

16

司法

Justice

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Since 1978, it has been fashionable, both inside China and around the world, to speak of the Maoist era as a period of near lawlessness, during which basic institutions of justice and adjudication essentially ceased to function in the People's Republic of China (PRC), whether for purposes of criminal punishment or civil dispute resolution. In this telling, China had some form of traditional or capitalist legal system prior to 1949, and later recovered from the Maoist dark ages to reestablish a new rational developmentalist legal order that could underpin a new form of socialism with Chinese characteristics, and eventually help give rise to a socialist market economy, while preserving the Chinese Communist Party (CCP) in power. The (re)construction of the legal system is thus central to the CCP's ideological narrative of the reform era, even as critics abroad continue to decry China's alleged rule of law shortcomings and pine for greater change (see Trevaskes's essay in the present volume). Both the Party and its critics base their perspectives on an assumption that whatever legal order existed prior to the Revolution was destroyed or suspended, but not replaced, during the subsequent three decades. Both narratives make this explicit in claiming that no law functioned at all during the 'long Cultural Revolution' (1966–76). Unfortunately, such breathless teleological accounts misjudge and misconstrue the Maoist legal system that actually existed and functioned between 1949 and 1978.

Maoist Justice

Maoist justice did not operate in a manner most legal scholars are trained to spot. Law was not essentially conservative,¹ but rather functioned as a vehicle for mobilisation and an arena for political contestation.² Critical to this was the fact that the polity—the set of politically empowered actors—was constantly contested and in flux, with dire or deadly consequences for any that might lose out in the high-stakes battles of Maoist

politics.³ Indeed, we can characterise Chinese law in the Maoist era as a ‘mobilisational legal regime’, in which unsteady members of a divided polity regularly intervened in legal processes and adjudication in order to advance their own transformative political agendas. This stands in contrast to the ‘rational pluralism’ most rule of law perspectives assume ought to exist in what they define as well-functioning legal orders, where the polity is open and contested but adjudication remains free from political influence. It also differs from what I call ‘rule by law’ and ‘neotraditional regimes’ that we can observe in contexts where unified hierarchical polities either permit the formally rational adjudication of cases or intervene heavily into the legal process to protect their own interests.⁴

The one force that prevented any devolution into outright and open conflict over the first 30 years of the PRC’s existence was Mao’s periodic charismatic intervention.⁵ Such interventions did not render the law or the operation of courts and legal institutions predictable or formally rational in Weberian terms. Maoist law thus retained a thoroughly mobilisational character, with its unsettled polity taking an active role rather than promoting the ‘rational pluralism’ many legal scholars use as a touchstone (though this rarely exists, even at the times or in the places they tend to look to as rule of law paragons).⁶ If we recognise the law’s mobilisational nature in Maoist China, with its fractious and contested polity and heavy intervention by non-legal actors into the process of adjudication, we can analyse its legal order in a more dispassionate and objective manner, without endorsing it on normative grounds or condemning it as tyrannical lawlessness.

Law and politics did not manifest the same way in all courts or institutions across all of China at all times. Instead, we see differentiated patterns in rural versus urban areas and across time.⁷ Further, civil dispute resolution in areas other than family law was largely neglected, though not entirely absent.⁸ Family law was among the first priorities for the new regime after seizing power in 1949 and the implementation of the CCP’s Marriage Law has received a great deal of attention.⁹ Still, criminal law was the main focus of the CCP regime in its early days and throughout the Maoist period and is my main focus in this essay.¹⁰ Of course, criminal law in a revolutionary context carries some special connotations and enjoys an expansive scope. Criminals are defined as *hostes* to the new order, not simply ‘bad elements’ or ‘deviants.’¹¹ Maoist mobilisational criminal law, therefore, served a critical function of rooting out and suppressing ‘antagonistic’ contradictions through the application of legitimate state violence or coercive force (see Rojas’s essay in the present volume). Any other conception of law was at best secondary, if not reactionary or simply irrelevant.

The overall construction and reconstruction of legal institutions after 1949 was rapid. In cities, the CCP took over existing Republican courts where they existed and ensured that at least all prefecture-level cities (*dijishi*) had a functioning basic legal apparatus. In the countryside, there were fewer existing legal institutions to work with. The CCP often had to make new ones, more or less from scratch. In many places, only crude institutions of criminal justice could be established quickly. Chief among these were the so-called ‘justice sections’ (*sifake*) that many local governments set up for handling routine cases and ‘people’s tribunals’ (*renmin fating*) that operated under the direction of land reform teams for the ‘mass adjudication’ (*gongshen*) of alleged land reform-related crimes.¹² Overall, the preferred political method for implementing the new

system was the mass campaign (see Li's essay in the present volume).¹³ This proved highly destabilising to more or less intact urban institutions, but provided resources and political impetus for the construction of previously absent or moribund rural ones.¹⁴

