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## AN EMPIRICIST'S VIEW OF THE CHINESE LEGAL SYSTEM

M.L. MARASINGHE\*†

In any given society there are certain elements which indicate the existence of a legal system. Of these, three elements appear universally true. First, there must be the modalities by which law is regularly established.<sup>1</sup> Second, there must be the modalities by which existing law could be repealed or amended.<sup>2</sup> Third, there must be recognized organs of state power which may be used within an established framework of laws to enforce the laws and punish their breaches.<sup>3</sup> The latter primarily distinguishes arbitrary acts by state organs from lawful and controlled acts.

Within these basic parameters there is a wide area for variation among modern societies. In the West, the legal institutions stand separate and are identifiably distinguished from other institutions; Montesquieu would describe this as "separation of powers."<sup>4</sup> In China, these three elements which determine and identify a legal system do exist as a fact. But the roles played by each of the three compartments of government concerned with the three aforementioned elements tend to become merged with each other, and with the surrounding socio-political structure. In a sense, therefore, they are not separate and are often indistinguishable. The result could be the politicization of the judicial organs of the state to the extent that the system of "dispute settlement" becomes arbitrary and corrupt.

The Chinese attempt to check this evil by submitting the law and its institutions to the control of the society, as politically con-

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1. These constitute the primary rules in Hart's analysis. See H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961).

2. *Id.*

3. *Id.* These would fall under the secondary rules of Hart's analysis.

4. BARON DE MONTESQUIEU (CHARLES LOUIS DE SECONDAT), *THE SPIRIT OF LAWS* (trans. T. Nugent).

ceived through popular participation.<sup>5</sup> Realizing the difficulty of achieving popular participation with a population of nearly 900 million, the Chinese Communist Party introduced to a very substantial extent a method of decentralization. This method of decentralization was essentially a question of expediency, when, during the lengthy struggle with the Kuo-min-tang forces, the Red Army was compelled to organize village by village, after their capture, so that each village remained an independent socio-economic unit, governing itself. This enabled the Red Army to move along, leaving behind an organization in each village capable of carrying on independently of the rest of the country. By the end of the revolution, these micro-organizations had become so well established that the need at that stage was merely to formulate a basis upon which they could be integrated, socially, politically, economically and legally; this integration became known in 1949 as The People's Republic of China. The study of the legal system of China includes as its core element a study of the social organizations that had emerged, in particular, during the period spanning what has now come to be known as "The Cultural Revolution;" the period between 1966-1976.

This paper is devoted to the study of those institutions and their interrelationships. The study is based on extensive field work conducted in the People's Republic of China during two visits to the mainland in 1975<sup>6</sup> and 1977.<sup>7</sup> The nature of the field work consisted of observing the workings of the communes, factories and schools and conducting both direct and indirect interviews with persons in the branch organizations<sup>8</sup> of the Communist Party of China. Interviews with some foreign persons who had then been longstanding residents of Peking, Shanghai and Canton also produced exceedingly useful data. The unavailability of published documents was compensated for by utilizing the private archives and notes of persons who were residents at the time in China. The paper, therefore, is based upon empirical data and shall rely on primary sources wherever possible.

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5. J.R. TOWNSEND, *POLITICAL PARTICIPATION IN COMMUNIST CHINA* ch. 4 (1968); 4 *MODERN CHINA* 3-62 (1978).

6. The 1975 visit included communes and factories in the provinces of Kwangsi and Kwangtung in the south, Chekiang and Kiangsu in the east and the municipality of Peking.

7. The 1975 visit included communes and factories in the provinces of Liaoning, Shansi, Honan, Hunan and provinces of Liaoning in the north, Honan, Hupeh and Hunan in the middle.

8. These are the various "revolutionary committees" of the communes, factories and schools.

AN HISTORICAL SURVEY OF THE INSTITUTIONS  
WHICH DEAL WITH LAW<sup>9</sup>

During the pre-1949 period China espoused no established legal traditions. The Chinese socio-political system during the pre-revolutionary days was seeped in Confucian philosophy. However, by 1949 the Kuo-min-tang government had reduced the civil and criminal laws of China into six codes. These codes were referred to as *Fa*, or enacted law. *Li*, a system of values based on exemplary behavior, was practically non-existent towards the end of the revolution. The deep political turmoil through which the Chinese society had passed, ever since the first shots of the revolution were fired by Mao Tse-tung in 1945, opened the flood gates of enacted law, or *Fa*, but produced no increase of the principle of guidance through exemplary behavior, or *Li*. The six codes into which the Kuo-min-tang government had reduced the laws of China by 1949, therefore, were viewed by the Communist Party as abhorrent and thoroughly evil.

Thus, in February, 1949, on the eve of the birth of "New China," the Central Committee of the Communist Party of China published a document: The Directive on the Abolition of the Six-law Codes of the Kuo-min-tang and the Definition of the Principles in Judicial Work of the Liberated Areas.<sup>10</sup> By this directive the central Committee expressly declared:

[T]he six-law codes of the Kuo-min-tang must be abolished in the jurisdiction of people's democratic dictatorship led by the proletariat and with the alliance of workers and peasants as its mainstay [and] as the people's law is not yet rounded out, the guiding principles of the judicial organs in their work should be: where programmes, laws, decrees, regulations and resolutions have laid down provisions, they should be observed; where no programmes, laws, decrees, regulations or resolutions have made any provisions, they should follow the policies of the New Democracy.<sup>11</sup>

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9. This section is partly based on interviews conducted among members of the Law Department in the University of Peking and also from a recent publication given to me, namely: SHOUYI, A REVIEW OF LEGAL SCIENCE IN NEW CHINA FOR THIRTY YEARS, 1 Researches on Law (Peking Univ. 1980). The author is presently Professor and Dean of the Department of Law in University of Peking and is also a member of the Legal Affairs Committee of the National People's Congress (which means a member of Parliament).

10. *Shouyi*, *supra* note 9, at 1-2.

11. *Id.*

This decree, which was issued some six months before the establishment of the People's Republic of China on October 1, 1949, may be considered as providing a basis for the construction and evolution of the post-revolutionary legal system of China. In fact, due to the exigencies of the revolution, the Communist Party was unable to provide for "programmes, laws, decrees, regulations or resolutions" in any substantial way. Therefore, the administration of justice under early Communist rule took more the appearance of *Li* based on the elements of "The New Democracy" rather than of *Fa*, which the party had little or no time to enact.

The period between 1949 and 1954 saw a large number of criminal trials in China proceeding along somewhat arbitrary lines. The reason for this may be found in the absence of a settled view on what constitutes "the policies of New Democracy." The absence of enacted law left the tribunals of justice to rely on this "catch phrase," and therefore regional and often district variations in interpretation became startlingly apparent. Realizing the apparent disparities in the administration of justice, the Central Committee of the Communist Party drafted an "inter-party circular" urging the tribunals of justice: "As a general rule, before passing a death sentence, refer the case to the masses and consult democratic personages. Exercise strict control, guard against indiscriminate action and avoid mistakes."<sup>12</sup> The submission of the facts constituting the offense charged to the masses was encouraged from a very early point of time of Communist rule in China. A few weeks before the above "inter-party circular" was distributed, the Central Committee issued the following directives to the tribunals urging care and caution in sentencing people to death:

Please make certain that you act surely, accurately and relentlessly in suppressing the counter-revolutionaries.<sup>13</sup>

. . . .

One batch of bandit chieftains, local tyrants and secret agents has been executed in twenty-one counties in Western Hunan, and another batch is to be executed by local authorities this year.—To strike surely means to pay attention to [facts]. To strike accurately means to avoid wrong executions. To strike relentlessly means resolutely to kill all such reactionary elements as [do] deserve the

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12. 5 SELECTED WORKS OF MAO TSE-TUNG 46 (1977). The inter-party circular in question was issued on February 18, 1951.

