statute in the *Qing Code* specified the punishment "if x appoints an heir *contrary to law*" (emphasis mine). But the relevant law is not stated. As G. Jamieson has argued in *Chinese Family and Commercial Law* (1921), there seems to be an implicit assumption that the unwritten customary law was known in detail by most citizens. It seems likely that Jamieson is quite correct. Chinese school children (even today in Hong Kong and Taiwan) expended enormous effort in learning by heart the elaborate system of kinship nomenclature and degrees of mourning. There is little reason to doubt that they also learned inheritance rules and the penalties for violating them at the same time.

¹⁰ Ch'ü T'ung-Tsu, *Law and Society in Traditional China* (1965).

¹¹ In post-1954 China, see Case No. 1 in J. Cohen, *The Criminal Process in the People's Republic of China* (1968) at 25. Here an individual is caught stealing rice from a government storehouse. Because he stole from hunger, is considered a proletarian, and has no previous record, he is allowed to simply post some public apologies and undertake a public self-criticism. The culprit does not encounter the formal legal machinery at all.

¹² Also in post-1954 China, for the same reasons. As explained by V. Li's "cliff theory", the act is not categorized as inherently criminal or civil for the real issue is how the offender has progressed along the road to becoming a criminal by habit. If a violent assault were a first offence, the community would have dealt with it rather than the judiciary. V. Li, *Law Without Lawyers: A Comparative View of Law in China and the United States* (1978) at 38-45.

¹³ D. Bodde and C. Morris, *Law in Imperial China* (1973) at 196.

¹⁴ *Id.* at 246, 413-17.

to commit suicide¹⁵ might well result in heavy penalties being inflicted by the formal judicial process.

The second consideration was, and is, the sheer magnitude of the act. These two criteria may often amount to the same thing, but not always. Whatever the inherent nature of an act (criminal or civil in western terms), as a general rule it will not encounter the formal machinery in China if it has a relatively minor impact on society. But if it creates a noticeable disturbance, whether by "criminal" activity, or simply by fomenting discontent, there will inevitably be formal legal implications.¹⁶

The third factor determining whether a legal issue ultimately

¹⁵ *Id.* at 440.

¹⁶ "Disturbing public order" in China has always entailed penalties of extreme severity. Thus inciting a commercial strike was punished by decapitation under the *Qing Code* (Bodde and Morris, *supra*, note 13 at 279). For a contemporary example see the case of Fu Yue-hua, "Two Years Imprisonment for Fu Yue-hua", *Ta Kung Pao* (27 Dec. 1979).

It should be noted that this case was tried just days before the new *Criminal Code* and *Criminal Procedure Code* came into effect. Throughout this paper I have drawn on other cases which also were adjudicated before the new laws came into effect on 1 January 1980.

It is submitted that there is no irregularity in measuring the performance of the new codes against cases which technically predate them, for several reasons. First, in the changeover period, the Chinese have not only applied the new laws retroactively but have even articulated a formula for so doing. Second, the laws had been formally adopted by the National People's Congress in July of 1979 and had been widely publicized amidst great fanfare.

Perhaps most important, it is assumed that, particularly in capital cases or cases involving counter-revolution or dissidence, the Chinese would have no desire to justify their actions on the basis of the technicality that the new standards need not be met until 1 January 1980.

Article 10 of the new *Code of Criminal Procedure* renders criminal "any action which . . . disrupt public order . . . or any other action which endangers society and is punishable by law. . . ."

The case of Fu Yue-hua is particularly instructive in two aspects. First, the traditional Chinese penchant for legal ad hoc decisions was well illustrated; secondly it provided the first reported interpretation of the words "disrupts public order". Fu faced two charges. She was accused of having persistently, over a period of almost seven years, falsely accused a superior of raping her. Fu was also charged with disrupting public order, apparently on the grounds that she had led a demonstration at Tiananmen Square, waving a white bedsheet containing the slogan "Against hunger, against persecution, for democracy, for human rights". Traffic was allegedly blocked for more than an hour.

Assuming the rape accusations were apocryphal, Fu might easily have been convicted under section 145 for having seriously insulted another person or fabricated facts to libel him. For this she could have been imprisoned for up to three years. However, she may have been charged only under section 138 which also makes it an offence to bring false charges against anyone. Judge Liu Zhongming of the Beijing Intermediate People's Court found Fu Yue-hua guilty of the libel charge but then declared that the charge "would not be pursued" because her false accusations "had not caused undue damage". But he then sentenced her to two years imprisonment on the charge of disrupting public order.

comes to court is the success or failure of the more informal judicial organs. Thus in traditional times the emperor and courts were, as noted above, quite content to leave as many disputes as possible to be settled by clan, guild, village organization or mediators of various kinds.¹⁷ But if these agencies tried and failed to resolve a dispute or reform a chronic trouble-maker, the affair would finally reach the court.

The best description of this traditional practice in operation between 1957 and 1976 is to be found in Victor Li's *Law Without Lawyers*.¹⁸ Though now out of date as a description of the overall legal process in China due to the momentous post-1976 changes, this book contains a still relevant and very valuable analysis of the process traversed by a criminal before ultimately experiencing the sanction of a formal court. It also helps the westerner to understand why, prior to the introduction of the new *Criminal Code*, penalties in Communist China were usually designed to fit the criminal, not the crime. This practice occasionally received criticism from outside because of the apparent inequity involved where, for example, an assault brought the death penalty,¹⁹ as did embezzlement,²⁰ while a brutal murder resulted in three years reform through labour.²¹

The infamous cruelty, harshness and utter inflexibility of the codified and highly formal legal system implemented throughout China during the Qin Dynasty (221 B.C.-208 B.C.) made such an indelible impression on the Chinese psyche that for more than two

¹⁷ The Kang Xi emperor, responding to criticism of his courts, said,

[t]he good citizens, who may have difficulties among themselves, will settle them like brothers, by referring them to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the lawcourts -- that is the justice that is due to them.

See T. Jernigan, *China in Law and Commerce* (1905) at 191, cited in S. van der Sprenkel, *supra*, note 8 at 114.

¹⁸ *Supra*, note 12.

¹⁹ Victor H. Li, conversation with the writer, 1977. He referred to a case in which the offender was executed for the stabbing of an African journalist, who had recovered. But the offender was of landlord origin, his relatives had fled to Taiwan and he had a long history of violent crimes. All attempts at re-education had failed.

²⁰ See item 250, Cohen, *supra*, note 11 at 540. Here again the real issue was not the immediately instant crime but the offender's long record and complete imperviousness to efforts to reform him.