Eventually, all courts were regularised and brought into a nationally unified system under the 1954 Constitution and the Organic Law of People's Courts enacted the same year. This created what has become China's familiar four-level judicial system, with basic-level courts (*jiceng fayuan*) in every county or urban district, intermediate courts (*zhongji fayuan*) in every prefecture or equivalent city, a high court (*gaoji fayuan*) for each province or directly administered municipality, and the Supreme People's Court (*zuigao renmin fayuan*) in Beijing as a court of final appeal. In each court, civil and criminal sections hear each type of case and every trial is presided over by either a single judge (for petty crimes or minor disputes) or more properly a three-judge panel (*heyiting*), comprised of a 'presiding judge' (*shenpanzhang*) and two associate judges—one of whom usually acts as the 'principal adjudicating judge' (*zhushen faguan*) with primary responsibility for determining the verdict and legal reasoning.¹⁵ Court personnel are appointed and overseen by the CCP's political and legal affairs committee (*zhengfawei*) at the equivalent level, while court budgets are allocated by state fiscal organs (*caizhengju/ting/bu*) at the equivalent level.¹⁶ Also at each level, a procuratorate (*jianchayuan*) and public security bureau (*gonganju/ting/bu*) were established to oversee investigations and prosecutions as well as police work and stability maintenance, respectively—resulting in the now-common acronym of *gongjianfa* to stand for the whole legal apparatus.

Though these institutions indeed grew into something resembling their modern forms between 1954 and 1978, their operation throughout the Mao era continued to be subjected to pervasive intervention by powerful and contending political actors—as well as by Mao and his underlings themselves, asserting his charismatic authority—throughout the period. The manner and degree of intervention was different across specific moments over those several decades, however. Indeed, we can see a clear periodisation, in which land reform and the CCP takeover characterised legal politics between 1949 and roughly 1957, with a distinctly different pattern arising during the Great Leap Forward. This was followed by a period of relative calm and consistently harsh rectification during the early 1960s, before a decidedly new and novel framework emerged during the Cultural Revolution that remained (through various twists and turns) in place until Mao's death.

Specific Manifestations

Immediately after the establishment of the PRC, the CCP set to work building and rebuilding legal institutions in the countryside. This took place in tandem with land reform (1950–52) and the upheavals it caused. Indeed, for the next 30 years, the roots of a great many criminal cases could be traced directly to the land reform period and to issues dating back to before 1949. Many counties established justice sections by 1952 and most had seen widespread mass adjudication of land reform claims against 'counterrevolutionaries' (*fangeming*), 'land bandits' (*tufei*), and 'illegal landlords' (*bufa dizhu*), as well as alleged agents of the old regime. In addition to such cases, a high

proportion of otherwise routine crimes were imbued with political content to facilitate their prosecution—for example, by calling a rapist or burglar a counterrevolutionary or bandit.

Also during this period, basic institutions of criminal adjudication and punishment grew up in the rural areas. ‘Reform through labour’ (*laodong gaizao*) camps and factories, prisons, and institutions capable of dispensing capital punishment and other penalties were all established, alongside at least proto-courts. The content of prosecutions remained overwhelmingly political and politicised. But the institutions and workings of justice began to come into being. Thus, on the eve of the enactment of the Organic Law and 1954 Constitution, most of rural China already had the makings of a legal and criminal justice system, albeit one that had grown up under the mobilisational politics of land reform and its immediate aftermath.

The situation in cities was markedly different. There, already existing courts were turned upside down through purges of judges and other officials during the many campaigns, such as those to Suppress Counterrevolutionaries, the Three Antis, and Five Antis. Without the highly skilled and experienced, if politically suspect, old regime officials, urban courts and other institutions had difficulty continuing to function. Many cities resorted to mass rallies in the early 1950s to prosecute hundreds or even thousands of criminals en masse (sometimes punishing them—occasionally even by execution—immediately afterward). Once the campaigns subsided somewhat and the new institutional framework was enshrined in foundational laws, the urban courts returned to more or less routine functioning by the mid-1950s.¹⁷

The relative calm of the First Five-year Plan period (1953–57) was disrupted, however, in both cities and rural areas, by the Anti-rightist Campaign of 1957 and especially the Great Leap Forward (1958–62). Courts in the countryside became more heavily politicised during this period than any other, prosecuting multitudes of alleged counterrevolutionaries and punishing them very harshly, quite often for crimes related to their pre-1949 conduct or alleged misdeeds during land reform.¹⁸ Also during this period, ‘reeducation through labour’ (*laodong jiaoyang*), a form of administrative detention that allowed police to detain people without judicial recourse for up to three years for minor offences, became a favoured tool of public security bureaus, and appears (particularly in the early 1960s) to have been used to deprive many newly-urban workers of their urban residency and relocate them back to their ‘home’ villages.¹⁹ In the cities, the Great Leap Forward years were also a time of intense politicisation and political competition in the legal system, though most of this played out in the prosecution of workers for economic crimes related to cheating or undermining the aims of the new planned economy.²⁰ Those alleged to have stolen supplies, sold ration tickets, or shirked official duties came in for especially harsh punishments. But so did those who were accused of undermining the Great Leap’s radical mobilisation through ‘reactionary speech’ (*fandong biaoyu*)—for example, in questioning unrealistic plan targets or criticising excesses—or other misdeeds or omissions of thought or ideology.

