

POLITICAL DEVELOPMENTS AND HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA



HEARINGS

BEFORE THE
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27. Tang Tsou, "Back from the Brink of Revolutionary-'Feudal' Totalitarianism," in Victor Nee and David Mozingo (eds.), State and Society in Contemporary China (Ithaca: Cornell University Press, 1983), pp. 53-88.
28. The defining characteristics of pluralism are those suggested by Cyril E. Black and John P. Burke, "Organizational Participation and Public Policy," World Politics, vol. XXXV, no. 3 (April 1983), pp. 393-425.
29. David Apter, The Politics of Modernization (Chicago: University of Chicago Press, 1965).
30. I have drawn the term "consultative authoritarianism" from H. Gordon Skilling, "Group Conflict and Political Change," in Chalmers Johnson (ed.), Change in Communist Systems (Stanford: Stanford University Press, 1970), pp. 215-34.

Mr. SOLARZ. We will now hear from Professor Chiu.

STATEMENT OF HUNG-DAH CHIU, PROFESSOR OF LAW,
UNIVERSITY OF MARYLAND LAW SCHOOL

Mr. CHIU. Thank you, Chairman Solarz and Chairman Yatron. I feel a great honor to have the opportunity to present testimony to these esteemed subcommittees. My presentation is on the recent legal development and its impact on the human rights situation in China.

One of the major concerns of the post-Mao leadership in the People's Republic of China is to strengthen the socialist legal system in order to provide a more secure and stable environment for carrying out the PRC's ambitious Four Modernizations Program. To achieve this goal, the People's Republic of China has taken a series of measures to reform its legal system in an attempt to establish a limited degree of a "rule of law" and respect for human rights in China while still maintaining the dominant control of the Chinese Communist Party [CCP]. In 1980, the People's Republic of China Criminal Law and Criminal Procedure Law came into force. In 1982, the Provisional Act on Lawyers also came into force. The People's Republic of China has also greatly expanded its legal education and research.

The highlight of legal reform was the enactment of a new constitution on December 4, 1982.

Chapter 1 of the constitution sets forth the People's Republic of China political and economic system, and its general policies. Article 1 states that the People's Republic of China is "a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants." It also provides that the "socialist system is the basic system" and "sabotage of the socialist system by any organization or individual is prohibited."

Article 3 states that "the state organs of the People's Republic of China apply the principle of democratic centralism." These provisions make it clear that the People's Republic of China is essentially a totalitarian system where no challenge to its socialist system shall be allowed and decisionmaking process shall be within the hands of a few in the name of "centralism."

Generally speaking, except for the missing stipulation on freedom of residence, the constitution restores or expands the provisions on individual rights and freedoms in the 1954 constitution. The most notable one is equality before the law for all citizens of the People's Republic of China (article 33).

The constitution, however, also stresses that the rights of citizens are inseparable from their duties (article 33). These duties are safeguarding state secrets (article 54) and to refrain from infringing "upon the interests of the state, of society and of the collective or upon the lawful freedoms and rights of other citizens" when exercising their freedoms and rights (article 51). These vaguely phrased provisions can be invoked by the People's Republic of China authorities to restrict citizen freedoms provided in the constitution.

Besides these provisions, article 5 of the constitution establishes the principle of the supremacy of the constitution in the People's Republic of China legal system. There was no comparable article in any previous People's Republic of China constitution. Moreover, it also restores the provisions of the 1954 constitution on judicial and procuratorial independence.

The constitutional provisions, if substantially implemented, would certainly provide a certain degree of a "rule of law" and respect for human rights in the People's Republic of China. However, no matter how optimistic one may be, there still remains a sharp discrepancy between the law and reality. The most serious problem is that there is no mechanism in the constitution to prevent the People's Republic of China legislative and administrative organs to enact law or promulgate administrative decrees to curtail citizens' rights and increase citizens' duties under the constitution.

The anticrime campaign is an example. In 1981, a nationwide campaign against crime was launched. During the campaign, the People's Republic of China press frequently reported mass meetings to pronounce death sentences and the immediate execution of the accused after the meeting. Despite the existence of all procedural guards provided in the criminal procedure law, the PRC judicial authorities appear to pay little attention to them.

