Free Speech in China

Ellen R. Eliasoph
Free Speech in China

Ellen R. Eliasoph

If one were to say that freedom of speech has only the scope that those in power intend it should have then, it may well be asked, has there ever been—in ancient times or the present, in China or outside of it—a state in which speech has not been “free”? If we were to proceed along this line of reasoning, would not our sacred constitutional provision of freedom of speech become nothing more than the most senseless, empty words?

—From a wall poster at Peking University, December, 1980

Introduction

The Constitution of the People’s Republic of China (P.R.C.) guarantees China’s citizens a full panoply of speech rights.1 Yet recent events have caused both domestic and foreign observers to wonder whether these guaranties have any substance. Shortly after the highly publicized trial of the dissident author and editor Wei Jingsheng in October, 1979, and the ensuing crackdown on political dissent,2 “Democracy Wall”3 was stripped and its use as a forum for “big-character posters” (dazibao) was prohibited. These events were only a prelude. In June, 1980, the Central Committee of the Communist Party of China recommended that the National People’s Congress remove the “Four Big Rights” (sida)—the citizens’ rights to “speak out freely, air their views...”4

† J.D., Yale Law School, 1982.
+ Unless otherwise indicated, all translations of Chinese materials are by the author.
1. Under Article 45 of the Chinese Constitution, “[c]itizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike. . . .” XIANFA (Constitution) art. 45 (China).
2. Wei Jingsheng was the editor of, and a major contributor to the dissident journal TANSUO (EXPLORATIONS), a leading publication during the 1978-79 period of open political debate that has since come to be known as the “Beijing Spring.” See text accompanying infra. Wei’s trial and sentencing themselves became subjects of criticism and dissent. Attempts to sell transcripts of the trial served as the basis for arrests. See N.Y. Times, Nov. 12, 1979, at A7, col. 1; id., Nov. 13, 1979, at A5, col. 1.
3. “Democracy Wall” (xidan qiang) is a wall several hundred feet long, located on a major boulevard in the city of Beijing. After the Cultural Revolution ended in 1976, the wall became a medium for the expression of Chinese opinion. Most people put up big-character posters; others went to the wall to distribute materials or to address the crowd. The posters, pamphlets, and speeches covered a wide range of subjects, from pleas for more democracy to complaints about the leaders of specific work units. See generally J. SEYMOUR, THE FIFTH MODERNIZATION 12 (1980).
fully, hold great debates, and write big-character posters"—from Article 45 of the Constitution, and, in August, 1980, the Congress dutifully abolished them.

These events suggest that there is little room for freedom of speech in China; that the constitutional guaranties are mere words; and that those words can be removed from the Chinese Constitution at the discretion of the authorities. Yet these events were more than unrelated instances of the exercise of political power; they were crucial to the authorities' attempt to define the role that speech plays in Chinese society. This Comment will examine this role and assess its appropriateness in the Chinese political and social context.

The authorities' recent actions must be examined against the background of the political-legal universe of post-1949 China. That background contains theoretical and practical elements that lend a superficial cogency to official explanations of the current restrictions on speech rights. But it also suggests alternative approaches to the problem.

Alternative definitions of the role of speech have appeared during the political history of the People's Republic and in recent writings by Chinese legal scholars. At present, China's leaders give cursory attention to the values that these alternatives embody. If there is to be any hope for the development of free speech doctrine and the expansion of speech rights in China, China's authorities must begin to grant these values their full weight.

Foreign governments, as well as the P.R.C., have adopted policies that minimize international scrutiny of Chinese government actions in the area of civil liberties. The United States, for example, has placed improved relations with China before concern for human rights. The

4. The "current authorities" refers to the current Party leadership, as opposed to judicial or elected authorities. Though the principle of judicial independence (duli shenpan) is part of the present Chinese conception of the role of law, the content of legal concepts responds to fluctuating political imperatives. It can be assumed, for example, that the Party was the main initiator of the legal proceedings against Wei Jingsheng, just as it was the Party's Central Committee whose "recommendation" that the "Four Big Rights" be deleted from the Constitution was duly adopted by the obedient national legislature. Cf. F. Schurmann, Ideology and Organization in Communist China 188 (2d ed. 1970) ("[O]ne can argue that the Party, in effect, has displaced the system of law as the third arm of the State.") See generally Leng, Criminal Justice in Post-Mao China: Some Preliminary Observations, 87 China Q. 458-61 (1981).

5. Unless otherwise indicated, the terms "China" and "Chinese" are used in this Comment to refer to mainland China after 1949.

6. The Carter administration—an administration that was, at least rhetorically, committed to furthering human rights—ignored the argument that the process of normalizing relations with China should have been linked to the lack of due process and civil liberties in that
Chinese contribute to the world community’s neglect of China’s rights practices. At the United Nations, China, a party neither to the Universal Declaration of Human Rights nor to the International Covenant on Civil and Political Rights, has been quiet on questions about human rights. At home, the government periodically denounces “bourgeois” human rights concepts, and makes clear its belief that such concepts have little relevance in China. The authorities also obstruct foreigners’ attempts to study China’s legal system, view prisons, and make contact with dissidents. On publishing unflattering material, foreign reporters have lost favor with the Chinese.

Chinese policy runs against the pull of external relations. As the scope of China’s international activity expands, China may find its trading partners “linking” important economic and political decisions to human rights considerations. By denouncing the deplorable state of civil liberties that existed in China during the Cultural Revolution, and by launching a “socialist legality” campaign, the current authorities have themselves invited attention to the subjects of due process and civil rights in China.

Accordingly, this Comment is addressed in part to the prospect of a dialogue between China and the rest of the world. Familiarity with the Chinese political vocabulary and comprehension of the Chinese conception of rights will diminish the possibility that such a dialogue will result in a battle of broad clichés: the ability to evaluate China in China’s own language will enhance the prospects for communication.

I. Toward a Functional Definition of “Rights” in China

Readers trained in the American legal system might well be struck by the apparent ease with which the “Four Big Rights” were removed from the Chinese Constitution. What kind of “rights” are rights that can so readily be abolished? The following discussion, which attempts to convey the meaning of the Chinese term “right” (quanli) in the Chi-


7. Id. at 249-50.
8. Id. at 251.
12. See text accompanying note 137 infra.
nese context, argues that the term is a "false friend" of the English word "right."

A. Rights and the Chinese Constitution

1. Constitutional Theory

The following is a brief sketch of the constitutional theory that underlies the alternative Chinese conceptions of rights. It presents the tenets of a legal milieu in which the constitution is viewed as a practical tool.

a. *The presumption of consensus*

Provisions concerning rights appear in Chapter III of the Chinese Constitution, "The Fundamental Rights and Duties of Citizens." The two preceding chapters are: "I. General Principles" and "II. The Structure of the State." In the Chinese Constitution, as in the constitutions of other socialist countries,\(^\text{13}\) theory, governmental and economic organization, and the role of citizens form an organic whole. Citizens do not retain rights against the State; rather, the interests of the State and its citizens are viewed as one.\(^\text{14}\) This should not be surprising. The framers of the Chinese Constitution embraced the theory that all ownership is by the people, all State power is wielded by the people, and the government exists, simply, as an expression of the people's will.\(^\text{15}\) In such a State, the relationship between the government and the governed *ipso facto* must be one of consensus, not of conflict. This reasoning underlies much of the public discussion of Chinese legal theory and legal policy.

Of course, Chinese theorists recognize that the presumption of con-

---

\(^\text{13}\) See, e.g., KONSTITUTSI (Constitution) (Union of Soviet Socialist Republics); CONSTITUTIČN (Constitution) (Cuba); ALKOTMÁNY (Constitution) (Hungary).

\(^\text{14}\) By contrast, the Bill of Rights to the U.S. Constitution constitutes the second part of what is in a sense a bipartite document. The constitutional text itself presents a scheme of government, and the Bill of Rights enumerates the rights of the people as distinct from that scheme of government. The Ninth Amendment in particular embodies the principle that the government possesses only its enumerated powers, while all other rights and freedoms previously enjoyed by the citizens are to be retained by them.

Hence, the proscriptive aspect of most of the amendments constituting the Bill of Rights: U.S. CONST. amend. I ("Congress shall make no law....") (emphasis added); U.S. CONST. amend. IV ("The right of the people to be secure.... shall not be violated....") (emphasis added); U.S. CONST. amend. V ("No person shall be held to answer....") (emphasis added). In contrast, the rights provisions of the Chinese, Soviet, and other socialist constitutions, neither prescribe nor proscribe, but rather purport to describe objectively the rights enjoyed by citizens in those socialist societies.

\(^\text{15}\) Article 3 of the Chinese Constitution reads "[a]ll power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at various levels." XIANFA (Constitution) art. 3 (China).
Speech in China

sensus cannot be carried too far. The laws of contradiction (maodun) may cause conflicts between the leaders and the led; improper implementation of Party policies, or an incorrect style of Party leadership, may create rifts between the Party and the masses; and imperfections in democratic processes may produce inadequate political representation of the electorate. Reliance on the presumption of consensus nevertheless is a commonplace of Chinese ideology and is particularly evident in discussions about modifying the Constitution. The full significance of the presumption of consensus appears when the Chinese Constitution is amended and in the context of the ideological impetus for change.

b. The expectation of change

Chinese dialectical and historical materialist analysis denies that a constitution (which in Chinese eyes mirrors the relations among social classes) can possess transcendent validity. This denial derives from the following assumptions. First, the balance of the class forces in any given society is constantly shifting. A major shift in the balance makes revolution possible. But even after the revolution, classes still exist and change is regarded as the normal state. In dialectical terms, originating from Hegelian and Marxist philosophy as well as from Taoist thought, everything by definition has an opposite. These 'contradictions' (or thesis and antithesis) are in constant interaction with each other, and their continual resolution produces a synthesis, which in turn continues to interact with its opposite to produce further change. . . . [Thus] it should not be surprising that Western-style law, which supposes stability and restrains change, has not fared well in the People's Republic of China. That kind of law is too conservatizing in the philosophical sense of denying change as the normal and preferred state.

V. Li, LAW WITHOUT LAWYERS 4 (1978).


22. “Chinese dialectical and historical materialism” refers to the Marxist-inspired political philosophy that Chinese thinkers, and Mao in particular, developed in the course of organizing the Communist Party of China, leading the Chinese revolution, and establishing the People’s Republic. Chinese writers often credit Mao with having taken the best, most useful elements of Marxism, and adapting those elements to China’s unique situation. See F. Schurmann, supra note 4, at 26. The basic elements of the theory are the unity of the law of opposites, the theory of class struggle, and the theory of proletarian revolution and proletarian dictatorship. See id. For a discussion of the application of Chinese dialectical and historical materialism to society and politics, see J. Starr, supra note 17, at 34, 39-43.
their relationships change as society progresses through its socialist phase toward the realization of Communism. Second, a constitution can reflect the balance of class forces only at the time it is drafted; it cannot be read as fixing terms and apportioning powers for eternity. Therefore, if it is truly to reflect social reality, a constitution must constantly be revised in response to changing conditions. And, insofar as the constitution is subject to revision, the people’s rights and duties are subject to modification.

