

# Northwestern Journal of International Law & Business

---

Volume 1  
Issue 1 *Spring*

---

Spring 1979

## China's Changing Constitution

Jerome Alan Cohen

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Constitutional Law Commons](#), [Foreign Law Commons](#), and the [Legal History, Theory and Process Commons](#)

---

### Recommended Citation

Jerome Alan Cohen, *China's Changing Constitution*, 1 *Nw. J. Int'l L. & Bus.* 57 (1979)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Northwestern Journal of International Law & Business* by an authorized administrator of Northwestern University School of Law Scholarly Commons.



## China's Changing Constitution\*

*Jerome Alan Cohen\*\**

*In 1978, the People's Republic of China promulgated its third constitution since the communist revolution. In many respects, the new constitution reflects the attitudes and policies of Peking's current leadership. In this article, Professor Cohen analyzes the changes wrought by the new constitution in property relations, restraints on executive power, and the protection of individual liberties by comparing it with its predecessors.*

An organization must have rules, and so must a state. A constitution is a set of general rules, it is the fundamental law . . . . Constitution-making is a matter of science.

-Mao Tse-tung<sup>1</sup>

The most exciting current development in international business, particularly in light of the United States' recent recognition of the People's Republic of China, is China's sudden receptivity to enhanced contact and cooperation with the capitalist world. Because of this new trend, large numbers of western businessmen and their lawyers are eager to learn about law in the People's Republic of China. Peking's present leaders, intensely pragmatic and determined to modernize their country with foreign cooperation, recognize that they must now construct a formal legal system to facilitate not only domestic transactions but also transnational ones. They frankly acknowledge that China has to start from scratch, by first erecting a constitutional framework and

---

\* This article is based upon a lecture presented to the Northwestern University School of Law on April 6, 1976, as part of the Julius Rosenthal Lecture series and is published simultaneously in the *Northwestern Journal of International Law & Business* and the *China Quarterly*.

\*\* Director, East Asian Legal Studies, Harvard Law School; LL.B., 1955, Yale University. I am grateful to my assistants Paul Theil, Peter Chan, and Jane Leifer for their valuable help in preparing this study, and to Professor Harold J. Berman of Harvard University and Dr. Frank Munzel of the Max Planck Institute in Hamburg for their stimulating comments.

<sup>1</sup> MAO TSE-TUNG, *On the Draft Constitution of the People's Republic of China*, in 5 *SELECTED WORKS OF MAO TSE-TUNG* 145-46 (1977).

then gradually adding the other conventional indicia of a legal system that give confidence to foreign traders and investors. This is why recent constitutional changes in China are of considerable importance to those who seek to do business with this country of almost one billion people. In reviewing these changes the following essay sketches the political-legal environment that will shape economic development during the coming decades.

On March 5, 1978, the People's Republic of China promulgated its second constitution in little more than three years and the third since its establishment in 1949.<sup>2</sup> What functions does a constitution serve in the Chinese political-legal system? Is it a sham not worth the paper on which it is printed? Is it an artifice of propaganda designed to impress and mislead foreigners? Does it have a legal as well as political significance? The 1954 Constitution was not revised for two decades. Why then was its 1975 successor so quickly overtaken by events? What are the differences among these basic documents?

#### BACKGROUND

Self-conscious constitution-making is a twentieth century phenomenon in China. To be sure, the succession of imperial dynasties that ruled the country from the third century B.C. until 1912 had gradually developed a large collection of sophisticated statutes that described the structure, principles, functioning, and interrelationships of the various agencies of the empire, and these were supplemented by customs, traditions, and precedents. Yet the type of single document charter of government that began to proliferate in the West after the American and French Revolutions did not appear in China until the very last years of the ailing Manchu dynasty. Then, in a desperate attempt to stave off collapse, the Manchu Government, "more ancient and conservative than any other living organization,"<sup>3</sup> grudgingly announced that it would introduce a western-style constitution and become a monarchy of the parliamentary type over the period of a decade.

The Manchus appeared to accept the demands of reformers who

---

<sup>2</sup> The full text of the new constitution is reprinted in the Appendix, *infra* at 112. English translations can also be found in DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 125-72 (1978) and in PEKING REV., Mar. 17, 1978, at 5-14. An English translation of the 1975 version can be found in THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1975) and in PEKING REV., Jan. 4, 1975, at 12. An English translation of the 1954 document can be found in DOCUMENTS OF THE FIRST NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 131-63 (1955). The term "procuracy" has been substituted for the less familiar and more awkward "procuratorate" in this article.

<sup>3</sup> Wang, *Law Reform in China*, CHINESE SOC. & POL. SCI. REV., June 1917, at 13.

wished to emulate Japan. That country had gained great strength as a result of the massive changes symbolized by the Meiji Constitution of 1889,<sup>4</sup> which had borrowed from Europe the forms of a conservative constitutional monarchy. Japan had inflicted a stunning defeat in 1895 upon its traditional elder brother, China, had terminated the humiliating extraterritorial privileges of the western imperialist powers in 1899 and had defeated Imperial Russia in 1905. Some type of western constitutionalism, if only of the rather undemocratic Japanese and Prussian variety, seemed to China's reformers not only to symbolize modernity and legitimacy, but also to hold the key to wealth and power in the international society that had ended the isolation of the Central Realm. The Empress Dowager herself was compelled by circumstances to cry, "Our hope too is in a constitution."<sup>5</sup>

The process of constitution-building had indeed begun. Yet before long, the disappointed reformers noted that "while promising lavishly the Government was steadily concentrating power in the hands of the royal family. Autocracy grew while constitutionalism was held up as the prize."<sup>6</sup> Because the Manchus kept the promise to the ear but broke it to the hope, failing to move ahead even with the modest innovations that had been contemplated, unsuccessful reform turned into successful revolution, and the Republic of China was born in 1912 with the promulgation of a provisional constitution.<sup>7</sup>

So much early republican energy was devoted to constitution-making that in 1917 a leading western expert on Chinese constitutional development wrote that "[o]ne is apt to get confused with the welter of constitutions that have come and gone."<sup>8</sup> These efforts culminated in the supposedly permanent constitution of 1923,<sup>9</sup> a splendid document that was wholly out of touch with Chinese realities and was promulgated by the government of President Ts'ao K'un, whose writ did not run far beyond Peking. The best that could be said for this document,

---

<sup>4</sup> See G. BECKMAN, *THE MAKING OF THE MEIJI CONSTITUTION*, Appendix X (1957). See also S. FUJII, *THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW* (1940).

<sup>5</sup> Bevan, *China's Constitutions*, *CHINESE SOC. & POL. SCI. REV.*, Dec. 1917, at 92.

<sup>6</sup> Wang, *supra* note 3, at 14. For English translations of the two principal documents promulgated by the Manchu government, the principles of Constitution (1908) and The Nineteen Articles (1911), see L. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 318-19, 320-21 (1964).

<sup>7</sup> CHUNG-HAU MIN-KUO LIN-SHIH YÜEH-FA (*PROVISIONAL CONSTITUTION OF THE REPUBLIC OF CHINA*). For an English translation of this document, see L. TUNG, *supra* note 6, at 322-25. Literature on the Manchu flirtation with constitutionalism and its Republican sequel is extensive. In addition to the other sources cited in this article, CH' IEN TAUN-SHENG, *THE GOVERNMENT AND POLITICS OF CHINA* (1950) is an informative analysis upon which I have generally relied.

<sup>8</sup> Bevan, *supra* note 5, at 90.

<sup>9</sup> For an English translation of this document, see CH' IEN, *supra* note 7, at 436.

which called for a western-style cabinet system of parliamentary democracy, was that it established ideals towards which warlord-ridden China might one day strive. In reality it was largely intended for the edification of the imperialist powers, which had promised to surrender extraterritorial privileges once China adopted government and legal institutions familiar to the West.<sup>10</sup>

Chiang Kai-shek's rise to at least nominal national power in 1928 led to further efforts to frame a constitution for the country. This resulted in the provisional constitution of 1931,<sup>11</sup> which largely confirmed the existing arrangements which all government agencies were controlled by the generalissimo's authoritarian Nationalist Party. The provisional nature of this document and the domination of the Nationalist Party reflected the theory of Sun Yat-sen, who had prescribed that a period of "political tutelage" should follow the Nationalists' military unification of the country and precede the true constitutional era that would unfold once the ways of democracy had been learned.<sup>12</sup>

Nevertheless, before long, the continuing struggle for power led various groups to demand promulgation of a permanent constitution,<sup>13</sup> contrary to Sun Yat-sen's theory of the need for a period of tutelage. During the next fifteen years, despite the interruptions required by the war against Japan, enormous amounts of energy were lavished upon what one close observer has called "the futilities of constitution-making."<sup>14</sup> We cannot consider here even a summary of those events, but several points are worth noting.

One is that China's republican leaders frequently changed their attitudes towards constitutionalism, depending upon their calculation of political expediency. Thus, the successive draft constitutions often differed drastically from one another. The ruling Nationalist Party seemed especially ambivalent. It was reluctant to embrace constitutionalism for fear of restricting its powers. Yet it was determined, if there was to be a constitution, that the document should become a vehicle for enhancing its rule by creating a strong executive that would op-

---

<sup>10</sup> For a valuable, in-depth study of the political currents which shaped this document, see A. NATHAN, PEKING POLITICS 1918-23, FACTIONALISM AND THE FAILURE OF CONSTITUTIONALISM (1976).

<sup>11</sup> CHUNG-HAU MIN-KUO HSUN-CHENG SHIH-CHI YÜEH-FA (PROVISIONAL CONSTITUTION OF THE REPUBLIC OF CHINA FOR THE PERIOD OF POLITICAL TUTELAGE) of 1931. For an English translation of this document, see L. TUNG, *supra* note 6, at 344-49.

<sup>12</sup> CH'EN, *supra* note 7, at 296-303.

<sup>13</sup> *Id.* at 317.

<sup>14</sup> *Id.* at 308. For an intelligent analysis of some of the Kuomintang's early post-1931 dilemmas concerning constitutionalism, see L. EASTMAN, THE ABORTIVE REVOLUTION, CHINA UNDER NATIONALIST RULE, 1927-1937, at 159-80 (1974).

erate under form party control. Opposition leaders, intellectuals, and others generally favored a permanent constitution in the hope of curbing the increasingly dictatorial nationalist regime.

A second point to note is that all sides in the struggle to shape a constitution tended to claim the mantle of Sun Yat-sen's ideology. His ideas, however much distinctively blended, had come from the West. Indeed, the impact of the West had left most Chinese convinced of the superiority of western law and institutions and eager to apply them in China.

Yet, from the earliest days of China's concern with constitutions, some western scholars warned Chinese modernizers against importing western institutions that did not suit the country's conditions and looked forward to "the time when constitutions with a character of their own will come out of the East."<sup>15</sup> And, at least occasionally, the Nationalist Party seemed to be searching for autochthonous Chinese constitutional norms and forms that would be briefly and simply described in a document intelligible to the people.

The Constitution of the Republic of China promulgated in 1946,<sup>16</sup> which continues to prevail in Taiwan today, displayed major western influences. Nevertheless, the presidential system that it prescribed also reflected significant Chinese characteristics. For example, it grafted onto the three branches of government familiar to the West two additional branches that have deep roots in Chinese history—the examination and control yuan.

Although the 1946 constitution is neither brief nor simple, it is an impressive compound of East and West. Unfortunately, experience in its application both before and after the flight of the Republican government to Taiwan in 1949 suggests that, like its predecessor, it has made little difference in the nature and character of the Nationalist Party's dictatorial rule. The organization and management of the party remain more important than the formal structure and processes of government in the Republic of China. This is especially true because the martial law that has continued to prevail on Taiwan since the communist victory on the mainland has resulted in suspension of certain constitutional provisions and in party allocation of important aspects of

---

<sup>15</sup> Quigley, *The Constitution of China*, 18 AM. POL. SCI. REV. 346, 350 (1924).

<sup>16</sup> CHUNG-HUA MIN-KUO HSIEN-FA (CONSTITUTION OF THE REPUBLIC OF CHINA) of 1946. For English translations of this document, see CH'EN, *supra* note 7, at 447, and L. TUNG, *supra* note 6, at 350-66. For an interesting discussion of this document by Dean Roscoe Pound, who served as advisor to the Chinese Ministry of Justice, see Pound, *The Chinese Constitution*, 22 N.Y.U. L. REV. 194 (1948). See also W. TSAO, *THE CONSTITUTIONAL STRUCTURE OF MODERN CHINA* (1947).

state control to the military and security forces.<sup>17</sup>

Until its decline imperial China had tended to display a high correlation between the forms of power and its actual exercise; power had been exercised by a small elite and had been rationalized and justified on that basis. The influx of western ideas during the republican era led to a yawning gap between, on the one hand, constitutional documents that called for representative democratic institutions and individual liberties and, on the other, a personalized party-military dictatorship maintained over a non-western populace that was for the most part poor, illiterate, disorganized, and impotent. In these circumstances constitutionalism could not take root, and the documents that were formulated could not lead to the stability for which their advocates hoped.

#### THE CONSTITUTION OF 1954

This background gives us some perspective on problems of constitution-making in the People's Republic of China after 1949. As we shall see, Peking's Constitution of 1954, although the charter of a revolutionary system that was radically different from pre-1949 republican regimes, nevertheless confronted similar problems and bore certain general resemblances to its bourgeois predecessors.

Like its predecessors the 1954 constitution was essentially a foreign product. Although it was not directly influenced by either Anglo-American or Western European models, it was, nevertheless, a western product because it was in large part borrowed from the Soviet Union and the Eastern European people's democracies. However exotic these countries may appear to Anglo-American or Western European eyes, the Soviet Union and its Eastern European allies seemed western to the Chinese. Indeed, many of the institutions and values enshrined in the constitutions of the Soviet-bloc states are derived from the West.

The influence of the Soviet Constitution<sup>18</sup> was especially strong, even though that document had been formulated to mark the Soviet Union's entry into the socialist stage of development, while China in 1954 had not yet reached socialism but was at the earlier stage of a people's democracy en route to socialism. Despite the consequent difference in state form between the "people's democratic dictatorship" of

---

<sup>17</sup> Peng, *Political Offenses in Taiwan: Laws and Problems*, 47 CHINA Q. 471 (1971). This article contains a detailed discussion of the consequences of the "state of seige" proclaimed throughout the island on May 19, 1949 and that is still in effect.

<sup>18</sup> KONSTITUTSIIA (OSNOVOI ZAKON) SOIUZA SOVIETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS) OF 1936 [hereinafter cited without cross-reference as U.S.S.R. CONST.].

the People's Republic and the "dictatorship of the proletariat" that still prevailed in the Soviet Union in 1954, the Chinese constitution reflected the Soviet model.

Like the Supreme Soviet, the National People's Congress, although unicameral, became the highest organ of state power. Its Standing Committee, like the Presidium of the Supreme Soviet, was expected to exercise effective legislative power between the infrequent sessions of the parent body. The State Council, like the Soviet Council of Ministers, functioned under the legislature as the highest state executive organ. Although the Soviet Union is a federal state while China is not, the latter's local people's congresses and people's councils were modelled on the local soviets and their executive committees in the socialist republics.

In addition, the judicial system and the procuracy, a prosecutorial institution that was supposed to have the power to investigate and protest against violation of law by government agencies as well as by others, followed the Soviet system. So too did the 1954 constitution's long list of fundamental rights and duties of citizens parallel that of the Soviet constitution. Finally, as in the Soviet-bloc countries, China's courts were not granted the power to invalidate legislation on the grounds of constitutional violation.

Thus we can understand why, in his *Report on the Draft Constitution*,<sup>19</sup> Liu Shao-ch'i, who later succeeded Mao as president of the People's Republic, declared that the document was not only the "epitome of the historical experience of Chinese constitutionalism" but also a "product of the international socialist movement."<sup>20</sup> The constitutions of the Soviet Union and other socialist states had been widely drawn upon as Mao himself conceded, even while contending that the document "sums up [China's] experience in constitution-making since the last years of the Ch'ing Dynasty . . . ."<sup>21</sup> Moreover, as we have seen, that experience itself had involved the assimilation of western principles and institutions.

Few were surprised when the 1954 constitution was promulgated. Once the initial years of upheaval, economic reconstruction, and consolidation of Party control had passed, it had been anticipated that a formal constitution would replace the temporary documents of 1949<sup>22</sup>

---

<sup>19</sup> LIU SHAO-CHI'I, REPORT ON THE DRAFT CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, DOCUMENTS OF THE FIRST NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (1955).

<sup>20</sup> *Id.* at 12, 20.

<sup>21</sup> MAO, *supra* note 1, at 142.

<sup>22</sup> The first plenary session of the Chinese People's Political Consultative Conference adopted



and symbolize the new era of stability and economic growth. As in other communist states and as in Republican China under the Nationalists, a government constitution was perceived to be a useful creature of Party convenience. It established the basis for a strong, unifying national government and allocated responsibilities among different agencies, bringing greater clarity and order to a people who have always dreaded, and frequently experienced, political confusion. It also confirmed, both at home and abroad, the legitimacy of a regime that felt understandably insecure about its prestige.

This constitution, plainly a transitional document, set forth the goals of a state that was advancing from a "people's democracy" to a "socialist transformation" of industry, commerce, and agriculture.<sup>23</sup> As Mao emphasized, it was designed to heighten the enthusiasm of and unite the people by prescribing "a clear, definite and correct path to follow . . . ."<sup>24</sup> Indeed, one of its major uses was as an instrument of indoctrination. Thus, in draft form, it was said to have been discussed by over 150 million people and, following its promulgation, there was a vigorous campaign to further disseminate and explain it to the masses. Pamphlets, law reviews, popular magazines, and newspaper and radio commentaries all elaborated upon the tasks prescribed and the terms employed in the document.<sup>25</sup> Of particular interest were discussions of provisions that were ambiguous and appeared to reflect a political compromise that left the job of defining their meaning to the future. A leading example was article 78, which stated that "[i]n administering justice, the people's courts are independent, subject only to the law."<sup>26</sup>

The transitional nature of the 1954 constitution made it evident that, once socialist transformation of the economy had been attained,

---

the Organic Law of the Central People's Government of the People's Republic of China on Sept. 27, 1949. Two days later the same body adopted the Common Programme of the Chinese People's Consultative Conference. For English translations of these two documents, see FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 34-53 (Common Programme), 104-14 (Organic Law) (A. Blaustein ed. 1962) [hereinafter cited as FUNDAMENTAL LEGAL DOCUMENTS].

<sup>23</sup> See CHUNG HAU REN MIN KUNG HO KUO TI HSIEN FA (CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA) of 1954, preamble [hereinafter cited without cross-reference as CHINA CONST.].

<sup>24</sup> MAO, *supra* note 1, at 145.

<sup>25</sup> See J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION (1968). For a bibliography of relevant English language material, see CHINESE LAW, PAST AND PRESENT 49-55 (Lin Fu-shun ed. 1966). For a list of relevant Chinese language periodical literature, see T. HSIA, GUIDE TO SELECTED LEGAL SOURCES OF MAINLAND CHINA 261-65 (1967). For western analyses of the 1954 constitution, see Steiner, *Constitutionalism in Communist China*, 49 AM. POL. SCI. REV. 1 (1955), and Houn, *Communist China's New Constitution*, 1955 W. POL. Q. 199.