13. *Id.* at 53 (dated December 19, 1950).

death penalty (of course, those who don't will not be executed). So long as we avoid wrong executions, we don't have to worry even if the bourgeoisie raises an outcry.<sup>14</sup>

By 1954, although a large body of *Li* had grown during the previous few years of Communist rule, the Chinese government was conscious of the arbitrary nature of the country's criminal jurisdiction. This the government considered as a hindrance for the much needed diplomatic offensive that they had launched in order to win recognition on the world stage. Therefore, in 1954, four years after the People's Republic of China signed a Treaty of Friendship with the Soviet Union, the Chinese Communist Party decided to adopt *en bloc* the Soviet laws and legal institutions causing a massive influx of *Fa*, or enacted law, into the country.<sup>15</sup> As a part of the responsibilities assumed by the Soviet Union under the Treaty of Friendship, Stalin sent to China in 1954 a number of lawyers and law teachers to help the Chinese to place their new legal institutions upon a stable footing. To further support the move towards an ordered system of laws and judicial administration, the Chinese Communist Party (which was also the government) in 1956 adopted a new Constitution for The People's Republic of China modeled on the 1936 Constitution of the Soviet Union.

Two of the early codes to emerge out of Communist rule in China were *The Marriage Law* of 1950 and *The Land Reform Law* also of 1950. But not until August 29, 1958, did the Communist Party consider it opportune to recognize the existence of mutual aid teams and agricultural producers' co-ops, which were the starting points for the rural communes of China.<sup>16</sup> Mao Tse-tung, having first visited the Chili-yang "Peoples Commune" on August 6, 1958, declared in a speech to the Shantung Provincial Committee of the Communist Party three days later: "It is good to set up People's communes. Their advantage is that they combine industry, agriculture, commerce, education and military affairs, thus making the task of leadership easier."<sup>17</sup> Twenty days later Mao Tse-tung moved before the Political Bureau of the party's Central Committee a resolution on the establishment of People's Communes in the rural areas. This proved to be a mere recognition of a reality that had come into ex-

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14. *Id.* (dated January 17, 1951).

15. D. LLOYD, *INTRODUCTION TO JURISPRUDENCE* (4th ed. 1979).

16. For a useful historical sketch as to the evolution of the rural commune see C. LI, T. CHIEH-YUAN, *INSIDE A PEOPLE'S COMMUNE* 5-31 (1974). See also F. GREENE, *A CURTAIN OF IGNORANCE* 143-65 (1968).

17. C. LI, T. CHIEH-YUAN, *supra* note 16, at 6.

istence as a result of the *Land Reform Law* of 1950,<sup>18</sup> under which "[t]he feudal exploitative system of land ownership by landlord class shall be abolished and the system of peasant land ownership shall be introduced in order to set free the rural productive forces, develop agricultural production and pave the way for New China's industrialization."<sup>19</sup>

By a resolution moved before the sixth plenary session of the Eighth Central Committee of the Chinese Communist Party, on December 10, 1958, the establishment of communes as a new social organization was confirmed. In moving the resolution, Mao Tse-tung declared: "A new social organization has appeared, fresh as the morning sun, above the broad horizon of East Asia."<sup>20</sup> As the rest of this article shall show, the commune formed the "basic socio-legal unit" which in due course became a central laboratory for socio-legal research in China.

With the affluxion of time and particularly during the cultural revolution (of 1966-1976) new dimensions and new strains were added to the Chinese legal system. Particularly, in the administration of criminal justice the Chinese jurists began utilizing sociological and psychological data in sentencing procedures. These, in fact, were grafted upon existing procedures. Two cases of which I learned while in China provide good examples of where new sociological and psychological data were used both in the determination of guilt and in the determination of the appropriate sentence in a criminal trial in China.

### *The Case of the Visiting Journalist*

During my second visit to the People's Republic of China in 1977, I happened to meet an old friend who was then a member of the International Press Corps, at the Peking Hotel. He told me of a trial which had just ended in Peking. It involved a vicious attack on a visiting African journalist by a Chinese national. The Chinese national had stabbed the African visitor on the neck while the visitor was walking towards the Friendship Shop in the East City of Peking. At the trial it was established that the assailant had committed similar attacks on two previous occasions on visitors. On each occasion he was sent to a labor camp for reform. On each occasion he had responded to treatment and was sent back as a reformed per-

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18. THE LAND REFORM LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1950).

19. *Id.* at art. 1.

20. See note 17 *supra*.

son. But at the time of trial it came to light that he was a committed anti-state person who wished to do harm to the international image of China. Although the African visitor had survived his injuries, the Chinese assailant in question was sentenced to die "with immediate effect" and was in fact executed some thirty minutes later. The lesser sentence of death, which takes effect "after 24 months,"<sup>21</sup> which invariably leads to a commutation, was denied him. Being somewhat anxious about the result, I took an opportunity to speak to a colleague at the Faculty of Law at the University of Peking, a recognized teacher in China of Criminal Law and Procedure. The Chinese professor smiled and told me that I didn't actually understand the Chinese legal philosophy regarding crime and punishment. Speaking through my interpreter, he said: "We have a different outlook to crime than you have. Ours could be best expressed as 'a slow slide to the bottom.' We do everything possible to correct and rehabilitate the criminal and return him back to society. If we find that the person cannot be rehabilitated because his criminality is too basic—such as being political—then he has overcome the corrective social blocks we have placed in his path towards reaching the bottom. He has made a determined attempt to hit the bottom. We have no room for him." The assailant in the case of the African visitor appeared to have shown such a determination because of his anti-party

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21. The Chinese criminal law and procedure draws a distinction between crimes that carry death sentences to be carried out immediately and those to be carried out 24 months later. In the latter case, the condemned person is given an opportunity to rehabilitate himself within 24 months and thus avoid the supreme penalty. This distinction could be traced initially to a set of instructions added by Mao Tse-tung when he revised the draft resolution of the Third National Conference on Public Security in May, 1951. The instructions read:

The number of counter-revolutionaries to be killed must be kept within certain proportions. The principle to follow here is that those who owe blood debts or are guilty of other extremely serious crimes and have to be executed to assuage the people's anger and those who have caused extremely serious harm to the national interest must be unhesitatingly sentenced to death and executed without delay. As for those whose crimes deserve capital punishment but who owe no blood debts and are not bitterly hated by the people or who have done serious but not extremely serious harm to the national interest, the policy to follow is to hand down the death sentence, grant a two-year reprieve and subject them to forced labour to see how they behave. In addition, it must be explicitly stipulated that in cases where it is marginal whether to make an arrest and that in cases where it is marginal whether to execute, under no circumstances should there be an execution and that to act otherwise would be a mistake.

5 SELECTED WORKS OF MAO TSE-TUNG 51 (1977). Note the sentences imposed on Jiang-quing (Mao's widow) and Zhang Chunchiao at the end of the "gang of four" trial (January, 1981).



attitude. The Chinese law professor then proceeded to say that Western jurisprudence would not allow the society to check a person's latent propensities towards the commission of a crime—for that would affect his "civil liberties" or may breach the laws of false imprisonment or libel. But when he harms the society by committing a crime, it is then that the law permits the society to take heed of his conduct. The professor emphasized that in his view: "Some innocent member of the western society must actually be harmed before the society becomes interested in the criminal. He may well have been seen to be moving swiftly towards the edge of the cliff—but he must actually "fall off the cliff" and hit the bottom injuring both himself and at least one other innocent person before the system apprehends him." I returned back to the Peking Hotel that evening with the distinction between the Chinese attitude to crime and punishment, and ours, aptly rolled into one sentence. For the Chinese the criminal law is concerned with "a slow slide to the bottom" while for the West the concern is limited to "a falling off the cliff."<sup>22</sup>

*The Case of the Young Man from ChengChow*

Subsequently, I noticed that at a hearing in ChengChow in Hanan province the court did take into consideration the background of the accused and concluded that the accused was suitable for rehabilitation rather than for punishment. This was a case of a young man who had been brought up by his grandfather; the accused had become an orphan at a very early stage of his life. The community in which he lived looked upon him as an unfortunate. Most of his deviant behavior, amounting to petty larceny of fruits or chicken—for the purpose of his own food and not for sale—was forgiven by the community. In the case before the Tribunal the young man was accused of stealing a woman's money from her wallet. The Court found that the community had forgiven all his previous misdeeds because he was an orphan and this in fact was the first time he had been brought before a Tribunal accused of a crime, in spite of his past reprehensible conduct. The Tribunal, therefore, concluded that "the society had not discharged its responsibility towards him by attempting to 'stop his slow slide to the bottom' and had in fact watched him go down with folded arms." The Tribunal was, therefore, unwilling to convict or sentence him, but merely ordered that he be recruited into the Chinese Railways and given training which would lead him to employment in the State

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22. This is an excerpt from my notes made on Saturday, July 2, 1977.

