Progress of the Law in China

Roscoe Pound
When I am asked to write on the law in China, I take it I am to use the term "law" in a wide sense, not only to include the codes and statutes but the organization of courts, application and interpretation of the codes and statutes, legal education, and the whole administration of justice as affected by or resulting from these things. I am able to speak with no little assurance on this subject, because since 1935 I have made a full and careful study of the Chinese codes and legislation on legal subjects and since February, 1946, as adviser to the Chinese Ministry of Justice, I have had to observe on the spot and study particularly many of the points of which I shall speak. Moreover, for some time past, under appointment from the Minister of Justice, I have been directing a Survey of the Administration of Justice in eastern China. The Assistant Director is Dr. Chao-lung Yang, Director of the Criminal Bureau of the Ministry, and we have a staff of fifteen—judges, law teachers, members of the Department staff, and recent graduates of law schools in the United States and Europe. We have already made thorough inspection of the facilities, methods, and personnel and survey of the needs of the courts, the agencies of criminal investigation, and the penal and correctional institutions of three large cities and have held a number of conferences with the judges, procurators, clerks of courts, and police in which the methods employed, difficulties encountered, needs, and questions of application of the codes which have been raised and constitutional questions presented have been fully gone into. Carefully prepared questionnaires have been widely circulated, going into all important articles of the codes and matters disclosed by the records of the courts and of the Ministry. The full answers returned show clearly the present conditions of the administration of justice and what needs to be done in the way of obviating difficulties, improving facilities, and procuring supplementary legislation.

I. THE CHINESE LEGAL SYSTEM AND THE WAR

Administration of justice in China in the past ten years has had to go on under many and serious difficulties. First of them is the general disruption brought on by the war and hostile occupation of the greater and richer part of the country. An account of the re-establishment of the courts at Shanghai on the evacuation by the Japanese in September of 1945, to be found in the report of the Chief Procurator of the District Court covering September 1945 to September 1947, is revealing. At the Japanese invasion the judges and officials of the courts were scattered. The President of the High Court had to hide and was pursued relentlessly by the puppet regime set up by the invaders. The Chief Procurator of the District Court had to flee and went to Chungking. As soon as possible after the Japanese evacuation, on September 19, 1945, the Chief Procurator arrived in Shanghai. He had no baggage and no facilities for work, but at once set about the task of reconstruction. Everything was in disorder. The officials who had acted under the Japanese puppet regime could not be utilized. Indeed many of them had to be prosecuted. The original staff was largely out of reach and competent new officials to take their places were hard to find. The volume of prosecution growing out of the disorder following the collapse of the Japanese regime was enormous. On September 25 the lawful judges were at hand and the prosecuting machinery had been set up and had begun to function. Between September and December of 1945 the procurators handled 4,987 cases with a depleted staff, and only 975 cases were undisposed of at the end of December. From January to December of 1946 there were 17,570 prosecutions, and at the end of the year only 520 cases were not disposed of. From January to December of 1947 there were 19,708 prosecutions, and at the end of the year only 246 had not been concluded. There was not a full staff of procurators, clerks, and clerical assistants until the latter part of 1946.

In more than one city the court records were destroyed or dissipated. Often the buildings and furniture of the courts were gone or in great part destroyed. In Nanking the High Court still has to make use of part of a Confucian temple, the rest being used for a school. In many places the prisons and houses of detention were destroyed in whole or in part, and where not destroyed the equipment was removed and has had to be replaced. Often the courts are working with deficient equipment, and money is lacking as a rule to supply what has been lost. The
efficiency with which courts are operating in spite of this condition speaks eloquently for the energy, ability, and devotion to duty of the judges, procurators, and clerks.

A like story to that told in the report of the Chief Procurator of the District Court at Shanghai can be told for the High Court and for civil causes and indeed for the District Courts and High Courts throughout the regions occupied by the Japanese.