<sup>26</sup> For analysis of this provision and the struggle over its application, see Cohen, *The Party and the Courts: 1949-1959*, 38 CHINA Q. 120 (1969).

the document would be in need of revision. Yet socialist transformation came much sooner than many expected; it was substantially completed in agriculture shortly afterward and in industry and commerce by the end of the 1950's. Late in 1958 Chairman Mao himself noted this problem of constitutional obsolescence with specific reference to the structural changes wrought by the people's communes. He asked, "Has the [establishment of the rural] people's commune violated the constitution? The issue of integrating politics and the commune, for example, was not passed by the People's Congress, nor is it in the constitution. Many parts of the constitution are obsolete . . ."27

The "anti-rightist" movement that began in mid-1957 had already virtually ended attempts to implement chapter VI of the constitution, which dealt with the courts and the procuracy.<sup>28</sup> As a result, it was no longer feasible to argue against Party interference in the determination of concrete cases as some courageous officials had done. Nor was there further talk of implementing the rights enshrined in articles 75 and 76, which entitled an accused to make a defense in a public trial before a tribunal that included a judge and representatives of the people called "assessors."<sup>29</sup>

Of course, little effort had ever been made to implement some provisions of the constitution. For example, during the spring of 1957, during that brief, heady period when it was a Party policy to "Let a hundred flowers bloom," a well-known Shanghai lawyer and journalist, Ku Chih-chung, was one of many who assailed the Party for disregarding the constitutional guarantees of equality before the law, freedom from arrest except with the approval of a court or procuracy, and freedom of speech, press, assembly, and association.<sup>30</sup>

Actually, some legislative and administrative steps had been taken to protect citizens against arbitrary arrest, but these had only proven partially successful.<sup>31</sup> The Hundred Flowers period itself might be regarded as a limited experiment with free speech, but it was soon ended by the "anti-rightist" campaign that was launched shortly after Ku Chih-chung's speech. The Party struck back at its critics: "Ku Chih-chung made a shameless attack on the Constitution. He will learn that the Constitution protects the freedom of the People; but he will be dis-

---

<sup>27</sup> I MISCELLANY OF MAO TSE-TUNG THOUGHT, 1949-1969 (MAO TSE-TUNG SSU-HSIANG WAN-SUI) 138 (Joint Publication Research Service Pub. No. 61269-1, 1974).

<sup>28</sup> J. COHEN, *supra* note 25, at 14-18.

<sup>29</sup> *Id.* at 430-35.

<sup>30</sup> See INT'L COMM'N JURISTS, BULL. NO. 20, TEN YEARS OF THE CHINESE PEOPLE'S CONSTITUTION 22, 28 (1964).

<sup>31</sup> See, e.g., J. COHEN, *supra* note 25, at 11-18, 25-35, 354-64.

appointed if he hopes that the Constitution will protect the freedom of speech, press and assembly of traitors, counter-revolutionaries and rightist elements.”<sup>32</sup> Ku and his ilk were plainly not considered to be among the “People.”

The Cultural Revolution of 1966-1969, which was nothing less than a disabling attack by Party Chairman Mao upon both the Party and government organizations, left the remaining vestiges of the constitution inoperative. This became evident when the President of the People's Republic, Liu Shao-chi, was stripped of his office even though the National People's Congress, the only organ authorized to take this action, had not met.<sup>33</sup> Indeed, the failure to convene the Congress year after year throughout the entire decade 1965-1975, despite the constitutional requirement of annual sessions, was a glaring embarrassment. As the terror of the Red Guards receded and the People's Liberation Army restored order, pressures grew in many quarters for a new constitution. Some groups hoped thereby to introduce a new era of stability, civilian government, and greater protection for individual rights. Others, particularly those who had improved their status during the power shifts of the Cultural Revolution, wanted a document that would take account of the vast changes that had occurred since 1954 and formally confirm the altered political situation. Party Vice-chairman Lin Piao and his followers were, of course, eager to use the occasion to assure Lin's designation as Mao's successor and promote Lin's policies.<sup>34</sup>

#### CONSTITUTION-MAKING IN THE 1970's

The draft of a revised constitution that was approved by the Party Central Committee in 1970, but was not officially adopted, was a document radically different from the 1954 constitution. It consisted of a mere 30 articles and 2,000 words, instead of the 106 articles and 15,000 words of its predecessor.<sup>35</sup>

Major internal changes occurred in China between 1970 and 1975, including the death of Lin Piao, the purge of his followers, the rebuilding of Party, government, and mass organizations under the increasingly powerful leadership of Premier Chou En-lai, and the rehabilitation of many veteran leaders, including Teng Hsiao-p'ing,

---

<sup>32</sup> INT'L COMM'N JURISTS, *supra* note 30, at 28.

<sup>33</sup> See L. DITTMER, LIN SHAO-CH'I AND THE CHINESE CULTURAL REVOLUTION 94-109 (1974).

<sup>34</sup> See THE LIN PIAO AFFAIR (M. Kau ed. 1975).

<sup>35</sup> For an English translation of the revised draft of the Constitution of the People's Republic of China, approved by the Party Central Committee on September 6, 1970, see THE NEW CONSTITUTION OF COMMUNIST CHINA: COMPARATIVE ANALYSES 312-20 (M. Lindsay ed. 1976) [hereinafter cited as NEW CONSTITUTION].

who had been dismissed during the Cultural Revolution.<sup>36</sup> Vast changes also occurred in China's foreign policy and international standing during that period. Yet the revised constitution that was finally adopted in January 1975 in many respects followed the 1970 draft.<sup>37</sup>

To be sure, a number of significant changes had been made. It is enough to note here, however, that the 1975 revised constitution eliminated the 1970 draft's repeated references to "the great leader Chairman Mao Tse-tung" and dropped any mention of the dead Lin Piao, whom the draft had identified as "Chairman Mao's close comrade-in-arms and successor."<sup>38</sup> It also replaced "Mao Tse-tung Thought" with "Marxism-Leninism-Mao Tse-tung Thought" as the nation's theoretical guide.<sup>39</sup> It added to the emphasis upon the leadership of the Communist Party of China over the state. And, most importantly, it inserted the crucial and unique provision that the chairman of the Party Central Committee "commands the country's armed forces," including the people's militia.<sup>40</sup>

A few months after the 1975 constitution's promulgation, a Chinese diplomat asked me, in a tone that affected hurt, why the western press had paid so little attention to this important event. In truth, the western media had not given it the broad coverage that this document might have inspired. Perhaps this reflected the widespread belief that in China, as well as in other communist states, constitutions tend to be worthless pieces of paper drafted by hypocrites. Moreover, the brevity of the new constitution and its high slogan content, minimal statement of goals and vague allocations of power only encouraged the cynical to believe that especially in this case the mountain had labored and brought forth a mouse. Only the Soviet propaganda mill—no stranger to hypocrisy—devoted extensive coverage to the 1975 constitution, castigating it ad nauseum for its alleged violation of the principles of

---

<sup>36</sup> See Rice, *The Second Rise and Fall of Teng Hsiao-ping*, 67 CHINA Q. 494 (1976); Starr, *From the 10th Party Congress to the Premiership of Hua Kuo-feng: The Significance of the Colour of the Cat*, 67 CHINA Q. 457 (1976).

<sup>37</sup> Some observers have stated that there was also a second revised draft adopted by the Party Central Committee in 1973. See Gudoshnikov, *Two Constitutions of the People's Republic of China*, 3 FAR E. AFFAIRS 72 (1975). Indeed, the Republic of China on Taiwan published an English translation of what purported to be such a document. See BACKGROUND ON CHINA (Chinese Information Service Pub. No. B.74-13, 1974); NEW CONSTITUTION, *supra* note 35, at 321-27. Yet two knowledgeable commentators have questioned the authenticity of this document. See T. HSIA & K. HAUN, THE 1975 REVISED CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 2 (1975).

<sup>38</sup> NEW CONSTITUTION, *supra* note 35, at 314 (article 2 of the 1970 draft constitution).

<sup>39</sup> CHINA CONST. of 1975, preamble.

<sup>40</sup> *Id.* art. 15.

Marxist-Leninist socialist legality.<sup>41</sup>

What is particularly noteworthy is the fact that, apart from a nationwide campaign to explain why the 1975 constitution proclaimed China to be a "dictatorship of the proletariat" rather than the "people's democratic dictatorship" that the People's Republic had originally established,<sup>42</sup> the media in China devoted even less attention to the new document than did the western press. There was virtually none of the detailed exegesis of many constitutional provisions that had appeared in books, magazines, and newspapers, and on the radio when the 1954 constitution had been adopted. Indeed, the exclusive emphasis on the "dictatorship of the proletariat" suggested that at least those who then commanded China's propaganda organs were not enthusiastic about other aspects of the constitution. Further, Chairman Mao's highly-publicized absence from the meetings of both the Party Central Committee and the National People's Congress that produced the constitution and his failure to endorse it, raised questions about its political support.

When compared to its predecessor and to the fundamental charters of other communist states, the 1975 constitution seemed a radical instrument, despite the claim of then Vice-premier Chang Ch'un-ch'iao that it was "the continuation and development of the 1954 Constitution."<sup>43</sup> Yet in the context of Chinese politics it was the product of a series of reluctantly made compromises between contending groups that, for short-hand simplicity, we will call "radicals" and "pragmatists." The former, often identified as "the Shanghai group" or "Maoists", have been described as "fundamentalists who insist that China must not sacrifice revolutionary values on the altar of economic

---

<sup>41</sup> For an example of a more scholarly analysis of the 1975 constitution, see Gudoshnikov, *supra* note 37. For an interesting commentary on a similar Soviet work, by an American expert on Soviet law, see Hazard, *A Soviet Model for Marxian Socialist Constitutions*, 60 CORNELL L. REV. 985 (1975). For the range of western analyses of the 1975 constitution, in addition to the works cited elsewhere in this article, see Rowe, *The PRC's Constitutions and the Philosophy of Constitutionalism*, ISSUES AND STUDIES, July 1975, at 2-23; Hsüeh, *The New Constitution*, PROBLEMS OF COMMUNISM, May-June 1975, at 11; Tsien, *Les Traits Particuliers de la Nouvelle Constitution Chinoise*, 1975 REVUE INTERNATIONALE DE DROIT COMPARÉ 349; Munzel, *Eine Verfassung der Proletrarischen Diktatur*, 4 WGO-MONATSHEFTE FÜR OSTEUEPÄISCHES RECHT 243 (1974).

<sup>42</sup> See, e.g., Heng, *Conscientiously Study the Theory of the Dictorship of the Proletariat*, PEKING REV., Feb. 14, 1975, at 6; Szu, *Historical Tasks of the Dictatorship of the Proletariat*, PEKING REV., Mar. 14, 1975, at 4.

<sup>43</sup> CHANG CH'UN-CH'IAO, REPORT ON THE REVISION OF THE CONSTITUTION, DOCUMENTS OF THE FIRST SESSION OF THE FOURTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 36 (1975).

development.”<sup>44</sup> They have emphasized ideological purity and cultural and educational policies that seek to transform the “world outlook” of the masses. The latter, occasionally called “the Peking group”, tend in the short run to place rapid industrialization and economic development before ideological orthodoxy and socio-economic egalitarianism. They favor bureaucratic rationality and central planning over the mass mobilization and decentralization preferred by the radicals, and they stress educational policies that enhance professional, scientific, and technical skills. Only with the greatest difficulty did these rival groups manage to agree upon a document, and the one that they did adopt did more to echo many of the developments of the preceding two decades than to regulate the contemporaneous exercise of power or to specify China's future tasks.

The dramatic events of 1976 that began with the death of Premier Chou En-lai accelerated in April when the massive outpouring of sentiment to memorialize Chou turned Peking's Gate of Heavenly Peace into the site of the most serious rioting the capital had witnessed in many years.<sup>45</sup> This led to the second removal of Vice-premier Teng Hsiao-p'ing and the appointment of Hua Kuo-feng as premier, a hasty appointment that was made without the approval of the National People's Congress, a requirement of the 1975 constitution.<sup>46</sup> The death of Chairman Mao in September, which precipitated the arrest of the leaders of the Shanghai group, thereafter branded the “gang of four”, led many observers to wonder whether the triumphant pragmatists would translate their victory over the radicals into a new government constitution, one that would eliminate the earmarks of the significant, albeit incomplete, influence that the radicals had exercised over the existing document.

Following the Eleventh Party Congress of August 1977, which promulgated a new Party charter as part of the effort to extirpate “the poison of the gang of four,” and the second re-emergence of Teng Hsiao-p'ing, it became clear that another government constitution was indeed on the way. Yeh Chien-ying, chairman of the Standing Committee of the National People's Congress, stated in his report on the draft of the 1978 constitution that the smashing of the “gang of four” marked the end of the Cultural Revolution and the beginning of a new period of development that required a new fundamental law to meet its

---

<sup>44</sup> Lieberthal, *The Internal Political Scene*, PROBLEMS OF COMMUNISM, May-June 1975, at 1, 5-6. It is not clear to me whether Lieberthal's third group, the military, really constituted a coherent category regarding the questions discussed here.

<sup>45</sup> See *New York Times*, April 6, 1976, at 1, col. 6; *PEKING REV.*, April 9, 1976, at 4.

<sup>46</sup> CHINA CONST. of 1975, art. 17.

needs.<sup>47</sup> Although the adoption of the 1978 constitution by the Fifth National People's Congress did not stimulate an educational campaign comparable to that of 1954, the gradually unfolding nationwide effort to disseminate the new principles is proving to be considerably greater than that of 1975. Nevertheless, even among the leaders of the pragmatists' camp there appear to be varying degrees of enthusiasm for, or at least preoccupation with, the 1978 constitution,<sup>48</sup> the enactment of which Yeh Chien-ying characterized as "a major event in the political life of our people."<sup>49</sup>

### THE CONSTITUTION OF 1978

It is not possible here to scrutinize every provision of this most recent constitution and contrast it with its predecessors. It is feasible, however, to inquire briefly into three aspects of particular interest to students of law and government: property relations, institutional restraints upon the exercise of executive power, and analogs to a bill of rights.

#### *Property Relations*

Property relationships alone could not have provided an important enough stimulus for enacting a new constitution, because in this respect the pragmatists had been surprisingly successful in the 1975 constitution. Thus the 1978 version made relatively few changes.

According to Marxist analysis, the essential features of every society are determined by its economic base, that is, its property relationships.<sup>50</sup> Because the People's Republic had virtually completed the collectivization of the means of production in agriculture, industry, and commerce by the end of 1960,<sup>51</sup> China had left the "new democracy" stage of development and entered the socialist stage. Yet until 1975 the constitution, the most obvious manifestation of what Marxists call the superstructure, was not altered to reflect the major changes in the economic base. As Yeh Chien-ying's report on the 1978 draft constitution noted: "This great victory [socialist transformation] was already re-

---

<sup>47</sup> YEH CHIEN-YING, REPORT ON THE REVISION OF THE CONSTITUTION, DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 173, 176-77 (1978). See PEKING REV., Mar. 17, 1978, at 15.

<sup>48</sup> See *Socialist Legal System*, China News Analysis No. 1123, June 16, 1978, at 4.

<sup>49</sup> YEH, *supra* note 47, at 212.

<sup>50</sup> K. MARX, *Private Property and Communism*, in KARL MARX: EARLY WRITINGS 152-67 (T. Bottomore ed. 1963).

<sup>51</sup> Dutt, *Some Problems of China's Rural Communes*, in CHINA UNDER MAO: POLITICS TAKES COMMAND 119-43 (R. McFarquhar ed. 1966).

corded in the existing [1975] constitution."<sup>52</sup> Its property provisions had belatedly confirmed the economic transformation.

In 1975 there was no longer a need to retain the 1954 constitution's limited protection of capitalist ownership,<sup>53</sup> because capitalism was a thing of the past. Similarly, there was no need for further reference to the peasant's right to own means of production.<sup>54</sup> However, because some individual working people in non-agricultural pursuits—handicraftsmen and peddlers, for example—are still not collectivized, the 1975 constitution authorized the state to allow them to engage in individual labor in ways that involve no exploitation of others, that are within the limits permitted by law, and that are "under unified arrangement" by basic level organizations.<sup>55</sup> The limited constitutional tolerance of this vestige of the individual entrepreneur was balanced, however, by the admonition that "these individual laborers should be guided onto the road of socialist collectivization step by step."<sup>56</sup> The new constitution retains this provision in substance and in almost identical language.<sup>57</sup>

The new constitution also reiterates its predecessor's statement that "there are mainly two kinds of ownership of the means of production . . . at the present stage."<sup>58</sup> One is "socialist ownership by the whole people,"<sup>59</sup> that is, state ownership. The second is "socialist collective ownership by the working people,"<sup>60</sup> that is, collectively-owned communes and other organizations. Presumably the phrase "at the present stage" implicitly contemplates future evolution towards communism through the transformation of collective ownership to state ownership.

The property provisions of the 1975 constitution had revealed three clear instances of the influence of the pragmatists. In describing the three-level ownership system that "generally" prevails "at the present stage" in the rural communes, article 7 had noted that the production team—the basic-level organization below the production brigade and the commune—is "the basic accounting unit."<sup>61</sup> This gave constitutional status, however temporary, to an arrangement that offers team members a more direct financial incentive to be productive than if their

---

<sup>52</sup> YEH, *supra* note 47, at 202.

<sup>53</sup> CHINA CONST. of 1954, art 10.

<sup>54</sup> *Id.* art. 8.

<sup>55</sup> CHINA CONST. of 1975, art. 5.

<sup>56</sup> *Id.*

<sup>57</sup> CHINA CONST. art. 5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> CHINA CONST. of 1975, art. 7.



efforts were submerged in the larger brigade or commune. Article 7 of the 1978 constitution retains this language but adds—perhaps to show the ideological orthodoxy of the pragmatists—that “[a] production brigade may become the basic accounting unit when its conditions are ripe.”<sup>62</sup> Yeh Chien-ying’s report notes that some brigades have already become accounting units and urges “dynamic but steady policies and steps” to encourage others to do so when the conditions are appropriate.<sup>63</sup>

The new constitution also retains the second of the pragmatists’ 1975 triumphs—the provision that “commune members may farm small plots of land for personal needs, engage in limited household side-line production, and in pastoral areas keep a small number of live-stock for personal needs.”<sup>64</sup> However, in 1978 as in 1975 the proviso is attached that this may only be done if “the absolute predominance of the collective economy of the people’s commune is ensured,”<sup>65</sup> that is, so long as the peasants do not neglect their principal labor on behalf of the collective. Nevertheless, in 1975 this constitutional concession to personal self-interest was surprising because of the bitter efforts of the radicals to do away with such selfish practices in the past, efforts that had been successful on a number of occasions. Now that the radicals have been done away with, the provision has plainly been retained as part of the programme for satisfying the peasants and stimulating their production. The current version, by omitting its predecessor’s additional condition that private production not hinder “the development” of the collective economy, but only its “absolute predominance,”<sup>66</sup> seems to give the peasants greater latitude than before.