Railways. The Railways were recommended by the Tribunal because the rural society from which he came had not trained him to work on the farms, and besides, with the present cloud hanging over him he might become the butt of some ridicule which might in turn force him into a life of crime merely as an act of defiance.<sup>23</sup>

*The 1977 Changes—The Modernizing Trend*<sup>24</sup>

The two cases when considered side by side show the way the Tribunals in China determine the question of both guilt and punishment within the framework of the principle of "a slow slide to the bottom." Present changes in China do not appear to alter these basic propositions. The recent changes in the criminal law and criminal procedure have merely streamlined the institutions which investigate alleged offenses, and the channels through which offenses are brought before the courts. The creation for the first time, in 1979, of a Ministry of Justice must help in regularizing the enforcement of criminal justice across the nation.

In addition, in 1979, the government introduced changes in the law schools' curriculum, both at the Universities of Peking and of Wuhan. The Chinese Academy of Social Sciences has now opened a department for research in law and has plans to open its doors to Western scholars. At the beginning of this year a law dictionary containing both Chinese legal concepts and a compilation of laws has been produced. The dictionary is now being translated into several languages, English and French being two of them. All these matters are mere encrustations upon the existing legal supra-structure and are mainly meant as indicators of a modernizing trend moving China as a whole into the third quarter of the twentieth century. Other indicators are flowing at a rapid pace from the Chinese Communist Party itself. These are:

(i) *The Joint Venture Law* (July 8, 1979)

This is a result of the government's interest in increasing trade and commerce with foreign trading concerns. The law requires the foreign partner to introduce at least 25% of the capital from outside resources. The law does not, as in other developing countries, state a maximum foreign investment. The law

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23. This is an excerpt from my notes made on Wednesday, July 27, 1977.

24. This section is founded partly from materials recently obtained from Professor Gong Xiangrui, who is a faculty member of the Department of Law at the University of Peking and Professor H. de-Pei of the Department of Law at the University of Wuhan, partly from interviews conducted with some diplomatic representatives who had served their countries in Peking and through empirical research.

fixes the income tax at 33% of the earned income and gives a legal guarantee of protection of the foreign investor's legal rights and his interests.

(ii) *Economic Laws*

Since 1977 China has enacted a little more than 100 such laws. In the main they deal with: national economic planning, basic construction (land use planning and environment protection rolled into one), economic contract (contractual undertakings between government agencies and social organizations such as communes or factories on the one hand and contracts between foreign investors, *inter se*, on the other), patents, trademarks, and building (mainly the health and safety aspects of buildings).

(iii) *Other Changes*

Statutory alterations of existing laws, such as the amendment to the Marriage Law, have been passed. These changes are generally of a peripheral nature such as raising the marriageable age to twenty-two for males and twenty for females. There were changes made to the Constitution of 1978, and these too appear to be minimal. They merely re-emphasized the attributes of "The dictatorship of the proletariat" and declared in emphatic terms: "[T]hat the Government of a socialist country would proceed to secure obedience not merely by imposing punishments, but by persuasion, education and reformation."

The government appears to have no intention at the moment of changing the Civil Law and the Civil Procedure Law of the country. This leaves the settlement of disputes largely to be "handled according to policies and through mediation and consultation."<sup>25</sup> This requires popular participation, and the process of decentralization which had begun during the early days of the revolution has now manifested itself primarily in the system of communes, in which more than three-quarters of the Chinese nation live. It is, therefore, necessary at this stage to turn to the commune, which appears clearly to be the basic socio-legal unit in China.

THE STRUCTURE AND THE ORGANIZATION  
OF A BASIC SOCIO-LEGAL UNIT

In support of Mao Tse-tung's assertion<sup>26</sup> that China is one vast

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25. G. Xiangrui, *Current Legislation in Modern China* (paper presented by Professor Xiangrui of the University of Peking at the Second International Congress on Legal Science, September 7-12, 1980 in Amsterdam).

26. An oft-quoted statement by Chinese while greeting visitors from abroad. The statement is alleged to have been made to a visiting dignitary in 1957.

sociological laboratory, the "basic socio-legal unit" may be cited. Relying on the Marxist theory of the fundamental relationship between the supra-structure and the infra-structure of a society,<sup>27</sup> the Chinese political theorists have structured a highly decentralized system of government in which the politico-economic base strikes an intimate relationship with the socio-legal institutions. It is the reliance which the Chinese place on this system that has compelled them to prepare, first, a politico-economic base sufficiently strong and flexible to take the dead weight of a whole new legal system. Before proceeding to examine and evaluate the role of law, it is necessary to expose the structure and the organization of the "basic socio-legal unit" which rests upon the politico-economic foundations of the People's Republic of China.

The elements which form the modern Chinese society are drawn from five sources. Arranged in the order of decreasing economic importance are: the peasants, the workers, the cadres, the service personnel and the students. Into one of these categories must every one of the 900 million Chinese fall.

### *The Peasants*

The peasants are now wholly based in communes. Prior to 1949 they were largely tenant farmers. Their relationship with the land owners varied from one of a mere tenant who was required to deliver a predetermined share of the produce, by way of rent, to one of a quasi-slave or a serf, whose future income was pledged to the land owner. The latter situation resulted from recurring bad harvests or by recurring bouts of ill health, necessitating greater borrowings and ever increasing debts. The dialectic of this situation was widespread famine with its concomitant deaths. It is this sequence which has compelled writers on pre-1949 China to call her the "sick man of Asia."

One of the earliest reforms undertaken by the new regime, after 1949, was land reform. By Article 1 of the Land Reform Law<sup>28</sup> of 1950: "the feudal exploitative system of land ownership by landlord class shall be abolished and the system of peasant land ownership shall be introduced. . . ." In creating "peasant land ownership" out of lands that were once owned by the single landowners under whom the peasants worked, the Chinese have maintained the former geographical relationship between the tenant or serf and his farm;

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27. D. LLOYD, *supra* note 15, at 729-30.

28. See note 18 *supra*.

that is, the peasants continued to work on the same land on which they had previously worked. That the Chinese peasantry was conceived within the geographical framework within which they and their forefathers had lived, worked and died has been found crucial to the structural integrity of the social system. The emotional and the spiritual link with the land was found essential to the new society they were helping to build and, therefore, the creation of the Chinese communes, contrary to certain views, did not result in mass human migrations.

Between 1950 and 1958, the Chinese peasantry were able, to varying degrees, to claim a proprietary right over the produce. The cumulative effect of the Land Reform Law was to transform a tenant into a produce-owner, allowing him varying degrees of ownership over the corpus. At one end of the scale one sees his absolute ownership of farm products, obtained from "small plots [made available] for [his] personal needs—[and from] a small number of livestock."<sup>29</sup> These rights are now guaranteed by the Constitution and are limited to the circumscribed area of private property that each commune may, under a collective agreement, allow. At the other end of the scale, the peasant has only a collective right to the produce of the commune. This right differs from both the traditional concepts of co-ownership and joint-ownership in that, upon the death of a commune member, he is neither able to "will away" as he would in the case of co-ownership, nor would he by his death enlarge the interests of other individual commune members, as in the case of a joint-ownership. Instead his share in the communal property will simply evaporate.<sup>30</sup> This process could be grounded partly on the socialist principle: he who does not work, neither shall he eat, and from each according to his ability, to each according to his work. It could also be founded on the grounds that his right to the communal produce is merely a *usufruct*, and as he owns not the *corpus*, his death would terminate that *usufruct*.

Historical data are available to suggest that the march towards the communization of China was a slow one. It had taken a decade to achieve the starting point with the first commune in Chili-ying. At the beginning, soon after the Land Reforms were first commenced in 1950, the peasants worked in mutual-aid teams, which slowly evolved into co-operatives. These, by a steady dialectical process of evolution gave rise to the advanced agricultural producers' co-operatives. Two commentators on this growth process wrote:

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29. THE PEOPLE'S REPUBLIC OF CHINA CONST. art. 7.