Such modification poses less theoretical difficulty than might be expected. In the Chinese view, rights exist only as powers exercised by individuals within a shifting social framework. The idea that there exists such a thing as “inalienable rights” is a bourgeois delusion. Notions about such things as moral values, social roles, and individual rights, being merely part of the superstructure, evolve in response to changes in the economic base. For example, some of the moral values of feudalism might be regarded as evils from the viewpoint of bourgeois society. Similarly, “inviolable rights” said to exist under capitalism are revealed to be illusory or at least unnecessary when a socialist system comes into being.

23. According to the Chinese view, in a single country, during different historical periods, and as a result of changes in the balance of class forces, the constitution continuously changes and develops. For example, China’s 1954 Constitution was a constitution of the transitional period, reflecting the balance of the class forces. It stipulated that China’s chief task during the transitional period was the progressive realization of the nation’s socialist industrialization and the progressive socialist reform of agriculture, handicraft industry, and capitalist industry and commerce. . . . Similarly, China’s new [1978] constitution is the fundamental law of the new period of socialist revolution and socialist construction that China’s people have achieved since the time of the State’s founding. . . . [The dictatorship of the proletariat [has been] consolidated to an unprecedented extent, and [has] entered into a new period of development. China’s new constitution has been drawn up to meet precisely the needs of this new period.

HUBEI RENMIN CHUBAN SHE (HUBEI PEOPLE’S PUBLISHING HOUSE), ZHONGHUA RENMIN GONGHEGUO XIANFA JIANGHUA (LECTURES ON THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA) 13-14 (1979) [hereinafter cited as LECTURES ON THE CHINESE CONSTITUTION].


25. In this regard, Chinese writers cite the following passage from Stalin:

Capitalist constitutions are frequently limited to the stipulation of the formal rights of citizens: they pay no attention to the conditions for the realization of those rights, the possibility that those rights could be realized, or the mechanisms for their realization. They empty talk about the equality of citizens, ignoring the fact that, while the capitalists and landowners possess the wealth and the political power in society, the workers and peasants have none; and that, while the capitalists and landowners are exploiters, the workers and peasants are the exploited; so that factory bosses and workers, landlords and peasants, can’t possibly be truly equal. Moreover, they vainly talk of freedom.
The historical materialist interpretation of "bourgeois rights" regards those rights as the worthless tokens individuals in capitalist societies receive in exchange for giving up what alone truly is their right: the right to control the means of production and the disposition of what is produced. Because socialist revolution returns this fundamental right to the people, the other rights, which are merely formal when held by the citizens of capitalist countries, can begin to take on reality and substance only in a socialist milieu. To regard such rights as inalienable would disregard their ultimate dependence on changes in the economic base, changes that determine the extent to which rights can be realized and enjoyed. In view of this dependence, the importance of rights and the scope to be afforded their exercise must, according to the Chinese, remain unsettled.

2. The Removal of the "Four Big Rights" from the Chinese Constitution

The deletion of the "Four Big Rights" from the Chinese Constitution must be viewed in the context of this political and constitutional theory. Rather than an isolated assertion of authority, it is just one constitutional modification that has taken place during the brief history of the People's Republic of China. The P.R.C. adopted its first Constitution in 1954. Its two successors, the 1975 and 1978 Constitutions, have each incorporated several modifications. The "Four Big Rights" were themselves one such change, appearing for the first time in the 1975 Constitution.

In contrast to the process of amending the U.S. Constitution, the procedures for modifying the Chinese Constitution are neither open to the
The electorate's scrutiny nor subject to its influence. The Party Central Committee recommends changes and the National People's Congress adopts them in the course of promulgating a new version of the Constitution. The deletion of the "Four Big Rights" was unique and obtrusive only in that the change took place just after the 1978 Constitution had been ratified.  

In publicizing the Central Committee's recommendation that the "Four Big Rights" be removed from the Constitution, the Chinese press relied on the presumption of consensus, publishing a spate of articles describing the masses' enthusiastic approval of the recommendation. Analysis of the event, both in the press and in legal periodicals, took the following form. The "Four Bigs" are forms of political expression that appeared in China prior to the Cultural Revolution. Their use reached its height during the Cultural Revolution, a time of great ideological ferment and mass political activism. Indeed, at that time the "Four Bigs" played such a significant role that they came to be

28. But note that there were early indications of disagreement among the leadership as to the status of the "Four Big Rights." Ye Jianying's "Report on the Revision of the Constitution," issued on March 1, 1978, contained an ambiguous passage regarding the inclusion of the "Four Big Rights" in Article 45.

It is precisely for the purpose of ensuring great democracy under the leadership of the proletariat that the draft of the revised Constitution provides that citizens have [the "Four Big Rights"]. The "gang of four" waved the banner of great democracy to oppose the leadership of the Party and the proletariat. . . . Such "great democracy" would mean a vengeful comeback of the landlords, rich peasants, counter-revolutionaries and bad elements, and an anti-Party and anti-socialist rightist coup . . . . Isn't it fair and just for the broad masses to reject that kind of "great democracy"? Chairman Mao long ago said, "[i]f anyone resorts to what he calls great democracy to oppose the socialist system and try to overthrow the leadership of the Communist Party, we shall exercise the dictatorship of the proletariat over him."


29. See text accompanying notes 15-19 supra.

30. See Quxiao "sida" fuhe dangxin shunying minyi, Beijing Daily, Mar. 3, 1980 (abolition of the 'Four Bigs' accords with the wishes of the Party and responds to the people's desires); Quxiao "sida" hehu minxin, People's Daily, Mar. 10, 1980 (abolition of the 'Four Bigs' accords with the people's wishes); Quxiao "sida" fuhe quanguo renmin yiyuan, People's Daily, Enlightenment Daily, and Beijing Daily, Apr. 15, 1980 (abolition of the 'Four Bigs' accords with the wishes of all the nation's people). Notice that the verb used in all of the headlines is "quxiao," which means "abolish" or "obliterate." Actually, the "Four Bigs" were not "abolished" by this decision, in the sense of being made illegal; all that was done was to deny constitutional protection to their exercise. But such headlines implied that the "Four Bigs" were to be abolished, not only as rights, but also as permissible forms of expression.

31. Some commentators noted that big-character posters were used during the "Anti-Rightist" campaign of 1957. See Discussing Big-Character Posters, 5 MINZHU YU FAZHI 15, 16 (1979) [hereinafter cited as DEMOCRACY AND LAW]; The "Four Bigs" Are Not Good Methods For Realizing Socialist Democracy, Enlightenment Daily, Apr. 2, 1980. But see J. SEYMOUR, supra note 3, at 5-6 (suggesting that the use of wall posters in post-1949 China was "never truly free" from official control until the winter of 1978-79).
enshrined in the Constitution. But now that the Cultural Revolution has ended and China emphasizes the orderly development of the economy instead of mass political campaigns, these "great democratic" modes of expression are no longer as significant as they were. Quite the contrary. Because their exercise disrupts social order, zealous exercise of the "Four Bigs" could impede progress towards the goal of this new era, the realization of the Four Modernizations.32

Other reasons adduced in support of abolishing the "Four Big Rights" made it clear that not only are the "Four Bigs" no longer to be constitutionally protected forms of political expression; the authorities actually disapprove their exercise.

The "Four Bigs," commentators noted, were misused during the Cultural Revolution. The "Four Bigs," according to the authorities, were used by "bad people"—Wei Jingsheng, for example—to stir up dissent, foment factionalism, and encourage anarchy. Big-character posters were even used to leak state secrets. Many good people suffered slanderous attacks, while their attackers remained anonymous. Mass criticism campaigns ruined lives and reputations. Critics also noted the lack of personal responsibility and legal accountability associated with the "Four Bigs," and the absence of opportunities for victims of poster campaigns to respond to the charges against them. The "great debates" of the Cultural Revolution, some observers pointed out, often were unilateral attacks in the service of a personal vendetta, rather than real debates.33

These criticisms may have some validity. But they fall far short of being a thorough evaluation of the "Four Bigs" and their effects. "Slandering individuals" and "causing trouble" were not the only purposes of wall posters. Using posters created open fora in a society in which few people have access to the public media or to any private means of disseminating their views.34 Some posters addressed major political problems.35 Others, such as those that demanded review of specific cases or expressed desires to change jobs or residences, focused on the problems of individuals.36 Aggrieved citizens, who reasonably

32. The "Four Modernizations" (sige xiandaihua) campaign, which began at the end of the Cultural Revolution, aims for the modernization of agriculture, industry, defense, and science and technology by the year 2000.
33. See notes 30-31 supra; The Four Bigs Are All Empty, 3 DEMOCRACY AND LAW, supra note 31, at 22 (1980).
34. See generally J. SEYMOUR, supra note 3, at 251; The 'April Fifth Forum' Story, SPEAKHEAD, Winter 1980-81, at 1, 24-25.
35. See J. SEYMOUR, supra note 3, at 11-12.
feared retaliation from officials or bosses, and who lacked access to a judicial forum, may have found that their only recourse was anonymously to write a big-character poster in the hope that someone would read it and take heed. Finally, in their most recent, dramatic and notorious use, the wall posters of the 1978-79 "Beijing Spring" period of open dissent called for democracy and human rights. This latter development was undoubtedly the main object of critics' references to "factionalism" and "anarchy."

The authorities did not feel obliged to undertake, or to allow, a more searching inquiry into the reasons for the removal of the "Four Big Rights" from China's Constitution. Such an inquiry might well have led to arguments more principled and compelling than the ones advanced. The literature on the subject, for example, alluded to the fact that much of the supposedly "spontaneous" exercise of the "Four Bigs," particularly during the Cultural Revolution, seems to have been mass activity orchestrated by powerful Party members. This issue undoubtedly is sensitive for the current leadership, many of whom were in the "wrong" faction when the "great debates" of that period took place. Nonetheless, the delicacy of the question should not have foreclosed inquiry into why and how the "Four Big Rights" became tools of certain Party officials who mobilized the masses, like private armies, to fight their battles for them. After all, the exercise in other countries of the rights to demonstrate, hold mass meetings, and post posters does not inevitably result in ideological warfare and the ruination of people's lives.

