

# China's Changing Constitution

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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>

On 5 March 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 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

Some preliminary observations are in order. Self-conscious constitution-making is a 20th-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 effort to stave off collapse, the Manchu

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1. Mao Tse-tung, "On the draft constitution of the People's Republic of China," 14 June 1954 in *Selected Works* (Peking: Foreign Languages Press, 1977), Vol. V, pp. 141, 145–46.

2. An English translation of the new constitution can be found in *Documents of the First Session of the Fifth National People's Congress of the People's Republic of China* (Peking: Foreign Languages Press, 1978), pp. 125–72. An English translation of the 1975 version can be found in *The Constitution of the People's Republic of China* (Peking: Foreign Languages Press, 1975). 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* (Peking: Foreign Languages Press, 1955), pp. 131–63. All quotations from these constitutions are from those translations unless otherwise indicated, but the term "procuracy" has been substituted for the more awkward and less familiar "procuratorate."

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 wished to emulate Japan. That country had gained great strength as a result of the massive changes symbolized by the Meiji Constitution of 1889, 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>4</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>5</sup> Because the Manchus kept the promise to the ear but broke it to the hope, failing to move ahead with even 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>6</sup>

So much early republican energy was devoted to constitution-making that in 1917 a leading western expert on constitutional development residing in Peking wrote, with classic British understatement: "One is apt to get confused with the welter of constitutions that have come and gone."<sup>7</sup> These efforts culminated in the supposedly permanent constitution of 1923, a splendid document that was wholly out of touch with Chinese realities and was promulgated by the government of

3. Wang Chung-hui, "Law reform in China," *The Chinese Social and Political Science Review*, Vol. II, No. 2 (June 1917), p. 13.

4. L. R. O. Bevan, "China's constitutions," *The Chinese Social and Political Science Review*, Vol. II, No. 4 (December 1917), pp. 89, 92.

5. Wang, "Law reform in China," p. 14. For English translations of the two principal documents promulgated by the Manchu government, the "Principles of constitution" of 1908 and "The nineteen articles" of 1911, see William L. Tung, *The Political Institutions of Modern China* (The Hague: Nijhoff, 1964), pp. 318-19, 320-21.

6. For an English translation of that document, see Tung, *The Political Institutions of Modern China*, pp. 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 Tuan-sheng, *The Government and Politics of China* (Cambridge, Mass.: Harvard University Press, 1950) is an informative analysis on which I have generally relied.

7. Bevan, "China's constitutions," p. 90.

President Ts'ao K'un, whose writ did not run far beyond Peking. The best that could be said for this document, 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>8</sup>

The rise to at least nominal national power of Chiang Kai-shek's Nationalist Party in 1928 led to further efforts to frame a constitution for the country. This resulted in the Provisional Constitution of 1931, which largely confirmed the existing arrangements according to which all government agencies were controlled by the generalissimo's authoritarian Nationalist Party.<sup>9</sup> The provisional nature of this document and the domination of the Nationalist Party reflected the theory of late great republican leader 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.

Nevertheless, before long, the continuing struggle for power led various groups to demand promulgation of a permanent constitution, contrary to Sun Yat-sen's theory of the need for a period of tutelage. During the next 15 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>10</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 operate under firm party control. Opposition leaders, intellectuals and others generally favoured a permanent constitution in the hope of curbing the increasingly dictatorial nationalist regime.

8. For a valuable, in-depth study of the political currents that shaped this document, see Andrew J. Nathan, *Peking Politics 1918-23, Factionalism and the Failure of Constitutionalism* (Berkeley, Los Angeles and London: University of California Press, 1976). For an English translation of the 1923 Constitution, see Ch'ien, *The Government and Politics of China*, p. 436.

9. For an English translation of the 1931 Provisional Constitution, see Tung, *The Political Institutions of Modern China*, pp. 344-49.

10. Ch'ien, *The Government and Politics of China*, p. 308. For an intelligent analysis of some of the Kuomintang's early post-1931 dilemmas concerning constitutionalism, see Lloyd E. Eastman, *The Abortive Revolution, China under Nationalist Rule, 1927-1937* (Cambridge, Mass.: Harvard University Press, 1974), especially pp. 159-80.

A second point to note is that, whatever their position in the struggle to shape the constitution – whether advocates of a presidential or a cabinet system, a strong or a weak central government, unicameralism or bicameralism, direct or indirect elections, a single party or a multi-party system – all sides tended to claim the mantle of Sun Yat-sen's ideology, and his ideas, although 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 had 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>11</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, which continues to prevail on 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 *yüan*.<sup>12</sup>

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 to 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 to the military and security forces of important aspects of state control.<sup>13</sup>

11. Harold Scott Quigley, "The constitution of China," *The American Political Science Review*, Vol. 18, No. 2 (1924), pp. 346, 350.

12. For an English translation of the 1946 Constitution, see Ch'ien, *The Government and Politics of China*, p. 447. For an interesting discussion of this document by Dean Roscoe Pound, who served as adviser to the Chinese Ministry of Justice, see "The Chinese constitution," *New York University Law Quarterly Review*, Vol. 23, No. 3 (1948), pp. 194–232. See also W. Y. Tsao, *The Constitutional Structure of Modern China* (Melbourne: Melbourne University Press, 1947).

13. See Peng Ming-min, "Political offences in Taiwan: laws and problems," *The China Quarterly (CQ)*, No. 47 (July–September 1971), p. 471, for a detailed discussion of the consequences of the "state of siege" proclaimed throughout the island on 19 May 1949 that is still in effect. To be sure, only some aspects of everyday life in Taiwan are affected

Until its decline imperial China had tended to display a high correlation between the forms of power and the actual situation – 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 1954 Constitution*

This background gives us some perspective on problems of constitution-making in the People's Republic of China since 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 them 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 in that in large part it was 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, to the Chinese the Soviet Union and its Eastern European allies, and especially their legal systems, seemed western. 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 U.S.S.R. Constitution of 1936 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 the People's Republic and the "dictatorship of the proletariat" that still prevailed in the U.S.S.R. in 1954, the Chinese Constitution reflected the Soviet model.

Like the U.S.S.R. 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

by martial law. Although political activists, intellectuals and the press are acutely aware of dictatorial restraints, the impact on most ordinary people is usually rather modest.

sessions of the parent body. The State Council, like the U.S.S.R. Council of Ministers, functioned under the legislature as the highest state executive organ. Although the U.S.S.R. 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 union republics of the U.S.S.R.

In addition, the judicial system and the procuracy, a prosecutorial institution that was also supposed to have the power to investigate and protest against violations 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, and, as in the Soviet-bloc countries, China's courts were not granted the power to invalidate legislation on grounds of constitutional violation.

