

# Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China

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## INTRODUCTION

Scholars often struggle to understand why the People's Republic of China (PRC) has not developed the kind of democratic rights and institutions prevalent in the West. One traditional explanation is that Western conceptions of democratic rights and Chinese socialist values are separated by an unbridgeable gap. It is thought that the Chinese people, steeped in Confucian values for centuries and now recently immersed in socialism, simply have no desire to pursue the ideals advanced in Western rights discourses. Hua Sheng's foregoing retrospective, *Big Character Posters in the PRC: A Historical Survey* (*Historical Survey*), poses a potent challenge to this view.<sup>1</sup> *Historical Survey* does not portray a complacent people quietly accepting the dictates of what Confucius would call a "virtuous ruler," but a people struggling relentlessly for freedom of thought, belief, and speech against a repressive government.

Reflecting on this history, the present essay explores how a right to freedom of speech in general, and a right to write big character posters (*dazibao*) in particular, can be realized in the PRC. Drawing on the insights generated by contemporary legal theories, it advances a rights theory to provide a theoretical basis for the development of rights and democratic institutions in the PRC. This essay begins with a critical examination of the theoretical explanations for the source of democratic rights and institutions traditionally provided by the "natural rights theory." It argues that the natural rights theory constructs a sharp yet fictive distinction between "liberal individualism" and "socialist collectivism." Consequently, the natural rights theory is

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1. See Hua Sheng, *The Big Character Posters in the PRC - A Historical Survey*, 4 J. CHINESE L. 233 (1990).

unable to explain why rights and freedoms exist in the West, but are generally absent in the PRC.

In place of the natural rights theory, this essay advances a "pragmatic" rights theory that re-defines "rights" as freedoms which the state provides to its citizens by way of political practices that are sensitive to the interests of all segments of the society, and justifiable in accordance with the standard of rationality generally accepted in the society. Contrary to common perceptions, it is not the PRC's collectivist culture which precludes the development of sensitive and rational government practices, but its lack of a comprehensive collectivism in which both the people *and* the governing elites forsake their personal interests to advance the goals they in fact share. A comprehensive collectivism can develop only when both the people and the governing elites participate in, and internalize, a "common democratic consciousness" generated by an unfettered marketplace of ideas. Only when government practices are informed and constrained by a common democratic consciousness, do citizens enjoy rights, not just in theory, but in practice. The second part of this essay examines the important role that *dazibao* play as a medium of expression in the PRC. It argues that the PRC's present political and economic conditions make *dazibao* an ideal means for creating an open marketplace of ideas and developing a common democratic consciousness.

## I. THE SOURCE OF RIGHTS AND DEMOCRACY

Since 1975, the PRC Constitution has recognized "Four Great Democracies:" "to speak out fully, air views freely, hold great debates, and write big character posters."<sup>2</sup> Even though this provision was repealed in 1980, the PRC Constitution nevertheless continues to provide for the "freedom of speech."<sup>3</sup> However, despite the apparent similarity between this provision and those found in Western constitutions, the Chinese people have, in practice, enjoyed little freedom to express political dissent.<sup>4</sup> Scholars have offered a number of explanations to account for why the provision for such rights in the PRC does not generate the kind of freedoms it does in the West. However, as shall be examined below, these explanations often assume the validity and indispensability of a Western "natural rights theory." As such, they suggest that the PRC's socialist and collectiv-

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2. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter PRC CONST.], art. 13 (1975). See generally Hua Sheng, *supra* note 1.

3. Article 35 of the 1982 Constitution states:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

4. See Hua Sheng, *supra* note 1.

ist political culture, and its instrumental approach to law, preclude its citizens from enjoying rights similar to those found in a Western liberal democracy. This essay argues that a natural rights theory obscures the intellectual inquiry into how democratic rights can be realized in the PRC. A "pragmatic" conception of rights, on the other hand, explains the PRC's poor rights practices and provides a basis for the PRC government to expand individual rights while maintaining its collectivist ideology.

### A. *The Natural Rights Theory*

Traditional legal and political theories often assumed that at the foundation of Western democratic institutions and practices is the idea that each person is naturally endowed with certain fundamental rights by virtue of "humanhood."<sup>5</sup> This assumption has been highly influential in Western constitutional thought. Solemn guarantees of rights are often enshrined in Western constitutions, and elaborate judicial institutions are established to implement such provisions.<sup>6</sup> Such guarantees on rights, however, would make little sense unless the judiciary has some way to objectively determine their substance and scope. A jurisprudential theory known as "legal formalism" has traditionally supplied the explanation for how the meaning of rights guarantees can be objectively determined.

#### 1. Legal Formalism and the Rule of Law

Legal formalism asserts that statutes and precedents embody pre-existing legal principles which only await discovery by a rational adjudicator.<sup>7</sup> Thus the substance and scope of constitutionally guaranteed rights are discoverable simply by applying neutral, apolitical legal reasoning. Formalists think that rational, sincere judges will always be constrained by the pre-determined meanings embodied in constitutional rights provisions and would, therefore, argue that the government cannot, for instance, make a law forbidding anti-government speech because such a law would conflict with the pre-determined essence of the constitutional guarantee on "freedom of speech."<sup>8</sup>

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5. For a study of the development of liberal rights theory, see I. SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* (1986). See also EDWARDS, HENKIN & NATHAN, *HUMAN RIGHTS IN CHINA* 14-17, 43-47, 120-23 (1986) [hereinafter *HUMAN RIGHTS*].

6. *HUMAN RIGHTS*, supra note 5, at 13-20, 120-124.