Traffic in and use of opium had been effectually stopped by 1937. It came back during the Japanese occupation. The Japanese actively fomented its use. Now it is a prolific breeder of crime, and the criminal courts, already overburdened with prosecutions growing out of conditions of disorder created by the war, are much occupied with opium prosecutions, and the prisons, especially the women's prisons, are filled with opium convicts. Also, since the Japanese evacuation, prosecution of "collaborators" (those who took active part in the Japanese puppet regime) has taken up much of the time and activities of procurators and crowded the dockets of the courts. I have read many complaints as to the way the "collaborators" are treated. I talked with many of them in the prisons of the High Court at Nanking and at Shanghai. Some of them were well educated, not infrequently in American universities, and had held good and even high positions. I found them well treated, given, if they desired it, work in teaching fellow convicts, and translating or copying if their education had fitted them for such work. They were furnished good books to read, given a special diet if they were not used to Chinese food, and put in comfortable cells. I could see no reason for complaint as to their treatment in prison.

Communist activities, too, give the prosecutors and courts much additional work. It is not general advocacy of communist ideas or preaching of abstract communism that is prosecuted but direct stirring up of disorder, rioting, and destruction, even hiring children to set fires. Prosecution of these overt acts is often represented as political persecution. But I am satisfied, after having the records examined, that the authorities are discriminating and cautious beyond what we have been in the United States in time of war.

II. DIFFICULTIES OF ADMINISTRATION

A very great hindrance to reconstructing the administration of justice has been and is lack of money. After eight years of occupation of the greater and richer part of the country, with widespread destruc-
tion of the means of communication, of court houses and government buildings, and of the buildings and equipment of educational and penal institutions, and of libraries and court records, of the disruption of the judicial, administrative, educational, and correctional systems, with the exigencies of civil war taking a heavy toll of its revenues, the government is hard-pressed to meet even the minimum requirements of reconstruction of the administration of justice. The progress which has been made since the return of the Ministry of Justice from Chungking in the summer of 1946, under such circumstances, is truly marvelous. One of the most serious effects of lack of money is to be seen in the low salaries which the government can afford to pay the judges, procurators, and officials of the Ministry of Justice. Taken with the depreciation of the national currency and the mounting cost of living, they are a serious handicap to reconstruction. Yet the progress goes on steadily notwithstanding.

Want of unified teaching, interpretation, and application of the codes has also been a hindrance, though to less extent than one might have anticipated. There has been a certain clash of ideas and techniques between teachers trained in different systems and modes of juristic thought, in France, Germany, England—either in the Inns of Court or in the Universities—the United States—in universities in different parts of the country with more or less different traditions—in Japan, or in China by teachers with a like diversity of training. The tendency of much of this training abroad has been to bring about fixed ideas derived from some foreign system of the doctrines and technique of that system as the legal order of nature. While many law teachers whom I have met are able to rise above this, it remains something with which law teaching and so law must reckon until teaching of Chinese law as such, and not as declaratory of comparative law or of some other system, becomes well established.

Another difficulty in interpreting and applying the constitution and codes is the need of finding out how to adapt provisions borrowed from Anglo-American law to a Continental legal system and reach a balance of comparative law and historical Chinese traditions and modes of thought which have entered into both the constitution and the codes. In the Constitution, in particular, need of adjusting Anglo-American legal rules and methods to systematic ideas derived from the Continental modern Roman law, will require judges and teachers of wide knowledge of comparative law and clear grasp of the technique of both systems and their possibilities of adaptation. Happily such
jurists are to be found in China in larger proportion than in countries where no such adjustments have to be made.

An example of the difficulties made for courts by hasty importation of rigid provisions, without considering their accord with the system in which they are to operate and adjusting them thereto, may be seen in one of the clauses in Article 8 of the Constitution. As it has been translated it reads: "No person shall be tried or punished except by a court of law in accordance with procedure prescribed by law." To the Anglo-American ear this sounds very well. But to the Chinese, accustomed to the French regime of police handling of petty police offenses informally, and to general convenience and satisfaction, if the words of the original are rightly translated "court of law," the result will be awkward. The inconvenience to the public of the American system of traffic courts for petty cases in large cities—Shanghai, 6,000,000 people; Nanking, 2,000,000; Hangchow, 1,000,000—in comparison with the French system, which I have seen in operation in France and in those cities, is obvious to the critical observer. Moreover, the traffic courts in the United States for such things as parking in the wrong place or wrong way and like minor infractions of traffic regulations are by no means satisfactory. If the Chinese text can be translated "judicial authority" and legislation can be enacted describing the limits of the offenses cognizable and prescribing the procedure in case of minor infractions of police regulations, the customary practice can be brought within the Constitution. This is not the only problem of the sort raised by the Constitution. In places the Constitution suggests overmuch the work of abstract political scientists, in places where lawyers should have been turned to, which will require molding by constitutional law.

