



Qiang Fang

# The Communist Judicial System in China, 1927-1976

## Building on Fear

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in China, 1927-1976



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*Qiang Fang*

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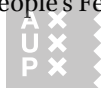
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*Dedicated to my parents*



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# Acknowledgement

In 2009, when I was revising my first book on the Chinese complaint systems, I went to the Shanghai Municipal Archives, arguably the best and most open official archive in China today, to read archives pertaining to law, police, and court in both the Republic of China and the People's Republic of China. But my eye was suddenly caught by a plethora of archives on the Shanghai People's Court in the 1950s. After spending a couple of weeks in the archives, I found that the archives of the Shanghai People's Court had never been studied before and could be a very good research topic for my second book. Fortunately, the Chinese government policy was relatively tolerant at that time and there was no limit for me to photocopy almost whatever archives I wanted, albeit all copies had to be approved in advance and stamped by officials in the archives. The situation became drastically hostile and stricter after 2013 as the Shanghai Municipal Archives began to limit the number of photocopies to at most one third of each archive. Given the fact that many archives contained pages ranging from ten to more than one hundred, it would be rather cumbersome for researchers to type or write down what they needed. Making matters worse, archives related to politically sensitive issues such as the people's court, police, death penalties, or political campaigns would no longer be approved to be read, much less photocopied. Fortunately, prior to the new draconian policy, I had already gleaned the bulk of legal archives I could find. I am still grateful to the staffs in the Shanghai Municipal Archives for their assistance.

While I have been distracted by some other duties since 2010, I manage to write about one chapter each year and present it at the annual conferences organized by the American Historical Association (AHA), the academic gathering organized by Chinese Historians in the United States (CHUS), or the Association of Chinese Professors in Social Sciences (ACPSS). In the summer of 2019, I was invited by Professor Yang Songtao to present part of my book in the law school at Henan University where I had received many valuable suggestions and comments from Professor Yang, Chen Shuang, a history professor at the University of Iowa, and some students.

This book has also benefited greatly from official documents and archives collected by Professor Cao Shuji and the history department at Shanghai Jiaotong University. Most notable ones are the court and police archives of Liangshan, Jiaying, and Neixiang counties from the early 1950s to the end of the Cultural Revolution. The University Service Center for China Studies at the Chinese University of Hong Kong holds one of the most comprehensive

collections of the PRC in the world including many local legal gazettes and documents. Some staffs in the center have been very friendly and helpful during my visits there. The staffs at the Taiwan Academia Sinica library and professors such as Lai Hui-min at the Institute of Modern History have also been very kind to me.

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*Qiang Fang*  
*January 2021*



# Acronyms

CCP	Chinese Communist Party
COCR	Central Organization of the Cultural Revolution
GMD	Nationalist Party
OLC	Organic Law of the People's Court
PRC	People's Republic of China
ROC	Republic of China
SPC	Shanghai People's Court
SPSB	State Political Security Bureau
SRPS	Six Regulations of Public Security





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# Introduction

## Abstract

The book starts with recent cases in which several prominent Chinese dissidents have been punished under the crime of threatening state security. The Introduction then examines the long history of governmental imposition of draconian penalties on people for fear that they may threaten the rulers or ruling parties. The Communist judicial system in China is a hodgepodge that is a mixture of Soviet laws, Republican laws, and traditional Chinese legal norms. Throughout the Mao era, Communist judges had been swung from “left (law was a tool of the Party)” to “right (upholding basic legal principles).” During political campaigns, judges were required to stick to central policies to punish so-called political enemies severely. When the campaign subsided, many judges including top judicial officials began stressing legal principles.

**Keywords:** building on fear, legal hodgepodge, judicial pendulum

## Building on Fear

In December 2017, the Second Tianjin Intermediate Court sentenced Wu Gan, whose internet nickname was “Super Vulgar Butcher,” to eight years in prison. The verdict accused Wu of “seriously threatening state security and social stability,” a crime synonymous with “counterrevolutionary” in the era of Mao Zedong (c. 1927-1976). Among his main “crimes” were providing legal support to victims of local government abuses, expressing anti-government rhetoric on the internet, “[O]rganizing boisterous protests outside courthouses and government offices,” and conducting illegal demonstrations.<sup>1</sup> Among many Westerners, Wu Gan is not as famous as other Chinese political dissidents such as Liu Xiaobo, the 2010 Nobel Peace Prize

<sup>1</sup> Chris Buckley, “Chinese Activist Sentenced to 8 Years in Prison for Shaming Officials” in *The New York Times*, December 26, 2017.

winner, and Fang Lizhi, a leading figure in the 1986 student demonstrations.<sup>2</sup> Since 2008, the Chinese Communist Party (CCP) has beefed up crackdowns against outspoken political critics and Wu Gan was just one of the many minor targets. Liu Xiaobo was sentenced to eleven years of imprisonment in 2009 for his championing of a “democratic charter.” In 2014, a Beijing court convicted Xu Zhiyong, a civil rights lawyer, for “gathering a crowd to disturb public order” and sentenced him to four years in prison.<sup>3</sup> In June 2016, two dissidents in Zhejiang who had tried to promote a political party and “published prodemocracy essays on overseas websites” were harshly punished with eleven years in prison.<sup>4</sup>

The People’s Republic’s campaigns against political dissenters and critics are by no means limited to the provinces of the mainland. The Party’s long arm has extended to territories considered to be part of China or even to other countries. In late 2016, for example, several booksellers were kidnapped by Chinese agents in Hong Kong, a semi-autonomous city, and in Thailand, a fully independent foreign country. They were taken to China and interrogated about their plan to publish a gossip book about the private life of China’s president Xi Jinping.<sup>5</sup> In the early summer of 2017, Lee Ming-cheh, a Taiwan activist attempting to assist China’s democratic movements, was charged by a Chinese court for “colluding with individuals” in China and “establishing an illegal organization and implementing activities to subvert state power.” For that alleged crime, Lee, in spite of being a Taiwan resident, would spend the next five years of his life in a Chinese prison.<sup>6</sup> Aside from political crackdowns, the CCP has appointed student spies to monitor college teachers’ lectures. It has installed millions of surveillance cameras with facial-recognition technology to oversee lives of ordinary citizens.<sup>7</sup> Reports

2 For Liu Xiaobo see “China: Democratic Voice Liu Xiaobo Dies in Custody” in *Human Rights Watch*, July 13, 2017 <https://www.hrw.org/news/2017/07/13/china-democratic-voice-liu-xiaobodies-custody>; for Fang Lizhi see Fang Lizhi 方励之, *Autobiography of Fang Lizhi (Fang Lizhi zizhuan 方励之传)* (Taiwan: Tianxia yuanjian chubanshe, 2013).

3 Jonathan Kaiman, “China Upholds Four-year Sentence of Activist Xu Zhiyong” in *The Guardian*, April 11, 2014.

4 Chris Buckley, “2 Chinese Activists Sentenced to Over 10 Years on Subversion Charges” in *The New York Times*, June 20, 2016.

5 Michael Forsythe, “If China Meant to Chill Hong Kong Speech, Booksellers’ Case Did the Job” in *The New York Times*, November 7, 2016.

6 Chris Horton and Chris Buckley, “China Charges Activist From Taiwan with ‘Subverting State Power’” in *The New York Times*, May 29, 2017.