During the euphoric days of the Great Leap Forward in 1958-59, when the masses were mobilized in the hope of achieving utopian goals, the commune was the accounting unit, and the farming of small plots of land for personal needs and similar pursuits were terminated and actually banned. Moreover, in some places individual incentives were also blunted by a system of distributing food and other compensation to peasants without regard to the usual linking of income to the number of work points an individual earned. The pragmatists won a third victory in article 9 of the 1975 constitution, which repudiated this visionary “free distribution” by flatly enunciating the classical Marxian principles for the era of socialism: “He who does not work, neither

---

<sup>62</sup> CHINA CONST. art. 7.

<sup>63</sup> YEH, *supra* note 47, at 204.

<sup>64</sup> CHINA CONST. art. 7.

<sup>65</sup> *Id.*

<sup>66</sup> CHINA CONST. of 1975, art. 7.

shall he eat" and "from each according to his ability, to each according to his work."<sup>67</sup> Yeh Chien-ying's report on the 1978 constitution leaves no doubt about the radicals' opposition to this provision:

The "gang of four" slanderously alleged that "to each according to his work" is a capitalist principle. They attacked our system and policies of payment for labour which embody this principle as the use of material incentives as bait, and thus they undermined the application of this principle, dampened the working people's socialist enthusiasm and disrupted socialist production.<sup>68</sup>

Thus, for the present at least, constitutional blessing continues to be given to the maintenance of income differentials based on individual talent and effort. The attempt to enhance production by offering individual material incentives would founder, of course, if people's earnings, savings, homes, and other items of personal use were arbitrarily taken away. Yet, despite the 1954 constitution's protection of "the right of citizens to own lawfully earned incomes, savings, houses and other means of life,"<sup>69</sup> confiscation occurred in the countryside during the Great Leap Forward of 1958-1959 and in the cities during the Cultural Revolution.

The 1975 constitution retained the earlier document's protection of individual ownership, but replaced the phrase "lawfully earned incomes"<sup>70</sup> with the narrower "income from work."<sup>71</sup> This seems to imply disapproval of income earned by means other than one's labor, such as from "fixed interest" that expropriated capitalists had been paid as compensation for surrendering their property or dividends from the investments in the People's Republic that overseas Chinese had formerly been induced to make. Article 9 of the 1978 version restores the original protection. Presumably it represents a necessary reaffirmation of the security of one's personal property as part of the effort to guarantee citizens, including overseas Chinese, against a repetition of earlier unfortunate events.<sup>72</sup>

This provision may only have credibility to the extent that the

---

<sup>67</sup> *Id.* art. 9. These maxims are reaffirmed in CHINA CONST. art. 10. They appeared in article 12 of the Soviet constitution of 1936. The current Soviet constitution reiterates: "From each according to his ability, to each according to his work." U.S.S.R. CONST. art. 14. Similarly, the concession securing the peasant's garden plot and related activities appeared in U.S.S.R. CONST. of 1936, art. 7, and is retained in article 13 of the current constitution.

<sup>68</sup> YEH, *supra* note 47, at 205. See PEKING REV., Mar. 11, 1978, at 24.

<sup>69</sup> CHINA CONST. of 1954, art. 11.

<sup>70</sup> *Id.*

<sup>71</sup> CHINA CONST. of 1975, art. 9.

<sup>72</sup> Article 54 of the new constitution specifically guarantees the just rights and interests not only of "overseas Chinese," as in previous constitutions, but also of "their relatives," that is, those actually residing in China. The Soviet Union has long struggled to define the boundary between

state assures restitution or compensation to persons who have been forced to yield their houses, household furnishings, bank accounts, or other property. The fact that the 1978 constitution—while authorizing citizens to complain against infringement of their rights<sup>73</sup>—failed to reinsert the 1954 document's provision for the state to make compensation for such infringement cannot be tremendously reassuring.<sup>74</sup> Nevertheless, at various times during the past two decades, restitution or compensation has been made to persons who have suffered property deprivations,<sup>75</sup> and the present government is taking further steps to make amends.<sup>76</sup>

A principal satisfaction of individual property ownership, of course, comes from the ability to transmit it to one's heirs. Yet the 1978 constitution, like its immediate predecessor, fails to retain the 1954 prescription that "[t]he state protects the right of citizens to inherit private property according to law."<sup>77</sup> This is one example among many which raises the question of what inference can be drawn from the failure of the 1978 constitution to retain one of the 1954 version's provisions. As we have seen, it would have made no sense to retain certain provisions because events made them obsolete. There was apparently no need to retain some other provisions because they were subsumed, in the interest of brevity, under some broad phraseology of the truncated 1975 version and even of the somewhat longer 1978 document. With respect to inheritance, however, neither of these explanations seems appropriate, and we cannot tell why the provision was not retained.

Does the omission of this provision mean an end to inheritance in the People's Republic? Apparently not. That would be inconsistent

---

earned and unearned income, and article 13 of the 1977 Soviet Constitution maintains the distinction.

<sup>73</sup> CHINA CONST. art. 55.

<sup>74</sup> See text accompanying notes 154-75, *infra*.

<sup>75</sup> See, e.g., E. VOGEL, CANTON UNDER COMMUNISM 279 (1969) (reports efforts in 1960-1961 to make at least partial restitution or compensation to peasants for property seized from them during the Great Leap Forward).

<sup>76</sup> See *Kirin Purges Gang Follower, Compensates Victims*, Peking NCNA Domestic, April 28, 1978, summarized in FBIS-CHI-78-84, May 1, 1978, at L1, L4 (states that property taken from victimized persons was returned to them and that they were repaid wages which had been withheld). Chinese media have shown increasing concern about property deprivations such as the failure to restore to their owners houses that have been requisitioned for a long time by the military. See *Liberation Army Daily on Observance of Law, Discipline*, Peking Domestic Service, April 12, 1978, summarized in FBIS-CHI-78-74, April 17, 1978, at E6, E8. See also *Shantung Provincial Party Committee's United Front Department Sends a Letter to the Overseas Chinese Affairs Office of the State Council*, Jen-min Jih-pao (People's Daily), July 19, 1978, at 6 (recounts the two-year efforts of government agencies to oust a resistant cadre from a house of an overseas Chinese that he occupied long beyond his authorized tenancy).

<sup>77</sup> CHINA CONST. of 1954, art. 12.

with the steps taken to restore individual incentives. Indeed, in a major article on the implications of the 1978 constitution for judicial affairs no less a personage than Chiang Hua, president of the Supreme People's Court, stated that "[w]hen handling cases of inheritance disputes, the courts must protect the lawful inheritance rights of the inheritors designated by law and pay attention to protecting the inheritance rights of juvenile and disabled persons."<sup>78</sup> It is possible that in 1975, as a concession to the egalitarian sensitivities of the radicals, an agreement was made simply to remove the institution of inheritance from view so as to avoid the attention it would receive by continuation at the constitutional level. If so, this was a modest enough concession in return for their acquiescence in the constitutional vindication of the highly controversial individual incentives. The campaign to elucidate the "dictatorship of the proletariat" that immediately followed promulgation of the 1975 constitution seemed in part to be an attempt by the radicals to prepare the ground for eliminating these so-called "Bourgeois rights," whose continuing existence fuels the fears of orthodox Maoists that China may succumb to capitalist tendencies or Soviet-style income differentials. The principal draftsmen of the 1978 constitution—the Political Bureau of the Chinese Communist Party Central Committee—undoubtedly gave some thought to reinstating constitutional protection of the right to inherit, but probably rejected this option as one that was unnecessary to the perpetuation of inheritance and one that would probably provide ammunition to critics eager to condemn the post-Mao leadership for returning to the ways of the discredited "capitalist roader" Liu Shao-ch'i.

### *Restraints on the Executive*

Although the 1978 constitution makes few changes in the 1975 document's treatment of property relations, it restores some of the institutional restraints upon the exercise of executive power that the 1954 constitution had provided for but the 1975 revision had omitted. The 1954 constitution was not based upon the separation of powers, but upon the theory that the National People's Congress is the supreme organ of state power.<sup>79</sup> Thus it endowed the Congress and its Standing Committee with a variety of powers that might have fostered the growth of significant restraints upon the executive agencies led by the

---

<sup>78</sup> Chiang, *To Implement the New Constitution is the Glorious Task of the People's Courts*, *Jen-min Jih-pao* (People's Daily), May 23, 1978, at 3.

<sup>79</sup> See CHINA CONST. of 1954, art. 21.

State Council.<sup>80</sup> Unfortunately, efforts made to invoke some of these powers in the mid-1950's proved abortive. Yet, in certain authoritarian societies, constitutionally sanctioned agencies for restricting the executive have developed unanticipated significance. The gradual evolution of democratic checks upon the executive following promulgation of the Meiji Constitution in Japan offers a striking illustration.<sup>81</sup> Even communist societies may witness the evolution of modest governmental restraints upon the executive, as suggested by the slow growth in the Soviet Union of the role of the procuracy and the oversight functions of legislative committees and, to a lesser extent, the courts.<sup>82</sup> China's 1975 constitution represented an apparent design—agreed upon by both radicals and pragmatists—to avoid that possibility. The 1978 version reintroduces at least some potential checks upon executive action.

Under the 1954 constitution, the National People's Congress had been granted the power "to supervise the enforcement of the Constitution" as well as to decide on general amnesties and questions of war and peace.<sup>83</sup> It and its Standing Committee also had been authorized to "appoint commissions of inquiry for the investigation of specific questions."<sup>84</sup> All state organs as well as people's organizations and citizens had been "obliged to supply necessary information to these commissions when they conduct investigations."<sup>85</sup> Moreover, Congressional deputies had been given "the right to address questions to the State Council, which are under obligation to answer."<sup>86</sup> And, in order to protect these deputies against administrative retaliation, the 1954 constitution had provided that no deputy could be arrested or placed on trial without the consent of the National People's Congress or, when it was not in session, its Standing Committee.<sup>87</sup>

The 1975 constitution failed to retain any of these provisions, causing observers to wonder what inference to draw from that fact. It was possible, of course, that all of them were omitted in order to produce a succinct document and that they still could have been invoked under the retained authorization for the Congress to make laws and to "exer-

---

<sup>80</sup> The procuracy and the judiciary, organs which were responsible to the National People's Congress, were also granted powers which could potentially have been used to restrain the executive.

<sup>81</sup> See Takayanagi, *A Century of Innovation: The Development of Japanese Law*, in *LAW IN JAPAN* 5-12 (A.T. von Mehren ed. 1963).

<sup>82</sup> See H. BERMAN, *JUSTICE IN THE U.S.S.R.* 238, 299, 375 (rev. ed. 1963).

<sup>83</sup> CHINA CONST. of 1954, art. 27.

<sup>84</sup> *Id.* art. 35.

<sup>85</sup> *Id.* (article 34 of the 1954 constitution also established various permanent committees).

<sup>86</sup> *Id.* art. 36.

<sup>87</sup> *Id.* art. 37.

cise such other functions and powers as seems necessary.”<sup>88</sup> One can make a similar point about the failure of the 1975 constitution to restate powers that had been previously granted to the Standing Committee of the National People’s Congress. It had been authorized—if we list only restraints on the executive not mentioned in 1975—to supervise the work of the State Council, the Supreme Court, and the Supreme Procuracy: to annul decisions and orders of the State Council contrary to the constitution, laws, or decrees; to revise or annul inappropriate decisions of provincial governments, autonomous regions, and municipalities directly under the central authority; to appoint and remove the highest officials of the State Council except the premier; to decide on state awards; to grant pardons; to decide, when the Congress is not in session, upon declaration of war in certain circumstances; and to decide upon military mobilization and enforcement of martial law.<sup>89</sup> Perhaps the failure in 1975 to specify all of those powers could be compensated for under the Standing Committee’s continuing grants to adopt decrees and “exercise such other functions and powers as are vested in it by the National People’s Congress.”<sup>90</sup>

Yet it seemed unlikely that such potentially important powers of the National People’s Congress and its Standing Committee, impinging as they might upon the highest administrative authorities, would have been relegated to this treatment if the draftsmen had intended them to survive under the 1975 constitution. Rather, it seemed probable that the omissions were designed to make certain that the supposedly supreme organ of state power, the Congress, remained passive before the exercise of governmental power by its nominal executive agent.<sup>91</sup> Under the 1975 arrangements, of course, the Party’s control over both organs was enhanced by the exclusive power conferred upon the Party Central Committee to propose to the Congress the appointment and removal of the premier and the members of the State Council.<sup>92</sup>

The draftsmen of the 1978 constitution plainly did not think it wise to perpetuate the doubts about the continuing existence of some of the original powers of the National People’s Congress and its Standing Committee that had gone unmentioned three years earlier. In addition to restating the Congress’ power to decide upon questions of war and peace, thereby reaffirming the legislative prerogative on a basic issue that might otherwise have been thought to have been allocated to the

---

<sup>88</sup> CHINA CONST. of 1975, art. 17.

<sup>89</sup> CHINA CONST. of 1954, art. 31.

<sup>90</sup> CHINA CONST. of 1975, art. 18.

<sup>91</sup> See T. HSIA & K. HAUN, *supra* note 37, at 82, for a similar conclusion.

<sup>92</sup> CHINA CONST. of 1975, art. 17.

executive, they again spelled out congressional power "to supervise the enforcement of the constitution" and actually broadened its supervisory responsibilities by adding the phrase "and the law."<sup>93</sup> Although the new constitution fails to reaffirm the power of the Congress or its Standing Committee to appoint commissions of inquiry with the right to compel those investigated to furnish necessary information, it does reassert the right of deputies to address inquiries to, and to compel answers from, the State Council and subsidiary agencies.<sup>94</sup> It places the Supreme People's Court and the Supreme People's Procuracy under the same potential scrutiny.<sup>95</sup> It seems doubtful, however, whether these individual inquiries can develop into as potent a check upon the executive as investigative commissions could, especially when the new constitution fails to reinstate the 1954 constitution's protection of deputies against arrest or trial without the consent of the Congress or its Standing Committee,<sup>96</sup> thereby suggesting the vulnerability of obstreperous legislators to executive or Party retaliation.

Just as the 1978 constitution restores some of the checks upon the executive that the 1954 document granted to the National People's Congress, so too does it deal with the Standing Committee. Of the Standing Committee's powers to curb the executive that were granted in 1954 but unmentioned in 1975, three are not restored. The failure to restore the powers to decide on military mobilization and martial law<sup>97</sup>—however intrinsically important such powers might be in theory—does not deprive the Standing Committee of instruments that could have developed into effective controls over the executive. But what can we say about the failure to bring back article 31(6) of the 1954 constitution, which authorized the Standing Committee "to annul decisions and orders of the State Council which contravene the constitution, laws or decrees"?<sup>98</sup> In view of the fact that old article 31(7), authorizing the revision or annulment of inappropriate decisions of local governments, is restored,<sup>99</sup> the intent of the draftsmen was obviously to permit the Standing Committee to nullify the decisions of local governments but not those of the central authorities. Thus the Standing Com-

---

<sup>93</sup> CHINA CONST. art. 22. The new provision makes no reference to a power to declare a general amnesty, and there are other minor differences.

<sup>94</sup> *Id.* art. 28.

<sup>95</sup> *Id.* Article 27 also authorizes the National People's Congress or its Standing Committee to establish special committees "as deemed necessary," and this provision could become the basis for investigating committees.

<sup>96</sup> CHINA CONST. of 1954, art. 37.

<sup>97</sup> *Id.* art. 31.

<sup>98</sup> *Id.* art. 31(6).

<sup>99</sup> CHINA CONST. art. 25(5).

mittee has been denied the most formidable weapon against the executive, even though it has had some useful tools restored to it and has been explicitly granted for the first time power to interpret the constitution, not merely ordinary laws.<sup>100</sup>

Potentially much more important as a restraint upon the executive than the new constitution's reaffirmation of certain powers of the National People's Congress and its Standing Committee is its restoration of the procuracy. The 1954 constitution authorized the Supreme People's Procuracy and its subordinate units to exercise "procuratorial authority over all department of the State Council, all local organs of state, persons working in organs of state, and citizens, to ensure observance of the law."<sup>101</sup> Built along Soviet lines, but resting on China's millennial tradition of the censorate as an institution for checking the legality of bureaucratic and occasionally even imperial action, the procuracy, designed to serve the People's Republic not only as a prosecutorial agency but also as an independent watchdog of governmental legality, is responsible only to the National People's Congress—not to the central executive or local executive agencies and not even to local people's congresses. According to the 1954 legislation that implemented the constitutional prescription, the procuracy, although lacking the power directly to annul or alter unlawful resolutions, orders, and actions of state agencies, could request their correction and protest against them.<sup>102</sup>

The efforts of the procuracy to carry out its tasks were crippled by the "anti-rightist" campaign of 1957-1958,<sup>103</sup> and the Cultural Revolution administered the coup de grace to this organization. The 1975 constitution confirmed the abolition of the procuracy and transferred its powers to "the organs of public security at various levels."<sup>104</sup> Thus the police, originally one of the subjects of the procuracy's supervision, became authorized to take on the responsibility not only for prosecut-

---

<sup>100</sup> *Id.* art. 25(3). One should note that the power to annul illegal decisions of local governments that article 60 of the 1954 constitution conferred upon local people's congresses has not been revised by article 36 of the current constitution.

<sup>101</sup> CHINA CONST. of 1954, art. 81.

<sup>102</sup> Organic Law of the People's Procuracies of the People's Republic of China arts. 8-9 (1954), translated in DOCUMENTS OF THE FIRST NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 206-07 (1955).

<sup>103</sup> THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS 48-50 (R. McFarquhar ed. 1960).

<sup>104</sup> CHINA CONST. of 1975, art. 25. There is some evidence that, even after promulgation of the 1975 constitution, certain procuratorial organs continued to function as separate departments within public security bureaus. See Seikichi, *The Judicial System Under the New Chinese Constitution*, 602 JURISTO (JURIST) 124 (1975).



ing crimes but also for investigating the legality of their own actions as well as those of other agencies. Moreover, unlike the procuracy, the police were not independent of the executive but part of it and responsive to its direction at every level of government. And, to make certain that the police had no illusions about being able to exercise procuratorial authority independently, the 1975 constitution prescribed that “[t]he mass line must be applied in procuratorial work and in trying cases.”<sup>105</sup> In theory, of course, this meant that the opinions of the masses had to be consulted, but in practice the Party is the only authoritative interpreter of the mass line’s concrete content.

The 1978 constitution’s restoration of the procuracy is its most significant change. Yeh Chien-ying’s report on the draft stated that this was done “[i]n view of the extreme importance of fighting against violations of the law and discipline.”<sup>106</sup> He reiterated what Peking media had been claiming since the arrest of the “gang of four” 17 months earlier—that Chang Ch’ing and her cohorts had “raved about ‘smashing the public security organs, procuratorial organs and people’s courts’ and put their words into action . . . .”<sup>107</sup> They had been charged with terrorizing the populace and going so far as to exercise dictatorship within the Party and the ranks of the people by arbitrarily arresting large numbers of political opponents, confining them incommunicado for years at a time, and subjecting them to endless “struggle meetings,” midnight interrogations and other intimidations that coerced false confessions and sometimes led to suicide and murder.<sup>108</sup> They had also been accused of unfairly dismissing hundreds of thousands of Party members, bureaucrats, scientists, teachers, and others on the basis of hearsay, speculation, and inadequate evidence without giving them an opportunity for a hearing or review.<sup>109</sup> Plainly, the demise of the procuracy had not been attributable to the pragmatists, who brought it back at their earliest opportunity. In their view,

[d]etention and arrests must follow legal procedures and the system of checking and approval must be strictly observed in this regard. In the trial of cases, stress must be laid on the weight of the evidence and on

---

<sup>105</sup> CHINA CONST. of 1975, art. 25.