Thus we can understand why, in his "Report on the draft constitution," 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>14</sup> The constitutions of the U.S.S.R. and the 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>15</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 political 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>16</sup> and symbolize the new era of stability and economic growth. As in other communist states and as in Republican China under the Nationalists, although the Party remained the effective power behind the government, a government constitution was seen 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.

14. Liu Shao-ch'i, "Report on the draft constitution of the People's Republic of China," 15 September 1954, in *Documents of the First NPC*, pp. 9, 20, 28.

15. Mao, "On the draft constitution," p. 142.

16. The first plenary session of the Chinese People's Political Consultative Conference adopted on 27 September 1949 "The organic law of the Central People's Government of the People's Republic of China." Two days later the same body adopted "The common programme of the Chinese People's Political Consultative Conference." For English translations of these documents, see Albert P. Blaustein (ed.), *Fundamental Legal Documents of Communist China* (South Hackensack, N.J.: Rothman & Co., 1962), pp. 104-114 and 34-53, respectively.

This constitution, plainly a transitional document, set forth the goals of a state that was advancing from “people’s democracy” to “socialist transformation” of industry, commerce and agriculture. 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>17</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, newspaper and radio commentaries all elaborated upon the tasks prescribed and the terms employed in the document.<sup>18</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>19</sup>

The transitional nature of the 1954 Constitution made it evident that, once socialist transformation of the economy had been attained, the document would be in need of revision. Yet socialist transformation came much sooner than many expected; it was substantially completed in agriculture shortly afterwards and in industry and commerce by the end of the 1950s. 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. . . .<sup>20</sup>

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. As a result, it was no

17. Mao, “On the draft constitution,” p. 145.

18. For translations of and commentary on selected excerpts from this literature, see generally J. A. Cohen, *The Criminal Process in the People’s Republic of China: 1949–1963: An Introduction* (Cambridge, Mass.: Harvard University Press, 1968). For an English language bibliography of relevant materials, see Fu-shun Lin (ed.), *Chinese Law, Past and Present* (New York: Columbia University, 1966), especially pp. 49–55; for a list of relevant Chinese language periodical literature, see Tao-tai Hsia, *Guide to Selected Legal Sources of Mainland China* (Washington: Library of Congress, 1967), esp. pp. 261–65. For western analysis of the 1954 Constitution, see H. Arthur Steiner, “Constitutionalism in Communist China,” *The American Political Science Review*, Vol. XLIV, No. 1 (March 1955), pp. 1–21; and Franklin W. Houn, “Communist China’s new constitution,” *The Western Political Quarterly* (1955), pp. 199–233.

19. For analysis of this provision and the struggle over its application, see J. A. Cohen, “The Party and the courts: 1949–1959,” *CQ*, No. 38 (April–June 1969), p. 120.

20. Quoted in *Miscellany of Mao Tse-tung Thought (1949–1968)* (Mao Tse-tung ssu-hsiang wan-sui) (1967, 1969), Joint Publications Research Service (JPRS), No. 61269-1 (20 February 1974), p. 138.

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: that an accused is entitled to make a defence, in a public trial, before a tribunal that includes representatives of the people called " assessors " as well as a professional judge.

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 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 guaranties 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>21</sup> Actually, some legislative and administrative steps had been taken to protect citizens against arbitrary arrest, but these had only proven partially successful.<sup>22</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. As one Party authority put it:

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 disappointed if he hopes that the constitution will protect the freedom of speech, press and assembly of traitors, counter-revolutionaries and rightist elements.<sup>23</sup>

Ku and his ilk were plainly not considered to be among " the people."

The Cultural Revolution of 1966–69, 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-ch'i, was stripped of his office even though the National People's Congress (NPC), the only organ authorized to take this action, had not met. Indeed, the failure to convene the NPC year after year throughout the entire decade 1965–75, 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 that 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

21. See " Ten years of the Chinese people's constitution," *Bulletin of the International Commission of Jurists*, Vol. 1, No. 20 (1964), pp. 22, 28.

22. See, e.g., Cohen, *The Criminal Process in the People's Republic of China*, pp. 11–18, 25–35, 354–64.

23. Quoted in " Ten years of the Chinese people's constitution," p. 28.



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.

### *Constitution-making in the 1970s*

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>24</sup>

Major internal changes occurred in China between 1970 and 1975, especially 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, who had been dismissed during the Cultural Revolution. 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>25</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>26</sup> It also replaced "Mao Tse-tung Thought" with "Marxism-Leninism-Mao Tse-tung Thought" as the nation's theoretical guide. It added to the emphasis upon the leadership of the Communist Party of China over the state. And, most important, 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>27</sup>

24. For an English translation of the "Revised draft of the constitution of the PRC," approved by the Party Central Committee 6 September 1970, see Michael Lindsay (ed.), *The New Constitution of Communist China: Comparative Analyses* (Taipei: Institute of International Relations, 1976), pp. 312-20.

25. Some observers have stated that there was also a second revised draft adopted by the Party Central Committee in 1973. See, e.g., Leonid Gudoshnikov, "Two constitutions of the People's Republic of China," *Far Eastern Affairs*, No. 3 (Moscow, 1975), p. 72. Indeed, the Republic of China on Taiwan published an English translation of what purported to be such a document; see *Background on China*, B.74-13 (New York: Chinese Information Service, 26 September 1974) and also Lindsay, *The New Constitution of Communist China*, pp. 321-27. Yet two knowledgeable commentators have questioned the authenticity of this document, which will not be discussed here. See Tao-tai Hsia and Kathryn A. Haun, *The 1975 Revised Constitution of the People's Republic of China* (Washington: Library of Congress, 1975), p. 2.

26. Article 2, p. 314, Lindsay, *The New Constitution of Communist China*.

27. Article 15 (1975 Constitution).

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 so long-awaited a 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 laboured and brought forth a mouse. Only the Soviet propaganda mill – no stranger to hypocrisy – devoted extensive coverage to the 1975 Constitution, castigating it *ad nauseam* for its alleged violation of the principles of Marxist-Leninist socialist legality.<sup>28</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, 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. And 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 further 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 – later discredited as one of the “gang of four” – that it was “the