7. For a general explication of legal formalism, see Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988). For discussions and critiques of formalistic approaches to law, see Lin, *Wittgenstein, Language, and Legal Theorizing: Toward a Non-Reductive Account of Law*, 47 *U. TORONTO FAC. L. REV.* 939 (1989); R. DWORKIN, *LAW'S EMPIRE* 1-44 (1986); H. HART, *THE CONCEPT OF LAW* 124-25 (1961).

8. For discussions and critiques of the formalist theory of adjudication, see Singer, *The*

This formalist theory of adjudication is the basis of the "Rule of Law" as it is traditionally understood. Under the rubric of the Rule of Law, the electorate, through its voting power, constrains law-makers to legislate according to its will. A neutral, apolitical judiciary implements the democratically constituted imperatives embodied in legislation.<sup>9</sup> The judiciary, through its power of judicial review, ensures that the majority will expressed in legislation does not infringe on each individual's naturally endowed rights, and prevents the state from abusing its legislative power.<sup>10</sup> As such, law imposes a constraint originating from the will of the people on both the government and the people themselves. The people's indirect self-determination thus effected constitutes the very idea of a liberal democracy.

## 2. Explaining the Lack of Rights in the PRC

In trying to explain the PRC's poor rights practices, scholars have offered comparative analyses of Western conceptions of rights and those in the PRC. These can be summarized as follows.<sup>11</sup>

First, a Western liberal democracy sees each person as naturally endowed with certain fundamental, inviolable rights by virtue of humanhood, and such rights are guaranteed by a constitution which cannot be easily amended by the state.<sup>12</sup> The PRC, on the other hand, sees rights as a kind of privilege created by state policies.<sup>13</sup> The PRC Constitution functions only as a statement of prevailing government policies, and can be easily amended to abrogate existing rights

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*Player and the Cards: Nihilism and Yale Theory*, 96 YALE L.J. 1 (1984); Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). See also R. DWORKIN, *supra* note 7, at 1-113; Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 1 (1985); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); H. HART, *supra* note 7, at 121-50.

9. See I. SHAPIRO, *supra* note 5, at 1-140; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-130 (1977). See also Book Review, *Law's Empire*, 46 U. TORONTO FAC. L. REV. 322 (1988).

10. For discussions and critiques on liberal theories of judicial review, see Unger, *supra* note 8; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); McKay, *Judicial Review in a Liberal Democracy*, in *LIBERAL DEMOCRACY* 1983 (J. Pennock & J. Chapman eds. 1983); Railton, *Judicial Review, Elites, and Liberal Democracy*, in *LIBERAL DEMOCRACY* 1983 (J. Pennock & J. Chapman eds. 1983); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

11. For studies comparing Western and Chinese rights theories, see HUMAN RIGHTS, *supra* note 5; Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492 (1986); A. NATHAN, *CHINESE DEMOCRACY* (1985); Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 244 (1981).

12. See HUMAN RIGHTS, *supra* note 5, at 44.

13. *Id.* at 45; Eliasoph, *supra* note 11, at 292.

or add new rights according to the dictates of the state.<sup>14</sup>

Second, a Western liberal democracy is governed by the Rule of Law. A neutral, apolitical judiciary safeguards individual rights through its power to review and invalidate state action.<sup>15</sup> The PRC, on the other hand, adopts a "legal pragmatism" which views law only as an instrument of class oppression and the servant of social policies.<sup>16</sup> Rights are only instruments for realizing state objectives, and as such, must be subordinate to such objectives. There is no independent judiciary in the PRC to review the constitutionality of a law, or to restrain state intrusion on individual rights.<sup>17</sup>

Third, the West regards the conflict of interests between the individual and the state as fundamental.<sup>18</sup> Constitutionally guaranteed rights limit the legislative and executive power of the state and create a sphere of private autonomy for the citizen into which the state cannot intrude.<sup>19</sup> In the PRC, the state is presumed to represent the true interest of the citizens.<sup>20</sup> Instead of exempting citizens from compliance with the law, "rights" in the PRC are understood as "residual freedoms" which citizens have within the limits of the law.<sup>21</sup> The PRC Constitution, for example, imposes on citizens the duty to uphold both the Constitution and the law.<sup>22</sup>

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14. See HUMAN RIGHTS, *supra* note 5, at 121. Professor Cohen, for example, has pointed out that a People's Republic of China constitution is not what the western liberal tradition would call a constitution. Like its counterparts in other communist states—and some authoritarian non-communist states as well—it is a formalization of existing power configurations rather than an authentic institutional framework for adjusting relations between the political forces that compete for power. Cohen, *China's Changing Constitution*, 76 CHINA Q. 794, 836-37 (1978).

15. See HUMAN RIGHTS, *supra* note 5, at 28.

16. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 37-42, 49 (1989).

17. See HUMAN RIGHTS, *supra* note 5, at 27. Only the National People's Congress (NPC), which is both the supreme legislative and executive organ of the state, has the power to review the constitutionality of legislation. And even though the Administrative Litigation Law was enacted in 1989 in the PRC, this law only ensures administrative compliance with the law, and does not provide for the invalidation of legislation by an independent judiciary. See Epstein, *Administrative Litigation Law: Citizens Can Sue the State but Not the Party*, 1386 CHINA NEWS ANALYSIS 1 (1989); Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989).

18. See HUMAN RIGHTS, *supra* note 5, at 126-64.

19. See McKay, *supra* note 10. See also Lin, *supra* note 7; I. SHAPIRO, *supra* note 5; P. HIRST, LAW, SOCIALISM AND DEMOCRACY (1986).