²¹ Li, 1977 conversation. This case involved an individual who had grown up as an orphan, had not been properly supervised, and had never experienced the beneficial intervention of the various informal neighbourhood mechanisms. Reform through labour was said to have finally produced a model citizen.

millenia the Chinese people associated courts and formal law exclusively with punishments and suffering. In addition, this image was constantly fostered and renewed by actual court practices in all dynasties. No matter whether a court case resulted from a "civil" cause (for example, an accusation by one citizen against another²²) or from clear breach of the "criminal" code, the experience was invariably disastrous for all parties. Anyone involved in a lawsuit was likely to be bankrupted by the unlimited extortions of the magistrate's underlings.²³ Moreover, in the course of the trial itself torture was routinely applied not only to the accused but to witnesses as well.²⁴ Finally, the legal code itself put the finishing touches on this popular conception of formal law because with a very few, minor exceptions virtually every section or statute of the code carried a penalty.

The point which lies at the centre of all the confusion concerning "criminal" as opposed to "civil" law in China's legal tradition is simply that the pre-Republican Chinese legal code was entirely penal in that there was a prescribed penalty for every wrong act, whether that act was a crime in the western sense, or simply a departure from an administrative norm. This is precisely why western historians usually refer to the code as a "criminal code".²⁵

This approach, in the Chinese context, engenders confusion rather than clarity. The only meaningful subdivisions of pre-modern Chinese

²² This was extremely rare, for citizens in general avoided courts like the plague.

²³ For a detailed and vivid account of the venal activities of these underlings see Ch'ü T'ung-Tsu, *Local Government in China Under the Ch'ing* (1969) 36-93.

²⁴ Bodde and Morris, *supra*, note 13 at 97.

²⁵ But note the problem with this classification even in contemporary China where penal sanctions may be imposed under the *Marriage Law*.

In any case, the distinction between the western and Chinese categorizations of law is more apparent than real. Western lawyers loosely classify law as criminal or civil according to whether it is punitive or non-punitive. Any law which carries a penalty is criminal or at least quasi-criminal. But a somewhat more sophisticated analysis discloses that the real distinction is between public and private wrongs. Only a moment's reflection is required to realize that punishment, overt or camouflaged, is rather common in the civil and administrative law of western nations. The basic premise of damages is restitution. Nevertheless, punitive damages are not unknown in contract and there is a punitive element in virtually all tort damages. Fines are levied against trade unions in labour disputes, with no attachment of criminal stigma. Also, when one encounters the often repeated statement that China's "*Criminal Code*" covered many areas we could consider civil, one would do well to recall that in Britain a breach of pilotage regulation is a criminal offence. In the end, about the only clear, principled difference between the two in most western countries is that corporal punishment and imprisonment are excluded as penalties in civil law cases and that all damages paid by a defendant go to his victim.

law were those of *formal* law (involving the courts, the statutes and the Board of Punishments) and *informal* law (guilds, clans, village organizations and assorted mediators). The Chinese have simply never seen any fundamental philosophical impediment to punishing breaches of civil or administrative regulations. Their philosophical heritage creates no great dichotomy between private and public law. Rather, the key issue was whether a particular dispute or a violation of *any* law upset social harmony, which was the overriding concern of Confucianism.²⁶

In keeping with this goal, neither the courts nor the Code ever contemplated recompensing the victim, with a very few exceptions.²⁷ Their sole concern was requital in the broad sense: the restoration of social harmony which had been disturbed by the infraction.²⁸ The concept of damages never arose in old China. It is highly unlikely that the Chinese legal mind could ever accommodate the notion of tort damages for "pain and suffering".²⁹

Professor William Jones of Washington University, in addressing himself to the blurred boundary between criminal and civil in the old Chinese law, cites a list of offences under the Qing code which all carry criminal sanctions.³⁰ He contends that all his examples, if characterized according to western criteria, would fall strictly within the bounds of civil law. But by virtue of the very examples he cites,

²⁶ On this point it is crucial to understand that the family was the underpinning of the entire legal order in traditional China. The prevalent western assumption that family issues are *intrinsically civil* breaks down even in western systems. For example, bigamy and incest are clearly family matters yet both constitute criminal offences in virtually every western jurisdiction. These acts are simply considered to involve such critically important social policy considerations that the state has a legitimate right of interference.

There is no *principled* difference between this western treatment of bigamy and incest on the one hand and the intricate legal codification of a host of family relationships by the Chinese on the other. The difference is entirely one of degree. Confucian family relationships were seen as the very basis of the entire society and from that standpoint it was entirely reasonable to protect them with "criminal" sanctions.

²⁷ In accidental homicide or injury cases not involving senior relatives an offender was allowed to pay a monetary redemption which went to the victim or his family. Bodde and Morris, *supra*, note 13 at 79.

²⁸ The notion of requital is examined throughout Bodde and Morris, *id.*, but particularly at 180-83.

²⁹ Thus in one pre-1976 People's Republic case a young man riding a bicycle had, through carelessness, knocked down and seriously injured an old man. Rather than award damages the court decreed that the offender should attend at the victim's home every morning and evening in order to prepare meals for the latter.

³⁰ "Studying the Ch'ing Code — *The Ta Ch'ing Lü Li*" (1974) 22 Am. J. Comp. L. 330 at 348-49.

Professor Jones graphically illustrates the weaknesses of the argument that there are intrinsic, principled qualities clearly distinguishing civil offences from criminal. One example to which he refers is the offence of lending money at usurious rates. Yet sections on "loan-sharking" are quite common in modern western criminal codes.

The clearest articulation I have seen with respect to this issue is the following statement by G. Jamieson:

In truth the conception of civil as distinguished from criminal proceedings is entirely absent in Chinese legislation. Every wrongful act, whether it be stealing a purse, or not paying a debt, or laying claim to property which turn [sic] out to belong to another, is classed in the same category and entails a penalty. There is an all comprehensive Section of the Code which makes it a criminal offence to "do what you ought not to do". Under this every suit becomes technically a criminal matter, because either the plaintiff or defendant is wrong, and being in the wrong he is liable at least to the penalty for doing something which he ought not to do if not something worse. In awarding the penalty the civil rights are sometimes incidentally declared, but in the vast majority of cases the punishment to be inflicted is the chief or only object, and the civil right is left to be inferred.³¹

In short, there is no hard and fast philosophical borderline between civil and criminal law. This is abundantly illustrated by numerous examples of "administrative" acts which have been rendered criminal in the West and, at the other extreme, of killings within families which have in certain circumstances been considered private matters under the old Chinese system. In accepting the general truth of the cliché that the Chinese developed only a criminal code, it is vital to understand that China did not have a criminal code on the one hand, and a great legal void which should have been occupied by civil law on the other. Rather, the highly developed *legal* code covered many matters which would fall under the combined criminal and civil codes and/or common law in western countries. Perhaps even more importantly, the great bulk of "civil" matters were subject to legal institutions which operated completely outside the ambit of the code.³² Hence the almost universal practice of referring to the dynastic legal codes as "criminal" codes is predicated not on any logical, philosophical or scientific method of analysis and categorization, but on the simple fact that almost every

³¹ Jamieson, *supra*, note 9 at 1.