<sup>106</sup> YEH, *supra* note 47, at 197. The restoration of the procuracy is but one of a number of measures taken by the regime to increase the likelihood of discovering violations of law and discipline. Other measures include revival of Party Discipline Commissions, renewed emphasis on letters to newspapers and visits to government offices as important means of airing grievances, and reestablishment of the Chinese People’s Political Consultative Committee as a forum for discussion and protests by intellectuals.

<sup>107</sup> *Id.* at 197-98.

<sup>108</sup> *Id.* at 198.

<sup>109</sup> *Id.*

investigation and study. To obtain confessions by compulsion and then give them credence is strictly forbidden. Only thus will it be possible to protect the people effectively and strike sure, accurate and relentless blows at the enemy, with the stress on accuracy.<sup>110</sup>

In reestablishing the procuracy the new constitution reinserts most of the relevant language of the 1954 version. For emphasis, however, it specifies that the procuracy is "to ensure observance of *the constitution and the law*."<sup>111</sup> It also makes a more substantive innovation. It does not revive the original system under which local procuracies were free of all controls by local state organs and were responsible only to the Supreme People's Procuracy in Peking and, through it, to the National People's Congress.<sup>112</sup> Instead it provides that local procuracies, like local courts and revolutionary committees, will also be responsible to the people's congresses at the corresponding levels and report to them.<sup>113</sup> Moreover, it gives local people's congresses at and above the county level the power to elect and recall the chief procurator, as well as the court president and revolutionary committee members, at the corresponding level.<sup>114</sup> It also authorizes deputies to the local congresses to address inquiries to and receive answers from the procuracy as well as the court and revolutionary committee at the corresponding level.<sup>115</sup> This new deference to grass roots control may have been adopted to demonstrate a concern for democratic decentralization, permitting local people to press the local procuracy to fulfill its functions even at a time when the Supreme People's Procuracy may not be directing its subordinate units to do their job. Yet the change makes it equally possible for local forces to press the local procuracy not to do its job, whatever the orders from Peking are. That, after all, was the fear that led to the original independence of the procuracy from local pressures under the Soviet model.<sup>116</sup>

---

<sup>110</sup> *Id.*

<sup>111</sup> CHINA CONST. art. 43 (emphasis added).

<sup>112</sup> CHINA CONST. of 1954, arts. 79 & 80.

<sup>113</sup> CHINA CONST. art. 43.

<sup>114</sup> *Id.* art. 36.

<sup>115</sup> *Id.* This power of local congresses to address inquiries to the procuracy, court, and revolutionary committee of the same level is an innovation of the new constitution.

The National People's Congress Standing Committee recently adopted a decision authorizing provincial revolutionary committees to select the chief procurator of the province when the provincial people's congress is in recess. *NPC Standing Committee Holds Second Session 23-24 May*, Peking NCNA Domestic, May 24, 1978, summarized in FBIS-CHI-78-101, May 24, 1978, at E12, E13.

<sup>116</sup> See J. HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY* 157-58 (1960). For recent commentary on the Chinese procuracy, see T. HSIA & K. HAUN, *THE RE-EMERGENCE OF THE PROCURATORIAL SYSTEM IN THE PEOPLE'S REPUBLIC OF CHINA* 9-10 (1978). The failure of the new constitution to restore to local people's congresses their earlier power to annul decisions of local

In view of the control that the local Party committee would have continued to exercise in any event over the procuracy as well as other local law enforcement organs, we should not exaggerate the importance of this innovation. Although the new constitution does not repeat its predecessor's requirement that "the mass line" be applied in procuratorial work,<sup>117</sup> like its predecessor it makes clear at the outset that the Party "is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China."<sup>118</sup> The procuracy can be no more exempt from Party leadership than other state organs.

As we have seen, one of the major reasons for the restoration of the procuracy was the need to provide some independent institutional check upon detentions and arrests. Article 89 of the 1954 constitution guaranteed the inviolability of the citizen's freedom of the person and, to implement it, provided that "[n]o citizen may be arrested except by decision of a people's court or with the sanction of a people's procuracy."<sup>119</sup> As in the Soviet Union, the constitution imposed no restraint upon the power to detain citizens, but the constitutional restraint upon the power to arrest presupposed statutory requirements that the police apply for an arrest warrant within twenty-four hours of detaining a suspect and that the procuracy check upon police compliance.<sup>120</sup> The 1975 constitution retained the guarantee, but altered the implementation clause to substitute "public security organ" for "procuracy."<sup>121</sup> Thus, instead of being required to obtain the approval of either a court or a procuracy in order to obtain an arrest warrant, the police had only to meet their own standards. That this was no mere academic adjustment to the abolition of the procuracy for other reasons is demonstrated by the history of frequent tension between the police and the procuracy during the mid-1950's as a result of the latter's refusal to approve arrests and prosecutions urged by the police.<sup>122</sup> Indeed, the procuracy's stubborn manifestations of a so-called "favor the defendant" mentality that emphasized "trivial legal procedures and the

---

governments suggests that the drafters were not unduly concerned with establishing grass roots control over local executive agencies. See note 100, *supra*.

<sup>117</sup> CHINA CONST. of 1975, art. 25.

<sup>118</sup> CHINA CONST. art. 2.

<sup>119</sup> CHINA CONST. of 1954, art. 89.

<sup>120</sup> See Arrest and Detention Act of the People's Republic of China art. 7 (1954), translated in J. COHEN, *supra* note 25, at 360-62, 386, 584-85. For an analysis of the Soviet model of this scheme, see H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 10, 52-53 (2d ed. 1972).

<sup>121</sup> CHINA CONST. of 1975, art. 28.

<sup>122</sup> See J. COHEN, *supra* note 25, at 15.

rights and status of the criminal"<sup>123</sup> led to the attack upon it during the anti-rightist campaign and to its subsequent demise during the Cultural Revolution.

The 1978 constitution reverts to the wording of the 1954 version—that “[n]o citizen may be arrested except by decision of a people’s court or with the sanction of a people’s procuracy,”<sup>124</sup> thereby re-establishing the procuracy’s restraining role over the police in this respect. The return of this provision also apparently implies the revival of the Arrest and Detention Act that specifies detailed restraints upon the police.<sup>125</sup> In January 1978, two months prior to enactment of the current constitution, some High Court judges in Peking told me that the rules prescribed in that legislation were already being observed again, although they obviously cannot be followed to the letter until procuracies are actually functioning.

Because the procuracy formerly handled far more applications for arrest than the courts, the revival of its role in arrests could turn out to offer a significant check upon the executive and protection for the individual. We should recall, however, the history of the previous constitutional effort to give full scope to the procuratorial organs. Originally the police and the courts were designed to complement and restrict each other. But the system of mutual restraints contemplated by the 1954 constitution and the implementing legislation was “simplified” by the anti-rightist campaign, and the local territorial Party apparatus was given firm control of the law enforcement process so that “the three departments have become one fist, attacking the enemy even more forcefully.”<sup>126</sup> Is this what Yeh’s report on the draft constitution means by its reference to “strengthening the unified leadership of the Party and relying on the masses” while nevertheless giving “full scope” to these specialized legal agencies that are still supposed to complement and restrain each other?<sup>127</sup> If so, the new constitution will prove disappointing to many Chinese even after the procuracy becomes operational again. In other words, is the procuracy that is being revitalized to be like that of 1956-1957 or that of 1958-1966? The answer will

---

<sup>123</sup> T’an, *Absorb Experience and Teaching, Impel a Great Leap Forward in Procuratorial Work*, CHENG-FA YEN-CHIU No. 3, at 34, 38 (1958) [hereinafter cited without cross-reference as POLITICAL-LEGAL RESEARCH].

<sup>124</sup> CHINA CONST. art. 47.

<sup>125</sup> Arrest and Detention Act of the People’s Republic of China (1954), translated in J. COHEN, *supra* note 25, at 360-62, 386, 584-85.

<sup>126</sup> Chang, *Smash Permanent Rules, Go 1,000 Li in One Day*, POLITICAL-LEGAL RESEARCH No. 5, at 60 (1958).

<sup>127</sup> YEH, *supra* note 47, at 197.

make quite a difference in terms of the possibilities of limiting executive action.

To those who recalled the arbitrary actions of the Red Guards, the people's militia, members of the People's Liberation Army, and others, the now superseded arrest provision of the 1975 constitution was not entirely meaningless, for at least it reasserted the illegality of arrests made by groups or persons lacking the sanction of a court or the police. Since the fall of the "gang of four," we have been treated to endless harrowing tales of how the "gang's" minions in offices, factories, schools, research institutes, and other organizations arrested, confined, and abused large numbers of people without the approval of any law enforcement agency. The 1978 constitution goes beyond either of its predecessors in seeking to stop such actions by requiring not only that an arrest be approved by a procuracy or a court but also that it "must be made by a public security organ."<sup>128</sup> To be sure, if another Cultural Revolution should occur, the new provision cannot be expected to offer any more protection in practice than did the 1954 one. Moreover, the new constitution, like its predecessors, is silent about "detention," a term that, as we have seen, is understood to describe confinement for only a very brief period, but that in practice has often amounted to a much greater deprivation of freedom.

The 1978 constitution also reverses a few of the many changes in the status and procedures of the courts that the 1975 constitution confirmed, thereby reintroducing at least the possibility that certain judicial restraints upon executive action might develop. In view of judicial practice since the anti-rightist movement of 1957-1958, there can be no doubt that the failure of the 1975 document to include most of the basic judicial provisions of its predecessor was attributable not to a desire to save space but to reflect the actual situation. The power of the state to work its will was enhanced by the omission of the 1954 constitution's requirements that trials be held before "people's assessors," amateurs who, in theory at least, might outvote the judge assigned by the state to join them on the tribunals,<sup>129</sup> that trials generally be open to the public,<sup>130</sup> and that the accused be accorded the right to make a defense against the state's accusations.<sup>131</sup> All of those provisions have been reinserted in the 1978 constitution,<sup>132</sup> but it is too early to know to what extent they will be implemented in ways that will make public trials

---

<sup>128</sup> CHINA CONST. art. 47.

<sup>129</sup> CHINA CONST. of 1954, art. 75.

<sup>130</sup> *Id.* art. 76.

<sup>131</sup> *Id.*

<sup>132</sup> CHINA CONST. art. 41.

more than morality plays staged for the edification of the masses. Some of the experimental public trials conducted during the 1950's were genuine attempts to determine the degree of the defendant's guilt and the appropriate punishment.<sup>133</sup> There were also many instances in which courts dismissed or returned to the police and procuracy for further investigation cases in which proof of criminality was insufficient—actions for which the judiciary was condemned and curbed during the anti-rightist movement and the Cultural Revolution.<sup>134</sup>

The failure of the 1978 constitution to reinsert the 1954 provision that “[i]n administering justice the people's courts are independent, subject only to the law”<sup>135</sup> suggests that the courts are unlikely to pose a serious challenge to the executive. The 1975 omission of that article was far from inadvertent, for, whatever its intended meaning in 1954, the provision was explicitly repudiated several years later.<sup>136</sup> Unlike the 1975 version, however, the new constitution does not go so far as to place the courts under formal executive as well as legislative controls. In the 1975 version the courts were responsible and required to report to, not only the people's congresses, but also “their permanent organs at the corresponding levels.”<sup>137</sup> Thus, the courts below the Supreme Court fell under the jurisdiction of the local revolutionary committees which under the new order serve as local people's governments.<sup>138</sup> In 1975 the “permanent organs of the people's congresses,” that is, the National People's Congress Standing Committee and the local revolutionary committees, were also given the power previously enjoyed by their parent congresses to appoint and remove the presidents of the people's courts at their level.<sup>139</sup> The 1978 constitution releases the courts from formal executive controls and restores the 1954 arrangements.

Of course, there is no need for the courts to be placed under formal executive control if they can be satisfactorily manipulated by the Party. The anti-rightist movement made clear that the courts, having refused to do the bidding of the police and procuracy on occasion, were henceforth to be more compliant. To assure elimination of contradictions between the courts and the other law enforcement agencies, it was

---

<sup>133</sup> A. BARNETT, *CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA* 240 (1967).

<sup>134</sup> See J. COHEN, *supra* note 25, at 13.

<sup>135</sup> CHINA CONST. of 1954, art. 78.

<sup>136</sup> See Cohen, *supra* note 26, at 141-47.

<sup>137</sup> CHINA CONST. of 1975, art. 25.

<sup>138</sup> See *id.* art. 22.

<sup>139</sup> *Id.* art. 25.

explicitly announced that the former as well as the latter would be controlled by the local Party committee not only in matters of policy but also in the handling of concrete cases.<sup>140</sup> The judiciary was to be the Party's docile tool.

The new constitution does not spell this out in so many words. Indeed, perhaps for cosmetic rather than substantive reasons, it deletes its predecessor's requirement that "the mass line" be applied in trying cases. Like its predecessor, however, in addition to omitting the previous guarantee of judicial independence, it provides for the Party's exercise of leadership over the state, which includes the judiciary.<sup>141</sup> The Supreme People's Court has the status of an organ separate from, but subsidiary to, the National People's Congress—like the Supreme People's Procuracy and the State Council. Like other state organs, it is expected to "constantly maintain close contact with the masses,"<sup>142</sup> "accept supervision by the masses,"<sup>143</sup> and "practice democratic centralism,"<sup>144</sup> all of which are euphemisms that, at least until recently, served to mask Party control. The status of the lower courts is similar in relation to the local people's congresses and other state organs; they too are under Party control.

One might argue that, because the National People's Congress Standing Committee supervises the work of the Supreme Court as well as that of other agencies,<sup>145</sup> because deputies are for the first time empowered to oblige the Court by answering inquiries,<sup>146</sup> and because, as we have seen, the Court is responsible and reports to the Congress and has its principal officers appointed and removed by the Congress and its Standing Committee,<sup>147</sup> it would have been inconsistent on this ground alone to retain the judicial independence provision. The controls possessed by the local people's congresses over the courts at corresponding levels could be cited in further support of this argument.<sup>148</sup> Yet similar legislative-judicial arrangements in the 1954 constitution were not thought to be inconsistent with the principle of judicial independence. It was not the legislature's general controls over the judi-

---

<sup>140</sup> See Chang, *These are not the Basic Principles of our Country's Criminal Litigation*, POLITICAL-LEGAL RESEARCH No. 4, at 77-78 (1958), Liu, *Realizations from my Adjudication Work*, POLITICAL-LEGAL RESEARCH No. 1, at 48-51 (1959).

<sup>141</sup> CHINA CONST. art. 2.

<sup>142</sup> *Id.* art. 15.

<sup>143</sup> *Id.* art. 16.

<sup>144</sup> *Id.* art. 3.

<sup>145</sup> *Id.* art. 25(4).

<sup>146</sup> *Id.* art. 28.

<sup>147</sup> *Id.* arts. 22(6), 25(7), 42.

<sup>148</sup> See *id.* arts. 36, 42.

ary that ran afoul of the principle but the Party's insistence on determining the outcome of specific cases. Until the Party yields this prerogative, as the Communist Party claims to have done in the Soviet Union,<sup>149</sup> the judiciary is unlikely to make a significant impact in restraining the executive or the Party.

Events since the adoption of the new constitution indicate that the Party has no intention of yielding this prerogative. At the Eighth National Conference on People's Judicial Work held in April and May 1978, Chi Teng-k'uei, who is a vice-premier but was identified only as a member of the Political Bureau of the Chinese Communist Party Central Committee, emphasized that "[s]trengthening Party leadership over judicial work and adhering to the mass line are the two fundamental points in our experience in judicial work. They are also the sure guarantee of our success."<sup>150</sup> In a report to the conference, Chiang Hua, president of the Supreme People's Court, echoed Chi's call, stating that judicial work and the application of the mass line must be placed "under the direct leadership of Party committees."<sup>151</sup> Shortly thereafter, Chiang, while laying great stress on the need to improve judicial procedures and act according to law, again insisted that "the mass line under Party leadership" be upheld.<sup>152</sup>

To make certain that the courts remain responsive to the Party, the *People's Daily*, in a major editorial on the new constitution and the legal system, instructed Party committees at all levels to make necessary changes in judicial personnel; they "should promote those comrades to leadership posts who have been tested in the struggle between the two lines" and meet political requirements and "should remove from leading bodies or transfer out of judicial organs unrepentant elements who have committed serious mistakes" and other political unrelia- bles. "People's judicial organs are an important tool of the dictatorship of the proletariat," the editorial stated, and like other law enforcement organs, they must follow Party leadership and "actively participate in the 'two blows' movement against the sabotage activities

---

<sup>149</sup> See H. BERMAN, *supra* note 120, at 14; Sharlet, *The New Soviet Constitution*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1977, at 11-12 (the Soviet claim is treated cautiously).

<sup>150</sup> *Reportage on National Judicial Conference Held in Peking*, Peking NCNA Domestic, May 27, 1978, summarized in FBIS-CHI-78-105, May 31, 1978, at E1, E2.

<sup>151</sup> *Id.* at E3.

<sup>152</sup> Chiang, *To Implement the New Constitution is the Glorious Task of the People's Courts*, Jen-min Jih-pao (People's Daily), May 23, 1978, at 3.



of the class enemies and the flagrant offensive of the capitalist forces  
. . . .”<sup>153</sup>

Some recent provincial radio broadcasts shed even more sobering light upon the role of the courts. They suggest that, since the fall of the “gang of four”—not only before promulgation of the new constitution but also subsequently—the Party and the police may have continued to dispense criminal sanctions in some cases. Unlike many broadcasts, which claim at least nominal participation of the judiciary, these reports do not even mention the courts. Chinese newscasters have yet to appreciate the irony of stories that tell how local Party committees, as part of their efforts to publicize the new constitution, stimulate public security bureaus, not the courts, to hold “public trials” of “typical cases of undermining the socialist legal system.”<sup>154</sup>

In addition to modestly endowing the legislature, the procuracy, and the courts with certain theoretical powers to check the executive agencies, the new constitution preserves the right of citizens to challenge arbitrary executive actions. The 1954 constitution had given citizens “the right to bring complaints against any person working in organs of state for transgression of law or neglect of duty by making a written or verbal statement to any organ of state at any level.”<sup>155</sup> Moreover, to put some teeth into this provision, it had added: “People suffering loss by reason of infringement by persons working in organs of state of their rights as citizens have the right to compensation.”<sup>156</sup>

Unlike a number of other provisions of the 1954 constitution, this one did not remain entirely a dead letter. Even prior to 1954 there had occasionally been cases in which, following discovery of false arrest or unjust conviction, the wrongfully accused person had been compensated for the damage suffered under procedures prescribed by a decree of the Central People’s Government.<sup>157</sup> After enactment of the 1954 constitution a small amount of the annual national budget was set aside

---

<sup>153</sup> *People’s Daily Editorial Hails Judicial Work Conference*, Peking NCNA Domestic, May 28, 1978, summarized in FBIS-CHI-78-106, June 1, 1978, at E1, E2.