Another difficulty, especially awkward in legal education but with marked effect in many connections, is lack of a fully developed Chinese juristic and legal terminology. Such ideas as "administration of justice," the distinction between "law" and "a law," the conception of "a right" and the many distinctions developed in the latter part of the nineteenth and in the present century by analysis of "a right," the distinction of legal precepts as rules, principles, precepts defining conceptions, and precepts establishing standards, and the distinctions of "justice" as an individual virtue, as the ideal relation among men, as the end of law, and as a regime of adjusting relations and ordering conduct, are very hard to bring home to Chinese students in words with which they are familiar and make the teaching of the science of law a hard task. Indeed despair of putting such fundamental ideas in
Chinese led an eminent Continental jurist, who served for some time as legal adviser to the Chinese government, to the mistaken conclusion that the Chinese did not have the idea of justice. The modern science of law in China is a matter of fifty years as compared with its long development in the West from the classical Roman jurists to the present. Moreover, when in English and in the Continental languages we are confronted with new ideas or a new phenomenon we can always fall back on Greek and Latin for the material from which to coin a word. The Chinese lack that resource and have to turn to paraphrases and to analogical uses of familiar words or combinations of them. Juristic development in China will gradually find how to meet this difficulty as a unified juristic method is worked out and the results of diversified training in the legal systems and juristic methods of other lands are eliminated.

III. IMMEDIATE NEEDS FOR IMPROVEMENT

Needs of the administration of justice, some of them urgent, but all of which must await improvement of the financial position of the government, which is pressed with demands of reconstruction on every side, are: More complete equipment of all the agencies of justice, adequate libraries—court libraries, bar libraries, and law school libraries—adequate salaries, Chinese treatises and textbooks applying the more recent methods of doctrinal development and exposition to the codes, an adequate system of reporting judicial decisions, development of constitutional law to go along with the interpretation and application of the Constitution, and improvement of the position of the bar. Each of these needs calls for some explanation or consideration.

Few courthouses escaped partial destruction. Some were razed and all rendered untenantable. In the shortage of buildings due to widespread destruction the best has had to be made of such quarters as have been available. The furniture and equipment was destroyed or carried off, and in some important courthouses I have visited courtrooms which have the barest of furnishings and in others essential furniture is still being made. This is even more true of penal and correctional institutions and causes crowding which is undesirable but necessary. Nowhere are the records adequately protected against fire. Temporary wooden cases are all that has been available.

Law libraries were either destroyed or greatly impaired. In Nan-king and Shanghai the agencies of criminal investigation have built up good working libraries, but everywhere there is little more than a
beginning of restoring the necessary libraries. This has specially bad effect upon the law schools.

Need of adequate salaries in every part of the administration of justice, as in all the agencies of government and education, is an outstanding drawback.

Also the judges, overburdened with work of writing out judgments and orders, need secretaries such as we have learned to give them in America. But even if there were money for this the law schools are hardly yet in a position to supply the needed men.

Since even the best of codes will not administer themselves, there is much need of Chinese doctrinal treatises, such as are well known in Continental Europe, not only as the basis of law teaching but for the assistance of courts and legal advisers. When we remember that the system of codes was not complete until 1930 and the Code of Civil Procedure was revised in 1935, that the Japanese were in control of Manchuria from 1931 and of the greater part of China from 1937 to 1945, it can be understood why there has been no more than the beginning of a Chinese legal literature. Commentaries on the codes noting the decisions of the Supreme Court applying their articles is about as much as has been possible. There are in China many well-trained, learned, able jurists, some of them of world-wide repute. But doctrinal treatises on the interpretation and application of the codes will require (1) consideration of the history and course of development of the texts taken or adapted from other recent codes and the course of doctrinal exposition and judicial interpretation of them and of analogous texts or texts on the same point in other codes, and (2) consideration of the conditions, customs, and modes of thought in China in the light of which and of Chinese ethical philosophy the codes must be interpreted and applied. This will call for libraries which have to be restored, for money to restore them has mostly been lacking, and leisure, which the teacher, who has to eke out a meager salary by taking on other work, is seldom able to find.

