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**STRUCTURAL CHANGES IN THE ORGA-
NIZATION AND OPERATION OF CHINA'S
CRIMINAL JUSTICE SYSTEM**

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of
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Structural Changes In The Organization And Operation of China's Criminal Justice System*

BY HUNGDAH CHIU

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** Documents added for publication in this series.

Structural Changes in the Organization and Operation of China's Criminal Justice System

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1. Introduction

Since the emergence of the Hua Kuo-feng—Teng Hsiao-p'ing leadership in the People's Republic of China (PRC) in 1977, reform of the legal system has become an important part of the PRC's ambitious modernization program. Law and the legal system have come to be frequently discussed in Chinese politics, news media, and publications. Only a few years ago, specialists in Chinese law outside China were confronted with a frustrating problem: the lack of sufficient information or research materials. Now, they are again frustrated, but for an entirely different reason: the emergence of voluminous materials on Chinese law waiting to be digested. Now, barely a single day passes without the appearance of new legal materials in the PRC newspapers or other publications. Moreover, because the PRC is now opening more places for overseas Chinese visitors, is sending more students abroad, and is allowing increased emigration, more information concerning law is now available to researchers. Furthermore, the emergence of underground publications relating to human rights in China has also revealed much inside information concerning the operation of the Chinese judicial system. Under these circumstances, for the first time since the founding of the PRC in 1949, it has become possible to have a reasonably complete understanding of how the Chinese judicial system operates, what its problems are, and why the PRC is now moving toward reform of the legal system.

This paper is a modest attempt to analyse an important part of the PRC legal system—its criminal justice system. It will emphasize the structural¹ and operational changes of the criminal justice system in the PRC since the purge of the "Gang of Four" in the fall of 1976.

To understand the present changes in the criminal justice system, one has to appreciate how the system operated before 1977. Accordingly, this analysis begins with an overview of the Chinese criminal justice system in the pre-1977 period.

2. The Structure and Operation of the Criminal Justice System Before 1977

In 1951, the PRC set up a three-level, two-trial (one appeal) system of the people's courts: County Court, Provincial Court, and the Supreme People's Court. All people's courts were organic parts of the people's government of the corresponding level.² A people's procuracy was also established on a level corresponding with each people's court; the procuracy was at the same time a component part of the people's government at the same level.³ As a result, both the courts and the procuracy were, in law and in fact, under the control of administrative organs and there was no separation of powers among them. This structure continued until 1954, when a formal constitution and a new organic law of the courts were adopted.

Before the formal inauguration of the PRC on 1 October 1949, the Chinese People's Political Consultative Conference adopted the Common Program⁴ which served as a provisional constitution until the adoption of a formal constitution on 20 September 1954. The Common Program abolished all former Republic of China (Nationalist) laws,⁵ but the PRC did not itself enact comprehensive civil and criminal codes to replace those it had abolished. The only important criminal legislation enacted before the effective date of the present Criminal Law (1 January 1980) was the Act for the Punishment of Counter-revolutionaries of the PRC, promulgated on 21 February 1951.⁶ Two articles of this Act deserve special attention. First, Article 18 made the Act retroactive to cover "preliberation" activities, *i.e.* acts committed before the establishment of the PRC in 1949.⁷ Second, Article 16 set forth the principle of crime by analogy:

Persons who have committed other crimes with counterrevolutionary intent that are not specified in the law shall be punished according to analogous specified crimes in the Act.⁸

But the lack of a comprehensive criminal code and detailed statutes did not hamper the work of the people's courts, since they were frequently instructed to follow orders or policies of the government or the party in cases not covered by existing law.⁹

In judicial practice, the people's courts usually did not indicate under which law and under what particular provisions a given judgment was rendered. After the facts of the case were stated, the accused was sentenced to imprisonment or death without telling him which law he was alleged to have violated.¹⁰

A Chinese law specialist has described the operation of the criminal justice system during the period as follows:

During this period the criminal process served as a blunt instrument of terror, as the Chinese Communist Party proceeded relentlessly to crush all sources of political opposition and to rid society of apolitical but antisocial elements who plagued public order... Although the Communist government created a judicial structure, much criminal punishment during these years was administered outside the regular courts... During the regime-sponsored "mass movement" or campaigns that swept the country, such as those instigated to carry out the land reform, to suppress counterrevolu-

tion, and to eradicate official corruption and related illegal activities in the business community... ad hoc "people's tribunals", which were thinly veiled kangaroo courts, dispensed their own brand of justice.¹¹

On 20 September 1954, the PRC promulgated a formal constitution,¹² guaranteeing *inter alia*, equality before the law and protection against arbitrary arrest.¹³ The 1954 Constitution and the organic law governing the people's court promulgated shortly thereafter provide for a four-level two-trial (one appeal) court system.¹⁴ Below the Supreme People's Court, local courts were divided into higher people's courts, intermediate people's courts, and basic people's courts.

This constitution and the laws subsequently enacted purported to introduce a number of democratic features to the new judicial system including the right of legal defense, the principle of public trial, and the concept of judicial independence.¹⁵ The PRC was also reported to be in process of enacting criminal and civil codes.¹⁶

During the period of 1956-1957, the PRC announced its policy of "letting one hundred flowers blossom and one hundred schools contend"¹⁷ and invited the people to criticize the government, including the judicial system. Many jurists and scholars took this opportunity to criticize the defective administration of justice and suggested the restoration of certain legal concepts such as the presumption of innocence and the benefit of the doubt for the accused.¹⁸

Alarmed at the strong criticisms evoked by the "Blooming and Contending" Movement, the PRC launched an Anti-Rightist Campaign in the summer of 1957 to eliminate its critics. So far as the judicial system was concerned, the independence of the judiciary was interpreted as subject to party control, and the presumption of innocence was pointedly attacked as incompatible with the socialist judicial system.¹⁹ As a result of the Anti-Rightist Campaign, the public security organs and other administrative organs were again given significant power in the administration of justice. On 3 August 1957, a decision of the State Council formally authorized certain administrative organs to send rightists, persons not engaged in proper employment, persons who did not obey work assignments or job transfer orders, and others to "rehabilitation through labor",²⁰ i.e. to a *de facto* criminal penalty for an indefinite period.²¹

Between 1958 and 1966, when the Cultural Revolution broke out, the PRC's judiciary appeared to regress to its earlier arbitrary practices, while the public security organs played a growing role at the expense of the procuracy and the courts. An interesting case vividly describing the Chinese criminal justice after the 1957 Anti-Rightist Movement can be found in Boa Rue-Wang's *Prisoner of Mao* (1973).²²

* * *

Although legal institutions were not one of the major revolutionary targets at the beginning of the Cultural Revolution in 1966,²³ they were not exempt from the ensuing destruction of the “establishments”. Many high officials, including the President of the Supreme People’s Court, Yang Hsiu-feng (Yang Xiufeng in pinyin), were purged or abused without resort to judicial process. During the period from 1967 to the early 1970s, the function of the courts was seriously disrupted or usurped by some vaguely described organs. Later, the People’s Liberation Army (PLA) intervened in various places in China to restore order to the chaos created by the Cultural Revolution; many criminal cases were handled by the PLA without the participation of the courts. The courts, as an institution, survived the turmoil of the Cultural Revolution, and there does not appear to have been any serious attempt to abolish the courts.²⁴ The procuracy, however, was not so fortunate. It was reported to have abolished in the late 1960s.²⁵

With the gradual subsidence of the Cultural Revolution and the PLA’s military control in the early 1970s, the court also gradually resumed their activities, at least in form. Nevertheless, the operation of the courts remained under the control of the administrative organ—the “Revolutionary Committee”, which replaced the “people’s governments”, at provincial and lower levels. The majority of the judges, however, now came from worker, peasant, or military backgrounds, while only a few were university graduates from faculties of law.²⁶ The profession of defense lawyer, which had been in steady decline since the Anti-Rightist Movement in 1957, was completely wiped out.²⁷

On 17 January 1975, the Fourth National People’s Congress adopted a new Constitution for the PRC,²⁸ which confirmed the subordination of the judiciary to the administrative organs, officially abolished the procuracy (whose function was transferred to the public security organs at corresponding levels), and introduced “mass trials” with respect to the “major counterrevolutionary criminal cases”.²⁹

While the activities of the courts were resumed, the functions of the higher people’s court and the Supreme People’s Court were not apparent, as there were very few, if any, appellate cases for these courts to decide. In a number of court documents available to Chinese law specialists, there is a repeated emphasis on the Party policy of “leniency towards those who confess and severe punishment for those who resist”.³⁰ Such a policy obviously discouraged persons convicted at the trial level from resorting to an appeal because of the fear of receiving a heavier punishment in the second trial. As a matter of fact, the right of appeal was rarely invoked by persons convicted at trial in the PRC even before the Cultural Revolution. Many former residents of mainland China have indicated that appeals are generally considered unwise and generally resulted in heavier punishment.

A recent PRC official publication has described the operation of the criminal justice system during this period as follows:

(The Gang of Four) let loose hoodlums and thugs to smash, grab and loot, to break into and ransack homes, illegally detain people, set up kangaroo courts and torture innocent people to extort confessions... In many cases even a semblance of judicial proceedings was dispensed with. Personal property and personal freedom were wilfully encroached upon and the safety of people's lives was not guaranteed.³¹

Since early 1978 barely a day has passed without a report in *Jen-min jih-pao* (*Renmin Ribao* in pinyin, *People's Daily*) or other official newspapers of a reversal of verdicts against innocent people convicted or simply executed or imprisoned before 1976. Information concerning miscarriages of criminal justice revealed by some publications was quite shocking. For instance, former residents of mainland China had long reported that before executing a political prisoner, the PRC authorities sometimes pierced the throat of the victim with a long needle in order to prevent him or her from shouting "reactionary" slogans at the public mass sentencing and execution meeting. In some extreme cases, the authorities reportedly cut the throat of the victim and inserted a steel tube to keep the victim silent at the mass meeting. This report was confirmed by a recent PRC publication.³² A underground publication, *Spring of Peking*, vividly describes the execution of Communist Party Member Ms. Chang Chih-hsin: her throat was cut and she was kept alive by a steel tube before her execution on 3 April 1975—the same day the Shengyang (Mukden) Intermediate People's Court sentenced her to immediate death.³³ Recently, the PRC issued a posthumous reversal of the verdict against Chang and publicly praised her as a heroine and a model Communist Party member for resisting the "Gang of Four".

3. Recent Changes in the Structure and Operation of the Chinese Criminal Justice System

On 5 March 1978, the Fifth National People's Congress of the People's Republic of China adopted a new constitution³⁴ to replace that enacted in 1975. The 1978 Constitution revives the procuracy "to ensure observance of the Constitution and the law by all the departments under the State Council, the local organs of state at various levels, the personnel of organs of state and the citizens" (Article 43). It also provides that "all cases in the people's courts are heard in public except those involving special circumstances, as prescribed by law" and that "the accused has the right to defense" (Article 41). However, the new Constitution still retains the clause on mass-participation in trials contained in the 1975 Constitution by providing: "With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions" (Article 41, paragraph 2). The legal profession of defense lawyer is now revived, and there are reports of serious shortages of qualified persons.³⁵

Perhaps the most serious defect of the PRC's criminal justice system before 1979 was the absence of a substantive and procedural criminal law. With sur-

prising speed, the Second Session of the Fifth National People's Congress, held between 18 June and 1 July 1979, enacted, among other laws, a Criminal Law and a Criminal Procedure Law.³⁶ Earlier, in February 1979, a new law was promulgated to prevent illegal arrests and detentions, replacing a similar law enacted in 1954³⁷ that was never fully implemented and had been totally ignored in the last decade.