The anticrime campaign was intensified in 1983 and 1984. On September 2, 1983, the National People's Congress Standing Committee adopted a resolution removing practically all guarantees of

due process provided in the criminal procedure law for persons accused of murder, rape, armed robbery, and other violent crimes. Another resolution revised the criminal law to increase sharply the number of capital offenses to cover virtually any serious crimes and order the courts to impose stiffer penalties, including execution, on people convicted of violent crimes. Under the amended criminal law and criminal procedure law, a person charged with one of the violent or serious crimes could be executed within 8 days or so, including arrest, investigation, prosecution, sentencing, appeal and execution.

A recent Chinese article revealed that during the anticrime campaign some legal adviser offices, where the Chinese lawyers are required to practice, are reluctant to accept cases for accused criminals. What is more shocking is that some courts have even rendered sentences before trials, and have written judgments before opening the case for hearing. In this connection, one must realize that the Chinese criminal procedure law still refuses to adopt the principle of presumption of innocence. Thus, once a person is arrested he or she is almost certain to receive criminal sanction.

Most of those executed were in the age groups from 15 to 40. Many were unemployed. The total number of criminals executed is not clear because the People's Republic of China has not published any statistics. It appears that in 1984 alone, the People's Republic of China executed at least 10,000 for offenses ranging from habitual thieves to counterrevolutionaries.

I will omit my presentation on the political offenses since Andy Nathan is going to present that.

Another problem for Chinese legal reform is the judicial independence. Although the constitution provides for judicial independence, many newspapers and articles published in China reveal that judicial cadres in China today still find it prudent, as in the past, to secure advice and consent from party committees in dealing with many criminal cases. Sometimes it takes direct intervention from party committees to settle cases of controversial or political nature.

In conclusion, in my view, the Chinese leaders, despite their intention to establish a limited "rule of law" and respect for human rights in China, have so far paid sparse attention to legal procedure in carrying out their policies and also wanted to retain escape clause in legislation. They appear to believe that the ends can justify the means. The anticrime campaign is an example. In carrying out this campaign, they paid almost no attention to proper procedures prescribed by the constitution, the criminal law, and the criminal procedure law. They intended to do things quickly and thus dispensed with legal procedure. They exhibited similar attitudes in dealing with political dissidents.

In comparison with the Maoist period, the People's Republic of China has significantly improved the legal system and human rights situation since 1977. However, the legal system and the human rights situation there are still below the recognized international minimum standards as provided in the 1948 Universal Declaration of Human Rights adopted unanimously by the General Assembly of the United Nations.

Article 11 of the Universal Declaration of Human Rights provides for the principles of no punishment without preexisting laws and the presumption of innocence in criminal justice. Both principles were rejected by the People's Republic of China.

If the United States does not require countries receiving bilateral assistance to recognize the very basic principle of criminal justice as provided in article 11 of the Universal Declaration of Human Rights, then there is no reason why the United States should set a higher standard for China in United States human rights policy.

On the other hand, if some countries recognizing these basic principles of criminal justice in their domestic legislation, such as the Soviet Union and the Eastern European countries, are denied assistance under the existing legislation on the ground of their human rights situation, then how can the U.S. Congress justify authorizing bilateral assistance under its legislation to a country which is not even willing to recognize those basic principles of criminal justice on paper, not to mention their actual implementation?

In his address to the U.N. General Assembly in September 1984, President Reagan stated that the United States will continue to view concern for human rights as the moral center of U.S. policy. If the President and the Congress are serious about implementing this policy, both should apply a uniform standard in human rights in U.S. relations with all countries, whether those countries are allies, friends, adversaries and nonaligned. Thank you.

Mr. SOLARZ. Thank you very much, Professor, for a very comprehensive statement.

[The prepared statement of Mr. Chiu follows:]

PREPARED STATEMENT OF HUNGDAH CHIU, PROFESSOR OF LAW, UNIVERSITY OF
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RECENT LEGAL DEVELOPMENT AND THE HUMAN RIGHTS SITUATION IN CHINA

(Prepared for a Hearing on Political Developments and Human Rights Situation in China, Subcommittees on Human Rights and International Organizations and on Asian and Pacific Affairs, Committee on Foreign Affairs, U.S. House of Representatives, October (9, 1985.)