20. Eliasoph, *supra* note 11, at 289-91.

21. Fiss, *supra* note 11, at 493-94.

22. Article 53 of the 1982 PRC Constitution states:

Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property and observe labor discipline and public order, and respect social ethics.

See also *id.* at 494.

Fourth, the West regards the protection of each individual's interest as paramount. Rights create a sphere of autonomy for *each* individual in which to pursue purely selfish interests that are independent of collective objectives.<sup>23</sup> Within her sphere of autonomy, a citizen has no duty to support state interests. The PRC, on the other hand, regards the realization of collective objectives as paramount. Individuals are required to be selfless, and must sacrifice their individual preferences for the sake of the collective good.<sup>24</sup>

Fifth, while every person has rights in the West, the PRC adopts the principle of "proletarian dictatorship," whereby "the people" exercise dictatorship over the "reactionaries" (also called the "enemies" or "counter-revolutionaries").<sup>25</sup> In practice, this means that rights can be enjoyed only by those who abide by the law and support the leadership of the Communist Party (the "people"), and not by those who oppose the government (the "reactionaries").<sup>26</sup>

These analyses point to factors which might well have contributed to China's poor rights practices. Nevertheless, they suffer from one important theoretical defect. Implicitly and explicitly, they assume that it is the natural, individualistic, and apolitical character of rights which give rise to the existence of democracy in the West. This supposed causal relationship between rights theory and rights practice, and between collectivism and the absence of rights, is, in turn, predicated on the validity of the natural rights theory. How-

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23. See *id.* at 497-99.

24. See HUMAN RIGHTS, *supra* note 5, at 144-47.

25. See Eliasoph, *supra* note 11, at 302-03; Hua Sheng, *supra* note 1. Mao explained his idea of "democratic dictatorship" as follows:

"You are dictatorial." My dear sirs, you are right, that is just what we are. All the experience of the Chinese people accumulated through several decades teaches us to enforce the people's democratic dictatorship, that is, to deprive the reactionaries of the right to speak and let the people alone have that right. What are the people? . . . [T]hey are the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie . . . they enforce their dictatorship over the running dogs of imperialism—the landlord class and bureaucrat-bourgeoisie, as well as the representatives of those classes, the Kuomintang reactionaries and their accomplices . . . If [the reactionaries] speak or act in an unruly way, they will be promptly stopped and punished. Democracy is practiced within the ranks of the people, who enjoy the rights of freedom of speech, assembly, association, and so on. The right to vote belongs only to the people. The combination of these two aspects, democracy of the people, and dictatorship over the reactionaries, is the people's democratic dictatorship. Why must things be done this way? The reason is quite clear to everybody. If things were not done this way, the revolution would fail, the people would suffer, the country would be conquered.

4 SELECTED WORKS OF MAO TSE-TUNG 418 (People's Pub. House 1956) [hereinafter MAO'S WORKS].

26. See HUMAN RIGHTS, *supra* note 5, at 59 n.30; Eliasoph, *supra* note 11, at 306-11; Gelatt, *The Bounds of Free Expression*, Asian Wall St. J., Dec. 18, 1979 at —.

ever, the sharp contrast between liberal individualism and socialist collectivism suggested by the natural rights theory and the formalist conception of the Rule of Law is viewed, largely, as fictive in contemporary Western legal theories. As such, the natural rights theory can adequately account for neither the existence of rights in the West nor the absence of rights in China.

### 3. A Critique of Legal Formalism and the Natural Rights Theory

Legal formalism assumes that the natural, pre-determined meaning of guaranteed rights can be discovered by the application of neutral, apolitical judicial reasoning. But few, if any, contemporary legal scholars are satisfied with this idealized view of adjudication.<sup>27</sup> For instance, a judge may, based on her understanding of the true "essence" of the constitutional guarantee on free speech, hold as constitutional a law which forbids anti-government political expression. In this case, however, legal formalism provides no effective procedure for distinguishing between an incorrect legal decision framed in the rhetoric of truth and a decision which is "really correct" in the formalist sense.<sup>28</sup> Formalism does provide a vocabulary whereby judges can assert that their legal interpretations are consistent with the natural, pre-determined meanings of rights. It does not, however, ensure that such interpretations will be acceptable to other members of society.

#### B. A Pragmatic Rights Theory

Influenced by developments in the philosophy of language in this century, contemporary Western legal theorists have widely rejected the formalist legal theory which underlies the natural conception of rights.<sup>29</sup> Instead, they have adopted what can be called an "anti-formalist" theory of knowledge<sup>30</sup> and adjudication. As shall be seen

27. See R. DWORKIN, *supra* note 7, at 1-113; H. HART, *supra* note 7, at 121-50; Tushnet, *supra* note 10; Unger, *supra* note 8; McKay, *supra* note 10; Levinson, *supra* note 8; Grey, *supra* note 8; Brest, *supra* note 8; Cohen, *supra* note 8, Boyle, *supra* note 8.

28. See Levinson, *supra* note 8; Peller, *The Metaphysics of American Law*, 100 CAL. L. REV. 1151 (1985); Unger, *supra* note 8, at 563-86; Singer, *supra* note 8.

29. See generally Book Review, *supra* note 9; R. DWORKIN, *supra* note 7, at 1-113; H. HART *supra* note 7, at 121-50. See also *supra* note 8.

