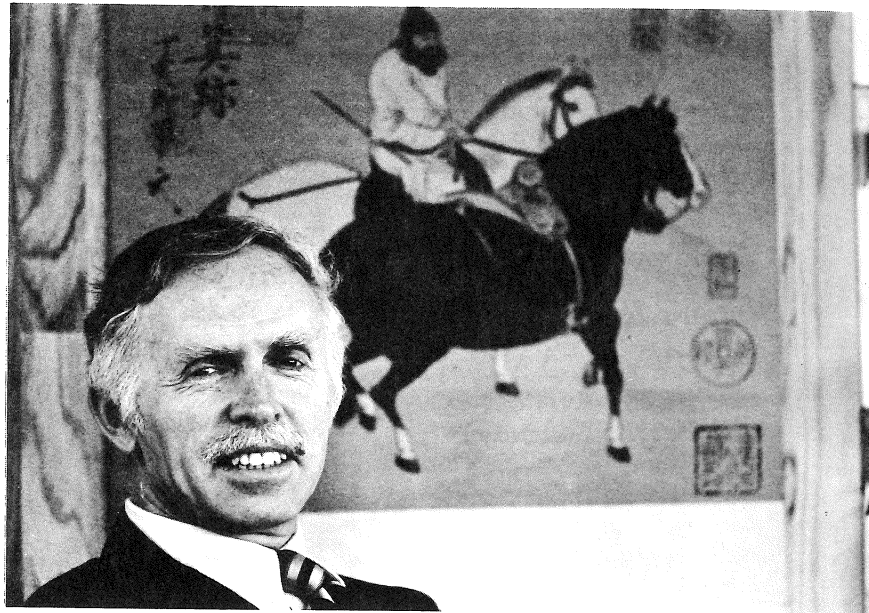


Due Process?

JEROME ALAN COHEN



*Jerome A. Cohen puts a lawyer's finger to the pulse of China after thirty years of Marxist rule. Believing passionately in the importance of law to human welfare, he inquires into the relationship of the individual to the state in China. Dismissing the cultural relativists, Cohen asserts that "due process" is a measure of the health of any society. He applies it as a lens to Chinese theory and practice in a most illuminating way. We are given the best analysis to date of the 1978 constitution of the PRC, and of other recent legal developments. Cohen offers some reason for hope about the future of due process, but plenty for caution as well.*

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—R.T.

Once a head is chopped off, history shows that it can't be restored, nor can it grow again, as chives do, after being cut. If you cut off a head by mistake, there is no way to rectify the mistake, even if you want to.

—Mao Tse-tung

Do Chinese care about "due process of law"? Is it a matter of indifference to citizens of the People's Republic if their government arbitrarily arrests, imprisons, tortures, or executes them? If officials, scientists, teachers, or workers are stigmatized and deprived of their jobs without notice of charges, opportunity to defend against them, or review of the decision, do they feel a sense of injustice? Does the Chinese government claim the power to take such actions? What does it do in fact?

The current concern over "human rights" embraces many aspects of the individual's relation to the state. Whether every government—regardless of its country's history, traditions, socioeconomic circumstances, political system, or ideology—has an obligation to provide its people with minimum economic, social, and educational benefits and allow basic freedoms of expression are much-mooted questions. Yet the very nub of what Americans ordinarily mean when they resort to the shorthand phrase "human rights" is the set of values that has slowly evolved in the West over two millennia—those elements of fundamental fairness that the state is expected to observe prior to inflicting serious harm upon individuals and groups.

Some American specialists on China have claimed that such due process values, as we call them, are irrelevant to China. Their argument is one of extreme cultural and political relativism.\* The Chinese, we are told, are completely different from all other peoples, except from those on their periphery—in Korea, Vietnam, and Japan—whom they profoundly influenced through the reach of Confucian civilization. Traditional China, it is said, emphasized not law but morality, not rights but duties, not the individual but the group. Moreover, the argument contin-

\*Readers of this volume may detect a modified version of the argument in the essays of Fairbank and Li.—R.T.

ues, given the impoverished circumstances of the world's largest population, contemporary China's rulers have had to choose between assuring survival through economic development and recognizing individual human rights, and not surprisingly they have opted for survival. Happily, it is said, this choice has won the natural acceptance of a collectivist-minded people who never experienced Roman law, Magna Carta, and the English, American, or French revolutions that emphasized the rights of man. They do not miss what they never had. Thus, the conclusion emerges, it would be dangerously self-righteous demagoguery—indeed, cultural imperialism—to suggest that Chinese, like other people, might wish their government to observe minimum standards of fundamental decency in dealing with them.

Is this argument correct? No question could be more pertinent to understanding China today. It has been widely discussed in the wake of the overthrow of the Gang of Four, and in the course of the adoption of a new Chinese constitution in 1978. One of the most striking attributes of this constitution is its attempt to symbolize renewed government respect for some of the values embraced by our phrase, "due process."

Among the new charter's most significant changes is its restoration of the procuracy as an organ of government. According to the constitutional system established in 1954 under Soviet influence, the procuracy was charged with responsibility not only for prosecuting criminal cases but also for overseeing the legality of the conduct of all government officials, as well as ordinary citizens. During the "anti-rightist" campaign of 1957–58, the procuracy was severely attacked for repeatedly refusing to approve arrest warrants and prosecutions sought by the police. Procurators were accused of maintaining a "favor the defendant" mentality by ordering the release of detained persons on a variety of technical grounds: that the action in question did not amount to a completed crime, or that it was not committed with the required intent, or that it had not resulted in serious consequences. Like the courts, the procuracy was subsequently subjected to closer control both by the police and the Communist Party apparatus. The Cultural Revolution of 1966–69 witnessed an even graver onslaught upon all three of the political-legal organizations—the police, the procuracy, and the courts—and upon the Party itself. Each of the organizations was crippled, but only the procuracy was abolished. The 1975 constitution, which was a compromise between the so-called moderates who now rule China and the so-called radicals later branded as the "Gang of Four," formalized the demise of the procuracy and allocated its functions to the police.