One of the major concerns of the Post-Mao leadership in the People's Republic of China (PRC) is to strengthen the socialist legal system in order to provide a more secure and stable environment for carrying out the PRC's ambitious Four Modernizations program. To achieve this goal, the PRC has taken a series of measures¹ to reform its legal system in an attempt to establish a limited degree of a "rule of law" and respect for human rights in China while still maintaining the dominant control of the Chinese Communist Party (CCP). On January 1, 1980, the PRC's Criminal Law and Criminal Procedure Law, both promulgated in mid-1979, came into force. On January 1, 1982, the Provisional Act on Lawyers, which was enacted in 1980, also came into force, though before that date the PRC had already allowed certain lawyers to start practice. The PRC has also greatly expanded its legal education and research.

The highlight of legal reform was the enactment of a new Constitution on December 4, 1982, which a prominent Chinese scholar observed as making "clear the important principle of 'governing a country by law and fully confirming the 'rule of law.'"² Amid these positive developments geared toward a more stable system, the PRC also, from 1981 to 1985, engaged in an anti-crime campaign in which at least more than 10,000 were summarily executed. This paper will first, analyze the new constitution; second, determine exactly which civil rights are in fact recognized by the new constitution and other relevant laws and administrative decrees; third, examine the anti-crime campaign; fourth, the question of political offenders; fifth, judicial independence; and, finally, the implications of these developments on U.S.-China relations.

The Chinese Constitution of 1982

The 1982 Constitution, like all three previous ones, has a preamble and four chapters. The preamble's importance lies in the fact that it indicates how the CCP perceives recent developments in Chinese history and reveals policy trends, both domestic and foreign. Changing CCP interpretations of recent Chinese history and new policy positions required discarding the entire constitution. Amendment was simply too cumbersome.

Chapter 1 is entitled "General Principles," and sets forth, inter alia, the PRC's political and economic system, and its general policies. Article 1 states that the PRC is "a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants." It also provides that the "socialist system is the basic system" and "sabotage of the socialist system by any organization or individual is prohibited." Article 3 states that "the state organs of the People's Republic of China apply the principle of democratic centralism." These provisions make it clear that the PRC is essentially a totalitarian system where no challenge to its socialist system is allowed and decision-making process is within the hands of a few in the name of "centralism."

Chapter 2 of the 1982 Constitution deals with the fundamental rights and duties of citizens, which contains 24 articles (Articles 33 to 56), i.e., about 17.39% of the total 138 articles of the 1982 Constitution. Chapter 3 is on the structure of the state and Chapter 4, the last one, provides for a national flag, national emblem, and capital.

Generally speaking, except for the missing stipulation on freedom of residence,³ the Constitution restores or expands the provisions on individual rights and freedoms in the 1954 Constitution. The most notable one is equality before the law for all citizens of the People's Republic of China (Article 33). In religious freedom, the Constitution drops the right to propagate atheism as contained in the 1978 Constitution. It states that "the state protects normal religious activities" but adds that no religious affairs may be "subject to any foreign dominations" (Article 36). The Constitution guarantees the "freedoms and privacy of correspondence" and at the same time permits public security or procuratorial organs to censor correspondence in accordance with the procedures prescribed by law to "meet the needs of state security or of investigation into criminal offenses" (Article 40).

Among the major new additions of the Constitution is the provision that the "personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge of frame-up directed, or slander against citizens by any means is prohibited" (Article 38). There is also an added statement on the freedom of person: "Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited" (Article 37). The Constitution specifically stresses that the rights of citizens are inseparable from their duties (Article 33). Chinese people not only have the right but also the obligation to work (Article 42), and to receive education (Article 46). Added to the list of citizens' duties are safeguarding state secrets (Article 54) and to refrain from infringing "upon the interests of the state, of society and of the collective or upon the lawful freedoms and rights of other citizens" when exercising their freedoms and rights (Article 51). These

vaguely phrased provisions can be invoked by the PRC authorities to restrict citizen freedoms provided in the Constitution.

