

CHINA LAW REVIEW

Volume 1

NUMBERS 1-9

1922-1924

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THE CHINA LAW REVIEW

Vol. I

April, 1922

No. 1

COMMENTS ON CURRENT EVENTS

Law Enforcement in the United States.—By a vote of 56 to 22 the United States Senate has recently passed the Willis-Campbell supplemental dry enforcement measure. The passage of this law marks one further step toward making effective the 18th Amendment of the United States Constitution. As will be recalled, this amendment was ratified on January 29, 1919, and provides for prohibition of the manufacture, sale, transport, import, and export of intoxicating liquors for beverage purposes.

Since the ratification of the amendment there has been a persistent fight on the part of those who oppose the law to prevent its enforcement. This fight has contributed somewhat to the spirit of lawlessness which has prevailed to some extent throughout the country.

A Commission to Investigate China's Judicial System.—An agreement was reached by the Disarmament Conference, which met at Washington, to appoint a commission of legal experts to inquire into the progress made by China toward establishing an effective, modern judicial system. Upon the report of this commission will be based the decision of how long the promised abolition of extra-territoriality must be postponed. The prospective visit of such a commission is awakening great interest in legal questions, and leading to renewed efforts toward judicial reform. The Ministry of Justice is sending delegates to the principal cities of China with a view to improving the judicial system in a way that will commend itself to the favorable consideration of the Commission. One of these delegates has arrived at Shanghai and is discussing the problem of reform with the Shanghai judicial authorities. The lawyers at Chekiang have proposed the convening of a national conference of lawyers on May 1 next to discuss the question.

Members of International Court of Justice. Their First Meeting.—Professors of international law constitute a majority of the

members of the new International Court of Justice recently elected by the League of Nations. The professors are John Bassett Moore of the United States, Senator Rafael Altamira y Crevea of Spain, Dionisio Anzilotti of Italy, Max Huber of Switzerland, Dr. Yorozu Oda of Japan, Charles Andre Weiss of France, and Antonio Sanchez de Bustamente of Cuba. Of these Altamira and Anzilotti are also practicing lawyers. Viscount Robert Bannatyne Finlay of Great Britain and B. C. J. Loder of Holland are lawyers, while Dedrik Galtrup Gjedde Nyholm of Denmark is classed as a jurist, and Senator Ruy Barbosa of Brazil as a statesman and constitution-maker, being one of the authors of the Brazilian constitution. Dr. Wang Chung-hui of China is one of the four supplemental judges.

The first informal preliminary meeting of the Permanent Court of International Justice was held on January 30 in the Palace of Peace at The Hague. Nine judges and two supplementary judges were present. Dr. Loder presided pending the election of a president and the meeting adjourned until the following Friday after deciding that all of the four supplemental judges should be invited to participate in the election.

Shanghai Bar Association Suggests Legal Reforms.—The Shanghai Bar Association, which some time ago appointed a committee to investigate the legal situation in China, has made several suggestions to the authorities, among those of more importance being the abolition of Magistrate Courts, replacing them with district courts and courts of first instance; the establishment of more Supreme Courts and High Courts to facilitate legal business; and the expedition of the revision and promulgation of all the codes.

Not very much can be said on the third point as the government seems to have spared no efforts to effect a speedy codification of the laws, especially when matters have been so complicated that nobody could expect them to be finished overnight. The first and second questions deserve special comment. It is conceded that the present magistrate courts are comparatively more efficient than those in the old days. The qualification of the judges has been fixed—the procedure is all modern, but, nevertheless, they leave much to be desired. The spirit of modern jurisprudence lies in its independence. No justice can be afforded when the courts are under the control of the administrative branch of government.

The difficulties which have prevented the establishment of a district court in every city have been two—the lack of personnel, and the lack of money. Progress made in recent years has already

largely removed the former difficulty, but the second remains the same. Some suggest that China might adopt the jury system, thus reducing the judges of each district court, from three or more to one, with the result that other courts could be established on the savings made. This sounds good on first hearing, but in view of the general illiterate condition of the people, its workability is exceedingly doubtful. Indeed, what is best for the people is far more important than what is cheapest for the government.