<sup>154</sup> See, e.g., *Cases on Infringing on Rights Noted in Heilungkiang*, Harbin Heilungkiang Provincial Service, May 22, 1978, summarized in FBIS-CHI-78-106, June 1, 1978, at L1; *District in Shensi Improves Public Security Work-Style*, Sian Shensi Provincial Service, May 26, 1978, summarized in FBIS-CHI-78-106, June 1, 1978, at M1, M2. Such efforts are to be contrasted with the efforts of Peking media to emphasize the renewed role of the courts and formal judicial trials. See, e.g., *Shang-hai Resumes Open-Court Hearings After 10 Years*, Peking NCNA Domestic, July 25, 1978, summarized in FBIS-CHI-78-143, July 25, 1978, at G5-G6. Sydney Rittenberg, an American who has long worked for Peking propaganda organs, has suggested that their recent reporting concerning the judiciary “was all pretty far from the truth.” Mathews, *American Reflects on His Rise and Fall in China*, L.A. Times, July 24, 1978, at 1, col. 3.

<sup>155</sup> CHINA CONST. of 1954, art. 97.

<sup>156</sup> *Id.*

<sup>157</sup> F. MASAO, *Chinese Legal Affairs (Second Discussion)*, in CHUGOKU NO HO TO SHAKAI (CHI-

for payment of such claims, but almost none were filed. According to Chinese Communist officials, once the "judicial reform" of 1952 had rid the courts of judges left over from the old society, there were few erroneous judgments and thus few occasions for such claims.<sup>158</sup> Yet this is plainly contradicted by information published in China which reveals that erroneous criminal judgments were frequent.<sup>159</sup> Chairman Mao himself, in his famous 1957 speech "Problems Relating to the Correct Handling of Contradictions among the People," admitted that many errors had been made in the punishment of alleged counter-revolutionaries.<sup>160</sup>

The reasons why the constitutional guarantee of making compensation for state wrongs was rarely implemented seems to lie elsewhere. For one thing, the attempts of many aggrieved persons to file complaints and claims were frustrated by official refusal to process them. Moreover, many persons were afraid to press their grievances against state organizations because of the widespread belief that those organizations would retaliate against them. In order to ease this fear, Lo Lung-chi, one of the leading non-communist figures of the regime, suggested during the Hundred Flowers period that aggrieved persons be allowed to complain to a special organization that should be established to investigate cases that had been wrongly decided during the previous mass movements to suppress counter-revolutionaries and other enemies of the state. He believed that enabling aggrieved persons to take their troubles to an organization other than the one that offended them would guarantee that people who dared to "bloom" and "contend" would not be subject to attack and retaliation.<sup>161</sup> Finally, many persons who did have the courage to complain against state action did not seek or simply were not granted compensation, even if other measures may have been taken to restore their status.

Although the widespread violations of human rights that occurred during the Cultural Revolution were often committed by Red Guards,

---

NESE LAW AND SOCIETY) 47 (1960), translated in J. COHEN, *supra* note 25, at 583. For typical compensation cases, see J. COHEN, *supra* note 25, at 574, 584.

<sup>158</sup> J. COHEN, *supra* note 25, at 583.

<sup>159</sup> See, e.g., Tung, *Adjudication Work of the People's Courts in the Preceding Year*, HSIN-HUA PAN YUEH K'AN (NEW CHINA SEMI-MONTHLY), No. 15, at 10 (1956). There are, of course, many current reports of the large number of erroneous judgments handed down during the decade preceding the overthrow of the "gang of four." See, e.g., *Nanking Court Re-examines Appeals*, Peking NCNA Domestic, July 13, 1978, summarized in FBIS-CHI-78-137, July 17, 1978, at E12, E13.

<sup>160</sup> An English translation of this speech is given in COMMUNIST CHINA 1955-1959, POLICY DOCUMENTS WITH ANALYSIS 273, 290 (1962).

<sup>161</sup> THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS 48 (R. McFarquhar ed. 1960).

factory workers, farmers, and others who were not state officials, such persons frequently acted under official direction, and officials personally committed many abuses against citizens. The Cultural Revolution can only have increased resentment over the government's failure to fulfill the constitutional promise of compensation.

Against this background it is interesting to note that the 1970 revised draft constitution wholly omitted any reference to a citizen's right to complain about and claim compensation for wrongs committed by state officials. The reasons for the deletion of this provision are opaque, but the radicals, including the Lin Piao faction, were riding high at that time and, having authorized their own followers in the police, the army, and other official agencies to commit all kinds of abuses during the Cultural Revolution, they were undoubtedly hostile to the reaffirmation of this right. Whatever the reasons may have been, by 1975 a different situation apparently prevailed.

The 1975 constitution retained the right to complain against a state official's wrong but did not include the right to compensation.<sup>162</sup> Instead, it provided that "[n]o one shall attempt to hinder or obstruct the making of such complaints or retaliate."<sup>163</sup> Again we cannot be sure about the reasons for the change. The reappearance of the right to complain may have been attributable to agreement between radicals and pragmatists on the desirability of exposing the bureaucracy to necessary and continuous criticism. Those leaders who doubted the wisdom of reendorsing the principle may have gone along with it in the belief that it could not cause much difficulty in practice despite the pious admonition against deterring such complaints. After all, the demise of the procuracy had eliminated the principal government institution for the processing of complaints against the bureaucracy's violations of law, and by dropping the right to compensation for harm inflicted, the 1975 constitution deprived individuals of an incentive to bring complaints against the state. The compensation provision was probably eliminated as a concession to the radicals, perhaps to assure their acceptance of the right to complain; they undoubtedly believed that placing a money value on the loss of human rights was too bourgeois to be tolerated. And many leaders may have worried about the potentially huge financial burden that a constitutional right to compensation would impose upon the state.

Plainly the complex problems involved in this area presented China's current leaders with a genuine dilemma. In the 1978 constitu-

---

<sup>162</sup> CHINA CONST. of 1975, art. 27.

<sup>163</sup> *Id.*

tion they devised a flexible and subtle solution, one that is progressive and yet does not obligate the state to pay vast sums in compensation. The first sentence of article 55 restates the previous right to file with any government organ a complaint against a violation of law or neglect of duty, but significantly broadens that right by including violation or neglect not only by any person working in a government agency but also by any person employed by what Peking's Foreign Languages Press translates as an enterprise or institution.<sup>164</sup> The Chinese term for "enterprise" (*ch'i-yeh*) has a commonly understood core meaning, generally connoting an industrial or commercial unit operating under government management, such as a factory or department store. Yet the term "institution" (*shih-yeh tan-wei*, literally "operating unit") has a meaning which is less clear. Undoubtedly it is intended to include other units that are managed by the state, but will it be interpreted to embrace the people's militia, groups such as the Red Guards, perhaps the Communist Youth League, and possibly even the Party itself? A foreign observer cannot define the ambit of this term, but can only point out that the newly added words importantly, if imprecisely, expand the scope of the activities subject to constitutionally-protected complaints by citizens. This addition, like the newly established rule that arrests must be made only by a public security organ, probably reflects the unfortunate experiences of many citizens at the hands of persons who frequently were not officials of a government agency but who often acted under orders from officials.

Although the new constitution does not restore the 1954 right to compensation of individuals who have suffered loss as a result of infringement of their rights by state officials, unlike the 1975 version, it does not ignore the plight of individuals who wish to pursue remedies for violations of their rights. The new constitution grants to citizens "the right to appeal to organs of state at any level against any infringement of their rights."<sup>165</sup> Although we are not told the meaning of this sentence or the policy underlying its insertion, several points about it are worth noting. First, unlike the 1954 compensation provision it is not limited to infringements by state officials. It would appear to be applicable as well to all infringements covered by the first sentence, which now includes the conduct of persons employed by any "enterprise or institution," however defined. Indeed, the second sentence may be read literally, to go beyond those instances covered by the first sentence and to apply to any infringements of an individual's rights,

---

<sup>164</sup> CHINA CONST. art. 55.

<sup>165</sup> *Id.*

even those committed by persons not employed by state organs, enterprises, or institutions. Such a broad construction would make sense if the new leadership is determined to protect its citizens against arbitrary acts from whatever source. Thus, under this construction the state would have the responsibility to stop infringements by persons such as the militia, the Red Guards, or the Youth League or Party members even if they are not included within the ambit of the first sentence.

A second point worth noting is that, unlike its 1954 predecessor, the new provision does not limit relief to cases in which the aggrieved individual can prove that he or she has suffered loss as a result of the infringement. The only thing that need be shown is that one's rights have been violated. This is no mere technical change because it permits individuals to obtain government remedies before serious harm has occurred or at least before damage can be proved, even if no damage can ever be shown. For example, a member of a commune that is illegally forced to contribute funds to a county project can presumably obtain immediate relief. To take another increasingly important illustration, although the 1978 constitution does not give individuals a right to an unpolluted environment, it does provide that "[t]he state protects the environment and natural resources and prevents and eliminates pollution and other hazards to the public."<sup>166</sup> If an environmental right develops through administrative or judicial decision or legislation, individuals adversely affected by undue factory pollution may be able to obtain immediate relief without proving damage.

A final point to note is that, by reintroducing explicit concern for aggrieved individuals and authorizing them to petition government for relief that will often plainly include compensation as well as other measures,<sup>167</sup> the constitution has implicitly opened the door to awards of compensation without obligating the state to continue an experiment that may turn out to be enormously costly. It also forbids the suppression of complaints and appeals as well as retaliation against persons making them.<sup>168</sup> And it takes on somewhat greater credibility from the restoration of the procuracy, which is assigned the task of pursuing the kinds of problems covered by article 55.<sup>169</sup>

Events since the fall of the "gang of four" suggest that this provision is likely to prove of greater practical significance than its predecessors in enabling citizens to protect themselves against an all-powerful

---

<sup>166</sup> *Id.* art. 11.

<sup>167</sup> *Id.* art. 55.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

executive. China is at present engaged in a veritable orgy of rectifying injustices ostensibly committed not only by the followers of Lin Piao and the "gang" but also by government personnel and even Party officials since the overthrow of the "gang." People with serious grievances are being mobilized to air them through writing letters to, or by personally visiting, government offices, thereby helping to implement the new constitution. The "letters to the editor" columns of newspapers have been revived in order to expose wrongdoing, and investigative reporting of various kinds of abuses and corruption has become prominent, providing a valuable supplement to the efforts of Party and law enforcement authorities. Great effort is being made to convince people that the regime will not tolerate suppression of complaints or retaliation because of them, and cases in which officials and others have been punished for such misconduct are well-publicized. Recognizing, however, that people still understandably fear retaliation, the *People's Daily* has even encouraged accusations to the extent of acting upon anonymous letters, stating that "the masses, when reporting a case, may consider it wise not to sign their names through fear of eventual consequences."<sup>170</sup>

Despite the fact that it is no longer constitutionally required to compensate persons suffering loss as a result of infringements by state officials, compensation has been made in many recent cases, for example, by paying the lost wages of personnel who had been unfairly dismissed from a government research institute.<sup>171</sup> Typical of some recent reports where Party and public security personnel were found to have been victimized is the decision by the relevant Party committees in Liaoning

that those who were persecuted to death are to be treated as persons who died while carrying on public business, that those who were tortured and became disabled are to be accorded proper arrangements for work and livelihood, that those families, dependents and relatives who were implicated in the cases must be properly treated and be freed from the influence of the cases, and that all fabricated slanderous materials must be sorted out and burned.<sup>172</sup>

Not a day goes by without the announced rehabilitation of large numbers of persons who suffered from false charges, including Yang Hsiufeng, the former Supreme Court President who was purged in 1967 as a member of an anti-Party group.<sup>173</sup> In effect, posthumous rehabilitation

---

<sup>170</sup> This quotation is from the *People's Daily*, May 15, 1978, summarized in *Socialist Legal System*, China News Analysis No. 1123, June 16, 1978, at 4.

<sup>171</sup> See note 76, *supra*; *Party Justice*, China News Analysis No. 1121, June 2, 1978, at 4-5.

<sup>172</sup> *Shenyang, Fushun Committees Reverse Wrong Decision*, Shenyang Liaoning Provincial Service, May 28, 1978, summarized in FBIS-CHI-78-107, June 2, 1978, at L4, L5.

<sup>173</sup> *Kyodo: Former Jurist, First Secretaries Reinstated*, Tokyo Kyodo, Feb. 28, 1978, summarized

has become recognized as a human right, accompanied by proper funerals and reinterment where necessary.

As Supreme Court President Chiang Hua has emphasized: "Failure to exonerate the victims of frame-ups and redress unjust verdicts means continued encroachment upon the rights of citizens and infraction of the law."<sup>174</sup> Less legalistically, a provincial newspaper has pointed out that if all persecuted comrades are rehabilitated and their persecutors punished, "the broad masses of people will have outlets for their feelings against those who oppressed them, and their revolutionary enthusiasm will be boosted . . . ."<sup>175</sup> Whether the injustices suffered by "the broad masses," and especially those of the disfavored classes, will be attended to as assiduously as those of the Party and government elite remains to be seen, and we cannot be at all certain that the current zeal for righting wrongs will apply to future infringements. Yet one cannot ignore the significance of what is taking place for strengthening notions of legality and rights-consciousness in a land where they have been in short supply, at least on the part of the governments.

Although the new constitution makes certain changes in the electoral process, there is still no prospect that citizens will be able to curb arbitrary administration by electing responsive representatives to the people's congresses that are the nominal superiors of the executive. To be sure, the new constitution retains the sentiment that "[a]ll power in the People's Republic of China belongs to the people,"<sup>176</sup> but its electoral provisions, like those of its predecessors, depreciate this rhetoric. The 1978 version returns to the electoral method adopted by the 1954 constitution—direct popular election of the lowest level people's congresses and election of the superior congresses by the congresses below them.<sup>177</sup> The 1975 version had simply provided that "[d]eputies to the people's congresses at all levels are elected through democratic consultation," which presumably meant through Party-managed selection.<sup>178</sup>

---

in FBIS-CHI-78-40, Feb. 28, 1978, at D3. Yang was reinstated as a delegate to the National People's Congress. There is, however, no indication of his return to the judiciary.

<sup>174</sup> Chiang, *To Implement the New Constitution is the Glorious Task of the People's Courts*, *Jen-min Jih-pao* (People's Daily), May 23, 1978, at 3.

<sup>175</sup> *Liaoning Daily on Need to Reverse Incorrect Verdicts*, *Shenyang Liaoning Provincial Service*, May 28, 1978, summarized in FBIS-CHI-78-106, June 1, 1978, at L4, L5.

<sup>176</sup> CHINA CONST. art. 3.

<sup>177</sup> *Id.* arts. 21, 35.

<sup>178</sup> CHINA CONST. of 1975, art. 3. In his commentary on the 1975 constitution, Gudoshnikov pointed out that the phrase "democratic consultation" was used to describe the process of selecting delegates not only to the government congresses, but also to the Ninth and Tenth Party Congresses. Under this arrangement, he stated, "the will of the electorate was not brought out, the

The new version provides for election "by secret ballot after democratic consultation," whether at the direct or indirect stages, thereby adding a cosmetic touch.<sup>179</sup> And it eliminates the unorthodox provision of its predecessor that "[w]hen necessary, a certain number of patriotic personages may be specially invited to take part as deputies."<sup>180</sup>

Of course, even under the 1954 constitution not every adult was entitled to take part in elections. Feudal landlords and bureaucrat-capitalists were deprived of their political rights for at least a certain period.<sup>181</sup> The 1975 constitution enlarged the categories of disfavored classes. In addition to what it described as landlords and reactionary capitalists, two new groups were denied political rights: rich peasants and "other bad elements."<sup>182</sup> The present constitution deprives landlords, reactionary capitalists, and rich peasants of political rights, but treats "other bad elements" like other serious criminals rather than as members of a class.<sup>183</sup> Although it continues to guarantee the right to vote and to stand for election to all citizens at least 18 years of age, like its predecessors it excepts "persons deprived of these rights by law."<sup>184</sup>

### *Protection of Individual Liberties*

If the new constitution only modestly enhances the formal institutional opportunities for confining executive power to the standards imposed by law, does it make many changes in the standards themselves? Given the bitterness of the struggle against the "gang of four," the enormity of the charges lodged against them, and the impressive measures adopted by the present leadership to undo their wrongs, one might expect the constitution that celebrates their downfall to grant significantly greater protection to human rights than its predecessor, which was the product of compromise between the opposing lines. Yet, in this respect as in others, the contrast between the 1978 and 1975 constitutions is not as marked as might be supposed. There are two principal reasons for this. On the one hand, the 1975 constitution, to a consider-

---

deputies or delegates being appointed by the corresponding local agencies ('revolutionary committees' or Party committees) following consultations with the centre." Gudoshnikov, *supra* note 37, at 73. See CHUNG-KUO KUNG CH'AN TANG TI HSIEN FA (CONSTITUTION OF THE COMMUNIST PARTY OF CHINA) art. 9, 11th National Party Congress, translated in PEKING REV., Sept. 2, 1977, at 20 [hereinafter cited as PARTY CONSTITUTION].

<sup>179</sup> CHINA CONST. arts. 21, 35.

<sup>180</sup> CHINA CONST. of 1975, art. 16.

<sup>181</sup> CHINA CONST. of 1954, art. 19.

<sup>182</sup> CHINA CONST. of 1975, art. 14.

<sup>183</sup> CHINA CONST. art. 18.

<sup>184</sup> *Id.* art. 44.



able extent, reflected the realities of the antecedent two decades of state practice. On the other hand, it did not go as far as might have been anticipated in eliminating the guarantees of the 1954 version, which nominally enshrined classical western liberties as well as material facilities requisite to their enjoyment.

One important illustration of congruence between the new constitution and its immediate predecessor that reflects the practice of the preceding two decades is the omission of the 1954 constitution's declaration that "[c]itizens of the People's Republic of China are equal before the law."<sup>185</sup> That declaration had seemed inconsistent with the same document's deprivation of the political rights of feudal landlords and bureaucrat-capitalists as well as with the realities of everyday life in China. Its omission in the new constitution avoids any inconsistency either with the continuing denial of political rights to "those landlords, rich peasants and reactionary capitalists who have not yet been reformed"<sup>186</sup> or with the preamble, which makes clear that "for the entire historical period of socialism" there will continue to be "class struggle" under the dictatorship of the proletariat.<sup>187</sup>

This is a fundamental point of doctrinal difference between the world's two leading communist parties. The Communist Party of the Soviet Union long ago declared that socialism in that country had advanced to such an extent that class struggle had come to an end, that the state had become "a state of the whole people" and that the dictatorship of the proletariat had fulfilled its historic mission. This supplied the theoretical underpinning for the post-Stalin reforms emphasizing greater legal guarantees of fair treatment for all citizens.<sup>188</sup> Soviet critics condemned the 1975 Chinese Constitution for proclaiming, a generation after the founding of the People's Republic, the necessity of continuing the class struggle under the dictatorship of the proletariat until the great but far-off day when true communism dawns.<sup>189</sup>

In China for a long time to come some citizens will surely be more equal than others, and the new constitution does not try to hide this fact. Yeh Chien-ying's report does not, of course, refer to the report on the 1975 constitution by the now discredited Chang Ch'un-ch'iao, who had stated that "this principled stand" sharply differentiates China's

---

<sup>185</sup> CHINA CONST. of 1954, art. 85.