There is need of a better system of reporting judicial decisions. Thus far only syllabi of the points of law are published. But such reports are not adequate. There ought to be a full statement of the facts and of the application to those facts of the articles of the code interpreted. There is no need of the elaborate discussions of facts or elaborate citations and discussions of authorities to be found in American judicial opinions, although the former operate as a check on the courts and satisfy the public that the facts have been thoroughly con-
sidered, and the latter are valuable in estimating the value of a decision as a precedent. But there should be enough reported to enable assured understanding of what the court decided and to have its application to the facts clearly brought out.

A great and immediate need is the development of a true constitutional law. Like the American Constitution the Chinese Constitution is both a legal and a political document. But teaching and writing on the Chinese Constitution have tended to be from the standpoint of political science rather than of law, and a tendency to treat constitutional questions, which under the Constitution should be legal, as political, and to attempt to adjust jurisdictional lines by compromises at conferences of party leaders and of representatives of departments, instead of by law, has been noticeable. However, some of the leading men of China are aware of this, and I hope to see a real text book of Chinese constitutional law set constitutional development in the straight path at the outset.

Not the least need is the place of the bar in the administration of justice, which needs to be better understood and the profession needs to be better appreciated. The position of the bar in public esteem in China is much what it was in America after our Revolution and in the beginnings of our independent polity and in large part for like reasons. It is enough to say in the present connection that when we reflect on the conditions of admission to and conduct and discipline of the profession and the consequences as they were manifest in our large cities down to the change which began only in the last decade of the nineteenth century, we have no cause to reproach China for not, in the generation since her Revolution of 1911-1912, getting as far as we did in the fifty years after 1890. At any rate, the Chinese system of admission insures educated, trained, and reasonably competent practitioners.

IV FEATURES OF THE CHINESE SYSTEM

Of the noteworthy good features of Chinese administration of justice we may put first the organization of courts. On the whole, the courts are organized on the French model except that the judiciary is independent of the executive instead of being a part of the executive as in France. At its head is the Judicial Yuan, one of the five departments of government provided by the Chinese Constitution. It has general jurisdiction over the administration of justice and disciplinary punishment of public functionaries. The Grand Justices, nominated by the President of the Republic and confirmed by the Control Yuan, have
the duty of interpreting the Constitution and unifying the interpretation of laws and ordinances. Laws and executive ordinances in conflict with the Constitution are declared null and void, and the jurisdiction to give effect to these provisions is in the Grand Justices. At the head of this body is Dr. Wang Chung-hui, D.C.L. of Yale, barrister of the Middle Temple, deputy judge of the Permanent Court of International Justice at The Hague, 1923-30, judge of that court, 1930-35, former Minister of Justice, translator into English of the German Civil Code, known all over the world as a jurist of the first rank.

The court system provides a Supreme Court, sitting at the capital, modeled on the French Court of Cessation. Its jurisdiction is appellate from the High Court and it proceeds by examination of the records transmitted to it and written arguments of counsel accompanying the grounds of appeal. Like the highest court of France it does not as a rule hear oral argument and passes only on questions of law. In each province there is a High Court with some original jurisdiction (e.g., in cases of treason) but primarily it is a court of appeal from the District Courts, modeled on the French Courts of Appeal. In provinces where business requires it has a number of branches. The courts of general jurisdiction of first instance are the District Courts, provided for districts in each province. Where business requires it they may have civil and criminal branches. There are no separate courts for small causes. The flexible organization of the District Courts makes it possible to handle them well with a simple procedure. The judges are appointed for life, removable only for misconduct (upon conviction or disciplinary judgment) or inability to function, and may not be superseded, transferred, or have their salaries reduced except in accordance with law.

Another outstanding feature is the Ministry of Justice. It is part of the executive Yuan. It has general powers with respect to the administrative side of the courts very like those of the office of administration of our federal courts. Also it has the power exercised by the Home Secretary in England of reprieves and commutation of punishment in capital cases: But its most important work from an American point of view is to study the functioning of legal institutions, the application and enforcement of law, the cases in which and reasons for which it fails to do justice or to do complete justice, the new situations which arise continually and means of meeting them, what legislation achieves its purpose and what not and why, and thus to give expert and intelligent guidance to those who frame and those who administer the laws. The Minister of Justice, Dr. Hsieh Kwan-sheng, is a docteur en droit.
of the University of Paris and a scholar and wise administrator with vision as to the future of Chinese law. He has held the position since 1937 and did notable work in keeping the machinery of justice going during the Japanese occupation and in restoring the disrupted organization and system since the close of the war. One of his most useful acts was the setting up of an experimental court at Chungking to try out features of procedure and observe the possibilities of procedural simplifications and devices.