After all, it is a matter for the authorities to test out. No problem is too hard for men who are really patriotic.

THE COURT SYSTEM OF CHINA

[A lecture in Chinese by the Hon. Hsu Chien, ex-Minister of Justice and now Chief Justice of Supreme Court at Canton, at The Comparative Law School of China, November 12, 1920, recorded and translated by H. T. Chen, edited by Dr. H. C. Mei.]

I. HISTORY

The history of the courts of the Republic dates from exertions to create an independent judiciary during the last decade of the Tsing dynasty. The beginning of this reform was marked in 1905 by the memorable event of the sending of five commissioners by Emperor Kwang-Hsu (光緒) to Europe and America charged to make a careful study and investigation into the prevailing political systems. One of the commissioners was Tai Hung-tze (戴鴻慈), then Minister of Justice, to whom much credit belongs for ushering in a new era in our judicial history. In accordance with the nine-year program of preparation for the establishment of constitutional government, Tai purposed to carry into effect his new judicial system throughout the country, taking Peking as the starting point.

Prior to this reform the judicial functions were exercised concurrently by the executive officials. There was no clear demarcation between the judicial and executive powers of government. Justice was administered by five instrumentalities: (1) the Chi-hsien (知縣), or district magistrate; (2) the Chi-fu (知府) and the Taotai (道台); (3) the Nieh-s (臬司); (4) the Yuan, or Tu-fu (總督 or 巡撫); (5) the Shing-pu (刑部), or the Ministry of Justice. Before the modern courts were established, the five organs administering justice in Peking were (1) the Shing-pu, or Ministry of

Justice; (2) Pei-ya-men (北衙門), or Ti-tu-ya-men (提督衙門); (3) the Central Police Board of the Outer City (外城巡警總廳) and that of the Inner City (內城巡警總廳); (4) Ta-Shing-Hsien (大興縣) and Wan-Ping-Hsien (宛平縣); and (5) Tu-chi-pu (度支部) (taking cognizance of civil cases only). These organs were not so arranged as to form a system by themselves. The important criminal cases entered upon the "Autumn Trials" (秋審) records irrespective of whether they were decided in Peking or in different provinces, had, however, to be submitted to the Shing-pu, or Ministry of Justice, for final adjudication.

To inaugurate the new judicial system, the Ministry of Justice met with various obstacles from conservative quarters only overcome after considerable controversy and hard struggle. To begin this reform, a supreme court was established in Peking as the highest tribunal of justice, with Sun Chai-pen (沈家本) as chief justice. This supreme court did not, however, confine itself to purely judicial functions but strove with the Ministry of Justice for executive powers. Ultimately the ministry memorialized the throne and succeeded in obtaining sanction to limit the supreme court power solely to administering justice and to exclude it from the work of organizing the courts of Peking and of the country at large. At the time the lecturer was councilor of the ministry. After laying down a definite plan for the organization of the courts of the country, the ministry proceeded to organize the courts of Peking. The work was of a twofold character, to wit:

1. To make provisional rules and regulations governing (a) the proposed courts, (b) the proposed procuratorates and their police, (c) the legal forms to be used by litigants.

2. To organize the four grades of courts, namely, the Local, the District, the High, and the Supreme; to organize the four grades of procuratorates, namely, the Local, the District, the High, and the procuratorate general, each of which was attached to the corresponding court.

The experimental stations for the new judicial system were Peking, the provincial capitals, and the treaty ports. A high court of justice and two subordinate courts were established in each provincial capital. In treaty ports only local and district courts were provided.

