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Chinese Law: An Inheritance?

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Dear Mr. Nolte,

Among the first acts of the present government in Mainland China was the abolition of all the legal institutions of the Nationalist Republic. By Article 17 of the Common Programme of the Chinese People's Political Consultative Conference (which served in place of a constitution until 1954) promulgated on September 29th, 1949,

> "All laws, decrees and judicial systems of the Kuomintang reactionary government which oppress the people shall be abolished. Laws and decrees protecting the people shall be enacted and the people's judicial system shall be established."

Since that time, although a constitution has been promulgated, there has been a remarkable absence of formal legislation, or at any rate of published legislation. There are no codes of either substantive or procedural law to replace the old ones, though they have at various times been promised, and there is a widespread belief amongst lawyers and others in the West that the result of the clean sweep of 1949 was the creation of a sort of legal vacuum, a state of 'non-law', in which a completely dictatorial regime acts without reference to any predetermined rules.

It is not my purpose to discuss the view, equally widely held in the West, that the law administered by the Mainland government so seriously violates generally accepted notions of legality and the rule of law as to make it doubtful whether we should apply the sacrosanct term 'law' to it at all, though I think that when applying this much fought over word to the legal system of a country largely outside the European and American jurisprudential tradition one is faced with a problem of definition that is not wholly illusory. What I should like to do is to draw attention to a problem which I believe to be fundamental to the study of modern Chinese law, that of the extent to which account must be taken of Chinese legal tradition. It has long been clear that the structure of Chinese institutions is not derived solely from other Communist models. Accordingly, it seems relevant to look for models elsewhere. It may be said at the outset that the old (imperial) legal system was, in terms of modern concepts, quite surprisingly 'soft' and loose-knit in view of the highly bureaucratic nature of Chinese government. It is against this background that I should like to discuss some aspects of the Chinese legal 'vacuum'.

The assumption that a legal vacuum was created in 1949 has gained currency in the West partly because of the lack, until quite recently, of any authoritative study of the subject in Western languages. It has been supported, somewhat naturally, by those who were closely

connected with the sophisticated legal system of Nationalist China, carefully constructed to integrate traditional institutions (so far as they were to be preserved) with a systematically arranged set of organizing principles of the modern Western kind. Official and professional opinion in Taiwan has had the backing of such writers as Father Andre Bonnichon, former Dean of the Faculty of Law at the University "L'Aurore" in Shanghai, who in an eloquent memorandum addressed to the International Commission of Jurists asks whether we would not be justified in concluding that "to the extent in which law stands as general rule and prevision, it is and must be considered as banished from the communist city."

It was clear from an early stage that there is no lack of judicial organization in China. Recent discussion of the judicial system by Western scholars has made known at least the broad outline of the hierarchy of courts and of the organization of the procuracy. The texts of the "Provisional Regulation Governing the Organization of the People's Courts of the Chinese People's Republic" (1951) and of the instruments which replaced it, the "Constitution of the People's Republic of China" (1954) and the "Organic Law of the People's Courts of the People's Republic of China" (1954) issued pursuant to the Constitution, have been translated and analysed. They reveal a judicial system that has no exact parallel in other Communist states, though certain features, such as the presence of a strong procuracy, functioning on the same levels as the various courts but through a separate administrative hierarchy, invites comparison with other Communist models.

Although accounts of individual cases decided in these courts have been secured and analysed, it is doubtful whether there is enough material available outside China on which a comprehensive assessment of the jurisprudence of even the Supreme People's Court could be based, far less that of the subordinate courts. It is not my present purpose to try to make such an assessment. I merely wish to draw attention to two kinds of tribunal which have aroused the particular interest of Western scholars as putting a special stamp on the Chinese legal system, and which I believe to be related to my topic.