This line of inquiry might well have resulted in the much-needed discussion of some more fundamental questions: what kind of "democracy" does China need and is China ready for? During the Cultural Revolution China conducted a unique experiment in mass participatory democracy. The "Four Big Rights" were forms of political expression integral to this experiment. They were, in fact, described in the 1975 Constitution as "new forms of carrying on socialist revolution

37. The power of factory bosses and unit leaders to make workers' lives miserable is legendary. It is summed up in the Chinese phrase "gei wo xiao xiezi chuan.quot; ("He gives me small shoes to wear.")

38. Legal facilities are scarce, and access is limited. See Li, Law, in HUMANISTIC AND SOCIAL SCIENCE RESEARCH IN CHINA 163, 164-65 (1980).

39. See generally J. SYMOUR, supra note 3, at 7-21.

40. Numerous examples of this phenomenon can be found in the indictment filed in the recent "Gang of Four" trial. See Trial of Lin-Jiang Cliques: Indictment of the Special Procuratorate, 48 BEIJING REV. 9 (1980).

41. Deng Xiaoping and Zhao Ziyang are among those members of the current leadership who were publicly criticized. They were, in fact, paraded through the streets wearing dunce caps during the Cultural Revolution. See Butterfield, The Pragmatists Take China's Helm, N.Y. Times, Dec. 28, 1980, ¶ 6 (Magazine), at 22, 24.
Speech in China

created by the masses." The current Chinese view is that this experiment in mass democracy was a failure. But, granting arguendo the correctness of that evaluation, what were the reasons for the failure? Was it primarily due to mistakes made by Party leaders? Or was it due, rather, to the fact that the masses are at present incapable of the responsible and effective exercise of democratic rights?

These are difficult questions, and it is not surprising that the authorities should have been loath to address them. It is particularly unlikely that, when new leaders are attempting to consolidate their power following the "downfall of the Gang of Four," they would favor public scrutiny of the intra-Party struggles that led to abuses of the "Four Bigs." Nevertheless, the skewed and self-serving arguments offered to justify removing the "Four Big Rights" from the Constitution apparently did not persuade the public.

The Chinese citizenry were more impressed by the government's zig-zag: in the fall of 1979 the authorities encouraged the exercise of the "Four Big Rights," only to suppress their exercise and delete them from the Constitution a year later. The parallel with the "Hundred Flowers" campaign of 1956-57 and its successor "Anti-Rightist" movement is unmistakable.

Despite official discouragement, use of the "Four Bigs" nonetheless has continued. It seems that, at least for some, they have become

42. See note 27 supra.
44. See J. SEYMOUR, supra note 3, at 12-13.
45. The "Hundred Flowers" campaign, a brief, dynamic period of relatively free artistic and literary expression, began in May, 1956, with Mao's injunction to "[l]et a hundred flowers bloom, let a hundred schools of thought contend" (baihua qfang baffia zhengming). This sudden renaissance of debate, expression, and criticism quickly ended, however, with the June, 1957 publication of Mao's speech entitled "On the Correct Handling of Contradictions Among the People." The speech contains, inter alia, a list of "political criteria" for distinguishing illegitimate from legitimate criticism; i.e., a list of guidelines for speech. See MAO ZEDONG, supra note 16, at 119-20. Soon thereafter an "Anti-Rightist" campaign was launched. Many people who had criticized the Party and the government during the Hundred Flowers movement were in turn criticized and punished, and the movement was broadened to encompass other "rightists" as well—members of the procuracy, technicians, "bourgeois intellectuals," people who were thought to have close connections with foreigners, and so on. Thousands lost their jobs and were sent to labor reform camps. See generally R. MACFARQUHAR, THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS (1960). The stigma of having been branded a "rightist" during this period tainted not only the individual, but his or her entire family as well, for years thereafter.
46. But see Dreyer, Limits of the Permissible in China, PROB. OF COMMUNISM, Nov.-Dec., 1980, at 64 ("Despite these fears, the actions of the government thus far amount to a modification of recent policies rather than the precipitous reversal witnessed in 1957.")
47. See N.Y. Times, Nov. 29, 1980, at A2, col. 3 (reporting on student campaigns for the December, 1980 local people's congress elections).
important modes of political expression. And even if they are not constitutionally protected *per se*, their proper exercise is still arguably protected by the more generally phrased constitutional guaranties of "freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike." If this is indeed the case, then the ultimate fate of the "Four Bigs" will depend on the scope afforded the exercise of those rights.48

3. *The Unity of the People's Rights and Duties (renmin de quanli he yiwu de yizhixing)*

At present, "the unity of the people's rights and duties" determines the scope of democratic rights in China. Any prediction or assessment must confront this principle and its implications.

a. Constitutional theory

Chapter III of the Chinese Constitution ("The Fundamental Rights and Duties of Citizens") enumerates the rights and duties of Chinese citizens. This constitutional structure embodies the notion that those rights and duties are inseparable.49

The notion derives from the same assumptions that produce the presumption of consensus. Socialist, as opposed to capitalist, countries are said to be wholly owned by the people and governed, through the dictatorship of the proletariat, in the interests of the people. Thus, people living in a socialist system are truly "masters of their own house" *(dangjia zuozhu)*50 and, like any mature proprietors, are willing to undertake duties necessary to the effective, responsible governance of their establishment. China's Constitution reflects this willingness.

b. Implications of the theory for the practice of rights

One might expect the principle of "the unity of the people's rights and duties" to serve only as a general reminder that the citizens' exercise of democratic rights helps them become better able to perform the duties owed the state, and vice versa. Recent developments,51 however, run counter to this view. What follows is a brief exposition of the rela-

---

48. For a similar view, see Gelatt, *supra* note 36.
49. This principle of socialist political theory has been made explicit in Article 59 of the Soviet Constitution. "The exercise of rights and freedoms is inseparable from the performance by the citizen of his duties." Konstitutsii (Constitution) art. 59 (Union of Soviet Socialist Republics).
51. See text accompanying notes 96-97 infra.
tionship between rights and duties that these developments seem to require.

The rights and duties enumerated in the Constitution must be understood to inform each other in more than a merely theoretical way. True, the exercise of rights may help citizens become better able to perform their duties; but perhaps more important is the requirement that their exercise not transgress the limitations imposed by those duties. The proper relationship between rights and duties may in fact be summarized as follows: the exercise of rights must increase the citizen's ability to perform the duties owed the State. Any exercise of rights which violates this principle is not really an exercise of rights, but rather an instance of failure to “abide by the Constitution and the law.”

This reasoning has significant implications. In any given situation a person must determine what constitutes appropriate action by weighing the benefit to be gained from exercising a right against the chance that the performance of a duty will thereby be disrupted. To exercise rights irresponsibly is to shirk the obligation to perform this calculus, and thus may be tantamount to turning against the State.

The constitutional duties that bear most directly on the exercise of democratic rights derive from Articles 56 and 57 of the Chinese Constitution. Article 56 provides that “[c]itizens must support the leadership

52. Id. According to one Chinese commentator, the Constitution of our country stipulates rights such as freedom of speech. It also stipulates that citizens have the obligation to ‘support the leadership of the Communist Party of China and the Socialist system, safeguard the unity of the motherland and unite all nationalities. Therefore opinions which are antiparty and antisocialist and which sabotage the unity of the motherland and the nationalities must be prohibited.’ By doing so we are uniting the citizens’ rights with their obligations, and in no way have infringed upon the citizens’ freedom of speech. Zhu, supra note 24, at L15.

53. Cf. id. (“Every conscientious socialist citizen should not only spontaneously restrain his opinions and abide by the laws and the regulations of ‘the Constitution,’ but should also measure himself against socialist morality and ‘restrain his opinion.’ ”)

54. This is not to suggest a legal obligation to perform the duties owed the State. Nor, on the other hand, does there seem to be any form of legal guaranty for the exercise of rights. Though Article 55 of the Chinese Constitution stipulates that citizens have the right “to appeal to organs of state at any level against any infringement of their rights,” in all likelihood this right is not enforceable in a court of law. See Gelatt, Legal Profession and Lawyers Start to Reemerge in China, Asian Wall St. J., Sept. 25, 1980, at 9, col. 1 (“[t]he Chinese conception of a legal system has never embraced the notion of citizens’ actions against the state”). Also note that, whereas a provision guaranteeing to China’s citizens material compensation for infringements of their rights appeared in the 1954 Constitution, such a provision does not appear in the present version of the Constitution.

This lack of clarity regarding the legal status of the citizens’ rights and obligations can easily result in blurred distinctions between the failure to perform a duty owed the State and the commission of a crime. See text accompanying notes 96-103 infra. Cf. Ginsburgs & Pomorski, A Profile of the Soviet Constitution of 1977, in F. Feldbrugge, The Constitutions of the U.S.S.R. and the Union Republics 53-54 (1979) (possible legal consequences of the emphasis upon the “unity of rights and duties”).
of the Communist Party of China, support the socialist system, safeguard the unification of the motherland and the unity of all nationalities in our country and abide by the Constitution and the law.”

Article 56 requires the citizens to “take care of and protect public property, observe labour discipline, observe public order, respect social ethics and safeguard state secrets.”

During the year that witnessed the rise and fall of the “Beijing Spring” dissident movement, the authorities saw fit to derive two new “duties” from Articles 1 and 2 of the Constitution. Article 1’s statement that “[t]he People’s Republic of China is a socialist state of the dictatorship of the proletariat” means, the authorities announced, that the people have a duty to “uphold the dictatorship of the proletariat.” Similarly, Article 2, which provides that “[t]he Communist Party is the core of leadership of the whole Chinese people” and that “[t]he guiding ideology of the People’s Republic of China is Marxism-Leninism-Mao Zedong Thought” was found to oblige the people to “uphold the leadership of the Communist Party of China” and to “uphold Marxism-Leninism-Mao Zedong Thought.” These three quasi-constitutional duties, together with the Article 56 duty to “support the socialist system” have come to be known as the “Four Principles.” At present, these “Principles” clearly limit the exercise of speech and publication rights.

B. Democratic Rights and Political Theory

Chinese constitutional theory and practice, as described above, situate rights in a fluid context. The degree to which citizens may exercise rights shifts in response to historical and social change, as well as to the demands of duties, on a situation-by-situation basis. Chinese political theory places rights in a framework in which their purpose is relatively limited and the scope of their application—in the concrete sense of who is entitled to use them—uncertain. The following discussion is intended as an introduction to the basic elements of that theory.

1. Democratic Centralism (minzhujizhongzhi) and the Formation of the Mass Line (qunzhong luxian)

The Chinese political system is one of “democratic centralism for the
people and dictatorship over class enemies.”

“Democratic centralism,” perhaps an oxymoron, connotes a system in which the people are autonomous to some degree in their economic decision-making and in their personal lives, but not to a degree that infringes on the interests of the people as a national collectivity. On the contrary, the ultimate aim of democratic centralism being national unity of action, democracy is a means to that unity and not an end in itself. The exercise of democratic rights should, in the interests of centralism, strengthen social consensus, and further the leaders’ ability to lead, and the willingness of the led to be led.