This Tsing system was borrowed directly from Japan and indirectly from Germany. It was generally known as the "four grades and three trials" (四級三審制) or the "two heads and three trials" (兩頭三審制) system, that is, the high court of

justice was the third and last resort (of justice) if the action was initiated in a local court; and the supreme court the third and last resort (of justice) if the action was initiated in a district court. The bringing of civil actions was left to the discretion of interested parties. In criminal cases, the state would prosecute the wrongdoer in its own name. Aggrieved parties had also the right to prosecute criminal actions (a right denied by the Ministry of Justice after the establishment of the Republic—a deprivation of a vital civil right!).

These Tsing courts have remained substantially the same as when organized, though some changes were made after the establishment of the Republic. Therefore, to understand the Republican court system one must bear in mind the history of the Tsing courts.

II. ORGANS ADMINISTERING JUSTICE UNDER THE REPUBLIC

These may be classified into the ordinary and the special. The ordinary organs are (1) regular judicial tribunals such as the supreme court, its subordinate courts, the procuratorate general, and subordinate procuratorates, and (2) a quasi-judicial officer as in places where district courts have not yet been provided, the district magistrate who usually employs a person versed in law to administer justice in his name. This second instrumentality is inconsistent with the Constitution, and should therefore be abolished at the earliest opportunity.

Special tribunals are of two kinds; namely, those having jurisdiction over the executive officers, and those over soldiers and sailors. The first consists of provincial executive heads, as courts of first instance with the Administrative Court in Peking as the last resort. The second is composed of various military and admiralty courts. These special organs are contrary to modern democratic ideas, and should therefore be also abolished.

III. CHANGES IN THE COURT SYSTEM SINCE THE REPUBLIC

During the first year of the Republic, a great deal was achieved for judicial independence and the establishment of various modern courts throughout the country. In the province of Chekiang

nearly every district was provided with modern courts which were, however, far from efficient or perfect. In the third year of the Republic Yuan Shih-kai (袁世凱) greatly reduced the number of courts because judicial independence tended to obstruct his absolute rule. At that time Liang Chi-chao (梁啟超) was minister of justice. He (梁啟超) reestablished bamboo-beating; abolished all local courts; reduced the number of district courts; abolished the "trial and prosecuting courts" (審檢所) which had previously existed in places where district courts were absent; and restored in their stead the system of trial by district magistrates. Since then the judicial system deteriorated every day and tended toward the old régime.

IV. THE JUDICIAL SYSTEM OF TO-DAY

At present there are no local courts although nominally they are still in existence. The functions of local courts have been given to the district courts or branch district courts as supplemental duties.

The courts in actual existence at present may be classified according to their ascending order of authority as follows:

1. *District Courts.* In places where district courts are not provided, there are (a) branch district courts (地方分庭) and (b) district courts attached to the branch high courts of justice.

2. *High Courts of Justice:* located at provincial capitals. In places distant from the capitals, branch high courts (高等分廳 or 高等分庭) are established.

3. *The Supreme Courts in Peking.* Branch Supreme Courts are provided in the "Rules for the Organization of Judiciary" (法院編制法), but so far have not yet been established.

As to the number of judges sitting at trials and rendering decisions in a district court or its branch courts, only one judge is required in cases within the jurisdiction of the nominal local court. Appealed cases or cases brought in the district court as the court of first instance are required to be tried before and decided by three judges. Certain specified cases, though brought in the district court as the court of first instance, are, however, by statute, tried before one judge. In a high court of justice or branch high court three judges sit at trial, and in the supreme court five judges.

According to their ascending authority the present executive officials who are concurrently administering justice may be classified as follows:

1. *The District Magistrates*: the scope of whose jurisdiction is concurrent with that of the district courts except that they have no authority over appealed cases from nominal local courts, for such appeals are reserved to district courts or branch district courts.

2. *Taoyin's Officers of Justice* (道署承審員) whose jurisdiction covers appealed cases from magistrates. At trial sometimes one judge and sometimes three judges sit. When one is dissatisfied with the judgment of the Taoyin's officers of justice, one may appeal to the high court of justice, the branch high court, or the supreme court, as the case may be.