The structure of the court system—four-levels and two-trials (one appeal)—remains unchanged, but because of the recent structural changes (revival of the procuracy and of the defense lawyer) and new legislation (enactment of the criminal law and criminal procedural law), it may be anticipated the courts will begin to play a more active role in the administration of criminal justice. Of course, how active and how independent the courts will be remains to be seen, although some recent indications are discussed below.

In the state council, the Ministry of Justice, which was abolished in 1959³⁸ after the Anti-Rightist Campaign, was reestablished in the fall of 1979.³⁹ According to newly appointed Minister Wei Wenbo (Wei Wen-po in Wade-Giles), the ministry will be mainly concerned with the following tasks:

- “(1) Judicial administrative work, including organization, personnel, training of cadres and funds, of the people's courts at all levels;
- (2) Supervision and training of judicial cadres;
- (3) Supervision of the administration of political-legal institutes and training of judicial personnel in various specialities;
- (4) Supervision of the work of the organizations of lawyers and notaries;
- (5) Compilation of codes of laws and decrees; and
- (6) Research on jurisprudence in cooperation with scientific institutes and publication of books and periodicals on law.”⁴⁰

At present, the people and some high officials certainly hope the procuracy and the courts will play a dominant role in the administration of criminal justice to avoid the chaos of the past and to provide increased personal security. At the 1978 December plenary session of the Central Committee of the Communist Party of China, General Yeh Chien-ying (Ye Jienying in Pinyin), a Politbureau member and Chairman of the Standing Committee of the National People's Congress, expressed the view that the procuratorial organizations and the courts must faithfully serve the people's interests, abide by the laws, rules and regulations, keep to facts, and maintain their independence as required. He also said that there must be fearless procurators and judges who are ready to sacrifice their lives to uphold the dignity of the legal system.⁴¹

Will the PRC's criminal justice system move in the direction suggested by General Yeh? Or, under a system of Party supremacy and class justice, is it even possible for the PRC's criminal justice to move in that direction? While it is not possible to give a definite answer to these questions, recently revealed informa-

tion concerning the operation of the Chinese criminal justice system appear to suggest that it would be quite difficult for the PRC procuracy and courts to achieve the high expectations of General Yeh. This point needs expansion.

It is well known that the Communist Party of China (CPC) controls the public security, the procuracy, and the courts. However, until very recently the degree of actual control by the CPC was not clear. In the Soviet Union, for example, while the party also controls public security, the procuracy, and the courts, with the exception of certain criminal cases relating to the security of the state, it does not appear that the party will actually intervene in the handling of individual criminal cases.⁴² Each division exercises its function according to law, and lawyers, even in sensitive criminal cases, are allowed to defend the accused. There is no guarantee that all cases referred by the public security be prosecuted by the procuracy; and, similarly, the criminal cases prosecuted by the procuracy do not necessarily result in sentencing by the courts. Even in sensitive criminal cases relating to the security of the state, the Soviet Union maintains at least the semblance of regular judicial proceedings.

The situation in the PRC is almost entirely different from that of the Soviet Union, despite the fact that both are communist countries. Nominally, the PRC has three divisions in the administration of criminal justice—the public security, the procuracy, and the courts—but in practice all are under the direction of the party committee at the same level and it is the committee that makes decisions as to arrest, prosecution, and sentencing. Since the Party committee has many other lines of endeavor and does not have time to review criminal cases, decisions making in criminal cases is in practice delegated to the secretary in charge of political-legal affairs. This system, in PRC writers' terminology, is called the system of "deciding a case by the secretary" (*Shu-chi p'i-an; Shuji pian* in pinyin).⁴³ A writer describes this system as follows:

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. This is called the system of deciding a case by the secretary.⁴⁴

The same writer also points out that this system in fact denies the "trial system and legal process" prescribed by law and makes trial by the people's court a matter of formality only.⁴⁵ The political-legal secretary is in charge of the public security, the procuracy, and the court of the area under the jurisdiction of the Party Committee, and before a case is referred to the people's court for trial, the secretary must have previously approved the investigation and prosecution of the accused; similarly, the secretary must have previously decided the punishment to be imposed. Since the relationship between the secretary and the people's court at the same level is that between a superior and a subordinate, the court has no other choice but to accept the instruction of the secretary.

The secretary's handling of cases is simple, efficient—and frequently careless.

The position of political-legal secretary at the party committee is not a full-time job, and the secretary is concurrently in charge of many other administrative duties. He neither reviews the files of the accused nor personally investigates each case. He usually reviews and decides criminal cases only once in a one- or two-month period.⁴⁶ According to a study on judicial work by a group of teachers and cadres of a Political-Legal Institute who assisted in handling accumulated criminal cases in a province between September 1974 and October 1978, the system of deciding a case by the secretary has the following problems:

(1) The secretary has voluminous tasks to do and sometimes it is not possible for him to decide cases for several months, thus causing delay in the timely handling of cases.

(2) The secretary's decision on cases usually takes the form of "surprise attack"; *i.e.* he decides several or even several dozen cases at one time. It is not possible for him carefully to study the facts, evidence, and the nature of each individual case.

(3) If a court disagrees with the handling of a case by the Party Committee (*i.e.* by the political-legal secretary), there is no rule prescribing that the court can request the party committee to reconsider the case. The rule is "whatever is approved (by the Party Committee) should be executed".

(4) Since arrest and sentencing are all decided by the secretary on behalf of the Party Committee, in the course of trial by the people's court, the court has no choice but to sentence the accused in accordance with the decision of the Party Committee, even if the result is contrary to law. For example, in one case, a truck driver accepted a bribe of more than 800 yen (about US \$500) and in 1976 the Party Committee decided that he should be subject to criticism, probation of his party membership status, and restitution of the money. However, the driver argued several times with the Party secretary on the correctness of the figure of the bribed money received, so in 1977 the Party secretary instructed the judicial organ to arrest him and sentence him to nine years imprisonment.

(5) When the secretary decides a case incorrectly, his attitude is "an official will never regret his decision"; the secretary consistently refuses to correct his mistakes. For example, in a city a homicide suspect had been detained for eighteen years despite the fact that the higher-level judicial organ had already decided that there was no evidence proving his guilt. He was held because the leadership insisted that in order "to maintain the decision of the city party committee" he should not be released.⁴⁷

Despite the recent call for strengthening the "socialist legal system" and the enactment of new legislation, there has been no indication that the PRC intends to abolish the system of "deciding a case by the secretary" (see case studies in next section), though some judicial cadres have suggested that the system be abolished. At the First Academic Seminar organized by the Chungking (Zhong-

qin) City Law Association on 22 and 23 October 1979, the majority expressed the following view, as expressed by a participant:

The procuracy and the court should independently exercise their function; *i.e.* in handling cases, they should insist to rely on facts and laws and should not allow any organs, groups and individuals outside the judicial organs, through open or secret methods, to interfere. The leadership exercised by the various level party committees toward the cadres of the procuracy and the court should primarily focus on strict supervision over their executing guidelines and policy and their strict compliance with and impartial execution of the law.⁵⁰

At the seminar, the participants also engaged in a sharp debate over the merits of the system of party committee review and approval of the cases. One view was that the system was correct because it served the needs of class struggle at different times and facilitated the execution of security work. Another view considered this system to be one of the causes for unjust, false, and wrongly decided cases. It was maintained that retaining the system of party committee review had resulted in more injustice than justice within the framework of the socialist legal system. It was said that during the special period of military control in the early years of liberation, it had been necessary for the party committee to approve cases, but that this was an expediency best confined to those early years. After the promulgation of the Constitution and the organic laws for the procuracy and the court, the continuance of the system of party committee approval of cases frequently resulted in replacing law with party policy, which was disadvantageous to perfecting and strengthening the socialist legal system. The supporters of this view further pointed out that the approval of cases by the party committee in practice is performed by the secretary in charge of political-legal work alone and that this delegation of authority inevitably resulted in subordinating the law to one individual's view. The conclusion of the participants of the seminar as reported by one participant, is as follows:

Based on the experience of thirty years' judicial practice and in accordance with the situation and special features of current class struggle, it is entirely correct to have the procuracy and the court to exercise their functions independently and to change the system of party committee's approval of cases.⁵⁰

* * *

In addition to the problem of the system of "deciding a case by the secretary", there are also several other problems which would frustrate the establishment of a more stable and fair criminal justice system. First, while the recently enacted criminal procedural law provides that everyone is equal before the law, it has been disclosed recently by a Vice-President of the Supreme People's Court that the jurisdiction of a people's court over an individual depends on the individual's status in the Chinese society: The basic people's courts shall exercise jurisdiction over common people; the intermediate people's courts over party cadres and

“democratic elements” (*i.e.* those persons who served as united front instruments of the PRC); and the higher people’s court over senior party cadres in the minister ranks.⁵¹

Despite this blatant inequality of treatment, the new system appears to be an improvement over the past practice. Until the promulgation of the new Criminal Procedure Law in mid-1979, judicial process in the PRC apparently did not apply to purges of government or party officials. Also, in the past, a government or party official convicted of a criminal offense usually received more lenient treatment or was simply not punished.

Second, the Criminal Law promulgated in mid-1979, following the precedent of the 1951 Counterrevolutionary Act, retains the principle of analogy as to criminal acts. Article 79 provides:

Those who commit acts not explicitly defined in the specific parts of the criminal law may be convicted and sentenced, after obtaining the approval of the Supreme People’s Court, according to the most similar article in this law.⁵²

Third, on 29 November 1979, the Standing Committee of the National People’s Congress decided that most of the laws and decrees promulgated since 1949 should remain in force, apparently including the 1951 Counterrevolutionary Act (see also case studies in the next section).⁵³ The Standing Committee also confirmed the continued applicability of the 1957 State Council’s decision on rehabilitation through labor,⁵⁴ *i.e.* the imposition of *de facto* criminal sanctions by administrative organs for actions ranging from criticizing the government to refusing to accept a work assignment. This decision, needless to say, will not improve the quality of the PRC’s criminal justice system.⁵⁵

4. Selected Case Studies

A study of the structural and operational changes of the PRC’s criminal justice system could not be complete without analyzing examples of the system at work. Because of the difficulty in obtaining case materials from the PRC and the limitation of space here, only two well-publicized cases are presented below.

(1) Wei Jingsheng (Wei Ching-sheng in Wade-Giles) Case.

