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A COMPARISON OF THE CHINESE AND SOVIET CODES OF CRIMINAL LAW AND PROCEDURE

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A purely textual comparison of the Chinese and Soviet codes of criminal law and procedure may be misleading, since the meaning of legal texts is always greatly affected by the historical experience from which they derive and in light of which they are intended to be applied. Nevertheless, there may be a special value in comparing the Chinese and Soviet texts, simply because the Chinese draftsmen had the Soviet texts before them and made the conscious choice of adopting some parts of them and rejecting other parts. That the Soviet codes served as models is apparent from the texts themselves and is confirmed by interviews with Chinese jurists. In fact, the Soviet texts were an important part of the historical experience from which the Chinese texts derived.

The language of the two sets of texts also has a certain significance in itself. The rhetoric and technique, and not only the policies, of the Chinese codes share certain important characteristics with, and also differ in certain important respects from, the rhetoric and technique of the Soviet codes.

Perhaps the most important common characteristic of the Chinese and Soviet texts is their emphasis on what in all socialist legal systems is called "the educational role" of law. This emphasis is, indeed, the most important characteristic that all socialist legal systems have in common.¹ In socialist countries the main purpose of law, in general, and especially of criminal law, is to educate, guide, and train a new type of person, who will be loyal, cooperative, disciplined, altruistic, and respectful of the rules of socialist communal life. The Chinese and the Soviet codes reflect this "parental" jurisprudence, although in different

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¹ See Berman, *What Makes "Socialist Law" Socialist?* 20 PROB. OF COMMUNISM, Sept.-Oct. 1971, at 24.

ways.²

Perhaps the most striking difference in the style of the two sets of codes is the profuse moralism of the Chinese, which is coupled with a high degree of latitude in the definition of crimes, as well as in pretrial and trial procedure. This contrasts with the stern formalism of the Soviet codes, which is coupled with a high degree of detail and precision in both substantive and procedural rules. Formalism, it should be noted, is by no means inconsistent with the parental character of Soviet law.

In this article, examples are given of these and other similarities and differences, and in a short conclusion an attempt is made to explain their relationship to the historical contexts in which the two sets of codes came into existence.

I. THE CRIMINAL PROCEDURE LAW

The similarities in structure and terminology between the 1979 Criminal Procedure Law of the People's Republic of China ("Chinese CP")³ and earlier Soviet legislation, especially the 1960 Code of Criminal Procedure of the RSFSR ("Russian CCP"),⁴ strongly suggest that the former was modeled substantially on the latter. On the other hand, there are many important differences in style and content between the two, so that it cannot be said that the Chinese CP is simply a copy of the Russian CCP. It must also be borne in mind that some of the earlier Soviet law of criminal procedure, based on the 1923 RSFSR Code of Criminal Procedure (which survived, with amendments, until 1958-60), had penetrated China in the decade after the establishment of the People's Republic and before the subsequent break with Moscow. The 1979 law was apparently modeled to a certain extent on drafts made during that earlier Chinese experience, as well.

The Chinese CP, like the Russian CCP, and, indeed, like Western European codes of criminal procedure, starts with a "general part," in which fundamental principles are set forth, followed by a series of chapters concerning procedure prior to trial, the trial, appeals, and execution of sentences.

² See H. BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* Part III, "Parental Law" (rev. ed. 1963); Berman, *The Use of the Law to Guide People to Virtue: A Comparison of Soviet and U.S. Perspectives*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 75 (J.L. Tapp & F.J. Levine eds. 1977).

³ The translation of the Criminal Procedure Law of the People's Republic of China is printed at pp. 171-203 *supra* [hereinafter cited as CHINESE CP].

⁴ Both the RSFSR Code of Criminal Procedure [hereinafter cited as RUSSIAN CCP] and the RSFSR Criminal Code [hereinafter cited as RUSSIAN CC] are translated in H. BERMAN & J. SPINDLER, *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES* (2d ed. 1972); an updated version of this translation may be found in *THE SOVIET CODES OF LAW* 54 (W. Simons ed. 1980).

The Chinese and Russian codes, in contrast to the Western European codes, also have sections on supervisory review of final judgments. This is connected with the importance attached in both systems to central supervision of lower courts by the procuracy and the supreme judicial tribunal. In addition, the Chinese code has a separate chapter, for which there is no Russian counterpart, on procedure for review of death sentences. The Russian code has sections, omitted from the Chinese, on proceedings in cases of minors, proceedings for application of compulsory measures of a medical character, and proceedings in cases of hooliganism. Even after these last three sections are subtracted, the Russian CCP has 370 articles, whereas the Chinese CP has only 164 articles. Moreover, the individual articles of the Russian CCP are much longer. The Russian code is, in fact, about five times as long as the Chinese. Thus, the Chinese code may be viewed, in one aspect, as a simplification of Soviet law.

A. PHILOSOPHY AND PURPOSES OF THE CODE

Article 1 of the Chinese CP proclaims the "guiding ideology" of the code, namely its basis in "Marxism-Leninism-Mao-Zedong thought," in the Constitution, and in the "people's democratic dictatorship." This has no parallel in the Russian CCP, although it is reminiscent of Soviet codes of the 1920s.

Article 2 of the Chinese CP states "the tasks" of criminal procedure. Here the language is so similar to that of Article 2 of the Russian CCP that one suspects the former is, in part, a translation of the latter. Both codes accept the compatibility of basic goals of criminal procedure which in current American legal thought are often taken as inherently in conflict with each other: to acquit the innocent and to convict the guilty, to proceed objectively in the investigation and prosecution of crimes and to educate citizens to be cooperative and loyal.⁵

B. RIGHT TO COUNSEL

The right to counsel is much more limited under the Chinese CP than under the Russian CCP. Under Article 49 of the Russian CCP, the participation of a defense counsel at trial is obligatory (unless the accused refuses one) in a case in which a state prosecutor appears, and if such counsel is not engaged by the accused he must be appointed by the court. The Chinese CP provides only that where the public prosecutor appears the court "may" appoint a defense counsel for the accused.⁶ Also the Chinese code follows the Russian code in providing for compul-

⁵ See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6-17 (1964).