30. This observation is culled from interviews conducted at communes.

Mutual-aid teams and the elementary and advanced agricultural producers' co-ops were the three forms of organization evolved in China's agricultural co-operation movement, representing specific and successively higher stages of development.

The mutual-aid team, in which the land remained under private ownership but the members helped one another with manpower, draught animals, etc. on an exchange basis, contained rudiments of socialism.

The elementary co-op was semi-socialist. Its members were remunerated for the amount of work they did, and in addition, drew appropriate dividends for their land, draught animals and bigger farm implements which were pooled in the co-op as shares and placed under its unified management.

The advanced co-op was fully socialist. All the income of its members came as a reward for their labor. Land and other principled means of production were owned collectively and no dividends were paid for them.<sup>31</sup>

By 1958, the advanced agricultural producers' co-operatives had reached the gateway to communization. The next step required no more than a structural change. The changing concepts of ownership and possession in the Chinese law were linked to these structural and organizational developments in the Chinese society. Together with such changes, as were necessary to move the mutual-aid teams into co-operatives and then into advanced co-operatives, in their march towards the creation of rural communes, the society too had undergone organizational changes of some considerable importance.<sup>32</sup> These organizational changes were found necessary not only to accommodate the commune concept of social organization but also to lend institutional support to the type of social system which the Chinese were developing. The result, therefore, was the creation of a basic socio-legal unit which was also designed to function as a socio-economic institution, and a political entity, sufficiently strong and flexible to sustain a whole new socio-legal system. It is this that makes the understanding of the commune system the key to an understanding of the role of law in the People's Republic of China.

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31. C. LI, T. CHIEH-YUAN, *supra* note 16, at 7.

32. *Id.* at 1-11.

*The Commune*<sup>33</sup>

The commune is populated by four hundred thousand to six hundred thousand persons. The principle function of a commune is to coordinate the political and economic activities of the whole commune. Article 7 of the Constitution<sup>34</sup> reads: "The rural people's commune is an organization which integrates government administration and economic management."<sup>35</sup> In so doing, its alter ego is the revolutionary committee. That committee functions as an executive arm of the party, which is also the government. The members of the revolutionary committee of the commune are elected for a period of two to three years. The evidence I possess supports the view that the members can be re-elected and often are, unless some serious deficiencies in their functions are brought into focus through "group meetings." These group meetings appear to be a basic democratic right open to all Chinese.

Each commune consists of about ten production brigades.<sup>36</sup> Each production brigade consists of nearly forty to sixty thousand people. The duties and the functions of the production brigade are somewhat amorphous. The brigade principally owns and runs the heavy industries and heavy industrial equipment. It owns the tractors, the lorries, the earth moving plants, and commune factories or mechanical workshops. In some instances the production brigade (and not the commune) runs the commune's health services. Often, the secondary schools fall under the governance of the production brigade. It is also concerned with cultural and sports activities. There is again a revolutionary committee at the brigade level which runs the affairs of the brigade. Unlike the commune revolutionary committee to which reference has already been made, the brigade committee is more of a housekeeping organ. Little or no concrete

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33. This section is written from empirical research. The Chili-ying commune which was the first to be recognized (not necessarily the first to be created), North of Chengchow, in Honan province on the Northern Bank of the Yellow River is regarded as one of the smallest of the communes in China. That commune was atypical in that it had no more than about one-tenth the average population for a typical commune. The Chili-ying commune produced the following figures:

38	Production Brigades
298	Production Teams
53,200	People
9,100	Households
93,000	Acres (Mu) of Cultivated Land

34. See note 29 *supra*.

35. *Id.*

36. In this respect the Chili-ying commune is also atypical. See note 33 *supra*.

political decisions are taken at this level. It has no legislative, executive or judicial powers either. The members of the brigade revolutionary committee are elected for a period of two years. It is, however, not clear as to whether they can be re-elected.

Except in the Chili-ying People's Commune, in every people's commune in China, the brigade is not the smallest social unit, there are also production teams. For historical reasons, the Chili-ying People's Commune, however, stopped its multi-sectioning process at the brigade level. Apart from Chili-ying, in all communes there are about ten production teams in each brigade. Each production team consists of four to six thousand persons. Commenting on production teams, Li and Chieh-Yuan<sup>37</sup> wrote:

In ownership, the people's communes also have three levels, with the production team as the basic one. This means that the commune, brigade and production team each own part of the means of production; but the land, the most important, belongs to the team. Hence the distribution of income also takes place mainly within the team which is the basic accounting unit. (In a number of places, the Brigade is beginning to play this role.)

Take for instance the No. 29 Production Team—It has 310 mu of land and 18 draught animals as well as a thresher, crusher, etc. They are collectively owned by its commune members of 36 households. The members work in the team and the income is distributed among them in line with the socialist principle, "from each according to his ability, to each according to his work."

The Brigade owns some of the larger means of production, too expensive for the average team to buy. They include such items as tractors and larger irrigation and drainage equipment. All are used in helping constituent teams with their production.<sup>38</sup>

These characteristics of the production team are now embodied in Article 7 of the 1975 Constitution.<sup>39</sup> The alter ego of the production team is its revolutionary committee. This revolutionary committee is elected for a period of one year, and is not as a general rule, re-

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37. C. LI, T. CHIEH-YUAN, *supra* note 16.

38. *Id.* at 11.

39. *See* note 29 *supra*.



elected. The theory behind this, is that since it is the basic social unit, its functions are sufficiently important that the members of the revolutionary committee may be exposed to the corrupting influence of power, and therefore, it is believed that they should not be permitted to occupy a tenured position on the committee. Therefore, an attempt is always made to rotate the membership on the committee as much as possible, so as to provide most of its members an opportunity to sit on it. In addition, it is required of the committee members at the production team level to subscribe to a minimum of about 17% of the normal production norm. This level appears to be common to most communes which I visited.

The production team performs many functions. It is the basic social unit. Insofar as it superintends the economic facets of commune life, it functions as the basic accounting unit. Insofar as it integrates the four to six thousand persons into a single cohesive society, by providing a forum for consultations, debates and discussions, it functions as a consultative unit. Insofar as it performs the administration of government, it functions as a basic socio-legal unit. And insofar as it integrates the society of four to six thousand persons into a common political theme (by education, debate and discussion) it functions as a basic political unit. It is now necessary to examine each of these functions separately and then attempt to synthesize them into a single coherent whole. The latter would lead to a clearer understanding of their interrelations and to the manner in which they fit into the core-theory of Marxist legal science, namely the "supra-structure—infra-structure" relationship. In this paradigm, the socio-legal rules occupy the supra-structure, while the politico-economic base of The People's Republic of China provides the infra-structure. This politico-economic base is largely derived from an interpretation of the works of Marx, Lenin and Engels in the light of the writings and opinions expressed by Mao Tse-tung.<sup>40</sup> In a sum total, and in a functional sense, the production team, may appear as the epitomy of a basic socio-legal unit. It is to the aforementioned functions that we must now turn.