7 Javier C. Hernandez, “Professors, Beware. A ‘Student Information Officer’ Might be Watching” in *The New York Times*, November 1, 2019; Emile Dirkes and Sarah Cook, “China’s Surveillance State Has Tens of Millions of New Targets” in *Foreign Policy*, October 21, 2019; <https://foreignpolicy.com/2019/10/21/china-xinjiang-surveillance-state-police-targets/>

also show that, in the past few years, the CCP has opened new fronts and attacked alien and untrustworthy religions such as Christianity and Islam by destroying churches and mosques.<sup>8</sup>

With millions of armed soldiers and police, why can the CCP and its judiciary not tolerate small-scale protests or moderate criticism? Why do the Communist courts inflict severe punishments on political activists whose numbers are scanty and evidence of “crimes” is flimsy? Why does the CCP hire students to spy on college professors? And what does the CCP really want to find out from millions of surveillance cameras? The best answer to these queries should and has to be the “fears” of the CCP: fear of insecurity, fear of people’s uprising, and above all fear of losing power. According to British philosopher John Locke, “Fear is an uneasiness of the mind.”<sup>9</sup> More recently, Corey Robin has argued about political fear, “It is not only the powerful who wield fear and the powerless who are afraid. People with power are themselves often seized by a fear of those without it.”<sup>10</sup> In other words, the fear of losing power compels rulers or ruling parties to routinely seek to intimidate potential foes. During the French revolution, Napoleon Bonaparte rejected the peace proposal of other European countries because he understood that his power and intrepidity hinged on strength and war. “I am an upstart soldier,” Napoleon said, “my domination will not survive the day when I cease to be strong, and therefore feared.”<sup>11</sup> Like Napoleon, the CCP, haunted by its constant apprehension of losing power, would employ draconian laws and the judicial system as the instrument or “knife hilt” (*daobazi*) of the Party.<sup>12</sup> It considered any political crimes, however minor, as a threat to the Party’s very survival.

In retrospect, most, if not all, rulers in China’s long history, like the CCP, relentlessly exercised law and the judicial system to punish or even eliminate opponents or potential enemies who may threaten their power or security. As Herrlee G. Creel has remarked, Zhou Wuwang, the martial founder of the Zhou dynasty, frequently imposed the death penalty against

8 Steven Lee Myers, “A Crackdown on Islam Is Spreading Across China” in *The New York Times*, September 23, 2019.

9 John Locke, *An Essay Concerning Human Understanding* (London: H. Woodfall, 1768): 187.

10 Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2006): 20.

11 Dennis Sherman and Joyce Salisbury, *The West in the World: A History of Western Civilization* (New York: McGraw Hill, 2011): 536; William H.C. Smith, *The Bonapartes: The History of a Dynasty* (London: A & C Black, 2007): 65.

12 For the judicial system being a knife hilt of the CCP see Qiang Fang and Xiaobing Li, *Power Versus Law in Modern China: Cities, Courts, and the Communist Party* (Lexington: University Press of Kentucky, 2017): Ch. 1.





lawbreakers, including his brothers, to consolidate his new dynasty and authoritarian rule. Wuwang's policies were later applauded by Lord Shang,<sup>13</sup> one of the most renowned legalists in ancient China who has been criticized as "the author of a despotic concept of law that placed the ruler at the pinnacle of the state."<sup>14</sup> Overwhelmed by fear of criticism, Liwang (890-828 BCE), another brutal and paranoid Zhou ruler, hired agents to monitor and execute whoever dared to speak ill of him. His extreme cruelty eventually triggered a mass rebellion that banished him.<sup>15</sup> Having conquered the other six states in 221 BCE, the First August Lord of the Qin (*qinshihuang*) imposed harsh punishments on newly identified crimes to deter any critics. Anyone who "accidentally or unintentionally cited" (*ouyu shishu*) Confucian texts could be put to death. Slanderers against the ruler or government could have their whole family executed. As a result of this law, hundreds of scholars reportedly were buried alive under the charge of defaming Qinshihuang.<sup>16</sup>

In the Western Jin (266-316), any subject or official who verbally or physically offended the ruler could be deemed a great traitor (*dani*) and, according to the Wei Code, could be chopped by half at the waist.<sup>17</sup> In the early Tang dynasty (618-907), the rulers promulgated the Tang Code whose impact on future periods was so great that as much as 30-40% of the code remained in the Great Qing code.<sup>18</sup> Many Tang rulers including Tang Taizong could respect judicial independence,<sup>19</sup> but Tang rulers inherited the Ten Serious Crimes of the Northern Qi (550-577) and changed them into the Ten Abominations. The first three abominations were all about rebellion, sedition, and betrayal. Violators of the first three abominations would be

13 Herrlee G. Creel, "Legal Institutions and Procedures during the Chou Dynasty" in Jerome A. Cohen, R. Randle Edwards, and Fu-mei Chang Chen, eds., *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980), pp. 26-55: 53-55.

14 Karen Turner, "War, Punishment, and the Law of Nature in Early Chinese Concepts of the State" in *Harvard Journal of Asiatic Studies*, Vol. 53, No. 2 (Dec., 1993), pp. 285-324: 312.

15 Zuo Qiuming 左丘明, *Discourses of the States* (*guoyu* 国语) (Shanghai: Shanghai guji chubanshe, 2015): 45-46.

16 Sima Qian 司马迁, *Historical Record* (*shiji* 史记) (Beijing: Zhonghua shujū, 2014): 1:329.

17 Zhang Jinfan 张晋藩, ed., *History of Chinese Judicial System* (*zhongguo sifa zhidushi* 中国司法制度史) (Beijing: Renmin fayuan chubanshe, 2004): 65.

18 William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995): 22.

19 Many Han and Tang rulers respected judicial independence and the supremacy of the law. See Qiang Fang and Roger Des Forges, "Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in Chinese History" in *Stanford Journal of International Law*, Vol. 44.1, 2007, pp. 101-146; also see Lin Qian 林乾, *Power and Law in Traditional China* (*chuantong zhongguo dequan yufa* 传统中国的权与法) (Beijing: Falü chubanshe, 2013): 194.

executed. People who refused to report the grave crimes to the government would be strangled.<sup>20</sup>

The political and military upheavals after the Tang prompted many rulers to adopt cruel punishments such as death by slicing (*lingchi*) for traitors. After losing large northern territories and two emperors to the Jin dynasty, Southern Song rulers were spooked by the prospect of losing power and they were said to have meted out more capital punishment by slicing than their predecessors had to strengthen their fragile dominion.<sup>21</sup> Zhu Yuanzhang, the commoner founder of the Ming dynasty (1368-1644), was a typical rags-to-riches model in Chinese history. Yet, his modest social origins may have made him fearful of being opposed and betrayed. During his reign, Zhu Yuanzhang had not only inherited harsh penalties from the Song targeting rebels and traitors but also launched major assaults against alleged treacherous and libelous officials that resulted in tens of thousands of deaths of innocent people.<sup>22</sup> In the late Ming period, weak rulers and bureaucratic factions resulted in harsh punishment and death of some officials from the Donglin faction and their opponents who were charged with allying with powerful eunuchs.<sup>23</sup>

In the last stage of the dynasty, Manchu rulers remained alert and anxious after overcoming rebels and Ming loyalists and taking power in Beijing in 1644. They continued to fear the prospects of resistance and rebellion on the part of the majority ethnic Han Chinese and they adopted severe laws and marshaled powerful forces to suppress evident and latent opponents. Jonathan Spence has analyzed the case of Zeng Jing, a Ming loyalist in the Yongzheng reign who failed to persuade a Han governor to rise against the Qing. While Yongzheng tried to use the Zeng Jing case to demonstrate his magnanimity, his son Qianlong put Zeng to a brutal death.<sup>24</sup>

20 Xue Yunsheng 薛允升, *A Combined Edition of the Tang and Ming Codes (tangminglu hebian 唐明律合编)* (Beijing: Falü chubanshe, 1999): 2-3.

21 Kong Xue 孔雪, "The Origin of Lingchi and its Development in the Song Dynasty (*lunlingchi zhixing deqiyuan,jizai songdai defazhan 论凌迟之刑的起源及在宋代的发展*)" in *Shixue yuekan 史学集刊*, Vol. 6, 2004, pp. 38-47; for a complete good study of *lingchi* see Timothy Brook, Jerome Bourgon, and Gregory Blue, *Death By a Thousand Cuts* (Cambridge, Ma: Harvard University Press, 2008).

22 Wang Tianyou 王天有 and Xu Daling 许大龄, *Sixteen Emperors of the Ming Dynasty (mingchao shiliudi 明朝十六帝)* (Beijing: Zijincheng chubanshe, 1991): 1-38.

23 John Dardess, *Blood and History in China: The Donglin Faction and its Repression, 1620-1627* (Honolulu: University of Hawaii Press, 2002).