Wei Jingsheng was a native of Anhui Province, in Central China, where he was born in 1950. Both of his parents were party officials, and he was intensively indoctrinated with Communist theories from his childhood. During the Cultural Revolution, he joined the Red Guards in 1966, but was jailed for four months early in 1967. With the gradual subsidence of the Cultural Revolution in 1969, Wei enlisted in the People’s Liberation Army, which enabled him to travel widely through China. Demobilized in 1973, he turned down an offer to become an official and took a job as electrician in the Peking Zoo.⁵⁶

In December 1978 Wei began an underground sheet called *Tanshuo* (*T'an-shuo* in Wade-Giles) (*Exploration*) and posted it on Xidan (Hsitan in Wade-Giles) Wall, the now-abolished "Democracy Wall", in Peking. It included an essay bearing his signature and calling on the Communist leaders to add a fifth item to their official list of modernizations the country should achieve in agriculture, industry, science, and defense. The fifth and most necessary, he wrote, is democracy.⁵⁷

Later *Exploration* became a mimeographed magazine and published many articles exposing the human rights situation in China. For instance, in the March 1979 issue of *Exploration*, an article entitled "The Bastille of the Twentieth Century—Qincheng (Ch'in Ch'eng in Wade-Giles) No. 1 Prison"⁵⁸ vividly described the inhumane treatment and torture of political prisoners in China. On 29 March 1979, Wei was arrested.

On 16 October 1979, more than six month after his arrest, Wei was brought to trial by the Peking Municipal Intermediate People's Court and sentenced to 15 years' imprisonment, with deprivation of political rights for a further three years. Wei was convicted of providing a foreigner with Chinese military intelligence and carrying out counterrevolutionary agitation.⁵⁹

The prosecution, debates and sentencing altogether lasted for 6 hours and 35 minutes (8:40 a.m. to noon and 2:00 p.m. to 5:15 p.m.; it is a custom of the PRC's officials to take a nap after lunch). The basis of the charge was the 1951 Counterrevolutionary Act, of which the following articles were cited by the court:

Article 2. "All counterrevolutionary criminals whose goal is to overthrow the people's democratic regime or to undermine the undertaking of the people's democracy shall be punished in accordance with this Act."

Article 6, paragraph 1. "Those who engage in any one of the following acts of espionage or of aiding the enemy shall be punished by death or life imprisonment; where the circumstances of their cases are relatively minor they shall be punished by not less than five years of imprisonment:

"(1) Stealing or searching for state secrets or supplying intelligence to a domestic or foreign enemy."

Article 10, paragraphs 2 and 3. "Those who, with a counterrevolutionary purpose, commit any one of the following acts of provocation or incitement shall be punished by not less than three years of imprisonment; where the circumstances of their cases are major they shall be punished by death of life imprisonment:

[* * *]

"(2) Provoking dissension among the various nationalities, democratic parties and groups, people's organizations or between the people and the government;

"(3) Conducting counterrevolutionary propaganda and agitation and making and spreading rumors."

Article 16. [See text quoted at p. 54 above.]

Article 17. "Those who commit crimes enumerated in this Act may be deprived of their political rights..."⁶⁰

Wei Jingsheng lodged an appeal against the court's judgment to the Peking Municipal Higher People's Court. On 6 November 1979, in one day's time, this court concluded the debate between the prosecutor and Wei and rejected the appeal.⁶¹ Under the PRC's legal process, the case was thus affirmed; no further appeal to the Supreme People's Court is permitted.⁶²

A thorough analysis of the merits of the prosecution and Wei's defense is beyond the scope of this paper; a summary of the charges and defense will appear in the appendix of this paper.⁶³ Here, the focus will remain primarily in the procedural aspects of the case. First, although a notice on the wall of the court on 16 October had said that the trial of Wei would be open to the public, none of Wei's family members or friends were allowed to enter the court room. Foreign correspondents were turned away. Several hundred spectators were taken in, but a woman who attended said afterward that she had received her ticket the day before the trial at her work place and had been instructed to attend.⁶⁴

Second, the Court apparently was not confident of the legal basis, under the 1951 Counterrevolutionary Act, upon which the charge and sentence against Wei was based. The court therefore invoked the catch-all Article 16 provision allowing for punishment for crime by analogy (quoted above). Thus as recently as October 1979, the PRC courts continued to employ the principle of crime by analogy, in spite of the gross vagueness and overbreadth of the principle.

Third, one of the charges against Wei was that he supplied military secrets regarding the Sino-Vietnamese War to a foreigner. In regard to the question of proof required for a conviction, it is instructive to note that the foreigner to whom the secrets were allegedly supplied was neither called to testify nor identified. However, one spectator said that the prosecutor, during the reading of a two-hour indictment, had mentioned several countries, including Great Britain and France.⁶⁵ If the recipient was indeed a national of one of these countries, then Article 6, paragraph 1 of the 1951 Counterrevolutionary Act was certainly not applicable, because Great Britain and France definitely are not "enemies" of the PRC today. Ironically, the day before Wei's trial, Hua Guofeng (Hua Kuo-feng in Wade-Giles), PRC's Communist Party Chairman and Prime Minister, began his three-week visit to four European countries, including France and Great Britain.

Fourth, whether Wei's case was handled in accordance with the system of "deciding a case by the Secretary", i.e. by the Party Committee of the area, is a question that cannot be ignored. According to an article in the *Ta-ti* (*Dadi* in pinyin, *Great Earth*, published on 4 November 1979,⁶⁶ the Peking City Revolutionary Committee, i.e. the municipal government, and the Peking Party Committee both played a dominant role in the arrest and sentencing of Wei. It is reported that Wei was arrested by the Public Security Bureau on telephone instruction from the Deputy Director of the Peking City Revolutionary Com-

mittee, Wang Hsiao-i (Wang Xiaoyi in pinyin). When Wei demanded the public security personnel to show their arrest warrant,⁶⁷ they replied: "We want to arrest you, why need an arrest warrant!" A week later, the arrest warrant was issued by the court. However, before the issuance of the warrant the court, apparently referring to the Peking City Intermediate People's Court, expressed the view that it should wait for instructions from the Peking Higher People's Court. The City Party Committee, however, instructed the court to issue an arrest warrant to the public security bureau. Later, according to the same report, the representatives of Peking City at the National People's Congress requested the procuracy and the court to explain the process of handling Wei's case, but the City Party Committee instructed the procuracy and the court not to do so. Only after a deputy chairman of the Standing Committee of the National People's Congress, T'an Chen-ling (Tan Zhenling in pinyin), criticized the City Party Committee and the City Revolutionary Committee, was a cadre from the Organization Department of the City Party Committee—not from the procuracy or the court—sent to explain the process of handling the Wei case to the representatives from Peking at the National People's Congress.

(2) The Case of Fu Yeuhua (Fu Yǔeh-hua in Wade-Giles)

Fu Yeuhua, a female, 34 years old, was originally assigned to a job with a construction company in the Xuanwu (Hsüan-wu in Wade-Giles) District of Peking in 1971. She was married to a graduate of Peking University who had been sent to work in Hebei (Hopei in Wade-Giles) Province and lived away from home. This type of enforced separation is common in China.

Her criminal case, pieced together from sources close to her family, from wall posters, and from Chinese with access to the trial transcript, by the *New York Times*, and other sources available to the author of this paper is summarized as follows.⁶⁸

When she was working at the construction company, the head of her unit, Mr. Geng (Keng in Wade-Giles), made sexual approaches to her, but she refused his advances. A few months later, during a political campaign, Mr. Geng accused her of being a counterrevolutionary and shortly thereafter raped her several times over a period of weeks. However, when Ms. Fu later decided to bring a charge against Mr. Geng, she limited her accusation to an incident that allegedly occurred on 14 February 1972.

Ms. Fu suffered a mental breakdown as a result of the rapes; she went to a hospital and was diagnosed as suffering from schizophrenia. A copy of her medical report was posted on the now abolished Democracy Wall in October 1979. Because of her mental condition, she had to stop working and was unable to get the construction company to pay her medical bills, which came to the equivalent of US \$535, almost two years' salary to her. Later she was also unable to get her job back or to be transferred to other work.

In the meantime, her husband went to the construction company to find out what had happened and was told that it was Ms. Fu who had seduced Mr. Geng. Without telling Ms. Fu his reasons, he applied for and was granted a divorce, following the requisite approval by her work unit.

On 8 January 1979, Ms. Fu led a peasant demonstration against hunger, and on 14 January she reportedly met an American diplomat at her home. On 18 January 1979, she was arrested without a warrant. It was reported in a poster that after her arrest the Peking party committee promulgated a document explaining the action against her, saying that she had slept with foreign diplomats and had entered the United States Embassy. Her family was not told that she had been seized until 3 April 1979, when the Peking Party Committee again promulgated a document stating that Ms. Fu had disrupted public order during the demonstration and had tied up traffic.

On 31 August 1979, Ms. Fu was reportedly tried for the first time by the Peking Intermediate People's Court, and sentenced to one year imprisonment for disrupting public order. She appealed, and on 11 October 1979, the Peking Higher People's Court found "the facts are not clear and the evidence is incomplete". Then on 17 October, she was put on trial again, with the added charge of libelling Mr. Geng in 1972. The trial session was recessed after her revelations about Mr. Geng's sexual molestations. On 24 December 1979, the trial was resumed, this time with still another charge added, namely that Mr. Fu had three times been detained by the public security bureau for theft while she worked at the construction company. The court found her guilty only of disrupting public order and sentenced her to two years' imprisonment. Her charge against Mr. Geng was dismissed on the ground that "a thorough investigation had failed to reveal any truth in the allegation" that Ms. Fu had been raped.

Fu's case seems to indicate that the party committee continues to play a dominant role in the administration of criminal justice. However, compared with past practice, the courts appear now to have begun to play a somewhat more active, though still very limited, role in deciding criminal cases.

(3) Mass Sentencing Meetings

Soon after the establishment of the PRC on 1 October 1949, thousands of people were executed after mass public trials (the estimates ranged from 800,000 asserted to Mao Tse-tung in 1958, to several million, estimated by scholars).⁶⁹ In these mass trials, the assembled crowds, whipped up to a frenzy by planted agitators, called invariably for the death penalty and for no mercy for the accused.⁷⁰ Later, Article 76 of the 1954 Constitution specifically provided for a guarantee of public trial for an accused and for the latter's right of legal defense. There was no mention of mass trials; by inference, that practice would appear to have been abolished by the Constitution because under a mass trial the accused is not permitted to undertake a legal defense.

Somewhat later, however, a practice similar to that of the mass trial de-

veloped: for important political cases, a mass meeting would be held to announce the court's sentence and the accused was sometimes executed immediately after the announcement of the sentence. During the Cultural Revolution, this practice became more frequent and mass meetings were held even to announce sentences for common criminal cases such as murder, rape, or robbery. The 1975 PRC Constitution legalized this practice of mass meeting by providing in Article 25, paragraph 3: "In major counterrevolutionary criminal cases the masses should be mobilized for discussion and criticism."

Despite its avowed purpose, announced by the present leadership, of strengthening the "socialist legal system", the 1978 Constitution not only maintains this practice, but also expands its application to common criminal cases. Article 41, paragraph 2 provides: "With regard to major counterrevolutionary or *criminal* cases, the masses should be drawn in for discussion and suggestions" (emphasis added).

Between September 1979 and the present time, the official news media in the PRC has reported the holding of many mass sentencing meetings. Those who were sentenced to death were usually executed immediately.

The purpose of these meetings has apparently been to warn the public against the commission of counterrevolutionary or criminal offenses. However, at the same time this process seriously disrupts the PRC's efforts to strengthen the socialist legal system. First, once a sentence is publicly announced at a mass meeting, it is unlikely that it would be altered by appeal or retrial; any alteration of a publicly announced sentence would result in a serious loss of face or prestige for the government.