The Constitution provides in Article 41 the right of citizens to criticize and to file complaints with state organs and establishes the principle of state compensation for infringing upon civil rights of citizens.

Besides the provisions contained in Chapter 2 of the Constitution, there are other provisions which are closely related to the implementation of citizens' rights and duties under the Constitution. Chapter 1, Article 5 of the Constitution establishes the principles of supremacy of the Constitution. There was no comparable article in any previous PRC constitution. Therefore, the inclusion of this article in the 1982 Constitution clearly demonstrates that the present leadership is more serious about enhancing the status of the Constitution in the PRC.

Moreover, the 1982 Constitution restores the provisions of the 1954 Constitution on judicial and procuratorial independence in Articles 126 and 131 of Chapter 3.

Civil Rights of PRC Citizens Under the 1982 Constitution and Relevant Laws and Decrees

The above stated constitutional provisions, if substantially implemented, would certainly provide a certain degree of a "rule of law" and respect for human rights in the PRC. However, no matter how optimistic one may be, there still remains a sharp discrepancy between the law and reality. The most serious problem is whether the PRC's legislative and administrative organs can enact law or promulgate administrative decrees to curtail citizens rights and increase citizens' duties under the constitutions. The following discussion provides some examples to illustrate this point.

- (1) While Article 33, paragraph 2, of the Constitution guarantees "equality before the law" for "all citizens," the PRC's election law discriminates against rural area citizens in electing delegates to the National People's Congress. According to the PRC Election Law one delegate is elected for every 130,000 persons, while rural residents can elect one delegate for every 1,040,000 persons.⁴ Since 80% of Chinese are in rural areas, the election law discriminates against the great majority of the Chinese people. In the recent Chinese drive against crime (see discussion below), there have been complaints about failure of the law to reach people of power or those related to them.⁵
- (2) Article 35 guarantees the citizens "freedom of speech, of the press, of assembly, of

association, of procession and of demonstration." In fact, aside from extreme exceptional cases, any one who tries to exercise such freedoms for political purpose will be punished, and most end up in jails or labor-education camps.

- (3) Article 37, paragraph 2 requires the arrest of a citizen to be approved by "decision of a people's procuratorate" or "a people's court." However, on various vaguely defined grounds such as "without proper employment," "refusal to accept work assignment or transfer," a public security organ can arrest a person and send him or her to "reeducation through labor" for up to four years in a labor camp. This measure is based on a 1957 Decision of the State Council on Reeducation through Labor and a subsequent "Supplementary Regulations on Reeducation through Labor" adopted by the Standing Committee of the NPC in 1979.
- (4) The Criminal Law enacted by the NPC in 1979 allows the use of analogy in Article 79 which undermines the basic spirit of "rule of law" which the constitution intends to establish.
- (5) Article 49, paragraph 2, provides that "both husband and wife have the duty to practice family planning," but the State Council arbitrarily establishes the principle of a single child for each family and conducted a forced abortion for a woman intending to have a second child. Severe sanctions in the form of fines, expulsion from work and others were imposed on violators.⁶
- (6) Under the 1979 Arrest and Detention Act, the family of the detainee or the arrested should be notified of the reasons for the action and the place of confinement within twenty-four hours," unless in the situation where investigation may be hampered or notification is impossible" (Article 5). In several recent cases, the PRC authorities appeared to apply the escape clause of Article 5 of the 1979 Act to hold a person incommunicado indefinitely, from several days to more than a year, apparently on the ground that any information on his detention, if released even to his family member, would "hamper" the investigation. The case of Hansen Huang is a recent example. Mr. Huang is a Hong Kong Chinese and graduated from Harvard Law School.

in 1976. He at first worked for an American law firm and later went to China to teach law at the Beijing Institute of Foreign Trade and Beijing University. Later, he became a legal consultant to China International Trust & Investment Co. (CITIC), set up by China to lure foreign capital into China. In January 1982, he called his mother in Hong Kong to tell her that he had a change of hotel in Beijing. His mother, however, did not hear from him until almost two years later. On February 1, 1984, a spokesman of the PRC Ministry of Justice said, "He (Huang) was arrested, tried and convicted of espionage and sentenced to 15 years' imprisonment." The PRC, however, has not yet released the text of the judgment against him, nor provided any information on his arrest and trial situation.⁷ He was parolled this year but is not allowed to receive visitors or to leave China.