<sup>186</sup> CHINA CONST. art. 18.

<sup>187</sup> *Id.* preamble.

<sup>188</sup> See H. BERMAN, *supra* note 82, at 90; Hazard, *supra* note 41, at 991.

<sup>189</sup> See Hazard, *supra* note 41, at 991. See also Gudoshnikov, *supra* note 37, at 73.

revised constitution "from such fallacies as Confucious' 'benevolent government' or the Soviet revisionist renegade clique's 'state of the whole people.'"<sup>190</sup> Yet the statement is plainly correct.

In explaining the constitutional denial of political rights to unreformed landlords, rich peasants, and reactionary capitalists—labels that were attached at the time of the communist takeover a generation ago and do not connote any current economic status in an economy that has been collectivized for two decades—Yeh stated that "counter-revolutionaries and other bad elements" are also subject to the same sanctions, which include continuing dictatorship over them in the hope of reforming those who have not committed crimes so heinous as to warrant the death penalty.<sup>191</sup> The new constitution makes what Yeh calls "[a]n important change" by adding to the groups it singles out for punishment a new variety of "bad elements" called "new-born bourgeois elements."<sup>192</sup> Yeh's definition suggests the breadth of this phrase:

It refers to those newly-emerged elements who resist socialist revolution, disrupt socialist construction, gravely undermine socialist public ownership, appropriate social property or violate the criminal law. Not a few of the embezzlers, thieves, speculators, swindlers, murderers, arsonists, gangsters, smash-and-grabbers and other evildoers who have committed serious crimes and offences against the law and discipline or disrupted public order in our socialist society belong to this new category . . . .<sup>193</sup>

Of course, the categories of counter-revolutionaries and bad elements are, strictly speaking, not based on class at all but on alleged misconduct either before or after the establishment of the People's Republic in 1949. Yet "bad" class background has frequently been a decisive factor in law enforcement agencies' decisions to detain and punish a suspect, despite Chinese commentators' occasional criticisms of such "subjectivism" during the early years of the People's Republic.<sup>194</sup>

Although the current leadership has refused to abandon the damaging labels, it has begun to demonstrate some sensitivity to the accumulated grievances caused by these stigmas and their many discriminatory consequences, which have been transmitted to the children and even grandchildren of the disfavored. This seems to be why, in describing the disfavored classes, the 1978 constitution uses the phrase "who have not yet been reformed" rather than the phrase "for a

---

<sup>190</sup> Chang, *supra* note 43, at 38.

<sup>191</sup> YEH, *supra* note 47, at 200-01.

<sup>192</sup> *Id.* at 199 (referring to China Const. art. 18).

<sup>193</sup> *Id.*

<sup>194</sup> See, e.g., Kuang, *Overcome Subjectivist Ideology, Raise the Quality of Investigation of Cases*, Kuang-ming Daily, April 15, 1957.

specific period of time according to law” used by its predecessors.<sup>195</sup> Yeh explained that:

[W]ith regard to those who after remoulding and education have really behaved well, we should remove their labels as landlords, rich peasants, counter-revolutionaries or bad elements and give them citizenship rights with the consent of the masses on the basis of public appraisal and approval by a revolutionary committee at the county level. This work must be done seriously, prudently and systematically under the unified leadership of Party committees at various levels and in accordance with specific policies.<sup>196</sup>

The process of removing labels is not a new one in China, but this high-level support should encourage officials to invoke it more extensively. It is interesting to note that in listing disfavored groups neither the new constitution nor Yeh's report mentions “rightists,” the category that lent its name to the 1957-1958 “anti-rightist” movement, which put an end to the Soviet-style legal system that had been developing on the basis of the 1954 constitution. A recent foreign press dispatch from Peking, quoting unidentified Chinese sources, reported that, thanks to the intervention of Party Vice-chairman Teng Hsiao-p'ing, the Party Central Committee issued a decree shortly before the adoption of the new constitution that granted a “general pardon” to most of the reportedly 130,000 remaining “rightists” and even banned the use of the term “rightist.”<sup>197</sup> The people who have at long last been rehabilitated had suffered sanctions that included sentences to prison and labor camps, “non-criminal” confinement, probationary supervision, loss of employment, and stigmatization. They are now said to have been accepted back into normal social life and given employment. The removal of the rightist label is interpreted to be part of the overall effort to forget past political errors and unite as many people as possible in building the nation.<sup>198</sup> Teng is also thought to be active in the effort to curb the application and the consequences of other labels.

The removal of large numbers of damaging labels is sure to arouse anxieties among ideologues about the impact on socialist society of releasing such suspect persons from close supervision. Yeh's report antic-

---

<sup>195</sup> Compare CHINA CONST. art. 18, with CHINA CONST. of 1975, art. 14, and CHINA CONST. of 1954, art. 19. The English translations of the same Chinese phrase appearing in the 1975 and 1954 versions vary slightly. The quotation in the text is from the 1954 constitution.

<sup>196</sup> YEH, *supra* note 47, at 200-01. China's English translation of this passage of Yeh's text omits reference to “reactionary capitalists.” The Chinese text simply refers to *fan*, which could symbolize either reactionary capitalists or counter-revolutionaries. The translator chose the latter.

<sup>197</sup> See *Party to Drop Charges Against 100,000 Rightwingers*, Tokyo Kyodo, May 17, 1978, summarized in FBIS-CHI-78-96, May 17, 1978, at E18-E19. One of those who benefitted from this measure was Lo Lung-chi, who is referred to in the text accompanying note 161.

<sup>198</sup> *Id.*

ipated this reaction, asking rhetorically: "What if some such persons make trouble again after their labels are removed? Well, we will just mobilize the masses to strike them down—and put their labels back again."<sup>199</sup>

Its failure to restore the general "equality before the law" clause does not mean that the new constitution has gone back on an earlier insistence upon equal treatment for minority nationalities. Indeed, the 1978 version reinforces the continuing principle, that all the nationalities are equal, by reinserting both the 1954 document's express prohibition of "[d]iscrimination against, or oppression of, any nationality" and its authorization for minorities "to preserve or reform their own customs and ways."<sup>200</sup>

The new constitution for the first time adds to the continuing general principle, that women enjoy equal rights with men, the specific prescription that "[m]en and women enjoy equal pay for equal work."<sup>201</sup> Similarly, it stipulates again for the first time, that "[m]en and women shall marry of their own free will,"<sup>202</sup> a principle laid down by the Marriage Law of 1950<sup>203</sup> but now given constitutional dignity. In view of the great pressure for late marriage, this latter addition is especially interesting; it is balanced, however, by a new assertion that "[t]he state advocates and encourages family planning."<sup>204</sup>

The "equality before the law" clause was not the only right prescribed in 1954 that, in the light of practice, the different draftsmen of 1975 and 1978 agreed should henceforth be omitted. Another unhypocritical deletion concerns the "freedom of residence and freedom to change their residence" that citizens ostensibly enjoyed under the 1954 constitution.<sup>205</sup> In actuality, of course, an individual's change of residence has required official approval. Moreover, the government has long imposed specific restrictions upon the ability of rural residents to move into cities.<sup>206</sup> Since 1968 it has also employed all the mass mobilization techniques at its command to pressure well over twelve million

---

<sup>199</sup> YEH, *supra* note 47, at 201.

<sup>200</sup> Compare CHINA CONST. art. 4 and CHINA CONST. of 1954, art. 3, with CHINA CONST. of 1975, art. 4.

<sup>201</sup> CHINA CONST. art. 53.

<sup>202</sup> *Id.*

<sup>203</sup> Marriage Law of the People's Republic of China arts. 1 & 3 (1950), translated in FUNDAMENTAL LEGAL DOCUMENTS, *supra* note 22, at 266, 267.

<sup>204</sup> CHINA CONST. art. 53.

<sup>205</sup> CHINA CONST. of 1954, art. 90.

<sup>206</sup> See, e.g., Instructions of the Central Committee of the Chinese Communist Party and the State Council of the People's Republic of China Relating to Checking the Blind Outflow of People from Rural Villages (1957), translated in part in J. COHEN, *supra* note 25, at 287.

“educated youth” to leave the cities for careers in the countryside.<sup>207</sup> Many of these urban young people, unwilling to accept the difficulties of rural life, have illegally returned to the cities without jobs or ration cards, creating a grave social problem. In these circumstances one can understand why constitutional draftsmen thought retention of the residential freedoms clause unwise.

The 1978 constitution also retains several of the 1975 version's modifications of fundamental rights originally set forth in 1954. We have already pointed out the new constitution's failure to restore the right to compensation for wrongs inflicted by state officials and its retention of the substitute 1975 principle of non-interference with the citizen's right to complain against such actions.<sup>208</sup> Here we should note that, while the 1954 constitution provided that the “privacy of correspondence is protected by law,”<sup>209</sup> both of its successors merely list freedom of correspondence as one of the freedoms enjoyed by citizens without specifying its nature.<sup>210</sup> Omission of the word “privacy” hardly appears accidental in view of the government's widespread practice of opening mail and resorting to other means of infringing the privacy of correspondence.

Another modest concession to practice that results in no change between the 1975 and 1978 versions relates to religion. Although these documents retain the freedom to believe in religion articulated in 1954, they strike a more realistic note by adding the phrase, “and freedom not to believe in religion and to propagate atheism.”<sup>211</sup>

No concession to the real situation is made, however, by the retention in unmodified form—in 1978 as well as 1975—of the freedoms of speech, the press, assembly, association, procession, and demonstration, which were proclaimed in 1954 but which have never been consistently enjoyed by citizens of the People's Republic.<sup>212</sup> One of the major unresolved puzzles of Chinese constitutionalism is to ascertain why these freedoms continue to be asserted when to do so is contrary to the everyday experience of the Chinese people. Would elimination of these guaranties risk a propaganda attack abroad? Would it doom to failure the Party's spasmodic efforts to win the loyalty of China's intellectuals

---

<sup>207</sup> See Bernstein, *Urban Youth in the Countryside: Problems of Adaptation and Remedies*, 69 CHINA Q. 75 (1977).

<sup>208</sup> See text accompanying notes 162-69, *supra*.

<sup>209</sup> CHINA CONST. of 1954, art. 90.

<sup>210</sup> CHINA CONST. art. 45, CHINA CONST. of 1975, art. 28.

<sup>211</sup> Compare CHINA CONST. of 1954, art. 88, with CHINA CONST. of 1975, art. 28, and CHINA CONST. art. 46.

<sup>212</sup> See CHINA CONST. art. 45; CHINA CONST. of 1975, art. 28; CHINA CONST. of 1954, art. 87.

who are essential to the country's modernization but who aspire to greater freedom?

Yet does retention of these symbols also carry risks? At one end of the spectrum there is the possibility of further enhancing popular cynicism towards the government for not allowing the freedoms it proclaims. At the other, there is the risk that large numbers of people may actually try to enjoy those freedoms and justify their conduct by invoking the constitution as some did during the Hundred Flowers era and others did during the turmoil of recent years. After a generation of experience, however, the Party leaders probably still believe it unlikely that either of these risks is as great as the risk of immediate embarrassment that would be created by failing to reassert the freedoms in question.

Even more interesting than the 1978 constitution's retention of many of the freedoms continuously prescribed since 1954 is its retention of other freedoms first given constitutional status in 1975 and usually associated with the radicals. Because widespread labor unrest did much to undermine China's production in 1974-76<sup>213</sup> and because many of those strikes were politically inspired by followers of the "gang of four," one might have thought that pragmatic leaders, determined to restore labor discipline and suppress the radicals, would have been eager to do away with the recently-enshrined freedom to strike that had sometimes been invoked to justify the work stoppages.<sup>214</sup> But, according to Chang Ch'un-ch'iao's report on the 1975 constitution, freedom to strike had been added at the specific request of Chairman Mao.<sup>215</sup> This made it very difficult in 1978 for Hua Kuo-feng to challenge this provision, because Hua's legitimacy as Party chairman rests upon his alleged appointment by Mao. Mao's desire to grant constitutional protection to strikes was not new. As long ago as March 1957, when the Hundred Flowers campaign was gaining strength, Mao had said:

Strikes and boycotts are means of struggle against the bureaucracy. If we do not allow these, I think it is no good. Although the constitution has no provision regarding this, I think we should let people do it. This is not to say that we advocate strikes and boycotts throughout the country. We do not promote this. We advocate fighting against bureaucracy. We promote the use of criticism among people to solve problems. Is the strike a sort of struggle? Yes, it is. When the use of struggle by criticism cannot

---

<sup>213</sup> See MacDougall, *The Chinese Economy in 1976*, 70 CHINA Q. 355 (1977). But see Field & Kilpatrick, *Chinese Grain Production: An Interpretation of the Data*, 74 CHINA Q. 369 (1978).

<sup>214</sup> See CHINA CONST. of 1975, art. 28 (establishing the right to strike).

<sup>215</sup> CHANG, *supra* note 43, at 39-40.

solve the problem, we must allow the strike to be used.<sup>216</sup>

Apparently in order to avoid inconsistency with the right to strike, the 1975 constitution, unlike the 1954 version,<sup>217</sup> did not declare that citizens have a duty to observe labor discipline. The pragmatists could not have been pleased with this further encouragement of chaos. Although in the 1978 constitution they had to tolerate retention of freedom to strike,<sup>218</sup> they balanced it by reviving the earlier duty of citizens to maintain labor discipline, protect public property, observe public order, and respect social ethics.<sup>219</sup> Yeh Chien-ying's report focused attention on reassertion of this duty and quoted Mao's 1959 call for "unity and iron discipline," which, he maintained, is the spirit embodied in the new constitution.<sup>220</sup> He did not even mention freedom to strike.

The pragmatists have also retained, albeit in abbreviated form and in a less prominent place, the most distinctive contribution that the radicals made to the freedoms listed in the 1975 constitution. Article 13 of that document, located in the initial chapter of general principles rather than placed with other fundamental rights near the end as its successor is now,<sup>221</sup> had provided:

Speaking out freely, airing views fully, holding great debates and writing big-character posters are new forms of carrying on socialist revolution created by the masses of the people. The state shall ensure to the masses the right to use these forms to create a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness, and so help consolidate the leadership of the Communist Party of China over the state and consolidate the dictatorship of the proletariat.<sup>222</sup>

This article, a long one for that succinct document, was no mere repetition of classical western liberties. Rather, it was the articulation of autochthonous Chinese political techniques that were widely practiced in the late 1950's during the anti-rightist campaign, the Great Leap Forward, and the movement to establish people's communes, and were perfected during the Cultural Revolution. Despite its use of words that suggest similarities to conventional freedoms, article 13 made clear that

---

<sup>216</sup> MAO TSE-TUNG, MAO TSE-TUNG SSU-HSIANG WAN-SUI (LONG LIVE MAO TSE-TUNG THOUGHT) 93 (1969).

<sup>217</sup> Article 100 of the 1954 constitution had required citizens not only to uphold labor discipline, but also to abide by the constitution and the law, keep public order, and respect social ethics.

<sup>218</sup> CHINA CONST. art. 45.

<sup>219</sup> *Id.* art. 57. Article 101 of the 1954 constitution had established the duty of every citizen to protect public property.

<sup>220</sup> YEH, *supra* note 47, at 191.

<sup>221</sup> *See* CHINA CONST. art. 45.

<sup>222</sup> CHINA CONST. of 1975, art. 13.

it was designed not to protect individual expression as much as to authorize the masses to participate in the political struggle under Party guidance as an instrument of consolidating Party leadership over the state and the dictatorship of the proletariat.

In other words, just as the right to strike was perceived as a political weapon for mobilizing the masses to intimidate the bureaucracy, rather than as an economic weapon to achieve improvements in the employment conditions of the workers, so too are these recently-evolved political freedoms perceived to be tools of the Party which, at least in theory, can never be separated from the masses. Of course, those persons whom the Party classifies as enemies are by definition not within "the people." Therefore they may not benefit from either these new freedoms or the bourgeois freedoms to which the new freedoms are now appended in the 1978 constitution, for they are the subjects of the dictatorship of the proletariat. As the reports of both Chang Ch'un-ch'iao and Yeh Chien-ying recognized, democracy is only to be practiced within the ranks of the people. The "gang of four" and their triumphant rivals were at one in invoking Maoist theory about the importance of correctly distinguishing between the two types of contradictions: those "between the enemy and ourselves" and those "among the people." They could also agree that the people could be defined as "all who support socialism."<sup>223</sup>

The problem, of course, lies in applying to concrete cases a standard that is so vague as to permit arbitrary manipulation against anyone who disagrees with the current line. Mao himself conceded that "it is sometimes easy to confuse the two types of contradictions."<sup>224</sup> Even loyal Party leaders who oppose the will of whatever leadership faction is dominant at a given time have often been declared capitalist roaders, counter-revolutionaries, and enemies of the people. This, after all, is the principal charge against the "gang of four"—that "[t]hey went so far as to exercise dictatorship within the Party and the ranks of the people."<sup>225</sup> And, of course, the present leaders are exercising dictatorship over the "gang" and what is usually called "the handful of their unrepentant sworn followers." Rather than abandon Maoist theory, the current leaders seek to benefit from their application of it. Thus the new freedoms have been retained as part of this intellectual structure. They will be enjoyed by those in favor with the new leaders to serve the purposes of those leaders.

---

<sup>223</sup> YEH, *supra* note 47, at 216.

<sup>224</sup> COMMUNIST CHINA 1955-1959, POLICY DOCUMENTS WITH ANALYSIS 279 (1962).

<sup>225</sup> YEH, *supra* note 47, at 198.



It is difficult to know how to characterize the new constitution's reassertion that "[c]itizens have the freedom to engage in scientific research, literary and artistic creation and other cultural activities."<sup>226</sup> The identical 1954 provision<sup>227</sup> had been deleted in 1975 and replaced by a general principle that plainly reflected the impact of the radicals' determination to perpetuate the Cultural Revolution:

The proletariat must exercise all-around dictatorship over the bourgeoisie in the superstructure, including all spheres of culture. Culture and education, literature and art, physical education, health work and scientific research work must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labor.<sup>228</sup>

By in turn deleting this article and replacing it with its predecessor, have the present leaders promoted freedom or acted hypocritically?