#### THE FUNCTIONS OF THE PRODUCTION TEAM

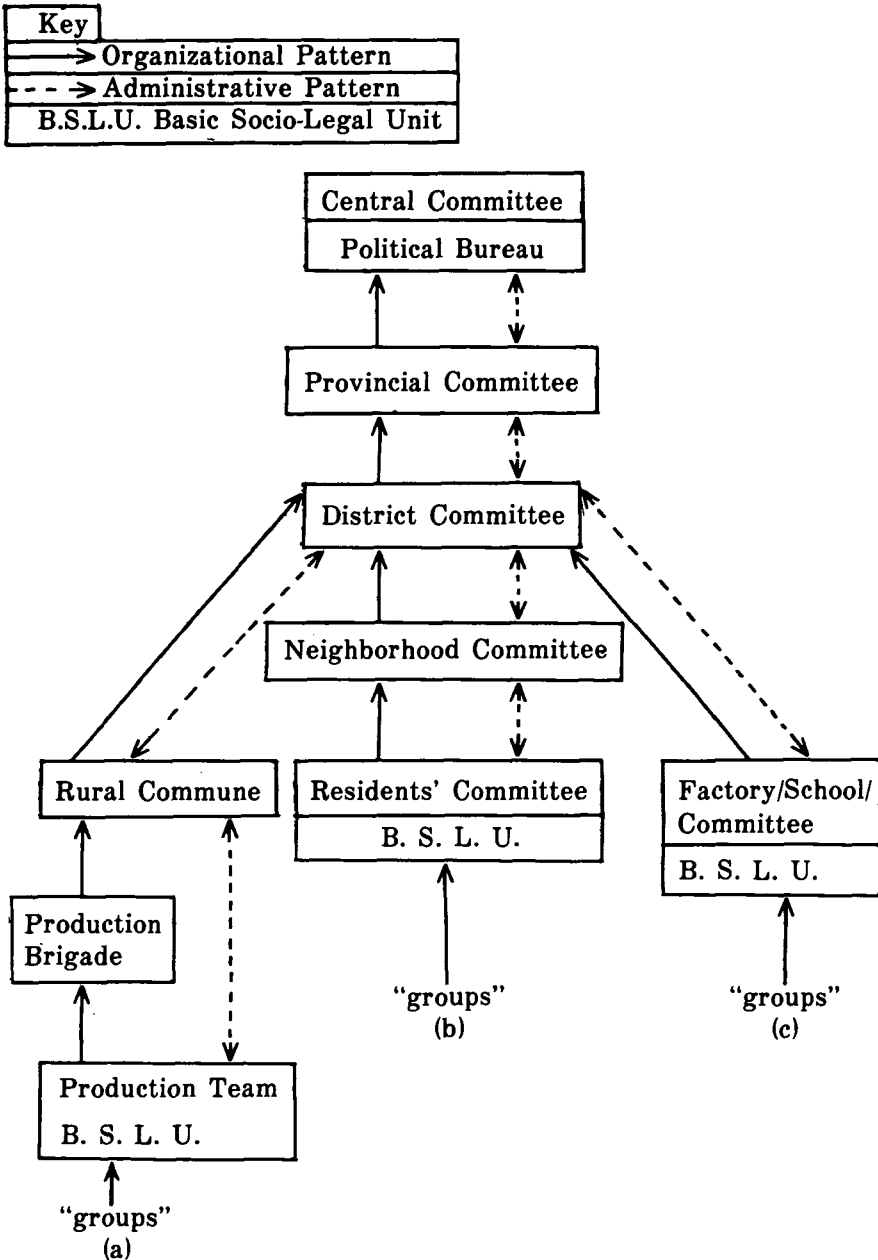
##### *An Economic Unit*

As an economic unit, the team controls the production quotas, receives the monies arising out of selling the produce from such quotas, and conducts the accounting procedures as a prelude to the

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40. 1-5 SELECTED WORKS OF MAO TSE-TUNG (1977).

Organizational Structure of  
 (a) communes  
 (b) rural residential groups and  
 (c) factories and schools



distribution of profits. A portion of the income in terms of both money and grain are banked. These are the accumulations put aside for unforeseen exigencies and are commune property, which the revolutionary committee holds in trust for its members. Although more detailed exposition of this role is beyond the scope of this article, it must, however, be mentioned, that the role of the production team as a basic economic unit would be very relevant to an analysis of the commune economy. Our concern principally is one of law, which in effect excludes the need for any exhaustive statement on the economic role of this basic social unit.

#### *A Consultative Unit*

Although its economic functions are often given greater prominence by the Chinese themselves, the role that the production team plays, as a basic democratic unit in a largely consultative capacity, merits particular attention. The production teams are normally grouped into seven contingents of about 800-900 persons in each. Each contingent is required to meet on two half days per week. These meetings, known as "group meetings," provide a forum for debate and discussion. Some of these debates and discussions are in the nature of complaints against the local, district or provincial party organizations or against their officers. This is also the forum in which their own revolutionary committees come under close scrutiny. Complaints against working conditions and their fellow workmates come to be aired. This scrutiny, criticisms and the inevitable airing of group thoughts often take the form of both suggestions for reform and change.

In this role, the group meetings evolve guidelines for the running of associated institutions, such as health stations (work clinics), nursery schools and shops. Further, its consultative role includes the organization and execution of the electoral process. The electoral process here in question includes the elections to the revolutionary committees at the brigade, commune, and production team levels.

#### *An Administrative Unit*

It is this function that interests us most. In this role the production team, in groups of about 900, engage in legislative, executive and socio-legal work. The units both suggest new ideas as bases for new rules and receive central party decisions from the "politburo" for adoption. These two functions require separate treatment.

The former responsibility, that of suggesting new ideas as bases for new rules, is satisfied principally through group meetings. At such meetings, the production team may formulate new ideas which may have a beneficial bearing for the commune, the district, or the province to which it belongs. Sometimes, as was the case during the Cultural Revolution of 1966, the rural communes may be the source of nationwide trends. Particularly during the Cultural Revolution, many new resolutions affecting the whole country originated at the team level. Now, since the saga of "the gang of four,"<sup>41</sup> many resolutions of a general nature regarding production norms and educational standards are also originating from the team level. These resolutions appear to have a nationwide effect. In any event, the production team at group meetings debate and discuss these new ideas. In many instances, these ideas are discussed in small groups, outside the caucus meetings of 900. Eventually, these suggestions are evolved into a concrete resolution. The discussions on the resolution are equally detailed and extensive. The resolution is finally passed individually and independently by each of the groups of the production team. Thereafter the forum of discussion shifts to the commune level.

At that, the entire commune meets in several manageable sessions. These are ongoing consultative sessions and the responsibility to organize and coordinate them is left in the hands of the revolutionary committee of the commune. Once it is adopted by the commune, the resolution proceeds to the district level, and then to the provincial level. Finally it reaches the Political Bureau of the Communist Party of China. District committees and the provincial committees are essentially administrative organs of the Communist Party. These are, therefore, government organs and as such are not elective. They are appointed by the Central Committee of the Communist Party and function largely as amanuenses of the Political Bureau. Their functions do not include the rejection of the resolutions, but merely a duty to comment on them. These committees, therefore, merely state an opinion as to whether the resolution in question falls into line with the general developmental pattern of that district or province. Their comments will deal with the need for such legislation and will assess the affect it would have upon the politico-economic structure of their districts or provinces. They will not be concerned with the social implications because that would be a matter falling logically within the competence of the production

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41. Namely, Jiang Qing (Mao Tse-tung's widow), Zhang Chun-chiao, Yao Wen-yuan and Wang Hong-wen (all politburo members).

team and the commune. Once the resolution goes beyond the commune, the district and the provincial committees are required merely to view the resolution from a purely politico-economic standpoint, which in effect provides the *le fondement* for China. With these comments, the resolution and the accompanying opinions reach the Political Bureau of the Communist Party.

What precisely occurs at the level of the Political Bureau is largely conjectural. However, there is some indication that at the Political Bureau the resolution receives careful study so as to evaluate its probable socio-economic implications. Further, an attempt is made to restate "the pith and substance" of the resolution in Marxist terms. It must not be forgotten that the particular brand of Marxism currently practiced in China, is Marxism-Leninism as interpreted by the writings of the late Chairman, Mao Tse-tung. Unless the pith and the substance of the resolution has some central significance to the core policies of the Communist Party, the Political Bureau may, without reference to the Central Committee, make a final decision as to its acceptability. However, if the resolution falls into the area of policy which has a core-relationship to the party, then it is believed that the Central Committee of the Communist Party will be consulted. It is not clear as to how many of such members and in what manner those consultations occur. Though conjecture, it is generally believed that during the life of Prime Minister Chou-En-Lai these consultations did not go beyond him. The final outcome of the work done to the resolution by the Political Bureau is the formulation of what is known as "the mass line."<sup>42</sup> This is no more than a policy directive based on the pith and the substance of the original resolution. The mass line travels down to the production team that first originated the resolution. In this journey downwards, the provincial, district and the commune committees are merely informed of the mass line; they apparently are not consulted.

It is possible that the mass line may represent generally the pith and substance of the original resolution. If it does, the production team, again in groups, will resolve to adopt it. Such an adoption will, from that moment of time and without more, transform the mass line into a rule of law. At this point too, the units in their group discussions will have another opportunity to debate, discuss and thereby more thoroughly understand the rule. If the mass line were to emerge in a form in which it is required to be adopted

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42. J.R. TOWNSEND, *supra* note 5, at 72-74.

generally throughout the provinces, districts or the commune, then the mass line, insofar as the other production teams in the commune, the district or the province are concerned, would be received by way of a central committee directive attracting separate considerations. As we have mentioned before this will receive separate treatment later.