Second, the immediate execution of death sentences at mass sentencing meetings is in flagrant violation of the procedure announced by the PRC. On 15 July 1957 the National People's Congress adopted a resolution requiring that all death sentences of the lower court be submitted to the Supreme People's Court for approval.⁷¹ (The present-day Criminal Procedure Law adopted on 1 July 1979 by the National People's Congress also provides in Article 144 that death sentences must be reviewed by the Supreme People's Court.)⁷² This review procedure was ignored in at least several of the reported mass sentencing meetings. For instance, on 14 November 1979, the Hanchou (Hanzhou in pinyin) City Intermediate People's Court convened a mass sentencing meeting, reportedly attended by more than six thousand people, announcing *inter alia*, the sentencing of Hsiung Tzu-ping (Xiong Ziping in pinyin) to death on the charge of being the leader of a "gang of rapists". He was immediately executed. The report by the New China News Agency pointed out that the Court rendered a judgment against Hsiung on 30 October 1979 and that he appealed to the Chekiang (Che-chiang in Wade-Giles, Zhejiang in pinyin) Higher People's Court, which rejected his appeal. There was no mention of any appeal to or approval by the Supreme People's Court of his death sentence.⁷³

Concluding Observations

Since the present PRC leadership came into power, it is undeniable that tremendous efforts have been made in improving the quality of the PRC's criminal justice system. New legislation, such as the Arrest and Detention Act, the Criminal Procedural Law, and the Criminal Law were enacted; the importance of establishing a more perfect socialist legal system has been emphasized and publicized; and legal education has not only been revived but strengthened. All these developments have brought some significant changes in the structure of the PRC criminal system. However, the PRC has continued to avoid certain crucial structural changes. The principle of analogy remains under the new criminal law; the practice of rehabilitation through labor, *i.e.* the placing of a person in a labor camp for up to four years, is not only maintained but strengthened; and the continued validity of formerly enacted vague criminal legislation, such as the 1951 Counterrevolutionary Act, has been explicitly ratified.⁷⁴

How far the enacted structural changes will actually affect the operation of the PRC's criminal justice system, thus improving the system's quality, remains to be seen. In spite of their limitations, these structural changes, if seriously implemented, may well offer a substantial improvement to the PRC's criminal justice system. The crucial question is whether the party organizations, at all levels, will in fact allow the PRC's criminal justice system to operate in accordance with the recently enacted structural changes without undue party interference. If the party organizations choose to obstruct these structural changes, it is unlikely that any significant improvement of the system can be made.

At present, there has been slight hint from the PRC leadership that the party is prepared to relax its control over the public security, the procuracy, and the courts.

The PRC is a party state, and it is understandable that the party would definitely intervene in judicial policy, guidelines or major political cases. However, current practice in the PRC indicates that the party organizations on various levels continue to intervene in all criminal cases.⁷⁵ Recently, it was reported that the President of the Supreme People's Court, Chiang Hua (Jianghua in pinyin), has maintained that Party leadership over judicial work should be limited primarily to the guidelines and policies of the judiciary and should thoroughly guarantee that the courts may conduct trial independently.⁷⁶ Similarly, the Chief Procurator of the Supreme People's Procuratorate, Huang Ho-ch'ing (Huang Heping in pinyin), also said that "procuracies at various levels must be placed under the leadership of the party committee, and they must report to and seek instruction from the party committee with respect to major guidelines and policy problems", thus implying that the party committee should not intervene in the handling of individual cases by the procuracies. However, at present, it is not clear whether the PRC's criminal justice system will actually move in the direction of independence. Until the PRC more precisely defines the relationship

between the party and the public security, the procuracy and the courts, and until it is willing to prohibit party interference with individual criminal cases, any changes in the structural aspects of the criminal justice system will fall short of having any significant effect on the operation and quality of the system.

NOTES

1. The term "structure" here refers to the organization of the courts, administrative agencies in charge of certain types of criminal sanctions, and the applicable rules, decrees, and laws by the courts or agencies.
2. Article 10 of the Provisional Organic Regulations of People's Courts in the People's Republic of China, promulgated on 4 September 1951. Text of the Regulations in *Chung-yang jen-min cheng-fu fa-ling hui-pien* (Collection of Laws and Decrees of the Central People's Government), Peking 1953, Vol. 2 1951, 79-82.
3. Article 6 of the General Rules Governing the Office of the Local People's Procurators at Various Level, promulgated on 4 September 1951, in *id.*, 86-87.
4. For an English translation of the Common Program, see *China: A Handbook*, (Yuan-li Wu, ed.), New York 1973, 789-798.
5. Article 17 of the Common Program.
6. For an English translation of the Act, see Jerome Alan Cohen, *The Criminal Process in the People's Republic of China, 1949-1963, An Introduction*, Cambridge, Mass. 1968, 299-302.
7. *Ibid.*, 302.
8. *Ibid.*
9. *E.g.* Article 4 of the 1951 Provisional Organic Regulations of the People's Courts in the PRC provides:
The adjudication of cases by the people's court shall be based on the provisions of the Common Program of the Chinese People's Political Consultative Conference and the laws, decrees, decisions, and orders promulgated by the People's Government. Where no specific provisions are applicable, the policy of the Central People's Government shall be followed.
Translated in Shao-chuan Leng, *Justice in Communist China*, Dobbs Ferry, NY 1967, 32.
10. *E.g.* see photocopy of the Ning-hsiang County People's Court judgment of 1953 disclosed by a PRC document during the Cultural Revolution. The judgment sentenced Yang Chien-hsiang to death. "An Investigation Report Concerning the Crimes of the Renegade, Traitor and Scab Liu Shao-ch'i, Prepared by a Special Case Deliberation Team of the Chinese Communist Party Central Committee (18 October 1968)," Exhibit No. 18, reproduced in *Liu Shao-chi' wen-t'i tsu-liao ch'uan-chi* (A Special Collection of Materials on Liu Shao-ch'i), Taipei 1970, 663. Usually only with respect to some cases relating to aliens did a people's court actually cite statutory provisions to support its judgment. *E.g.* see judgment against the alleged US spies Downey-Fecteau decided the Supreme People's Court on 23 November 1954; excerpt appeared in Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study*, Vol. I, Princeton, NJ 1974, 625-628.
11. Cohen, *op. cit.*, note 6, 9-10.
12. English translation in Wu, *op. cit.*, note 4, 799-810.
13. Articles 85 and 89 of the Constitution.
14. Article 73 of the Constitution and Articles 15-30 of the Law of the PRC for the Organization of People's Court, 28 September 1954. The Law is translated in Cohen, *op. cit.*, note 6, 425-428.
15. Articles 76 and 78 of the Constitution.
16. See Leng, *op. cit.*, note 9, 54.
17. For information on this movement, see generally Roderick MacFarguhar, *The Hundred Flowers Campaign and the Chinese Intellectuals* New York: Praeger, 1960 and Mu Fu-sheng (pseud.), *The Wiling of the Hundred Flowers; The Chinese Intelligensia under Mao*, New York 1963.
18. For a summary of these criticisms, see Leng, *op. cit.*, note 9, 57-62.
19. *Ibid.*, 62-63
20. "Decision of the State Council of the PRC Relating to Problems of Rehabilitation Through

- Labor", promulgated on 3 August 1957, translated in Cohen, *op. cit.*, note 6, 249-250.
21. Cf. *Political Imprisonment in the People's Republic of China*, An Amnesty International Report, London 1978, 89-90.
 22. Bao Ruo-Wang (Jean Pasqualini) and Rudolph Chelminski, *Prisoner of Mao*, New York 1976.
 23. The campaign began in 1966 and subsided in 1969; its purpose was to rekindle revolutionary fervor by inculcating Mao Tse-tung thought and to eliminate revisionism, associated by Maoists with the PRC Chairman Liu Shao-ch'i (Chairman in 1958-1967) and his supporters.
 24. For a summary of the impact of the Cultural Revolution on the judiciary, see Hungdah Chiu, "The Judiciary in Post-Cultural Revolution China", in *Proceedings of the Fifth Sino-American Conference on Mainland China* (9-11 June 1976), Taipei 1976, 106-117.
 25. In a report published in the *New York Times* on 25 November 1973, C. L. Sulzberger stated that PRC officials told him that the procuracy was abolished in the late 1960s.
 26. See Gerd Ruge, "An Interview with Chinese Legal Officials", *The China Quarterly* March 1975 No. 61, 21.
 27. *Ibid.*, 120-121.
 28. For an English translation of the text of the new constitution, see 18 *Peking Review* 24 January 1975 No. 4, 12-17.
 29. Article 25 of the Constitution. For a study of the PRC judiciary under this constitution, see Hungdah Chiu, "The Judicial System Under the New PRC Constitution", in *The New Constitution of Communist China: Comparative Analysis*, (Michael Lindsay, ed.), Taipei 1976, 87-103.
 30. See the documents translated in the documentary part of Chiu, "The Judicial System...", *op. cit.*, note 29, 108-114 and Hungdah Chiu, "Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents", 68 *Journal of Criminal Law & Criminology* 1977 No. 3, 392-398.
 31. "Prospect and Retrospect, China's Socialist Legal System", 22 *Beijing* (formerly Peking) *Review* 12 January 1979 No. 2, 26-27.
 32. Teaching and Research Office of Peking (Beijing in Pinyin) Political-Legal Institute, *Chung-hua jen-min kung-ho-kuo hsin-shih su-sung fa-chiang-i* (Zhonghua renmin gonghequo xinshi susong fa jiangyi in Pinyin) (Lectures in the Criminal Procedure Law of the PRC), Peking 1979, 123.
 33. Shih Ming (Shi Ming in pinyin), "A Good Daughter of the People—Before and After the Heroic Death of Martyr Chang Chih-hsin [Zhang Zhixin in pinyin]", *Pei-ching chih -ch'un* (Beijing zhichun, *The Spring of Peking*) 28 September 1979 No. 8, 12-19.
 34. For an English translation of the Constitution, see 4 *Rev. Soc. Law* 1978 No. 3, 247-258.
 35. E.g. see Wan Ch'ing-hua (Wang Ginghua in Pinyin), "Why one is Unable to Get a Lawyer?" *Min-chu yu fa-chih* (Minzhu yu fazhi in pinyin) Sept. 1979 No. 2, 36.
 36. Text of the Criminal Law is published in *Jen-min jih-pao* (Renmin Ribao in pinyin, *People's Daily*), 7 July 1979, 1, 3, 4; the text of the Criminal Procedural Law is published in *Kuang-min jih-pao* (Guangmin Ribao in pinyin, *Enlightenment Daily*), 8 July 1979, 1, 2, 3. Both laws entered into force on 1 January 1980.
 37. "Regulations for Arrest and Detention", 22 *Beijing Review* 9 March 1979 No. 10, 4. Complete text released by New China News Agency on 24 February 1979. English translation of the 1954 law in Cohen, *op. cit.*, note 6, 360-362.
 38. See Resolution of the First Meeting of the Second Session of the National People's Congress of the PRC Relating to Abolition of the Ministry of Justice and the Ministry of Supervision (passed on 4 April 1959), in *Chung-hua jen-min kung-ho kuo fa-kuei hui-pien* (Zhuanhuo renmin gonghe guo fagui huibian in pinyin, Collection of Laws and Regulations of the PRC), Vol. 9, Peking 1959, 108.
 39. "New Minister of Justice Interviewed", 22 *Beijing Review* 19 October 1979 No. 42, 3.
 40. *Ibid.*, 3-4.
 41. "Speeding the Work of Lawmaking", 22 *Beijing Review* 2 March 1979 No. 9, 3.
 42. The Communist Party of the Soviet Union may issue directives to tell judges, for instance, to "intensify the struggle against thefts in the factories or to make examples of managers who have tampered with the books, or to bear down on some other activity which the party is seeking to 'liquidate'". Harold J. Berman, *Justice in the USSR*, Rev. ed. Cambridge, Mass. 1963, 271-272. However, there appears to have been no report on Party review or approval of individual criminal cases handled by the courts.