The elimination of the procuracy left the police to investigate the legality of their own conduct, an inadequate safeguard in any society. Moreover, no longer were the police required to obtain approval of an

external agency—either procuracy or court—before formally arresting a suspect; under the 1975 constitution they could simply decide on their own, thereby rendering hollow that document's continuing guaranty of the personal freedom of citizens. The restoration of the procuracy in 1978 put an end to the unfettered arrest power of the police because the new constitution also reinstated the 1954 constitution's requirement that they obtain approval of the procuracy (or the court) prior to making a formal arrest.

In his March 1978 Report on the Revision of the Constitution, Yeh Chien-ying, chairman of the standing committee of the National People's Congress, made clear the significance of the procuracy's revival, which he attributed to "the extreme importance of fighting against violations of the law and discipline." He admonished Party and government officials that it was strictly forbidden to confine people arbitrarily. "Detention and arrests must follow legal procedures and the system of checking and approval must be strictly observed in this regard," he said.

The 1978 constitution also made potentially major changes concerning the trial of an accused. The 1975 constitution had omitted from its truncated section on the judiciary virtually all of the protections granted an accused by its 1954 predecessor. The 1978 constitution reestablished several of these. The most fundamental provides that "the accused has the right to defense"—a proposition so elemental that one might have thought it impossible to eliminate from any legal system. In addition, "all cases in the people's courts are to be heard in public except those involving special circumstances, as prescribed by law." Not only are cases ordinarily to be tried in public, but representatives of the masses are to participate in such trials as assessors, joining a full-time judge in administering justice.

Although Yeh Chien-ying's report did not tell us how, in light of these specific changes, trials are to be conducted, it did emphasize the importance of carefully investigating, analyzing, and weighing the evidence. And it prohibited extracting confessions from an accused through compulsion and relying on any coerced confession as proof.

Yeh linked the abuses of the Gang of Four to this renewed interest in institutional and procedural protections for accused. According to his report, the Gang raved about smashing the three political-legal organizations, and "put their words into action, seriously undermining the state apparatus of the dictatorship of the proletariat. They went so far as to exercise dictatorship within the Party and the ranks of the people."

During the period between the overthrow of the Gang in October 1976 and promulgation of the new constitution in March 1978, Party propagandists had spelled out many accusations of the Gang's violations of individual rights. For example, in recounting how the deposed leaders

allegedly sought to conceal their criminal past, editorial writers claimed that: "They also sent people disguised as Red Guards to ransack the homes of those in the know and even had them arrested on trumped-up charges, kept them in jail for a long time and cruelly persecuted them to the point of murder to prevent divulgence of their secrets." Party officials arranged for a famous opera star—a member of the National People's Congress—to tell visiting American journalists how the Gang detained her incommunicado for three years of political investigation, subjecting her to the psychological intimidation of "struggle sessions" and middle-of-the-night interrogations that coerced her false confession. And personnel of the Supreme People's Court charged that the four "privately set up the 'Gang's' law, arrested and imprisoned people freely, conducted private trials, treated human life as no more than grass, provoked struggle by force and practiced fascist terrorism." The Gang, it is alleged, sought to usurp the state's judicial powers by replacing the courts with their own institutions.

The currently voiced concern in China for the return of "socialist legality" reflects more than abuses of the criminal process, horrendous as they apparently were. Statistically even more numerous were administrative sanctions that apparently resulted in loss of employment and reputation for hundreds of thousands of officials, scientists, technicians, and teachers. As the time-consuming task of restoring these victims to their jobs and reputations proceeds, the media repeatedly lecture both the bureaucracy and the public on the evils of relying on hearsay, speculation, false testimony, and coerced confessions.

To those of us who hope for the growth of due process values in China, events since the downfall of the Gang of Four have, on the whole, been rather encouraging. But how far will the trend go and how significant is it likely to be? On the basis of almost three decades' experience since the founding of the PRC in 1949, a healthy skepticism would seem our best attitude.

First of all, one has to recognize that the constitutional changes recited above may simply remain paper reforms. In 1978 the Party has been much slower than in 1954 to mobilize an effective national campaign for the study and implementation of the constitution. Second, even if a sustained effort is made to implement the changes, these provisions are likely to be interpreted as they were during the period 1954–57, the previous era when socialist legality was China's goal. At that time the police frequently circumvented the law that required them to seek the procuracy's approval of an arrest shortly after a suspect was detained. To the extent that the public trial ordinarily guaranteed an accused actually took place, guilt or innocence was not genuinely an issue; the proceedings merely rehearsed the record compiled during

the often lengthy pre-trial investigation and interrogation process and, at most, the sole question in controversy was the precise sentence to be meted out. The people's assessors, who were supposed to decide the case together with a judge, were generally mere ornaments to the proceedings; and the right to make a defense meant that the accused, who invariably confessed, could plead mitigating circumstances in an attempt to reduce the severity of his sentence. Indeed, in June 1978 I witnessed precisely such a criminal trial in Shanghai.

It is important to note that the 1978 constitution did not bring back all of the 1954 constitution's provisions bearing upon the criminal process. Most obvious is its failure to reincorporate Article 78, which stated that in adjudicating cases the courts were to be independent and subject only to the law. During the mid-fifties that principle had been invoked by certain judges and scholars in an unsuccessful effort to free the courts from Party control of their decision making in specific cases. The "anti-rightist" movement of 1957–58, however, left no doubt that the demands of legal professionalism had to yield to those of the political struggle. And the 1978 constitution made no change in this position, treating the judiciary as simply one of a number of state agencies under the supposedly all-powerful National People's Congress. Moreover, unlike the 1954 constitution, it identified the Party as "the core of leadership of the whole Chinese people" and the vanguard that exercises leadership over the state in behalf of the working class. This is the significance of Yeh Chien-ying's call for strengthening the unified leadership of the Party over the courts as well as the police and procuracy.