China has excellent codes. They will compare with the best of the recent codes which have been framed and enacted since 1896. The Civil Code is exceptionally well done. It has made good use of the Swiss Civil Code of 1907, revised in 1912, and has introduced some notable improvements, particularly the giving up of the historical distinction between civil and commercial law, which grew up on the continent of Europe in the Middle Ages when the merchants were a distinct class, trading from land to land, with their own customary law and their own courts. The distinction has no rational claim to perpetuation in a modern code but had persisted until China gave it up. Also the Civil Code is well adapted to Chinese conditions, since it makes ample provision for the local customs which have been long established in different parts of China’s vast domain. The Code of Civil Procedure is very well framed also. It follows largely the Austrian Procedure and is advanced, flexible, and simple.

Another excellent feature of the Chinese polity is the examination system. The Constitution provides (Article 85) that no person shall be appointed to a public office unless he is “qualified by examination.” It provides also (Article 86) for examinations as to “qualifications for practice in specialized professions and as technicians.” The Examination Yuan is a separate and independent department of the government. It is based on an old traditional institution in China and the system has the confidence of the public. Such complaints of it as I have heard grow out of disturbed conditions during the war and at the beginning of reconstruction or else are what President Eliot used to call the wail of the unfit. The system assures training and competence from the top to the bottom of the judicial and administrative personnel.

In all the courts the record system and the compiling of statistics are admirable. Everything is well indexed and one can ascertain readily the exact state of the business of the courts and of the procurators, what each judge and each procurator has done and is doing, and the condition and progress of each case.
Legal education is fundamental in a country governed by a constitution which is the supreme law of the land, to be interpreted by judges and prescribing government by law. But legal education in China has had but a short time and little chance to develop. It is a matter of the present century. In 1904 the imperial regime perceived that it would be needful for China to transform her law fundamentally in order to keep pace with the rest of the world. A commission was appointed to compile a commercial code. In 1906 a codification commission was appointed. Universities founded by missionaries from abroad began to teach law, but not Chinese law, however, which was only at the beginning of its formative era, but French or Anglo-American, according to where the teachers came from. Chinese students began to go to Europe, to America, and to Japan to study law. After the Revolution in 1911-1912, codification went forward, culminating in 1930 in the present system of codes. In 1927 the establishment of the central government at Nan-king began a period of rapid growth of education and establishment of institutions of higher and professional learning. Some strong law schools had already grown up and others were set up and a general high level of legal education was aimed at. But the Japanese invasion upset the whole program. Most of the institutions of higher learning had to move to the interior and often many times move further. Their buildings were often destroyed and largely damaged. Their libraries and equipment were destroyed or looted and their teachers scattered. They carried on notwithstanding and have made a remarkable recovery in the last three years, though sorely hampered by lack of means to restore buildings, equipment, and libraries. The Ministry of Education has prescribed a standard curriculum. The goals are excellent. But want of textbooks, want of libraries, necessary low salaries in a time of high living costs, difficulty of finding qualified teachers, and necessity of large use of part-time teachers, joined to the pressure to turn out as quickly as reasonable, men qualified to become judges and procurators, to enable the courts to cope with the tide of litigation in a time of reconstruction, make the task of the law schools very hard. Nevertheless, there are some very good law schools, and all of them are doing more and better than might have been expected under the circumstances. I have lectured before ten of them and have met members of the faculties of many. On the whole, the teachers are well-trained, learned, diligent, and zealous. The Minister of Education has a sound ultimate program in view, and we may be assured progress will go forward as fast as circumstances will permit.
There are some excellent legal scholars among the law teachers. Some of them have written good doctrinal expositions of particular provisions of the Civil Code. But there is need of a whole systematic legal literature of which, on account of the war and destruction of libraries, there is only a beginning. To meet this need I have advised an organization analogous to the American Law Institute and a complete doctrinal exposition of Chinese law as a whole, to do what has been done in the United States by the Restatements of the Law.

V SPECIFIC PROBLEMS

Now as to certain special problems and questions.