⁶ CHINESE CP, art. 27.

sory appointment of defense counsel where the accused is deaf, dumb, or a minor, but omits to follow it in adding other categories such as blind persons or others who by reason of physical or mental defects are not themselves able to exercise their right of defense, persons brought to trial for capital crimes, and others.

The role of the defense counsel is spelled out in much greater detail in the Russian CCP. In both codes, defense counsel (or other person defending the accused, such as a near relative or legal representative or representative of a social organization) is required to present evidence tending to acquit the accused or to mitigate his responsibility.⁷ However, under the Chinese code, the defense counsel is only empowered to "consult the materials of the case" and "acquaint himself with the circumstances of the case . . . and interview and correspond with a defendant held in custody."⁸ The Soviet defense counsel, on the other hand, is given in addition "the right . . . to copy necessary information [from the file of the case], to present evidence, . . . to submit challenges, [and] to appeal from actions and decisions of the investigator, procurator, and court."⁹ Also the Soviet defense counsel may participate in the preliminary investigation after the investigator has issued an indictment, and may at that stage challenge the indictment and petition for further evidence to be obtained; he may also participate from the beginning of the preliminary investigation in certain types of cases.¹⁰ These two important aspects of the right to counsel before trial under Soviet law are omitted from the Chinese code.

C. "RIGHTS OF THE ACCUSED"

A special feature of the Russian CCP is its separate enumeration of certain "rights of the accused." Article 46 provides that

the accused shall have the right to know what he is accused of and to give explanations concerning the accusation presented to him, to present evidence, to submit petitions, to become acquainted with all the materials of the case upon completion of the preliminary investigation or inquiry, to have defense counsel [at a certain point in the preliminary proceedings], to participate in the [trial], to submit challenges, and to appeal from the actions and decisions of the person conducting the inquiry, the investigator, the procurator, and court.

These rights must be explained to the accused in advance and notation of his acknowledgment of such explanations must be obtained.¹¹

The Chinese CP contains no comparable provisions. Also the Chi-

⁷ RUSSIAN CCP, art. 51; CHINESE CP, art. 28.

⁸ CHINESE CP, art. 29.

⁹ RUSSIAN CCP, art. 51.

¹⁰ *Id.*, arts. 47, 49.

¹¹ *Id.*, art. 149.

nese CP contains nothing comparable to Article 150 of the Russian CCP, which provides that "[i]nterrogation of the accused may not take place at night, except in instances not permitting delay."

D. EVIDENCE

Chapter Five of each code is entitled "Evidence." In the Soviet code this chapter starts with a precise enumeration of the kinds of circumstances of a case that are subject to proof, including the time, place, and other circumstances of the crime, the guilt of the accused, mitigating and aggravating circumstances, and the character and extent of harm caused.¹² The Chinese code merely refers in general to "the true circumstances of a case."¹³ Article 31 then goes on to list six kinds of evidence that may be presented; these seem to be drawn directly from Article 69 of the Russian CCP. The provision of the Russian code requiring the court to evaluate evidence "in accordance with its inner conviction, based on a thorough, complete, and objective consideration of all the circumstances of the case in their totality, being governed by law and by socialist legal consciousness"¹⁴—is entirely omitted from the Chinese code. Also omitted are the provisions prohibiting the attaching of any previously established value to any type of evidence (so-called "formal proofs")¹⁵ and excluding a witness' testimony to factual data unless he can state the source of his knowledge of them.¹⁶

In the chapter on Evidence, the Chinese CP forbids the use of torture, threat, enticement, deceit, or other unlawful means to obtain evidence.¹⁷ This is also forbidden by the Russian CCP.¹⁸ Both the Chinese CP¹⁹ and the Russian CCP²⁰ forbid conviction on the basis of a confession uncorroborated by other circumstances.

E. COERCIVE MEASURES

Chapter Six of the Chinese code, entitled "Coercive Measures," corresponds to Chapter Six of the Russian code, entitled "Measures of Restraint." Under the Russian code, a person arrested for committing a crime may be held for 24 hours prior to being turned over to the procuracy, which may detain the suspect for 48 hours before making a

¹² *Id.*, art. 68.

¹³ CHINESE CP, art. 31.

¹⁴ RUSSIAN CCP, art. 71.

¹⁵ *Id.*

¹⁶ *Id.*, art. 74.

¹⁷ CHINESE CP, art. 32.

¹⁸ RUSSIAN CCP, art. 20.

¹⁹ CHINESE CP, art. 35.

²⁰ RUSSIAN CCP, art. 77.

formal accusation. However, "in exceptional instances," a suspect may be kept in custody for ten days before an accusation is presented to him.²¹ Under the Chinese code, the police may detain a suspect up to three days, and in exceptional cases up to seven; thereafter the procurator has three days to bring formal charges ("arrest").²² The Russian code permits an accused person to be kept in custody during the preliminary investigation if there is reason to believe that he will engage in criminal activity or if there is reason to believe that he will hide or otherwise hinder the investigation.²³ The Chinese CP, on the other hand, refers only to confinement of persons who have been arrested for a crime. Suspects who are not formally charged within ten days must be released; if formally charged, they may be confined or released under surveillance during the preliminary investigation. No standard is provided in the Chinese CP for the exercise of discretion to confine an accused or release him under surveillance.

