

ABSTRACT OF

**THE IMPACT OF TRADITION UPON
CHINESE COMMUNIST
CRIMINAL PROCEDURE**

A Note on the Right to Counsel

JEROME ALAN COHEN
Harvard Law School

IF ONE IS CAUTIOUS ABOUT avoiding the pitfalls of both over- and under-emphasizing the continuity between Imperial and Communist patterns of rule in China, it will be found that significant aspects of current Communist Chinese criminal procedure bear a striking resemblance to prerevolutionary methods and concepts, and that the similarity may provide an important focus for research on Communist Chinese law. The Chinese procedures differ sharply from those in both the U.S. and even in the post-Stalin U.S.S.R., where the principle of providing the defendant with adequate means for presenting his own case, accepted as fundamental in Western democratic systems, has been making halting progress and where the Soviet bar has gained prestige through its active defense of individual rights. Similar tendencies have appeared periodically in China, but have been suppressed for reasons which warrant close inspection.

After the Communist takeover in 1949, strenuous efforts were made to suppress the practice of former lawyers, who used various subterfuges to continue practice. But the new Constitution of 1954, following the Soviet model, arranged for the training of large numbers of "peoples' lawyers" to serve in Soviet-type collective law offices. By 1956, embryonic attempts at defense of the individual were beginning to win support for lawyers from sections of the urban population, and arguments in behalf of a legal profession were being circulated by official sources.

Yet there were both deeply-felt Party and popular suspicions about the need for a legal profession, with its implications of social conflict and official fallibility.

The unanticipated wave of criticism of Communist practices which came from lawyers and other parts of society during the brief "hundred flowers" period resulted in the crushing repression of the summer of 1957. This put an end to plans for an adversary system and a professional bar. While systematically denouncing the Western-style legal system which had been imported from the Soviet Union during Communist China's first decade, Chinese writers frequently denied any connection with Imperial Chinese practices. Occasionally, however, the non-Westernness of the Imperial tradition has been invoked as a means of justifying rejection of the Soviet model. Lawyers are portrayed as being traditionally suspect in China because of their assistance to mercenary exploiters of the masses. Ideological as this may sound, there is ample evidence that such a view of lawyers might be justified on the basis of China's prerevolutionary experience. "Litigation tricksters," who stirred up litigation outside the courtrooms of traditional China despite the fact that trial representation was generally prohibited, provided the Chinese with an unfortunate model of the legal "expert." Moreover, in the early period of the Republic, an ill-trained, unethical professional group grew so fast and proved so disruptive that the Government took various urgent steps to curb its growth.

However unpopular the lawyer's role, though, historical continuity lies more in governmental than in popular attitudes. The inquisitorial pattern, reaffirmed by the 1957 repression, resembled Imperial practices in many respects. Exclusion of defense counsel reflected the view of law and legal institutions as instruments for the expansion of state power. The "trial" is merely a process of judicial inquisition in which defense counsel are denied access even to the information that the "trial" is occurring. Public trials occur only where officialdom expects them to have educational value. The individual's fate depends, therefore, on the conscientiousness and ability of Government and Party officials. No independent challenge to state authority is permitted.

While this continuity does not "prove" a causal link between traditional and modern practices, Imperial practices have offered no contrary model as an ideological hurdle. Further study is needed before we can say more than that this continuity with Imperial Chinese practices at least reinforces the Chinese Communist attitude toward the criminal process.