30. "Anti-formalist theory of knowledge" is used here to refer to the view that "knowledge" is a socially constructed artifact of human practices. This view of knowledge can be seen in the work of major contemporary legal scholars such as H.L.A. Hart, Ronald Dworkin, and Owen Fiss. In contrast, the formalist theory of knowledge sees "knowledge" as a metaphysical entity discoverable by reason. For discussions on and critique of the formalist and anti-formalist theories of knowledge, see Weinrib, *supra* note 7; R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); See also R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Lin, *supra* note 7.

below, anti-formalism provides the basis for a “pragmatic” conception of rights.

### 1. Anti-Formalism

The anti-formalist theory of knowledge sees legal concepts and principles as humanly constituted artifacts of social and legal practices.<sup>31</sup> From this perspective, “rights” are not metaphysical entities intrinsic to the fabric of the universe whose natural essence can be discovered by way of neutral legal reasoning. Instead, they are legal constructs whose meanings are humanly constituted.<sup>32</sup> Consequently, judicial interpretation does not involve a value-neutral, passive process in which the pre-determined content of legislative imperatives or guaranteed rights are “discovered.”<sup>33</sup> Instead, the substance, scope, and application of all legal provisions must be constituted in a creative process by a human adjudicator who adopts certain ideological values and presuppositions.<sup>34</sup> Such values and presuppositions determine how the adjudicator constitutes the meaning and scope of legal rights.

### 2. A Pragmatic Definition of Rights

Assuming that the adjudicator has no access to immutable truths about “the nature of things,” the source of the adjudicator’s values must be either the adjudicator herself or some other human agent. In a democracy that eschews elitism, a judge cannot apply purely subjective or sectarian values.<sup>35</sup> Instead, the values she adopts must be sensitive to the interests of all segments of the community in which she resides, and justifiable in terms of the standard of rationality generally accepted in that community.<sup>36</sup> It follows that conceptions of collective values are inevitably embedded and implicit in every judicially-

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31. See Boyle, *supra* note 8. For studies on the social construction of knowledge, see A. SHERIDAN & M. FOUCAULT: *THE WILL TO TRUTH* (1980); M. FOUCAULT, *DISCIPLINE AND PUNISHMENT* (1977); M. FOUCAULT, *MADNESS AND CIVILIZATION* (1967). See also Coombe, *Room for Maneuver: Toward a Theory of Practice in Critical Legal Studies*, 14 L. & SOC. INQUIRY 69 (1989).

32. See *supra* note 8.

33. See *supra* note 7, 8.

34. See *supra* note 28; Singer, *supra* note 8.

35. See Tushnet, *supra* note 8; Singer, *supra* note 8; Levinson, *supra* note 8; R. DWORKIN, *supra* note 9; R. DWORKIN *supra* note 7.

36. “Standard of Rationality” here means the standard with reference to which the rationality of an action is judged. Certain widely adopted standards of rationality for political action include due process, consistency, non-arbitrariness, reasonableness, etc. As Dworkin points out, in a democracy, judges must apply principles of justice to which the community as a whole can be committed. A judge cannot adopt a standard of rationality that is divorced from her community. See R. DWORKIN, *supra* note 7, at 151-275.



defined right.<sup>37</sup>

Thus anti-formalism suggests we should abandon the notion that rights are metaphysical entities naturally constituted with purely individualistic connotations. Instead, rights should be defined as a freedom which the state provides to its citizens by way of political practices that are sensitive to the values, interests, and aspirations of all segments of the society, and justifiable in accordance with the standard of rationality generally accepted in the society. Conceptions of what constitute "sensitive" and "rational" government practices must be supplied and informed by the people themselves, and dictated by the governing elites. This pragmatic conception of rights, therefore, points directly to the paramount necessity of providing the people with the freedom to frankly express their values, interests, and aspirations, so that they can inform notions of acceptable government practices.

The pragmatic rights theory just proposed differs in important ways from the natural rights theory. The latter assumes that individuals are naturally endowed with certain rights, and uses this assumption to require the government to act with sensitivity and respect towards its citizens. The problem with this approach is that a government can simply reject the philosophical assumption that such naturally endowed rights exist, and assert, as does the Chinese government, that such notions are only "bourgeois inventions" designed to deceive the people.<sup>38</sup> When the assumption that "natural rights" exist is rejected, there is no longer a basis for arguing against oppressive governmental practices.

In contrast, the pragmatic rights theory abandons entirely the philosophical debate on whether people "really" have naturally

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37. Tushnet, for example, points out that the legitimacy of judicial review presupposes a form of communitarianism at odds with the individualism which liberal democratic theories traditionally advance. Thus to subscribe to the Rule of Law is not to accept a liberal individualism, but rather a form of communitarian collectivism. See, Tushnet, *supra* note 10. In Dworkin's idea of "law as integrity," it is also necessary to posit that "the community as a whole can be committed to principles of fairness or justice or procedural due process." See R. DWORKIN, *supra* note 7, at 167.

38. The Commentator of the Guangming Ribao, for example, asserts:

The theory of "natural rights of man" was a powerful ideological weapon of the rising bourgeoisie in its revolution against feudalism. Human Rights became their main slogan and the basic content of the bourgeois political programme . . . [It] is also a slogan with which imperialism and the bourgeoisie attack our proletarian dictatorship and socialist system . . . We can still remember that in the old China there was a sign bearing the words "No admittance for dogs and Chinese" hung at the gate of a park in Shanghai . . . How can imperialists have the effrontery to prate about the so-called human rights question in China?