24 Jonathan Spence, *Treason by the Book: Traitors, Conspirators and Guardians of an Emperor* (London: Penguin Books, 2012).



With the establishment of a Republic in 1912 and the drafting of constitutions that guaranteed citizens' rights to speech and a political representation, the use of harsh penalties to deter and punish political foes was ostensibly obsolete. Indeed, Sun Yat-sen abolished official privileges, while Yuan Shikai and subsequent Republican leaders labored to create what might be called a "golden age" for aggrieved complainants.<sup>25</sup> In the late 1920s, however, members of a nascent Communist Party came into conflict with warlords and a young Nationalist Party (the Guomindang, or GMD). Some Communist leaders such as Li Dazhao lost their lives.<sup>26</sup> After the Nationalist Party split with the Communists in 1927, they founded a government under Chiang Kai-shek, which had from the very beginning engaged in prolonged and violent wars with the CCP. Unlike its counterpart in the early Republic, the judicial system of the GMD became increasingly politicized.<sup>27</sup> The specter of Communist subversion and a plot to monopolize power had always topped the GMD's concerns. In March 1928, the GMD legislature passed the Provisional Law Punishing Counterrevolutionaries to prevent efforts to overthrow the government or other political crimes. In the 1930s, the GMD promulgated more laws such as the Self-surrendering Law of the Communists that applied penalties ranging from ten-year incarceration to death against any person who plotted to disturb social security.<sup>28</sup> In Shanghai, GMD police collaborated with foreign concessions and local courts in campaigns arresting Communists. According to Frederic Wakeman Jr, courts in Shanghai concessions asked local police to arrest suspected Communists on a list sent by GMD provincial government. Moreover, GMD agents under spymaster Dai Li had virtually full power and impunity in detaining and torturing Communist suspects.<sup>29</sup>

From its inception, the CCP judicial system was built amid a life-and-death military struggle with the GMD. The CCP's overriding goal was survival on which the Party could create an army and judicial system. To ensure

25 Qiang Fang, *Chinese Complaint Systems: Natural Resistance* (Abingdon: Routledge, 2013): Ch. 5.

26 For a good study of Li Dazhao see Maurice Meisner, *Li Ta-Chao and the Origins of Chinese Marxism* (Cambridge, Ma: Harvard University Press, 1967).

27 For the politicization of the GMD judicial system see Xiaoqun Xu, *Trial of Modernity: Judicial Reform in Early Twentieth-Century China, 1901-1937* (Stanford: Stanford University Press, 2008).

28 Liu Hengwen 刘恒姝, Revolution and Counterrevolution: A Study on the GMD Law in the Period of Nanjing Nationalist Government (*geming/fangeming: Nanjing guomin zhengfu shiqi guomindang defalü lunshu* 革命/反革命: 南京国明政府时期国民党的法律论述) in Wang Pengxiang 王鹏翔, ed., *Legal Thoughts and Social Vicissitudes in 2008 (2008 falü sixiang yushehui bianqian 2008 法律思想与社会变迁)* (Taiwan: Academia Sinica, 2008): 255-304.

29 Frederic Wakeman, Jr., *Policing Shanghai, 1927-1937* (Berkeley: University of California Press, 1995): 176-177, 250-251.



its security, the CCP used its army and judicial system to brutally suppress alleged counterrevolutionary cliques and organizations. In 1942, as tensions with the GMD mounted, the CCP launched an internal struggle against suspected GMD and Japanese agents within the party. Like its dynastic and Republican predecessors, the Communists maintained and nurtured an ingrained and constant fear of opposition well beyond its victory in 1949.

From the Korean War (1950-1953) until the end of the Cultural Revolution (1966-1976), China experienced a number of major internal campaigns. Most of them stemmed from fears of external threats (the Korean War) and internal sabotage (of GMD agents or other class enemies). In the Anti-Rightist Movement alone (1957-1958), hundreds of thousands of alleged “rightists” or counterrevolutionaries were prosecuted, imprisoned, or forced to do hard labor. The Cultural Revolution has been described as the worst era in the PRC for legal practice, and its first two years (1966-1967) were filled with excessive and unchecked violence as well as a dysfunctional judicial system.<sup>30</sup> To make its judicial system more effective in combatting class enemies and averting counterrevolutionary sabotage, the Party in early 1968 moved to put the judicial system under military control. As a result, many political critics of Party leaders were convicted and punished with long imprisonment or even death. Even Mao’s death in 1976 and the subsequent reforms failed to liberate the Party from the persistent fear of losing power. As we will find out in the Conclusion, the fear remains active in China today.

To be sure, harsh judicial policies and punishments triggered by fear of political disruption or subversion are not confined to China. In many countries, be they authoritarian or democratic, courts and police can sometimes be used to prosecute and punish suspects thought to be posing imminent or potential threats. A good example is the former Soviet Union ruled by Joseph Stalin. As Eugenia Belova and Paul Gregory have pointed out, most crimes for Stalin were against himself. In other words, for Stalin, almost any crime could generate uneasiness. To stave off his fear and potential threats, Stalin imposed expansive and ruthless terror. Even minor economic crimes such as petty theft or accidental misdemeanors could be severely punished.<sup>31</sup> In the Great Terror (1937-1938) alone, more than one million people died by execution or as a result of poor conditions in the Gulag.<sup>32</sup>

30 For more details about the law in the Cultural Revolution see Chapter 7.

31 Eugenia Belova and Paul Gregory, “Political Economy of Crime and Punishment under Stalin” in *Public Choice*, Vol. 140, No. 3/4 (Sep., 2009), pp. 463-478: 464.

32 James Harris, *The Great Terror: Stalin’s Terror of the 1930s* (Oxford: Oxford University Press, 2016): 1.

From 1940 to his death, Stalin's terror continued as an average of 19,000 people lost their lives each year and the annual prison sentences were five times that of the US rate.<sup>33</sup> The Soviet judicial system that had since Lenin been a legitimate "tool for implementing" Bolshevik orders,<sup>34</sup> now became an active accomplice of the dictator Stalin who implemented the terror and arbitrary trials and punishments.<sup>35</sup>

Democratic countries including the United States are not at all immune from insecurity or the fear of subversion, by communism for instance. In extreme times, democratic governments could still employ rigorous laws and the established judicial system against alleged anarchists or subversives. One of the best cases was the spread of McCarthyism during the early 1950s when the "fear of communism" spread widely among millions of ordinary citizens in the United States. At the height of the Cold War, almost any Communist or even any critic of the US government could be viewed as a Soviet agent. In 1947, President Truman announced a federal loyalty program that virtually made "both domestic and international communism the enemy of American democracy."<sup>36</sup> University professors advocating socialism or even liberalism would be warned or laid off.<sup>37</sup> Seeing communism as "a phantom that conjured a myriad of demonic images," lawmakers in the Capitol created the House Un-American Activities Committee to interrogate witnesses and impugn citizens' loyalty to the country.<sup>38</sup> The anti-communist sentiment was so strong that the supposedly independent and powerful Supreme Court justices had to retreat in the mid-1950s from their previous favorable decisions toward accused communists. According to Robert M. Lichman, the Supreme Court had also tweaked its decisions under political pressure shortly after World War One.<sup>39</sup> If the United States, a supposed exemplar of democracy, could not always uphold its cherished judicial independence in times of political repression,

33 Eugenia Belova and Paul Gregory, 2009: 464-465.

34 For Soviet law and judicial system see Peter H. Solomon, *Soviet Criminal Justice Under Stalin* (Cambridge: Cambridge University Press, 1996): 17.

35 Thurston, 1998: 16-58.

36 M.J. Heale, *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965* (Georgia: University of Georgia Press, 1998): 3.

37 Ellen Schrecker, "McCarthyism: Political Repression and the Fear of Communism" in *Social Research*, Vol. 71, No. 4, Fear: Its Political Uses & Abuses (Winter, 2004), pp. 1041-1086: 1060-1068.

38 William M. Tuttle, Jr., "Red Summer, Red Scare" in William Graeber and Leonard Richards, eds., *The American Record: Images of the Nation's Past, Vol. II* (Boston: McGraw Hill, 2001), pp. 175-192.