First, the special People's Tribunals, apparently set up initially in accordance with Article 32 of the Agrarian Reform Law, (1950), for the special purpose of implementing that law, and subsequently extended to the cities in 1951-1952 in the furtherance of various social and economic changes. The life of these courts was a limited one, but their procedure and conduct made a great and lasting impression on the West. Although the "Organic Regulations of the People's Tribunals" (1950) laid down rules for the election of the presiding judge, his deputy and half the associate judges, it seems clear that these tribunals were in most cases large, informally constituted assemblies which did justice of the roughest kind. They were, as their organic law made clear, the embodiment of the principle of using "dictatorial methods" in the war against enemies of the people and of the revolution which has long been a feature of the Chinese Communist programme and which is well summed up in the words of Mao Tse-Tung:

"The contradictions between ourselves and our enemies are

antagonistic ones....."

"Since the contradictions between ourselves and the enemy and those among the people differ in nature, they must be solved in different ways. To put it briefly, the former is a matter of drawing a line between us and our enemies, while the latter is a matter of distinguishing between right and wrong. It is, of course, true that drawing a line between ourselves and our enemies is also a question of distinguishing between right and wrong.....but it is different in nature from questions of right and wrong among the people." (Speech "On the Correct Handling of Contradictions among the People", 27 February 1957.)

Although Article 32 of the Agrarian Law provided the People's Tribunals to be established should

"...try and punish, according to law, the hated despotic elements who have committed various crimes and whom the masses of the people demand to be brought to justice..."

the words "according to law" seem to have gone no way at all towards restricting the activities of these mass tribunals to any predetermined procedure, if contemporary accounts are to be believed. There was no provision for appeal, which may be taken as a confirmation of the view that these bodies were deliberately given a free hand. Indeed, in 1957, when these tribunals were no longer operating, and when reparations for some of their mistaken decisions were being discussed openly, it was still made clear that

"The dictatorship of the proletariat resembles the dictatorship of any exploiting class in that it is a regime directly based on force, and not subject to restraint from laws or regulations of any kind".(Mao Tse-Tung, Lectures on the Theory of State and Law, 1957.)

Thus, while the state set up the People's Tribunals, it deliberately refrained from laying down, at least explicitly, the principles on which they were to operate. The way in which the Tribunals are reported to have functioned suggests that the members of each community visited by the peripatetic judges were deliberately involved in what might be called a corporate act of justice, according to principles formulated on the spot - no doubt with some prompting. The use of the dictatorial method in dealing with 'enemies of the people' was never in doubt, but, outwardly at least, it was the local group and not the national one that did the dictating.

The second group of institutions which have aroused interest are those concerned with arbitration. Although the jurisdiction of the courts as defined by the Organic Law of 1954 extends to civil as well as criminal cases, it has been shown that from the earliest days of Chinese Communist organization the settling of purely private disputes has not been considered a primary function of the People's Courts. Arbitral bodies are expected to play a much larger part in the settlement of disputes than would be the case in any other major legal system.

The number and nature of these bodies still seems to be rather obscure. It is known that in certain areas of the law, divorce law, for example, arbitration or conciliation is a prerequisite to other proceedings, and in other kinds of dispute court personnel seem to be active as arbitrators and conciliators. Arbitration is not necessarily voluntary or contractual in nature, as in Western legal systems. Though it is not necessary to resort directly to arbitration of one's own volition, parties to lawsuits are liable to be ordered to submit to it.

Arbitration is a service provided for in the stucture of the communes, where, indeed, the regulatory powers of the minor tribunals are quite extensive; Article 26 of the Draft Regulations for the Weihsing (Sputnik) Commune - published in 1958 as a model - provided that

> "...Anyone causing loss to public property by negligence must be criticized, or dealt with by disciplinary measures by the commune. Cases of corruption, theft or destruction of public property must be handled in a serious manner; those involved in serious cases should be referred to the higher judicial departments to be punished according to law." (Emphasis added)

The result of all this seems to be that a large proportion of disputes, including some disputes which we would characterize as criminal cases, are settled on a non-legal basis, or at least on a basis of locally determined rather than nationally determined laws or customs. In the case of both the arbitral tribunals and the People's Tribunals we are confronted with an extensive delegation of law- making, or law-finding functions to local judicial bodies. Though, just as the People's Tribunals were established to carry out a specific state policy, the arbitrators have to bear in mind state policy in reaching their decisions, at face value both institutions had a wide degree of local autonomy in their means and procedures.