With regard to the crucial question of the maximum length of the preliminary investigation, both codes start with a rule of two months, and both permit this to be extended by the procuracy of the next higher level. The Chinese code permits extension for one month. The Soviet code also permits extension for one month at first but then, by the RSFSR Procurator, for another three months, and thereafter, "only in exceptional instances," by the USSR Procurator General, for still another three months (in other words, for a total confinement of nine months). The Chinese code is less complicated; it merely states that "in especially major or complex cases" the National People's Congress Standing Committee may grant an extension beyond the initial three months.²⁴

F. THE PRELIMINARY INVESTIGATION

In the 1950s the People's Republic of China imported from the Soviet system of law and government the institution of the procuracy, whose dual function is (a) to supervise legality²⁵ by protesting administrative violations of law to higher authorities and (b) to investigate and prosecute crimes. The Soviet "investigator" (*sledovatel'*) like his pre-Revolutionary Russian forebear, performs functions similar to those of the French *juge d'instruction* or German *Untersuchungsrichter*. However, the So-

²¹ *Id.*, art. 90.

²² CHINESE CP, art. 48.

²³ RUSSIAN CCP, art. 89.

²⁴ CHINESE CP, art. 92.

²⁵ On the history of the Russian procuracy and the responsibility of the procurator and its function of "general supervision" of the legality of administrative acts, see H. BERMAN, JUSTICE IN THE USSR 239-47 (2d ed. 1963).

viet investigator, unlike his French, German, or pre-Revolutionary Russian counterpart, is subordinate not to the court but to the procuracy. The procuracy confirms the indictment and conducts the prosecution in court.

In China the investigation of almost all types of cases is conducted by an official of the police rather than of the procuracy; however, abuses by the investigator are subject to appeal to the procuracy.

If we compare the provisions of the Chinese and Soviet codes of criminal procedure dealing with the preliminary investigation, it appears, once again, that the Chinese have adapted to their own purposes, and greatly simplified, the Soviet law. The Russian CCP contains 96 articles in the portion of the code devoted to the preliminary investigation; the Chinese CP contains only 33 articles. Moreover, the text of those 96 articles is about five times as long as the text of the 33 articles.

One result of this great condensation is that it is much more difficult to evaluate, on the basis merely of the code, the quality of the Chinese system of preliminary investigation. The Russian CCP, in contrast, gives a strong impression of an effort to repudiate the practices of the Stalin era, when legal procedures and legal standards were greatly emphasized and at the same time greatly abused and distorted in political cases. We have seen examples in the admission of counsel to the preliminary investigation, albeit in most cases at a late stage; in the requirement that the rights of the accused be explained to him and that he sign a statement to the effect that such an explanation has been given; and in the prohibition against interrogation at night. Even apart from such examples as these, the entire body of law on preliminary investigation contained in the Russian CCP sets very high standards of objectivity, thoroughness and skill. There is no way of knowing, of course, from such a document alone, the extent to which those standards are implemented in practice. Even apart from widespread reports of abuses in political cases there is evidence from Soviet legal literature that investigators do not always fulfill their responsibilities. Similarly, the fact that the Chinese code provisions suffer by comparison does not necessarily mean that the Chinese practice suffers by comparison. Regardless of how Chinese practice in criminal investigations compares with Russian practice, it is interesting that the Chinese *code* suffers by comparison.

G. TRIAL PROCEDURE

The courtroom procedure for considering a criminal case set forth in the Chinese CP resembles Soviet criminal trial procedure in most respects. Like its Soviet counterpart, the Chinese tribunal consists of a professional judge and two lay assessors, with decision by majority

vote.²⁶ Trial is public except in cases involving state secrets, intimate private affairs, and juvenile crimes.²⁷ The trial starts with a reading of the indictment—in China by the public prosecutor and in the Soviet Union by the presiding judge. Then the court interrogates the accused, who is subsequently interrogated by the prosecutor, the victim or civil plaintiff, and defense counsel. Witnesses are then interrogated first by the court and then by the other participants. The right to the “last word”—before the court retires to deliberate—is reserved to the accused.²⁸ These provisions have exact counterparts in Soviet law.²⁹

The Chinese accused, however, in contrast to the Soviet, is not told in advance the evidence to be used against him. He is not allowed to see the entire record of the preliminary investigation. His lawyer may see it, but, according to leading Chinese jurists interviewed by one of the authors in June 1981, the lawyer may not disclose to his client the detailed contents of the evidence. One reason given for this extraordinary rule is that such disclosure would tend to impair the voluntary character of a confession. The result is to change the nature not only of the preliminary investigation, but also of the right to counsel and of the trial itself.

H. APPEALS

As in Soviet procedure, there is a right to one appeal in Chinese procedure, by either the accused or the prosecutor. The Chinese time limit for bringing an appeal from a judgment is ten days; the Soviet time limit is seven days. The court of second instance reviews both facts and law. If the accused appeals, the court of second instance is not to increase the punishment. The judgment of the court of second instance is said to be final; nevertheless, there is a procedure for discretionary review, called “supervisory review,” or “review by way of supervision,” through which final decisions of appellate courts may be revised by higher courts. All these features of the Chinese CP have almost exact parallels in the Russian CCP.³⁰

However, Article 137 of the Chinese CP (which states that in cases appealed by the accused the court of second instance may not increase the penalty, whereas in cases appealed by the procuracy this limitation is inapplicable) omits, perhaps inadvertently, the Soviet provision that if the procurator appeals (technically, “protests”) on the ground of the mildness of the punishment or the necessity of applying the law applica-

²⁶ CHINESE CP, arts. 105-06.

²⁷ *Id.*, art. 111.

²⁸ *Id.*, arts. 114-15.

²⁹ RSFSR L. ON CT. ORGANIZATION, in H. BERMAN & J. SPINDLER, *supra* note 4, at 335, arts. 10, 12; RUSSIAN CCP, arts. 18, 278, 280, 297.