The new constitution did not reassert the 1954 constitution's promise that citizens "are equal before the law." Legislation had spelled out the meaning of this principle by stating: "In the adjudication of cases by people's courts, the law shall be applied uniformly to all citizens irrespective of their nationality, race, sex, occupation, social origin, religious belief, level of education, property status, or duration of residence." Until 1957, at times when the masses were not being mobilized in one campaign or another, Chinese commentators occasionally admonished law-enforcement officials to overcome the "subjectivism" revealed by their tendency to detain and convict suspects largely because of their "bad" class background. But, as in the case of judicial independence, the anti-rightist movement witnessed the repudiation of the principle of equality before the law, in both theory and practice, and no mention was made of it in either the 1975 or 1978 constitutions.

It is common ground between the Gang of Four and their captors that, following the Maoist line, the dictatorship of the proletariat means dictatorship over "the enemy" and democratic centralism within the ranks of "the people." Both groups thereby invoke Mao's famous distinction be-

tween the two kinds of contradictions: those "between the enemy and ourselves" and those "within the people." This basic dichotomy has been taught to every criminal justice administrator, although there has been considerable debate over how to determine whether a suspect should fall into one category or the other, and what are the specific implications of the categorization.

In some cases, of course, it is easy to determine, without regard to a suspect's class status, that a given act reveals "a contradiction between the enemy and ourselves" and deserves severe punishment. If, for example, an individual assassinated an important official while shouting "Down with communism!" there would be no difficulty, whatever his class status, in convicting him of the crime of counterrevolution and sentencing him to the death penalty. But many cases are not so simple. If a peasant is caught stealing a few bowls of rice from a commune granary, the authorities may be puzzled. Should he be treated as an enemy or a member of the people, and with what consequence? Although other factors are also considered, in such cases the suspect's class status often proves decisive. If he is classified as a "poor peasant," he may simply be released after some private criticism-education or criticism and self-criticism before members of his production team. If he has "landlord" or "rich peasant" status, however, he may be prosecuted and sentenced to five years of reform through labor for the counterrevolutionary crime of sabotaging socialist production. Because he is a member of one of the "reactionary classes," evil intent can be attributed to him, even though he may actually have been motivated by hunger. Surely there is at least a presumption to be overcome.

These class labels were attached to everyone in the nation at the time of the Communist takeover a generation ago. They do not connote any current economic status in an economy that has been collectivized for two decades, and are often inherited by children and even grandchildren. Actually, the labels have not remained constant. The constitutional definition of reactionary classes has expanded over the years. The 1954 constitution listed "feudal landlords" and "bureaucrat capitalists" as the only politically disfavored classes; but both the 1975 and 1978 constitutions, reflecting the intervening theory and practice, refer to all landlords, add the category of "rich peasants," substitute the broader term "reactionary capitalists" for "bureaucrat capitalists," and then add, as a catch-all, "other bad elements."

The category of "bad elements" is not a class at all but a hotchpotch of miscellaneous offenders. In a famous 1957 speech "On the Correct Handling of Contradictions Among the People," Mao made clear that "bad elements," like counterrevolutionaries, were to be lumped with "the enemy" and treated as objects of the dictatorship of the proletariat. He stated: "In order to protect the social order and the interests of the

vast [number of] people, it is also necessary to put dictatorship into effect over robbers, swindlers, murderer-arsonists, hooligan groups, and all kinds of bad elements who seriously undermine social order."

Mao conceded that many people confused the two different types of contradictions, and he admitted that "it is sometimes easy to confuse them," and that "[i]n the work of liquidating counterrevolutionaries, good people were mistaken for bad." He went on to say that "such things have happened before and still happen today. We have been able to keep our mistakes within bounds because it has been our policy to prescribe that there must be a clear distinction between the enemy and us and to prescribe that mistakes should be rectified."

The challenge of keeping mistakes within bounds persists. This is why the Preamble to both the 1975 constitution and its successor emphasized the importance of correctly distinguishing and handling the two kinds of contradictions. As we have seen, the Gang of Four itself went "so far as to exercise dictatorship within the Party and the ranks of the people." Its successors seem well aware that they would risk endangering their society if they allowed unrestrained use of the criminal law as an instrument of the political warfare called "class struggle." Yet they believe that it would be premature to follow the Soviet example by announcing an end to class struggle, especially in view of the present ever more intense contest for power in Peking and the purges that this periodically generates at every level of government.

In one sense the 1978 constitution even compounds the problems of keeping mistakes within bounds; for, in what Yeh Chien-ying calls "an important change," it adds yet another category of targets to "the enemy." These are the so-called newborn bourgeois elements, who have been singled out, Yeh notes, "in conformity with the present situation of the class struggle in our country." Yeh's definition of this term may elude some officials, for he states that:

It refers to those newly emerged elements who resist socialist revolution, disrupt socialist construction, gravely undermine socialist public ownership, appropriate social property or violate the criminal law. Not a few of the embezzlers, thieves, speculators, swindlers, murderers, arsonists, gangsters, smash-and-grabbers, and other evildoers who have committed serious crimes and offenses against the law and discipline or disrupted public order in our own society belong to this category of newborn bourgeois elements. . . . To exercise dictatorship over them is very necessary.

It should be pointed out that Yeh did not content himself with adding to the disfavored categories, but also stressed the possibility of restoring to the ranks of "the people" those who have reformed. He stated that:

[W]ith regard to those who after remoulding and education have really behaved well, we should remove their labels as landlords, rich peasants, counter-revolutionaries or bad elements and give them citizenship rights with the consent of the masses on the basis of public appraisal and approval by a revolutionary committee at the county level.

It was subsequently reported that some 100,000 persons who were declared "rightists" in 1957-58 have had their "caps" removed. There have also been reports of recent efforts to curb discrimination against the children and grandchildren of individuals who retain "bad" labels, a policy endorsed by the *People's Daily* itself.