It is very much a feature of the legal system of traditional China that the courts should only play what is virtually an auxiliary part in the settlement of disputes and the enforcement of rights. The legal system of imperial China rested largely on the principle that the juridical relationships of individuals should be regulated within the groups to which they belonged - for example families, clans, mercantile and industrial guilds, etc. The imperial codes were almost entirely concerned with administrative and criminal law. (While it is true that the criminal provisions of the codes contained rules of civil law, including some legislative reforms of the customary law, the predominantly criminal character of imperial law was very marked.) Questions of private law only came before the state authorities by way of criminal proceedings. It was an accepted policy that such litigation should be discouraged as interfering with the natural and social harmony which it was the emperor's duty to maintain; and the atmosphere of a criminal trial in old China was calculated to deter all but the most optimistic litigants.

The curious absence of an organic connexion between the state judicature and the private law was also reflected in the rules of

the groups themselves. Thus out of 151 sets of clan rules (which are themselves often virtually codes of law for their members) analysed by Mrs. H.-C. W. Liu in a recent book, 57 had rules requiring the arbitration of intra-clan disputes. Of these, 27 prohibited litigation without prior arbitration (only 10 permitted it expressly when arbitration proved unsatisfactory) and 14 actually prohibited disobedience to the arbitral award by resort to the courts. In addition, it is clear that the social stigma attached to those who went to court was a further deterrent, even where no express rule was made. Many of these rules give their reasons; some of these are connected with the corruption of officials under the old regime, the unpredictable nature of decisions, the costliness in time and money of litigation. Others refer to the risk of alienating other clan members and other members of the community, and also to the risk of torture and punishment. Many clans also enjoined their officers to dissuade members from litigating against non-members. As one rule puts it, in words which would not seem out of context in modern China, "Whether one is right or wrong can be readily ascertained by the public opinion in the neighbourhood and the community."

Groups such as these made and enforced their own law, both civil and criminal, to use the Western terminology, and the imperial administration accepted and perhaps encouraged this. The protection by a legal system of the independent functioning of sub-systems is by no means unknown in the legal history of other countries. Even today, among the highly centralised legal systems of Western Europe there are some which recognize and enforce arbitration clauses in contracts which oust the jurisdiction of the courts altogether. What strikes me particularly about the Chinese experience, however, is that for reasons which I cannot now discuss the courts of a highly organised, bureaucratic country made no attempt to extend their jurisdiction. This suggests a remarkable divergence between Chinese expectations of a legal system and those of other communities. I would also suggest that the structure of the modern institutions which I have referred to bears such a resemblance to much older bodies in its reliance on decentralisation as to point to the continued existence of these expectations.

The extent to which the legal tradition was modified by the introduction of codes modelled on the Western system of jurisprudence betwwen 1914 and 1949 is uncertain, but few scholars seem to claim that the system had much influence outside the large cities where the demands made by contact with the West had to be satisfied and where a bar and trained personnel could be found. One of the commissioners for the codification of family law himself admitted that a dispute in his family would be settled according to custom rather than in accordance with the new code. Writing in 1926, at the height of the codification movement, in which he himself was deeply involved, Jean Escarra wondered whether the Chinese would not "turn from courts and modern laws back to their old preferences for conciliation, compromise, arbitration within the family circle, guilds, professional associations, which are in truth their provincial and communal framework, their true form of government."

The new regime has swept away many of these old institutions, but we should not be too surprised if old ideas of group justice still appear on the surface. The Western jurist's model of law as a rational, closed system of concepts probably has little to do with what the Chinese expect of their legal system. When we examine the law of modern China, we cannot but apply to it our own conceptual model, and we must also compare it to other Communist systems. But if we fail to form a coherent picture of the likely expectations of those who live under the system, in traditional as well as modern terms, we shall be neglecting something important.

Yours sincerely,

Anthony Allott

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