*Notes on the Human Rights Question*, BEIJING REV., Nov. 9, 1979, at 17-19.

endowed rights. Instead, it realistically recognizes that, within a collective social order, the state has dominant control over civil freedom, and thereby focuses on the real issue at hand: how the state, being entrusted with such awesome power, should behave toward its citizens. The pragmatic rights theory insists that the provision for and limitation of civil freedoms cannot be dictated solely by the values and interests of the governing elites or any particular segment of the society. Rather, the state should be sensitive to the interests of all segments of the society and act consistently with the standard of rationality generally adopted in the society. Of course, a government might simply reply that it is determined to be autocratic and abusive toward its people, and that it has no desire to further their interests. In this case, however, the real nature of this government is exposed, and it may no longer act under the pretense of democracy. Such a government is no longer able to disguise the real issue at hand, to wit, its very legitimacy, as an abstract philosophical issue about the "real" nature of rights. By diverting citizens' attention away from the abstract academic debates on rights theories, the pragmatic conception of rights can help the people of the PRC focus on the social and political transformation required to realize rights.

### 3. Rights and Collectivism

Liberalism defines an ideal society as one in which each individual is guaranteed an inviolable sphere of freedom in which to pursue her independent self-interests. It assumes that this sphere of freedom can be guaranteed by a neutral, independent judiciary through the protection of constitutional rights. However, if anti-formalism is correct, there are no metaphysical, pre-existing rules that judges can draw from to determine the substance and scope of individual freedom. Judges can at best operate on values that are derived from the community in which they reside. Judicially-defined individual rights must, therefore, inevitably be constituted by, and must embody, some conception of collective values. Every individual right connotes a commitment to values that are collective and beyond oneself. The very idea of a "right" is, in effect, a conceptual mechanism instrumental to the realization of such values.

Far from implying that the freedoms enjoyed by Western citizens are only illusory, the pragmatic rights theory suggests that the existence of such freedoms cannot be explained simply by the natural, individualistic character that rights are thought to have. Instead, rights are not only compatible with, but are essentially a product of, a collective social order oriented toward the development of common

social values and objectives.<sup>39</sup> Indeed, the very concept of judicially protected rights presupposes a cohesive, collective social order in which individuals pursue collective goals which might conflict with their self-interests. The political elites, for example, must permit the establishment of an independent legal institution, willingly submit to its power of review, and abstain from interfering with its independence, even though this may conflict with their self-interest. Similarly, judges must arrive at decisions independent of their self-interest, such as not allowing bribes to influence their decisions, even if they could do so with impunity. Thus rights cannot be purely individualistic and apolitical, whether in a liberal democracy under the rubric of the Rule of Law or in the still authoritarian PRC.

The pragmatic conception of rights could have important ramifications for the development of democracy and rights in the PRC. Not only does it suggest that the realization of rights and democracy in the PRC is not contingent on the acceptance of a natural conception of rights, but also that the collective nature of Chinese society is not an impediment to the development of democracy.

#### 4. Democracy and Political Consciousness

The pragmatic rights theory requires the government to provide its citizens with freedoms that are generated by sensitive and rational governmental practices. The development of such practices, however, is always threatened by the fact that the governing elites have both the power and incentive to advance their own interests at the expense of those of the citizens. How can the elites be restrained from abusing their powers? One way of constraining the action of the elites involves the limitation of their power by way of institutional structures. For example, the electoral system could constrain those who wish to stay in office from acting insensitively towards the people, and the institution of judicial review could prevent legislative and executive abuses. However, while these "external constraints" can help reduce the probability of authoritarianism, they alone are insufficient to preclude corrupt and oppressive government practices. Whatever institutional structure exists, judicial and administrative officers can always "get around the rules" by collusion,<sup>40</sup> and engage in abuses and over-reaching with impunity. Citizens have little means of elimi-

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39. Even in the United States, where individual rights are supposedly "inviolable," "fundamental rights" can be overridden by a "compelling or overriding" state interest. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 739-796, 1553-1618.

40. The Chinese idiom "one official will always collaborate with (or protect) another" describes the sense of helplessness the citizens often have in dealing with state bureaucracy. No institutional "checks and balances" will preclude abusive state practices if government

nating such abuses. Thus for the people to be protected from the governing elites' illegitimate exercises of power, and for any democratic system to function with integrity, there must be a widespread, entrenched, and "self-sacrificial" commitment by the elites to act consistently with the values and standard of rationality generally accepted by the people. Such a commitment involves a "self-sacrifice" because the governing elites have to forgo the advantage they could otherwise gain by abusing their powers, in exchange for a system from which all will benefit. This commitment, which imposes an "internal constraint"<sup>41</sup> on the action of the elites, cannot be produced by institutional structure alone. It has to originate from a "democratic consciousness" which both the governing elites and the people share. It would be impossible to maintain the integrity of the democratic system unless this widespread unselfish mode of political action existed.

What is a "common democratic consciousness"? In the West, the existence of an open "marketplace of ideas" enables citizens and governing elites to inform each other with a wide spectrum of political values and visions.<sup>42</sup> This ideological openness gives rise to a pervasive intellectual fabric in which diverse political views can freely compete and be synthesized into broadly shared values. This makes it possible for all segments of the society, including the governing elites, to participate in, and internalize a "common democratic consciousness" which synthesizes diverse political ideas generally subscribed to in the society. This shared consciousness in turn supplies constraints which "internally" limit the values and the standard of rationality generally held by members of the society. Only when the governing elites participate in and internalize a political consciousness that is shared by the people can they align their values and standard of

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officials do not commit themselves to acting in the interests of the people. The governing elites in some countries have, for example, preempted the electoral process by declaring martial law.