Surely the growth of due process values will be deterred by the Party's continuing insistence on political control of judicial decision making and harsher treatment of disfavored groups. Yet some progress is taking place, and more appears to be on the way. Yeh Chien-ying's report announced that "[i]n accordance with the new Constitution we shall revise and enact other laws and decrees, as well as rules and regulations for the various fields of work." The Gang of Four has been repeatedly denounced for inciting anarchism and slandering all laws, rules, and regulations as revisionist and capitalist. It is clear that efforts are taking place to "strengthen the socialist legal system," as editorial writers frequently exhort. The director of the Institute of Legal Science within the new Academy of Social Sciences has announced that codes of criminal and civil law and procedure, as well as economic legislation, will actually be promulgated before long. Moreover, summaries of judicial decisions are being edited for publication in order to provide further guidance for both officials and the public.

For the Party, of course, the advantage of a better articulated set of laws is that it will provide, as Yeh put it, "a deterrent to, and a restraining force upon, law-breakers and offenders; for enemies who sabotage socialist revolution and construction it is a merciless iron fist; but for the masses of the people it is a code of conduct which they voluntarily observe." Yet the nationwide campaign to publicize the constitution and educate the people about law for which Yeh called—and the development of the habit of rule-following it may produce—may reinforce the ferment that already exists over the importance of government itself observing the law and adhering to notions of fundamental fairness. This in turn may stimulate demands for further reforms.

Support for such a trend may come from other sources. Legal education, which ceased during the Cultural Revolution and has been hobbled since its resumption in the early seventies, has taken on new life at Peking University. Legal research—in virtual abeyance since 1966 and seriously restricted prior to the Cultural Revolution—is reportedly resuming.

Criminal law and procedure and constitutional law are said to be among the subjects that will be pursued at the graduate level under the auspices of the new Academy of Social Sciences. In the mid-fifties some legal scholars and legal officials vainly advocated interpretations that would have transformed a variety of vague constitutional provisions into due process safeguards. And many bureaucrats who had been trained to apply the rules and procedures established by the regime opposed the efforts of the more Maoist-minded to eliminate the restraints of the system; this in turn produced much of the frustration that the radicals vented on the procuracy, the courts, and even on important elements within the police.

It is possible that the PRC may eventually reintroduce "people's lawyers," as one member of the National People's Congress privately predicted in mid-1977. During the period of law reform that began with the 1954 constitution and ended with the anti-rightist campaign, "offices for legal advice" were established in large and medium-sized cities, and their lawyers—successors to the bourgeois lawyers whose functions had been abolished after the Communist takeover—played a role in both criminal and civil cases. To be sure, they were only called into a relatively small number of criminal cases, and then only after the pre-trial investigation and interrogation of the accused had been completed. Furthermore, their courtroom duties were usually confined to pleading mitigating circumstances in an effort to obtain a lenient sentence. But the participation of these lawyers seems to have provided an additional stimulus to the government to observe its own rules and muster sufficient evidence to justify conviction of the accused under the charges lodged. Those Party leaders who presided over the introduction of a Soviet-style legal system into China in the mid-fifties—and Teng Hsiao-p'ing, perhaps the most powerful current leader, was prominent among them—permitted explanations to be published, for the benefit of other Party leaders and the public, concerning the necessity for a Communist government to employ lawyers, who are often thought to be a bourgeois excrescence. That this educational effort failed became clear when the "offices for legal advice" fell casualty to the anti-rightist campaign, long before the procuracy was abolished.

For two decades China, a country of almost 1 billion people, has had no organized legal profession. After the demise of "people's lawyers," Peking claimed that they had been unpopular, a claim that contradicts the earlier propaganda in their behalf. In any event, it is said that they became unneeded as the populace became better educated and therefore able to handle its own legal problems. The return of the lawyers would be an important signal that Party leaders were preparing to take another step in the direction of legality.

Other potential sources of due process values are the systems devised

for disciplining Party members and government functionaries. Once the current preoccupation with "reversing the wrong verdicts" has passed, to what extent will the treatment of the country's elite continue to set standards of fundamental fairness that may eventually be applied to the imposition of sanctions against ordinary people, if not disfavored elements? The 1977 Party constitution, for example, reviving a provision of its 1956 predecessor that had been omitted by the 1973 version, states:

When a Party organization takes a decision on a disciplinary measure against a member, it must, barring special circumstances, notify the member that he or she should attend the meeting. If the member disagrees with the decision, he or she may ask for a review of the case and has the right to appeal to higher Party committees, up to and including the Central Committee.

The 1956 law regulating dispensation of disciplinary sanctions against state employees, which has presumably been revived by the current government, similarly required that, before the imposition of serious sanctions, the official must receive notice of the charges, a hearing before the decision-making unit, and an opportunity to review the decision.

If these standards are consistently observed in practice, it is possible that, when members of the elite impose sanctions of equal or greater severity upon other people, they may see the need for granting them similar procedural protections. Surely such niceties would be appreciated not only by those enmeshed in the criminal process but also by those against whom nominally noncriminal, yet severely punitive, sanctions are applied. Many of the hundreds of thousands or millions who have suffered "rehabilitation through labor," which consists of long confinement in a labor camp in conditions not substantially very different from those suffered by convicted criminals, received no notice of any charges, no hearing, and no chance for appeal. The same is true of the far larger number who have received the equally stigmatizing but generally less severe "supervised labor," which does not separate the recipient from society but keeps him or her employed for an indefinite term under restrictions far more stringent than those applicable to criminals on parole or probation in the United States. If the Party's current concern for applying strict standards of proof prior to imposing criminal or administrative sanctions reaches these two major categories of "noncriminal" cases, this will constitute a major reform; for more offenders are undoubtedly dealt with by means of these categories than through the criminal process, and in some periods they have assumed far greater importance than criminal sanctions.

Some of the stimuli for due process reforms comes from abroad. The fact that the PRC is now represented in the United Nations means that it is caught up in the slow but inexorable multilateral efforts to formulate international legal norms to regulate nation-states' treatment of their own nationals. Because it has long opposed UN invocation of "human rights" as a means of influencing China's domestic affairs, even while appreciating the opportunities that this vehicle offers for influencing the domestic affairs of other states, the PRC has attempted to tread carefully in what is becoming a legal minefield.