³² On this point see particularly van der Sprenkel, *supra*, note 8 and Ch'ü, *supra*, note 10.

statute and sub-statute prescribed punishment rather than damages, injunctions, specific performance or foreclosures.

The second key to understanding Chinese legal thinking is to be found in the two very different value systems upon which the pre-Republican system (and much of the content of the post-Republican systems as well) was based. The influences of *li* and *fa* are to be found in the Chinese legal system even today. Some of the best writers in the field of Chinese law consider only *fa* as law while treating *li* as something quite outside the legal sphere; an *alternative* to law.³³ This dichotomy is even more misleading than the civil/criminal problem treated above.

Fa is usually defined as "law" simply because it corresponds very closely to the meaning which "law" conveys to most westerners. It was based on a detailed and precise written code. It involved recognizable legal machinery, such as courts and magistrates. It also provided specific punishments for specific crimes. *Li*, in striking contrast, was a mechanism for maintaining social order which eschewed all written law or codification of any kind. The Confucian school in ancient China put forward the *li* as a body of ethical principles (and standards for behaviour) which, when voluntarily accepted and internalized by all citizens, would become a far more effective instrument of control than would a coercive system externally enforced. *Li* has frequently been compared with the theory of natural law in the West, while *fa* has been seen to bear a striking resemblance to western positivism.³⁴

Obviously the two schools were based upon radically different conceptions of human nature. The Confucian proponents of *li* were convinced that human beings were born inherently good. Although capable of being corrupted, their basic nature was to do what was morally right. The legalist school, which argued for *fa*, held that humans were naturally greedy, grasping and basically "bad".

A number of obvious conclusions follow from these positions insofar as social control mechanisms are concerned. *Li* emphasized education, rehabilitation and, in later times, fitting the punishment to the criminal, rather than the crime. *Fa* insisted that a given crime should always entail an identical penalty. The supporters of *li*, believing man to be basically good, saw an inflexible written code first as an instrument of tyranny which would exclude the disposition

³³ This is, for example, Ch'ü's practice. Throughout his work he translates *fa* as law, but leaves *li* as an untranslated Chinese alternative to law.

³⁴ Bodde and Morris, *supra*, note 13 at 20.

of cases according to their particular facts and mitigating circumstances, and second, as a device which would inevitably corrupt the people by instilling in them a mentality of "loopholism".³⁵ Their argument was that human beings know when their conduct is ethical, fair, just, humane, considerate and moral. If they must conduct themselves according to an internalized moral value system they will demand of themselves the highest standards and will be deterred from unethical action by their own sense of shame. Conversely, if written law prescribes "the minimum acceptable standard of conduct" citizens are wont to simply fit their actions into the interstices of the code and substitute semantics for morality. The legalists responded to all these arguments by declaring that there was not more than a handful of people in the entire empire who conformed to the Confucian ideal. Hence, the way to maintain order was to make it impossible for citizens to break the law through the provision of massive deterrents.

Li and *fa* originally existed as completely uncompromising and diametrically opposed positions. But by the first century A.D. they had become fused as two strands of a legal system later embodied in the Tang Code of 653 and in all succeeding dynastic codes. The most lucid description of this fusion is provided by Professor Ch'ü T'ung-tsu.³⁶ Professor Ch'ü points out that each legal school had two principal aspects. One was its content, that is, the values and behaviour it sought to enforce, quite distinct from the enforcement mechanism itself. The other aspect was precisely the method of enforcement. Both *li* and *fa* are used sometimes to refer to content and sometimes to enforcement depending upon the context in which they appear. Professor Ch'ü's thesis is that the principal aspect of the two is content, the enforcement aspect being only secondary. Hence there is no great problem with basing the law on the content of one system while implementing it through the enforcement mechanism of the other.³⁷ This is in fact what happened and for two millenia

³⁵ See the criticism of the early *Cheng Code*, cited in Bodde and Morris, *supra*, note 13 at 16.

³⁶ Ch'ü, *supra*, note 10 at 274.

³⁷ From a purely philosophical and academic standpoint Professor Ch'ü's thesis contains one glaring flaw and must be treated with caution. His mistake lies in failing to appreciate that for the classical Confucianist it was impossible to divorce content from enforcement. The use of non-violence, persuasion, example and education in inculcating *li* was an inherent part of *li*. Theoretically the Confucian can no more enforce *li* through coercion and physical punishment than the Christian can spread the love of Jesus by killing all those who refuse to accept it. Nevertheless, allowing for the fact that Ch'ü's thesis does violence to Confucian theory, from an empirical point of view it accurately describes the evolution of the Chinese legal system.

Confucian morality (*li*) as embodied in the dynastic codes was enforced by legalist (*fa*) machinery and penalties.

The subject of *li* and *fa* is an extremely complex one and would justify a monograph. It has been treated in somewhat simplistic fashion here because for our purposes it is primarily important for one reason alone. Legal philosophers in ancient China debated the merits of *li* at great length. Let us reserve for the moment any such judgment of merits. Whether it is seen as strength or weakness, *li* has been largely responsible for the development of an overwhelming Chinese preference for making decisions on an ad hoc basis, a practice which has characterized all Chinese legal history and which is still quite clearly discernible in the legal developments of the past six years. This does not mean that the legal codes or the courts have operated on principles of *li* or that they have operated in ad hoc fashion. On the contrary, both the code itself and the courts operating under it have been overwhelmingly influenced by *fa* values and a central feature of the system has been the almost non-existent discretion of the magistrate,³⁸ who finds that a given fact situation usually is accompanied by a given penalty which may not be modified. The Chinese preference for resolving legal problems on an ad hoc basis is not a characteristic of the formal legal system but is clearly traceable to the influence of *li*. This preference reflects the overwhelming distaste the Chinese have always displayed toward approaching the courts or becoming involved with formal law. Resolution of disputes by mediation has always been preferred for two reasons. First, the preference for *li* means a preference for placing one's fortunes in the hands of wise and virtuous men rather than having them decided on the basis of an impersonal code. Second, mediation results in a solution agreed to by both parties rather than one *imposed* by force upon a loser.