41. This idea of "internal constraints" can be found in both Eastern and Western thought. Confucianist scholars, for instance, argue that the enactment of legal rules cannot ensure that people will comply with such rules or act kindly towards others. Instead, such rules would simply encourage people to act strategically to get around them. Confucianism asserts that a harmonious social order can be obtained only when the people are inculcated with an internal moral inclination to act morally and with kindness, and not to simply seek to maximize their self interest. See D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 17-48 (1967). In the West, Wittgenstein's concept of "rule-following" and H.L.A. Hart's idea of the "internal aspect" of rules, also point to a similar idea. Hart, for example, asserts that the very existence of legal rules presupposes a form of life in which people adopt certain rules as definitive of the way they act. This "internal aspect" of rules is similar to the rules of a game. People do not follow such rules just to avoid punishments; instead, they do so because they have simply decided to adopt such rules as their *modus operandi*. See H. HART, *supra* note 7; and Lin, *supra* note 7.

42. See L. TRIBE, *supra* note 39, at 785-89.

rationality with those generally held by the people, and act in ways which accord with the will of the people.<sup>43</sup> No community, for instance, is likely to support judicial review if the judiciary consistently generates decisions that destroy rather than foster the fundamental values and standards of rationality accepted by the community. It is because of the internal constraints which a common democratic consciousness places on interpretive freedom that judges in a liberal democracy are generally able to produce decisions that are acceptable to their people. This is true in spite of the inevitably subjective and political nature of adjudication, the often elitist and static composition of the courts, and the overriding paramouncy<sup>44</sup> of state interests in adjudication.

In the PRC, on the other hand, the people cannot express ideas differing from those held by the political elites without the fear of severe sanction. This authoritarian approach to speech makes it impossible for a free marketplace of ideas to develop, and precludes the development of a common democratic consciousness. Therefore, the internal constraints which only a common democratic consciousness can supply cannot be generated. The result is a large schism of interests and values between the political elites and the people. This schism is reflected in the elites ready use of oppressive force against the people, in their widespread use of official power to advance their self interest at the expense of the governed, and in their violation of rules under which everyone is supposedly governed.<sup>45</sup> While Mao favored "democracy for the people, dictatorship for the counter-revolutionaries,"<sup>46</sup> this schism gives rise to a "collectivism for the people, individualism for the elites." An authoritarian approach to speech thus creates a vicious cycle which breeds more authoritarianism. This impedes the development of a comprehensive collectivism in which *both* the elites and the people act cohesively to bring about the kind of

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43. See *Fish, Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). See also, Yalbon, *Law and Metaphysics* 96 YALE L.J. 613 (1987).

44. See *supra* note 39.

45. Li Maoguan, *Why "Laws Go Unenforced"*, BEIJING REV. Sept. 11-17, 1989, at 17. As Li points out:

In China today not many people say outright that power is bigger than law. But actually nowhere in the country has a mechanism yet been established capable of restricting power abuse in the true sense of the word . . . Some power wielders, who think themselves superior, always take it for granted that laws are something designed for other people, the rank-and-filers, while they themselves stand high above the law, far out of its reach . . . Party committees invalidate the election results of the people's congress, deliberately dismiss leaders from the government without proper procedures.

46. See MAO'S WORKS, *supra* note 25.

government practices that the people desire; hence, the absence in the PRC of meaningful rights.

An unfettered marketplace of ideas, and the consequent development of a common democratic consciousness, is more fundamental to the realization of rights and democracy in the PRC than the implementation or reform of any legal or social structures. Unless the governing elites' political consciousness can be aligned with that of the people, the existing schism of values will persist, and traditional authoritarianism will simply be reproduced in any new institutional structures implemented.<sup>47</sup> Dazibao can play a pivotal role in creating this essential common political consciousness in the PRC.

## II. TOWARDS A RIGHT TO FREE SPEECH IN THE PRC

Rights cannot genuinely exist in the PRC unless both the governing elites and the people participate in and internalize a common democratic consciousness. The existence of such a consciousness depends on the availability of an unfettered marketplace of ideas in which diverse political views can be freely expressed. Obviously, in countries where ideas can be freely published, political publications provide an important and effective means of creating a free marketplace of ideas. In the PRC, however, the government's strict control of all formal media makes it difficult for the press and other similar media to generate such a marketplace of ideas. Hua Sheng's *Historical Survey* shows that the people of the PRC have resorted to an alternative means of political expression: dazibao.<sup>48</sup>

### A. *Dazibao as a Vehicle for Free Speech*

Dazibao are a uniquely important means of expression in the PRC. Unlike the printing press, dazibao are a medium for publicizing ideas to which virtually all people in the PRC have access, regardless of their economic and educational background. Ideas which if submitted to the press would be censored can nevertheless be privately publicized by means of dazibao. Dazibao also offer a greater degree of anonymity than other means of political expression. Since both the people and the governing elites have traditionally regarded dazibao as a key forum in which diverse political views can be expressed and assimilated, ideas expressed through dazibao can inform not only the

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47. Even though institutional reforms per se are insufficient, structural transformations can serve as a catalyst to bring about changes in the political consciousness of the elites. The relationship between a democratic political consciousness and institutional transformation is not diametric but mutually constitutive.

48. See Hua Sheng, *supra* note 1.

political consciousness of the people, but also that of the governing elites.

The PRC government has, however, imposed tight limits on the use of dazibao and provided for severe penalties to punish the expression of "counter-revolutionary" ideas with dazibao.<sup>49</sup> These measures impede the free expression of political ideas and thus seriously hamper the development of a common political consciousness in the PRC. Regulations on speech in general, and on dazibao in particular, must be transformed if the PRC government is to provide the type of "right" to free speech that is essential to bring about a common political consciousness.