Especially in Shanghai there is agitation for a system of Juvenile Courts, a matter to which the Minister of Justice is giving anxious attention. General disorganization during and after the Japanese occupation, large numbers of war orphans and recently great numbers of refugees from places devastated by the communists, have made vagrant children and children used by adults for begging a real problem in some cities. There is good provision for war orphans. For the rest, the Boys' Town, Chao-ho-kin, at Shanghai, under the Bureau of Social Affairs, is a model institution which can not be praised too highly. The children picked up by the police and sent there and those sent by the District Court have the best of care and training and a wise mixture of useful work and play. No guards are needed. The boy sent there quickly feels himself part of a community. No boy tries to get away. At eighteen they leave, well prepared for useful occupations and with the best of spirit. The buildings were partly destroyed and much damaged during the war, and in consequence there is some crowding. But the general spirit is so good that the crowding does not work the harm it might do otherwise. On the other hand, in another city the reformatory I visited was an impressive example of how not to do it. Guards were everywhere, there were continual attempts to escape, those who had tried to escape were herded with adults taken in attempted escape, and shackled like the latter. The whole atmosphere and spirit were those of a prison. In that city the authorities are moving to correct this. But the privately subscribed funds which can be had to maintain a Boys' Town in a rich city like Shanghai are not generally available nor are well-sustained social service organizations at hand everywhere to make the work of treating juvenile delinquents effective. A system of juvenile courts, with a well-equipped, well-developed probation system,
proper homes for detention, and all that goes with successful institu-
tions for delinquent children in America, is very expensive. For a begin-
ning, what seems to be indicated, where there are many delinquent or
vagrant children to be dealt with, is to assign one procurator specially
for children’s cases, fit up a simple room for him for interviews with
them rather than formal interrogation of children, and assign a judge
likewise for such cases with a like simply furnished room for informal
disposition of children’s cases. A short, simple statute could authorize
the individualized procedure. No separate courts need be set up, as the
flexible organization of the District Courts will permit them to provide
the procurator and the judge for children’s cases and legislation can
authorize the appropriate procedure so as to meet the requirements of
the Constitution. Establishment of institutions such as the Boys’ Town
at Shanghai is highly desirable. But until money for this is available,
the organization of the houses of detention of the District Courts can
be adjusted to the needs of juvenile delinquents and work a great
improvement.

Some foreign observers and lawyers trained in England or America
criticize the procurator system. The Chinese procurator has no exact
equivalent in Anglo-American legal terminology. He differs from both
the examining magistrate and the public prosecutor in the Anglo-
American system, being something of each, and from the officials of the
Ministere public in the Continental system. He has not only the power
to prosecute, i.e., to initiate and conduct prosecutions, but the powers
of a juge d'instruction on the Continent, those of a grand jury and of
an examining magistrate in the Anglo-American system, and of a coro-
nier and coroner’s jury in the English common law. He is at once a
criminal judge of first instance, a judicial criminal investigator, and a
public prosecutor. As to the institution of a prosecution and as to
whether a prosecution instituted by some one else shall go on, he is like
a French juge d'instruction.

A serious question is raised by one of the provisions of Article 8
of the Constitution, which requires that when a person is arrested on
suspicion of having committed a crime the person or organ effecting the
arrest shall within twenty-four hours turn him over to a competent
judicial authority for hearing. In graver cases in the higher courts the
procurator is also a prosecuting counsel. But for the purposes of the
constitutional provision, where an arrest is not made as a result of his
investigation and hearing but by the police or a private complainant,
as he has judicial authority to conduct a preliminary examination and
determine whether to prosecute or not to prosecute, he would seem to be the competent judicial authority to whom an arrested person is to be turned over for a hearing in twenty-four hours from arrest. In some countries in which the inquisitorial system obtains there is divergence of opinion as to whether procurators are judicial or are administrative officials or are partly the one and partly the other. As in Continental politics the judiciary is often part of the executive, so nothing much turns on this question. In the Chinese polity they are judicial officers with certain administrative functions. Where the rigid separation of powers characteristic of American constitutions does not prevail such a combination is perfectly possible. The Anglo-American system of prosecution is not adapted to China. The American district attorney, too often deep in politics, was not a model for China to follow. The Continental system, which China has adapted from the French, is working well and is not more criticized here than the American prosecuting system is in the United States. Criminal prosecution labors under difficulties which make it a target for criticism in all lands.