The preference inherent in *li* for ad hoc, subjectively based legal decisions, was incalculably strengthened by the lasting historical impression made by *fa* during the only period of Chinese history in which it completely dominated the Chinese legal system. The harshness, terror and utter barbarity of legalism in practice during the Qin Dynasty (221-208 B.C.) have been recorded at length else-

³⁸ This lack of discretion was somewhat mitigated, however, through the device of sentencing by analogy. On occasion we find an offender sentenced by analogy to a somewhat tenuously related statute despite the existence of one which seems to cover his offence almost exactly. The explanation for this apparently bizarre practice is that the penalty could be raised or lowered when sentence was given by analogy.

where.³⁹ We need only note here that the harshness of Qin legalism turned the Chinese people away from formal law for two thousand years and led them to equate it almost entirely with negative images.⁴⁰

Parts of the new Chinese *Criminal Code* betray significant continuity with the dynastic codes. However, as mentioned above, the *li* philosophy manifested itself more without than within the old system. There could be no greater mistake than to take the dynastic codes as epitomizing the legal preferences of the populace. It is not surprising, therefore, to find that the 1980 *Criminal Code* and *Code of Criminal Procedure*, drafted by members of a post-revolutionary generation, contain numerous sections which allow for legal problems to be resolved on an ad hoc basis.

The objection to dichotomizing *li* and law (*fa*), as opposed to correctly understanding *li* and *fa* as two quite different prescriptions for legal systems, is not simply academic. The implications are by no means limited to the misdescription of one ancient philosophical school. Contrary to the assumptions of many observers and, indeed, contrary to the current position taken by the Chinese press, there was a legal system operating in China from 1957 to 1976.⁴¹ It was an informal system very much characterized by versatility and discretion and in many ways very much in the *li* tradition. If we define law in the narrow sense of *fa* we are likely to render the discipline of law virtually useless for the study of this particular period. Law must be understood, with reference to China, in the broadest possible terms, encompassing all mechanisms for maintaining social order, including

³⁹ See, for example, the treatment of the Qin period and its historical legacy, in C. Fitzgerald, *China, A Short Cultural History*, 4th ed. (1976).

⁴⁰ It is tempting to speculate as to whether post-1976 events in China will not ultimately be seen as a very similar phenomenon, but at the other end of the legal spectrum. The spectre of Qin legalist abuses fed the Chinese revulsion for formal law over a two thousand year period. The Chinese desired a humane form of decision making and so tried to be flexible, did not adhere to codified rules and approached each new problem on an ad hoc basis. But during and after the Cultural Revolution, when all formal law was denounced as "bourgeois", this case-by-case method of problem solving was carried to its greatest historical extreme and every caprice of those in power took on the force of law. Many Chinese, looking back on the tyranny of this period, seem to have exactly reversed their cultural preferences and now see the existence of formal codes and rigid legal procedures as a protection against oppression by power-hungry opportunists. Nevertheless, the ancient Chinese tendency towards ad hoc solutions keeps creeping back, even into the codes themselves.

⁴¹ See Li, *supra*, note 12. Li argues and demonstrates that law must be more broadly defined in China than westerners are wont to do, that the sources of law in this period were quite different from those in other civilizations and that the most meaningful legal machinery existed quite apart from the judiciary.

mediation committees, conciliation processes and small group decision-making of many kinds.

The Influence of the Pre-Republican System on Modern Day China

I turn now to a consideration of selected traits of the pre-Republican legal system which continue to influence contemporary Chinese legal practice. The first rather striking aspect of the old formal legal system was the tremendous antipathy felt for it by virtually the entire population. In sharp contrast to most other civilizations China developed no legends ascribing laws to gods or even to any great Chinese mythical figure. The first written laws were said to have been compiled by a despicable, non-Chinese people who were in fact punished by the gods for so doing.⁴² Throughout Chinese history the formal law has been feared but never respected. No legal profession ever existed and the rare individuals who occasionally tried to derive financial benefit from preparing legal papers for others enjoyed roughly the same social status as prostitutes and were often punished by the courts for this very act.⁴³

The judicial process generally, and statutory interpretation in particular, were almost exclusively oriented toward punishment rather than toward legal analysis in the sense of determining whether all the elements in an offence were present in the fact situation before the court.⁴⁴ In fact, from a western viewpoint the emphases in a Chinese trial were precisely reversed. In the occidental courtroom the great bulk of the time has always gone toward determining the issue of guilt. This necessarily involves ingenious argument and sometimes considerable sophistry as to whether given acts come within the wording of the statute so as to constitute all the necessary elements of the crime.⁴⁵ In the Chinese courtroom there was an implicit assumption that the accused was guilty and it was a rare occasion when any other possibility was entertained. Moreover, he could not be convicted in the absence of a confession. If he did not confess, torture

⁴² Bodde and Morris, *supra*, note 13 at 14.

⁴³ *Id.* at 246.

⁴⁴ For example, see Jones, *supra*, note 30 at 342.

⁴⁵ In many instances it is quite possible to say that an accused in a western context is entirely incompetent to say whether or not he is guilty because guilt is a strictly legal issue. The accused knows he did a given act, but whether that act in the circumstances contained all the specified elements of the crime is a question only the court can determine. In the Chinese approach this fine argument was lacking.

was administered to avoid time-consuming delays.⁴⁶ Once the confession was obtained, guilt was not in issue and the entire judicial deliberation then concentrated solely on fitting the fact situation to the most appropriate statute and hence the appropriate penalty.⁴⁷

The principle of retroactivity was accepted without question in the formal Chinese legal system. That is to say, a citizen could always be sentenced under a statute which did not exist at the time he committed the act. Indefensible from a British or Western European viewpoint, this practice posed no great ethical problem for Chinese jurists. It constitutes a useful example of how the notion of *li* continued to exert influence even in the formal legal system, which was overwhelmingly oriented toward *fa*. Though *fa* was predicated upon certainty, which was the rationale for a written code in the first place, the legacy of *li* shaped the conviction that since people knew when they were doing something wrong, even though it was not specifically written into the code, there was no serious question of punishing any *innocent* party once the code was updated to take account of the particular act of immorality which it had theretofore overlooked.⁴⁸

From retroactivity we move on to consider a particular type of statute which western jurists find even more reprehensible. This is the "catch-all" statute. There were three primary "catch-alls" in the *Qing Code*. The most well-known, referred to above, made it an offence to "do what ought not to be done". Thus when a student, distressed by the death of his teacher, wrote to officials stating his intention to commit suicide and then changed his mind, he was prosecuted for "stupidly bothering officialdom".⁴⁹ There was no such offence under the code but he was sentenced for "doing what he ought not to have done" and received eighty strokes of the heavy bamboo.