Peking has not directly criticized the UN General Assembly's Universal Declaration of Human Rights, which proclaims, "as a common standard of achievement for . . . all nations," principles including equality before the law, the right to an effective judicial remedy for violation of one's legal rights, freedom from arbitrary arrest and detention, the presumption of innocence, and the right to defend oneself against criminal charges in a fair and public trial by an independent and impartial tribunal. Yet the PRC has never endorsed the Declaration, despite the fact that the PRC has accused the colonial and racist regimes of southern Africa of violating it. Peking's pretext for failing to endorse it is that, because the Republic of China had participated in its adoption, the PRC "reserved its right to comment on that Declaration." The real reason, plainly enough, is the inconsistency between the Declaration's content and the norms applied by the PRC at home. For the same reason Peking has failed to comment on the International Convention on Civil and Political Rights, which goes beyond the Declaration in spelling out Western-style procedural guarantees.

Although the PRC has not chosen to sit in the UN Commission on Human Rights, it is represented in both the Commission's parent body, the Economic and Social Council, and the Social, Humanitarian and Cultural Committee of the General Assembly, as well as in the Assembly itself. Thus it has had to react to various human rights proposals that have come before these bodies. Apart from questions of colonialism and apartheid, Peking generally prefers to abstain or not even participate in the voting and to be as silent as possible. For example, it appears to have purposely absented itself from the Assembly's 1976 vote on a resolution concerning the protection of human rights in Chile.

Nevertheless, it has voted for Assembly resolutions that condemn torture on the basis of the Universal Declaration, the International Covenant on Civil and Political Rights, and other internationally articulated standards. Yet the PRC has opposed most Assembly efforts to call upon states to: report laws and administrative and judicial measures that prohibit torture; give urgent attention to developing an international code of ethics for law-enforcement agencies; and approve the Standard Minimum Rules for the Treatment of Prisoners adopted by the First UN Congress on the Prevention of Crimes and the Treatment of Offenders, which

guarantees an accused the presumption of innocence, the right to be informed of the charges, and a proper opportunity to make a defense.

The PRC did not object to the Assembly's adoption by acclamation of the "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," even though that Declaration called upon states to: provide appropriate training for law-enforcement personnel; undertake systematic review of interrogation practices; make criminal all acts of torture; and establish complaint and disciplinary procedures. It is not clear whether the PRC voted favorably or merely abstained regarding an Assembly resolution entitled "Human Rights in the Administration of Justice," but in committee Peking approved a draft version of the resolution despite the fact that it indirectly called on states to consider, when formulating national legislation, draft principles that are completely at odds with those endorsed in China, such as an independent judiciary, access to legal counsel, and a privilege against self-incrimination.

It is difficult to reconcile the PRC's actions on these last two resolutions with its general sensitivity about international interference in China's domestic affairs. To be sure, PRC scholars have long maintained that General Assembly resolutions are not legally binding but merely recommendatory. Yet this has not prevented the PRC from opposing or not taking a position on other resolutions that endorse principles contrary to those prevailing in China. It is possible to explain Peking's support for simple anti-torture resolutions on the ground that their provisions are not inconsistent with the norms of China's criminal process, which explicitly ban torture. But this cannot explain Peking's acquiescence in those parts of the 1975 Declaration that go beyond condemnation of torture, and surely the administration of justice resolution is at odds with the PRC's domestic system. Perhaps China did not wish to appear to be the only country unprepared to endorse these humanitarian standards. Whatever the explanation, enough has been said to suggest that the People's Republic is now enmeshed in a complex web of international negotiations that should heighten its sensitivity to the criminal process and add to the pressures favoring increased protections for the individual.

Perhaps even more of a prod than the relatively unpublicized international legislative process is the intense, unremitting propaganda war in which the PRC is engaged on two fronts. Peking's rivals in Taipei and Moscow, although conscious that "human rights" is a two-edged sword that can be turned against them as well, have sought political advantage by enhancing foreign interest in the situation on the mainland. ROC propagandists never lose an opportunity to charge PRC leaders with having "wrongly imprisoned, tortured and killed millions of their own

people," and having failed to enact codes of criminal law and procedure. Taipei also injected this "human rights" question into the American debate over whether the United States should establish formal diplomatic relations with the PRC. Many American opponents of normalization stressed the lack of due process and free expression in China. Even some proponents of normalization stated that those Americans who favor making human rights an important component of U.S. foreign policy have no reason to support normalization. Certain other proponents argued that human rights should not enter into any discussion of normalization.

Ever since 1964 the U.S.S.R. has been openly critical of the PRC's departure from the Soviet model of socialist legality. Commentators in Moscow had a field day ridiculing the excesses of the Cultural Revolution and the lack of formal protections in the 1975 constitution. And after the fall of the Gang of Four, they claimed that, in order to eliminate its pernicious influence, China's new leaders "adopted methods used by the Gang of Four." According to Moscow Radio, beamed to China in Mandarin, "many people have been executed and detained" and "[t]he public security organs are running rampant everywhere," extracting coerced confessions and creating frameups, even while the new leaders are condemning the Gang of Four for such practices.

More objective works circulating in the West, such as the publications of Simon Leys, Jean Pasqualini's *Prisoner of Mao*, Chen Jo-hsi's *The Execution of Mayor Yin*, and Ross Munro's widely read series on human rights in the Toronto *Globe and Mail* and other papers,\* have begun to put the People's Republic on the defensive.

Peking has sought to deflect the increasing foreign interest in human rights in China by a variety of techniques. One is to denounce "the so-called 'human rights' issue" as "nothing more than a hypocritical farce" staged by the rival superpowers, "a regular slanging match with each letting the other's skeleton out of the closet." A second is to claim that China "is the country where human rights are best observed," that more than 95 percent of the Chinese people enjoy them, and that the rest can also, "if they are receptive to reeducation."