³⁰ CHINESE CP, arts. 129, 131, 137, 148; RUSSIAN CCP, arts. 325, 332, 337, 340, 371.

ble to a graver crime, the court may vacate the judgment and remand the case for a new trial.³¹ This rule goes together with the rule that if the accused appeals, the court may not worsen his situation (*reformatio in peius*). The omission of any reference to remand in Article 137 of the Chinese code leaves open the question of what the court may do if both the accused and the procurator appeal. Apparently the appellate court may itself increase the punishment. (In one such case, heard on appeal in Shanghai on June 9, 1981, at which one of the authors of this article was a spectator, the court did just that.)

I. PRESUMPTION OF INNOCENCE

Neither the Chinese CP nor the Russian CCP contains the presumption of innocence *expressis verbis*. Nevertheless, the Russian CCP contains a series of provisions that add up to the presumption of innocence at the trial level—or at least to that much of it that is meaningful in a system in which the court interrogates the accused on the basis of the indictment issued after a preliminary investigation. Thus the Russian CCP, following the USSR Fundamental Principles of Criminal Procedure, provides:

(a) that the court, procurator, investigator, or person conducting an inquiry may not transfer the obligation of proof to the accused;³²

(b) that the accused has the right to present evidence,³³ but that it is forbidden to extract statements from him by force, threat, or other illegal measures,³⁴ and no punishment is applicable to him (as it is to others) for refusing to testify or for giving false testimony;³⁵

(c) that the judgment of the court shall be based only on evidence considered in the trial;³⁶

(d) that the accused shall be acquitted if his participation in the commission of the crime is not proved;³⁷

(e) that a conviction may not be based on assumptions (*predpolozheniia*, “presuppositions”) but shall be decreed only if the guilt of the accused is proved in the course of the trial;³⁸

(f) that on appeal a conviction shall be vacated and the case

³¹ RUSSIAN CCP, art. 347.

³² *Id.*, art. 20.

³³ *Id.*, art. 46.

³⁴ *Id.*, art. 20.

³⁵ *See, e.g., id.*, art. 282.

³⁶ *Id.*, art. 301.

³⁷ *Id.*, art. 309.

³⁸ *Id.*

terminated if the findings of the court are not confirmed by evidence considered in the judicial session.³⁹

None of these provisions of the Russian CCP appear in the Chinese CP, although Articles 32 and 36 might, by very broad construction, be given similar effect.

There is another aspect of the presumption of innocence that has not been sufficiently recognized as such in England and America, namely, the right of the accused person prior to trial to be treated with as much dignity as possible, taking into consideration the need to interrogate him and bring him to trial. This is traditionally covered in English and American law chiefly in terms of the remedy of habeas corpus and the right to bail; in Europe, ever since the 1789 French Declaration of the Rights of Man, it has been considered to be part of the presumption of innocence. Neither the Chinese nor the Russian Code of Criminal Procedure addresses itself to this aspect of the presumption of innocence.⁴⁰

J. THE ROLE OF SOCIAL ORGANIZATIONS

In the 1950s, when the Khrushchev regime began to emphasize popular participation in the administration of justice (comrades' courts, people's guards, representation of collectives of workers or neighbors in judicial proceedings, etc.), it was suggested by some Western observers⁴¹ that the Soviets were emulating Chinese developments. Others, however, pointed out a significant difference between Chinese and Soviet conceptions of popular justice, namely, that the Soviet conception stressed the conjunction of popular and official procedures and the subordination of the former to the latter.⁴² From this point of view it is of interest that in contrast with Soviet law there are no articles in the Chinese CP providing for participation of a "social accuser" and "social defense counsel" in a criminal trial,⁴³ or for transfer of criminal cases to comrades' courts,⁴⁴ or for enlisting social organizations in the exposure of crime,⁴⁵ or for special rulings to social organizations concerning the incorrect conduct of individual citizens.⁴⁶ There is, however, in the

³⁹ *Id.*, arts. 342, 344.

⁴⁰ See Berman, *The Presumption of Innocence: Another Reply*, 28 AM. J. COMP. L. 615, 622-23 (1980). See also Cohen, *Introduction*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 18 (J. Cohen ed. 1970).

⁴¹ See Berman & Spindler, *Soviet Comrades' Courts*, 38 WASH. L. REV. 842 (1963).

⁴² *Id.*

⁴³ See, e.g., Russian CCP, arts. 250, 263.

⁴⁴ See, e.g., *id.*, arts. 7-10, 95, 304.

⁴⁵ See, e.g., *id.*, art. 128.

⁴⁶ See, e.g., *id.*, art. 321.

Criminal Law of the People's Republic of China,⁴⁷ as in the Russian, a provision for transfer of convicted persons to the "control" (in Russian terminology, "suretyship") of social organizations.⁴⁸ With this exception, it would appear that in Chinese law the use of informal social pressure is kept separate from the formal procedures set forth in the code.

II. THE CODE OF CRIMINAL LAW

The Criminal Law of the People's Republic of China ("Chinese CL"), like the Criminal Procedure Law, bears a strong family resemblance to its Soviet counterpart, the 1960 RSFSR Criminal Code⁴⁹ ("Russian CC"). It is, similarly, much shorter, with about two thirds as many articles occupying about one third as much space. In contrast to the procedural code, however, the Chinese code of substantive criminal law has a great many distinctive features, most of which seem characteristically Chinese, though some seem to bear traces of Soviet law of the period before Stalin's death.