28. For an example of more scholarly Soviet analysis of the 1975 Constitution, see Gudoshnikov, “Two constitutions of the People's Republic of China.” And for an interesting commentary on a similar Soviet work, by an American expert on Soviet law, see John N. Hazard, “A Soviet model for Marxian socialist constitutions,” *Cornell Law Quarterly*, Vol. 60, No. 6 (1975), pp. 985–1004. For the range of western analyses of the 1975 Constitution, in addition to works cited elsewhere in this article, see e.g., David N. Rowe, “PRC's constitutions and the philosophy of constitutionalism” *Issues and Studies* (Taipei), July 1975, pp. 2–23; Chün-tu Hsüeh, “The new constitution,” *Problems of Communism*, Vol. XXIV (May–June 1975), pp. 11–19; Tsien Tche-hao, “Les traits particuliers de la nouvelle constitution chinoise,” *Revue internationale de droit comparé*, April–June 1975, pp. 349–73; and Frank Munzel, “Eine Verfassung der Proletarischen Diktatur,” *WGO-Monatshefte für Osteuropäisches Recht*, Vol. 4 (1974), pp. 243–53.

continuation and development of the 1954 Constitution.”<sup>29</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 development;”<sup>30</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 favour 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 belatedly 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 moved into top gear 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. This led to the second removal of Vice-premier Teng Hsiao-p’ing and the appointment of Hua Kuo-feng as premier, an appointment that was made hastily without the approval of the National People’s Congress, a requirement of the 1975 Constitution.<sup>31</sup> With the death of Chairman Mao in September, which precipitated the arrest of the leaders of the Shanghai group, thereafter branded the “gang of four,” many observers began 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 11th 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

29. Chang Ch’un-ch’iao, “Report on the revision of the constitution,” in *Documents of the First Session of the Fourth National People’s Congress of the People’s Republic of China* (Peking: Foreign Languages Press, 1975), p. 36.

30. Kenneth Lieberthal, “The internal political scene,” *Problems of Communism*, Vol. XXIV (May–June 1975), pp. 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.

31. See Article 17.

indeed on the way. Yeh Chien-ying, chairman of the Standing Committee of the NPC, stated in his report on the draft of the 1978 Government 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 needs.<sup>32</sup> Although the adoption of the 1978 Constitution of 60 articles by the Fifth NPC 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 pragmatist camp there appear to be varying degrees of enthusiasm for, or at least preoccupation with, the 1978 Constitution,<sup>33</sup> the enactment of which Yeh Chien-ying characterized as “a major event in the political life of our people.”<sup>34</sup>

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 analogues to a bill of rights.

### *1978 Version: Property*

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. 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, 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 recorded in the existing [1975] constitution.”<sup>35</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, because capitalism was a thing of the past. Similarly, there was no need for further reference to the peasant's right to own the means of production. However, because some individual working people in non-agricultural pursuits – handicraftsmen

32. Yeh Chien-ying, “Report on the revision of the constitution,” 1 March 1978, in *Documents of the First Session of the Fifth NPC*, pp. 173, 176–77.

33. See “Socialist legal system,” *China News Analysis*, No. 1123 (16 June 1978), p. 7.

34. Yeh Chien-ying, “Report on the revision of the constitution,” p. 212.

35. *Ibid.* p. 202.

and peddlers, for example – are still not collectivized, the 1975 Constitution authorized the state to allow them to engage in individual labour 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>36</sup> The limited constitutional tolerance of this vestige of the individual entrepreneur was balanced, however, by the admonition that “these individual labourers should be guided onto the road of socialist collectivization step by step.”<sup>37</sup> Article 5 of the new constitution retains this provision in substance and in almost identical language.

The new Article 5 also reiterates its predecessor’s statement that “there are mainly two kinds of ownership of the means of production . . . at the present stage.” One is “socialist ownership by the whole people,” that is, state ownership. The second is “socialist collective ownership by the working people,” 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.” This gave constitutional status, however temporary, to an arrangement that offers team members a more direct financial incentive to be productive than if their efforts were submerged in the larger brigade or commune as the accounting unit, as has sometimes been the case. Article 7 of the 1978 Constitution retains this language but adds – perhaps to show the ideological orthodoxy of the pragmatists: “A production brigade may become the basic accounting unit when its conditions are ripe.” 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 conditions are appropriate.<sup>38</sup>

The new Article 7 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 limited number of livestock for personal needs.” 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,” that is, so long as the peasants do not neglect their principal labour on behalf of the collective. Nevertheless, in 1975 this constitutional concession to personal self-

36. Article 5.

37. *Ibid.*

38. Yeh Chien-ying, “Report on the revision of the constitution,” p. 204.

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 it is the radicals who have been done away with, the provision has plainly been retained as part of the programme for satisfying the peasants and stimulating their production, and 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," 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 banned and actually terminated. 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 shall he eat" and "from each according to his ability, to each according to his work." Yeh Chien-ying's report on the 1978 Constitution, which reaffirms these maxims in Article 10, leaves no doubt about the radicals' opposition to this provision. According to Yeh:

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>39</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>40</sup> this is precisely what happened to many persons in the countryside during the Great Leap Forward of 1958–59 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

39. *Ibid.* p. 205. These maxims appeared in Article 12 of the 1936 U.S.S.R. Constitution, and Article 14 of the 1977 U.S.S.R. Constitution reiterates: "From each according to his ability, to each according to his work." Similarly, the concession securing the peasant's garden plot and related activities appeared in the 1936 U.S.S.R. Constitution, Article 7, and is retained in Article 13 of the 1977 version.

40. Article 11.

incomes ” with the narrower “ income from work,”<sup>41</sup> perhaps to imply disapproval of income earned by means other than one’s labour, as from interest on bank accounts, “ 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>42</sup>

This provision may only have credibility to the extent that the 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 – failed to reinstate the 1954 document’s provision for the state to make compensation for such infringement cannot be tremendously reassuring.<sup>43</sup> Nevertheless, at various times during the past two decades, restitution or compensation has been made to persons who have suffered property deprivations,<sup>44</sup> and the present government is taking further steps to make amends.<sup>45</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

41. Article 9.

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

43. See the discussion in the text *infra*, after note 107.

44. See, e.g., Ezra Vogel, *Canton under Communism* (Cambridge, Mass.: Harvard University Press, 1969), p. 279, which reports efforts in 1960–61 to make at least partial restitution or compensation to peasants for property seized from them during the Great Leap Forward.

45. See, e.g., “ Kirin purges gang follower, compensates victims,” Peking NCNA Domestic (28 April 1978), in FBIS-CHI-78-84 (1 May 1978), LI, L4, which states that property taken from victimized persons was returned to them and that they were repaid wages that had been withheld. Chinese media have shown increasing concern about property deprivations such as 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 (12 April 1978), in FBIS-CHI-78-74 (17 April 1978), 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*, (*Jen-min*) (*People’s Daily*), 19 July 1978, p. 4, which 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.

private property according to law.”<sup>46</sup> This is one example among many to raise 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 its omission mean an end to inheritance in the People's Republic? Apparently not. That would be inconsistent with the steps taken to restore individual incentives. Indeed, in a major article on the implications of the 1978 Constitution for judicial affairs, published in the *People's Daily*, no less a personage than Chiang Hua, president of the Supreme People's Court, stated: “When 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>47</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 mentioned above. 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 that would 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.