Chinese democratic centralism operates through the “formulation of the mass line,” a process that occupies a central role in Maoist political theory. The mass line, as Mao described it, derives from the continuous interplay of leadership and participation. Leaders take the ideas expressed by the masses, extract from them what is valuable, and return with them to the masses who study them, grasp them, and translate them into concrete practice. Such a process values political expression primarily for the tangible gains it can bring about, not for its own sake. Ideas expressed by the masses fuel the system; but, ultimately, those ideas that are “incorrect” or “useless” will be thrown off, as waste, in the course of the system’s operation.

Democratic centralism thus is all that the term implies: a form of government in which democracy and authority support and limit each other. Like the related right/duty opposition, democracy/centralism requires that any given exercise of rights occurs within the framework of a dialectical process designed to determine whether that exercise is valid and meaningful. Note, however, the dialectic’s limitation. “Va-
validity” and “meaning” are ultimately matters for unilateral decision. The authorities have the final word on which ideas are “correct.”

2. Dictatorship Over Class Enemies

Influenced by the experience of the Soviet Union, China’s Marxist-Leninist revolutionary practice subjected the enemies and former oppressors of the people to the “dictatorship” of the proletariat who overthrew them. In China, the concept of the “people’s dictatorship” is a central feature of political and constitutional theory.

The people, it is said, practice democracy among themselves and exercise “dictatorship over class enemies.” This “dictatorship” takes the form of the “suppression and punishment” of traitors, counterrevolutionaries, and other “bad elements” and the deprivation, “according to law,” of the political and civil rights of other specified classes of people. The appropriate objects of this suppression, punishment, and deprivation change over time, in accordance with changing historical and social conditions. But change in the contents of the “enemy”

64. See generally V. LENIN, State and Revolution, in LENIN ON POLITICS AND REVOLUTION 184-230 (1968).
65. See XIANFA (Constitution) of 1954 (China); XIANFA (Constitution) of 1975, art. 1 (China); XIANFA (Constitution), art. 1 (China).
66. Article 18 of the Chinese Constitution provides, in part, that “[t]he state safeguards the socialist system, suppresses all treasonable and counter-revolutionary activities, punishes all traitors and counter-revolutionaries, and punishes new-born bourgeois elements and other bad elements.”

Mao identified the purposes of the State in a similar manner. What is this dictatorship for? Its first function is to suppress the reactionary classes and elements and those exploiters in our country who range themselves against the socialist revolution, to suppress all those who try to wreck our socialist revolution. . . . For instance, to arrest, try and sentence certain counterrevolutionaries, and to deprive landlords and bureaucrat-capitalists of their right to vote and their freedom of speech for a specified period of time—all this comes within the scope of our dictatorship.

MAO ZEDONG, supra note 16, at 83.

This view is reflected in the writing of other Chinese scholars. In dealing with [class enemies], we must establish the dictatorship of the proletariat. That is to say, we must deprive all class enemies of their political rights, including freedom of speech. This indicates that freedom of speech in socialist society is similar to that in capitalist society—neither is supraclass. The only difference is that in socialist society, the majority uses dictatorship over the minority; and unlike the bourgeoisie, the proletariat does not deny the class character of freedom of speech. On the contrary, it explicitly declares that only the masses have the right to enjoy freedom of speech, not the reactionary class nor the counterrevolutionaries.

Zhu, supra note 24, at L14.

67. This principle is reflected in the changes made by the 1978 Constitution. As to the enforcement of proletariat dictatorship, the second [1975] Constitution calls on the state to ‘punish all traitors and counter-revolutionaries’ and ‘deprive the landlords, rich peasants, reactionary capitalists and other bad elements of political rights. . . . ’ The new [1978] Constitution, while retaining ‘all traitors and counter-revolutionaries’ has added ‘new-born bourgeois elements and other bad elements.’ This has been dictated by developments . . . in recent years.
Speech in China

category does not lessen the need to continue the struggle between the “supraclasses” of “people” and “enemy.”

The changing content of the category does, however, make the practice of dictatorship extremely difficult. By what criteria can a person be adjudged to belong to a class that should be deprived of rights? Who are the “counterrevolutionaries” deserving suppression and punishment? The answer to this question goes to the core of the scope of rights in China.

In sum, the Chinese concept of “right” is narrower than its western-democratic counterpart. It refers, not to an inalienable power, but to a limited form of freedom: the freedom, for most but not all of the people, to participate in the political system in a prescribed way, and for a particular purpose—the achievement of greater unanimity of action.

One might expect this narrow conception to possess the virtue of precision. But, as we have seen, this is not the case. At any given time, the scope afforded these limited freedoms known as “rights” will be defined in reference to the constitutional and political contexts in which they are exercised. And because it is in the nature of such contexts to change, so it is in the nature of these freedoms to expand and contract.

Unfortunately, a sudden contraction or an official determination that a person has incorrectly evaluated the “context,” can result in grave sanctions for individuals who attempt to exercise their rights.

II. The Exercise of Rights and the Imposition of Sanctions

Numerous criminal and administrative sanctions, liable to discretionary application, deter the vigorous exercise of rights in China.

A. Criminal Sanctions

The Criminal Code of the People’s Republic of China (the “Criminal Code”) was promulgated in 1978 and adopted in 1979. It provides


68. See generally J. STARR, supra note 17, at 109-16.

69. Even Mao acknowledged that it is sometimes difficult to tell who the counterrevolutionaries are.

Successes were the main thing in our work of suppressing counter-revolutionaries, but there were also mistakes. In some cases there were excesses and in others counterrevolutionaries slipped through our net. Our policy is: ‘Counter-revolutionaries must be suppressed whenever found, mistakes must be corrected whenever discovered.’ . . . Wherever mistakes have been discovered. . . steps have been or are being taken to correct them.


70. ZHONGHUA RENMIN GONGHEGUO XINGFA (1979) (China) [hereinafter cited as XINGFA]. This is the People’s Republic of China’s first comprehensive criminal code. For
punishments for slander, disturbing the public order,\textsuperscript{71} and for the counterrevolutionary crimes of plotting with foreign governments,\textsuperscript{72} plotting to overthrow the state,\textsuperscript{73} revealing state secrets "to the enemy," spying, or working for "the enemy,"\textsuperscript{74} organizing counterrevolutionary groups,\textsuperscript{75} organizing or using religious organizations or superstitious sects to carry out counterrevolutionary activity,\textsuperscript{76} and carrying out counterrevolutionary incitement by disseminating counterrevolutionary literature, or by other means.\textsuperscript{77}

Broad or discretionary enforcement of these provisions may interfere with the exercise of democratic rights. Given the provisions' vagueness and generality, this result is likely. Because the Criminal Code is new and has scarcely been tested, few limiting precedents exist. At least for the time being, these categories of crime may remain fluid, and probably will respond to changes in the political climate.

1. Counterrevolutionary Crime

Especially subject to potential abuse is the category "counterrevolutionary crime." The concept of "counterrevolutionary" cannot be separated from the more inclusive "enemy" category of which it forms a part.\textsuperscript{78} Because the latter category changes over time, so the characteristics of "counterrevolutionary activity" may never be subject to fixed definition. Recent events demonstrate that political activities, permitted and even sanctioned when they were undertaken, may be defined retroactively as "counterrevolutionary crimes."\textsuperscript{79}

Being designated a suspected counterrevolutionary has an uncertain impact on the procedural treatment of an individual. Counterrevolutionaries are to be "suppressed" as a class, "punished," and "deprived of rights" by the dictatorship of the proletariat. Bringing counterrevolutionary activity within the reach of a criminal code represents a step

\textsuperscript{71} XINGFA, arts. 138, 158-160.
\textsuperscript{72} Id. art. 91.
\textsuperscript{73} Id. art. 92.
\textsuperscript{74} Id. arts. 97(1), 97(3).
\textsuperscript{75} Id. art. 98.
\textsuperscript{76} Id. art. 99.
\textsuperscript{77} Id. art. 102.
\textsuperscript{78} See text accompanying notes 66-69 supra.
\textsuperscript{79} During the recent trial of the "Gang of Four," Jiang Qing, Mao Zedong's widow, consistently maintained that the alleged counterrevolutionary acts were not only legal at the time they were performed, but also that, in fact, "she had acted during the Cultural Revolution under the instruction of Mao and the Communist Party Central Committee." N.Y. Times, Dec. 30, 1980, at A2, col. 3.
Speech in China

toward uniform adjudication of the cases of "counterrevolutionary elements." This change undoubtedly is welcome; during the Cultural Revolution the extra-legal arrest, detention, and punishment of supposed "counterrevolutionaries" were common occurrences, and the scope of the term "counterrevolutionary" extended beyond all rational limits. But it is not reasonable to suppose that a neat legal definition can readily replace such a political concept.

"Counterrevolutionary offense" is defined as "[a]ny act which jeopardizes the People's Republic of China for the purpose of overthrowing the political power of the dictatorship of the proletariat and overthrowing the socialist system." Official commentators stress the importance of specific intent; yet just what suffices to demonstrate the presence of the requisite "purpose" remains unclear.

2. The Problem of Speech

Recent debates in the Chinese press over the definition of "counterrevolutionary offense" reveal great uncertainty regarding the circumstances under which speech becomes a criminal act. According to Chinese legal theory, "ideological offenses" do not exist. Speech, being something more than ideology and something less than action, poses a problem for the law. Although all commentators agree that the principle, "[b]lame not the speaker" (yanzhe wu zu), should be given effect, they also agree that, in some circumstances, one may cross the boundary between non-actionable "speech" and actionable "conduct."

80. He, supra note 67, at 46 ("People could be put under arrest at will and held incommunicado for investigation. During the wildest days of the Cultural Revolution, even physical tortures were used.")

81. This practice was particularly pronounced during the heyday of Lin Biao and the 'Gang of Four.' During that period, some localities and units made counterrevolutionary many criminal offenses which essentially do not belong to the category of counterrevolutionary crime, such as 'counterrevolutionary rape,' 'counterrevolutionary theft,' 'counterrevolutionary corruption,' and so on. This even reached to the extent where actions totally without counterrevolutionary objective, which had no harmful consequences to society, and which essentially did not belong to the category of criminal conduct, for example, carelessly destroying a leader's picture or such things, were elevated to the level of counterrevolutionary offenses.

The Criminal Research Group, the Law Institute, and the Chinese Academy of Social Sciences, supra note 70, at 43.

82. XINGFA art. 90.

83. According to one commentator on China's criminal system, a person with reactionary thinking whose behavior and actions do not endanger society cannot be considered to have committed an offense. China does not recognize 'ideological offenses.' There is no stipulation in the criminal law for the punishment of an 'ideological offender.'