A. THE GENERAL PART

The structure of the Chinese CL resembles that of the Russian CC in several important respects. It consists of a General Part and a Special Part. The General Part is subdivided into the same broad topics as its Russian counterpart and follows the same general order. The definitions of crime and criminal responsibility (intent and negligence, imputability, necessary defense, etc.) and stages of criminal activity (preparation, attempt, *locus poenitentiae*)⁵⁰ do not differ significantly from parallel provisions of the Russian CC.⁵¹

There are, however, some important stylistic and substantive differences even in the General Part. These differences include the following:

(1) The Chinese CL retains the language of "proletarian dictatorship," "the worker-peasant alliance," and "struggle against counter-revolutionary conduct"⁵²—language which disappeared from Soviet legal documents after Stalin's death. Its reference in Article 1 to "Mao-Zedong Thought" is, of course, uniquely Chinese. However, the corresponding phrase "Marxism-Leninism" also does not appear in the current Soviet codes. In addition, phrases such as "safeguarding the smooth progress of the socialist revolution and the work of socialist con-

⁴⁷ The translation of the Criminal Law of the People's Republic of China is printed at pp. 138-70 *supra* [hereinafter cited as CHINESE CL].

⁴⁸ CHINESE CL, arts. 33-34.

⁴⁹ See note 4 *supra*.

⁵⁰ CHINESE CL, arts. 10-21.

⁵¹ RUSSIAN CC, arts. 7-19.

⁵² CHINESE CL, art. 2.

struction"⁵³ stand in contrast to the more conservative emphasis of the Russian CC on protecting "the socialist legal order" and "the Soviet social and state system."⁵⁴

(2) The extraterritorial reach of Chinese criminal law under Articles 4, 5, 6, and 7 goes far beyond that of Soviet law. In particular, the Chinese lawmakers seem to have been especially concerned to extend Chinese criminal law to cover many acts committed outside of China not only by citizens of the People's Republic, but also by citizens of other states.

(3) The Chinese CL carries over from Soviet theory the concept that an act, to be criminal, must be socially dangerous.⁵⁵ However, the Chinese CL does not repeat the Soviet injunction against punishing a person for an act that is not expressly prohibited in the Special Part of the Code. On the contrary, Article 79 of the Chinese CL firmly incorporates the principle of analogy, which formed a key part of the 1926 Russian CC, but which was criticized in the late 1930s and finally discarded by the Soviets in 1958. Under that principle a person who commits a socially dangerous act not expressly prohibited by law may be punished under an article in the code proscribing an "analogous" act. That the earlier Soviet controversy found a parallel in Chinese legal thought is reflected in the compromise reached in Article 79, under which any application of the principle of analogy requires the approval of the Supreme Court.

(4) The penalty of "control"⁵⁶ is not to be found in the Russian CC (although it appears to be similar to the Russian *poruka*, "suretyship," of social organizations), nor are the expressions "criminal element"⁵⁷ and "the masses."⁵⁸

(5) The Russian CC provides a list of aggravating and mitigating circumstances to guide a court in determining the penalty in a given case within the maximum and minimum limits set for the particular crime.⁵⁹ The Chinese CL also provides that the penalties should be adjusted according to "the circumstances provided by this law for giving a 'heavier' or 'lesser' penalty" but then does not set forth a list of such circumstances.⁶⁰

(6) Unlike the Russian CC,⁶¹ the Chinese CL makes no provision

⁵³ *Id.*

⁵⁴ RUSSIAN CC, art. 1.

⁵⁵ CHINESE CL, art. 10; RUSSIAN CC, art. 7.

⁵⁶ *Id.*, art. 28.

⁵⁷ *Id.*, art. 31.

⁵⁸ *Id.*, art. 34.

⁵⁹ RUSSIAN CC, arts. 38-39.

⁶⁰ CHINESE CL, art. 58.

⁶¹ RUSSIAN CC, art. 57.

for expunging a record of conviction a certain number of years after the sentence has been served.

(7) The Russian CC permits full criminal responsibility to be imposed on persons of fourteen or above in certain types of serious crimes,⁶² whereas the Chinese CL provides for some mitigation of punishment for minors under eighteen in all cases.⁶³ Unlike the Russian CC,⁶⁴ however, the Chinese CL provides no special procedures to guide parole decisions or reduction of sentences in cases of minors.

(8) Unlike the Russian CC,⁶⁵ the Chinese CL makes no mention of compulsory medical or educational measures.

B. THE SPECIAL PART

The Special Part of the Chinese CL, like the Special Part of the Russian CC, contains both the definitions of specific crimes and the punishments applicable to each. The classifications are roughly similar, and proceed generally in a descending order of dangerousness to society. It is hard to doubt that the Chinese draftsmen had the Soviet model before them. Nevertheless, they clearly were inclined to depart from it in some important respects, of which the following are examples:

(1) The Chinese CL is much less specific and detailed than the Russian CC in its enumeration of crimes and much less precise in its definitions of their component elements. This is illustrated by the fact that the Special Part of the Chinese CL contains only 103 articles, whereas the Special Part of the Russian CC contains 206 articles—precisely twice as many. Moreover, the 206 articles in the Russian CC are broken down into far more subsections than are the 103 articles of the Chinese CL. At the same time, the Chinese code defines or characterizes crimes in much broader terms than its Soviet counterpart. For example, the Russian CC contains sixteen separate articles on crimes against socialist ownership, including secret stealing, open stealing, assault with intent to rob, embezzlement, swindling, causing property damage through extortion, intentional destruction or damaging of property, negligent destruction or damaging of property, and others.⁶⁶ Many of these articles are divided into several parts, with different punishments assigned, depending on whether the crime has been committed, for example, repeatedly, or by a group of persons, or by an especially dangerous recidivist, or on a large scale, or with serious loss or with grave bodily injury. This classification is in addition to eight separate articles on

⁶² *Id.*, art. 10, 63.

⁶³ CHINESE CL, art. 14.

⁶⁴ RUSSIAN CC, arts. 55, 63.