### *1978 Version: Restraints on the Executive*

Although the 1978 Constitution makes few changes in the 1975 document's treatment of property relations, it restores some – but not all – of the institutional restraints upon the exercise of executive power that

46. Article 12.

47. Chiang Hua, “To implement the new constitution is the glorious task of the people's courts,” *Jen-min*, 23 May 1978, p. 3.



the 1954 Constitution had provided for but that the 1975 revision had omitted. The 1954 Constitution was not based upon the separation of powers, but upon the theory that the NPC is the supreme organ of state power. Thus it endowed the NPC and its Standing Committee – and the procuracy and the judiciary, which were directly responsible to the NPC – with a variety of powers that might have fostered the growth of significant restraints upon the executive agencies led by the State Council. Unfortunately, efforts made to invoke some of these powers in the mid-1950s 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>48</sup> Even communist societies may witness the evolution of modest governmental restraints upon the executive, as suggested by the slow growth in the U.S.S.R. of the role of the procuracy and the oversight functions of legislative committees, and to a lesser extent the courts.<sup>49</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 NPC had been granted the power “to supervise the enforcement of the constitution” as well as to decide on general amnesties and on questions of war and peace.<sup>50</sup> It and its Standing Committee also had been authorized to “appoint commissions of inquiry for the investigation of specific questions,” and 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>51</sup> Moreover, NPC deputies had been given “the right to address questions to the State Council, or to the ministries and commissions of the State Council, which are under obligation to answer.”<sup>52</sup> And, in order to protect NPC deputies against administrative retaliation, the 1954 Constitution had provided that no NPC deputy could be arrested or placed on trial without the consent of the NPC or, when it was not in session, of its Standing Committee.<sup>53</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 could still have been invoked under the retained authorization for the NPC to make laws and to “exercise such

48. See Kenzo Takayanagi, “A century of innovation: the development of Japanese law, 1868–1961,” in A. T. von Mehren (ed.), *Law in Japan* (Cambridge, Mass: Harvard University Press, 1963), pp. 5–12.

49. See Harold J. Berman, *Justice in the U.S.S.R.* (New York: Vintage, 1963), rev. edit., pp. 238 *et seq.*, 375, 299 *et seq.*

50. Article 27.

51. Article 35. Article 34 also established various permanent committees.

52. Article 36.

53. Article 37.

other functions and powers as [it] deems necessary.”<sup>54</sup> One can make a similar point about the failure of the 1975 Constitution to restate powers that had previously been granted to the NPC's Standing Committee. It had been authorized – if we list only powers related to curbing the executive that were not mentioned in 1975 – “to supervise the work of the State Council” as well as that of the Supreme Court and the Supreme Procuracy; “to annul decisions and orders of the State Council which contravene the Constitution, laws or decrees;” “to revise or annul inappropriate decisions issued by the government authorities of provinces, 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 NPC is not in session, upon declaration of war in certain circumstances; and to decide on military mobilization and enforcement of martial law.<sup>55</sup> Perhaps the failure in 1975 to specify all of these 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>56</sup>

Yet it seemed unlikely that such potentially important powers of the NPC 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 NPC, remained passive before the exercise of governmental power by its nominal executive agent.<sup>57</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 NPC the appointment and removal of the premier and the members of the State Council.<sup>58</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 NPC and its Standing Committee that had gone unmentioned three years earlier. In addition to restating the NPC's power “to decide on 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 executive, they again spelled out the power of the NPC “to supervise the enforcement of the constitution” and actually broadened the NPC's supervisory responsibilities by adding the phrase “and the law.”<sup>59</sup> Although the

54. Article 17.

55. Article 31.

56. Article 18.

57. See Hsia and Haun, *The 1975 Revised Constitution*, p. 82, for a similar conclusion.

58. Article 17.

59. Article 22. The new provision makes no reference to a power to declare a general amnesty, and there are other minor differences.

new constitution fails to reaffirm the power of the NPC 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 NPC deputies to address inquiries to, and to compel answers from, the State Council and subsidiary agencies and places the Supreme People's Court and the Supreme People's Procuracy under the same potential scrutiny.<sup>60</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 NPC or its Standing Committee, thereby suggesting the vulnerability of obstreperous legislators to executive or Party retaliation.

Just as the 1978 Constitution restores some, but not all, of the checks upon the executive that the 1954 document granted to the NPC but the 1975 version omitted, so too does it deal with the Standing Committee of the NPC. 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 – 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”? In view of the fact that old Article 31 (7) authorizing the revision or annulment of inappropriate decisions of local governments is restored, 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 Committee has been denied its 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>61</sup>

Potentially much more important as a restraint upon the executive than the new constitution's reaffirmation of certain powers of the NPC 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 departments of the State Council, all local organs of state, persons working in organs of state, and citizens, to ensure observance of the

60. Article 28. Article 27 also authorizes the NPC or its Standing Committee to establish special committees “as deemed necessary,” and this provision could become the basis for investigating committees.

61. Article 25 (3). One should also note that the power to annul illegal decisions of local government that Article 60 of the 1954 Constitution conferred upon local people's congresses has not been revived by Article 36 of the 1978 Constitution.

law.”<sup>62</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 had been designed to serve the People's Republic not only as a prosecutorial agency but also as an independent watchdog of governmental legality, responsible only to the NPC – 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>63</sup>

The efforts of the procuracy to carry out its tasks were crippled by the “anti-rightist” campaign of 1957–58, and the Cultural Revolution administered the *coup de grâce* 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>64</sup> Thus the police, originally one of the principal subjects of the procuracy's supervision, became authorized to take on the responsibility not only for prosecuting crimes but also for investigating the legality of their own actions as well as those of other agencies. Moreover, unlike the procuracy, the police are 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>65</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 institutional 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>66</sup> He reiterated what Peking media had been claiming since the arrest of the “gang of

62. Article 81.

63. Law of the People's Republic of China for the Organization of People's Procuracies, promulgated 28 September 1954, Articles 8 and 9; an English translation can be found in *Documents of the First Session*, pp. 201, 206–207.

64. Article 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 Haryu Seikichi, “The judicial system under the new Chinese constitution,” *Juristo* (Jurist), No. 602 (Tokyo, 1975), p. 124.