### *B. The Pragmatic Rights Theory and Free Speech in the PRC*

Traditional approaches to free speech argue that freedom of speech should be regarded as an "inviolable right," and that the government must refrain from regulating speech in ways which infringe on this right. While this approach expresses the need for freedom of speech in China, the mere assertion that one has a "right" to free speech is insufficient. The natural rights theory provides no effective procedure for defining the substance and scope of this right. Nor does it identify the proper balance between the need for free speech and the need for limiting speech to further legitimate social objectives. In restricting the right to use dazibao, for example, the PRC government has argued that it is only imposing reasonable limits on the right to free speech similar to those found in the West. The natural rights theory, however, can at best facilitate, but not resolve, competing assertions about the correctness of these limits in light of the "true nature" of the rights to free speech.

In contrast, a pragmatic conception of rights focuses on what governmental practices relating to speech are sensitive to the interests of all segments of the society and justifiable in terms of the standard of rationality generally accepted in the society. This inquiry raises two issues. First, what are "the interests of all segments of the society" in the PRC, and who should decide what those interests are? Second, what limits to speech are rational and justifiable? As shall be seen below, the PRC government and the pragmatic rights theory provide two markedly different sets of answers to these questions.

#### **1. Theory and Practice of Rights in the PRC**

Traditional government practices in the PRC in effect answer the

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49. *Id.*

foregoing questions as follows. Only the governing elites have the authority and competence to decide for the people what is in their true interest. Thus speech can be allowed only insofar as it promotes the leadership of the elites and enables them to realize what they consider to be the true interests of the people.<sup>50</sup> As Deng Xiaoping explains:

Our Party has made serious mistakes, but these were always corrected by the Party itself, not by any other force . . . No one is allowed to resist the leadership of the Central Committee by using the Central Committee's mistakes as a pretext.

Thus all limits on speech which further the elites' objectives are justifiable, and any speech which undermines the elites' leadership must be censured. Media such as *dazibao*, which allow the people to criticize the elites, must be strictly regulated.<sup>51</sup> This philosophy of governance coincides with what Professor Fiss describes as the "top-down" approach to democracy:

[The top down approach to democracy] vests power in elites, who in turn are to exercise power to further the ("true") interests of the people. It is government *for* the people. The elite are to lead the people toward the realization of their true interests; in this scheme, free speech plays only a minor role, at most allowing the people to make suggestions and recommendations to the governing elite.<sup>52</sup>

Under this philosophy, the elites not only determine what the true interests of the people are, but are also the final judge of the correctness of their own determinations. Thus the elites can always act in the name of furthering the interests of the people, even when they are only acting to further their selfish interests. Such an approach to governance conflicts with the very *raison d'être* of a "People's Republic of China" in which "the Chinese people took state power into their own hands and became masters of the country."<sup>53</sup> It facilitates the entrenchment of an elite leadership even if this leadership acts against the people's interests.

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50. A. NATHAN, *supra* note 11. See also Eliasoph, *supra* note 11, at 309; Gelatt, *supra* note 26.

51. Article 102 of the Criminal Law of the PRC, for example, provides severe sanctions for "counter-revolutionary" speech, while the Four Cardinal Principles, *infra* note 60 and accompanying text, among other things, makes it mandatory to uphold "the leadership of the Party, and Marxist-Leninism Mao Zedong Thought." See Hua Sheng, *supra* note 1.

52. Fiss, *supra* note 11, at 500.

53. PRC CONST., preamble (1982).



## 2. A Pragmatic Conception of the Free Speech Right

If the PRC government were to provide its citizens with a right to free speech, it would have to understand that the content of the "true interests of all segments of the people" can only be supplied and informed by the people themselves. Only the people can decide what government practices further their interests and what collective goals they should pursue. Being "sensitive to the interests of all segments of the society" means that conceptions of the substance and proper limits on the right to free speech must be supplied by the people themselves. Thus a government that is sensitive to the interests of the people would impose few restrictions on any speech or criticisms which address the governance of the nation and the functioning of political institutions. As Professor Fiss writes:

[There is a] conception of democracy, which works from the bottom up. It is government by the people, and extols the capacity of the people at the bottom of the pyramid—the masses—to govern themselves. The citizenry guides the state, and to do that, the citizens must be free to create their own agenda and they must have the information needed to make intelligent choices. There must, in short, be free debate over issues, for it is the essential pre-condition of true collective self-determination.<sup>54</sup>

If the PRC government were committed to providing a "right" to free speech in China, it would make a medium of expression like *dazibao*, which allows for the free and frank expression of diverse political visions by all segments of the society, open to the people, and ensure that citizens will not be sanctioned by the government or any powerful interests for political ideas therein expressed. Only then can the people express their visions of what social policies are desirable and transform the PRC in the direction they desire.

### C. *The Regulation of Speech in the PRC: Problems and Solutions*

The PRC government has argued that although it appreciates the value of free speech, there must be limits to free speech. The government points out that such limits are imposed even in the so-called Western democratic countries.<sup>55</sup> It is true that free speech often conflicts with other legitimate social goals, and the complete absence of

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54. Fiss, *supra* note 11, at 500-01.

55. See Hua Sheng, *supra* note 1.

regulation on speech could give rise to "social chaos."<sup>56</sup> Constitutional cases in the United States have established a set of limits on the right to free speech,<sup>57</sup> and the Canadian Constitution explicitly contemplates limits to the exercise of all rights.<sup>58</sup> However, the limits on speech found in these countries differ significantly from those imposed in the PRC.