Cao, Questions and Answers, 23 BEIJING REV. 18, 19 (1980) (discussing China's criminal law).
Until this boundary line is more clearly—and, to whatever extent possible, firmly—demarcated than it now is, the prospect of prosecution for counterrevolutionary incitement, slander, or libel will continue to deter substantial numbers of people from exercising speech rights.84

3. The Wei Jingsheng Case

The Wei Jingsheng case demonstrates that the criminal law will indeed be used to "blame the speaker," and that, whatever the precise definition of the permissible, an outspoken person may easily exceed it. The trial and the surrounding events also demonstrate how "counterrevolutionary crime" can be used to combat dissent, and how theoretical limitations on the citizens' exercise of democratic rights can influence the determination of whether a counterrevolutionary crime has been committed. One may say, therefore, that the Wei Jingsheng case epitomizes the state of speech in China.

Wei was the editor of, and chief contributor to, the dissident journal Explorations (Tansuo), which was founded during the brief period of officially-sanctioned free expression that followed the downfall of the Gang of Four.85 His essays and posters emphasized the need for a "fifth modernization" in China—democracy86—and described the Cultural Revolution as having marked the defeat of the nation's democratic movement by the forces of tyranny.87 He characterized the current Chinese system as "a feudal monarchy disguised as socialism,"88 described the process whereby Marxist revolutions give rise to totalitarian states,89 and clearly expressed his disdain for the current leadership, asking "[a]re not the people justified in seizing power from

84. One writer has noted that the provision of positive legal safeguards for freedom of speech would help to "eradicate the citizens' fears of being punished for their words." Yang, Should Laws be Formulated to Safeguard Freedom of Speech?, 9 DEMOCRACY AND LAW, supra note 31, at 5 (1980).

85. See text accompanying note 39 supra.
87. Some commentators have questioned the importance of democracy for the Chinese people.
88. Id. at 10.
89. Id. at 20-21.
Speech in China

these overlords?  

Wei's posters first appeared on Democracy Wall in Beijing in late 1978. Publication of Explorations soon followed. The magazine circulated in Beijing and the nearby city of Tianjin, and some of Wei's articles were reprinted and excerpted in foreign periodicals.  

Wei was arrested on March 29, 1979, and tried on October 16. He was charged with "supplying a foreigner with Chinese military intelligence and carrying out counterrevolutionary incitement."  

In support of the first charge, evidence was introduced to the effect that, four days after the beginning of China's "battle of self-defense" against Vietnam, Wei divulged to a foreign reporter the names of Chinese commanders, the numbers of troops involved, and information about battles and casualties. The content and distribution of Wei's writings were cited in support of the second charge. Convicted on both counts, he was sentenced to fifteen years in prison, to be followed by a three-year deprivation of political rights. Both at home and abroad, the sentence was criticized for its severity.  

Many observers regarded Wei's trial as a show trial designed to signal the end of the "Beijing Spring." That it certainly was. In this respect, Wei's case was an example of the ability of the authorities to move an individual from the "people" to the "enemy" camp.  

But the trial also established legal precedents. It revealed the authorities' understanding of what "speech" rises to the level of actionable "conduct," and of what "conduct" is counterrevolutionary. The present discussion is concerned chiefly with Wei's conviction for "counterrevolutionary incitement." Chinese commentators also gave this aspect

90. Id. at 11.

91. Wei was said personally to have sold a subscription to his magazine to a foreign reporter. Cf. A Philosopher vs. the System, ASIA WEEK, Nov. 2, 1979, at 14 ("Wei's articles were reprinted by Chinese publications in Hongkong, translated and excerpted in other languages.")

92. Wei was charged and tried after the National People's Congress had adopted the new Criminal Code, see note 70 supra, but before it came into effect on January 1, 1980. Accordingly, he was charged under the Regulations Regarding the Punishment of Counterrevolutionaries (Chengzhi fangeming tiaoli), which had been in effect since 1951. See Transcript of Wei Trial, at 4 (copy on file with The Yale Journal of World Public Order). But neither the legal specialists' nor the authorities' commentary on the case has drawn a distinction between the definition of "counterrevolutionary crime," which was used to convict Wei, and the definition applicable to adjudications under the Criminal Code. The discussion in this Comment, therefore, assumes that the definition of "counterrevolutionary" generated by the Wei decision is currently in force.


94. "Wei Jingsheng's sentence to 15 years in prison was harsh but necessary "to make an example of him," Deng Xiaoping said in an interview with Encyclopedia Britannica. Deng . . . asserted that Wei was among a small group that tried to disrupt the democratic process." Asian Wall St. J., Nov. 27, 1979, at I, col. 1.
of Wei’s case closest scrutiny. Although they did not ignore his conviction for “revealing military secrets to a foreigner,” and occasionally even criticized the reasoning behind that conviction,95 Chinese interpreters and critics of the Wei decision focused on the nature of the crime that Wei was found to have committed by expressing dissident views. No one could overlook the fact that Wei and his writings had figured prominently in the “Beijing Spring.”

The constitutional guaranties of freedom of speech and publication, and the Chinese legal system’s non-recognition of “ideological offenses,” provided the most important legal grounds for criticism of the “counterrevolutionary incitement” conviction. The official explanations of the case, of course, denied the validity of such criticisms.

Constitutional rights, the authorities pointed out, are limited by constitutional duties. There is no such thing as a “right” that exceeds the limitations imposed by those duties; and, in fact, conduct, which under the claim of “right” violates those limitations, is reprehensible in and of itself. Thus, the argument continued, in the case of speech and publication, the limitations embodied by the “Four Principles” are crucial to determining whether a given utterance is entitled to Article 45 protection, or whether it is, on the contrary, unprotected and “reactionary.” A statement opposed to socialism, the dictatorship of the proletariat, the Party, or Marxism-Leninism-Mao Zedong Thought falls in the latter category.

Such statements filled Wei’s writings. Wei’s judges emphasized his failure to make the proper determination as to where “rights” end and “duties” begin. They rebuked Wei for violating Articles 56 and 57 of the Constitution96 and for failing to uphold the “Four Principles.”97 They repeatedly referred to his writings as “reactionary.”

And, in the view of the authorities, Wei did more than make reactionary statements; he “spread his reactionary ideas.”98 Active dissemination made Wei’s offense more than a mere “mistake of political ideology.” It is true, the authorities continued to maintain, that China’s legal system does not recognize “ideological offenses.” No prosecution,

95. The conviction for “supplying of military intelligence” was criticized persuasively on several grounds. It is questionable whether the information given to the foreigner was “secret”; the Criminal Code (which presumably represents the legal standard by which Wei’s conduct was judged, see note 92 supra) refers only to supplying military intelligence to “the enemy,” XINGFA art. 97(1), not to friendly or neutral foreigners; and, finally, the whole charge was suspect insofar as no attempt was made to prosecute the person—presumably, a member of the military—who revealed the “secrets” to Wei. See There were Ample Reasons for Wei Jingsheng’s Conviction and Sentence, Beijing Daily, Dec. 11, 1980.

96. See Prosecutor’s Indictment, Transcript of Wei Trial, supra note 92, at 18.

97. Id.

98. See Taking Facts as the Foundation and Law as the Criterion, Workers’ Daily, Nov. 9, 1979 (legal experts’ forum discussion of Wei Jingsheng case).
Speech in China

for example, could be based on a person's notes or diary entries because such writings lie within the scope of permissible expression of individual "belief" (xinyang). But once an idea is made public, it has social "consequences" that the law will not ignore.

A two-step analysis thus supported the court's finding that Wei Jingsheng had committed the crime of "counterrevolutionary incitement." First, his statements were found to have been reactionary; and, second, these reactionary statements were found to have been disseminated. That Wei's writings offended the "Four Principles" apparently provided sufficient evidence of the "counterrevolutionary purpose" required by the Criminal Code's definition of "counterrevolutionary crime." "Jeopardy" was found in the "harmful social consequences" of Wei's dissemination of reactionary literature.

This is a sorry precedent. The primitive reasoning of the decision left open many more questions than it answered. Is there any distinction, for the purposes of a finding of "incitement," between harshly critical language and exhortation to revolt? Is there any distinction, for that matter, between spoken words, which are always in some sense "public" acts with "social consequences," and written ones? Finally, why did the court assume that constitutional "duties" take precedence over constitutional "rights"? How is it, in other words, that the "Four Principles" have subsumed the constitutional guaranties of free speech and publication and taken on the status of criminal prohibitions?

99. See There Were Ample Reasons for Wei Jingsheng's Conviction and Sentence, supra note 95.
100. See text accompanying note 82 supra.
101. See Prosecutor's Indictment, Transcript of Wei Trial, supra note 92, at 4.
102. The Prosecutor's Indictment lists numerous examples of Wei's "reactionary" statements. Some could be characterized as criticisms, and the others as exhortation. No clear distinction, as to legal significance, was made between the two categories.

He did his utmost to libel Marxism-Leninism-Mao Zedong Thought as a prescription only slightly better than that peddled by charlatans, and slandered our socialist system as an undemocratic and anti-democratic autocratic social system, calling it a 'feudal monarchy disguised as socialism.' He brazenly raised a hue and cry, [saying] 'we should concentrate our fury on the sinister system creating the tragic situation of our people,' and arrogantly proposed that 'we should seize power from out of the hands of these overlords.' He opposes the socialist system, and what kind of system does he want, anyway? Whose power does he want to seize? Is it not extremely clear?

Id. at 18.

That many of Wei's statements were couched in clearly exhortative terms undoubtedly made his an easy case. Precisely because it was so easy, it left no guidelines for deciding the more difficult hypothetical case involving strong criticism, but no exhortation.

103. The Prosecutor asserted that every citizen's freedom of speech is a freedom which rests on the foundation of four basic principles—support of the socialist road, the dictatorship of the proletariat, the leadership of the Party, and Marxism-Leninism-Mao Zedong Thought. There is only freedom to defend that foundation: there is no freedom to destroy it.

Id. This view is echoed by other Chinese commentators.
B. **Administrative Sanctions**

Weijingsheng's case was a vivid example of unpredictable, discretionary application of criminal sanctions to activities arguably entitled to constitutional protection. The citizens' awareness that the criminal law can readily be put to such a use undoubtedly chills the exercise of democratic rights. One would think that this chill chiefly affects those citizens who desire to exercise their rights in relatively dramatic ways, i.e., those citizens who can foresee that their expression of political views, or involvement in political activity, might have a social impact great enough to provoke the authorities' wrath. But to regard the criminal law as the sole mechanism limiting the exercise of rights in China ignores the reality of the Chinese social system.

The criminal law is simply the outermost of a series of concentric circles of social control surrounding the individual in China. It is a society in which surveillance is the norm, not the exception. Mutual surveillance and control begin with the family and extend to the neighborhoods, schools, work units, public security organs, and, finally, to the legal authorities. The pressures exerted by all of these institutions diminish the likelihood that any individual will express unorthodox ideas, or, in fact, that an individual will develop such ideas in the first place.