65. *Ibid.*

66. Yeh Chien-ying, “Report on the revision of the constitution,” p. 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. Others include: revival of the Party disciplinary commissions; renewed emphasis on letters to newspapers and visits to government offices as important means of airing grievances; and re-establishment of the Chinese People's Political Consultative Conference as a forum for discussion and protests by intellectuals.

four ” 17 months earlier – that Chiang 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>67</sup> They have 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. They have 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. Plainly, the demise of the procuracy had not been attributable to the pragmatists, who brought it back at their earliest opportunity. In their view, as Yeh’s report made clear:

Detention and arrests must follow legal procedures and the system of checking and approval must be strictly observed in this regard. In the trials of cases, stress must be laid on the weight of the evidence and on 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>68</sup>

In re-establishing 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*,” the italicized words being added.<sup>69</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 NPC. 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>70</sup> Moreover, it gives local people’s congresses at county level and above the power to elect and recall the chief procurator, as well as the court president and revolutionary committee members, at the corresponding level, and it 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>71</sup> This new deference to grass roots control may have been adopted to demonstrate a

67. *Ibid.* pp. 197–98.

68. *Ibid.* p. 198.

69. Article 43.

70. *Ibid.*

71. Article 36. This power of local congresses to address inquiries to the procuracy, court and revolutionary committee of the same level is an innovation of the 1978 Constitution. The NPC Standing Committee recently adopted a decision authorizing

concern for democratic decentralization, permitting local people to press the local procuracy to fulfil 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>72</sup>

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>73</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>74</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." 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 24 hours of detaining a suspect and that the procuracy check upon police compliance.<sup>75</sup> The

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," NCNA Domestic (24 May 1978), in FBIS-CHI-78-101 (24 May 1978), E12, E13.

72. See John N. Hazard, *Settling Disputes in Soviet Society* (New York: Columbia University Press, 1960), pp. 157-58. For recent commentary on the Chinese procuracy, see Tao-tai Hsia and Kathryn Haun, *The Re-emergence of the Procuratorial System in the People's Republic of China* (Washington, D.C.: Library of Congress, 1978), especially pp. 9-10. The failure of the new constitution to restore to local people's congresses their earlier power to annul decisions of local governments (see *supra*, note 61) suggests that the draftsmen were not unduly concerned with establishing grass-roots control over local executive agencies.

73. Article 25 (1975 Constitution).

74. Article 2.

75. See Article 7 of the Arrest and Detention Act of the People's Republic of China, promulgated 20 December 1954. For an English translation of the Act, see Cohen, *The Criminal Process in The People's Republic of China*, pp. 360-62, 386, 584-85. For analysis of the Soviet model for this scheme, see Harold J. Berman, *Soviet Criminal Law and Procedure* (Cambridge, Mass.: Harvard University Press, 1972), 2nd ed., pp. 10, 52-53.

1975 Constitution retained the guaranty, but altered the implementation clause to substitute “ public security organ ” for “ procuracy.”<sup>76</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-1950s as a result of the latter’s refusal to approve arrests and prosecutions urged by the police.<sup>77</sup> Indeed, the procuracy’s stubborn manifestations of a so-called “ favour the defendant ” mentality that emphasized “ trivial legal procedures and the rights and status of the criminal ”<sup>78</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>79</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 1954 Arrest and Detention Act that specifies detailed restraints upon the police.<sup>80</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 they, 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 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>81</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

76. Article 28.

77. See Cohen, *The Criminal Process in the People’s Republic of China*, p. 15.

78. T’an Ch’eng-wen, “ Absorb experience and teaching, impel a great leap forward in procuratorial work,” *Cheng-fa yen-chiu* (hereafter *Political-Legal Research*), No. 3 (1958), pp. 34, 38.

79. Article 47.

80. See *supra*, note 75.

81. Chang Wu-yün, “ Smash permanent rules, go 1,000 li in one day,” *Political-Legal Research*, No. 5 (1958), p. 60.

giving “full scope” to these specialized legal agencies that are still supposed to complement and restrain each other?<sup>82</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 1956–57 or that of 1958–66? The answer will 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 – and apparently all too true – 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>83</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 predecessor, 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 – but not all – 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 1957–58, 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 to a desire not 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>84</sup> that trials generally be open to the public;<sup>85</sup> and that the accused be accorded the right to make a defence against the state's accusations.<sup>86</sup> All of these provisions have been reinserted in the 1978 Constitution, but it is too early to know

82. Yeh Chien-ying, “Report on the revision of the constitution,” p. 197.

83. Article 47.

84. Article 75.

85. Article 76.

86. *Ibid.*



to what extent they will be implemented in ways that will make public trials more than morality plays staged for the edification of the masses. Some of the experimental public trials conducted during the 1950s were genuine attempts to determine the degree of the defendant's guilt and the appropriate punishment. There were also many instances when 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>87</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>88</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>89</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 to, and required to report to, not only the people's congresses, as before, but also "their permanent organs at the corresponding levels."<sup>90</sup> Thus, the courts below the Supreme Court fell under the jurisdiction of the local revolutionary committees that under the new order serve as local people's governments.<sup>91</sup> In 1975 the "permanent organs of the people's congresses," that is, the NPC 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>92</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 it 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 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>93</sup> The judiciary was to be the Party's docile tool.

87. See Cohen, *The Criminal Process in the PRC*, p. 13.

88. Article 78.

89. See Cohen, "The Party and the courts: 1949-1959," pp. 141-47.

90. Article 25.

91. See Article 22.

92. Article 25.

93. See, e.g., Chang Hui *et al.*, "These are not the basic principles of our country's criminal litigation," *Political-Legal Research*, No. 4 (1958), pp. 77-78; Liu Tse-chün, "Realizations from my adjudication work," *ibid.* No. 1 (1959), pp. 48-51.

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 guaranty of judicial independence, it provides for the Party's exercise of leadership over the state, which includes the judiciary.<sup>94</sup> The Supreme People's Court has the status of an organ separate from, but subsidiary to, the NPC – 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>95</sup> "accept supervision by the masses"<sup>96</sup> and "practise democratic centralism"<sup>97</sup> – all 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 NPC Standing Committee supervises the work of the Supreme Court as well as that of other agencies,<sup>98</sup> because NPC deputies are for the first time empowered to oblige the Court – not merely other agencies – to answer inquiries<sup>99</sup> and because, as we have seen, the Court is responsible to and reports to the NPC and has its principal officers appointed and removed by the NPC and its Standing Committee,<sup>100</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>101</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 judiciary 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 U.S.S.R.,<sup>102</sup> the judiciary is unlikely to make a significant impact in restraining the executive or the Party.