First, the limits on speech imposed in the United States, for instance, are not directed at regulating the content of speech.<sup>59</sup> Limits are imposed to ensure that speech is made in the proper time, place, and manner, and not to suppress ideas with which the government disagrees. In contrast, the content of speech in the PRC is strictly controlled. During the trial of Wei Jingsheng, one of the PRC's famous political dissidents who, among other things, wrote a number of *dazibao* to criticize the government, the prosecution stated:

Freedom of speech of the individual citizen must be based on the four basic principles of insisting on the socialist road, the dictatorship of the proletariat, the leadership of the Party, and Marxism-Leninism Mao Zedong Thought. The citizen only has the freedom to support these principles and not the freedom to oppose them.<sup>60</sup>

The "four basic principles" just mentioned, often referred to as the Four Cardinal Principles, in effect require all political expressions to support the leadership of the dominant political elites and the ideology to which they subscribe.

Second, limits on speech in Western democratic countries like the United States are subject to judicial scrutiny. Among other things, they are required to be clearly and precisely defined, so as to provide a guide to conduct for citizens, and must be rationally related to, and narrowly tailored to serve, legitimate social objectives.<sup>61</sup> In the PRC, on the other hand, while there are limits to speech, there are no limits to the power of the government to limit speech, nor is the government required to submit its legislative power to any independent review.

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56. Fiss points out that to some Chinese people the American concept of free speech might seem so liberal as to be "an invitation to social chaos." Fiss, *supra* note 11, at 502.

57. See L. TRIBE, *supra* note 39, at 785-1061.

58. See *infra* note 61.

59. L. TRIBE, *supra* note 39, 794-96.

60. See N.Y. Times, Nov. 15, 1979 at A22, Col. 1.

61. See L. TRIBE, *supra* note 39. For the Canadian approach to limits on rights, see *Black v. Law Society of Alberta*, [1986] 27 D.L.R. (4th) 527, at 559; Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at 373-74; *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-39.

Thus the limits on speech imposed in the PRC differ significantly from those found in a liberal democracy. Limits such as those imposed by the Four Cardinal Principles and the offense of "counter-revolution" are often broadly interpreted to justify the sanctioning of any speech the government deems reprehensible.<sup>62</sup> As such, they do not provide a genuine guide to conduct, and are neither sensitive to the interests of the people nor consistent with the standard of rationality they adopt. Indeed, the use of these limits to punish citizens for criticizing the government simply precludes the people from expressing their interests and informing government practices.

If the Chinese government were to develop regulations on speech that are rational and sensitive to the interests of its people, it would re-constitute the way it limits the freedom of speech. It would ensure that all limits on free speech, such as restrictions on the use of *dazibao*, be clearly and precisely set out. It would not impose limits which oblige the people to subscribe to any particular political ideology, or which preclude the citizens from criticizing the government or any power holder. Instead, limits would be imposed only where they advance the interests of all the people and facilitate the free expression of diverse ideas. Only then would the people be able to inform the governance of the nation to further the collective objectives they consider desirable.

The mere existence of limits on speech such as those imposed by the Four Cardinal Principles need not be an insurmountable obstacle to establishing a right to free speech in the PRC. No laws can dictate their own interpretations and applications, and even "autocratic" rules can nevertheless be "democratically" construed and applied. Thus any limits on speech can be narrowly construed so as to be consistent with the interests of the people and the standard of rationality they adopt. To illustrate, one may argue that the very meaning of the Four Cardinal Principles must be informed by the people themselves. To do so, however, the people must be able to freely and frankly express their political ideas without the fear of sanction. Thus even if the Four Cardinal Principles continue to exist in the PRC, judicial and administrative officials sympathetic to democratic ideals need not feel bound to penalize expression of political dissent.<sup>63</sup>

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62. In Wei Jingsheng's case, for example, the Four Cardinal Principles were used as a basis for sanctioning criticisms against political leaders. See Eliasoph, *supra* note 11, at 306-311.

63. This point illustrates the decisive importance the "internal constraints" on political action which a democratic consciousness supplies. Oppressive legal rules would have little effect in producing abusive practices if government officers are determined to act "democratically."

## CONCLUSION

The traditional natural rights theory is inadequate for explaining the PRC's poor rights practices. To understand the transformation that must take place in the PRC for rights and democracy to exist, a pragmatic conception of rights which focuses on the establishment of a desirable collective social order is essential. The impediment to the realization of rights and democracy in the PRC is neither its collectivism nor its legal instrumentalism. Instead, it is the schism of values and interests between the governing elites and the people which precludes a comprehensive collectivism necessary for producing rights. To obliterate this schism, the governing elites in the PRC must "internalize," and have their practices informed by, a political consciousness that is shared by the people. For this consciousness to exist in the first place, there has to be a "free marketplace of ideas" in which all segments of the society can freely and frankly express their values, interests, and aspirations, and inform each other with their views, without fear of governmental oppression and sanctions. Therefore, legal and institutional reforms cannot obviate the need for the masses to appeal to the governing elites for political openness, and to strive for the freedom to express their frank political views. Only in an open society in which all citizens have freedom of speech can rights and democracy be realized both in theory *and* in practice. Thus, freedom of speech in general, and the freedom to write *dazibao* in particular, are crucial to the realization of rights and democracy in the PRC. Indeed, in freedom of speech lies the possibility of all other freedoms, and in these freedoms lie the possibility of a truly democratic nation.