⁴⁶ Even when torture was abolished in 1904 an exception was made in capital cases on the ground that without it cases would be interminably delayed. See Meijer, *supra*, note 3 at 25.

⁴⁷ It is this historical legacy which is undoubtedly responsible for Article 35 of the new *Law on Criminal Procedure* which stipulates both that an accused may not be convicted on the basis of a confession if there is no other evidence and, conversely, that he shall be convicted even in the absence of confession if the evidence is conclusive.

⁴⁸ Under the Canadian *Criminal Code* the Supreme Court may uphold a conviction even though proper procedures have not been followed in the lower court if the Supreme Court feels that no substantial miscarriage of justice will result therefrom. See the Canadian *Criminal Code*, Section 613.

⁴⁹ Bodde and Morris, *supra*, note 13 at 531.

Another "catch-all" made it an offence to violate imperial decrees.⁵⁰ Prima facie, this may appear quite straightforward, particularly if we assume that the decrees are to be identified in the charge. But such an assumption would be quite unfounded. Not only are the decrees not identified, the fact is that on occasions when this statute was invoked almost invariably there was no relevant decree in force. The real substance of the charge was that if the emperor had ever thought about the act done by the accused, undoubtedly he would have disapproved and very likely would have issued a prohibitory decree!

A third "catch-all" statute in the *Qing Code* provided punishment for "vicious scoundrels who repeatedly create disturbances and without reason molest decent people".⁵¹ It is, however, somewhat more difficult for western critics to attack this particular statute inasmuch as it bears a close resemblance to recent habitual criminal laws which can be found in Canada and elsewhere. It is not nearly as vulnerable to criticism as is the vagrancy charge either existing in or only recently removed from many western criminal codes.

To the western-trained lawyer the most reprehensible aspect of the Chinese legal system in dynastic times was the principle which allowed an accused to be sentenced by analogy. According to this principle if there were no specific statute in the code prohibiting what the accused had done (not even "doing what ought not to be done"?), sentence could be levied by analogy to any other statute considered sufficiently similar. Thus a man who advertised that he was available to render assistance with legal and taxation problems was sentenced to one hundred strokes of the heavy bamboo and two years of penal servitude, by analogy to the statute prohibiting the unauthorized assumption of a rural headman's position.⁵² In this case the only link between the "crime" and the statute was the fact that one of the duties of a rural headman was tax collection.

No "catch-all" statute or sentence by analogy could justify the death penalty and all sentences so levied had to be personally approved by the emperor. Except for the reference to the emperor, the principle of analogy appears in absolutely unmodified form in the new Chinese *Criminal Code*.

In short, Chinese society never produced a legal equivalent to the Roman principle *Nulla poena sine lege*. Nor is there anything in

⁵⁰ *Id.* at 532.

⁵¹ *Id.*

⁵² *Id.* at 246.

Chinese legal philosophy remotely corresponding to the Millsian notion that the legitimate authority of the state should be circumscribed.⁵³ To this day Chinese law and Chinese lawyers are not prepared to accept the proposition on which rests the entire corpus of western criminal law: *what is not forbidden is clearly allowed*.

Yet another interesting characteristic of formal Chinese law in dynastic times was the relative lack of concern for the element of intent and the complete absence of any notion of proximate cause. Chinese courts did contemplate intent and take it into account in certain instances but, particularly in the case of injury or death of senior family members at the hands of junior family members, the Code and the courts applied what amounted to a doctrine of strict liability and extremely heavy punishments were often meted out for total accidents. The official legal rationale was that the relationship of parents and offspring was so pivotal to society that accidents should simply not be allowed to happen.⁵⁴

Proximate cause, remoteness, foreseeability and related notions did not figure in the determination of guilt at all. Nothing was too remote to be considered causal; the chain of causation was virtually endless. Thus, in one case a daughter-in-law had lost track of time and neglected to buy some meat before her husband and parents-in-law returned from work. They arrived home for supper and she had only one dish of eggplant to offer. The mother-in-law was furious and scolded the daughter-in-law. Although the latter humbly accepted the rebuke, the father-in-law defended her and scolded his wife for having been so greedy and raised such a commotion. Consequently the mother-in-law, as one would expect, forthwith went out and hanged herself. Legal result? The daughter-in-law was sentenced to life exile because the court ruled that the cause of the older woman's death was the failure of the younger one to buy meat.⁵⁵

⁵³ J. S. Mill "On Liberty" in J. Robson, ed., *John Stuart Mill: A Selection of his Works* (1966) 1.

⁵⁴ Ch'ü, *supra*, note 10 at 44, 48. For a case involving a principle very similar to the western tort notion of transferred intent, see Bodde and Morris, *supra*, note 13 at 468. In this case a woman had killed her father-in-law while intending to injure someone else. As killing a parent constituted one of the ten "abominations" she was sentenced to death by slicing. However, the emperor had compassion upon the woman and commuted her sentence to immediate decapitation. The fact that she was pregnant raised a further fine legal problem. The law provided that pregnant women sentenced to slicing should be given one month before their execution in which to nurse their child. But women sentenced to the lesser penalty of immediate decapitation were entitled to one hundred days for the same purpose. Happily, legal logic decreed that in this case the mother was entitled to the full hundred days.

⁵⁵ *Id.* at 114.

In a very similar case, the beans a daughter-in-law gave her mother-in-law had not been sufficiently cooked. They were consequently too hard for the old lady, who was toothless, and hurt her gums. She reviled the daughter-in-law in strident tones, whereupon the latter tried to soothe her and provided her with some nice soft noodles. The old woman tried to eat the noodles but her gums still smarted, and the more she contemplated the wrong done her, the more indignant she became. Finally, unable to bear her mounting anger, she stormed out and threw herself down a well. Again this meant life exile for the daughter-in-law because the cause of the older woman's demise was held to be the hardness of the beans for which the daughter-in-law was clearly responsible.⁵⁶

No doubt it is explainable in terms of the tremendous emphasis on "face" in Chinese culture, but an extraordinary number of traditional "homicide" cases actually involve suicides who have either been physically injured or verbally abused by the accused before taking their own lives out of rage, humiliation or a combination of the two. The accused is almost always held liable for homicide in such cases.⁵⁷ What is particularly interesting, and somewhat amazing as well, is that we are by no means dealing with an extinct social or legal phenomenon. Suicides resulting from what would appear to westerners as rather trivial incidents still occur with some frequency in China. Several such anachronistic cases have been reported in Chinese newspapers and legal periodicals over the past few years.⁵⁸ Not only is the act of suicide itself difficult to credit in the circumstances, but the reports read very much like those reported in the Qing Dynasty and appear to rest on the same assumptions. More-

⁵⁶ *Id.*

⁵⁷ "Pressing a person into committing suicide" was one of the twenty plus varieties of homicide specified in the *Code*. See Bodde and Morris, *supra*, note 13 at 190-92 for examples of the myriad and bizarre forms of this offence.