This two-way process, which Mao describes as "bottom-up and top down,"<sup>43</sup> together with the fairly extensive opportunities made available for debates and discussions, fulfill one of the basic Marxist requirements for enacting law, *i.e.*, the educative process. It is suggested that the communication of a law is one thing, but an educated understanding of it is another, and perhaps a more important function. Through this type of popular participation, the Chinese have attempted to lay down a basis for the educative process of law. It is suggested that this type of popular participation appears largely to lessen the need for policing the effective implementation of the law, which has by now become a product of the popular will. To that extent, its observance should appear as a logical step towards implementing a popular decision taken by the whole production team.

Sometimes the mass line may be at variance with the pith and substance of the original resolution. In such an event, the production team that initiated the process has the option of not adopting the mass line. It is here that the full thrust of the political forces behind the team comes into play. The issue, thereafter, becomes political. From this point of time there are a number of options available to the team to oppose the deviant mass line. The most popular step that a team normally takes is to lobby the district and the provincial committees of the Communist Party. As the amanuenses of the Political Bureau, the district and the provincial committees could, after consultations with the Political Bureau, revise the original mass line. Besides this, the production team has the power to have the matter raised at the Party congresses both at the district level and at the provincial level. Another political alternative is to attract the attention of the media. Dr. Li<sup>44</sup> has recently examined the extent to which the media is now becoming available as a channel for dissent.<sup>45</sup>

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43. A frequently used Chinese term for a process leading to the popular participation in political activities.

44. V. LEE, *LAW WITHOUT LAWYERS* (1977).

45. *Id.* at 81-89 (Kuo's case).

The second of the functions of the production team as an administrative unit occurs when a mass line originates from a decision taken by the Central Committee of the Communist Party. Here, different policy considerations come into play. Such a mass line is none other than the distinctive and the deliberate policy of the Communist Party of China, which in effect is the government. In such instances, the production teams, as basic socio-legal units, are required to adopt the mass line and thereby create new law. This type of mass line is common. With every shift of political emphasis at the top, a mass line comes down to the basic socio-legal unit. It is this that makes a study of the substantive rules of Chinese law somewhat unreal, for what is certain are the procedures for creating law, but not the law itself. As for the latter, there is a tendency to change the law with the changing impulses at the center of political power. Aside from the ability of the basic socio-legal units to delay by prevarication the adoption of this type of mass line, they have *per se* no room to outmaneuver the policy decisions of the Central Committee. There is the power to lobby its repeal with the district committees and the provincial committees. But that is an activity after the fact; that is, after it has already been adopted by the Central Committee. Aside from it being a political decision originating at the level of the Central Committee of the Party, this second type of mass line may well be the transformation of a resolution originating at the level of a particular production team in one area of the country, into law. The Political Bureau may seize upon such a resolution which they consider eminently suitable for a whole commune, a whole district, a whole province, or even for the whole country and therefore adopt it as a political decision of the Central Committee of the Party. At that point, a mass line may originate from the Political Bureau directing particular communes, districts, provinces or the entire country to adopt a particular line of action. Such mass lines are not that infrequent particularly during times of major social transformations, such as during the Cultural Revolution (1966-1976) or during the present period of modernization.

It is important to bear in mind that the production team is one of the basic socio-legal units in China. In addition to its functions as a law-creating organ, it is also a law-enforcing organ. In this respect, there are no particular individuals charged with the specialized function of maintaining law and order. Concomitant with popular participation in the law-creating process is the popular interest that the rules of the law are indeed observed, for the greater good of the production team. It is, therefore, suggested that popular participation in the enactment of law to a large measure dispenses with the

need for a specialized agency to constantly oversee its effective enforcement. This is so as long as the rules of law conform to something like the "felicitous calculus" of Bentham.<sup>46</sup> However, should the need arise, the revolutionary committee of the production team has the power to call in the members of the public security station, *i.e.*, the police, whenever it appears to be necessary. It seems clear that during times of political stress, the work of the revolutionary committee in maintaining law and order has been strengthened by the members of the public security stations. The attitude of the party is that, such a need reflects a general malaise among the members of the production team. Every effort is, therefore, made to internalize the problem and solve it through sustained political education and by peer pressure in the first instance. However, where the deviant behavior is by a single member or by a small group of members, and the behavior is sufficiently grave as to involve personal injury or injury to private or commune property, the revolutionary committees may decide to hand over the matter to the public security organs, leading to criminal proceedings before the established system of courts.<sup>47</sup> That will be a necessary prelude to initiating trial procedures, without which a conviction followed by a sentence cannot be obtained. In view of the fact that the dispute settling functions of the revolutionary committees are limited to mediation and conciliation, they have neither the power to convict nor the power to impose any particular sentence. Their powers are channeled towards political education and rehabilitation. Their instrumentalities work in conjunction with peer pressure. The two following cases should show, to some extent, how this mediation and conciliation works.

Case (1): This took place in a commune at the foot of the Tai-Hang Mountains in Honan Province a few miles from Tsien-Shin on the northern banks of the Yellow River.

Facts: *H* and *W* were married. There was a son and a daughter by that marriage. The parties were living with *H*'s mother *K*. *H* died. *W*, the widow, and the children continued to live with *K*. In the middle of 1976, *W* re-married *Z*. *Z* had no connection with *W*'s former husband's family. *W* went to live with *Z*. *K* refused to hand over her deceased son's children. Had *W* sought the instrumen-

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46. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-13 (1970).

47. Edwards, *Reflections on Crime and Punishment in China*, 16 COLUM. J. OF TRANSNATIONAL L. 1-103 (1977). Professor Edwards culls his information from old legal textbooks, emigre interviews and Chinese newspaper accounts to describe the criminal process in China.



talties of the established courts, she would have been awarded the custody of the children. Through the organs of the state, the children would have been delivered to her. The revolutionary committee persuaded *W* to seek mediation. They did this partly through compassion for *K* who had nothing left in this world except her son's children and partly to achieve some kind of harmony between *W* and *K*. By May, 1977, *K* had agreed to let her granddaughter go and had established cordial relations with *W* and with *Z*. The chairman of the revolutionary committee was confident that there would be a breakthrough regarding *K*'s grandson. *K* and *Z* had begun to see each other and *K* was thinking of moving in with *W* and *Z*, which would then put an end to the dispute.

The mediation had taken over a year. The form of mediation was a combination of peer pressure and discussion. The argument was goal-oriented, the goal being to bring the two families together. What was needed was to satisfy *K* that her emotional attachment to the two children would be respected by both *W* and *Z* and by the whole community. This is where the revolutionary committee sought peer pressure to assure *K* and assail her fears. This could have been impossible, they say, had *W* sought the instrumentalities of the law. The revolutionary committee first had to win *W* over to their point of view before embarking on the processes of mediation. According to the view expressed by the chairman of the revolutionary committee the fact that all parties were known to the community and the fact that the whole community was behind the idea of mediation as distinct from litigation had helped enormously in this venture.

Case (2): This took place in the West China Street, in Peking and concerned the West China Street neighborhood committee. *X* and *Y* lived on opposite sides of the same street. Their children played together. There were certain disputes among the children, and *X* and *Y* were both drawn into the dispute. *X* and *Y*, who were both housewives, became enemies. *X* was a seamstress and *Y* worked as a cadre in a department store. One day in April, 1977, *X* short-circuited the fuse in *Y*'s fuse box. There was an electricity failure. The matter was essentially criminal, but the neighborhood committee decided to mediate and reconcile, rather than prosecute. By a process of mediation the parties have been reconciled.

This line of approach adopted by the revolutionary committee was by appealing to the class roots of the two disputants. Both *X* and *Y* had grown up as housemaids in a wealthy Chinese home. Their parents were illiterate and were employed as "coolies." Both *X* and *Y* had the same class background, and before 1949, both were

economically and socially oppressed. They were, therefore, class sisters and not class enemies. The fact they had become enemies was by a mistaken interpretation of their roles as class sisters. Their duty was not to extend the disputes of their children but to extinguish them by mediation and by peer pressure. This they should have done alone or with the help of the neighborhood committee. Instead of terminating one dispute, they were told that they had extended it to two. Such a path was a dangerous path. And, therefore, they should recognize their roles as class sisters and work towards harmony and good neighborliness. This line of mediation, supported by peer pressure, within a very short time brought them back to their original roles.