This pervasive pressure to conform bears a complex relationship to the exercise of democratic rights in China. But the focus of the present

---

[1] Notes in opposition to the proletariat dictatorship, socialist road, the Party's leadership, [and] Marxism-Leninism-Mao Zedong Thought will not be allowed to be freely aired in newspapers, magazines, books, radio, films or dramas, nor can these opinions be freely spread through other means. If there are still people who insist on airing them, the minor offenders will be criticized and educated. Serious offenders or people who refuse to mend their ways despite repeated admonition will be punished accordingly. Do such practices encroach on the citizens' freedom of speech? No, they do not. Zhu, supra note 24, at L15.

104. Cf. V. Li, supra note 20, at 39-53 (characterizing process of individual's transition from normalcy to deviance in Chinese social context as "gradual slide," as opposed to "falling off the edge of a cliff" that occurs in the Western context, with both the "gradual slide" and "concentric circle" images emphasizing the continuity and pervasiveness of social control).

105. One of the important functions served by grassroots social institutions in China—street committees, study groups, and others—is to catch incipient "contradictions" and resolve them before they become too fierce. Such contradictions include disputes between individuals, and institutional problems. They also include "contradictions" between individuals and their environment. Persuasion (shuofu) by their peers and colleagues is used as a means of winning over those individuals who express disagreements with Party policies or dissatisfaction with their work. Small group institutions also serve as important conduits for disseminating new policies. See generally id; Mitchell, Dispute Settlement in China, 4 AM. SOC'Y INT'L L. SOC'IES INT'L L. J. 71, 78-80 (1980).
inquiry being tangible sanctions, discussion will be limited to the outermost source of pressure, the threat of “administrative punishment.”

“Administrative penalties” constitute a loophole in the Chinese legal system. These penalties, which are initiated and administered by the local public security bureaus, include warnings, fines, detention, and sentences to labor camps. The vagueness of the provisions defining “violation of public order”\(^\text{106}\) and describing the classes of people who deserve “labor education”\(^\text{107}\) ensure discretionary application. In principle, a labor education committee or a people’s court must approve a sentence of labor education, or of the hardly distinguishable punishments of forced labor or labor reform. In practice these punishments, which may result in hard labor for periods of up to four years, often are imposed without trial and with little or no judicial review.\(^\text{108}\) The number of people in forced labor camps may well rival the number of those being held in more conventional prisons pursuant to criminal convictions.\(^\text{109}\)

The prospect of such punishment threatens those who wish to engage in behavior that might be deemed aberrant by a variety of authorities. This possibility creates an impossible standard to satisfy. Yet—constitutional theory aside—it may mark the actual limit of the scope of citi-

\(^{106}\) A “violation of public order” is defined as “[conduct which disturbs public order, harms public safety, infringes citizens’ personal rights, or injures public or private property which is relatively minor and, while not sufficiently serious] to be deserving of criminal punishment, ought to be penalized in accordance with these regulations.” \(\text{ZHONGHUA RENMIN GONGHIEGUO ZHIAN GUANLI CHUFU TIAOLI (The People’s Republic of China Regulations Regarding Penalties [Used in] Administration of Public Order) (1957).}\)

\(^{107}\) The “labor education” provisions are not unlike the “parasitism” laws of the Soviet Union. Among the classes of people described as appropriate subjects for “labor education” are people who exhibit “hooliganism,” “jeopardize public order,” “refuse to comply with work assignments,” or “continuously cause trouble for no reason,” and “counterrevolutionary and reactionary elements opposed to socialism whose offenses are minor and to whom no criminal responsibility has been assigned.” \(\text{GUOWUYUAN LAODONG JIAOYANG WENTI DE JUEDING (Resolution of the State Council Regarding Labor Education) (1957) (reissued and supplemented, 1979).}\) \(\text{Cf. N.Y. Times, Dec. 31, 1980, at A3, col. 1 (“A middle-aged Communist Party member was recently arrested and sent to a labor reform camp for talking with an American reporter. She was accused of divulging information about her personal life and on sexual habits in China.”")}\)

\(^{108}\) Under a loophole in the law, authorities may imprison people for up to four years without trial. Often these detainees are sent to the dreaded labor camps. The editor of one unofficial journal committed suicide by jumping under a train that was to carry him to such a camp. \(\text{Seymour, Human Rights in China, SPEAHRHEAD, Winter, 1980-81, 1, 27 (excerpt of testimony delivered before a joint session of two U.S. Congressional subcommittees).}\)

\(^{109}\) It has been estimated that as many as 9,000 persons are incarcerated in the forced labor camps on the outskirts of Beijing alone. \(\text{See China Revives Labor Camp System, Wash. Post, June 1, 1980, at A1, col. 5. The number incarcerated throughout the whole of China is estimated at approximately 100,000. See N.Y. Times, Jan. 3, 1981, at A4, col. 3.}\)
zens' rights.\textsuperscript{110}

III. Democratic Expression and the Future of Free Speech

At present, numerous theoretical and practical restrictions limit the scope of the democratic rights enumerated in Article 45 of the Chinese Constitution. The most important of these are:

1) the idea that rights are not inalienable or fixed but are subject to modification in response to changing historical and social circumstances;

2) the principle of "the unity of the people's rights and duties;"

3) the nature of the society contemplated by the theory of democratic centralism;

4) the fact that, under the people's democratic dictatorship, rights are not universal;

5) the inhibitions that arise from the uncertain scope of China's criminal laws and from the fear of their discretionary application. "Counterrevolutionary crime" is an especially troublesome category. The definition of "counterrevolutionary" conduct changes over time, according to who are the "revolutionaries" of the moment. The legal significance of the term "counterrevolutionary" remains unclear;

6) the inhibitions arising from the close surveillance carried out at all levels of Chinese society; and, particularly, from the public security organs' surveillance of the citizenry and discretionary application of administrative sanctions. These sanctions, which can be quite harsh, are often imposed with little or no supervision by the legal authorities.

One must distinguish those restrictions consistent with Chinese political theory and with Chinese society from those that result merely from the repressive application of legal sanctions or other methods of control. Insofar as Chinese political theory neither views rights as inalien-

\textsuperscript{110}. The following passage from a Workers' Daily editorial evidences the haziness of the dividing line between permissible and impermissible speech.

There are people who think that we should not stop or 'arrest' people who publicize counterrevolutionary opinions. Instead, we should discuss and criticize them afterwards. These ideas are basic violations of the provisions of 'the constitution' of our country. Furthermore, China has stipulated various confidential regulations. According to provisions of these regulations, nobody should disclose confidential information in conversation, letters, talks, or writings to outsiders. Offenders will be charged with violation of criminal law. This is, in fact, a restriction on disclosing confidential information. There is another restriction on freedom of speech and that is the restriction on socialist morality. For example, 'we should not say things which are detrimental to the unity of our country.' Offenses will be criticized and condemned by public opinion, even though they are not punishable by law. Every conscientious socialist citizen should not only spontaneously restrain his opinions and abide by the laws and regulations of 'the constitution,' but should also measure himself against socialist morality and restrain his opinions.


312
able nor regards democratic expression as an end in itself, the scope of
democratic rights in China may well remain subject to modification in
light of other values. But how are those values to be defined, and how
are those definitions to be translated into cognizable limits? The future
of speech in China lies in the answers to these questions.

A. Three Paradigms for Democratic Participation

If it is in the nature of language\textsuperscript{111} to retain the old while presenting
the new, it is particularly characteristic of Chinese political discourse to
effect radical changes in policy under the guise of maintaining earlier
priorities.\textsuperscript{112} Any attempt to extract discrete paradigms for democratic
participation from the mass of available pronouncements thus is bound
to be somewhat artificial.

Nonetheless, bearing that caveat in mind, we may proceed to ex-
amine three paradigms whose interaction may determine the content of
permissible democratic expression in China, and the form of that ex-
pression. These paradigms derive from the political values of mass
participation, Party leadership, and what, for the purposes of this Com-
ment, I choose to call “due process.”\textsuperscript{113}

1. Mass Participation

As we saw in the discussion of the “mass line,”\textsuperscript{114} Chinese political
theory emphasizes political participation by the masses. Mass partici-
pation legitimates the political process and the role of leadership,\textsuperscript{115}
and is indispensable to democratic centralism.\textsuperscript{116}

Viewed in light of the importance of mass participation, leadership is
a temporary and relative phenomenon.\textsuperscript{117} If the masses determine that
their interests are not furthered by particular leaders or the policies
they pursue, they can, presumably, reject these leaders and revoke their
authority. In the past, the need for increased mass participation in the

\textsuperscript{111} “Language is at the same time a living thing and a museum of the fossils of life and

\textsuperscript{112} See Kraus, Class Conflict and the Vocabulary of Social Analysis in China, 69 China Q. 54, 74 (1977).

\textsuperscript{113} The analysis in this section draws on Leon S. Lipson’s description of the “three-
cornered” nature of Soviet legality. See Lipson, Law and Society, in Prospects for Soviet Society 104-11 (A. Kassof ed. 1968). But see V. Li, supra note 20, at 23-31 (identifying only
two distinct approaches to law in China—that of the “legal specialists,” on the one hand,
and that of the “communist cadres,” on the other—and tracing the interaction of these two
approaches through the course of P.R.C. history).

\textsuperscript{114} See text accompanying notes 61-64 supra.

\textsuperscript{115} See J. Starr, supra note 17, at 83; Liu & Niu, supra note 17.

\textsuperscript{116} See J. Starr, supra note 17, at 147-49, 151-52, 190-92.

\textsuperscript{117} Id. at 88-89.
political process has been said to justify the temporary relaxation of rules and hierarchical structures, even at the risk of excess and chaos.\textsuperscript{118}

Some scholars have suggested that the Cultural Revolution was an attempt by Mao and his followers to restore the primacy of mass participation to a milieu in which the Party was becoming a political elite divorced from its mass constituency.\textsuperscript{119} Certainly, the mass media of the Cultural Revolution period emphasized the importance of “unleashing the energy of the masses,” and allowing them to air their grievances against those in power.\textsuperscript{120} The “Four Bigs”—“new forms of carrying on socialist revolution created by the masses”—were to serve as the truly “mass” means for this reassertion of the peoples’ authority.