⁵⁸ In one, a young woman committed suicide after a neighbour family which had occupied part of her land verbally abused her. *Xin Hua*, (7 June 1979) cited in *JPRS-73682*, (19 July 1979) (*China Report* — Political, Sociological, Military Affairs No. 2). In the second case, another young woman killed herself after a brigade leader had attempted to coerce her into marrying his son. *Jinan Shandong Provincial Service Broadcast*, (2300 GMT, 30 July 1979) cited in *JPRS-74012*, (15 August 1979) (*China Report* No. 10, 85). In another, an aged couple took their lives in response to long-standing mistreatment by their sons and daughter-in-law. "Three Jailed for Maltreating Parents", *Ta Kung Pao*, (17 July 1980). In the words of the commentator:

Unable to tolerate this, Wang Meifang committed suicide by taking poison . . . Wang Weili (the accused) behaved unscrupulously . . . to encroach upon the property of another and caused her death. . . what he did was a criminal act.

All three cases are treated below.

over, the traditional assumptions with respect to causation are still entirely operative. In all three suicide cases cited above the person provoking the suicide was declared by Chinese courts to be directly responsible for the death.⁵⁹ In no case does there appear to have been any recognition that there was an element of *choice* involved or that any responsibility rested with the suicide himself. Moreover, both the 1980 *Criminal Code*⁶⁰ and the 1950 *Marriage Law*⁶¹ contain sections which seem specifically designed to cover this kind of situation.

Probably the most important characteristic of the traditional Chinese legal system, particularly for the purpose of assessing and comprehending the legal machinery established since 1979, is that its very basis was the principle of *inequality* before the law. In theory, the new Chinese criminal justice system is unequivocally committed to implementing the principle of *equality* before the law. This principle is specifically set out in the new *Law on Criminal Procedure*⁶² and it has been stressed to the point of monotony in the Chinese press and in Chinese legal publications for the past several years.⁶³ The likelihood of achieving equality before the law is slim. First, the weight of millenia must be overturned; not since 208 B.C. has a legal system based on equality before the law operated in China. Second, there have been many ambiguous statements on the equality issue from Beijing.⁶⁴

⁵⁹ *Id.*

⁶⁰ Article 179.

⁶¹ Article 26.

⁶² Article 4, which reads in part "All citizens are equal in the application of the law. No privilege whatsoever is permissible before the law".

⁶³ From the beginning of 1978 a radical theoretical swing away from *li* toward *fa* (certainty) is unmistakable in the Chinese media. In stark contrast with the pre-1976 editorials "in praise of lawlessness", almost every legal statement since 1978 has emphasized both certainty and equality. For example:

In respect to administration of the law, all citizens are equal irrespective of nationality, race, sex, *profession, social origin* (emphasis mine), religious belief, education, property and term of residence.

Zhang Zipei, "Basic Principles of the Law of Criminal Procedure" (9 June 1980) Vol. 23 No. 23 Beijing Review 23 at 24. The above statement would seem to clearly indicate an end to the legal class discrimination based on Mao's speech "On the Correct Handling of Contradictions Amongst the People".

⁶⁴ For example:

When we declare that all citizens are equal before the law, it is from the juridical point of view, that is, the law applies equally to all citizens. Legislatively, there is no stipulation that all citizens are equal; instead, the people must be distinguished from the class enemy. In this respect, upwards of 95 per cent of the population are considered as equals, but as treasonable and counter-revolutionary activities must be suppressed, so far as

traitors, counter-revolutionaries, newborn bourgeois elements and other bad elements are concerned, there is no equality for them with the people, but suppression of their sabotage activities. These provisions in the Constitution reflect the will of the proletariat and manifest the class nature of the law. "Active Judicial Circles" (12 January 1979) Vol. 22 No. 2 Beijing Review 34 at 35.

The confused reasoning flowing from the artificial dichotomy between "judicial" and "legislative" equality is symptomatic of an uneasy ambivalence which transcends most of the current Chinese legal writing. The continued reference to the ninety-five per cent "people" and five per cent "bad elements" having any kind of different status in law indicates an inability to come to terms with the new legal values which have been officially proclaimed.

Criminal law in China prior to 1976 was completely dominated by Mao's theory of "antagonistic" and "non-antagonistic" contradictions. Classification of the accused as one of the people, or as an enemy of the people, determined both the procedures used in determining guilt and the subsequent punishment administered. Now the principle is that all are equal before the law, yet here we are told this equality is only "judicial" and not "legislative". This is clearly an attempt to reconcile and somehow merge the old and the new in one system. But clearly these two concepts are entirely irreconcilable. The notion of equality necessitates legislating without distinction and subsequently punishing criminal transgressions without distinction. Thus criminality is defined by the objective criterion of violation of the law, whether the offender be proletarian or landlord. There is no room for any subjective standard based on prior categorization.

A recent article in a leading Chinese law journal indicates that the confusion over this issue continues. "Fa he Daode" *Zhongguo Fazhi Bao* (3 April 1981) 3. ("Law and Morality" *Chinese Legal Gazette*). The main thrust of the article is an attempt to clearly explain the difference between law and morality. It makes three distinct impressions upon the western reader. First, it underlines the extent to which law and morality have been indistinguishable in Chinese civilization. This has been a product of *li*, the idea that law meant something akin to ethics. It is precisely the tendency to treat law and morality as synonymous that accounts for such concepts as analogy and retroactivity, for catch-all statutes and for the ad hoc tendency. Second, one is impressed by the very basic conceptual level of the article and the clear indication that it is still very difficult for Chinese citizens to make the differentiation and come to terms with its implications. Finally, the article again launches into a theoretical discussion of the class basis of law, which raises questions about the commitment to the new principle of equality.

It is extremely difficult to assess theoretical articles which deal with the tension between equality on the one hand, and ideological theories of the class basis of law on the other. Much more is involved beneath the surface than the clash of ancient Chinese attitudes with very new ones. An increasingly sharp two-line struggle within the leadership of the Chinese Communist party has been waged since at least 1957. Basically, the struggle pitted Mao and his followers against a faction led by Liu Shaoqi and Deng Xiaoping.