Much of the criticism of the Chinese prosecuting system which I have read assumes that the provisions of Article 8 of the Constitution are habitually disobeyed. The current English translations create a wrong impression on the reader. In one version we read that an arrested person shall within twenty-four hours "be turned over to a competent court for trial." In another he is to be handed over for a "hearing to a court of law having jurisdiction of the case." If either of these versions were taken as expressing exactly what is meant, prosecution would be hopelessly hampered in many cases. The article would be quite impracticable in view of the conditions of communication and transportation, the short time allowed, and the frequent need of gathering further evidence before proceeding to trial. My impression is that "turned over to a competent judicial authority for hearing" would best express in English what is meant. Article 8 was presumably adopted with the general organization of Chinese criminal justices in mind, and was meant to insure against protracted police detention and nonjudicial examinations, against detentions and irresponsible questioning by private investigators, and the growth of methods known in America as the third degree.

In practice a procurator is in regular attendance at each police station to conduct a preliminary hearing to ascertain whether there is probable cause to hold the person arrested for further examination and either discharge him or order him held for further proceedings under
the Code of Criminal Procedure. I have made careful investigation in
three cities to ascertain whether there is anything in the nature of the
"third degree" practiced by police or procurators and have seen no
signs of it. I talked with a number of English-speaking prisoners, who
spoke freely, in Nanking and Shanghai and heard no complaints of this.
What was complained of, as it is with us, was seizure of letters, papers,
and documents. In fact under the Continental system of interrogation
of the accused, and especially in China, where the procurator interro-
gates him while sitting on the bench in a room fitted up for the purpose
and accessible to the public, there is no need of or advantage in unlaw-
ful interrogations. The Constitution provides for notice to relatives or
friends of the accused designated by him at the time of the arrest so
that they may attend the examination.

Police detention pending preliminary examination by procurators
and before transfer of the accused to the house of detention (jail) of
the District Court is short, and in most of the cities where I inspected
the place of detention is light, airy, and clean and will compare favor-
ably with the better police stations in America—for we have some
which are thoroughly bad. In one city where I inspected the place of
police detention was not satisfactory. But the Japanese occupation had
wrecked the building and money has been lacking to improve it. The
authorities are keenly aware of the deficiency and are doing the best
they can with a bad situation. The houses of detention of the District
and High Courts which I have seen are much better than the average
American jail.

Simplification of procedure is a perennial problem everywhere and
is urged by some in China where there is a very advanced type of
modern procedure. It must be noted at the outset that it is impossible
to realize the layman's ideal of a simple coming together of parties and
judge and offhand adjustment of the relations of men in a complex
economic organization of society. There is danger in oversimplification.
Procedural requirements which are merely historical should be pruned
away. But this pruning process had been done with reasonable thor-
oughness almost everywhere before the Chinese Code of Civil Pro-
cedure was framed. The danger of oversimplification is illustrated by
administrative procedure both in England and in America. In both
countries a desire to promote directness and expedition and to give
administrative officials power to act freely upon the everyday instincts
of ordinary men by leaving the deciding process unhampered by pro-
cedural rules and resulting undefined administrative procedure have
been found to lead to many abuses which in America we have sought to correct by the Administrative Procedure Act.

What is chiefly objected to in China is the burden on the judges because of requirements of findings as the basis of judgments. But the importance of findings of fact and law was well brought out in the experience of administrative determinations which led to the American Administrative Procedure Act of 1946. There is no more effective means of assuring reasoned decisions than by requiring the reasons to be formulated in statements of facts found and propositions of law applied. Guarantees against corruption, ignorance, and offhand one-sided dispositions of cases are needed everywhere. Doing away with or relaxing requirements as to the basis of judgments is likely to do more harm than good.

Detailed proposals for simplification of procedure must wait until the survey now going on indicates fully where there are possibilities of desirable change.