China's third technique is more to the point for our purposes. This is to divert attention by indicting the U.S.S.R.—in domestic Chinese newspapers and radio broadcasts as well as foreign-language media—for imposing "a police tyranny" and "inquisitorial persecution" that "can arbitrarily take people into custody and interrogate them for long periods, and use chains, handcuffs, or even guns to suppress those who dare

\*See also Jerome A. Cohen, "Human Rights in China," *Washington Post*, April 23, 1978, and Susan Shirk, "Human Rights: What About China?" *Foreign Policy* (Winter 1977-78).



resist"; for frequently confining political dissenters in mental hospitals, isolating them, and depriving them of all rights including an open trial; and for maintaining more than 1 million other prisoners in over 1,000 labor camps, where they are said to be tortured and inhumanely treated in a manner reminiscent of Hitler's concentration camps.

What do Chinese think when they hear and read such accusations against the U.S.S.R.? Do they think, as PRC propaganda suggests they should, that in the U.S.S.R. not merely intellectuals but also workers and peasants are oppressed, and therefore the Chinese people are much better off? Or do they think that the situation in the PRC is similar to that in the U.S.S.R.? Certainly the "intellectuals"—and in China anyone who is a high-school graduate is considered an intellectual—and the disfavored classes can be forgiven if they see the similarity. (Actually, since the late 1950s, Soviet accused have generally been allowed legal protections far greater than those available to their counterparts in the PRC.) The 1956-57 campaign to "Let a Hundred Flowers Bloom" revealed unexpectedly broad dissatisfaction with the administration of justice, at least among the educated. Subsequent widespread abuses, especially during the anti-rightist movement, the Great Leap Forward, and the Cultural Revolution, obviously magnified this feeling. Perhaps the most spectacular protest by intellectuals concerning socialist legality was the unusually long big-character poster put up in Canton in late 1974 under the pen name "Li I-che." It called upon the National People's Congress to plainly prescribe measures to punish the high officials who committed the heinous crimes of knowingly violating the law while enforcing it, fabricating cases, using public prosecution to avenge personal grudges, establishing their own jails, and resorting to unrestrained corporal punishment and murder.

The demands voiced by the famous Li I-che poster, which reportedly led its principal author to labor camp,\* presaged the charges lodged two years later against the Gang of Four. Those charges, of course, have left no doubt that the abuses of the criminal process have affected not merely intellectuals and people with "bad" class background, but also many officials of the Party and government and broad segments of the masses. Even before the Gang's downfall, indications of ferment among the masses on this score had filtered through the Bamboo Curtain. Some Red Guard newspapers published during the Cultural Revolution condemned arbitrary acts of the political-legal organs. More recently, demobilized soldiers complained about illegal beatings inflicted by the police and their assistants. Factory workers protested against the unjust rape conviction of a colleague. And co-workers in an organization intervened to save

\*The chief authors of the poster were released in early 1979.—R.T.

an innocent comrade from imprisonment for allegedly trying to escape to Hong Kong.

In these circumstances it is doubtful whether thoughtful Chinese needed Radio Moscow to point up the irony of the new leadership's condemning the Gang of Four for abuses of due process even while committing similar abuses in an effort to weed out the Gang's followers.

What about the case of the Gang of Four itself? In a curious way the enormous publicity generated about its alleged crimes has focused world interest upon China's criminal process. None of the previous PRC leadership struggles—surely not the purge of President Liu Shao-ch'i and other "capitalist roaders" during the lawlessness of the Cultural Revolution—so explicitly directed foreign attention to legal factors. To the Western observer, the handling of the case demonstrates the extent to which the administration of justice in the PRC departs from the world community's evolving notions of universal minimum standards. The accused have simply been detained incommunicado, with no opportunity to defend themselves against the dossiers compiled and circulated against them, even though, as we have seen, they have been charged with subjecting their political opponents to the same kind of defenseless incommunicado detention that they now suffer. This undoubtedly contributes to the relative lack of interest and even frequent cynicism that have greeted the 1978 constitution abroad.

Do thoughtful Chinese have a similar view? Because of the barriers to learning "public opinion" on any issue in China, we cannot know. Many Chinese must be aware of the inconsistency between how the current leadership says cases should be handled and how it is dealing with the Gang. Yet many undoubtedly recognize that special considerations often attend the handling of a case involving a nation's highest leaders, and a large number probably believe that the Gang is so thoroughly wicked that the ordinary rules of fairness should not apply.\*

In any event Chairman Hua and company confront a genuine dilemma in seeking to chart an appropriate way to dispose of the case. Is there to be a formal "show trial" reminiscent of the Stalin purge trials of the 1930s? An ordinary trial under the newly reestablished rules of the mid-fifties? Can Mao's widow and her cohorts be relied upon to confess in public or would they seize the occasion to defend themselves and attack the regime? Can they be shown to the country and the world after long months of intense interrogation and confinement? Would it leave a better impression to detain them indefinitely without any form of adjudication

\*Yet one of the demands made by the extraordinary crowds that gathered at Peking's freshly minted equivalent of "Hyde Park" in late November 1978 was for an open, fair trial of the Gang, televised to the whole nation!

as was apparently done in the cases of many previously deposed leaders? Should the government simply announce that they have been found guilty and sentenced? There is no easy way out for the victors, and the case seems sure to provoke further concern about China's criminal process, both inside and outside the country.