43. E.g. Liao Chün-ch'ang (Liao Junchang in pinyin), "The Independence of Trial and (the System of) Deciding a Case by the Secretary", *Hsi-nan cheng-fa hsüeh-yüan hsüeh-pao* (Xinan zhengfa xueyuan xuebao in pinyin, *Journal of the Southwest Political-Legal Institute*), May 1979 No. 1, 7.
44. *Ibid.*
45. *Ibid.*, 8.
46. *Ibid.*, 9.
47. Special Group Assisting the Handling of Cases from the Southwest Political-Legal Institute, "Looking at Some Problems Relating to Judicial Works from the Practice of Handling Cases", *Hsi-nan cheng-fa hsüeh-yüan hsüeh-pao*, *op. cit.*, note 43, 26-27.
48. Li Chin-jung (Li Jinrong in pinyin) "Chungking (Chung-ch'ing in Wade-Giles and Zhongqing in pinyin) City Law Association Held an Academic Seminar", *Hsi-nan cheng-fa hsüeh-yüan hsüeh-pao*, *op. cit.*, note 43, October 1979 No. 2, 59.
49. *Ibid.*
50. *Ibid.*
51. Japanese Women Lawyers Group's interview with Vice-President of the Supreme People Court Cheng Shao-wen (Zheng Shaowen in pinyin) in June 1979, and reported in the December issue of the Japanese journal entitled *Wen-i ch'un-ch'iu*. Interview summarized in *Lien ho-pao* (*United Daily News*) International edition, 4 January 1980, 1.
52. *Jen-min jih-pao*, 7 July 1979, 3. Translated by the author.
53. "Strengthening the Socialist Legal System", 22 *Beijing Review* 7 December 1979 No. 49, 3.
54. Peking Radio Broadcast of 29 November 1979. Reported in *Jen-min jih-pao*, 30 November 1979, 1.
55. See *op. cit.*, note 20, and accompanying text.
56. See Fox Butterfield, "Imprisoned Chinese Dissident Leader, Wei Jingsheng", *New York Times*, 20 October 1979, 9.
57. *Ibid.* Part of Wei's article, "The Fifth Modernization—Democracy and Others", is translated in "China Clamps Down on Dissidents", *The Asian Wall Street Journal Weekly*, 3 December 1979, 10. See also Melinda Liu, "Wei and the Fifth Modernization", *Far Eastern Economic Review* 2 November 1979, 22-23.
58. At 14-20. English excerpts from the article are published in *The New York Times*, 7 May 1979, A1, A10. See also Fox Butterfield, "Peking Dissident, in Rare Account, Tells of Political Prisoners' Torture", *ibid.*
59. "Wei Jing sheng Sentenced", 22 *Beijing Review* 26 October 1979, No. 43, 6-7.
60. Translation of these articles is from Cohen, *op. cit.*, note 6, 301, 302.
61. "The People's Verdict—Wei Jingsheng's appeal rejected", 22 *Beijing Review* 16 November 1979 No. 46, 15-16.
62. See Xing Zhong, "Judicial Organs and Judicial Procedure in China", 22 *Beijing Review* 12 January 1979 No. 2, 32.
63. Excerpts of the trial proceedings can be found in *New York Times*, 15 November 1979, A22.
64. See Fox Butterfield, "Leading Chinese Dissident gets 15-year Prison Term", *The New York Times*, 17 October 1979, A3.
65. See *ibid.*
66. Information supplied by a visitor to China.
67. Wei was arrested after the promulgation of the new Arrest and Detention Act. Both the new law and the 1954 Act require a warrant for arresting a person.
68. "Family of Prominent Chinese Activist Barred from Seeing Her in Jail", *The New York Times*, 8 January 1980, A2. See also United Reporters Group, "Minutes of Investigating the Case of Fu Yeuhua", *Tanshuo*, 11 March 1979 No. 3, 5-6.
69. For a study of the number of Chinese people killed under Communism, see generally, *The Human Cost of Communism in China*, Washington, DC 1971.
70. See *ibid.*, 11-13 and Cohen, *op. cit.*, note 6, 10.
71. See Cohen, *op. cit.*, note 6, 541.
72. *Kuangmin jih pao*, 8 July 1979. The law was to enter into force on 1 January 1980, so presumably it was not applicable before that date. However, the PRC has never abrogated its 1957 NPC decision on review of a death sentence. In an interview with Chinese legal officials in May 1974,

it was reported: "When local courts come to the death sentence, they must report to a court on a higher level which again reports to the court on the next level until the Supreme Court approves: The death sentence can be implemented only after the approval of the Supreme Court". Gerd Ruge, *op. cit.*, note 26, 119. However, in a recent article on judicial procedure in the PRC, which appeared in the authoritative *Beijing Review*, it is said: "If a court at the basic or immediate level hands down a death sentence, it should submit the sentence to a *higher court* or the Supreme People's Court for re-examination and approval before execution, whether the defendant appeals or not" (Emphasis added). Xing Zhong, *op. cit.*, note 62, 32. The author gave no source to support his view.

73. Radiobroadcast from Chekiang, 14 November 1979. Cited from Wang Hsiao-tang, "Legalism as Seen from Recent Public Trials", 13 *Chung-kung yen-chiu* (Studies on Chinese Communism), 15 December 1979, No. 12, 25-26. See also the photos of execution published in *The Washington Post*, 8 January 1979, A11.
74. On 29 November 1979, the Standing Committee of the National People's Congress passed "Supplementary Regulations Concerning Rehabilitation through Labor", which provide, *inter alia*, for the establishment of a Governing Commission on Rehabilitation through Labor in Provinces, Autonomous Zones, Large and Middle Size Cities. The duration of rehabilitation through labor is from one to three years and may be extended for another year. See *Jen-min jih-pao*, 30 November 1979, 1.
75. E.g. a PRC radio broadcast recently revealed that after the arrest of homicide suspect, Yu Chin-lung (Yu Jinlong in pinyin), the leaders of the Chekiang Provincial Party Committee and the Hanchou City Party Committee "personally took charge [of the case] and immediately deployed the public security and judicial organs to swiftly try the case". Radiobroadcast of Chekiang, 8 November 1979. Cited in Wang Hsiao-tang, *op. cit.*, note 73, 24.
76. *Jen-min jih-pao*, 11 January 1980, 1. It is reported that President Chiang Hua (Jiang Hua in pinyin) recently told a judicial conference held in Peking that: "We should abolish the practice by party committees of examining and approving criminal cases", "Chinese Court Official Seeks Less Political Interference", *The New York Times*, 25 August 1980, A5.

EXCERPTS FROM A PEKING TRIAL TRANSCRIPT

Special to *The New York Times**
15 November 1979, A22.

PEKING, Nov. 14—Following are translated excerpts from a transcript of the indictment against Wei Jingsheng, editor of the Chinese dissident journal Explorations, as read by the prosecutor, Gao Wenyu, in the Peking Intermediate People's Court on Oct. 16, and of Mr. Wei's defense. The transcript was published by the underground journal Fifth of April Forum and sold at Democracy Wall.

By the Prosecutor

Chief Judge, People's Assessors: There is no denying that Wei Jingsheng carried out an enormous amount of counterrevolutionary activities, given the amount of evidence.

First, the defendant betrayed his motherland by supplying military intelligence to a foreigner. Shortly after our country launched the counterattack in self-defense against the Vietnamese aggressors to defend our border area, the defendant Wei Jingsheng arranged secret meetings with foreign agents in Peking and supplied foreigner [blank] with important military intelligence including the names of the commanders of the Chinese troops, the number of such troops, battle developments and the number of casualties. The defendant willingly became the running dog of Vietnam. Thus he is merely a scum of the nation.

Charge Regarding Publication

Second, the defendant wrote many reactionary articles to carry out his counter-revolutionary propaganda and agitation for the overthrow of the dictatorship of the proletariat and the socialist system. Between December 1978 and March 1979, the defendant wrote over 10 reactionary articles such as the "Fifth Modernization", and put them up in such places as Xidan Street [the location of Democracy Wall] or printed them in the reactionary journal Explorations.

In these articles he tried his best to vilify Marxism-Leninism Mao Zedong thought as a prescription only slightly better than the medicine peddled by charlatans. He also slandered our socialist system as an autocratic system that oppresses democracy. He said it is nothing but a feudal monarchy disguised as socialism.

The above-mentioned counterrevolutionary crimes of Wei Jingsheng are directly in violation of Article 56 of our Constitution, which stipulates that "citizens must support the leadership of the Communist Party of China, support the socialist system and safeguard the unity of the motherland".

Our Constitution clearly stipulates extensive democratic rights. However, our democracy should be a democracy protected by law. It does not mean absolute freedom for one to do as one likes. Freedom of speech of the individual citizen

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must be based on the four basic principles of insisting in the socialist road, the dictatorship of the proletariat, the leadership of the party and Marxist-Leninism Mao Zedong thought. The citizen has only the freedom to support these principles and not the freedom to oppose them.

The defendant hid his criminal aim of overthrowing the dictatorship of the proletariat and changing the socialist system under the guise of democracy. If such individualistic freedom of the minority is allowed to run rampant, the freedom of the majority will be lost. The people will sink into misery and the nation will be doomed.

By Wei Jingsheng

I believe the charges enumerated in the prosecutor's indictment are untenable. I published articles and wrote big-character posters on the basis of Article 45 of the Constitution, which says that citizens have the freedom of speech, correspondence, assembly, publication, association, parade, demonstration and strike as well as freedom to write big-character posters and hold big debates.

We published our journal for the purpose of exploring China and making it rich and powerful. We believe that only by free, unrestrained and practical exploration is it possible to achieve this purpose.

On the first charge, the indictment states that a counterrevolutionary crime is committed when our country's military intelligence is given to a foreigner. The word military intelligence is a very broad concept. Citizens have the duty to keep secrets, but the premise is that citizens must know what secrets are to be kept.

Question of What Is a Secret

I was never told of the secrets I must keep. After the outbreak of the Chinese-Vietnamese war, I had no access to anything classified as secret.

I am an ordinary man in the street and my source of information was hearsay and not any official government documents. The news I talked about could not cause any harm to the situation on the front line. I took this into account beforehand. For instance, I mentioned the name of the commander in chief at the front. Who has ever heard that one side ever lost a battle because the other side knows the name of the commander?

Of course, the prosecutor might say that according to law this is a military secret. But during the time of the Gang of Four, anything was taken as a secret and any random talk with foreigners could be construed as illicit relations with foreign countries.

Does the prosecutor want people to follow the practice of the time of the Gang of Four?

If the prosecutor thinks I have committed errors because the content of my talks included things that the Government did not wish me to tell, I will totally accept it, since this is the duty of every citizen. But I still hope the Government can specify more clearly the scope of the secrets that should be kept by the people.