I have read complaints of the slowness of the courts. Such complaints are made in all lands and have been made at least as long ago as Hamlet's soliloquy Dispatch of business is not as rapid as in the English courts. But it will compare favorably with the average in the United States. There are three things to consider in this connection. (1) There is an abnormal volume of prosecution and civil litigation growing out of the general disorder and disruption occasioned by the Japanese occupation and the war, and kept up in some places by the communists. Prosecutions arising from the Japanese occupation have taken up much of the time and energies of procurators and judges. Titles to property were confused during the Japanese occupation and by the destruction of records. This and the acute housing shortage in cities, due to destruction during the war and the influx of refugees, have flooded the courts with controversies over possession. (2) In the hasty reconstruction of the courts after the Japanese surrender, the judges being scattered and many being missing, it was necessary to appoint many new judges of little experience. Schools for judges and procurators have been established and this condition will gradually be remedied. I have talked with many who are working with and under experienced judges and procurators and have found them intelligent, diligent, and zealous. I have no fear on this score. (3) The Chinese courts do not as a general thing have the assistance of counsel which is available in Anglo-American courts. In some cities there were lawyers practicing in the old consular courts and there are well-organized
bar associations. But in the country as a whole lawyers are little used. The people were not accustomed to them under the old regime, and the turmoil of establishing the national government after the Revolution and disorganization under the Japanese occupation have prevented the growth of a strong profession except in great urban commercial centers. Moreover in some places a bad tradition of antagonism between bench and bar and of distrust of each by the other in the consular courts has left some unhappy results. Organization of the bar for the whole country is one of the problems for the future. (4) The courts are hampered by want of adequate clerical help. The judges have a heavy burden of writing and money to provide for this is lacking.

I have read much in lay periodicals, newspapers, and the English press in China of the inefficiency and corruption of Chinese judges. Careful observation in many courts has failed to disclose any such condition. We should not overlook that a recent writer in an American periodical has described American courts in terms of extravagant depreciation of the judges. How little truth there is in this description you know well. There is as little truth in what is written of the Chinese judges of today. Moreover American judges operate under fewer and less handicaps and difficulties than Chinese judges and with more prestige and traditional public confidence and respect. Judge Grover of the New York Court of Appeals used to say that a defeated litigant—and one-half of all litigants must expect to be defeated—had two remedies: To appeal and to go to the nearest tavern and damn the court. General resort to the latter remedy will explain much of the disparagement of judges in all lands.

Also I have read some descriptions of Chinese prisons and jails which represent them as in terrible condition. I have found nothing of the sort. One which has been most complained of is the old French prison of the French concession before the late war, which, because of Japanese destruction of its better one, the government has had to use as best it could. I suspect that so far as there is foundation for the reports referred to they are based on conditions during the war and immediately after the Japanese evacuation, when everything was in disorder. But I have yet to examine some outlying districts where there may be need of improvement. I can say with assurance that the prisons in Nanking, Shanghai, and Hangchow, which I inspected thoroughly are up to the best standards in all respects except the crowding necessary until more buildings can be put up. The government is doing all
that can be done with limited means to maintain model penal and correctional institutions.

It is true there are remote and backward places in the vast domain of the Chinese Republic, where not merely reconstruction but construction has to be done, to which a picture of the Nanking area is not applicable. But there have been and are even yet such areas in our own country, and in neither case can the pictures of such areas be taken as pictures of the whole. The disruption due to Japanese occupation and the conditions of destruction created by Communist civil war have delayed but will not ultimately preclude the necessary improvement in those places, unless outside promotion of communism brings about another era of disruption.

It is wholly unreasonable to expect the administration of justice in China to be one hundred per cent perfect. Certainly American administration of justice is far from perfect, although it has had three centuries to develop in colonial and independent America, and has had no such disruption to contend with as that brought about by eight years of Japanese occupation of China, has had behind it the fully developed legal literature of the common law, well-organized legal education, a people brought up on belief in law and courts, and a bar with traditional organization, ethical traditions, and agencies of discipline. To measure administration of justice in China by standards of an abstract legal Utopia or to assume that not adopting wholesale American legal institutions, methods, and doctrines is proof of failure to comprehend the task of adjusting relations and ordering conduct through the systematic application of the force of a politically organized society is not merely grossly unfair. It argues ignorance of the machinery of justice in more than half of the world.

The Chinese are a patient, diligent, intelligent, idealistic people, filled with determination to set up and maintain a modern, democratic progressive polity, and thus to take and hold a place among the great peoples of the world. They confidently expect to do this not by force of arms but by force of ideals. No one whose privilege it is to associate with its leading men in their quest of achieving such a polity can fail to admire the progress they have made and are making and be confident that in spite of pressure from the outside which has been exerted upon them for more than a century the Chinese are achieving and will achieve it increasingly