39 Robert M. Lichtman, *The Supreme Court and McCarthy-Era Repression: One Hundred Decisions* (Urbana: University of Illinois Press, 2012): 3-8.



it would be less likely for other states, especially so-called authoritarian regimes, to do so. It should be noted that there is still a crucial difference between a Soviet judicial system and its counterpart in the US. In China, the judicial system was from the outset built as a state tool to defend the Party by all means necessary, including force, while the judicial system in the US was originally created as an independent body sharing authority with the legislative and executive branches and helping to maintain a balance of political power.

## Legal Hodgepodge

W.E. Butler has argued that Soviet law and the Soviet legal system are “comprehensible only against the background of their past: what was rejected, what was transformed, what has endured.”<sup>40</sup> This argument can be applied to the legal system in Communist China. In other words, it is impossible to have a better grasp of the PRC judicial system without knowing its rich and profound historical heritage. In February 1949, about six months before the founding of the PRC, CCP leaders declared that it would scrap all “reactionary” GMD laws and replace them with “people’s” laws. For the CCP, the GMD along with its laws was emblematic of reaction, capitalism, and imperialism, which conflicted with both the goals and principles of a new China.<sup>41</sup> However solemn the pledge, throughout Mao’s China, the law and judicial system of the PRC had failed to sever itself from either traditional laws or GMD laws. As this book will show, the PRC laws under Mao were at best a judicial hodgepodge carrying laws and legal traditions not just from dynastic China and the Soviet Union but also from the GMD and Western countries that the CCP had vehemently denounced.

In 1973, while China was experiencing the Cultural Revolution, radical Party leaders organized a group of scholars from Peking and Tsinghua universities, to compose articles against Confucius and Lin Biao. Lin was the former successor of Mao and an alleged advocate of Confucianism.<sup>42</sup> Some individual criminals in this hyper-political era learned to attribute their crimes to the “poisonous inculcation” of Confucianism to evade heavier

40 W.E. Butler, *Soviet Law* (London: Butterworths, 1983): 9.

41 For CCP’s order see *Studying Documents for People’s Judicial Construction (renmin sifa jianshe xuexi wenjian)* 人民司法建设学习文件 (Beijing: Zhongyang sifa jiguan sifa gaige bangongshi, 1952): 8-12.

42 Fan Daren, *The Rise and Fall of the Royal Pens in the Cultural Revolution: The History of Liangxiao* (Hong Kong: Mingbao chubanshe, 1999).



punishment.<sup>43</sup> Nevertheless, the CCP might not have been aware or willing to admit that the PRC judicial system had actually preserved certain key Confucian legal concepts. The most conspicuous one is “Reform through Labor (*laogai*)” that aims to reeducate criminals to become good men. As Frank Dikotter has remarked, prison in China was a “modern tool to pursue a more traditional vision of an ordered and cohesive social body governed by virtue.”<sup>44</sup> The “traditional vision” is what Confucius once said: “If a [ruler] governs people with virtue and disciplines them with ritual, people will develop a sense of shame and refrain from transgressing the law.”<sup>45</sup> While the idea of reforming prisoners started in the early Republic of China, the CCP added hard labor, another traditional punishment, to the reform that it believed would be both reformatory and profitable.<sup>46</sup>

Mediation is arguably another legal practice that the CCP inherited from Confucianism. In the words of Randle Peerenboom, China’s emphasis on mediation could be a “traditional cum Confucian preference for harmony and face-saving.”<sup>47</sup> Moreover, like Confucius who tried in 513 BCE to dissuade a Jin minister from publicizing law, Mao’s China also seemed to have a distrust of or hostility to crucial written laws.<sup>48</sup> Apart from a handful of laws such as a constitution, an organic law of the court, and some government regulations including an anti-counterrevolutionary one, the PRC had no criminal law, civil law, and many other crucial laws (e.g. criminal procedural law) until 1979. The main difference between Mao and Confucius might be that the former feared that written laws could restrict the CCP’s arbitrary punishments, while the latter was afraid that people with more legal knowledge would disrespect elites and dodge laws. As Jennifer Althenger has argued,

43 In 1971, one Meng Qinghe was sentenced to five years for theft. Before his prison term was over, Meng wrote a confession in which he blamed his crime on Confucianism. See “The Criminal Verdict of Meng Qinghe by the Zhangqiu County Military Control Commission” in the Archives of the Liangshan County, May 30, 1971. Y-8-15-1976.

44 Frank Dikotter, *Crime, Punishment and the Prison in Modern China* (New York: Columbia University Press, 2002): 7-8.

45 Zhu Xi朱熹, ed, *Collective Connotation of the Four Books (sishu zhangju jizhu四书章句集注)* (Liaoning: Liaoning jiaoyu chubanshe, 1998): 55.

46 For more information about PRC hard labor in prisons see Harry Wu, *Laogai: The Chinese Gulag* (Boulder: Westview Press, 1992)

47 Randle Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002): 288.

48 Creel, 1980, pp. 26-55: 51; Yang Bojun, ed., *The History of Zuo (zuozhuan)* (Beijing: Zhonghua shujū, 2018): 1314; for Mao’s distrust of law see Daniel Leese and Puck Engman, *Victims, Perpetrators, and the Role of Law in Maoist China: A Case Study* (Berlin: Walter de Gruyter GmbH & Co KG, 2018): 10; Li Rui李锐, *Arguments of Li Rui (Lirui lunshuo wenxuan李锐论说文选)* (Beijing: Zhongguo shehui kexue chubanshe 1998): 178.





the history of law in the PRC is marked by “extremes.” On the one hand, people were inundated with legal education on a few laws such as the 1950 Marriage Law and the 1954 constitution; on the other hand, state agents and ordinary people routinely “broke or circumvented laws.”<sup>49</sup>

In contrast to Confucianism, legalism may have had a greater impact on the PRC’s laws. Lord Shang (c. 395–338 BCE), a renowned legalist, stressed the importance of heavy punishments and light rewards. In his words, “[N]othing is better than heavy punishment in deterring evils and crimes [...]. If harsh penalty is applied, people will not dare to transgress the law.”<sup>50</sup> This is what Lord Shang meant when he advocated using punishment to end punishment (*yixing quxing*) and why the great historian Sima Qian categorized legalism as a form of Daoism.<sup>51</sup> Han Feizi, the most erudite legalist, unswervingly backed Lord Shang’s heavy punishment. “If a ruler loves his people, he will adopt heavy punishment and light reward,” Han noted, “although heavy punishments are resented by people, they help a state to attain better government.”<sup>52</sup> In political campaigns before and after the PRC was created, millions of people had reportedly been detained, imprisoned, tortured, or even executed. As this book will show, many people – especially those with “historical stains” – would be sentenced to years of incarceration for petty misconduct such as praying for rain, dropping Mao’s books, or unintentionally chanting a false slogan. The CCP might believe that harsh punishments would, as Lord Shang had argued, generate fear and thus “end punishment.”

Another similarity between the PRC judicial system and legalism is collective punishment (*lianzuo*). Lord Shang once said if any official violated state law he would be executed along with all the three-kinship of his family.<sup>53</sup> When Lord Shang ruled the Qin, he made people responsible for each other’s crimes. People failing to expose their neighbors’ treachery would be killed. The exposer/s would be rewarded in “the same [way] as [he/they would be for] killing an enemy in a battle.”<sup>54</sup> Despite persisting criticism of legalism for its harsh penalties in succeeding dynasties, collective punishment was

49 Jennifer Altehenger, *Legal Lessons: Popularizing Laws in the People’s Republic, 1949–1989* (Cambridge, Ma: Harvard East Asian Monograph, 2018): 3.

50 Lord Shang 商鞅, *Book of Lord Shang (shangjunshu 商君书)* (Shanghai: Shanghai sanlian shudian, 2018: 152; also see Mühlhahn, 2011: 21.