In all regular courts lawyers are allowed to appear to prosecute or defend cases for their clients. The employment of lawyers, however, is left to the discretion of the litigants. But in criminal cases subject to the second degree penalties or upwards, an attorney must be employed either by the accused himself or appointed by the court to defend him in case he cannot retain counsel. At trial before the magistrate or Taoyin's officers of justice (縣知事或道尹承審員), lawyers are not permitted to appear or argue for their clients.

In all criminal cases the public procurators prosecute the wrongdoers in the capacity of plaintiffs, with the aggrieved parties as complaining witnesses. The latter have no right to bring a criminal action; they can only apply to the public procurators for prosecution of the wrongdoers. In case the procurators decline to prosecute, the only remedy left is to apply to the higher procurator for reconsideration. In matrimonial and succession matters the public procurators deliver opinions in behalf of the state.

V. DEFECTS OF THE PRESENT SYSTEM

These may be divided as follows:

1. *Defects from the Viewpoint of Law.*

(a) For trying simple and minor cases, there is no "court of peace" (治安裁判所) where judgment would be final and no appeal allowed so that the people would not suffer unnecessary pain of prolonged litigation.

(b) There is no jury trial in criminal cases, thus giving the judges too great power in trying and deciding cases.

2. *Defects in the Constitution.* In the Provincial Constitution no mention is made of the citizen's right to participate in judicial affairs which should be provided as follows:

(a) Election of Judges: The judges of inferior rank or judges of the "Court of Peace" (治安裁判所) should be elected by popular vote. The right to be elected is to be extended only to those who are qualified to be judges. The judges of high rank should not, however, be elected but appointed by the President with the approval of the Parliament.

(b) Supervision over Judicial Officers: The judges of high rank should be subject to impeachment by Parliament and those of inferior rank to be recalled by the people who have elected them.

(c) The people should be given the right to participate in judicial trial through the jury.

The above is only a sketch of the most significant defects. There are, of course, other defects in the present judicial system to which students of law should pay attention, and which time now forbids detailing.



AMERICAN BAR ASSOCIATION MEETING AT CINCINNATI

Arranged by a Student of the Second-Year Class

The year 1921 witnessed the forty-fourth meeting of the American Bar Association at Cincinnati where a large gathering of lawyers from all states was present. This annual meeting brought forth many new faces and a larger proportion of the younger men of the profession than usual. Among the eminent personages who need special mention were Chief Justice Taft of the United States Supreme Court, Hon. John W. Davis, and Sir John Simon, K. C., the last mentioned being the guest of honor.

As to Speeches Delivered

Mr. Taft presided at the annual banquet and took part in the sessions of the Judiciary Section at which he made an eloquent address on "Adequate Machinery for Judicial Business." Although space here does not permit us to give a full résumé of his

speech, which was full of significance as to the present-day administration of justice, or rather its tardiness in rendering aid to those who seek immediate remedy, yet we cannot refrain from saying that such a timely article will have much influence on Congress in any effort to pass a bill relieving the courts of the ever crowding of arrears on the docket. If justice is to be afforded to those who seek it, more judges should be appointed so as to prevent the accumulation of suits that await final settlement. Such delays usually occur in civil cases rather than in criminal, for the state being a prosecutor in the latter can seldom afford to give a would-be criminal a chance to take advantage of any delay.

That the English law with respect to civil actions has a decided advantage over the American law, in that the former gives a more speedy trial by dispensing with many technicalities which the American procedure still retains, is the opinion of Sir John Simon. The speaker, formerly Attorney General of England, was perhaps the only member of the British Bar present at the meeting. He came as a stranger and left behind a host of friends. In advocating closer Anglo-American relationship, he pointed out that the common law, language, and love of liberty of these two peoples are identically the same. As regards the adjective law, as stated above, the English lawyer would argue in favor of his own procedure on the question of the rapid disposition of cases, both civil and criminal. His epigram, "Justice delayed is justice denied," should be borne in mind by all lawyers and law students.