The above stated examples demonstrate that the basic problem of the rights of Chinese citizens under the Constitution is that there appears to have been no effective mechanism in the Constitution to prevent the legislative and administrative organs from curtailing such rights and increasing their duties in disregard of the constitutional provisions.

Theoretically, the Constitution of the PRC is the supreme legal instrument, and according to Article 5, paragraph 2, "no law or administrative or local rules and regulations shall contravene the Constitution." So-called "basic statutes" (laws) rank second in the hierarchy of legal order, and they can only be enacted and amended by the National People's Congress (Article 62, paragraph 3). Next in binding force are statutes enacted by the Standing Committee of the National People's Congress (Article 67, paragraph 2).

The State Council can, however, exercise the power "to adopt administrative measures, enact administrative rules and issue decisions and orders in accordance with the Constitution and the statute" (Article 89, paragraph 1). According to a prominent Chinese legal official, the enactment of administrative rules by the State Council does not need prior approval by the NPC or its Standing Committee, nor does it require the State Council to file with these organs for record. In other words, all administrative rules enacted by the State Council are presumed to be consistent with the Constitution and statutes. Although under Article 67, paragraph 7, of the Constitution, the Standing Committee of the NPC can exercise the power "to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statute," so far no such case has ever arisen. Moreover, there is no procedure for an

individual to challenge the legality of administrative rules issued by the State Council.

In accordance with Article 5, paragraph 2 of the Constitution, the laws enacted by the NPC should not contravene the Constitution. However, in reality, the NPC can enact any laws it wishes in disregard of the spirit and letter of the Constitution. This is because the Constitution has given the power to interpret the Constitution to the NPC's Standing Committee (Article 67, paragraph 1). It is beyond imagination that this subordinate organ would interpret a law enacted by its parent organ, i.e., the NPC, as "unconstitutional."

Moreover, despite the fact that the Constitution restricts the NPC Standing Committee's power only "to enact, when the National People's Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes" (Article 67, paragraph 3), in fact the Standing Committee can, with respect to the statutes enacted by the NPC, do as it pleases because it has the power to interpret statutes (Article 67, paragraph 4). It is beyond imagination that the Standing Committee would interpret its supplement or amendment to a NPC statute as contravening the basic principles of that statute. This situation can best be explained in several NPC Standing Committee's decisions adopted during the Anti-Crime Campaign.

The Anti-Crime Campaign and the Rule of Law

In 1981 and the NPC Standing Committee on June 10, 1981 adopted two resolutions to deal with the problem of crime. The first one granted to higher people's courts, for the period of 1981-83, the right to approve death sentences on murderers, robbers, rapists, bomb throwers, arsonists and saboteurs. Under the Criminal Procedure Law, however, the death sentence must be approved by the Supreme Court. The second resolution provided for heavier penalties for escapees who are under reform through labor or reeducation through labor. A nation-wide campaign against crime was then launched.

During the campaign, the PRC press frequently reported mass meetings to pronounce death sentences and the immediate execution of the accused after the meeting. Despite the existence of all procedural guards provided in the Criminal Procedure Law, the PRC judicial authorities appeared to pay little attention to them. For instance, on June 23, 1981, the Nanjing Municipal Intermediate People's Court convened a 10,000 person mass rally, where a murderer named Luo received a death penalty and was immediately executed. It took only eight days for the whole legal process from the arrest of Luo to his execution, including police investigation, prosecution, trial, sentencing, and his appeal to the Provincial Higher Court.⁸ Under the PRC's Criminal Procedure Law, the delivery of a copy of the indictment must be delivered to a defendant at least seven days before the court hearing

(Article 110). After receiving a court's judgment, the defendant can file his or her appeal within ten days (Article 131). How the case could be handled within eight days was not explained.