51 Sima Qian 司马迁, *Historical Records (shiji 史记)* (Beijing: Zhonghua shujü, 1959): Ch. 63.

52 Han Fei 韩非, translated by Zhang Jue 张觉, *Han Feizi 韩非子* (Guizhou: Guizhou renmin chubanshe, 1992): 189.

53 Lord Shang 商鞅, 2018: 173. Three Kinship includes parents, brothers, and wife/children.

54 Sima Qian 司马迁, 1959: Ch. 68.





largely retained in Mao's China. Children from black-category families would suffer punishment and discrimination because their relatives had been subjected to struggle sessions. For instance, after Liang Heng's mother was declared a rightist in 1957, his father immediately demanded a divorce to protect his children from being discriminated against in access to education. According to the Yunnan Provincial gazetteers, if CCP cadres in the Cultural Revolution found that some targeted landlords and rich peasants had died, they would struggle their children instead. Regardless of what they had done, the cadres would first beat them. If anyone expressed any "bad attitude" (i.e. resistance), he or she would be beaten to death.<sup>55</sup>

To be sure, early PRC's adoption of Confucian and legalist concepts was selective and not comprehensive. Unlike Confucius who demanded that punishment be exactly right, many judges in Mao's China and beyond exercised punishments based on their "common sense" rather than by law or reason.<sup>56</sup> By imposing heavy penalties on black-category people or counterrevolutionaries, Mao's China deviated from both legalism's principle of "one punishment for all (*yixing*)" and its own laws such as the constitution of 1954 and the Organic Law of the Courts.

In addition to Confucianism and legalism, remnants of some other traditional or "feudal" customs and practices could also be found in the aspirationally socialist PRC. As in the dynasties when death penalties were conducted in open markets (*qishi*), the PRC continued to struggle and execute alleged criminals in public meetings and venues.<sup>57</sup> While the PRC nominally attempted to reestablish the institution of lawyers in the early 1950s, most alleged political criminals, if not all, could not find lawyers who were willing to defend them. This is reminiscent of what litigation masters experienced in the dynasties. The biggest difference might be that lawyers or litigation tricksters were outside the law in the dynasties but were nominally "legal" in the PRC.<sup>58</sup>

55 *Yunnan Provincial Gazette Vol. 55, Gazetteer of Trial (Yunnansheng shenpanzhi* 云南省审判志) (Yunan: Yunnan renmin chubanshe, 1999): 256.

56 Mühlhahn, 2011: 18.

57 For Mao's China see Harold Tanner, *Strike Hard: Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985* (Cornell: Cornell University Press, 1999); for executions in the Qing see Brook, Bourgon, and Blue, 2008; for recent public trials and executions see "Do Not Perform the Drama of Public Exposition and Death Trials (*sixing xuanpan shizhongju biezai jixu shangyanle*)" in *Xinjinbao*, December 18, 2017.

58 See Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford: Stanford University Press, 1998); Max Weber, *Confucianism and Daoism (rujiao hedaojiao)* (Beijing: Shangwu yinshuguan, 1998): 157; Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 2000): 29; Sida Liu, "With or Without

Ever since the early PRC, court cadres were subject to the dual leadership of their peer local governments and higher-level courts.<sup>59</sup> After the 1952 legal reform, most new judges would be appointed by the Party for their loyalty to the Party and not for their professional competence in the law. We can see the precedence in dynasties when local officials versed in Confucian texts acted as both “people’s parental officials” and as judges who had no legal training but had to deal with lawsuits.<sup>60</sup> Dynastic magistrates typically sought confessions as conclusive evidence of guilt, and cadres in the Communist base areas and the PRC continued the same practices.<sup>61</sup> For centuries, dynastic rulers had consecutively treated civil conflicts as minor cases and many rulers in the Ming and Qing forbade people to appeal civil cases in the capital.<sup>62</sup> In Mao’s China, the CCP considered most civil cases as internal contradictions among the people that should be resolved via mediation. As some chapters of this book will indicate, most of the cases adjudicated by people’s courts were counterrevolutionary or political cases. Only a small proportion of the cases was related to marriage, property, or debt.

Scholars such as Mark C. Elliott and Pär Cassel have discussed legal privileges of the Manchus in the Qing,<sup>63</sup> which apparently hark back to eight categories of legal privileges (*bayi*) in the Zhou.<sup>64</sup> There were also similar legal privileges in the PRC for certain special groups of people which have not been previously mentioned in scholarly works. In Chapter 5, we will find that the Shanghai government in 1954 explicitly excluded eight groups of

the Law: The Changing Meaning of Ordinary Legal Work in China, 1979-2003” in Margret Y.K. Woo and Mary E. Gallagher, eds., *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge: Cambridge University Press, 2011), pp. 234-268: 234.

59 *Shaanxi Provincial Gazette – Judicial Gazette (Shanxishengzhi shenpanzhi)* (Shaanxi: Shanxi Renmin chubanshe, 1994): 202.

60 Lubman, 2000: 29.

61 For abusive confessions in the Qing dynasty see William Alford, 1984. “Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China” in *California Law Review*, Vol. 72, No. 6 (Dec., 1984), pp. 1180-1256.

62 Qiang Fang, “Hot Potatoes: Chinese Complaint Systems from Early Times to 1898” in *The Journal of Asian Studies*, Vol. 68, No. 4 (November) 2009: 1105-35. For studies on judicial status of civil cases in the Qing see Philip Huang, “Codified Law and Magisterial Adjudication in the Qing” in Kathryn Bernhardt and Philip Huang, eds., *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994), pp. 142-186: 143.

63 Mark C. Elliott, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China* (Stanford: Stanford University Press, 2001); Pär Cassel, “Excavating Extraterritoriality: The ‘Judicial Sub-Prefect’ as a Prototype for the Mixed Court in Shanghai” in *Late Imperial China*, Vol. 24, No. 2 (Dec., 2003), pp. 156-180.

64 Sun Yirang, annotates. *The Ritual of the Zhou Dynasty (zhouli zhengyi)* (Beijing: Zhonghua shujū, 2015): 3340.



“important people” from being punished without governmental approval. There is no little irony that the constitution in the same year pledged to recognize the equality of all citizens before the law. This contradiction reminds one of that between the phraseology of the American declaration of independence and the institution of slavery in the early decades of the United States. Even more discordant was the persistence of the traditional marriage custom of “seven outs and three exceptions (*qichu sanbuqu*)”<sup>65</sup> well into the Cultural Revolution when all old customs and laws were supposed to be smashed, let alone its violation of the highly promoted new marriage law in 1950 that purportedly accorded women the same rights as men in divorce and marriage proceedings (Chapter 7).

While the CCP swore to relinquish all of the GMD’s capitalist laws and legal institutions, it nonetheless inherited some GMD laws. The most evident was its new marriage law in 1950, which, according to Susan L. Glosser, was “nearly identical” to a civil code issued by the GMD in 1931, almost twenty years earlier. “In fact,” Glosser points out, “the CCP Marriage Law resembled the GMD code of 1931 in both its particulars and objectives.”<sup>66</sup> Moreover, many provisions of the PRC’s 1954 constitution and the Organizational Law of Courts, such as people’s rights and judicial independence, were akin to laws of numerous Republican constitutions since 1912.

As a party owing much of its birth, development, and even conquest of mainland China to the Soviet Union, the CCP inevitably sought to duplicate Soviet models including its judicial systems. According to Jerome A. Cohen, “Many of the norms that continued to be enforced, such as the proscribed counterrevolutionary acts, are of obvious Soviet origin.” Moreover, the PRC’s application of the criminal law, its procuracy, and its labor camps also came from Soviet models.<sup>67</sup> Indeed, as early as the Jiangxi Soviet base areas, the Chinese Red Army had adopted Soviet “Cheka” or political police. In the same period, the CCP created the *laogai* system or labor camp, which were patterned after the Soviet *gulag*. More important, the CCP from its outset

65 The seven outs are the seven reasons for a husband to divorce his wife, such as barrenness, wanton conduct, neglect of parents-in-law, garrulousness, theft, jealousy, incurable disease; Three exceptions are that the wife has nowhere to go, within the three-year mourning period, or her husband was poor when married and is now rich. See Hugh D.R. Baker, *Chinese Family and Kinship* (London: The Macmillan Press, 2015): 45.