During the 1962–66 period, both city and countryside saw reduced political intervention into most cases and an increased use of reeducation through labour to handle petty crimes and send would be migrants into cities back to rural hinterlands. The lack of much political intervention during this time actually reflects a decreased

use of formal legal processes and institutions as much as anything else. The Socialist Education Movement played out very strongly through the Chinese political system and legal apparatus, just not as clearly through direct and overt prosecution.

The Cultural Revolution years are often erroneously assumed to be a period during which law and the legal system ceased to operate or function.²¹ This is completely false. In both cities and rural areas, courts and other legal institutions continued to operate. Overall, the Cultural Revolution certainly led to many urban judges and officials being displaced and a much less predictable implementation of justice in cities,²² but in some rural settings it actually produced a far more professionalised legal order than might otherwise have been present, precisely because of the involvement of military cadres and ‘revolutionary committees,’ as well as the entry of rusticated youth and other urban intellectuals into many rural settings.²³

Ultimately, by the end of the Maoist era the Chinese legal system was much more institutionalised in its form and regularised in its functioning than it had been in 1949. This was due primarily to the consistent assertion by Mao and his allies of his charismatic authority and claims to absolute leadership of the general revolutionary direction. The persistently mobilisational character of Maoist justice, however, resulted as much from the contestation of other rival political currents fighting for power as any ‘Mao in Command’ ideal. In fact, had Mao’s authority been more ironclad and the polity been more stable, it seems likely that we would have seen the emergence of a more settled legal order in China well before 1978. Yet, on the eve of reform, Chinese politics was as fractious as ever and the mobilisational character of Chinese law remained unchanged, despite all of the great upheavals in Chinese society more broadly.

The Rise of the Reform-era Hybrid

Importantly, the advent of the reform era in 1978 did not mean a sudden break from the Maoist order or a comprehensive embrace of Anglo-American or Western models of a rule of law. Instead, the major changes that did occur were the fixing of polity membership and a conscientious decision on the part of Deng and other leaders to foster the development of a market economy. This led to a distinctive hybrid legal regime that persists to this day, in which criminal law is characterised by neotraditionalism—in which entrenched powerholders intervene pervasively into legal processes to protect their interests—while civil law, especially in the commercial sphere, was marked by what I term ‘rule by law’—in which a stable polity refrains from intervening into adjudication of specific cases.²⁴

Once the struggle against the Gang of Four was complete and Hua Guofeng had been effectively outmanoeuvred, the new order led by Deng Xiaoping faced two essential tasks: keeping itself firmly in power, preventing any challengers, and promoting the market economic development they promised as China’s salvation and pathway to modernity. The first required pervasive intervention into the adjudication of criminal cases to ensure that any potential challengers to the new market order or, more bluntly, to the power of Deng and his faction, lost and were effectively sidelined or eliminated. The second necessitated the rollout of more predictable and formally rational adjudication processes and venues for civil dispute resolution to underpin a new system of contracts and market relations. We can see this pattern from at least the early 1980s forward, with

the imposition of campaigns like ‘strike hard’ (*yanda*) in criminal law alongside new systems of arbitration and legal clarification in areas like torts, contracts, and property law.

Indeed, without continued extralegal authority for the coercive apparatus,²⁵ China’s leaders could not be confident in their ability to maintain power in the form of a polity stabilised since 1978. At the same time, without ‘tying the regimes hands’,²⁶ China could never facilitate the development of markets on the scale or of the nature envisioned by Deng and his successors. Neotraditionalism and rule by law thus went hand in glove in the reform era’s particular developmentalist authoritarian order.

Reassessing China’s Legal Regime

In sum, Mao’s charisma helped prevent a breakdown of law or degeneration into a true *bellum omnium contra omnes* during the first three decades of the PRC. At the same time, his lack of total authority and the continuing high-stakes conflicts and struggles that characterised politics in the Mao era prevented any hardening of the polity’s boundaries or full routinisation of formally rational legal processes or adjudication. What prevailed was a highly idiosyncratic and astoundingly long-lived mobilisational legal regime, in which law definitely existed and legal institutions absolutely functioned, but in which law was always both a tool and a venue for political mobilisation and contestation. Understanding Maoist China’s mobilisational legal politics on their own terms is thus critical to avoiding mischaracterisations or assertions of lawlessness or obfuscations caused by trying to evaluate its legal order against some explicit or implied rule of law standard or template.

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