The anti-crime campaign was intensified in 1983 and 1984. On September 2, 1983, the NPC Standing Committee adopted a resolution to amend Article 13 of the Organic Law of People's Courts, enacted by the NPC, to allow the Supreme People's Courts to delegate the authority to approve death sentences to the provincial-level higher people's courts in cases of murder, rape, robbery, use of explosives, and other serious offenses. Another resolution of the NPC Standing Committee removed practically all guarantees of due process provided in the Criminal Procedure Law enacted by the NPC for persons accused of murder, rape, armed robbery and other violent crimes. The resolution ineffectuated Article 110 of the Criminal Procedure Law which requires that the defendants must receive a copy of the indictment at least seven days before the trial in order to prepare their defense. It also limited the time limit for appeals to three days from the ten days stipulated in Article 131 of the Criminal Procedure Law. In another resolution adopted again on the same day, the NPC Standing Committee revised the Criminal Law, enacted by the NPC, to increase sharply the number of capital offenses to cover virtually any serious crimes and order the courts to impose stiffer penalties, including execution, on people convicted of violent crimes. Under the amended Criminal Law and Criminal Procedure Law, a person charged with one of the violent or serious crimes could be executed within eight days or so, including arrest, investigation, prosecution, sentencing, appeal and execution.⁹ No one in the PRC seems to raise publicly the constitutional issue of whether the NPC Standing Committee's amendments to those basic laws are contrary to the basic principles of those laws. This speedy handling of criminal cases was in fact followed in some cases even before the enactment of the amendment.¹⁰

Condemned accused are usually paraded in public before execution, and humiliated in other ways, such as by forcing them to keep their heads bowed and bearing placards proclaiming their crimes. They are frequently executed in public, despite the fact that Article 155 of the Criminal Procedure Law provides that "the condemned should not be exposed to the public."

Despite the existence of a Criminal Procedure Law which provides for conducting "trials in public" (Article 8), little is known about the procedure followed at the trials of people sentenced to death, except the occasional release of scanty information on trials by press or in legal periodicals. Public notices summarizing the cases of condemned offenders are usually posted outside the buildings of the court which passed the sentences. The notices include some biographical data about the condemned offenders, but usually give almost no information about the procedures followed at the trials. According to different sources, such proceedings are very summary. Because the Chinese courts seek to conclude criminal cases swiftly, it is almost impossible for the accused to exercise effectively his or her right

of defense.¹¹ A recent Chinese article revealed that during the anti-crime campaign some Legal Adviser Offices, where the Chinese lawyers are required to practice, are reluctant to accept the cases for accused criminals. What is more shocking is that some courts even rendered the sentences first before the trials and a judgment was written up before opening the case for hearing.¹² In this connection, one must realize that the Criminal Procedure Law still refuses to adopt the principle of presumption of innocence. Thus, once a person is arrested he or she is almost certain to receive criminal sanction.

Most of those executed were in the age groups from 15 to 40. Many were unemployed, while many of those executed appeared to have been convicted of murder, rape, robbery, or other violent crimes, people were also executed for a wide range of other offenses. For instance, a worker was executed for stealing 1,600 grammes (about 56.5 ounces) of gold and 43,000 grammes (about 1518 ounces) of silver. A female worker was executed for stealing 148 tons of state petroleum.¹³ Two men were executed in Guangzhou (Canton) on September 5, 1983 after being convicted of hanging a banner with a "counter-revolutionary" slogan from a hotel window and of plotting to set up a radio station and two subversive organizations. Two other men were executed on September 24, 1983 in Tianjin for organizing a traditional-style secret society based on ancient rituals and religious practices. A peasant was executed in Shanghai on September 13, 1983 for "molesting women" and two men were executed on October 26, 1983 in Guangdong Province after being convicted of stealing antiques from a museum.¹⁴

The total number of criminals executed is not clear because the PRC has not published any statistics. Western reporters, based on scanty information within China, estimate that the toll ranges from 5,000 to 9,000 between August 1983³ to January 1985.⁴ It appears that in 1984 alone, the PRC executed at least 10,000 for offenses ranging from habitual thieves to counter-revolutionaries.¹⁵

Political Offenses

During the Maoist period, the largest percentage of criminals were political offenders. Some former political prisoners have said the percentage was as high as 40%. Moreover, such offenders were mistreated in prison or reform-through-labor camps because they were considered as the worst "enemies of the people." Under the post-Mao leadership, the number of political prisoners in China has been significantly reduced. One reason for this is that the newly-enacted Criminal Law has narrowed the definition of a counterrevolutionary by stressing that such a person must have committed some overt act (Article 90) and the mere harboring of a damaging thought against the dictatorship of the proletariat and the socialist system is not a criminal act. This positive development is, however, curtailed by the retaining of the 1951 State Secret Law which includes almost everything in the PRC not officially released to the public as "state secrets."