The Meaning of Revolution

Second, the indictment states that I carried out counterrevolutionary propaganda and agitation. If this is so, we should first clarify what is revolution and what is counterrevolution. Because of the policy of hoodwinking the people

adopted by the Gang of Four, some people have the following view: It is revolutionary to act in accordance with the will of the leaders in power and counter-revolutionary to oppose the will of the people in power.

I cannot agree with this debasing of the concept of revolution. Revolution is the struggle between the old and the new.

Since the revolutionary tides are different in different historical periods, the targets of the phrase “counterrevolutionary” are also different. The current historical tide is a democratic one, which opposes feudal, fascist dictatorship. The central theme in my articles such as the “Fifth Modernization” is that without democracy there will be no four modernizations. [The four modernizations—agriculture, industry, science and defense—are China’s official goals.]

How can such a theme be counterrevolutionary? People that oppose it should justly be labeled counterrevolutionary.

Marxism Is Said to Change

Third, the indictment says I “slandered Marxism-Leninism Mao Zedong thought as a prescription only slightly better than the medicine peddled by charlatans”. I did not. No things exist in the world that never change from beginning to end. Marxism is no exception. After 100 years of development, Marxism has been successively changed into many different branches, for example, Kautskyism, Leninism, Trotskyism, Stalinism, Mao Zedong thought and Eurocommunism.

We find that some governments organized under the dictatorship of the proletariat in which power is concentrated in a few hands, such as the Soviet Union and Vietnam, and China before the Gang of Four was smashed, have degenerated into fascist governments, with a minority of the leading class exercising dictatorship over the broad masses of the working people.

The fate of Marxism is like that of many schools of thought in history. Its revolutionary essence was emasculated after its second and third generations. Some of the ideals of its teachings have been used by rulers as the pretext for enslaving people. Is this not a prescription that is only slightly better than medicine peddled by charlatans?

Constitutional Provision Cited

Fourth, the indictment states that I “put forth the banner of so-called freedom of speech and the demand for democracy and human rights to agitate for the overthrow of the dictatorship of the proletariat”. I must point out that freedom of speech is not a wild allegation, but is guaranteed in black and white in the Constitution. The tone in which the prosecutor talks about that right shows not only that he is prejudiced in his thinking, but that he has forgotten his responsibility to protect the democratic rights of citizens.

The prosecutor accuses me of trying to overthrow the socialist system. In the course of my editing, our publication *Explorations* has never engaged in conspiracy of violence. *Explorations* is a journal of theoretical investigation on public sale. It has never taken the overthrow of the government as its aim.

The prosecutors perhaps do not agree with my theories. In my several conversations with them we have talked about this. I would just like to add a point. The Constitution gives the people the right to criticize leaders because they are human beings and not deities. Only through criticism and supervision by the people can they reduce their errors.

Criticism cannot possibly be nice and appealing to the ear or all correct. To

require criticism to be entirely correct and to inflict punishment if it is not is the same as prohibiting criticism and reforms and elevating the leaders to the position of deities. Is it really true that we must again take the path of superstition of the Gang of Four?

The above is my defense.

魏京生的辯護詞

魏京生的辯詞

法：現在由魏京生進行辯護。

魏：北京市檢察院分院起訴書所提到的罪狀，我認為是不能成立的。我編印刊物和寫大字報是根據憲法第四十五條：公民有言論、通信、集會、出版、結社、遊行、示威、罷工的自由；有運用大鳴、大放、大辯論、大字報的自由。我們編印刊物的目的，是為了探索使中國走向繁榮富強的道路。我們認為只有自由的、無約束的、實事求是的探討，才有可能達到這一目的。公安局和檢察院把我們基於上述原則而進行的活動說成是反革命活動，這是我們不能接受的。下述我對起訴書所羅列的罪狀的具體意見。

第一：起訴書上說，向外國人送給我國軍事情報，犯反革命罪。按我的記憶，新刑法和舊的懲治反革命條例（法官：魏京生，稍微慢些），都是這樣講的，向敵人提供情報算作叛國罪。檢察員認為我與英法等國記者談話中有叛國行為，是否把英法兩國記者當作敵人呢？我想提醒檢察員，在華國鋒接見西歐四國記者時，曾經明確地把各國記者叫作朋友們。憲法規定公民有保守國家機密的義務，起訴書卻把這一明確的概念變成爲軍事情報模糊的概念。如衆所周知，現在各國情報大部份都是從公開的渠道，例如報紙、電台消息等，經過分析得到的。檢察員是否也認為報紙、電台也犯了叛國罪了。可見，軍事情報是一個過於廣義的概念。公民有保守機密的義務，它的前提是公民必須要知道需要他保守的是甚麼機密，也就是說，這個機密必須事先就向他明確了，標明是國家機密或軍事機密，他才負有保守它的義務。這也是法律意義上的機密或軍事機密。

我從未被告知或需要我保守的機密。在中越戰爭爆發後，也未接觸過任何標明爲機密的東西。所以根本談不上向誰供給了法律意義上的機密。我與友好國家記者和外交官談話，不可能不談到國內各方面的情况（審判員：慢些），我認為這是通過記者和外交官增進各國人民之間的友誼和互相了解，是增進各國勞動人民相互支援的基礎。在中越戰爭爆發後，這場戰爭就成爲國內外人民共同關心的一件大事，所以在這期間我與外國記者和外交官談話，也就不可能不談到這一方面的情况。

我談到的消息，是不是政府不願意透露出來的消息，我是無法知道的。作爲一個普通百姓，我的消息來源是小道消息，而不是政府的正式文件。我的消息是否與標明爲機密文件有巧合的地方，我也無法知道。因爲我沒有看到過政府的機密文件，但我談到的消息，是不會給前綫局勢帶來有影響的。這是我事先就估計到的。例如我談到前綫總指揮的姓名，誰聽說過有藉不公佈指揮員的姓名而打了勝仗，誰又聽說過因爲對方知道了指揮員的姓名而打了敗仗呢？都沒有。那麼，談論前綫總指揮的姓名，怎麼會給前綫局勢造成不利呢？自古至今也沒聽說過指揮員的姓名會成爲戰爭勝負的一個因素。這個道理站不住腳。當然檢察員可以說按我國的習慣，隨便什麼事都算機密。但是在「四人幫」的時代，閉關鎖國的習慣，隨便什麼事情都算機密，隨便和外國人說幾句話都會被認爲是裏通外國的。檢察員是要讓公民遵守「四人幫」時代的習慣呢？還是要遵守法律？公安局曾經說過，說我應該遵守保守機密守則。我不知道這個守則是什麼，我只知道它本身也是保密的，因此它不是公開頒佈出來要求公民遵守的法律，它只能作爲內部規定。公民有遵守憲法和法律的義務，沒有遵守他所不知道的內部規定的義務。綜上所述，第一，我沒有抱背叛祖國的目的；第二，我也沒向敵人提供什麼；第三，我提供給朋友們的，也絕不是國家

機密或軍事機密，檢察員控告的叛國罪是不能成立的。如果檢察員認為我與外國人談話的內容是政府不希望我談出的東西，因而屬於錯誤，這我完全可以接受，並且在今後按照政府的合理要求，來保守政府認為需要保守的機密，因為這是每個公民的義務。但是我也希望政府能夠更明確地規定公民應該保守機密的範圍，不要使公民手足無措，直接地妨礙了中國人民與各國人民的友好來往，並且為司法工作帶來混亂，這對於國家，對於人民都沒有好處。

第二：起訴書說我進行反革命宣傳鼓動，並把我的文章《第五個現代化、民主及其它》等，叫做反動文章，將我們的刊物《探索》叫作反動刊物。既然如此，我們就應該弄清楚，什麼叫革命，什麼叫反革命。由於「四人幫」的文化專制主義和愚民政策的多年影響，現在有人是這樣看的，按照現在當權的領導的意志辦就是革命，反對現在當權者意志的就是反革命。這種對革命概念的庸俗化我是不能同意的。革命是指順應歷史發展的潮流，並站在歷史潮流的前面對一切舊的、保守的阻礙歷史發展的事物進行鬥爭這樣一種行為。革命是新事物與舊事物的鬥爭。把當權者的意志掛上永久革命的標籤，正是消滅一切不同的思想理論。「有權就是真理」，這種對革命概念的庸俗化，正是過去二十多年「四人幫」鎮壓革命者和人民的最有效的工具之一。

下面我談第二個問題，是「反革命」一詞的適當應用範圍，嚴格來講，反革命一詞，是從歷史角度出發，觀察問題所使用的政治概念。在政治領域裏沒有一成不變的概念，在不同的歷史時期由於革命的潮流不同，各有差異，反革命這一概念的對象就有所不同。如果以某一時期的某一概念為準則，結果只能是張冠李戴。即使在革命時期，由於人民認識水平的限度，對反革命這一概念的理解也會很不同。用這種不斷變化的政治概念作為定罪標準，就如同使用隨風飄揚的柳絮作為是高度的標準一樣，是不可能達到準確的目的的。這是我們過三十年來冤、假、錯案之大量發生的原因，也是「四人幫」在違背民意

的情況下上台的原因之一。把流行的政治概念作為法律的標準，它的必然結果就是反革命觀點，要受騙的。

最後一個問題是當前革命的潮流和我的文章的關係。當前的歷史潮流是民主的潮流。因為中國的社會發展到今天，它對中國人民提出了這樣的問題，不進行社會制度的改革，不廢除獨裁法西斯專制的社會根源，不徹底實行民主，不保障人民的民主權利，中國的社會就不能前進，社會主義現代化也不可能在我國實現。因此民主的潮流是當代革命的潮流，反對民主的人和事，站在民主潮流的對立面的專制主義保守派就是現在的反革命。我的《第五個現代化、民主及其它》等文章的中心議題是：沒有民主就沒有四個現代化，沒有第五個現代化——民主，一切現代化都不過是一個新的謊言。這樣的中心議題怎麼是反革命呢？反對它的人和事，恰恰應當被歸入反革命的範疇。當然文章中的論據和論點，並不一定都是正確的。它們應當接受歷史實踐的考驗，也應當接受來自各方面的批評，只有這樣，才能更加正確。但論據和論點即使不完全正確，也不妨礙中心議題的革命性，這是十分簡單明白的道理。

第三：起訴書中說誹謗馬列主義、毛澤東思想是比江湖騙子的膏藥更高明一些的膏藥。按我的理解，誹謗應該是指把不存在的罪名憑空加在別人頭上，「膏藥」根本不是罪名。檢察員用斷章取義的方法引用的這半句話，根本就不構成誹謗罪。我在文章中攻擊的馬克思主義，決不是一百多年前的馬克思主義，而是林彪、「四人幫」一類政治騙子的那種馬克思主義。我不認為世界上有始終不變的事物，也不認為世界上有絕對正確的理論。任何思想理論都是相對的，在它所存在的環境中，具有相對的真理性和相對的荒謬性。在此時此地相對正確的理論，在他時他地就可能相對荒謬的。相對於某些事物正確的理論，相對於其他事物就可能是荒謬的。任何理論本身都同時具有可能的真理性和可能的荒謬性。馬克思主義當然也不能例外。馬克思主義經過一百多年的發展已先後改變為許多不同的流派。如考茨基主義、列寧主義、托洛斯基主義、史大林主義、