Events since adoption of the new constitution indicate that the Party may find it hard to yield this prerogative. At the Eighth National Conference on People's Judicial Work held in April and May 1978, Chi Teng-k'uei, a vice-premier but identified only as a member of the Political Bureau of the CCP Central Committee, emphasized that

94. Article 2.

95. Article 15.

96. Article 16.

97. Article 3.

98. Article 25 (4) (1978 Constitution).

99. Article 28 (1978 Constitution).

100. Articles 22 (6), 25 (7), 42 (1978 Constitution).

101. See Articles 36, 42 (1978 Constitution).

102. See Berman, *Soviet Criminal Law and Procedure*, p. 14 and sources cited therein, and Robert Sharlet, "The new Soviet constitution," *Problems of Communism* (September-October 1977), pp. 1, 11–12, which treats the Soviet claim cautiously.

“ [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>103</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>104</sup> The article that Chiang published in the *People’s Daily* immediately after the conference laid great stress on improving judicial procedures and acting according to law (“ infraction of the law means violation of Party policy ”), but it insisted that “ the mass line under Party leadership ” be upheld.<sup>105</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 unrelies. “ 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 of the class enemies and the flagrant offensive of the capitalist forces. . . .”<sup>106</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>107</sup>

103. “ Reportage on national judicial conference held in Peking,” Peking NCNA Domestic (27 May 1978), in FBIS-CHI-78-105 (31 May 1978), E1, E2.

104. *Ibid.* E3.

105. *Supra*, note 47.

106. “ *People’s Daily* editorial hails judicial work conference,” Peking NCNA Domestic (28 May 1978), in FBIS-CHI 78–106 (1 June 1978), E1, E2.

107. See “ Cases of infringing on rights noted in Heilungkiang,” Harbin Heilungkiang Provincial Service (22 May 1978), in FBIS-CHI 78–106 (1 June 1978), L1. See also, e.g., “ District in Shensi improves public security work-style,” Sian Shensi Provincial Service (26 May 1978), in FBIS-CHI 78–106 (31 May 1978), M1, M2. Such accounts 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., “ Shanghai resumes open-court hearings after 10 years,” Peking NCNA (25 July 1978), FBIS-CHI 78–143 (25 July 1978), G5–G6. Sydney

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. Article 97 of 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." 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."

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>108</sup> After enactment of the 1954 Constitution a small amount of the annual national budget was set aside 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>109</sup> Yet this is plainly contradicted by information published in China, which reveals that erroneous criminal judgments were frequent.<sup>110</sup> Chairman Mao himself, in his famous 1957 speech on "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>111</sup>

The reasons why the constitutional guaranty to make compensation for state wrongs was rarely implemented seem 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,

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." Linda Mathews, "American reflects on his rise and fall in China," *Los Angeles Times*, 24 July 1978, pp. 1, 8.

108. Fukushima Masao, "Chinese legal affairs (second discussion)," in *Chūgoku no hō to shakai* (*Chinese Law and Society*) (Tokyo, 1960), p. 47, transl. in Cohen, *The Criminal Process in the People's Republic of China*, p. 583. For typical compensation cases, see Cohen, *ibid.* pp. 574, 584.

109. *Ibid.* p. 583.

110. See, e.g., Tung Pi-wu, "Adjudication work of the people's courts in the preceding year," *Hsin-hua pan-yüeh k'an* (*New China Semi-monthly*), No. 15 (1956), p. 10. 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* (13 July 1978), FBIS-CHI 78-137 (17 July 1978), E12, E13.

111. See the English translation reprinted in *Communist China 1955-1959, Policy Documents with Analysis* (Cambridge, Mass.: Harvard University Press, 1962), pp. 273, 290.

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, during the Hundred Flowers period Lo Lung-chi, one of the leading non-communist figures of the regime, suggested 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>112</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, 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 fulfil the promise of Article 97.

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 first sentence of old Article 97 almost verbatim, preserving the right to complain against a state official’s wrong.<sup>113</sup> But the second sentence, concerning the right to compensation, did not reappear. In its place was a provision to the effect that “ No one shall attempt to hinder or obstruct the making of such complaints or retaliate.”<sup>114</sup> Again we cannot be sure about the reasons for the change. The reappearance of the first sentence 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 re-endorsing the principle may have gone along with it in the belief that it could not cause

112. Quoted in Roderick MacFarquhar (ed.), *The Hundred Flowers Campaign and the Chinese Intellectuals* (London: Stevens and Sons, 1960), p. 48.

113. Article 27.

114. *Ibid.*

much difficulty in practice, despite the pious admonition against deterring such complaints contained in the new second sentence. 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 first sentence; 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 Constitution they devised a flexible and subtle solution, one that is progressive and yet does not oblige 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." 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") is more vague. 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 second sentence of Article 55 provides: "Citizens have the right to appeal to organs of state at any level against any infringement of their rights." 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, 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 militia, Red Guards, or Youth League or Party members even if they are not included within the ambit of the first sentence.

Secondly, this new provision, unlike its 1954 predecessor, 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 not mere technical change, because it permits individuals to obtain government remedies before serious harm has occurred, or at least before damage can be proved, or 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, Article 11 does provide that “[t]he state protects the environment and natural resources and prevents and eliminates pollution and other hazards to the public,” and an environmental right may develop through administrative or judicial decision or legislation; if so, individuals adversely affected by undue factory pollution may be able to obtain immediate relief without proving damage.

Finally, although Article 55 does not restore a right to compensation for harm suffered, 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 it 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. Restating the 1975 Constitution’s second sentence, Article 55 also forbids the suppression of complaints and appeals as well as retaliation against persons making them. And the entire article takes on somewhat greater credibility from the restoration of the procuracy, which is assigned the task of pursuing the kinds of problems covered by the article.

Events since the fall of the “gang of four” suggest that Article 55 is likely to prove of greater practical significance than its predecessor in enabling citizens to protect themselves against an all-powerful 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 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>115</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>116</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:

[T]hat 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, dependants 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>117</sup>

Not a day goes by without the announced rehabilitation of large numbers of persons who suffered from false charges, including Yang Hsiu-feng, the former Supreme Court president who was purged in 1967 as a member of an anti-Party group.<sup>118</sup> In effect, posthumous rehabilitation has become recognized as a human right, accompanied by proper funerals and reinterment, where necessary.

115. The quotation is from the *People's Daily* of 15 May 1978, as transl. in "Socialist legal system," *China News Analysis*, No. 1123 (16 June 1978), p. 4.

116. See *supra*, note 45 and "Party justice," *China News Analysis*, No. 1121 (2 June 1978), pp. 4-5.

117. "Shenyang, Fushun committees reverse wrong decisions," Shenyang Liaoning Provincial Service (28 May 1978), FBIS-CHI 78-107 (2 June 1978), L4, L5.

118. "Kyodo: former jurist, first secretaries reinstated," Tokyo Kyodo (28 February 1978), FBIS-CHI 78-40 (28 February 1978), D3. Yang was reinstated as an NPC delegate. There is no indication of his return to the judiciary.