Though Mao is gone and virtually all his policies and principles have been obliterated with unconcealed haste, it would be folly to assume that Maoist influence and sympathy have been completely expunged from the party and bureaucracy. It is therefore quite misleading to view China as a monolithic entity which has recently changed its values. The new legal, economic and political values now espoused are those which have always been promoted by Deng Xiaoping and those around him. China has not changed; rather one power group has replaced another.

With this in mind, one wonders whether the ideological rhetoric in current legal articles is taken seriously by the writers, or whether in fact such rhetoric is simply an attempt to placate the Maoist "left" with empty phraseology while constructing a "pragmatic" and essentially non-ideological system. Certainly there is every reason to suspect, given the history of law in China

Professor Richard Pfeffer has amply demonstrated the propensity of western critics of the Chinese legal system to err in their comparative legal analyses by comparing like to unlike.⁶⁵ For example, procedures and punishments under the dynastic codes are sometimes compared to their counterparts in present-day western legal systems for the purpose of demonstrating the alleged cruelty and barbarism of the Chinese system. The proper approach would of course be to compare legal practices obtaining in both eighteenth century China and eighteenth century Britain. When this is done it is easily demonstrable that the Chinese system was far more humane and enlightened than its British counterpart.⁶⁶ A more serious error, convinc-

since 1957, that China's intellectuals in general and legal scholars in particular have a distinct aversion to ideology. They may well be simply going through the motions in these articles. If this speculation is well-grounded, and if Deng or his followers retain power, we may well soon see complete abandonment of the attempt to rationalize the new legal system in Maoist or even Marxist terms. Consider how rapidly the stages of "de-Maoification" have unfolded from 1976 to the present.

In stage one, Mao was still revered, but it was pointed out that his policies had been "distorted" by the Gang of Four. The Cultural Revolution had been mainly positive though there had been some mistakes made in the course of it. But even in this first stage, the work of disassembling every aspect of Maoism was well underway. In stage two, it was declared that Mao had been a great man. However, he was only human and it was wrong to treat him as a god. In stage three, attacks were launched on the "cult of personality" and Hua Guofeng seems to have suffered to some extent from this development. In the course of these three stages almost every single one of Mao's bitterest political enemies was rehabilitated.

By stage four, the Cultural Revolution was described as *ten* years of total national disaster and tragedy completely unmitigated by any positive achievements whatsoever. It should be noted that the Cultural Revolution in fact was well over by 1971, but the new leadership has *ex post facto* lengthened it by five years in order to bring it right up to the time of the arrest of the Gang of Four.

The fifth stage was dramatically launched by the Chief Procurator's declaration at the Great Trial that Chairman Mao must bear responsibility for the terrible tragedies inflicted on the Chinese people in the course of the Cultural Revolution.

Stage six seems to involve a reassessment of Mao's historical role. If one views the rehabilitation of all Mao's erstwhile enemies, followed by the increasingly voluble criticism of Mao himself as part of a pendular swing, it seems likely that Mao may become a full-fledged villain before the swing terminates.

⁶⁵ "Crime and Punishment: China and the United States", in J. Cohen, ed., *Contemporary Chinese Law: Research Problems and Perspectives*, (1970) at 261.

⁶⁶ One need only reflect on the fact that dogs, horses and young children were all at one time hanged for "crimes" in Britain, to realize the truth of this statement. Diminished responsibility for children, the aged and the mentally or physically handicapped existed in all Chinese codes from 653 onward. Moreover, all death sentences in China were subject to an elaborate and painstaking appeal procedure. The concrete result was that only a small percentage of death sentences were ever executed. Unlike England, China never used the death sentence to deal with small property crimes. Finally,

ingly illustrated by Professor Pfeffer, is the comparison between the western *ideal* of law and the Chinese *practice* of law.⁶⁷

Equality before the law is an ideal of the American legal system. It is unimaginable that the correctness of the principle would be questioned by any American citizen. Few Americans would doubt that the principle is a fundamental underpinning of their legal system. Yet when Robert Earl May, a fourteen year old boy in Jackson, Mississippi, was sentenced to forty-eight years in prison with no chance of parole for the robbery of three firecracker stands and a convenience store,⁶⁸ every American could instantly visualize his skin colour without benefit of photograph. This was a penalty, in practice, reserved exclusively for black youngsters. It would be quite unavailable for use against any American citizen of pale complexion. Similarly, Florida has executed some hundreds of black men for the rape of white women but in the entire history of that state a white man has never died for the rape of a black woman.

The point is simply that it would be quite unfair and grossly hypocritical for any western critic to condemn the Chinese legal system on the basis that inequality and miscarriage of justice occur *in practice*. When we refer here to inequality before the law in China, it should be emphasized, therefore, that we are comparing like with like and that the ideals in China and the west have been, on this particular point, diametrically opposed. Despite its abysmal failure in practice, the United States clings to the theory, the principle of equality before the law. In short, equality is seen as a virtue. The Chinese, in contrast, practice aside, have historically completely rejected the theory of equality before the law and have enshrined the principle of inequality before the law.

Thus in formal cases adjudicated under the dynastic codes, the status of each party before the courts was almost always a primary issue. Frequenting prostitutes brought severe punishment to an official but was apparently not an offence where a commoner was concerned.⁶⁹ A commoner who struck an official was much more severely punished than was the official when the roles were reversed.⁷⁰ More-

even the most horrendous Chinese form of execution (slicing), which was invoked extremely infrequently, could not compare, in terms of sheer savagery, to the English practice of half-hanging, drawing and quartering.

⁶⁷ Pfeffer, *supra*, note 64 at 269.

⁶⁸ Reported in the *Windsor Star* (5 February 1979) by Associated Press.

⁶⁹ Bodde and Morris, *supra*, note 13 at 35.

⁷⁰ Ch'ü, *supra*, note 10 at 183.

over, officials could only be punished with the emperor's permission.⁷¹ But not surprisingly we find the greatest manifestation of legal inequality in the punishment prescribed for offences committed against family or clan members.