66 Susan L. Glosser, *Chinese Visions of Family and State, 1915-1953* (Berkeley: University of California Press, 2003): 170; also see Xiaoping Cong, *Marriage, Law and Gender in Revolutionary China* (Cambridge: Cambridge University Press, 2018): 246.

67 Jerome A. Cohen, *The Criminal Process in the People’s Republic of China, 1949-1963: An Introduction* (Cambridge, Ma: Harvard University Press, 1968): 11-13.



had learned from Lenin's arguments about the legal system and its role in a Communist polity.<sup>68</sup> Like its Soviet "big brother," the CCP made law an instrument of state authority and went further than the Soviets by singling out class enemies such as, inter alia, counterrevolutionaries, landlords, rich peasants, former GMD agents and officials. They were all the main targets of law who should be "controlled by dictatorial means."<sup>69</sup>

Nevertheless, the CCP also copied some positive legal apparatuses from the Soviet Union. For example, one of them was people's jury that the Soviet inherited from Russia's 1864 legal reform.<sup>70</sup> The CCP adopted the system in the base areas and expanded it to the whole country shortly after it took control of the mainland.<sup>71</sup> The other was the institution of lawyers ushered in after the 1952 legal reform, notwithstanding that its power, impartiality, and function were compromised under Party rule. The 1954 constitution was also "influenced profoundly" by the 1936 Soviet Constitution.<sup>72</sup>

With regard to Soviet law, according to Cohen, CCP leaders "had never felt comfortable about the decision to import the Soviet judicial model."<sup>73</sup> Rather, the Party took a largely utilitarian approach by adopting what it deemed useful to strengthen its power and rejecting what it thought harmful to its rule. It was more forthright in its selectivity after Stalin's death and the elevation of the prestige of the newly established PRC which forced the United States to sign an armistice agreement in Korea. In late 1955, while a head of the Shanghai High Court praised the succinctness, explicitness, and logic of Soviet court verdicts, he warned Chinese judges not to blindly copy the Soviet model. Instead, they should learn the spirit of Soviet law and "maintain both flexibility and legality" in adjudication. In other words, Chinese judges did not have to stick to the codes of law as rigorously as their Soviet counterparts had done.<sup>74</sup>

For instance, at the behest of Lenin, the Bolsheviks promulgated a criminal code in 1922, one year after the inauguration of the New Economic Policy. However dysfunctional the Soviet criminal law was during Stalin's rule, it

68 Solomon, 1996: 17-19; Gong Tingtai 龚廷泰 and Wang Jianguo 王建国, "Lenin's Judicial Thought and its Historical Value (*Lienin desifa sixiang jiqi shidai jiazhi* 列宁的司法思想及其时代价值)" in *Falü kexue* 法律科学, Vol. 6, 2008, pp. 9-16; 12; Butler, 1983: 27-28.

69 Altehenger, 2018: 8.

70 Butler, 1983: 25.

71 Gong and Wang, 2008: 15.

72 Shiping Hua, *Chinese Legal Culture and Constitutional Order* (Abingdon: Routledge, 2018): Ch. 6; also see Peerenboom, 2002: 44.

73 Cohen, 1968: 14.

74 "The Report of Deputy Head Gao Kelin at the Shanghai High Court (*Gao Kelin fuyuanzhang zai Shanghai gaoji fayuan debaogao*)" in the Shanghai Archives, B2-1-14-24. November 1, 1955.

provided certain protection to Soviet citizens. Yet the CCP consistently refused to promulgate a comparable law until 1979, 30 years after its establishment. In addition, the Soviet government generally prohibited local cadres from directly intervening in specific cases. In the PRC, however, the Party demanded that local officials review and approve court decisions before they were enforced. Other Soviet models that the PRC turned down or was unwilling to adopt were legal concepts such as judicial independence and nonretroactivity. They were dismissed by the CCP as Western capitalist principles.<sup>75</sup>

## The Judicial Pendulum

Another striking feature of the Communist judicial system in Mao's China was its swing between "right" and "left" in compliance with central policies. There have been many studies of the politics, society, leaders, and economy of the PRC.<sup>76</sup> There have been many fewer studies of the law and legal history of the PRC. Even fewer studies have discussed the law in the Soviet base period (1927-1935) and the Yan'an or Border Region period (1936-1947). Western and Chinese scholars such as Randle Peerenboom, Stanley Lubman, Albert Chen, Hongyi Chen, Bin Liang, Xin Ren, and Yan Wang have both deepened and broadened our understandings of China's legal reform under Deng Xiaoping and his successors.<sup>77</sup> While their books are centered on contemporary legal reform in China, those scholars have traced Chinese law to its historical origins and tradition in the dynasties and the Republican periods. Peerenboom, Lubman, and Ren have also discussed Chinese law prior to 1978.

75 Cohen, 1968: 15-16.

76 Most of the studies have spilled over the general history under Mao and post-Mao reform leaders such as Deng Xiaoping and Jiang Zemin. Some have also focused on specific periods such as the Great Famine, the Cultural Revolution, the Anti-Rightist Movement, the Gang of Four, the student movements, and the like.

77 See Peerenboom, 2002; Lubman, 2000; Stanley Lubman, *The Evolution of Law Reform in China: An Uncertain Path* (New York: Edward Elgar, 2012); Stanley Lubman, ed., *China's Legal Reform* (Oxford: Oxford University Press, 1996); John Gillespie, Albert Chen, and Hongyi Chen, eds., *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Abingdon: Routledge, 2010); Bin Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System* (Abingdon: Routledge, 2008); Bin Liang and Hong Lu, eds., *The Death Penalty in China: Policy, Practice, and Reform* (New York: Columbia University Press, 2015); Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* (New York: Praeger, 1997); Yan Wang, *Chinese Legal Reform: The Case of Foreign Investment Law* (Abingdon: Routledge, 2004).

Among these studies, Jerome Cohen's book on the criminal process in the early PRC remains a classic. Based on a great number of interviews of Chinese exiles, Cohen paints a preliminary picture of the PRC criminal justice from the 1950s through the early 1960s.<sup>78</sup> In recent years, thanks to newly available primary materials, some historians have done excellent studies on specific topics of law in Communist China. For example, Klaus Mühlhahn has made an in-depth study of labor camps in the PRC.<sup>79</sup> Xiaoping Cong has examined the new marriage law in the Yan'an period with a focus on a case of Liu Qiaoer and a distinction between free marriage and self-determined marriage.<sup>80</sup> Jennifer Altehenger's book centers on legal education and CCP propaganda in the 1950s to propagate the 1950 Marriage Law and the 1954 constitution. She pinpoints a dilemma of the CCP's official promotion of mass legal education. Although the CCP has wanted to disseminate legal knowledge among the masses in order to persuade them to obey the law, the Party has also wanted to retain control of "how laws were interpreted and how laws would serve the state."<sup>81</sup>

In his study of Communist police, Michael Dutton discovers that the friend/enemy binary originated in the Jiangxi Soviet period when the CCP was besieged by the GMD army. Dutton argues that the binary "completely dominated" CCP thinking from 1927 to 1978.<sup>82</sup> Glenn Tiffert has done a comprehensive study on the Beijing Municipal People's Court, but his focus is mostly on the origin, organization, development, and practice of the local court from the CCP border period in Shaanxi to 1958. He argues that the PRC judicial system bore a "concealed and congenital Republican imprint" that ignores the "humanity and [Communist] principle" that many CCP judges had utilized since the Yan'an period when there was no law. Apart from a few chapters that discuss the judicial system in other parts of the PRC, Tiffert fails to notice the wide disparities among different provinces/cities in the PRC, let alone the huge differences between major cities such as Beijing and the countryside.