The problem, of course, was that someone had to do the “unleashing,” and someone had to call a halt to it. In view of the paradoxes inherent in their leadership roles,\textsuperscript{121} cadres and Party leaders could not act simply as conduits for the energy and pent-up rage of the masses; and they were in any case unlikely to do so when they were themselves objects of criticism.\textsuperscript{122} This experiment in mass democracy quickly gave way to a situation in which freedom of expression was even more limited than it had been before. The “mass line,” originally conceived to be a fluid political process, became a set of rigid normative prescriptions used in the factional struggles of high Party officials. At the same time, “bourgeois” notions of legality were repudiated, the procuracy was weakened, and normal legal procedures were suspended. As a result, the scope of speech rights was highly uncertain and politically “safe” conduct severely restricted.\textsuperscript{123} It is no wonder then that, after the end of the supposedly “mass democratic” Great

\begin{thebibliography}{99}
\bibitem{118} The Land Reform of 1944-46 was one such occasion. See S. Pepper, \textit{Civil War in China} 244-46, 269-73 (1978). After 1949, the Cultural Revolution has been the most prominent instance of the “unleashing of the masses.” See M. Selden, \textit{The People’s Republic of China} 549-51, 584-85 (1979). See generally V. Li, supra note 20, at 65.
\bibitem{119} See J. Starr, supra note 17, at 549-53.
\bibitem{120} See M. Selden, supra note 118, at 149-53.
\bibitem{121} See text accompanying notes 125-26 infra.
\bibitem{122} During the tumultuous Cultural Revolution, the Lin Biao-Jiang Qing counterrevolutionary cliques... branded the great masses of people’s revolutionary opinions against the ‘gang of four’ and the expression of their sentiment of mourning Premier Zhou as ‘making counterrevolutionary speeches and uttering counterrevolutionary slogans.’ Under those circumstances, all kinds of epithets were hurled at those who dared to speak their minds, at the very least, while in serious cases, they were detained, resulting in many cases of miscarriage of justice. Many people shut their mouths, kept their fury to themselves and dared not speak. Citizens were totally deprived of their freedom of speech. See J. Seymour, supra note 3, at 11-13.
\end{thebibliography}
Proletarian Cultural Revolution, a substantial number of Chinese responded with intense enthusiasm to the “Beijing Spring” and the opportunity for officially-sanctioned freedom of expression.

The failures of the Cultural Revolution may prompt the Chinese to revaluate the theory of the mass line. But it is doubtful that revaluation will lead to rejection. The Chinese would be unlikely to acquiesce in a form of political practice that effectively reads the “democracy” out of democratic centralism.

2. Party Leadership

The removal of the “Four Big Rights” from the Constitution represented the final stage in the dismantling of the Cultural Revolution experiment in mass participation. That experiment, the current authorities maintain, yielded little besides chaos and a form of Party leadership so oppressive as to deserve the name, “fascism.”124 In the course of establishing their own “correct” version of Party leadership, the authorities have, accordingly, deemphasized the value of mass participation. To what extent this shift is temporary and aimed simply at a restoration of order, and to what extent it represents an attempt fundamentally to redefine the relationship of the Party and the masses, is an important question.

The role of the Party under Socialism is fraught with ambiguity. It is the proletariat’s spokesman, but also its vanguard.125 It is the masses’ tool, but also their leader. It provides the conduit for, but also shapes and refines the masses’ ideas. The Maoist theory of the mass line reflects these paradoxes. Only through mass participation can the Party legitimate its leadership, but it is only by itself deciding which ideas are “correct” that the Party can formulate the mass line.126 The latter part of the formula, combined with the lack of Party accountability to the masses, poses a great threat to the egalitarian ideals of socialism. Indeed, the theory of “embourgeoisement” holds that under such conditions, the Party may insulate itself from criticism, entrench itself in power, and become, essentially, a ruling élite.127

If the Cultural Revolution was an attack on incipient embourgeoisement...
certain developments since the Cultural Revolution suggest that the attack failed and that the feared process is proceeding apace. With the 1975 Constitution, the Party elevated itself to a constitutional status it had not theretofore enjoyed; the recent enunciation of the "Four Principles" grants the Party coequal status with socialism, Marxism-Leninism, and Maoism. In other words, the legitimacy of the Party has become a fixed tenet of constitutional law and political theory.

Recent discussion in the Chinese press indicates that the special status of the Party is thought to justify the maintenance of two separate systems of democracy: intra-Party democracy and democracy for the people. Within the Party, the unfettered discussion of views is permitted, and is said to be indispensable to the Party's ability to explore policies and achieve consensus. The people, however, should hear only the results of Party debates and evidence of intra-Party dissent should not become public.

As a corollary to this "dual democracy," there exists a dual system of access to information and to the means of disseminating it. Special publications containing detailed reports of domestic and international events are available only to Party members, and the Party dominates the mass media as well as most printing facilities.

128. Id. at 127. Cf. Wang & Liu, supra note 110, at R2 ("Some people ... claim that there is a bureaucratic class within the Party and threaten to launch a second Great Cultural Revolution.")

129. Article 2 of the 1975 Chinese Constitution, which is identical to Article 2 of the present Constitution, see note 124 supra, lacked precedent in the 1954 Constitution.

130. See text accompanying notes 55-60 supra.

131. See A Party Member's Statements and Actions Should Not Run Counter to Party Policy, Beijing Daily, Feb. 6, 1980; Zhu, supra note 24, at L16. Party members were given additional warning in the following ominous passage:

With regard to 'the citizens have freedom of speech,' the Constitution indeed does contain this provision. However, one serving as a member of the Communist Party ought not only abide by the Constitution, but should also, even more conscientiously, accept the restraints of Party rules and regulations. Otherwise, how can he avoid confusing himself with an ordinary civilian?

If There Are Differing Opinions Regarding a Party Organization's Resolution, Why Should They Not Be Discussed with the Masses, Beijing Daily, Mar. 5, 1980.

132. CANKAO ZILIAO (Reference Material) is a well-known example of such publications. It is a detailed bulletin of foreign news reports that is available only to Party members and officials. On the general question of differential access to information, see Butterfield, Chinese Get Their News From a Hidden Network, N.Y. Times, Dec. 31, 1980, at A3, col. 1.

133. Prominent Party officials candidly have admitted this domination. Deng Xiaoping, in a major speech delivered to 10,000 party cadres at Beijing's Great Hall of the People in January 1980, asked rhetorically why it was that 'certain secret publications' were printed so beautifully. Noting that their authors could not possibly possess printing plants, Deng concluded that the publications could not have appeared without the support of party members. Dreyer, supra note 46, at 62.

Official control of the information media has been noted by other observers.
Of course, Party privilege is not a new thing in China. It existed before the Cultural Revolution and persisted throughout the Cultural Revolution in the face of savage attack. Arguably, Party members should have some special status if they are to perform their leadership roles in a flexible and effective manner.

But should the legitimacy of the Party be a tenet of constitutional law? And—the presumption of consensus notwithstanding—should the Party have the power unilaterally to modify the Constitution? Should it be able to close its debates to the public and deliver its policy decisions without advance warning to the individuals who will be affected? In this latter regard, the events associated with the “Beijing Spring” developments were significant, not only for the fact that they allowed outsiders a rare glimpse at the aspirations of the Chinese people, but also because they provided an example of what may happen when Party “leadership” becomes unfettered Party authority. A Party policy that encouraged the people to express their grievances gave way to a contrary policy so quickly and dramatically that, within the course of several months, speech permitted under the former policy became actionable criminal conduct under the latter. Such inconsistency engenders social disorder in the short term and, in the long term, dissatisfaction with the government.

3. Due Process

China's current leaders maintain that the events of the Cultural Revolution demonstrated China's need for fixed legal procedures and a
comprehensive legal system. Accordingly, they have restored the procuracy to its pre-Cultural Revolution status, drafted new laws, refurbished the legal profession, and launched a nationwide campaign of legal education.137

This support of the rule of law is without precedent in post-1949 China. Although the legal profession survived the establishment of the People's Republic, the values it represents have long occupied a tenuous position in the regime's political theory. The “Anti-Rightist” campaign of 1957-58 explicitly rejected those values as “bourgeois,” and the Cultural Revolution, picking up where the Anti-Rightist campaign left off, decimated the legal profession and the legal system as well.138 Against this background, the present authorities’ seemingly unequivocal support of “socialist legality” appears to be a new thing; an open embrace of values that have previously been criticized and, from time to time, rejected.

The sincerity of this embrace may be questioned. Recent events have demonstrated the authorities’ lack of concern for the separation of law and politics. The rule of law has been used to suppress dissent and punish political enemies. Such activities suggest that the authorities contemplate only superficial adherence to the concept of legality.

But in contrast to this discouraging prospect, legal specialists in China have begun to debate the meaning of the new laws and to suggest lines of development for the new legal system. By drawing on the ideas they have expressed and adding others that they have not explored, one may construct a “due process” paradigm for the exercise of democratic rights.

a. The primacy of constitutional theory and practice

Some writers have suggested that abandoning the “Four Principles” concept would help to clarify the legal boundaries of speech rights.139 Such a development would be a positive step. The “Four Principles,” a recent creation,140 lack constitutional status; nor do they possess the

137. See Eliasoph & Grueneberg, supra note 9; Gelatt & Snyder, Legal Education in China: Training for a New Era, 1 CHINA L. REP. 41 (1980).
138. See V. Li, supra note 20, at 30-31; Mitchell, supra note 105, at 77-78.
139. See Zhang, Should Legal Safeguards be Provided for the Principle of “Blame Not the Speaker?” 9 DEMOCRACY AND LAW, supra note 31, at 4 (1980) (“[p]rovided their conduct does not constitute the crimes of libel, slander, personal attack, incitement or disturbing [public order] then, even if they harshly criticize Marxism, the Communist Party, or the socialist system, [speakers] should not be given criminal punishment”).
140. The “Four Principles” concept first appeared in 1979, apparently in response to the “Beijing Spring” and also, perhaps, in response to the sudden increase in public disturbances occasioned by the return to the cities of massive numbers of citizens who had been sent to the countryside during the Cultural Revolution. See Dreyer, supra note 46, at 52-54. The
status of formal prohibition represented by the criminal laws. Yet, as the Wei Jingsheng trial demonstrated, these "Principles" can take on the force of positive law. Moreover, no law protective of speech counters the requirement of adherence to the "Principles."

The only existing legal safeguards are the Constitution's Article 45 guaranties. Standing alone, these are inadequate to ensure the protection of speech rights. Recent history shows the authorities' tendency to give content and force to constitutional provisions that enumerate the people's duties, while relegating guaranties of citizens' rights to an indeterminate status. Historically, constitutional "duties" have become more onerous and more specific, while guaranties of democratic rights have undergone no comparable expansion.141

A satisfactory clarification of the relationship between the people's rights and duties may require restoration of the wording of Article 56 to the form in which it appeared in the 1954 Constitution. That version required only that citizens "abide by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics."142

This change would remove from the Constitution the duties of support owed the Chinese Communist Party and the socialist system, and would thus facilitate freer discussion of the importance and nature of those duties.