Perhaps the key question concerning due process that confronts Chinese leaders today is the extent to which, in major political cases and in ordinary cases, it can afford to alter the PRC's long-standing incommunicado interrogation practices, practices that none of the changes in the new constitution is likely to affect if the experience of the mid-fifties is any guide. In China in all but minor cases a criminal accused is detained and cut off from any outside contact while police interrogation and investigation run their course. He sees no lawyer, no friends, no family, even if processing of his case takes years. Usually he is given only a subsistence diet that leaves him slightly hungry and on edge. He is frequently kept in a cell with other prisoners who seek to improve their own prospects by mobilizing group and other pressures to urge him to make a full confession and to reveal the involvement of others. And he is subjected to interrogation, often for long periods and late at night, by officials who have been taught to use intimidation, ruses, and various psychological techniques to elicit his cooperation. There is no presumption of his innocence but the presumption, rather, that he would not have been detained unless he had done something wrong, and it is up to him to tell the police all about it instead of awaiting specific accusations. Not only does he possess no privilege against self-incrimination, but stubborn refusal to talk can even result in the application of leg irons or handcuffs or a turn in solitary confinement. Overt torture, however, is forbidden, although angry cellmates have been known to assault the obdurate. The fate of the accused is entirely in the hands of his jailers. There is currently no effective outside institutional restraint upon either the duration or conditions of police detention, whether by procurators, judges, legislators, or others.

Thus the accused in the PRC confronts what may well be the nearest thing to the Inquisition in the contemporary world. In dealing with those suspected of being "class enemies," the leadership of the Chinese Communist Party, like the Inquisition, views the criminal process as an official inquiry into an evil that must be stamped out. In these circumstances it would be absurd, China's leaders believe, to conduct that inquiry as a contest between equals, with the judiciary playing the role of umpire to make certain that if the prosecution violates the rules, it loses the game. The state cannot be neutral in the struggle against evil, they maintain; all of its agencies must cooperate in, not interfere with, that struggle. If the "class enemies" were permitted a host of procedural protections, they

would take advantage of them, refuse to reveal the truth, and thereby frustrate the investigation.

China has no belief that it is better to let many guilty people go free than to convict a single innocent person. This is not to say that the Chinese are indifferent to accuracy; they are not. Their criminal law seeks to identify and punish offenders, isolate them from society when necessary, rehabilitate all those who are susceptible, and deter and educate the populace. To the extent that the guilty go free, these purposes cannot be achieved. Nor can they be achieved to the extent that the innocent are convicted. The Chinese are aware that the coercive atmosphere of their inquisitorial process increases the likelihood of eliciting not only true confessions but also false ones. But they believe that through outside investigation and repeated careful interrogation of the suspect, followed by internal review within the police and verification now by the procuracy as well as the judiciary, there is, on balance, a higher probability of reaching accurate results than if they employ a more adversarial, more public process that offers the suspect greater procedural safeguards.

Should this rationale for subjecting "the enemy" to an inquisitorial process also apply to members of "the people" who are detained by the police for criminal investigation? The system of dictatorship does not apply to "the people," Chairman Mao maintained, and one might therefore suppose that even in a criminal case different procedures would apply in dealing with "a contradiction among the people" than in dealing with "a contradiction between the enemy and ourselves." Yet they do not. One reason for this, of course, is that often the proper classification can only be made after the process has been completed. Moreover, according to PRC ideology, there is no fundamental inconsistency between the interests of the Chinese state and those of the people. Unlike the situation in bourgeois countries, there is thus no need to protect a suspect by means of rules that are based upon mistrust of the state. A member of "the people" who is detained for investigation should simply cooperate and tell all. He can be confident, the Chinese Communists claim, that the state will do the right thing, for it has his interests at heart.

After all, if a parent returns home to find that his children have destroyed the furniture, he doesn't say: "Children, you are under suspicion, but you are under no obligation to tell me anything about what happened, anything you say may be used against you, and you have a right to counsel and a public trial." In this kind of situation parents often privately interrogate their children, comparing the answers and demeanor of each with those of the others and drawing appropriate inferences if anyone refuses to answer. In other words, if parents want to know whether a child has done something, they ask the child in circumstances calculated to elicit a response. Because parents have the best interests of

the child at heart and the child is supposed to know this, our society generally accepts the practice as a reasonable way to proceed. This is the attitude that the People's Republic adopts toward apparently wayward citizens.

The attitude is not a new one in China. Traditionally the family was taken as the model for relations between government and people, and the county magistrate, the imperial official closest to the people, was called the *fu-mu kuan*, "the father and mother official." Sir George Staunton noted in 1810 that "[t]he vital and universally operating principle of the Chinese government is the duty of submission to parental authority, whether vested in the parents themselves, or in their representatives. . . ."\*

Indeed, one is struck by many similarities between the contemporary criminal process and its Manchu predecessor. The conception of judges as ordinary civil servants rather than special officials independent of political authority, the frequently long detention of a suspect in a coercive environment, the presumption of his guilt, the lack of a privilege against self-incrimination, the absence of counsel, the inadequate opportunity to make a defense, and the emphasis upon confession are all as noticeable today as they were to the first Americans to visit China almost two centuries ago.

Yet, despite these similarities, it would be quite wrong to overgeneralize and assume that China's legal tradition is wholly without support for due process values. As one might expect of the nation that invented bureaucracy two millennia ago, as early as the seventh century A.D. the T'ang Dynasty produced a legal system that was then the world's most sophisticated and that served as a model for neighboring Korea, Vietnam, and even Japan. Although we lack sufficient records to generalize with confidence about the actual application of the law to specific cases in that distant era, the Manchu Dynasty that began a thousand years later and endured until the revolution of 1911 has left us a vast sample of its judicial decisions. To be sure, the Confucian heritage preferred moral indoctrination to legal coercion as the principal means of running the empire; nevertheless, these cases—and the comprehensive criminal code that they interpret—make clear the large extent to which the imperial system relied on law to reinforce the dominant moral values and to make people conform to the state's needs. The elaborate distinctions of the legislation, the reasoned opinions that judges were required to write in support of their decisions, and the lengthy review procedures in cases involving major sanctions, all reflect an overriding concern to curb arbitrary

\*Sir George Thomas Staunton, *Ta Tsing Leu Lee: Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China* (1810), p. xviii.

trary actions in the administration of justice. The Chinese tradition emphasized the group and the government rather than the individual, and duties to society rather than individual rights; but the legal system was an institutional and intellectual construct that plainly recognized and enforced limits beyond which officials were not permitted to go in dealing with suspected offenders. Even torture, which was allowed in court but not elsewhere to extract a confession from an obdurate accused, was carefully regulated both in duration and the types of instruments that could be used.