In a recent book edited by Daniel Leese and Puck Engman, scholars have used specific cases of victims of political campaigns to explore the role, process, and enforcement of law in Mao's China. Both Xu Lizhi and Jeremy Brown have challenged the conventional view that the Cultural Revolution

78 Cohen, 1968.

79 Mühlhahn, 2011.

80 Xiaoping Cong, 2018.

81 Altehenger, 2018: 3.

82 Michael Dutton, *Policing Chinese Politics: A History* (Duke: Duke University Press, 2005): 13-19.

was lawless.<sup>83</sup> Although the bulk of their studies is about the legal systems in the Republican periods, Frank Dikotter and Susan L. Glosser have briefly touched on the prison and marriage law in the early PRC.<sup>84</sup>

The biggest obstacle to research on the law and judicial system in Mao's China has long been the limited accessibility of archival court records.<sup>85</sup> For a long time, the CCP has tightly controlled the release of legal and political archives as well as official documents. Like their Western colleagues, Chinese scholars on Communist law generally face the same hostile situation. General studies on the history of Chinese law in China have had to skip the legal history of Mao's China.<sup>86</sup> Scholars who have covered the law in Mao's China including the turbulent periods in the late 1950s and the Cultural Revolution may be critical of its violations of law, but they would normally maintain positive views on the legal reform under Deng Xiaoping.<sup>87</sup> As a safe haven, many Chinese scholars intend to narrow their studies to a single legal case or a particular topic such as the 1952 legal reform or the Great Leap Forward (1958-1960) to avoid political consequences.<sup>88</sup> Consequently, much of the law in Mao's China has been understudied and our comprehension of the legal history in this crucial period remains limited and sometimes wrong.

83 Xu Lizhi, "Beyond 'Destruction' and 'Lawlessness': The Legal System during the Cultural Revolution" in Daniel Leese and Puck Engman, *Victims, Perpetrators, and the Role of Law in Maoist China*, pp. 25-51; Jeremy Brown, "A Policeman, His Gun, and an Alleged Rape: Competing Appeals for Justice in Tianjin" in Leese and Engman, 2018, pp. 127-149.

84 Dikotter, 2002; Glosser, 2003.

85 Leese and Engman, 2018: 6.

86 See Zeng Xianyi 曾宪义, *History of Chinese Legal System (zhongguo fazhishi 中国法制史)* (Beijing: Beijing daxue chubanshe, 2002); Ye Xiaoxin 叶孝信, *History of Chinese Legal System (zhongguo fazhishi 中国法制史)* (Shanghai: Fudan daxue chubanshe, 2002).

87 Gong Pixiang 公丕祥, ed., *China's Current Legal Revolution (zhongguo dangdai defalü geming 当代中国的法律革命)* (Beijing: Falü chubanshe, 1999); Xin Chunying 信春鹰, *Chinese Legal System and its Reform (Zhongguode falü zhidu jiqi gaige 中国的法律制度及其改革)* (Beijing: Falü chubanshe, 1999).

88 See for example, Huang Wenzhi 黄文治, "Conflict among Local Officials and Judicial Interference in the Great Leap Forward: Centering on the Case of Fang Shixin in Feixi County (*dayuejin shiqi jiceng ganbu chongtu jisifa jieru: yi Feixixian Fang Shixin anwei zhongxin 大跃进时期基层干部冲突及司法介入*)" in *Anhui shixue*, Vol. 2, No. 22, 2016; Li Yusheng, "Legal Reform Movement (*sifa gaige yundong*)" in *Faxue yanjiu*, September 1999, pp. 49-54; Chen Guangzhong 陈光中 and Zeng Xinhua 曾新华, "A Review of the Legal Reform Movement in the Early PRC (*jianguo chuqi sifa gaige yundong shuping 建国初期司法改革运动述评*)" in *Faxuejia*, No. 6, 2009, pp. 1-8; Li Lu 李露, "Rethinking the Situation and Policy of the 'Coordination of Repression and Magnanimity' (*zhenya yu kuanda xiangjiehe xingshi zhengce fansi 镇压与宽大相结合刑事政策反思*)" in *Renmin luntan*, 2014. 3, pp. 33-38.





Due to the paucity or lack of primary sources, there has not yet been any serious and in-depth study of the complexities and dynamics of the Chinese Communist judicial system in such periods as the 1955 anti-counterrevolutionary campaigns, the Anti-Rightist Movement, the Great Leap Forward, and the Cultural Revolution. The lack of evidence and vivid legal cases has led to mistaken interpretations. For example, with few open archives of legal records of the PRC judicial system, some scholars in China and the West are inclined to argue that the period between 1953 and 1956 was a “golden age” or consider the PRC judicial system as an “heir” to Republican judicial modernization, ignoring the imbedded tradition of Chinese law dating back to the dynasties.<sup>89</sup> Similarly, most scholars dismiss the Cultural Revolution as a period of legal nihilism or even lawlessness which was worse than any other periods in the PRC. Building on both rare and newly available primary legal archives and official documents as well as on existing scholarship on PRC law, this book centers on the Communist judicial system from CCP’s base areas to the end of the Cultural Revolution in 1976. Unlike studies focusing more on the normal judicial organization and operation on one city or one legal practice, this book, drawing numerous new court trials and litigation accounts, will probe deeply into the daily court files and functions, the contradictions and dilemmas faced by judges, the incongruity between central judicial policies and county court judgments, and the dynamic dichotomies between major cities like Shanghai and poorer or remote regions/counties.

As this book will show, the Communist judicial system originated in a period when the CCP was overwhelmed by a fundamental fear of its possible extinction at the hands of a superior nationalist military force. From its inception, therefore, the aim of the judicial system was to safeguard the Party and to crack down on its enemies. During the Yan’an period when the CCP acknowledged Chiang Kai-shek as the sole national leader so as to form a coalition against the Japanese, it had the opportunity to reconstruct its judicial system and develop its own legal mechanism. Unlike in the Jiangxi Soviet period which had few laws, Communist judges in the Border Region period began to adopt key Republican laws in dealing with cases. Emerging as a victor of the civil war in 1949, an assertive CCP denounced all

89 Julia Strauss has correctly argued that the early PRC was not a golden age. But her argument is based on PRC politics and not its law. The details of the “golden age” will be discussed in Chapter 5. For the argument about the “heir” see Tiffert, 2015: xxvi. For Strauss see Julia Strauss, “Morality, Coercion and State Building by Campaign in the Early PRC: Regime Consolidation and After, 1949-1956” in *The China Quarterly*, No. 188. *The History of the PRC (1949-1976)* (Dec., 2006), pp. 891-912: 894.



GMD laws and vowed to replace them with socialist codes. Yet, GMD laws and retained judges and lawyers still dominated PRC judicial system until the outbreak of the Korean War. As a result, counterrevolutionaries were initially treated magnanimously as normal criminals and their punishments were mostly fairly light. Then, suddenly facing both internal sabotage and an external war with the United States, the CCP abruptly reversed its erstwhile lenient policies and launched merciless anti-counterrevolutionary crackdowns. The military commissions as well as regular courts ordered arbitrary executions and imprisonments of alleged counterrevolutionaries. In 1952, as the war dragged on, the CCP moved forward to strengthen its power by purging former GMD judges and lawyers from its judicial system along with their “capitalist legal principles” such as judicial independence and the supremacy of law.

Shortly after the armistice in Korea, top CCP leaders tried to restore some common legal principles that they had denounced two years earlier. Both the first PRC constitution and an organic law of the court in 1954 reaffirmed judicial independence and the equality of persons before the law. However, the return to judicial “normalcy” did not last long. When another anti-counterrevolutionary campaign began in the spring of 1955, judicial negligence and infringement of law were unbridled and brazen. Some provincial governments rendered judges a minimum of five years imprisonment for most counterrevolutionary actions. With the exception of one year from early 1956 to the summer of 1957, the Communist judicial system was soon engaged in a new campaign – the Anti-Rightist Movement, which proved to be larger in scale and more terrible in effect than past campaigns. The new round of repression did not taper off until the end of the Great Famine in 1961 when central leaders and the Supreme Court stepped in to restore legal principles and began rehabilitating victims who were falsely charged and punished. Despite law violations like in the Four Cleanups (*siqing*), the restoration of law generally proceeded until the eve of the Cultural Revolution.