毛澤東主義、歐洲共產主義等等。這些理論都遵循馬克思主義的基本原理或部分基本原理，對馬克思主義的體系進行某些部分的修改或修正。因此，他們雖可以叫作馬克思主義，但都不是原來的馬克思主義體系。原始馬克思主義有相當數量的部分理論核心是對完美社會的描述，這種理想境界並非馬克思主義所獨有的。他是當時歐洲工人階級和知識分子對於自由平等、財產公有、社會公正的一種普遍願望。馬克思主義主張普遍民主及與權力集中的專政相結合的方式來達到這一理想，這是馬克思主義最顯著的特點。經過一百多年實踐，我們看到，按權利集中專政的方式組成的政府，例如蘇聯、越南、粉碎「四人幫」以前的中國，無一例外都墮落成爲一種少數領導階級對廣大勞動人民實行專政的法西斯政府，而且在這些政府中掌權的那些法西斯獨裁者們早已不是把無產階級專政作爲實現共產主義理想的工具。恰恰相反，他們無一例外地把共產理想作爲加強所謂無產階級專政，替少數統治者專政的工具。馬克思主義的命運和歷史上的許多宗教一樣，在它的第二代第三代以後，它的革命實質便被抽去，它的學說理想部份被統治者利用來作爲奴役人民的藉口和蒙蔽人民的工具，它的性質已發生了根本的變化，正是以理想作爲奴役的藉口和蒙蔽的工具的主義。我們把它叫做理想主義，也有人叫它做信仰主義。「四人幫」封建法西斯獨裁專政是它發展的頂峯。這種利用美好理想搞現代迷信的信仰方式，這種蒙蔽欺騙人民的法西斯主義難道不是現代的騙術嗎？難道不是比江湖騙子的膏藥更高明一些的膏藥嗎？需要指出的是我根據馬克思主義的歷史發展過程做出的這些結論可能是正確的，也可能是錯誤的，這可以通過進一步的理論探討來解決。我歡迎任何人對它提出批評，但無論結論正確與否，根據言論出版自由的原則進行理論探索和把思想結果與他人交流，這不構成犯罪。對任何歷史上存在過和現實中存在的思想理論，我們都是應該批判地對待它，這是馬克思主義的治學態度，那麼爲什麼就不能夠批判地對待馬克思主義呢？那些不准批判地對待馬克思主義的人，正是把馬克思主義作爲宗教來信仰的。任何人都沒有權信仰和遵循他認爲是正確的道理

，但是他不應當將他所信仰的理論用具有法律効力的規定方式強加給別人，否則他就干涉了別人的自由。

第四：起訴書說打着所謂言論自由、要民主要人權的旗號煽動推翻無產階級專政的政權和社會主義制度。首先我要指出，言論自由決不是什麼所謂的。而是憲法明文規定，每一個公民都應該享有的權力。檢察員用這樣的口吻來談論憲法賦予公民的權利，不但說明檢察員在進行思考中抱有偏見，而且說明檢察員忘記了他保護公民民主權力的責任。他把公民的民主權利當作嘲笑的對象。對於檢察員用斷章取義的方法羅列的罪狀，我覺得沒有逐條反駁的必要，我只想指出檢察員的疏忽。有一條罪狀是這樣半句話：「披着社會主義外衣的封建君主制。」難道「四人幫」的法西斯專政不是披着社會主義的封建君主制嗎？還有這樣半句話：「不要做獨裁統治者擴張野心的現代化工具。」它的後半句我記得是「我們要人民生活的現代化」，難道檢察員要做什麼獨裁統治者擴張野心現代化的工具，而不願意要人民生活現代化嗎？我想檢察員不會是這樣的。我也不願意相信檢察員不准批評「四人幫」的封建法西斯主義。然而上面引證能說明什麼呢？我不願意妄加評論，我只知道它不能說明我要推翻政府和社會主義制度，也不能說明我破壞了人民民主事業。我們的刊物《探索》在編輯過程中從未參與過任何陰謀組織或暴力組織活動。《探索》雜誌是公開出售的理論探討性刊物，它從未把推翻政權作爲自己的目的，也不可能去從事推翻政府的活動。它自認爲是人民民主事業的一部分，也不可能去破壞人民民主事業。當有人問到我們是否準備參加武裝鬥爭或者進行推翻政府的活動時，我曾經給予明確的回答。我認為武裝鬥爭不是造就民主政治必不可少的方式。我認為合法的宣傳和民主運動是造就民主政治的主要和必不可少的方式，推翻政權並不等於造就民主政治。民主的政治制度只有獲得多數人理解的情況下，通過對舊的政治制度的改革來逐漸地實現。這個觀點是我們刊物的根本宗旨之一。楊光、路林、趙南、劉青等人可以就這一點作證。他們曾經聽見過我說起過。檢察員控告我要推翻社會主義制度，這是更加與事實不相符合的

。檢察員自稱對我的文章進行了審查，那麼他應該看到，（第五個現代化、民主及其它）一文中專門有一章「社會主義與民主」談到我對社會主義的看法。我與檢察員多次的談話也談到了這個問題，檢察員不能說他不知道。當然檢察員心目中的社會主義制度和我認為的社會主義制度可能有很大的區別。我認為現實中的社會主義制度是多種多樣的，並非千篇一律。根據它們之間的明顯區別，我把社會主義制度分做兩大類。第一類是蘇聯模式的專制社會主義，以權力集中在少數當權者手中為特徵；第二類是民主的社會主義，以權力歸集於以民主方式組織起來的全體人民為特徵。我國絕大多數人民的願望都是要實行這種民主的社會主義。我們探索的目的，也是為了尋求達到這樣社會制度的道路。我參加到民主運動中來，也正是為了在我國實現這種民主的社會主義。我認為不進行政治制度的改革，不確立人民的民主權力，沒有民主的政治制度作保障，我國的經濟現代化是不可能達到的。民主的政治制度是我國全面現代化的先決條件，這就是我的文章《第五個現代化、民主及其它》的標題的來歷，也是文章闡述的中心思想。檢察員也許不同意這種理論，但是他們所不同意的社會主義理論，並不等於

公訴員的反駁詞

公訴員：審判長，裁判員，就剛才被告對自己的辯護意見，現在我發表公訴意見。被告辯護歸結起來有兩點，第一，不承認出賣情報，不構成反革命罪。第二，不承認進行反革命宣傳鼓動的，其它也不構成犯罪。圍繞着這兩個問題，他發表了許多觀點，我對他的這個錯誤觀點和反動的觀點加以駁斥。關於第一條，就是說沒有出賣國家情報那一點，首先是沒有反革命目的，沒有背叛祖國。另外，他所談的情況不過只是道聽塗說的消息，不是什麼機密，為了說明這個問題，我想首先交待一下關於機密的含意是什麼。機密就字來講，他本身的含意就是對事情

就是要推翻社會主義制度。

第五：檢察員用斷章取義的方法羅列的罪狀，我看沒有逐條反駁的必要。我只想指出兩點。第一，憲法賦予公民批評領導人的權力，是因為領導人是人不是神。他們只有在人民的批評監督下才可以少犯錯誤，才可以避免變為騎在人民頭上的老爺，才可以真正使人民放心。第二，要對我國的社會主義制度進行改革，就必須依靠全國人民，用批評和討論的方法，找出現有制度的缺陷，否則改革就不可能成功地進行。所以看到不合理的人和事物去進行批評，這是每一個公民固有的權力，也是他不可推卸的責任，是任何人任何機構也無權干涉的主權。批評不可能那樣美妙動聽，也不可能全都正確。如果強求批評的詞句動聽，要求批評完全正確，否則就治罪，就等於不准許批評，等於不准許改革，也就是等於把領導者擺上神化的地位。難道我們還要重新走「四人幫」搞現代迷信的老路嗎？當然批評必須是根據事實的，並且不允許進行人身攻擊和謾罵，這是我們刊物的根本原則之一，有《探索》雜誌的發刊聲明可以作證。如果檢察員認為我在這方面做的不夠，我願意接受檢察員以及任何人提出的批評，以上就是我的辯護。

成敗的有重要關係的中心環節、情報，也就是關於各種情況的報告。關於機密，內容和範圍也不像被告所說的根本就沒有規定，也沒有頒佈過施行法規，這一點不是事實。下邊我來講這個問題，關於國家機密主要範圍和內容是什麼，這在一九五一年六月五日中央人民政府政務院命令公佈實行的，保守國家機密暫行條例裏第二條就有規定。第二條，國家機密包括下列基本範圍：第一項，一切國防與軍事計劃和建設措施；第二項，一切武裝部隊的編制、番號、實力、裝備、駐防、調動、部署及建設等機密事項；第十三項，內務和人事的機密事項；第十

四項，資料、統計數字等；第十六項，一切未經決定或雖經決定尚未公佈的國家事物；第十七項，其他一切應該保守秘密的國家事物。什麼是機密及機密的範圍，早已經在一九五一年公佈實行，到現在已經有廿八年，被告依然否認這一事實，這一點我覺得除了他態度不好以外，什麼都不能說明。另外，被告在我們國家反對越南侵略者的自衛反擊戰中，也就是在越南進行擴張侵略的時候，我們全國人民都對此義憤填膺。當我們開始對他們反擊之後，我們全國人民都無不歡欣鼓舞。可是被告，在這個時候，他在做什麼呢？他對越南的侵略擴張主義是什麼態度呢？他把我們這個重要情況，也就是像我們起訴書上所認定的關於我們國家參戰的指揮員的姓名、出兵數目、戰鬥的進度、雙方傷亡的人數，全部提供給外國人。就這一點，按照國家機密包括的基本範圍裏頭，上述我已經唸過了，都通通是在這個範圍之內的。所以，我說的是情報，說的是國家機密，不是憑我公訴人的認為而言，不是憑我的想像，不是唯心主義，而是憑國家的法律規定。另外，也是根據你這個行為本身的事實來定的。被告為自己辯解的，就是說，像我們引用的條文或條款，有關法律規定，指的是階級敵人，而不是說友好國家的朋友。關於這一點，我覺得，我也發表不同的意見，駁斥被告的謬論。關於作戰情況這個機密，也就是軍事情報供給外國人，如果因為它的後果是產生在國外，而不是在國內，你的犯罪就在中國，你就應該承擔中國這個法律規定的法律責任。因此就是說，他無論是直接提供給別人，還是間接提供給別人，在國外引起的後果將都是同樣的。至於說因為他是友好，不是敵人，所以也就不算是情報。關於這一點，我們也是有法律根據的，就是在《懲治反革命條例》裏邊有規定，第十六條有這樣的內容，以反革命為目的及其他罪犯未經本條例規定者，依照本條例類似之罪判處。因此，我們按《懲治反革命條例》第一項也就是為國內外敵人竊取、刺探國家機密和供給情報者，都是竊取行為，應該處以死刑和無期徒刑。其情節較輕者可以處以五年以上徒刑。這一條也完全是法律根據的，也不是憑空捏造的，也不是公訴人在這兒對你進行誹謗的，給你