⁶⁵ *Id.*, arts. 58-63.

⁶⁶ *Id.*, arts. 89-101.

crimes against personal ownership.⁶⁷ The Chinese CL, by contrast, contains seven articles on crimes against property, each of them quite short, and most of them not distinguishing between public and private property.⁶⁸

Similarly, whereas the Chinese CL sets forth only two types of homicide—intentional and negligent—the Russian CC distinguishes, in addition, homicide committed while exceeding the limits of necessary defense, homicide resulting from intentional infliction of less grave bodily injury, and homicide resulting from intentional infliction of bodily injury while in a state of mental agitation.

An extreme example of the contrast between the precision and formality of the Soviet code and the generality of the Chinese may be found in their respective provisions on treason. The Russian CC defines treason (literally, “betrayal of the motherland”) as

an act intentionally committed by a citizen of the USSR to the detriment of the state independence, the territorial inviolability, or the military might of the USSR, namely, going over to the side of the enemy, espionage, transmission of a state or military secret to a foreign state, flight abroad or refusal to return from abroad to the USSR, rendering aid to a foreign state in carrying on hostile activity against the USSR, or a conspiracy for the purpose of seizing power⁶⁹

Under the Chinese CL, on the other hand, treason is not defined at all. Instead it is merely provided that “whoever defects to the enemy and turns traitor shall be sentenced”⁷⁰

It may also be noted that there are no parallels in Soviet law to the Chinese practice of failing to specify the amounts of fines.

(2) The Chinese CL uses the formula “[w]hoever does such-and-such shall be sentenced to such-and-such,” and “occasionally, “[a] person who does such-and-such shall be punished by such-and-such,” whereas the Russian CC uses the formula “[s]uch-and-such an act shall be punished by such-and-such.” Also the Chinese CL, in contrast to the Russian CC, occasionally uses the formula, “[l]eading elements shall be sentenced” This difference in style is linked with the difference in degree of specificity of individual crimes discussed in the previous paragraphs. The Soviet emphasis is on punishment of specific wrongful acts. The Chinese emphasis is on punishment of various kinds of wrongdoers.⁷¹

The emphasis on punishment of wrongdoers is connected with the

⁶⁷ *Id.*, arts. 144-51.

⁶⁸ CHINESE CL, arts. 150-56.

⁶⁹ RUSSIAN CC, art. 64.

⁷⁰ CHINESE CL, art. 94.

⁷¹ For an illuminating discussion of this distinction, see G. FLETCHER, *RETHINKING CRIMINAL LAW passim* (1978).

use of highly moralistic words such as "odious," "heinous," and "monstrous" to describe the elements of some offenses—words that do not appear in the Russian CC. Also the Russian CC does not use the phrase "it is prohibited" in referring to various types of punishable activity⁷²—a phrase which adds moral overtones of opprobrium to the specific elements of the crime.

(3) The Chinese CL, in contrast to the Russian CC, does not contain separate chapters on crimes against justice, crimes constituting survivals of local customs, and military crimes. It combines, as we have already indicated, crimes against socialist property and crimes against personal property. Its chapter on "crimes of disrupting marriage and the family" has no counterpart in the Russian CC. The Chinese chapter on "crimes of undermining the socialist economic order," which is also not contained as such in the Russian CC, includes some provisions that are found in the Russian CC in chapters on "crimes against socialist ownership" and "economic crimes," but the Chinese code casts them in a political framework, presumably requiring an intent to "undermine" socialism, so that they appear as another kind of crime against the state.

(4) Both codes start with major crimes against the state, which in the Russian CC are called "especially dangerous crimes against the state,"⁷³ and which in the Chinese CL are called (as they were called in the Soviet legislation prior to 1958) "crimes of counterrevolution."⁷⁴ This category is followed in the Chinese CL by a chapter on "crimes of endangering public security,"⁷⁵ which, although heavily preoccupied with crimes of sabotage, is roughly analogous to the second section of the first chapter of the Russian CC, entitled "other crimes against the state."⁷⁶ Here the Chinese code matches the Russian in length and, indeed, if the chapter on "crimes of undermining the socialist economic order"⁷⁷ is added, more than matches it both in length and in detailed characterization of proscribed conduct.

The terminology of "counterrevolution," which goes back to the earlier periods of Soviet criminal legislation, is linked—as it was in the 1926 Russian CC⁷⁸—with vague and sweeping denunciations. Such language as "[w]hoever organizes or leads a counterrevolutionary group," "[w]hoever . . . uses feudal superstition . . . to conduct counterrevolutionary activities," "[i]nciting the masses to resist or to sabotage

⁷² See, e.g., CHINESE CL, art. 138.

⁷³ RUSSIAN CC, arts. 64-73.

⁷⁴ CHINESE CL, arts. 90-104.

⁷⁵ *Id.*, arts. 105-15.

⁷⁶ RUSSIAN CC, arts. 74-88-2.

⁷⁷ CHINESE CL, arts. 116-30.

⁷⁸ In this respect, the RSFSR Criminal Code was superseded only in 1958 by a new Law on Crimes Against the State.

the implementation of China's laws or decrees," and leading "armed mass rebellion"—is reminiscent of the notorious Article 58, "Counter-revolutionary Crimes," of the 1926 Russian CC. On the other hand, nothing in the Soviet criminal legislation quite compares with the detailed provisions on sabotage contained in the Chinese CL; these are stretched out over eleven separate articles,⁷⁹ and proscribe such acts as setting fires, breaching dikes, causing explosions, spreading poisons, overturning means of transportation, transporting firearms, and many others, directed against factories, mines, oilfields, harbors, rivers, trains, automobiles, streetcars, ships, airplanes, railroads, bridges, tunnels, highways, lighthouses, etc.