If we look only at the constitutional language, the former appears plainly to be the case. Yet Yeh Chien-ying's report makes clear that this seemingly absolute freedom is to be enjoyed only by those who observe the "six political criteria."<sup>229</sup> This is a short-hand reference to Mao's famous 1957 speech that authorized only words and deeds that help to unite people rather than divide them, that are beneficial and not harmful socialist transformation and construction, international socialist unity, and the unity of peace-loving peoples, and that help to strengthen and not to weaken the people's democratic dictatorship, democratic centralism, and the Party leadership.<sup>230</sup> Within these murky limits that are susceptible of arbitrary manipulation, Yeh stated that "different forms and styles in art should freely develop, different schools in science should freely contend and questions of right and wrong in the arts and sciences should be settled through free discussion in artistic and scientific circles and through practical work in these fields."<sup>231</sup>

Yeh's invocation of Mao's six criteria makes the difference between the radicals' formulation and the constitutional prescription considerably smaller than appears on the surface. Indeed, the 1975 language represents quite an accurate description of the current Party line, even though as a factual matter much greater cultural, scientific, and educational freedom exists at present than existed during the intellectual nightmare of the decade 1966-1976. Just as the Party line dur-

---

<sup>226</sup> CHINA CONST. art. 52.

<sup>227</sup> CHINA CONST. of 1954, art. 95.

<sup>228</sup> CHINA CONST. of 1975, art. 12.

<sup>229</sup> YEH, *supra* note 47, at 211.

<sup>230</sup> For a translation of the relevant portions of Mao's speech, see COMMUNIST CHINA 1955-1959, POLICY DOCUMENTS WITH ANALYSIS 290 (1962).

<sup>231</sup> YEH, *supra* note 47, at 211-12.

ing that repressive era was more monolithic than the 1975 constitutional provision made it seem, so too is the current Party line more restrictive than the present constitutional provision would suggest. Nevertheless, although the new constitutional language does not indicate the restrictions upon the freedoms currently exercised under its auspices, it does symbolize that there has been an important change from what is now viewed as the tyranny of the "gang of four."

#### CONCLUSION

What can we conclude about the latest in the fundamental charters spawned by China in the 20th century? Our examination of three of its principal aspects suggests that it is a halfway house between the 1975 document on the left and the 1954 document on the right. Although the Party line since the overthrow of the "gang of four" has repudiated many of the policies that prevailed at the time the 1975 constitution was adopted and has returned to many policies of the mid-1950s, the new constitution has not gone as far as that shift might lead one to anticipate in repudiating the changes made in 1975 and returning to the 1954 version. Its property provisions are similar to those of 1975. It restores only some of the institutional restraints upon the exercise of executive power that had been established on paper and in a few instances had shown possibilities of realization. And it does surprisingly little to enhance the substantive protections of individuals in their relation to the state.

Yet is the document a mere paper charade undeserving of our attention? I think not, for it serves a number of significant functions in the Chinese political-legal system. One of these is to legitimize the post-Mao regime at home and abroad and to confirm in ideological and organizational terms both the present government's continuity with the first generation of the People's Republic and the major changes in the polity, economy, and society that occurred during that period. With greater credibility than its predecessor, it serves as a symbol of the national unity that the revitalized Party hopes to forge after the bitter upheavals of the recent past. It also symbolizes some significant changes in specific policies. Furthermore, the new constitution recites, albeit vaguely, the goals of the regime. As Yeh Chien-ying stated, it lays down in legal form "the general task for the whole nation in the new period as set forth at the Eleventh National Congress of the Communist Party . . . ." <sup>232</sup>

---

<sup>232</sup> *Id.* at 179.

The value of a constitution to the People's Republic lies in more than its symbolism, of course. It actually prescribes the formal allocation of power within the government and the relation of the government to both the Party and the people. To speak only of obvious illustrations, by authoritatively establishing that the Party is in command of the state machine, that the office of chairman of the People's Republic no longer exists, that the chairman of the Party commands the armed forces, that the executive is to be subject only to certain modest checks by the legislative, judicial, and procuratorial organs, that various human rights are recognized but others are not, and that certain individualistic property relations are to be tolerated during the current phase of socialism, the constitution actually performs a service, offering a formal basis for the orderly conduct of Chinese government.

Yet a People's Republic of China constitution is not what the western liberal tradition would call a constitution. Like its counterparts in other communist states, it is a formalization of existing power configurations rather than an authentic institutional framework for adjusting relations between the political forces that compete for power in a dynamic relationship.<sup>233</sup> Indeed, this was even more true of the 1975 constitution than of its counterparts in other communist states because it shrivelled the powers that its more conventional 1954 predecessor purported to confer upon the National People's Congress, the judiciary, and the procuracy.

The 1975 arrangement was based on the premise that the political process should not entail independent roles for the legislature, the courts, and the procuracy but instead should be confined within the Communist Party and the government administration that executes the Party's will. Is the new document very different? Plainly, the institutions and processes that it establishes will not determine the most important questions of political power, such as who will be the next chairman of the Party and therefore commander of the armed forces and militia. Nor will they make the final decisions about the country's policies regarding economic development, education, decentralization of authority, human rights, foreign policy, and a host of other challenging problems. For that, one still has to look not to the state machine but to the Party, whose most recent charter, adopted in 1977, itself does little more than confer decision-making powers on the Central Committee's Political Bureau and the Political Bureau's Standing Commit-

---

<sup>233</sup> See Lowenstein, *Reflections on the Value of Constitutions in our Revolutionary Age*, in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II, 191, 193, 204 (A. Zurcher ed. 1951).

tee.<sup>234</sup> Ultimately one must seek clues to the crucial operations of the political process not in any documents—published or perhaps even internal—but in murky and uncertain customary practices and expectations that must surely be as fascinating as they are secret.

In many ways this Chinese Communist experience echoes China's constitutional experience under Chiang Kai-shek's Nationalist Party, the Kuomintang, both before and after its flight to Taiwan. The Provisional Constitution of 1931, we should recall, largely confirmed the existing political arrangements according to which the Kuomintang controlled all government agencies. Similarly, the impressive 1946 Constitution of the Republic of China, although more significant than the 1975 Constitution of the People's Republic in the extent to which it regulates the exercise of governmental power, has been precluded by the continuing application of martial law from substantially altering the Kuomintang's dictatorial rule and making the government, rather than the Kuomintang, the arena in which major political forces are adjusted. In Taiwan legislative bodies have begun to play an increasingly important role in the political system in recent years, especially at the local level. Yet it is still true that in both the People's Republic of China and Taiwan, after a generation of rivalry between the state systems of the competing elites, the organization and management of the party remain more important than the structure and processes of the government.

Like the Kuomintang during the 1930's and 1940's, China's communist leaders have had divided, ambivalent, and changing attitudes towards western-style constitutionalism. Whatever their views, they have all invoked the mantle of Mao Tse-tung, sometimes even while opposing his policies, just as republican leaders generally claimed to be faithful to the "Three People's Principles" of Sun Yat-sen. Dr. Sun, we should remember, believed in the necessity of a period of political tutelage during which the Kuomintang would justifiably control the government until the Chinese people were ready to practice parliamentary democracy.<sup>235</sup> This was his way of bridging the gap between current realities and constitutional aspirations. His successor, Chiang Kai-shek, ultimately succumbed to pressure for a constitution, but he bridged the gap by using martial law to suspend the execution of those

---

<sup>234</sup> See PARTY CONSTITUTION, *supra* note 178, chs. 2-3. For a fascinating, groundbreaking study of the Politburo processes, see K. LIEFERT, *CENTRAL DOCUMENTS AND POLITBURO POLITICS OF CHINA* (1978).

<sup>235</sup> See Sun Yat-sen's *Fundamentals of National Reconstruction* (1924), *reprinted in* CH'EN, *supra* note 7, at 462. *But see* H. SCHIFFRING, *SUN YAT-SEN AND THE ORIGINS OF THE CHINESE REVOLUTION* 360 (1968).

provisions that were inconvenient to unfettered rule.<sup>236</sup>

Mao justified an era of communist "dictatorship of the proletariat" as a temporary necessity until the people are ready to practice true communism. The advent of communism, of course, will not introduce western-style constitutional government but the mysterious withering away of the state, eliminating the need for a government constitution or even a government. Although the Nationalists and the Communists thus have distinctive ideologies and claim to be moving in directions that have profoundly differing implications for constitutionalism, one has to remain skeptical about the likelihood that either regime will abandon rule by party-military dictatorship in the foreseeable future.

The Communists, as well as the Nationalists, have made some progress in the search for autochthonous Chinese norms and forms that can be briefly and simply described in a manner intelligible to the people. The 1946 republican constitution reflected the desire to build in part upon traditional Chinese institutions by creating the control and examination branches of government. To a much lesser extent it responded to the felt need for a brief, simple, non-legalistic charter of government. The 1975 Constitution of the People's Republic clearly met the latter need and was the most intelligible document of its kind the Chinese people had even seen, being also much simpler and shorter than counterparts in other communist states. Moreover, it was a more authentic constitutional product than others that had emerged in twentieth century China. Although it eliminated the procuracy, the descendant of the traditional Chinese censorate, as well as a counterpart to the Soviet procuracy, it did so as part of a plan that established the most monolithic, formally unchecked bureaucratic power since the fall of the Manchus. This bureaucracy was to be presided over by a single ruler, not an emperor but the Party chairman, who was to be aided by a small elite, not the aristocracy but the higher echelons in the Party.

To put it another way, in 1975 the Party narrowed the gap that has existed between modern China's constitutions and the reality of a personalized party-military dictatorship. Yet the Party did not have the temerity to end the gap and emulate the rulers of imperial China by matching the forms of governmental power to contemporary realities. The 1975 version, although rather different from its 1954 predecessor and the Soviet model, still contained a good measure of Soviet and even western values and institutions in its forms and standards of government.

---

<sup>236</sup> See H.R. ISAACS, *THE TRAGEDY OF THE CHINESE REVOLUTION* 295-98 (1961).

The new constitution, although composed of twice as many articles as its predecessor, is not noticeably less simple, and it does not approach the 1954 document in either length or complexity. In bringing back the procuracy, it strengthens the system's Chinese character as much as its Soviet character, yet without purporting to establish a sufficient number of institutional or substantive checks upon the executive to alter the monolithic nature of the state machine. Thus, by not very substantially going beyond its predecessor in asserting foreign principles, it does not significantly widen the gap.

Can we anticipate the course of future constitutional development in the People's Republic? Will the gap be closed by eliminating what remains of the western-Soviet constitutional window-dressing? Or might the gap be narrowed not by doing away with existing constitutional forms and norms but by gradually developing respect for them among the Party and the people? The 1975 constitution was short-lived because the profound political instability, created by a badly divided political leadership confronting its gravest crisis—the question of Mao's succession—could not endure. Obviously the outcome of that struggle was not importantly influenced by the government constitution or even the Party charter. The fate of the 1978 constitution will rest upon the extent to which the current leaders can prevent factionalism from again degenerating into open political combat as well as upon the degree of their success in protecting, feeding, clothing, housing, organizing, educating, and modernizing a population that may reach two billion by the year 2025. A more united and a more comfortable, modern, and sophisticated Party and people may eventually demonstrate a greater appreciation of institutional and substantive restraints upon government and begin to breathe life into some of those in the new constitution. A key factor will be the willingness of Party leaders to allow the various government agencies—not merely the executive—to assume principal responsibility for day to day government operations and to focus the Party on policy-making, as in the Leninist conception.

Even now it is not impossible that the present constitutional institutions, norms, and values may give rise to practices and expectations that will develop authentic roots in China's political culture. It is conceivable, for example, that the rights to strike and to put up big-character posters may turn out to be more than tools to be manipulated in the intra-Party struggle. Such actions have sometimes been the vehicles of genuine, spontaneous protest.<sup>237</sup> Endowing them with constitutional

---

<sup>237</sup> See, e.g., *Peking Wall Posters Appeal Cases to Authorities*, Paris AFP, April 21, 1978, summarized in FBIS-CHI-78-79, April 24, 1978, at F19.

legitimacy raises the political cost to the authorities of suppressing them, just as eliminating the rights to carry on private correspondence and to change residence deprives one of useful and occasionally persuasive political argumentation in support of those practices.

A similar evolution may occur as a result of continuing constitutional protection of other actions that have occasionally proved fruitful, such as filing complaints and appeals against illegal acts by state officials and others. The current campaign to condemn the "gang of four" and rehabilitate their many victims not only reinforces public outrage against the "gang's" violations of the person and suppression of freedom but also heightens public awareness of the possibility and desirability of vindicating human rights through these mechanisms.

We must also realize that this campaign itself—like the 1978 constitution and the plans to develop a formal legal system<sup>238</sup>—is an important part of the Party's response to the widely felt need to curb the long night of arbitrary rule. Although the Chinese political-legal tradition is very different from that of the western industrial democracies, it turns out that Chinese—not only intellectuals but also many less well-educated people—share with the outside world a common sense of injustice and would like their government to observe minimum standards of fundamental decency in dealing with them. The current leaders are seeking to meet this demand for greater personal security because they realize that it is essential to restore the morale, enthusiasm, and productivity of the articulate segments of the nation if they are to fulfill their ambition to make China a modern, powerful industrial state. So long as fear of arbitrary action persists, one cannot expect officials to take bold initiatives, scientists to innovate, teachers to present new ideas, and workers frankly to criticize bureaucracy. The new leaders have recognized that the relationship between economic development and individual rights is not an either/or proposition and that certain minimum guarantees of individual rights are necessary to promote development at China's present stage. Thus it is possible that certain types of "due process" protections may evolve in China even though other western constitutional values such as representative democracy and full freedoms of political expression may not.<sup>239</sup>

To be sure, it was easier to adopt an optimistic perspective during the original constitutional era of 1954-1957, especially during the Hundred Flowers period when frequent invocation and elucidation of con-

---

<sup>238</sup> See Cohen, *Will China Have a Formal Legal System?*, 64 A.B.A. J. 1510 (1978).

<sup>239</sup> See Cohen, *Due Process in China?*, in *HOW DIFFERENT IS CHINA?* (R. Terrill ed. forthcoming); Cohen, *Human Rights in China*, Wash. Post, April 23, 1978, at D2, col. 1.

stitutional provisions made the growth of constitutionalism seem conceivable if not likely. The dashing of those hopes, the experiences of two subsequent decades and the 1978 constitution's failure to restore some important aspects of the 1954 system suggest that, despite recent modest changes, it will be a very long time before the Chinese take western-style constitutionalism as seriously as politics.



APPENDIX

Constitution of the People's Republic of China (adopted March 5, 1978)

PREAMBLE

After more than a century of heroic struggle the Chinese people, led by the Communist Party of China headed by our great leader and teacher Chairman Mao Tse-Tung, finally overthrew the reactionary rule of imperialism, feudalism and bureaucrat-capitalism by means of people's revolutionary war, winning complete victory in the new-democratic revolution, and in 1949 founded the People's Republic of China.

The founding of the People's Republic of China marked the beginning of the historical period of socialism in our country. Since then, under the leadership of Chairman Mao and the Chinese Communist Party, the people of all our nationalities have carried out Chairman Mao's proletarian revolutionary line in the political, economic, cultural and military fields and in foreign affairs and have won great victories in socialist revolution and socialist construction through repeated struggles against enemies both at home and abroad and through the Great Proletarian Cultural Revolution. The dictatorship of the proletariat in our country has been consolidated and strengthened, and China has become a socialist country with the beginnings of prosperity.

Chairman Mao Tse-tung was the founder of the People's Republic of China. All our victories in revolution and construction have been won under the guidance of Marxism-Leninism-Mao Tse-tung Thought. The fundamental guarantee that the people of all our nationalities will struggle in unity and carry the proletarian revolution through to the end is always to hold high and staunchly to defend the great banner of Chairman Mao.

The triumphant conclusion of the first Great Proletarian Cultural Revolution has ushered in a new period of development in China's socialist revolution and socialist construction. In accordance with the basic line of the Chinese Communist Party for the entire historical period of socialism, the general task for the people of the whole country in this new period is: To persevere in continuing the revolution under the dictatorship of the proletariat, carry forward the three great revolutionary movements of class struggle, the struggle for production and scientific experiment, and make China a great and powerful socialist country with modern agriculture, industry, national defense and science and technology by the end of the century.

We must persevere in the struggle of the proletariat against the bourgeoisie and in the struggle for the socialist road against the capitalist road. We must oppose revisionism and prevent the restoration of capitalism. We must be prepared to deal with subversion and aggression against our country by social-imperialism and imperialism.

We should consolidate and expand the revolutionary united front which is led by the working class and based on the worker-peasant alliance, and which unites the large numbers of intellectuals and other working people, patriotic democratic parties, patriotic personages, our compatriots in Taiwan, Hong Kong and Macao, and our countrymen residing abroad. We should enhance the great unity of all the nationalities in our country. We should correctly distinguish and handle the contradictions among the people and those between ourselves and the enemy. We should endeavor to create among the people of the whole country a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness, so as to help bring all positive factors into play, overcome all difficulties, better consolidate the proletarian dictatorship and build up our country more rapidly.

Taiwan is China's sacred territory. We are determined to liberate Taiwan and accomplish the great cause of unifying our motherland.

In international affairs, we should establish and develop relations with other countries on the basis of the Five Principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence. Our country will never seek hegemony, or strive to be a superpower. We should uphold proletarian internationalism. In accordance with the theory of the three worlds, we

should strengthen our unity with the proletariat and the oppressed people and nations throughout the world, the socialist countries, and the third world countries, and we should unite with all countries subjected to aggression, subversion, interference, control and bullying by the social-imperialist and imperialist superpowers to form the broadest possible international united front against the hegemonism of the superpowers and against a new world war, and strive for the progress and emancipation of humanity.

#### GENERAL PRINCIPLES

**Article 1** The People's Republic of China is a socialist state of the dictatorship of the proletariat led by the working class and based on the alliance of workers and peasants.

**Article 2** The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China.

The guiding ideology of the People's Republic of China is Marxism-Leninism-Mao Tse-tung Thought.

**Article 3** All power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at various levels.

The National People's Congress, the local people's congresses at various levels and all other organs of state practice democratic centralism.

**Article 4** The People's Republic of China is a unitary multinational state.

All the nationalities are equal. There should be unity and fraternal love among the nationalities and they should help and learn from each other. Discrimination against, or oppression of, any nationality, and acts which undermine the unity of the nationalities are prohibited. Big-nationality chauvinism and local-nationality chauvinism must be opposed.

All the nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own customs and ways.

Regional autonomy applies in an area where a minority nationality lives in a compact community. All the national autonomous areas are inalienable parts of the People's Republic of China.

**Article 5** There are mainly two kinds of ownership of the means of production in the People's Republic of China at the present stage: socialist ownership by the whole people and socialist collective ownership by the working people.

The state allows non-agricultural individual laborers to engage in individual labor involving no exploitation of others, within the limits permitted by law and under unified arrangement and management by organizations at the basic level in cities and towns or in rural areas. At the same time, it guides these individual laborers step by step on to the road of socialist collectivization.

**Article 6** The state sector of the economy, that is, the socialist sector owned by the whole people, is the leading force in the national economy.

Mineral resources, waters and those forests, undeveloped lands and other marine and land resources owned by the state are the property of the whole people.

The state may requisition by purchase, take over for use, or nationalize land under conditions prescribed by law.

**Article 7** The rural people's commune sector of the economy is a socialist sector collectively owned by the masses of working people. At present, it generally takes the form of three-level ownership, that is, ownership by the commune, the production brigade and the production team, with the production team as the basic accounting unit. A production brigade may become the basic accounting unit when its conditions are ripe.