Under Article 13 of this Law, anyone who leaks "secrets" to a domestic or foreign enemy is subject to punishment as a counterrevolutionary.

Between 1978 and 1981, the PRC authorities arrested a number of intellectuals who advocated democracy and human rights in China. Usually they were detained for periods of over one year before being tried. The usual charges against them were "counterrevolutionary propaganda and agitation," organizing or taking part in a "counterrevolutionary group," incitement "to resist arrest or violate the law and statutes of the state," or leaking "state secrets."¹⁶ In most of these cases the prisoners are reported to have been tried in closed sessions without any advance notice to their family. Occasionally, a PRC court conducted an "open trial," but only a selected audience (which did not include their families) was invited to attend.¹⁷

Judicial Independence

Despite the fact that the 1954 Constitution and the Organic Law of People's Court all provide for judicial independence, the legal scholars and practitioners who took this provision seriously were branded in the late 1950s as "rightists" challenging Party leadership. In practice, there was no judicial independence, and the Party dominated all judicial work through the system of so-called Shuji pian ("approving cases by the secretary"), i.e., "whether the facts of a case are clear, the evidence is convincing; the defendant should be subject to criminal sanction and what criminal punishment should be imposed on the defendant, should be sent to the secretary in charge of political-legal affairs of the local party committee at the same level for review and approval."¹⁸

In August 1980, Jiang Hua, then President of the Supreme People's Court, announced that the Party decided to abolish this system. In spite of this announcement, there is evidence that Party officials have continued to interfere in the performance of adjudication functions by the judicial organs, as some cases reported in the authoritative Renmin Ribao (People's Daily) indicate.¹⁹

Moreover, abolishing the practice of "approving cases by the secretary" does not mean the Party would totally relinquish its control over the judiciary. In his address given in November 1981, Jiang Hua said that the courts should take the initiative to report to and seek instructions from the Party committee over significant policy questions and the handling of important and complicated cases. The court should also regularly keep the Party committees informed of the conditions of judicial work. As a matter of fact, judicial cadres in China today still find it prudent, as in the past, to secure advice and consent from Party committees in dealing with many criminal cases. Sometimes it takes direct intervention from Party committees to settle cases of controversial or political nature.²⁰

Conclusions and Implications on U.S.-China Relations

Although the PRC leaders attempt to establish the principle of the supremacy of the Constitution to assure a limited degree of "rule of law," there is no sufficient mechanism built into the Constitution to assure that the legislative body will not enact laws which may contravene the basic spirit and letter of the Constitution. The role for interpreting and supervising the implementation of the Constitution is entrusted to the Standing Committee of the National People's Congress -- a legislative body. This arrangement is similar to constitutions of the Soviet Union and other communist countries. With the exception of Yugoslavia, none of these countries have taken their constitutions seriously. Moreover, there appears to be no procedure available to individual citizens to challenge unconstitutional legislation or illegal administrative rules or orders issued by various levels of the administrative organs.

Despite the promulgation of the new Constitution and the entry into force of the Criminal Law and the Criminal Procedure Law, their effectiveness is curtailed by the PRC retaining certain vaguely drafted earlier laws and practices. These include the 1951 State Secret Law, reeducation through labor, the use of analogy in prescribing criminal responsibility, the refusal to accept the principle of presumption of innocence, and others.

The Chinese leaders, despite their intention to establish a limited "rule of law" in China, have so far paid sparse attention to legal procedure in carrying out their policies and also wanted to retain escape clauses in legislations. They appear to believe that the ends can justify the means. The anti-crime campaign is an example. In carrying out this campaign, they paid almost no attention to proper procedures prescribed by the Constitution, the Criminal Law, and the Criminal Procedure Law. They intended to do things quickly and thus dispensed with legal procedure. They exhibited similar attitudes in dealing with political dissidents. Under such circumstances, it appears that ensuring even a limited degree of a "rule of law" and respect for human rights in China will be a long time in coming.