However, the Soviet penalties for sabotage—under the one article of the code dealing with the subject⁸⁰—are more severe than the Chinese.

(5) The Chinese law contains no precise equivalent of the provisions of the Russian CC on possessing literature or circulating statements that defame the political or social system (Article 70 on anti-Soviet propaganda and Article 190-1 on defamation of the Soviet system seem to go much farther than Article 102 of the Chinese CL). Also the Chinese provision on divulging state secrets⁸¹ is considerably milder than the provisions of the Russian CC on this subject.⁸²

Other major provisions of the Russian CC that are absent from the Chinese CL are the following:

- a. Failure to report crimes;⁸³
- b. Concealment of crimes after the fact;⁸⁴
- c. Evasion of military duty;⁸⁵
- d. Negligent destruction of state or personal property;⁸⁶
- e. Violations of labor legislation;⁸⁷
- f. Copyright and patent infringements;⁸⁸
- g. Issuance of poor-quality products;⁸⁹
- h. Padding and other distortions of accounts concerning fulfillment of plans;⁹⁰

⁷⁹ CHINESE CL, arts. 105-15.

⁸⁰ RUSSIAN CC, art. 68.

⁸¹ CHINESE CL, art. 186.

⁸² RUSSIAN CC, arts. 64-65, 76, 259.

⁸³ *Id.*, arts. 88-1, 190.

⁸⁴ *Id.*, arts. 88-2, 189.

⁸⁵ *Id.*, art. 80.

⁸⁶ *Id.*, arts. 99, 150.

⁸⁷ *Id.*, arts. 137-40.

⁸⁸ *Id.*, art. 141.

⁸⁹ *Id.*, arts. 152, 157.

⁹⁰ *Id.*, art. 152-1.

- i. Deception of purchasers;⁹¹
- j. Hooliganism (*khuliganstvo*), defined as requiring not only intentional actions violating public order in a coarse manner but also the manifestation of a clear disrespect toward society.⁹² (The Chinese concept translated as "hooligan activities" in Article 160 of the Chinese CL may be similar in application, but it omits the specification of the psychological element of disrespect for society.);
- k. Vagrancy and parasitism;⁹³
- l. Failure to aid a person in danger or a sick person;⁹⁴
- m. Alcohol-related crimes;⁹⁵
- n. Homosexuality, depraved acts, sexual acts with a minor;⁹⁶
- o. Pollution of waters or air or of the sea;⁹⁷
- p. Motor vehicle crimes and related transportation crimes.⁹⁸

(6) Both Soviet and Chinese law identify as crimes a great many types of acts that are so characterized in most modern legal systems, such as intentional homicide, forgery, smuggling, tax evasion, and a host of others. Both Soviet and Chinese law also identify as crimes certain types of acts that are characteristic of their own political, economic, and social systems, and that are not criminal in most other types of systems. An example is the crime of speculation, which is named but not defined in the Chinese CL,⁹⁹ and which is defined in the Russian CC as "buying up and reselling of goods or any other articles for the purpose of making a profit."¹⁰⁰

The Chinese code contains many types of crimes that are not expressly covered in the Russian CC and that seem to be closely related to specifically Chinese circumstances. These include misappropriation of state relief funds (used for disasters, floods, etc.),¹⁰¹ forging or reselling ration coupons,¹⁰² assembling crowds to disturb order in public places,¹⁰³ assembling crowds to carry on hooligan activities¹⁰⁴ (the nearest Soviet analogue to "assembling crowds" is the anti-state crime of "mass disorders" under Article 79 of the Russian CC), falsely accusing

⁹¹ *Id.*, art. 156.

⁹² *Id.*, art. 206.

⁹³ *Id.*, art. 209.

⁹⁴ *Id.*, arts. 127-28.

⁹⁵ *Id.*, arts. 156, 158.

⁹⁶ *Id.*, arts. 119-221.

⁹⁷ *Id.*, arts. 223, 223-1.

⁹⁸ *Id.*, arts. 211-213-2.

⁹⁹ CHINESE CL, art. 117.

¹⁰⁰ RUSSIAN CC, art. 154.

¹⁰¹ CHINESE CL, art. 126.

¹⁰² *Id.*, art. 120.

¹⁰³ *Id.*, art. 159.

¹⁰⁴ *Id.*, art. 160.

or framing cadres or the masses,¹⁰⁵ unlawful detention or other deprivation of another's personal freedom,¹⁰⁶ unlawful personal search or house search or carrying out of "control" over another person,¹⁰⁷ public defamation and insults through the medium of big and small character posters,¹⁰⁸ retaliation by an official against one who has accused or criticized him,¹⁰⁹ harboring counterrevolutionary elements,¹¹⁰ swindling and rumormongering by sorcerers and witches using superstition,¹¹¹ intentional desecration of the state's boundary tablets, boundary markers, or survey indicators of a permanent nature,¹¹² marrying the spouse of a member of the military during the latter's actual service,¹¹³ and the "brutalization" of family members.¹¹⁴

C. PUNISHMENTS

The differences between the types of penalties provided by the two codes are not striking. The Chinese CL has not adopted the Soviet penalties of exile to or banishment from certain places. Also it has not adopted the penalty of deductions from monthly wages ("correctional tasks without deprivation of freedom"). On the other hand, the Chinese penalty of "control" seems to correspond to the Soviet "suretyship of social organizations." The maximum length of fixed term confinement in both cases is fifteen years;¹¹⁵ however, the Russian CC authorizes an additional five years of exile or banishment. The death penalty is more sparingly applied in the Chinese code.

A comparison of the severity of penalties imposed for particular crimes in the two codes would require a more detailed analysis than is warranted in a general article such as this. Also the policies underlying sentencing in the two codes deserves extensive discussion. Here it may be noted merely that the Chinese code omits the requirement that the court take into consideration the personality of the convicted person in assigning punishment. Apparently the emphasis is on the type of wrongdoer to be punished rather than on the particular wrongdoer.