These two examples merely indicate the mediation role that the basic socio-legal unit plays in China.

#### *A Political Unit*

Political education is a necessary step towards the effective implementation of Marxism. The importance of political education has been emphasized by many commentators on Marxist political theory. In a recent commentary on the Chinese legal process, Professor Edwards<sup>48</sup> wrote: "The theme which is stressed perhaps most openly and often in Chinese political propaganda is the need to consolidate and strengthen the proletarian dictatorship. A grasp of the meaning of this term is essential to the understanding of both the theory and the reality of the contemporary Chinese legal process."<sup>49</sup>

To a degree, success in the establishment of the dictatorship of the proletariat may be achieved by the utilization of force. The reliance the revolutionaries placed on armed struggle was a necessary stage through which China had passed. However, 1966-76 was a period of consolidation for China. The need to strengthen and consolidate the dictatorship of the proletariat was uppermost in their minds. Consolidation became of foremost importance the moment the dictatorship was established, which could have been before the commencement of the Cultural Revolution of 1966. The Chinese considered the need to consolidate as particularly crucial at that period of time. They viewed the work of what they called the "gang of four," in the wake of the death of the "Big Three"<sup>50</sup> in 1976, as pos-

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48. *Id.*

49. *Id.* at 46.

50. Namely, Marshall Chu-Teh (the Defense Minister and one-time commander-in-chief of the Red Army) Chou-en-lai (the Prime Minister) and Mao Tse-tung (the Chairman of the Party).

ing a significant internal threat to the social fabric of the nation. In their view, such threats could be best repelled by a correct understanding of the dialectical process of political evolution and not by any form of armed struggle. They, therefore, placed a heavy burden upon the production unit and such other socio-legal units to conduct mass education. Aside from this particular need at this peculiar stage of Chinese history, namely the period of the Cultural Revolution, the need for continuing political education had throughout the years of Communist rule, become one of the more important functions of the basic socio-legal unit. As we shall see later, political education occupies a central and a coordinating position in the Chinese legal model.

#### THE URBAN BASIC SOCIO-LEGAL UNIT

The foregoing is an exposition of the rural Chinese society, taking the production team as the basic socio-legal unit. Besides the production team there are many other socio-legal units, particularly in the urban areas. These are linked to the worker, cadre, serviceman, and student classifications of the Chinese society. In each case, each member within these classifications belongs to two sets of socio-legal units. First, each member belongs to the socio-legal unit at his or her place of work. The concern of this unit is basically over problems associated with the type of work they perform. Except in the case of the socio-legal unit of the students, all other socio-legal units have powers co-extensive with those that have been adumbrated for the production team. In the case of students, they appear to be endowed with a limited law-creating power. This power is limited to interpersonal relationships and does not extend, at least after the dethronement of the "gang of four," to such matters as those affecting their educational institutions.<sup>51</sup> However, even those law-creating powers at the interpersonal level are limited by the students' level of maturity. Subject to this fact, revolutionary committees representing the socio-legal unit even of nurseries do exist. In spite of these limitations, their powers of mediation and conciliation, together with their executive powers, remain untrammelled. It can only be assumed that the socio-legal units in the public security stations and in and among service establishments function similarly

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51. One of the charges made against the "Gang of Four," see note 41 *supra*, was that they tampered with the orderly progression of educational establishments by encouraging the students to participate in the running of schools. This trend was particularly widespread in 1975. By 1977, after the dethronement of the "Gang of Four," the trend had been reversed.

to the production teams, for these two segments of the Republic's armed forces are to a very large extent communized. Although the main focus here is on the administrative functions of the basic socio-legal unit, such units for these groups also perform the functions of an accounting unit, a consultative unit and a political unit. The alter ego of these basic units are the "revolutionary committees," elected in each case for a period of one year. In this aspect too, they resemble the general structure of the production team.

One basic distinction between the organization of the production team among the peasants and the basic socio-legal units among the other four classifications<sup>52</sup> requires emphasis. Unlike in the case of production units, the social situation prevailing in the factories, the department stores, the public security stations, together with the service barracks and the schools, is such that the citizen's life in these social compartments is shared between the work place and home. Insofar as the issues connected with their homes are concerned, their nexus is with the neighborhood committees and with the residents' committees.

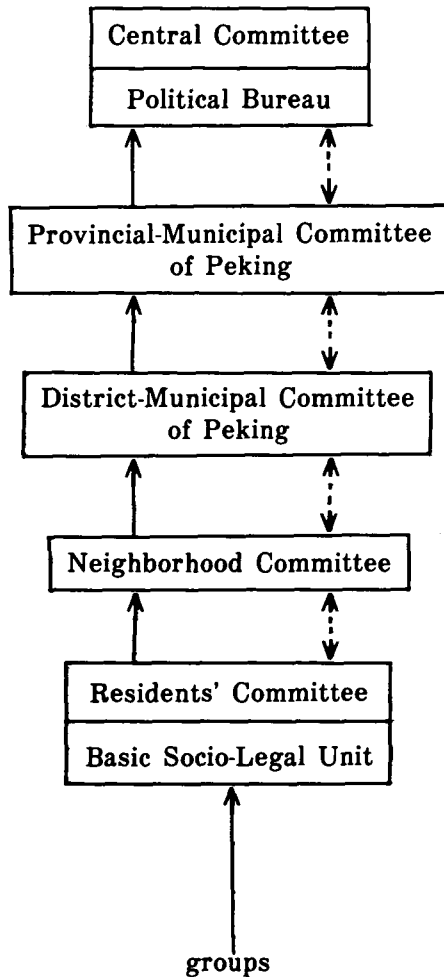
The particular neighborhood committees with which I was associated were within the municipal limits of Peking. They were the Western-City Neighborhood Committee and the Liantzu Residents Revolutionary Committee, both in Peking. Exposing the structure from the top-down one sees a pyramidal model developing. At the top of the neighborhood social structure is the Municipal Revolutionary Committee of Peking. Unlike other cities, Peking is a municipality and does not belong to any particular province or district. Corresponding with the rural commune structure, the Municipal Revolutionary Committee may be compared with provincial revolutionary committees. With reference to any other city, such as Kwangchow, the Municipal Revolutionary Committee of Peking will be paralleled by the Provincial Revolutionary Committee of the Kwangtung Province. Immediately below the Municipal Revolutionary Committee is the District Municipal Revolutionary Committee of Peking. This is again comparable to the district revolutionary committee associated with the communes. With reference to any other city, it could be compared to the district revolutionary committee of the district in which the city was located. Below the District Municipal Revolutionary Committee stands the Western City Neighborhood Committee. This is comparable with the revolutionary

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52. Namely, cadres (white collar workers including teachers), workers (blue collar workers, "hard hats" and factory hands), service personnel (the combined armed forces of the army, navy, the airforce and the students).

committee of a commune. All cities have neighborhood revolutionary committees, like the one here in question, and they each perform the same type of coordinating role as does the revolutionary committee of a commune. The basic socio-legal unit is the residents' committee, whose alter ego is its revolutionary committee. Its parallel is the production team.