A son who struck a parent was subject to decapitation regardless of whether or not the blow resulted in injury.⁷² However, there was no penalty whatsoever where a parent struck a son, unless the son died. In that case the parent received one hundred strokes of the heavy bamboo if the son had been disobedient, and one year of penal servitude plus sixty strokes of the heavy bamboo if the killing had been entirely unprovoked.⁷³ A wife who had the temerity to strike her husband received one hundred strokes of the heavy bamboo.⁷⁴ A husband could only be punished for wife-beating if two conditions were satisfied. First, the beating must have inflicted significant injury. Second, the wife must personally have lodged the complaint against her husband.⁷⁵ Such a complaint, however, was most unlikely, as a specific statute provided three years of penal servitude for any woman who lodged a complaint against her husband, regardless of its validity.⁷⁶ Age was always a paramount issue. Hence a younger brother who struck an elder brother was subject to two and one half years of penal servitude and ninety strokes of the heavy bamboo, notwithstanding the fact that no injury occurred. There was, however, no penalty for an elder brother beating a younger one.⁷⁷ Even among more distant relatives the sole substantive issues to be determined were often simply whether the offence had been committed by a junior against a senior or vice versa, and the degree of consanguinity the parties bore to each other, as determined by their degrees of mourning according to the Confucian family system.

The principle of inequality permeated every area of the law and of society. The young were legally inferior to the old; women were legally inferior to men;⁷⁸ commoners were legally inferior to officials;

⁷¹ *Id.* at 178, 180.

⁷² Bodde and Morris, *supra*, note 13 at 37.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ She was also given one hundred strokes of the bamboo. Ch'ü, *supra*, note 10 at 105.

⁷⁷ Bodde and Morris, *supra*, note 13 at 38.

⁷⁸ To maintain a comparative perspective, it should be noted that only in 1931 did women become "persons" under Canadian law.

the "mean" classes (actors, prostitutes and transients) were legally inferior to commoners; and concubines were legally inferior to wives.

By 1949 the *theoretical* basis for these particular inequalities had been completely smashed. But in 1957, Mao Zedong's speech "On the Correct Handling of Contradictions Amongst the People" once again enshrined and legitimized the principle of inequality before the law, although the criteria for categorization was completely new. Mao held that all "contradictions" in Chinese society could be classified either as "antagonistic" (between the people and the enemy) or as "non-antagonistic" (legitimate differences existing among the people). From 1957 to 1976 this formulation constituted the foundation of the criminal law process in China.

There were two practical implications of this theory insofar as it affected the legal system. Firstly, if a given crime were judged to have been caused by disputes among the people, then in theory, due process, the right to speak and defend and so forth, were available to the accused. However, if the alleged crime were considered antagonistic then the accused was outside the "people"; normal restraints and safeguards were denied even before there had been a finding of guilt. Second, the punishment inflicted on two offenders for the same crime might be markedly different depending upon whether the circumstances of the crime were adjudged antagonistic or non-antagonistic. In the latter case the court emphasized rehabilitation of the criminal, whereas in the first instance the emphasis was on the ruthless crushing and suppression of counter-revolution.

Most of the illustrations which this article has drawn from the post-1979 Chinese practice of criminal law are from the first two years after the new *Criminal Code* and *Code of Criminal Procedure* were proclaimed. In November of 1984 I had an extensive and animated discussion in Shanghai with three Chinese legal scholars who left no doubt in my mind that the traditional Chinese attitudes toward criminal law and criminals continues to exert tremendous influence on contemporary legal thinking. We engaged in what the diplomats term "frank discussions" concerning, *inter alia*, the Analogy Provisions of Article 79, and the proper relationship between law and morality. Obviously, these two issues are inextricably linked. Not one of my three Chinese legal colleagues was in any way uncomfortable with the principle of sentencing by analogy or, for that matter, with even the retroactive application of criminal law. All three steadfastly maintained that no separation between law and morality is possible and that there should in principle be no objection to punishing an offender for an "immoral" act which is not contem-

plated by the *Criminal Code* and therefore not expressly prohibited.

I explained to them the western civil libertarian's insistence on differentiating between law and morality. In Canada, I explained, the social fabric is composed of diverse ethnic and religious groups. How could the morality of the Muslim or Sikh communities be legislated so as to prescribe norms of behaviour for Buddhists, Christians or Jews? Should religious practices of any of these communities affect the activities of the atheist or agnostic?

My friends replied that my argument was entirely sound for Canada, but not for China. China, they said, is culturally homogeneous. There is no moral pluralism. The entire Chinese nation shares one morality, one standard of right and wrong. It is for this reason that there is no inherent injustice in punishing criminally an act which offends accepted morality but not the *Criminal Code*. "But", I objected, "Chinese morality has not been static through history. Feudal morality was based on serfdom and the genetic inferiority of the woman. How could this ever have changed without individuals who challenged the conventional morality of the day? How can any society progress in the absence of these creative individuals who eschew convention? In any case, why should you *wish* to suppress the eccentric non-conformist, so long as he does not violate the law?"

I scored no points with any of these rhetorical questions. No one, I was told, has a right to do anything of which the rest of the community disapproves. As for the role which dissent may play in the historical development of human civilization, the most articulate of the Chinese scholars told me emphatically that social progress should result from *evolution* not from *revolution*!

It has been abundantly clear since 1979 that China is not one culturally homogeneous unit. The Chinese press and legal periodicals have been replete with exhortations to the Chinese public on the general theme of universal obedience to the new laws. These continuing admonitions are necessitated precisely by the fact that the population continues to embrace age old values and behavioural norms which are anathema to the current leadership.

The day following the discussion with my Shanghai legal colleagues that city's daily newspaper, *Wen Hui Bao*, carried a telling and chilling account of a marital dispute within a village family. A young wife had, in the course of an argument with her husband, struck the latter lightly. The husband's parents witnessed the event and were so outraged that they administered a beating to the daughter-in-law. During the course of defending herself she threw

something at the parents but missed. After a number of intervening events the case was submitted to the village Communist Party Secretary for informal adjudication. He made three fundamental findings. First, it was unpardonable for a wife to strike her husband under any circumstances. Second, it was completely just and appropriate that the parents should beat the daughter-in-law in the circumstances. Finally, the action of the daughter-in-law in throwing an object at her parents-in-law constituted an abominable crime which could not go unpunished. Ultimately the wife's uncle and sister came from outside the village to attempt a solution through informal discussion. But all three were beaten unconscious and the villagers, with the active participation of the Communist Party Secretary, decided that all three should be buried alive. Graves were dug and the three were on the point of interment when Public Security personnel arrived and intervened.

This event does not reflect badly on China's criminal justice system. The murders were prevented, the victims were saved and the village ringleaders (including the Chinese Communist Party Secretary) received moderate punishment in the courts. But what of the alleged cultural homogeneity? Here was the Party's representative, presumably the vehicle for the proselytization of the new law and the new morality participating in behaviour which clearly demonstrated that the collective, unanimous perception of "right" had crystallized in a Confucian response which has not changed in two thousand years.