¹⁰⁵ *Id.*, art. 138.

¹⁰⁶ *Id.*, art. 143.

¹⁰⁷ *Id.*, art. 144.

¹⁰⁸ *Id.*, art. 145.

¹⁰⁹ *Id.*, art. 146.

¹¹⁰ *Id.*, art. 162.

¹¹¹ *Id.*, art. 165.

¹¹² *Id.*, art. 175.

¹¹³ *Id.*, art. 181.

¹¹⁴ *Id.*, art. 182.

¹¹⁵ *Id.*, art. 40; RUSSIAN CC, art. 24. However, under the Chinese Criminal Law terms of imprisonment up to life imprisonment can result from repentance by the convicted during the two-year period of suspension of the death sentence. CHINESE CL, art. 46.

III. CONCLUSION

As we have seen, the Chinese codes of criminal law and criminal procedure bear a strong family resemblance to the corresponding Soviet codes. Many of the similarities between the two sets of codes are also shared by the systems of criminal law and procedure of most other countries as well. Many other similarities between the Chinese and the Soviet codes, however, are not shared by countries whose criminal law and procedure have developed independently of the Soviet model. On the basis of the texts alone, we may speak of a strong Soviet influence on the language and style as well as on the policy of the Chinese codes.

Nevertheless, there are striking differences between the Chinese and Soviet codes. Some of these differences disappear when the Chinese codes are compared with the early Soviet codes. The use of the principle of analogy in criminal law, the use of the terms "counterrevolution" and "counterrevolutionary," the great emphasis on crimes of sabotage, the rhetoric of dynamic change—these and other features that distinguish the 1979 Chinese CL from the 1960 Russian CC also link current Chinese law with the 1926 Russian CC.

The syntax and style of the Soviet codes are distinguished by their plain, blunt, and often ponderous character.¹¹⁶ Elegance and subtlety are sacrificed to the terse and direct statement of the rules. Each of the articles is labeled. Also the Soviet codes have a casuistic character, as compared with many other modern European codes; they are more detailed and include many points that elsewhere are left to legal tradition. These qualities are to be explained chiefly by two facts. First, the Soviet codes are addressed primarily to legal officials—judges, procurators, investigators, police—who are accustomed to rely on specific written texts to support their actions and who are generally required to cite those specific texts in procedural documents. Second, the 1960 Russian codes were part of the revulsion against the period of the so-called "cult of personality" of Stalin, when there was a strong emphasis on law and legality and, at the same time, a terrible abuse and distortion of legal forms in the very large number of cases in which the organs of terror intervened. The Soviet codes are meant to remove the scars of the defects and injustices of the earlier era, when every loophole in the law was exploited—or, when desired, new loopholes created—to give a semblance of legality to Stalinist terror. Thus the message of the language

¹¹⁶ For an elaboration of the points made in this paragraph, see Berman, *A Linguistic Approach to the Soviet Codification of Criminal Law and Procedure*, in *CODIFICATION IN THE COMMUNIST WORLD* 39 (D. Barry, F. Feldbrugge & D. Lasok eds. 1975); Berman, *Introduction and Analysis*, in H. BERMAN & J. SPINDLER, *supra* note 4, Ch. 10, "The Language of the Codes," at 113.

of the Soviet codes is strict legality: no crime without a law, precise definitions of criminal acts, specific procedural rights of the accused expressly stated, and so forth. This message is not considered incompatible with the teleological emphasis of Soviet criminal law—its strong purposive and educational character.

The Chinese codes of 1979 are, by comparison, much more simple, much more general, much more programmatic, and much more moralistic in their syntax and style. Active verbs and dynamic sentence structure contrast sharply with the predominant use of nouns, passive verbs, and heavy language of the Russian texts. This difference may be accounted for partly by the fact that the Chinese codes are directed against a different kind of terror from that which prevailed under Stalin in the period from 1934 to 1953. The Cultural Revolution was an attack on even the appearance of legality. The memory of it survives in such articles of the Chinese CL as Article 137, making it a crime to “assemble crowds for beating, smashing, and looting”—a provision that has no parallel in the Russian CC. Moreover, the Cultural Revolution left no class of lawyers, judges, procurators, and others capable of responding effectively to a highly complex body of criminal legislation. In some ways Maoism was more similar to Soviet “militant communism” of the period from 1917 to 1921 than to the Stalinism of the late 1930s, 1940s, and early 1950s, against which the post-Stalin regime has reacted. China was surely far less stable in 1979 than the Soviet Union was in 1960. The present Russian codes embody the law of a revolution that has settled down; the present Chinese codes embody the law of a revolution that is still boiling.

The value of such historical comparisons is, of course, greatly diminished when they are carried too far. No doubt it is possible to interpret the high degree of generality, simplicity, flexibility, and dynamism of the Chinese codes without reference to Soviet law—as a product of Chinese history, experience, and policy. The farther one goes into the details of the two legal systems (or, indeed, into the details of any two legal systems), the more each of them appears to be unique. In view of the very high degree of flexibility and ambiguity in Chinese legal language, it is even possible to question the identity of Chinese linguistic terms with Russian terms that they purport to translate.¹¹⁷

Yet particularization, too, when carried too far, results in distortion. All legal systems have some things in common. From an Ameri-

¹¹⁷ See Finkelstein, *The Language of Communist China's Criminal Law*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES, *supra* note 40, at 188, 197-99, 200-02.

can perspective, the texts, at least, of the Soviet and the Chinese codes of criminal law and procedure show such marked similarities that one may characterize the latter as conscious adaptations of the former to Chinese conditions.