扣帽子的，更不是四人幫的那一套所講什麼，隨便談些什麼都是情報，都是機密。我們所說的機密，我們所說的情報，都是有法律根據的。關於他所強調，就是說，上午他的那個觀點，就是報紙、電台廣播等，都把這些消息公佈出去了，那麼他們也治罪嗎？就這點，我想他也是站不住腳的。為什麼呢？就是《國家保密條例》裏頭是具有這樣的規定，在第七條裏有這樣的規定，凡有關國家政策的新聞、論文、資料書目和報導，屬於政府範圍者，由中央人民政府政務院統一規定發布辦法，屬於軍事範圍者，由中央人民政府人民革命軍事委員會統一規定發布辦法。凡報刊、書目、電台廣播的新聞、論文、資料等內容，均不得涉及國家機密。而且不僅如此，各通訊社、報館，報導還有內部的保密審查辦法。那麼你提供這份情報，又經過誰來批准你呢？因此，根據被告人所犯下的罪惡事實，根據憲法第五十七條規定，一切公民就是說應該保守國家機密，被告人不僅違反了憲法，也觸犯了刑法。因此他這個行為完全構成了犯罪。既有事實，又有法律根據，決不是我們自己認為、憑空捏造的。這一點，我想我不再重複。再一個就是他認為沒有看機密文件，所以呢，也就不算做什麼情報，這一點也是站不住腳的。就是在當天，審判長在提審他這個問題的時候，他也回答不出所謂的來源是哪儿？或者他拒絕回答這個問題。那麼他認為，現在的交待就是小道消息，是道聽塗說。我認為不管這是道聽塗說，還是說你看國家機密文件，那麼算不算情報，算不算機密，都應該以國家規定的法規來衡量，而不是說你認為是不是。你的認為不能代替事實。因為竊取情報的方式方法很多，要看其內容是不是情報，是不是符合這個法規規定的，是不是觸犯了這個刑律。那麼你認為沒有看到文件就不是，你看不到這個機密文件就不是情報的話，那麼這個說法也是站不住腳的，因為只不過是小道消息，你這個刺探的方式不同而已，內容還是完全一樣的，是構成了出賣提供情報。這一點如果你你不承認的話，只能說明你態度壞，其他再也不能說明什麼問題了。我們國家對於一切公民在法律上一律平等，不允許有任何特權。你魏京生作為一個中華人民共和國公民，不遵守中

國的憲法，不遵守中國的法律、規定。那麼你想搞治外法權嗎？你想搞特權嗎？你想搞，那是因為什麼？但是我們作為無產階級專政的，作為依法行使法律監督權的檢察院，我們本身的任務是義不容辭的，就是要打擊反革命和一切犯罪份子的破壞活動。因此對你的犯罪行徑，必須按照法律規定，予以制裁。

第二個問題：關於被告魏京生不承認是反對毛澤東思想，不承認是反革命宣傳鼓動問題，就這一點，不管你承認還是不承認，我們因為不輕信口供，我們是重證據，重調查研究，我們是以事實為根據，以法律為準繩的。被告人撰寫的反動文章和反動刊物和他為主編的《探索》，在這裏也發了反動文章，清清楚楚地看到了他的矛頭是對着誰的。這一點現在被告曾多次強調他這是針對四人幫的，我們看他是不是針對四人幫呢？衆所周知，四人幫早已在一九七六年就被粉碎了，那麼他現在叫嚷要奪權，是奪四人幫的權嗎？那不是早已經被粉碎了嗎？

那你奪權奪的是誰呢？四人幫被粉碎以後是以華國鋒為首的黨中央掌握着操持着這個國政大權。那你是要奪四人幫呢，還是要奪現在以華國鋒為首的黨中央的權力呢？這不是很清楚嗎？關於被告講，他根據憲法第四十五條的規定，享有言論、出版、結社的自由，享有他應有的民主權利。同時你應該承擔法律所規定的義務。我們的憲法規定，我們國家的主導思想是馬列主義、毛澤東思想，我們的國家制度是社會主義的，是在中國共產黨領導下以工農聯盟為基礎的人民民主專政。這是有法律規定的，那麼你來反對它，你是革命的呢？還是反革命的呢？這一點不是很清楚嗎？所以你不承認是反革命，就是因為我們的立場不同而已。因為你認為那個反革命的行徑是理所當然的，所以這也就不難怪了。關於他不承認，也就是說在我們起訴書裏頭認定被告魏京生誹謗馬列主義、毛澤東思想是比江湖騙子的宵小更高明一些的宵小，他認為這不構成犯罪，而且認為不應該用規定的、統一的強加於人。如果要是強加於人，那就是干涉別人的自由。我們試看他對毛澤東思想是不是誹謗，那是不是得從頭說起。首先說什麼是誹謗。誹謗的含意，就是造謠污蔑，惡意中傷，也就是將人身的名譽、思想，言過其實，

這就叫做誹謗。我們不僅不允許誹謗國家領導人，而且對中華人民共和國的一切公民都不得進行誹謗。如果用大字報或小字報的形式，公然污辱他人或是捏造事實，誹謗他人的情節嚴重的，就應該治罪。這是法律規定的。什麼叫江湖騙子的宵小呢？江湖是四方各地走江湖，江湖騙子是指到處騙人的騙子，江湖騙子的宵小，那就是指到處騙人的東西。那麼我們國家從毛澤東同志在一九一七年於湖南創辦湘江評論開始，一直到四九年毛主席親自按下的電鈕，將千百萬革命烈士流血犧牲換來的、也就是用烈士鮮血染成的紅旗，升在我們祖國的上空。從此我們的國家進入了一個新的歷史時期，新的中國誕生了。我們在建國後，我們偉大的計劃所取得的成就，我就不用說了。難道這是騙人的東西嗎？我們之所以有今天，能夠有現在無產階級專政，現在社會主義制度，我們人民能夠享有廣大的完全的權力和民主和自由，那麼，這也是騙人的嗎？沒有毛澤東思想，那就沒有新中國，這一句話是顛覆不破的。當然，我們的領袖是人，不是神。毛澤東同志的救國救民的真理，是從實踐中得來的，這在中國偉大的鬥爭史上是實踐證明了的。在憲法第二條上規定，中華人民共和國的指導思想是馬克思主義、列寧主義、毛澤東思想。那麼被告對毛澤東思想進行誹謗，這就違反了憲法。因此也就是觸犯了法律，因為我們法律裏邊是要保護我們的憲法的執行。誰違反了這個，那我們就要制裁誰，因為憲法是公民的行為的準則，不允許任何人超出範圍。憲法所規定了範圍，誰要反對憲法，那麼誰就要得到懲罰。再一點，被告認為，是理論探討，是想探求中國走向繁榮富強道路的方法，並認為應有信仰自由。這一點，我想沒有必要再多說。我們的起訴書上寫得很清楚，並不是以你探討理論和不信仰馬克思主義而治你的罪。我們是治你的反革命罪。這一點你自己也看到了。我們憲法有規定，有信仰自由，你對馬列主義、毛澤東思想可以不信仰，也可以信仰，但是決不許你反對，反對就是違反憲法，違反了憲法就要給以制裁。這一點我們的觀點是明確的，旗幟是鮮明的。還有也就是說，不要再相信獨裁者的安定團結，不要做獨裁統治者擴張野心的現代工具，把

怒火集中在製造人民悲慘境遇的罪惡制度上。這些情況，他都說是爲了批判制度上的弊病，因爲制度上還不太完善。是不是這個情況呢？我認爲他這一點也不是老實的態度。我們從判決書、起訴書上這兩句話：披著社會主義外衣的封建君主制，把怒火集中在製造人民悲慘境遇的罪惡制度上，不難看出，集中一點，就是制度。這一制度，是指中國社會主義制度，被告把矛頭始終指向了我們這個制度。他指向我們這個社會主義制度，也就是我們國家制度。當然，我們這個制度是因爲上述我已經講過是工人階級領導的、工農聯盟爲基礎的無產階級專政的國家。那麼他當然也就是反對我們無產階級專政。我們的憲法第一條就規定，這是我們的國家制度。如果有哪一個反革命罪犯膽敢反對這個制度，那我們就堅決予以制裁。在中華人民共和國憲治反革命條例第一條裏是這樣規定：根據中國人民政治協商會議第七條共同綱領的規定，爲懲治反革命罪犯，鎮壓反革命活動，鞏固人民民主專政，特制定基本條例。第二條，凡以推翻人民民主政權、破壞人民民主事業爲目的的各種反革命罪犯，也以本條例治罪。被告要改變我們國家制度，要推翻我們的政權。這不是反革命的行徑，這又是什麼呢？我們承認，在我們的工作當中，有錯誤，我們制度有些地方也不太完善，甚至於有封建主義君主制的影響。我們也要批判，而且我們正在批判，要肅清這些影響。被告是要批評這些缺點錯誤嗎？事實證明，不是。我們知道，封建君主制是封建主義的國家政權組織形式，被告卻把我們的社會主義制度說成是封建君主制，這完全是誣蔑之詞，另外他說，不要做獨裁統治擴張野心家的現代化工具，要把權力從那些老爺們手裏奪過來。他所謂的老爺們，是指獨裁統治者，這獨裁統治者正像我如前所述的是指現在的掌握國家權力的領導者。所講的權力當然就是國家的國政大權了，也就是國家統治權。因此被告說，不承認把推翻政權作爲目的，也是不準確的。另外，被告強調他的民主權力。關於權力與自由，民主與法制，自由與紀律，這都是辯證的統一。人民在享受權力和應盡義務上都是一律平等的，不允許

任何人超出法律之外，有凌駕於法律之上的特權。從上述的事實就可以看出，被告所強調的，就是沒有任何約束的、絕對的自由和權力，換句話說，就是想怎麼幹就怎麼幹。因爲他講了，不應該用一種思想作爲一種行爲的準則。這是他所承認了的，他只強調權力，卻不承擔法律所規定的義務。中華人民共和國的公民都在承擔着國家的義務，那麼你魏京生有什麼特殊的權力，能夠置於這個法律之外呢？實際上搞特權的、搞獨裁的是你魏京生，人民依法享有完全的權力而且承擔一切義務，但對階級敵人，卻在一定時期就要剝奪他的權力。在我們國家裏，公民的權力和義務是相互依存的，不可分割的，沒有不盡義務的權力，也沒有不享受權力的義務。人民爲國家，國家爲人民，人民和國家的利益是一致的。沒有國家的利益，個人利益也就無從談起。試想，如果給你魏京生這個反革命份子以推翻無產階級政權的權力，給你推翻我們社會主義制度的權力，給你隨便曠工不生產的權力，那麼我們國家將不成國家了。我們就要變了。天啊，你當權了，廣大人民還談得上什麼權嗎？那麼你那個人自由，就是說，像上午公訴詞裏所講的，無非就是說，上工的時候，我可以不上工。這本來在憲法裏頭就有規定，應該遵守紀律，遵守憲法。你爲什麼不遵守憲法，不遵守紀律，不遵守刑法呢？要像你這樣的自由，四個現代化不是成了一句空話嗎？整天不上班不生產，那麼四化能夠來嗎？要有你的權力奪取我們權力的權力，那你操持了國政大權，哪還有我們億萬人民的什麼權力可談嗎？在階級社會裏，法和國家一樣，法本身就是指現在統治階級制度的體現，法是由國家制定和認可的，受國家強制力保證執行的刑律。

（編者按：魏京生提出上訴後，北京市高級人民法院於十一月六日上午進行審判。法庭聽了魏京生的上訴理由，聽了公訴人的支持公訴意見和辯護人的辯護意見，法庭駁斥了魏京生的理由，經過合議，宣佈終審裁定，駁回上訴，維持原判，不得上訴。）

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