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>119</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>120</sup> Whether the injustices suffered by "the broad masses," and especially those of the disfavoured 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 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>121</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>122</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>123</sup> 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>124</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, to the NPC."<sup>125</sup>

119. Chiang Hua, "To implement the new constitution,"

120. "Liaoning Daily on need to reverse incorrect verdicts," Shenyang Liaoning Provincial Service (28 May 1978), FBIS-CHI 78-106 (1 June 1978), L4, L5.

121. Article 3 (1978 Constitution).

122. Articles 21 and 35 (1978 Constitution).

123. Article 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 10th Party congresses. Under this arrangement, he stated, "the will of the electorate was not brought out, the deputies or delegates being appointed by the corresponding local agencies ('revolutionary committees' or Party committees) following consultations with the centre." See Gudoshnikov, "Two constitutions of the People's Republic of China," p. 73. See also Article 9 of the 1977 Party Constitution, *infra*, note 172, p. 20.

124. *Supra*, note 122.

125. Article 16 (1975 Constitution).

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>126</sup> The 1975 Constitution enlarged the categories of disfavoured 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>127</sup> a miscellaneous catch-all. Article 18 of the present constitution deprives the first three categories from 1975 of political rights, but treats "other bad elements" like other serious criminals rather than as members of a class. Although new Article 44 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."

### *1978 Version: Bill of Rights*

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 1975 and the 1978 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 considerable 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 guaranties 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 practice 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>128</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>129</sup> or with the Preamble, which makes it clear that

126. Article 19.

127. Article 14 (1975 Constitution).

128. Article 85.

129. Article 18 (1978 Constitution).

“ for the entire historical period of socialism ” there will continue to be “ class struggle ” under the dictatorship of the proletariat.<sup>130</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 the U.S.S.R. 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 guaranties of fair treatment for all citizens.<sup>131</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>132</sup>

In China for a long time to come some citizens are likely to be more equal than others, and the new constitution makes no bones about it. 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 revised constitution “ from such fallacies as Confucius’ ‘ benevolent government ’ or the Soviet revisionist renegade clique’s ‘ state of the whole people.’ ”<sup>133</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>134</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>135</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 evil-doers who have committed serious crimes and offences against the law

130. Preamble (1978 Constitution).

131. See Hazard, “ A soviet model for Marxian socialist constitutions,” p. 991, and Berman, *supra*, note 49, p. 90.

132. *Ibid.*; see also Gudoshnikov, “ Two constitutions of the People’s Republic of China,” p. 73.

133. Chang Ch’un-ch’iao, “ Report on the revision of the constitution,” p. 38.

134. Yeh Chien-ying, “ Report on the revision of the constitution,” pp. 200–201.

135. *Ibid.* p. 199, referring to Article 18 of the 1978 Constitution.

and discipline or disrupted public order in our socialist society belong to this new category. . . .”<sup>136</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>137</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 disfavoured. This seems to be why, in describing the disfavoured classes, the 1978 Constitution uses the phrase “who have not yet been reformed” rather than the phrase “for a specific period of time according to law” used by its predecessors.<sup>138</sup> Yeh explained that:

with 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>139</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 disfavoured groups neither the new constitution nor Yeh's report mentions “rightists,” the category that lent its name to the 1957–58 “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, shortly before the adoption of the new constitution the Party Central Committee issued a decree that granted a “general pardon” to most of the reportedly 130,000 remaining “rightists” and even banned the use of the term “rightist.” The people who have at long last been

136. *Ibid.* p. 199.

137. See, e.g. I Kuang, “Overcome subjectivist ideology, raise the quality of investigation of cases,” *Kuang-ming Daily*, 15 April 1957.

138. Compare Article 18 of the 1978 Constitution with Article 14 of the 1975 version and Article 19 of the 1954 version (the English translations of the same Chinese phrase in the two latter documents vary slightly – the quotation is from 1954).

139. Yeh Chien-ying, “Report on the revision of the constitution,” pp. 200–201. 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, and the translator chose the latter.

rehabilitated had suffered sanctions that included sentences to prison and labour camp, “non-criminal” confinement, probationary supervision and loss of employment, as well as stigmatization. They are now said to have been accepted back into normal social life and given employment. The removal of the rightist “cap” 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>140</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 anticipated 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>141</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>142</sup>

With respect to women, the new constitution for the first time adds to the continuing general principle that they enjoy equal rights with men the specific prescription that “[m]en and women enjoy equal pay for equal work.”<sup>143</sup> Similarly, just before the continuing provision that “[the] state protects marriage, the family, and the mother and child,” it stipulates, again for the first time, that “[m]en and women shall marry of their own free will,”<sup>144</sup> a principle laid down by the Marriage Law of 1950<sup>145</sup> but now given constitutional dignity. In view of the great pressure for late marriage, this latter addition is especially interesting; it is balanced by Article 53’s equally new assertion that “[t]he state advocates and encourages family planning.”

The “equality before the law” clause was not the only right prescribed in 1954 that, in the light of practice, the different draftsmen

140. See “Party to drop charges against 100,000 right-wingers,” Tokyo Kyodo (17 May 1978), in FBIS-CHI-78-96 (17 May 1978), E18–19. One of those who benefited from this measure is Lo Lung-chi, quoted in the text *supra* at note 112.

141. Yeh Chien-ying, “Report on the revision of the constitution,” p. 201.

142. Compare Article 4 of the 1978 Constitution and Article 3 of the 1954 Constitution with Article 3 of the 1975 document, which lacks the two quoted passages.

143. Article 53.

144. *Ibid.*

145. See Articles 1 and 3 of the Marriage Law of the People’s Republic, promulgated 1 May 1950. An English translation can be found in Blaustein, *Fundamental Legal Documents of Communist China*, pp. 266, 267.

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>146</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>147</sup> Since 1968 it has also employed all the mass mobilization techniques at its command to pressure well over 12 million "educated youth" to leave the cities for careers in the countryside.<sup>148</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>149</sup> Here we should note that, while the 1954 Constitution provided that the "privacy of correspondence is protected by law," both of its successors merely list freedom of correspondence as one of the freedoms enjoyed by citizens, without specifying its nature.<sup>150</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 – despite the almost total suppression of formal religious worship – they strike a more realistic note by adding the phrase "and freedom not to believe in religion and to propagate atheism."<sup>151</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,

146. Article 90 (1954 Constitution).

147. See, e.g., "Instructions of the Central Committee of the Chinese Communist Party and the State Council of the PRC relating to checking the blind outflow of people from rural villages (18 December 1957)," partially transl. in Cohen, *The Criminal Process in the PRC*, p. 287.

148. See Thomas P. Bernstein, "Urban youth in the countryside: problems of adaptation and remedies," *CQ*, No. 69 (March 1977), p. 75.