Given the problems associated with the Party's ability to accomplish constitutional change by fiat, one might argue that, ideally, the people should have the power to initiate, approve, or veto such change through promulgation of the "Four Principles" did not end the uncertainty concerning the scope of permissible speech.

At the same time that rebellion itself was outlawed, standards for dissent were clarified. Four criteria were advanced. . . . Although the promulgation of these four criteria was helpful in setting standards for dissent, the exact meaning of the four remained ambiguous, for the government seemed to be redefining the meaning of each. In an attempt to clarify just one of them, the party's newest heir-apparent, Zhao Ziyang, suggested that socialism could be reduced to two principles: public ownership of the means of production and payment to each according to his work. This fundamental reinterpretation of socialist doctrine . . . must surely have shocked those who had studied the Marxist-Leninist classics and had learned the Maoist interpretation thereof only a few years before.

Id. at 54 (footnotes omitted).

141. Duties appearing in the present Constitution that did not appear in the 1954 version include, with the exception of the duty to "abide by the Constitution and the law," all of the Article 56 duties, and the Article 57 duty to "safeguard state secrets." Note, however, that the duty to "pay taxes according to law," see XIANFA (Constitution) of 1954, art. 102 (China), does not appear in the present Constitution.

As for rights, they had actually been diminished to some extent, even prior to the removal of the "Four Bigs" from Article 43. See text accompanying note 149 infra. An exception to this trend is the 1978 Constitution's Article 45 guaranty of the "freedom to strike," which did not appear in the 1954 Constitution.

142. XIANFA (Constitution) of 1954, art. 100 (China). The content of this Article has been split into two parts and incorporated into the current Articles 56 and 57.
fixed democratic procedures. The presumption of consensus,\textsuperscript{143} a concept which seems inconsistent with "mass line" principles, may ultimately prove inadequate to satisfy developing standards of legality.\textsuperscript{144}

b. New legislation

Exalting constitutional theory and practice, without more, would not suffice to clarify the precise scope of the citizens' rights. As Chinese commentators have pointed out, reliance solely on constitutional and other general principles results in dependence on the winds of political change.\textsuperscript{145} Freedom of speech and publication must have positive legal safeguards. China should promulgate a publication law, and a law protecting the exercise of speech rights. One might hope that these laws would delineate the distinction between actionable "conduct" and non-actionable "speech."

Whether or not such laws are adopted, the clarification of speech rights requires resolution of the conduct/speech problem. As a stopgap, the promulgation of a law for the punishment of counterrevolutionary agitation would serve a useful, though limited, function. Use of the doctrine of current counterrevolutionary crime to punish what appear to be minor offenses has generated confusion and resentment.\textsuperscript{146}

If "counterrevolutionary crime" is to remain a category of offense,

\textsuperscript{143} See text accompanying notes 13-19 \textit{supra.}

\textsuperscript{144} Indeed, the fact that the authorities had to strain to make the crimes fit the statute may account for some of the peculiarities of the Wei Jingsheng case and the case of Fu Yuehua, another dissident who was tried during the aftermath of the "Beijing Spring". [Two leading dissidents were arrested. One of these, Wei Jingsheng, was accused of giving military secrets to . . . foreigners . . . The other, Fu Yuehua, had allegedly accused her Party secretary falsely of rape. Noting that both of these charges had surfaced rather late in the proceedings against Wei and Fu, \textit{The Economist} opined that the accused had been singled out as examples for reasons other than those contained in the formal charges.

\textsuperscript{145} The uncertain contours of proscribed speech clearly can be inhibiting. Because "[b]lame not the speaker" is an abstract principle, it does not demarcate the distinction between criminal and noncriminal; nor does it stipulate what legal responsibility should be borne by an offender. The crucial point here is that the question of whether a "speaker" has committed a crime is determined, not according to law, but according to the "listener's attitude—which is unpredictable—and his heart. . . . [It is] determined by the person who wields power. . . . Only laws safeguarding freedom of speech make "speakers" and "listeners" equal before the law; and it is only when [such] laws are powerful that people lose their fear of being punished for what they say.

\textsuperscript{146} Apparently in response to a similar dilemma, the Soviet Union adopted the following law in 1966, with the intention that it supplement, but by no means supplant, already-existing laws punishing the commission of "state crimes."
Speech in China

China should enact a law governing relatively minor "counterrevolutionary" conduct, and prescribing correspondingly lighter penalties.147

Finally, were China to grant due process values their full weight, it would adopt supplementary laws and procedures designed to make practicable the citizens' constitutional rights to "lodge complaints . . . against any person working in an organ of state, enterprise or institution for transgression of law or neglect of duty" and "to appeal to organs of state at any level against any infringement of their rights."148 Reinstitution of the 1954 Constitution's guaranty of a "right to compensation" for "[p]eople suffering loss by reason of infringement by persons working in organs of state of their rights as citizens" [sic]149 would help these guaranties become something more than formal.

Conclusion

Each of the "mass activism," "Party leadership," and "due process"


Art. 190(1). The systematic distribution in oral form of deliberately false fabrications harming the Soviet state and social structure, and also the preparation or distribution in written, printed or other form of productions of such content shall be punished by deprivation of freedom for a term of up to three years or by corrective labor without deprivation of freedom for a term of up to one year or by fine of up to 100 rubles.

Art. 190(3). The organization or active participation in group activity seriously violating public order or accompanied by clearly illegally insubordinate demands on representatives of authority or entailing disruption of the functioning of transport, state or public agencies and enterprises shall be punished by deprivation of freedom for a term of up to one year, or corrective labor without deprivation of freedom for a term of up to one year, or by a fine up to 100 rubles.


147. A recent People's Daily article's reference to a 1955 "Decision on dealing with illegal books and magazines"—a "decision" which has been in such obscurity that it was never even mentioned in the Wei trial—indicates that the authorities are aware of the need for such an intermediary law, and in fact have just such a law in mind.

According to the 'decision on dealing with illegal books and magazines' passed by the Standing Committee of the NPC on 8 November 1955, books and magazines having any one of the following characteristics are considered illegal: 1) opposing the people's democratic regime and violating existing policies, laws and regulations; 2) instigating discrimination and oppression against certain nationalities or races and undermining unity among all nationalities in the country; 3) obstructing diplomatic relations, opposing world peace and propagandizing imperialistic aggressive wars; 4) revealing state secrets; 5) advocating theft, obscenity, murder, arson and other criminal acts, endangering the people's health, undermining social morals and jeopardizing public order; 6) contravening the Constitution and laws and ordinances. Leading organs at various levels can impose the penalties of stopping publication, stopping circulation, stopping hiring out of and confiscation of the abovementioned publications, depending on the circumstances of the legal violation. Until the state formulates new laws on this matter, the above decision is still in effect.

Li, supra note 122, at L6.

148. XIANFA (Constitution) art. 55 (China).
149. XIANFA (Constitution) of 1954, art. 97 (China).
paradigms for the exercise of democratic rights has the potential to subsume the other two. But one might hope that extremism will be avoided. Careful integration of the three paradigms could go far toward achieving the Maoist vision of a "free but centralized, solemn yet lively" (zìyou jizhong, yansu huopo) socialist society.

The adoption of due process safeguards for the exercise of rights is a logical first step. Though such safeguards might ultimately prove unavailing in the face of onslaught from "ultra-leftist" extremists or autocratic Party bosses, their existence would at least pose an obstacle to sudden and arbitrary suppressions of political rights. If speech and publication doctrine were to develop and be consolidated through the principled adjudication of individual cases, those doctrines would prove more difficult to dismantle.

Such provision of basic safeguards for the exercise of rights could set the stage for the much-needed discussion of fundamental theoretical issues. Lively, open debates should address the meaning of the "mass line" concept, the relationship between democracy and centralism, and the work-style of the Party. But as long as speakers fear retribution for their words, such debates will never take place.

Two overriding practical factors will ultimately determine the scope of rights in China. The first is the problem of material limitations on the exercise of rights. Socialist legal theory points out the hypocrisy of granting people political rights while not providing material safeguards for their exercise. In accordance with this insight, the 1954 Chinese Constitution guaranteed to the citizens the "material facilities" necessary to their enjoyment of democratic rights.\textsuperscript{150} There are, undoubtedly, economic factors that account for the current leadership's failure to restore this guaranty. Nonetheless, absent such a guaranty and the resources to back it up, the "democratic rights" of China's impoverished citizens will remain empty words.\textsuperscript{151}

\begin{footnotesize}
\begin{enumerate}
\item XIANFA (Constitution) of 1954, art. 87 (China).
\item The April Fifth Forum, founded in 1978, was the first private newspaper to appear in the People's Republic of China. The following excerpts from an interview with its editor Xu Wenli testify to the economic obstacles faced by private citizens who wish to disseminate their views.
\begin{enumerate}
\item Q: What equipment has your newspaper? How and where is it printed?
A: We are operating under very difficult conditions. Our office looks shabby, printing equipment and methods are simple and primitive. Basically, we print by hand.
\item Q: How do you print it?
A: . . . [O]ur printing method is very primitive. We cut stencils first, and then have them mimeographed by hand. We devote only our spare time and nights to printing the newspaper.
\item Q: Where have the funds come from?
A: At the beginning, funds were donated by workers associated with the newspaper
\end{enumerate}
\end{enumerate}
\end{footnotesize}
Speech in China

Finally, no matter what the explicit limitation on the exercise of democratic rights—be it the present requirement of adherence to the “Four Principles,” or a “due process” requirement that the exercise of speech rights not transgress the limitations laid down by an interlocking set of laws—it will remain meaningless if it is not subject to uniform interpretation and enforcement. The chill created by the arbitrary use of legal and administrative sanctions is in some ways more injurious to democracy than the existence of the sanctions themselves. In this connection, one can only hope that the current authorities’ attempt to engraft legal principles and procedures in Chinese society will succeed; that law will become a potent, independent social force; and that the people will come to believe in it and rely on it.

whose monthly salaries range from 40 to 50 yuan [approximately U.S. $30.00 per month]. Beginning from . . . issue no. 5, it has been sold at a price that all the low-income Chinese people can afford . . . . I have used one 16-square meter room as our editorial department. It is where all the articles are edited, stencils are cut, copies are printed and stapled . . . . Since we all have regular daytime jobs, we can only spend nights running our newspaper. To meet the deadline, sometimes we can sleep only 1 to 4 hours a day.

The ‘April Fifth Forum’ Story, supra note 34, at 24-25.

The fate that befell the April Fifth Forum is also a form of testimony.

In mid-1980, Xu Wenli’s predecessor as April Fifth Forum editor was sentenced to three years imprisonment. At about the same time, Xu closed down the publication, perhaps to avoid a similar fate. By September, all of Peking’s unofficial journals had been forced to cease publication.

Id. at 25 (footnote omitted).