A careful survey of the English organization of the legal profession and certain aspects of the administration of justice in the United Kingdom characterized the address of Mr. John Davis, former American Ambassador to the Court of St. James. He gave a good insight into the courts, the practices of the lawyers, and the preparation for the Bar in England which may be of interest to students and lawyers educated in American law schools.

There were also many fine addresses by other distinguished members of the Association, and but for the limit of space we should publish them all in this journal. However, as it is impossible for us to do so, we must be content to reprint only the speech of ex-Ambassador Davis, which appears below.

As to Business Transacted

Various committees submitted their reports to the meeting for approval. The report on "Legal Education," which required two

years of college work and three years of law study as a condition for admission to the practice of law, immediately gave rise to heated debate. After much discussion, the Association adopted the committee's report. The report of the Committee on Aviation was received with much enthusiasm, for thus far no regulation had been fixed by Congress as to the development of interstate flying of commercial aircrafts as a means of transportation. It was urged that for Congress to pass a bill of this nature—that is, a bill for regulation of the art of flying throughout all the States as distinguished from state laws to the same effect—would give rise to constitutional questions which must be looked into. The result was that a resolution in favor of the development and regulation of aëronautics through constitutional amendment was finally approved. The condemnation of Judge Landis for accepting the position of a baseball commissioner while holding the office of a federal judge gave ground for a hot debate which ended by action in favor of denouncement. The Patent Office Salary question was presented, and the committee's report urged that the bill, pending before Congress increasing salaries in the Patent Office be passed and approved. The Association also adopted the resolution authorizing the Bar Association Delegates to take up the subject of providing a uniform interpretation and administration of the canons of legal ethics throughout the United States; and ratified other resolutions that were then pending.

Regret was expressed by the members over the death of the late president, Mr. W. A. Blount, whose place was taken temporarily by Mr. Hampton L. Carson. It is understood that a new president has been elected in the person of Mr. Cordenio A. Severance, who will take office soon.

A letter from President Harding, expressing his inability to attend the meeting but emphasizing the paramount importance of the evolutionary development of legal advancement as a prevention or avoidance of evulsive, perhaps revolutionary, changes, was read by the acting president of the Association.



OUR BRETHREN OVERSEAS

By Hon. JOHN W. DAVIS

Former U. S. Ambassador to Great Britain

[Address delivered at the Forty-Fourth Annual Meeting of the American Bar Association, at Cincinnati, Ohio, August 31, 1921.]

A sound rhetorical canon forbids the introduction of any address by an apology. No apology, however, is necessary to preface the statement that what I shall have to say to you has no tangible connection with any of the grave perplexities that vex the world to-day. With the hope that you may be willing to forego consideration of international and domestic problems for lighter, if more familiar, things, I shall ask you to listen to some random observations on the organization of the legal profession in England and the administration of English justice, for, while the activities of political, commercial, and professional life in Great Britain are easily translated into terms of our own experience, there is still enough of novelty to engage our interest and reward our study.

Any effort to picture the life of an English lawyer begins of necessity with the Inns of Court, those venerable institutions called by Jonson "the noblest nurseries of liberty and humanity in the Kingdom," or, as a less noble poet writes, in parody of Milton:

Yet not the more,
Cease I to roam through Elm or Garden Court
Fig Tree or Fountain side or learned shade
Of King's Bench Walk, by pleadings vocal made;
Thrice hallowed shades! Where slip-shod Benchers muse,
Attorneys haunt and Special Pleaders cruise.

Entering from the Thames embankment alongside the garden made famous by the plucking of the white rose and the red, the visitor, when enfolded by the quiet precincts of the Temple, seems to walk at once in a world apart. The ancient dining hall of the Middle Temple, graced in its day by Shakespeare and his Virgin Queen, stands as it has done for centuries, filled with its long rows of tables for the students and members of the Inn, and its high table of mighty English oak for the reverend Benchers. Across Temple Lane rise the buildings of the Inner Temple, less venerable in time by reason of fire, yet preserving nevertheless traditions running to the year 1327, when the Knights Hospitalers of St. John

of Jerusalem farmed the manor and place of the New Temple to the professors and students of the day. Here, too, is the old Temple church, consecrated in 1185 by Heraclius, Patriarch of Jerusalem, where the organ selected by Jeffrey of the Bloody Assizes still discourses its music to the sculptured knights upon the pavement and the pious lawyers in their pews.