149. Recall text discussion beginning at note 113.

150. Compare Article 90 of the 1954 Constitution with Article 28 of the 1975 version and Article 45 of 1978.

151. Compare Article 88 of the 1954 version with Article 28 of 1975 and Article 46 of 1978. The latter version is similar to Article 52 of the 1977 U.S.S.R. Constitution and its 1936 predecessor.

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>152</sup> One of the major unresolved puzzles of Chinese constitutionalism is to ascertain why these freedoms continue to be asserted when to do so flies in the face of the everyday experience of the Chinese people. Would elimination of these guaranties risk too great a propaganda attack abroad? Would it doom to failure the Party's spasmodic efforts to win the loyalty of China's intellectuals, 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 labour unrest did much to undermine China's production in 1974-76, 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 labour 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>153</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>154</sup> This made it very difficult in 1978 for Hua Kuo-feng to challenge, because Hua's legitimacy as Party chairman rests upon his alleged annointment 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. This is not our purpose. We advocate fighting against bureaucracy. We promote the use of criticism

152. Article 87 (1954 Constitution); Article 28 (1975 Constitution); Article 45 (1978 Constitution).

153. Article 28 of the 1975 Constitution established the right to strike.

154. Chang Ch'un-ch'iao, "Report on the revision of the constitution," pp. 39-40.

among people to solve problems. Is the strike a sort of struggle? Yes, it is. When the use of struggle by criticism cannot solve the problem, we must allow the strike to be used.<sup>155</sup>

Apparently in order to avoid inconsistency with the right to strike, the 1975 Constitution, unlike the 1954 version,<sup>156</sup> did not declare that citizens have a duty to observe labour 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>157</sup> they balanced it by reviving the earlier duty of citizens to maintain labour discipline and protect public property, observe public order and respect social ethics.<sup>158</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>159</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>160</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."

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 practised in the late 1950s during the anti-rightist campaign, the Great Leap Forward and the movement to establish people's communes, and that were perfected during the Cultural Revolution. Despite its use of words that suggest similarities to conventional freedoms, Article 13 made it clear that it was designed not to protect individual expression as much as to

155. Quoted in *Mao Tse-tung ssu-hsiang wan-sui (Long Live Mao Tse-tung's Thought)* (Taiwan: reprint, n.p., preface dated August 1969), p. 93.

156. Article 100 of the 1954 Constitution had required citizens not only to uphold labour discipline but also to abide by the constitution and the law, keep public order and respect social ethics.

157. Article 45 (1978 Constitution).

158. Article 57 (1978 Constitution). Article 101 of the 1954 Constitution had established the duty of every citizen to protect public property.

159. Yeh Chien-ying, "Report on the revision of the constitution," p. 191.

160. See Article 45 (1978 Constitution).



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 practised 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>161</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 many persons confused the two different types of contradictions and that "it is sometimes easy to confuse them."<sup>162</sup> Even loyal Party leaders – not to mention ordinary Party members – 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>163</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 – now that they are in power – 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 favour with the new leaders to serve the purposes of those leaders.

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>164</sup>

161. Yeh Chien-ying, "Report on the revision of the constitution," p. 216.

162. *Communist China 1955–1959*, p. 279.

163. Yeh Chien-ying, "Report on the revision of the constitution," p. 198.

164. Article 52.

The identical 1954 provision <sup>165</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-round 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 labour. <sup>166</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 it clear that this seemingly absolute freedom is to be enjoyed only by those who observe "the six political criteria" <sup>167</sup> – a short-hand reference to Mao's famous 1957 speech that, at least in the form in which it was ultimately published at the end of the Hundred Flowers period, authorized only words and deeds that help to unite people rather than divide them; that are beneficial and not harmful to socialist transformation and construction, and to international socialist unity and the unity of peace-loving peoples; and that help to strengthen and not weaken the people's democratic dictatorship, democratic centralism and the Party leadership. <sup>168</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>169</sup>

Yeh's invocation of Mao's six criteria makes the difference between the radicals' formulation and the current 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 1966–76. Just as the Party line during 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

165. Article 95.

166. Article 12.

167. Yeh Chien-ying, "Report on the revision of the constitution," p. 211.

168. For translation of the relevant passage of Mao's speech, see *Communist China 1955–1959*, p. 290.

169. Yeh Chien-ying, "Report on the revision of the constitution," pp. 211–12.

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 when the 1975 Constitution was adopted and has returned to many of the 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 that 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>170</sup>

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

170. *Ibid.* p. 179.

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 – and some authoritarian non-communist states as well – 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>171</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 NPC, 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 Committee.<sup>172</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, although more significant than the 1975 Constitution of the People's

171. See Karl Loewenstein, "Reflections on the value of constitutions in our revolutionary age," in Arnold J. Zurcher (ed.), *Constitutions and Constitutional Trends since World War II* (New York: New York University Press, 1951), pp. 191, 193, 204.

172. See especially Chs. 2 and 3 of the "Constitution of the Communist Party of China," adopted by the 11th National Party Congress, 18 August 1977, English translation in *Peking Review*, No. 36 (2 September 1977), pp. 16–22. For a fascinating, ground-breaking study of Politburo processes, see Kenneth Lieberthal, *Central Documents and Politburo Politics in China* (Ann Arbor: University of Michigan Center for Chinese Studies, 1978).

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 in recent years legislative bodies have begun to play an increasingly important role in the political system, 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 1930s and 1940s, 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 practise parliamentary democracy. 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 provisions that were inconvenient to unfettered rule.

Mao justified an era of communist "dictatorship of the proletariat" as a temporary necessity until the people are ready to practise 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 sceptical 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 ever 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 20th-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.

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>173</sup> Endowing them with constitutional 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>174</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 fulfil their ambition to make China a modern, powerful industrial state. So long as fear of arbitrary action persists, and Peking media concede that fear has been rampant for years, 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

173. See, e.g., "Peking wall posters appeal cases to authorities," Paris AFP (21 April 1978), FBIS-CHI 78-79 (24 April 1978), F19.

174. See J. A. Cohen, "Will China have a formal legal system?", *American Bar Association Journal*, Vol. 64 (October 1978).

other western constitutional values such as representative democracy and full freedoms of political expression may not.<sup>175</sup>

To be sure, it was easier to adopt an optimistic perspective during the original constitutional era of 1954–57, especially during the Hundred Flowers period when frequent invocation and elucidation of constitutional 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.

175. See J. A. Cohen, "Due process in China?" in Ross Terrill (ed.), *The China Difference* [New York: Harper & Row, (forthcoming)]; and Cohen, "Human rights in China," *Washington Post* (23 April 1978), p. D2.