The theory that underlay these restraints was not a philosophy of individualism and the rights of man but one that focused on the needs of good government. Yet it was premised on certain beliefs about what was fair, just, and acceptable to the Chinese people. Indeed, many cases reveal how strongly held Confucian notions of justice infused the application of legal principles. Although the code expressed duties rather than rights, those duties created obligations on the part of officials to behave properly according to the prevailing standards and thus created expectations on the part of the populace that officials would live up to those obligations.

Of course, like any other legal system, that of imperial China was not in fact congruent with the norms and procedures found in its statutes and reported decisions. Corruption and arbitrary departures from prescribed practices often plagued the administration of justice, especially during periods of dynastic decline, as nineteenth-century China made foreigners all too aware. Yet the records reveal continuing concern over this situation and periodic efforts to improve it. Moreover certain institutions, particularly the censorate, which enjoyed a roving mandate to inspect the legality of official conduct and which must have made the concept of the procuracy easier for contemporary Chinese to understand, were designed to cope with these problems. And a carefully articulated code of administrative punishments existed to deter arbitrary official actions.

It was the duty of a censor to admonish even the emperor if he departed from the standards associated with his role. Although the emperor theoretically enjoyed absolute power to interfere in the administration of justice and was under no technical legal restrictions, a considerable body of institutions, procedures, moral principles, and inherited role expectations actually circumscribed his discretion. According to the Confucian ethic, an emperor was to act like an emperor, just as a county magistrate was to act like a county magistrate, that is, each was to fulfill his obligations to those he ruled. In theory even the emperor had to be mindful of supervision from above. Ever since the earliest recorded dynasty—the Shang of 3,500 years ago—China's rulers have had to live with the idea that government must be benevolent toward the people. From this devel-

oped the doctrine that emperors inherited from their imperial ancestors the duty to rule wisely and fairly, and that a sovereign who treated his subjects arbitrarily risked losing the Mandate of Heaven that justified his right to rule. And, in fact, widespread dissatisfaction with the administration of justice proved to be one of the classic signs of dynastic decline, as contemporary China's historically minded rulers and people are well aware.

Interestingly, the People's Republic is at the moment popularizing the more positive aspects of imperial Chinese law rather than its repressive features. All over China, on both stage and screen, the traditional-style Chinese opera *Fifteen Strings of Cash*—banned by Mao's wife for a decade—is again delighting audiences with the dramatic story of how an upright judicial official reversed the unjust conviction of innocent persons from whom false confessions had been extracted through torture. On two separate 1978 visits to China I witnessed performances of this opera before large and enthusiastic audiences. On different occasions, I asked a number of Chinese whether any contemporary significance should be attached to the recent revival of this superb entertainment, which had been seen and approved by Chairman Mao and Premier Chou En-lai in 1956, shortly after it had been created to contribute to the law reform atmosphere of that era. Their answers were similar. As one put it: "Isn't it obvious? It means that the Chinese people will no longer tolerate arbitrary official acts, that torture is wrong, that confessions may not be coerced, that officials must go down among the people to get the facts and must weigh evidence carefully."

Of course, this theme ties in with the campaigns to discredit the Gang of Four, to popularize the new government's asserted respect for fundamental fairness, and to check abuses of power by corrupt and arrogant officials. Undoubtedly there is an element of scapegoating to the attempt to make the Gang exclusively responsible for the widespread abuses during the past generation. What we are witnessing is a de-Maoification process that is less disruptive than de-Stalinization was for the U.S.S.R. Whatever the accuracy of the claims that only the Gang and its followers violated the rights of the Chinese people, these accusations plainly acknowledge that governments should not behave in this way and that people have a right to complain about such treatment.

This recent official preoccupation with curbing arbitrary rule is plainly a response to the demands of the articulate segments of the population, who have experienced a great deal of arbitrariness. Peking's current leaders are engaged in a comprehensive effort to restore the morale, enthusiasm, and productivity of these people, whose active participation is essential to China's fulfillment of the ambition to become a modern, powerful socialist state. Not only intellectuals but Party and government

administrators and workers want reassurance about their personal security. So long as fear of arbitrary action persists—and PRC media now concede that such fear has been rampant for years—one cannot expect officials to take bold initiatives, scientists to innovate, teachers and researchers to present new ideas, and workers to criticize bureaucracy and inefficiency.

The current leaders have made it clear that in their view the relationship between economic development and individual rights is not an either-or proposition, and that even in a poor country that has China's distinctive tradition and circumstances certain minimum guarantees of individual rights are essential to promote development. Stalin's heirs acted on a similar premise, and this Soviet reaction to Stalin long ago led some observers of China to anticipate a similar trend there after Mao's passing. Despite its distinctiveness China, it turns out, is not totally different from the rest of the world in either human or economic terms. This is why the People's Government has again begun to use the term "human rights" in the due process sense of protecting individuals against fundamental unfairness, as it did during the law reform era of 1956–57 and as the Chinese Communists did prior to 1949 when they sought popular support against Chiang Kai-shek's regime.

To be sure, Peking is not on the verge of adopting the "rule of law" in a Western sense. As a Foreign Ministry official told me in early 1978: "Yes, the present liberalization is very exciting, but please remember that we will not go as far as many Western friends would like." Yet if the present Party line persists, enhancing economic development, educational progress, and international contacts, it is possible that the Chinese government may gradually demonstrate increasing respect for minimum due process standards.

The fact that a Chinese is poor and that his ancestors lived under Confucianism does not mean that his sense of justice and our own are wholly different. And posthumous rehabilitation, a practice that is now in vogue in China as the government seeks to make amends for many arbitrarily caused deaths, offers too little solace. As Chairman Mao recognized: "If you cut off a head by mistake, there is no way to rectify the mistake, even if you want to."