Through busy Fleet Street and up Chancery Lane the way lies to the stately buildings to Lincoln's Inn, adjoining Lincoln's Inn Fields, of which a contemporary wrote in 1735 that "from a heap of rubbish and the receptacle of ruffians and vagabonds is made one of the finest squares in the world." The place has had its turbulent history. In 1629, for instance, a royal messenger, holding a warrant of arrest, found his man in Lincoln's Inn Gardens, but forbore to touch him out of respect for the place; but when the messenger had quietly gone into the street, about thirty gentlemen of the Inn, who felt that his very presence had been an insult to their privilege, "fetched him into the house, violently pumped him, shaved him, and disgracefully used him." Here, too, stood the old Blue Boar Inn, at which Cromwell and Ireton, disguised as robbers, awaited the soldier who carried sewn into his saddle a letter from Charles the First to his Queen. While the soldier was detained within, they cut open the saddle, extracted the letter containing certain proof of Charles' incurable and incessant treachery, and sent the messenger on his way unwitting of his loss. And then, crossing Holborn, one comes to Gray's Inn to tread the pavement where the weary feet of Francis Bacon paced so many a round after his fall from place and power, and where, within sight of his statue in the outer court, one may still be shown the sacramental cup from which his sad lips drank.

The impression of age and antiquity which such a journey leaves is not lost even when one enters the Royal Courts of Justice, for, though built only in 1886, the design of the architect and the smoke of London have combined to make the building seem years older than they are, and in the hurrying figures of gowned and bewigged barristers and the red-robed judges on the Bench one recognizes forms familiar for centuries in legal portraiture. No degree of intimacy with the traditions which cluster round these halls or with the costume of the dwellers there can drive from the mind of the American visitor the contrast with his less ancient temples and the highly informal garb of their priests and acolytes. Only when he has tarried to witness the courts in action does this sense of the unusual wear away; for then he finds the rules of law

invoked are those upon which he was nurtured, the examination of witnesses is conducted in the manner and by methods he has himself employed, and judgment is rendered in language drawn from the very precedents he has been taught to revere. As he watches the triumphant victor or disgruntled vanquished leave the arena, he feels, to paraphrase John Bunyan, that "but for the grace of God" and the lack of a wig and gown there might he go himself.

"The best prospect," said Disraeli, "that the law holds out to a man is port and bad stories until he is fifty and then a peerage." Two of these rewards are obviously beyond the present reach of the American lawyer, no matter on which side of fifty he may find himself. It must be admitted that there are other differences between the lawyers of England and ourselves hardly less definitive. Of these the most pronounced, perhaps, are those which spring from the methodical, and, from the American point of view, the somewhat rigid, organization of the legal profession itself. In large part this organization is the result of slow-moving historical causes, but it springs, also, from that innate love of established order and custom which is one of the strongest instincts of the English race. The rank and precedence which obtain are not based upon any innate sense of superiority or inferiority among men—indeed, the underlying philosophy of the English state is profoundly egalitarian in point of human rights—but there is a desire to know and a willingness to recognize the exact limit of the sphere to which one has been assigned by choice or fate that is not felt in a newer society. The table of legal precedence accordingly is quite definite. It has at its apex the Lord Chancellor, as the highest legal dignitary of the Kingdom, and descends by successive gradation as follows:

The Lords of Appeal (six in number);

The Lord chief Justice of England;

The Master of the Rolls;

The Lords Justices of the Court of Appeal (five in number), according to seniority of appointment, and

The President of the Probate, Divorce, and Admiralty Division;

Judges of the High Court (twenty-three in number), according to seniority of appointment;

The Judge of the Arches Court;

The Attorney General;

The Solicitor General;

The Judges of the County Courts (fifty-four in number);