Up to the present, the role of the judicial system and the daily practice of law in the Cultural Revolution remain little known. New court archives and documents reveal that judicial cadres were actively involved in the first two years of the Cultural Revolution (1966-1968). After the military took over the judicial system in early 1968, the judicial system resumed their function, albeit almost all the cases were criminal. The harsh treatment of “counterrevolutionary” critics of central leaders (e.g. Mao, Lin Biao, and Jiang Qing) reached its peak in 1970 and then started to diminish in 1971. Lin Biao’s unexpected death in September 1971 and the reinstatement of



moderate leaders (e.g. Deng Xiaoping) opened the door for rehabilitating victims who had been punished for criticizing Lin Biao and backing former chairman Liu Shaoqi. This wave of legal and political rectification carried on to the spring of 1976, just months before Mao's death and the end of the Cultural Revolution.

From the Jiangxi Soviet period in the 1920s to 1976, two years before the CCP kicked off the current legal reform, the Communist judicial system had become a pendulum which had frequently swung from upholding universal legal principles to adopting utilitarian legal policies. During relatively peaceful years or whenever the threat was not imminent, such as 1950, 1954, 1956-1957, early 1960s, and 1971-1976, the Party would lean toward common legal principles by shifting to lenient policies and correcting false charges and punishments. Once the political situation turned hostile and the Party's survival became precarious (e.g. 1951, 1955, 1957-60, 1966-1970), the Party would become alarmed and would quickly direct its judicial system to severely and often arbitrarily punish alleged enemies/criminals without having tangible evidence or rational reasons for doing so. In addition, it is fair to argue that Communist judges were not all the stereotyped "knife hilt" of the CCP who blindly followed Party policies. As this book will show, even in the darkest periods of political campaigns many judges strived to hold on to "erroneous" legal principles and their legal professionalism and refused to make whimsical charges and impose irrational punishments.

## Sources and Chapters

This book is based primarily on newly accessible archives and myriad official materials. In the Shanghai Archives, probably the most open and comprehensive in China, I collected numerous court documents from the 1950s, including, among other things, court verdicts, meeting memos, speeches of national and municipal court leaders, judicial plans, criminals' confessions, and the like. Boasting one of the largest collections of materials on the Cultural Revolution in the world, the Chinese University of Hong Kong houses numerous provincial and county judicial gazetteers and detailed court chronicles and statistics. The Department of History at the Shanghai Jiaotong University possesses a good collection of rarely seen judicial archives of several counties in Shandong and Henan that cover the period from the early PRC to the late 1970s.

This book includes seven chapters each of which focuses on the Chinese Communist judicial system in one specific period. The first traces the



origin of the Communist judicial system in its Jiangxi Soviet base area (c. 1927-1935). Facing repeated GMD military attacks, the CCP formed its own army and mobilized its judicial system to counter its internal and external enemies. Born in blood and fear, the primitive Communist judicial system in CCP bases was from its outset designed as an integral mechanism of the Party based on Marxist and Leninist theories. Its principal objective was to eliminate counterrevolutionaries and protect the fledgling Soviet base (i.e. elected body that was different from the Soviet Union). Alarmed by mass killings and brutal torture by Red armies, the CCP took steps to create a more formal judicial system after 1931 that was expected to comply with certain legal procedures. Still, the Communist judicial system was not independent of the Party. Alleged criminals' confessions, often under pressure including torture, remained the main basis of adjudication.

Many scholars in China have applauded the legal system and practices such as the Ma Xiwu method of dealing with rural marriage cases in the Shaanxi Border Region as a main pillar of the PRC legal construction. Chapter 2 challenges this view with an argument that those scholars have ignored the enormous number of arbitrary transgressions of the law, such as torture and imprisonment. Nor do those scholars pay much attention to the CCP's "voluntary" acceptance of Republican laws during the anti-Japanese war. In stark contrast to CCP's previous and ensuing anti-GMD propaganda and policies, the period of the Border Area could be better called an aberration from the Communist judicial tradition rather than a cornerstone.

After the CCP conquered mainland China, the Party did not immediately abolish all GMD laws and legal mechanisms as it had once vowed to do. As Chapter 3 shows, the Party chose instead to try to make a smooth transition in the judicial system by retaining most former Republican judges and lawyers. As a result, many "counterrevolutionaries" were tried and punished more leniently in accordance with Republican laws. The mild legal policy underwent an abrupt shift shortly after the eruption of the Korean War. Facing a possible GMD effort to retake the mainland, the military commissions, police, procuracy, and courts launched fierce sanctions against counterrevolutionaries with more forced labor and executions. Furthermore, the court reversed its previous balanced handling of disputes between workers and capitalists by siding with labor against management.

Chapter 4 outlines the Party's growing distrust of the retained GMD judges and lawyers. Using excuses such as the high proportion of retained judges in people's court and the halfheartedness of retained judges in advocating Party's legal policies during the Three-Antis and Five-Antis Movements,



the Party in 1952 overhauled its legal system and dismissed most retained GMD judges and lawyers. To replace such court personnel, the Party enlisted progressive workers, military veterans, and students as future judges. Their political allegiance might have been impeccable, but they had little or no legal knowledge and training. This chapter argues that CCP's purge of former GMD judges was an intentional program clearly aimed at making the judicial system a more submissive and faithful instrument of the Party in future campaigns.

As the Korean War neared its end, the Communist judicial system pendulum began swinging to the right (liberal side) and reached its apogee in the fall of 1954 with the promulgation of the first Constitution and the Organic Law of the Court. Many scholars in China and the West therefore claim that the years between 1953 to 1957 were a "golden age" of the PRC. In fact, Chapter 5 argues that, with the exception of a short period from spring 1956 to early summer of 1957, this period was not much different from others. The widespread abuses of law, the use of torture, and the meting out of excessive punishment in the second anti-counterrevolutionary campaign of 1955-1956 were almost as bad as in the first one of 1951. Even after the Party called for righting the wrongs in 1956, official infringement of the law persisted in remote counties.

The role of the judicial system in the period from the Anti-Rightist Movement to the eve of the Cultural Revolution has been studied the least. Most scholarship has centered on the Anti-Rightist Movement, the Great Leap Forward, the 7000-Person Meeting, and the Four Cleanups. Chapter 6 explores a leap forward of law in this period and how judicial cadres in the three principal law-enforcing agencies (i.e. police, procuracy, and court) coordinated and fulfilled their revolutionary missions. It also examines the Communist judicial system in the early 1960s after the Party scaled back its severity and unlawful activities. But the era after the Great Famine was highly volatile and the Party policies were inconsistent and sometimes contradictory. My argument in this chapter is that the Communist judicial system swung between being a loyal Party instrument and honoring legal principles such as judicial independence and legal procedures.

The last chapter focuses on the role of the judicial system in the Cultural Revolution, an era that is often reduced to political turmoil, lawlessness, Red Guard brutality, and mass killings. Little ink has been spilled on describing the day-to-day function and practice of the judicial system in this significant period. In the first two years, the Communist judicial system was clouded by inaction and revolutionary chaos as judicial cadres were involved in factional fights but stayed mostly free of street violence. Starting from early

1968, the military took over the judicial system. Unlike local gazetteers that tend to emphasize the harsh punishments of military-controlled courts, local archives offer a more moderate picture of courts that is consistent with the early years of the PRC. As had happened several times in the past, the judicial rehabilitation began as early as 1970 and it lasted until the spring of 1976. While judicial and official violations of the law were excessive, they were not as egregious as in some other periods of Mao's China.

Triggered by fear of being crushed by the GMD, the CCP had from its cradle state-building era built a judicial system that was both powerful and obedient. The primary purpose of the Communist judicial system was to severely punish internal class enemies and other criminals. During relatively safe and peaceful times, the Party would try to stress partial legal principles such as judicial independence and legal process. The instrumental role of the Communist judicial system and its frequent oscillation from harshness to lenience and back continued throughout Mao's China. From 1949 to 1976, CCP's judicial policies often shifted from one side to the other to adapt to domestic and foreign political situations. The fear of losing power and swings of the judicial pendulum did not end with Mao's death. In the era of Deng Xiaoping and beyond, China has been undergoing one of its largest legal reforms ever with a promise of embracing the rule of law. Its judicial system, however, has continued to ignore laws by imposing draconian punishments against any person even remotely threatening Party rule. In that regard, so long as the CCP rules China, it will be unlikely to feel free from fear and its judicial system confident enough to embrace the rule of law.