In comparison with the Maoist period, the PRC has significantly improved its legal system and human rights situation since 1977. However, the legal system and the human rights situation there are still below the recognized international standards as provided in the 1948 Universal Declaration of Human Rights adopted unanimously by the General Assembly of the United Nations. Article 1 of the Declaration provides: "All human beings are born free and equal in dignity and rights." The Chinese election system is contrary to this provision by discriminating against 80% of its population which resides in rural areas by reducing the value of their votes to only that of 1/10 of a city resident.

Article 11 of the Universal Declaration of Human Rights provides: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a

public trial at which he has had all the guarantees necessary for his defence; (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." The PRC's Criminal Procedure Law is contrary to paragraph 1 by failing to recognize the principle of presumption of innocence. Its Criminal Law is contrary to paragraph 2 by allowing the use of analogy in defining criminal offense.

If the United States does not require countries receiving bilateral assistance to recognize the very basic principle of criminal justice and respect for human rights as provided in Articles 1 and 11 of the Universal Declaration of Human Rights, then there is no reason why the U.S. should set a higher standard for China in U.S. human rights policy.

On the other hand, if some countries recognizing these basic principles of criminal justice and respect for human rights in their domestic legislation, such as the Soviet Union and the Eastern European Countries, are denied assistance under the 1961 Foreign Assistance Act on the ground of their human rights situation, then how can U.S. Congress justify authorizing bilateral assistance under the 1961 Foreign Assistance Act to a country which is not even willing to recognize those basic principles of criminal justice and respect for human rights on paper, not to mention their actual implementation?

In his address to the U.N. General Assembly in September 1984, President Reagan stated that the United States will continue to view concern for human rights as the moral center of U.S. policy. If the President and the Congress are serious about implementing this policy, both should apply a uniform standard in human rights in U.S. relations with all countries, whether those countries are allies, friends, adversaries and nonaligned.²¹

Notes

1. For details, see Shao-chuan Leng and Hungdah Chiu, Criminal Justice in Post-Mao China: Analysis and Documents, Chapters 3 and 4, Albany, N.Y.: State University of New York Press, 1985; Hungdah Chiu, "Socialist Legalism: Reform and Continuity in Post-Mao People's Republic of China," University of Maryland School of Law Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 1-1982 (46).
2. Yu Haocheng, "The New Constitution Establishes the Important Principles of Governing a Country by Law Under the Leadership of the Party," in China Law Association, ed., Xianfa lunwenxuan (Selected essays on constitutional law), Beijing: The Law Press, 1983, p. 121.
3. The PRC strictly restricts a person's freedom of movement and right to change residence. Rural area residents are not allowed to move to the city without special permission. The Chinese can thus control the growth of the city population.
4. See 1983 Zhongguo baike nianjian (1983 Yearbook of the Encyclopedia of China), Shanghai: Distributed by New China Press, 1983, p. 226.
5. See Leng and Chiu, Justice in Post-Mao China, supra note 1, pp. 107-108.
6. See Michael Weisskopf, "China's Birth Control Policy Drive," The Washington Post, January 8, 1985, pp. A1, All.
7. See Leng and Chiu, Justice in Post-Mao China, supra note 1, pp. 90-91.
8. Renmin Ribao (People's Daily), June 25, 1981, p. 4; China Daily, June 26, 1981, p. 3.
9. China, Violations of Human Rights, Prisoners of Conscience and the Death Penalty in the People's Republic of China, London: Amnesty International Publications, 1984, p. 69.
10. See supra note 8 and accompanying text.
11. China, Violations of Human Rights . . ., supra note 8, p. 65.
12. A. Zhang, "The tender feelings of a lover just like water and the lofty ambition just like steel -- the sorrow and joy of a lawyer," Minzhu yu fazhi (Democracy and legal system), 1985, No. 2 (67), p. 16.
13. Zhang Zhiye, "Handling Crime Strictly According to Law -- An Interview with the Vice-President of the Supreme People's Court," Beijing Review, Vol. 27, No. 17 (April 23, 1984), p. 20.