Provided that the absolute predominance of the collective economy of the people's commune is ensured, commune members may farm small plots of land for personal needs, engage in limited household sideline production, and in pastoral areas they may also keep a limited number of livestock for personal needs.

**Article 8** Socialist public property shall be inviolable. The state ensures the consolidation and development of the socialist sector of the economy owned by the whole people and of the socialist sector collectively owned by the masses of working people.

The state prohibits any person from using any means whatsoever to disrupt the economic order of the society, undermine the economic plans of the state, encroach upon or squander state and collective property, or injure the public interest.

**Article 9** The state protects the right of citizens to own lawfully earned income, savings, houses and other means of livelihood.

**Article 10** The state applies the socialist principles: "He who does not work, neither shall he eat" and "from each according to his ability, to each according to his work."

Work is an honorable duty for every citizen able to work. The state promotes socialist labor emulation, and, putting proletarian politics in command, it applies the policy of combining moral encouragement with material reward, with the stress on the former, in order to heighten the citizens' socialist enthusiasm and creativeness in work.

**Article 11** The state adheres to the general line of going all out, aiming high and achieving greater, faster, better and more economical results in building socialism, it undertakes the planned, proportionate and high-speed development of the national economy, and it continuously develops the productive forces, so as to consolidate the country's independence and security and improve the people's material and cultural life step by step.

In developing the national economy, the state adheres to the principle of building our country independently, with the initiative in our own hands and through self-reliance, hard struggle, diligence and thrift, it adheres to the principle of taking agriculture as the foundation and industry as the leading factor, and it adheres to the principle of bringing the initiative of both the central and local authorities into full play under the unified leadership of the central authorities.

The state protects the environment and natural resources and prevents and eliminates pollution and other hazards to the public.

**Article 12** The state devotes major efforts to developing science, expands scientific research, promotes technical innovation and technical revolution and adopts advanced techniques wherever possible in all departments of the national economy. In scientific and technological work we must follow the practice of combining professional contingents with the masses, and combining learning from others with our own creative efforts.

**Article 13** The state devotes major efforts to developing education in order to raise the cultural and scientific level of the whole nation. Education must serve proletarian politics and be combined with productive labor and must enable everyone who receives an education to develop morally, intellectually and physically and become a worker with both socialist consciousness and culture.

**Article 14** The state upholds the leading position of Marxism-Leninism-Mao Tse-tung Thought in all spheres of ideology and culture. All cultural undertakings must serve the workers, peasants and soldiers and serve socialism.

The state applies the policy of "letting a hundred flowers blossom and a hundred schools of thought contend" so as to promote the development of the arts and sciences and bring about a flourishing socialist culture.

**Article 15** All organs of state must constantly maintain close contact with the masses of the people, rely on them, heed their opinions, be concerned for their weal and woe, streamline administration, practice economy, raise efficiency and combat bureaucracy.

The leading personnel of state organs at all levels must conform to the requirements for successors in the proletarian revolutionary cause and their composition must conform to the principle of the three-in-one combination of the old, the middle-aged and the young.

**Article 16** The personnel of organs of state must earnestly study Marxism-Leninism-Mao Tse-tung Thought, wholeheartedly serve the people, endeavor to perfect their professional competence, take an active part in collective productive labor, accept supervision by the masses, be models in observing the Constitution and the law, correctly implement the policies of the state,

seek the truth from facts, and must not have recourse to deception or exploit their position and power to seek personal gain.

**Article 17** The state adheres to the principle of socialist democracy, and ensures to the people the right to participate in the management of state affairs and of all economic and cultural undertakings, and the right to supervise the organs of state and their personnel.

**Article 18** The state safeguards the socialist system, suppresses all treasonable and counter-revolutionary activities, punishes all traitors and counter-revolutionaries, and punishes newborn bourgeois elements and other bad elements.

The state deprives of political rights, as prescribed by law, those landlords, rich peasants and reactionary capitalists who have not yet been reformed, and at the same time it provides them with the opportunity to earn a living so that they may be reformed through labor and become law-abiding citizens supporting themselves by their own labor.

**Article 19** The Chairman of the Central Committee of the Communist Party of China commands the armed forces of the People's Republic of China.

The Chinese People's Liberation Army is the workers' and peasants' own armed force led by the Communist Party of China; it is the pillar of the dictatorship of the proletariat. The state devotes major efforts to the revolutionization and modernization of the Chinese People's Liberation Army, strengthens the building of the militia and adopts a system under which our armed forces are a combination of the field armies, the regional forces and the militia.

The fundamental task of the armed forces of the People's Republic of China is: To safeguard the socialist revolution and socialist construction, to defend the sovereignty, territorial integrity and security of the state, and to guard against subversion and aggression by social-imperialism, imperialism and their lackeys.

#### THE STRUCTURE OF THE STATE

##### The National People's Congress

**Article 20** The National People's Congress is the highest organ of state power.

**Article 21** The National People's Congress is composed of deputies elected by the people's congresses of the provinces, autonomous regions, and municipalities directly under the Central Government, and by the People's Liberation Army. The deputies should be elected by secret ballot after democratic consultation.

The National People's Congress is elected for a term of five years. Under special circumstances, its term of office may be extended or the succeeding National People's Congress may be convened before its due date.

The National People's Congress holds one session each year. When necessary, the session may be advanced or postponed.

**Article 22** The National People's Congress exercises the following functions and powers:

- (1) to amend the Constitution;
- (2) to make laws;
- (3) to supervise the enforcement of the Constitution and the law;
- (4) to decide on the choice of the Premier of the State Council upon the recommendation of the Central Committee of the Communist Party of China;
- (5) to decide on the choice of other members of the State Council upon the recommendation of the Premier of the State Council;
- (6) to elect the President of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy;
- (7) to examine and approve the national economic plan, the state budget and the final state accounts;
- (8) to confirm the following administrative divisions: provinces, autonomous regions, and municipalities directly under the Central Government;
- (9) to decide on questions of war and peace; and

(10) to exercise such other functions and powers as the National People's Congress deems necessary.

**Article 23** The National People's Congress has the power to remove from office the members of the State Council, the President of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy.

**Article 24** The Standing Committee of the National People's Congress is the permanent organ of the National People's Congress. It is responsible and accountable to the National People's Congress.

The Standing Committee of the National People's Congress is composed of the following members:

- the Chairman;
- the Vice-Chairmen;
- the Secretary-General; and
- other members.

The National People's Congress elects the Standing Committee of the National People's Congress and has the power to recall its members.

**Article 25** The Standing Committee of the National People's Congress exercises the following functions and powers:

- (1) to conduct the election of deputies to the National People's Congress;
- (2) to convene the sessions of the National People's Congress;
- (3) to interpret the Constitution and laws and to enact decrees;
- (4) to supervise the work of the State Council, the Supreme People's Court and the Supreme People's Procuracy;
- (5) to change and annul inappropriate decisions adopted by the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government;
- (6) to decide on the appointment and removal of individual members of the State Council upon the recommendation of the Premier of the State Council when the National People's Congress is not in session;
- (7) to appoint and remove Vice-Presidents of the Supreme People's Court and Deputy Chief Procurators of the Supreme People's Procuracy;
- (8) to decide on the appointment and removal of plenipotentiary representatives abroad;
- (9) to decide on the ratification and abrogation of treaties concluded with foreign states;
- (10) to institute state titles of honor and decide on their conferment;
- (11) to decide on the granting of pardons;
- (12) to decide on the proclamation of a state of war in the event of armed attack on the country when the National People's Congress is not in session; and
- (13) to exercise such other functions and powers as are vested in it by the National People's Congress.

**Article 26** The Chairman of the Standing Committee of the National People's Congress presides over the work of the Standing Committee; receives foreign diplomatic envoys; and in accordance with the decisions of the National People's Congress or its Standing Committee promulgates laws and decrees, dispatches and recalls plenipotentiary representatives abroad, ratifies treaties concluded with foreign states and confers state titles of honor.

The Vice-Chairmen of the Standing Committee of the National People's Congress assist the Chairman in his work and may exercise part of the Chairman's functions and powers on his behalf.

**Article 27** The National People's Congress and its Standing Committee may establish special committees as deemed necessary.

**Article 28** Deputies to the National People's Congress have the right to address inquiries to the State Council, the Supreme People's Court, the Supreme People's Procuracy, and the ministries and commissions of the State Council, which are all under obligation to answer.

**Article 29** Deputies to the National People's Congress are subject to supervision by the units which elect them. These electoral units have the power to replace at any time the deputies they elect, as prescribed by law.

#### The State Council

**Article 30** The State Council is the Central People's Government and the executive organ of the highest organ of state power; it is the highest organ of state administration.

The State Council is responsible and accountable to the National People's Congress, or, when the National People's Congress is not in session, to its Standing Committee.

**Article 31** The State Council is composed of the following members:

- the Premier;
- the Vice-Premiers;
- the ministers; and
- the ministers heading the commissions.

The Premier presides over the work of the State Council and the Vice-Premiers assist the Premier in his work.

**Article 32** The State Council exercises the following functions and powers:

- (1) to formulate administrative measures, issue decisions and orders and verify their execution, in accordance with the Constitution, laws and decrees;
- (2) to submit proposals on laws and other matters to the National People's Congress or its Standing Committee;
- (3) to exercise unified leadership over the work of the ministries and commissions and other organizations under it;
- (4) to exercise unified leadership over the work of local organs of state administration at various levels throughout the country;
- (5) to draw up and put into effect the national economic plan and the state budget;
- (6) to protect the interests of the state, maintain public order and safeguard the rights of citizens;
- (7) to confirm the following administrative divisions: autonomous prefectures, counties, autonomous counties, and cities;
- (8) to appoint and remove administrative personnel according to the provisions of the law; and
- (9) to exercise such other functions and powers as are vested in it by the National People's Congress or its Standing Committee.

#### The Local People's Congresses And the Local Revolutionary Committees at Various Levels

**Article 33** The administrative division of the People's Republic of China is as follows:

- (1) The country is divided into provinces, autonomous regions, and municipalities directly under the Central Government;
- (2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties, and cities; and
- (3) Counties and autonomous counties are divided into people's communes and towns.

Municipalities directly under the Central Government and other large cities are divided into districts and counties. Autonomous prefectures are divided into counties, autonomous counties, and cities.

Autonomous regions, autonomous prefectures and autonomous counties are all national autonomous areas.

**Article 34** People's congresses and revolutionary committees are established in provinces, municipalities directly under the Central Government, counties, cities, municipal districts, people's communes and towns.

People's congresses and revolutionary committees of the people's communes are organizations of political power at the grass-roots level, and are also leading organs of collective economy.

Revolutionary committees at the provincial level may establish administrative offices as their agencies in prefectures.

Organs of self-government are established in autonomous regions, autonomous prefectures and autonomous counties.

**Article 35** Local people's congresses at various levels are local organs of state power.

Deputies to the people's congresses of provinces, municipalities directly under the Central Government, counties, and cities divided into districts are elected by people's congresses at the next lower level by secret ballot after democratic consultation; deputies to the people's congresses of cities not divided into districts, and of municipal districts, people's communes and towns are directly elected by the voters by secret ballot after democratic consultation.

The people's congresses of provinces and municipalities directly under the Central Government are elected for a term of five years. The people's congresses of counties, cities and municipal districts are elected for a term of three years. The people's congresses of people's communes and towns are elected for a term of two years.

Local people's congresses at various levels hold at least one session each year, which is to be convened by revolutionary committees at the corresponding levels.

The units and electorates which elect the deputies to the local people's congresses at various levels have the power to supervise, remove and replace their deputies at any time according to the provisions of the law.

**Article 36** Local people's congresses at various levels, in their respective administrative areas, ensure the observance and enforcement of the Constitution, laws and decrees; ensure the implementation of the state plan; make plans for local economic and cultural development and for public utilities; examine and approve local economic plans, budgets and final accounts; protect public property; maintain public order; safeguard the rights of citizens and the equal rights of minority nationalities; and promote the development of socialist revolution and socialist construction.

Local people's congresses may adopt and issue decisions within the limits of their authority as prescribed by law.

Local people's congresses elect, and have the power to recall, members of revolutionary committees at the corresponding levels. People's congresses at county level and above elect, and have the power to recall, the presidents of the people's courts and the chief procurators of the people's procuracies at the corresponding levels.

Deputies to local people's congresses at various levels have the right to address inquiries to the revolutionary committees, people's courts, people's procuracies and organs under the revolutionary committees at the corresponding levels, which are all under obligation to answer.

**Article 37** Local revolutionary committees of various levels, that is, local people's governments, are the executive organs of local people's congresses at the corresponding levels and they are also local organs of state administration.

A local revolutionary committee is composed of a chairman, vice-chairmen and other members.

Local revolutionary committees carry out the decisions of people's congresses at the corresponding levels as well as the decisions and orders of the organs of state administration at higher levels, direct the administrative work of their respective areas, and issue decisions and orders within the limits of their authority as prescribed by law. Revolutionary committees at county level and above appoint or remove the personnel of organs of state according to the provisions of the law.

Local revolutionary committees are responsible and accountable to people's congresses at the corresponding levels and to the organs of state administration at the next higher level, and work under the unified leadership of the State Council.

The Organs of Self-Government of National Autonomous Areas

**Article 38** The organs of self-government of autonomous regions, autonomous prefectures and autonomous counties are people's congresses and revolutionary committees.

The election of the people's congresses and revolutionary committees of national autonomous areas, their terms of office, their functions and powers and also the establishment of their agencies should conform to the basic principles governing the organization of local organs of state as specified in Section III, Chapter Two, of the Constitution.

In autonomous areas where a number of nationalities live together, each nationality is entitled to appropriate representation in the organs of self-government.

**Article 39** The organs of self-government of national autonomous areas exercise autonomy within the limits of their authority as prescribed by law, in addition to exercising the functions and powers of local organs of state as specified by the Constitution.

The organs of self-government of national autonomous areas may, in the light of the political, economic and cultural characteristics of the nationality or nationalities in a given area, make regulations on the exercise of autonomy and also specific regulations and submit them to the Standing Committee of the National People's Congress for approval.

In performing their functions, the organs of self-government of national autonomous areas employ the spoken and written language or languages commonly used by the nationality or nationalities in the locality.

**Article 40** The higher organs of state shall fully safeguard the exercise of autonomy by the organs of self-government of national autonomous areas, take into full consideration the characteristics and needs of the various minority nationalities, make a major effort to train cadres of the minority nationalities, and actively support and assist all the minority nationalities in their socialist revolution and construction and thus advance their socialist economic and cultural development.

The People's Courts and the People's Procuracies

**Article 41** The Supreme People's Court, local people's courts at various levels and special people's courts exercise judicial authority. The people's courts are formed as prescribed by law.

In accordance with law, the people's courts apply the system whereby representatives of the masses participate as assessors in administering justice. With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions.

All cases in the people's courts are heard in public except those involving special circumstances, as prescribed by law. The accused has the right to defense.

**Article 42** The Supreme People's Court is the highest judicial organ.

The Supreme People's Court supervises the administration of justice by local people's courts at various levels and by special people's courts; people's courts at the higher levels supervise the administration of justice by people's courts at the lower levels.

The Supreme People's Court is responsible and accountable to the National People's Congress and its Standing Committee. Local people's courts at various levels are responsible and accountable to local people's congresses at the corresponding levels.

**Article 43** The Supreme People's Procuracy exercises procuratorial authority to ensure observance of the Constitution and the law by all the departments under the State Council, the local organs of state at various levels, the personnel of organs of state and the citizens. Local people's procuracies and special people's procuracies exercise procuratorial authority within the limits prescribed by law. The people's procuracies are formed as prescribed by law.

The Supreme People's Procuracy supervises the work of local people's procuracies at various levels and of special people's procuracies; people's procuracies at the higher levels supervise the work of those at the lower levels.

The Supreme People's Procuracy is responsible and accountable to the National People's Congress and its Standing Committee. Local people's procuracies at various levels are responsible and accountable to people's congresses at the corresponding levels.



THE FUNDAMENTAL RIGHTS AND DUTIES OF CITIZENS

**Article 44** All citizens who have reached the age of 18 have the right to vote and to stand for election, with the exception of persons deprived of these rights by law.

**Article 45** Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and have the right to "speak out freely, air their views fully, hold great debates and write big-character posters."

**Article 46** Citizens enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism.

**Article 47** The citizens' freedom of person and their homes are inviolable.

No citizen may be arrested except by decision of a people's court or with the sanction of a people's procuracy, and the arrest must be made by a public security organ.

**Article 48** Citizens have the right to work. To ensure that citizens enjoy this right, the state provides employment in accordance with the principle of overall consideration, and, on the basis of increased production, the state gradually increases payment for labor, improves working conditions, strengthens labor protection and expands collective welfare.

**Article 49** Working people have the right to rest. To ensure that working people enjoy this right, the state prescribes working hours and systems of vacations and gradually expands material facilities for the working people to rest and recuperate.

**Article 50** Working people have the right to material assistance in old age, and in case of illness or disability. To ensure that working people enjoy this right, the state gradually expands social insurance, social assistance, public health services, co-operative medical services, and other services.

The state cares for and ensures the livelihood of disabled revolutionary army men and the families of revolutionary martyrs.

**Article 51** Citizens have the right to education. To ensure that citizens enjoy this right, the state gradually increases the number of schools of various types and of other cultural and educational institutions and popularizes education.

The state pays special attention to the healthy development of young people and children.

**Article 52** Citizens have the freedom to engage in scientific research, literary and artistic creation and other cultural activities. The state encourages and assists the creative endeavors of citizens engaged in science, education, literature, art, journalism, publishing, public health, sports and other cultural work.

**Article 53** Women enjoy equal rights with men in all spheres of political, economic, cultural, social and family life. Men and women enjoy equal pay for equal work.

Men and women shall marry of their own free will. The state protects marriage, the family, and the mother and child.

The state advocates and encourages family planning.

**Article 54** The state protects the just rights and interests of overseas Chinese and their relatives.

**Article 55** Citizens have the right to lodge complaints with organs of state at any level against any person working in an organ of state, enterprise or institution for transgression of law or neglect of duty. Citizens have the right to appeal to organs of state at any level against any infringement of their rights. No one shall suppress such complaints and appeals or retaliate against persons making them.

**Article 56** Citizens must support the leadership of the Communist Party of China, support the socialist system, safeguard the unification of the motherland and the unity of all nationalities in our country and abide by the Constitution and the law.

**Article 57** Citizens must take care of and protect public property, observe labor discipline, observe public order, respect social ethics and safeguard state secrets.

**Article 58** It is the lofty duty of every citizen to defend the motherland and resist aggression.

It is the honorable obligation of citizens to perform military service and to join the militia according to the law.

**Article 59** The People's Republic of China grants the right of residence to any foreign national persecuted for supporting a just cause, for taking part in revolutionary movements or for engaging in scientific work.

THE NATIONAL FLAG, THE NATIONAL EMBLEM AND THE CAPITAL

**Article 60** The national flag of the People's Republic of China has five stars on a field of red.

The national emblem of the People's Republic of China is: Tien An Men in the centre, illuminated by five stars and encircled by ears of grain and a cogwheel.

The capital of the People's Republic of China is Peking.