ORGANIZATIONAL STRUCTURE  
FOR THE CITY OF PEKING



In the hierarchical structures of neighborhood committees outside Peking, municipal and the district municipal committees are not found. The neighborhood committees in cities outside Peking fall directly under the district revolutionary committee of the relevant district. These committees coordinate the activities not only of the rural communes and their socio-legal units, but also those of the urban residential areas. Peking is the only anomaly, for it belongs neither to a province nor to a district. It is a mere municipality. The Western City Neighborhood Committee has thirty-five residents' committees within it. Liantzu Residents Revolutionary Committee is one of them. This residents' committee extends its control over three lanes, 690 households, and over a group constituting a basic socio-legal unit of 2400 persons. This basic socio-legal unit was almost half the average size of a similar unit in a rural commune, namely a production team. The allocation of power between the residents' committees and the neighborhood committee appear to adopt the same pattern as that between the commune and the production team. Similar to the production team, the residents' committee functions as a basic accounting unit. It receives rents where rents are charged. It keeps the utilities functioning and maintains the general cleanliness of the area. The residents usually meet in groups of 300, once a week. These meetings take place at times when the participants are free from work. Their group discussions are less effusive and less formal than those conducted by the production teams. This fact is explainable on the grounds that the issues submitted for discussion at residents' group meetings are more pedestrian and more localized than the issues that go before a group meeting of a production team. Unlike the production team groups, the residents' groups have very few policy or economic matters to consider. There are no work norms, production norms, production costs, or transport and communication problems. The residents often have the alternative of discussing issues of policy and economics at the group meetings held at their place of work. A large portion of the time spent at neighborhood meetings is devoted to political discussions. Aside from these functions, the resident groups take part in mediation work, under the general umbrella of the neighborhood committee. Although comparative figures are not available, the residents' groups seemingly mediate more in domestic disputes than in other types of disputes, unlike a revolutionary committee of a production team in a rural commune. This fact can be attributed to the increasing stresses of urban living causing domestic disruptions.

It may sometimes appear that the importance placed upon the economic, consultative, administrative and political roles of this urban socio-legal unit is less than the recognition given to similar roles played by the rural socio-legal units, namely the production teams. But the fact that the urban Chinese may have two independent parts to play (one in his place of work and one in his neighborhood) does tend to make the one socio-legal unit appear less important than the other. The general paradigm of governance, however, remains unchanged. The urban social structure and the rural social structure play the same type of role; namely, to provide an institutional framework within which the socio-legal system of China may be conceived. Both the urban and the rural societies provide a politico-economic base structurally suitable to receive the dead-weight of a whole new socio-legal system. The nexus that links the rural components with the urban components of the Chinese society is their common politico-economic base, where both its political theory and its economic theory may be traced to a common source, that is, Marxism-Leninism and Maoism.

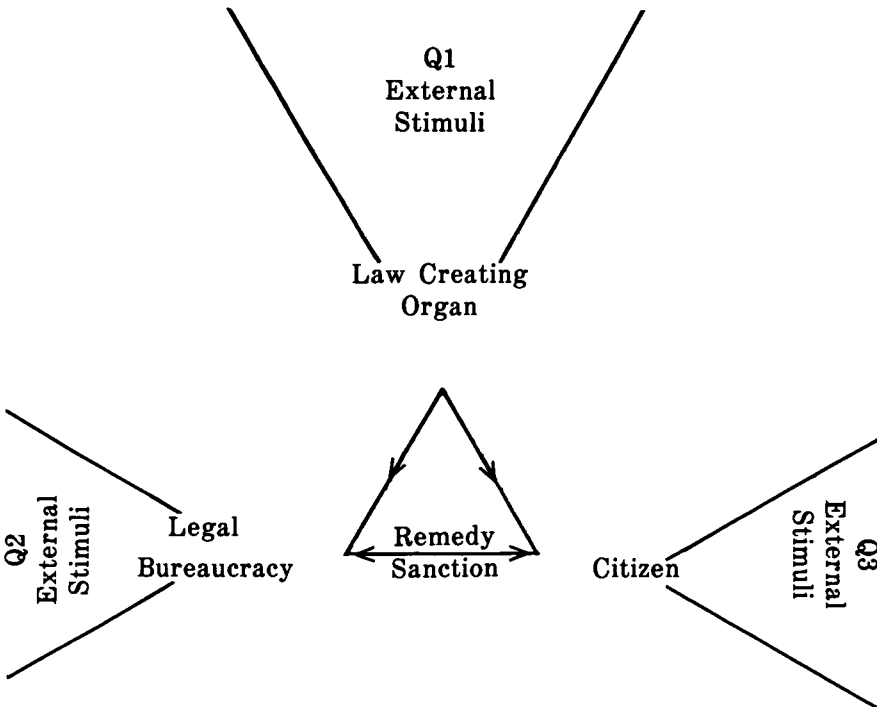
#### REFLECTIONS

It is necessary at this stage to attempt the construction of a model to explain the interrelationships of this mass of empirical data. It is necessary to search for an answer as to what purposes have predicated the development of these types of socio-economic institutions—the production units, the residents' groups and work place groups. Are their roles, which have been adumbrated earlier, designed to play independent parts or interdependent parts? Do they in some way fall into this gigantic jig-saw puzzle which China appears to be? And within the parameters of their own preordained roles, do they appear to function well?

In any system of rules, there always exists a relationship between the source of rule-making power and the legal bureaucracy which *inter alia* enforces the rules. The latter are the various legal institutions ranging from a judge or a lawyer to a jailor. The sources of law are the traditional law-creating organs recognized as such by the legal system. There is also a relationship between the source of rule-making power and the citizen. This relationship is the corollary to the first relationship. When a rule is made, two types of directives move outwards. One directive conveys to the citizen a message as to what activities are permitted and what are prohibited. The other directs the legal bureaucracy as to how they should act, depending on the response the citizen makes to the

directive addressed to him. In one form or another the citizen, the rule-making power, and the legal bureaucracy become linked to form a grand triangle. This could be by way of a sanction, where the directive to the citizen contains a criminal prohibition. Alternatively, the directive could be one of facilitative law, where provision has been made for a remedy, or the enforcement or recognition of a right (such as a rule of contract law, a rule relating to the making of wills, a rule concerning marriage or divorce, or some other broad-based non-criminal matter). In this way a triangular model will result. But this does not represent the complete picture.

#### THE THEORETICAL ASPECTS OF THE SOCIO-LEGAL MODEL<sup>53</sup>



At each angle of this triangle are human agencies performing the functions of the institutions they represent. Human beings function as law makers, legal bureaucrats and as "role occupants." In

53. Seidman, *Law and Development: General Model*, LAW AND SOCIETY REVIEW 316-324 (1972).



each of these capacities, human beings drawn from varying socio-economic backgrounds, espousing varying political ideologies, practicing varying ethical or religious beliefs nurtured in different cultural milieus, may perform the key functions. Subject to all manner of prejudices and biases, each role in this triangular relationship may be played from a heuristic standpoint. Denoting each group of external stimuli that affect the human agencies at each angle of the triangle by the letter Q, we will have three such groups, Q1, Q2 and Q3 to contend with. The pressures Q1, Q2 and Q3, as a rule, are not the same. Therefore, the framework within which the law is created may differ from the framework with reference to which the law is judged. Both these criteria of reference may differ from the conscious attitude of the citizen who is required to respond to the law. His frame of reference, which we may call Q3, would differ from both Q1, and Q2, Q1 being the frame of reference of the law makers and Q2 being that of the legal bureaucracy. This lack of congruence in legal systems has often been noted as the reason for the lack of any functional harmony within them. The corollary to this must be that a system which approaches a functional equality among Q1, Q2 and Q3, must produce the highest degree of internal consistency, the least degree of breaches or violations, and the best opportunity for achieving a stable legal order. That must surely be axiomatic.

Where there is a substantial disparity between Q1 and Q2, the legal system tends to become dysfunctional. The adjudicatory process will have little or no relevance to the goals and purposes espoused by the law creating organs. This could place an inordinate strain upon the socio-legal model.

A substantial difference between the stimuli Q1 and Q3 could lead to an incessant breach of the law. It would result in tension between the citizen and the law creating organ, which could be injurious to the stability of the society.

A difference between the stimuli grouped under Q2 and Q3 could create a breakdown in the legal order. This could lead to such social strains as those witnessed in the United States during the height of the Vietnam War.

The best model for development is one where Q1, Q2 and Q3 approximates equality. The further they move away from congruency, the greater will be the internalized strain upon the system. In such circumstances, the role of the civil libertarians will be to engage themselves in prevailing exclusively upon the law creating agencies to correct the imbalance in the legal system. But their role

is not one of adjusting the external stimuli so as to bring about an approximate equality among Q1, Q2 and Q3. The role of the civil libertarians during a time of increasing stress and strain is a difficult one. This difficulty becomes compounded when their work succeeds in getting a change of the law at Q1, for that could, in a sense, create a greater tension for the legal bureaucracy, with an adverse affect on the citizen. The need is to harmonize the forces comprising of Q1, Q2 and Q3 rather than to change the existing laws by altering the assumptions upon which Q1 operates as the supreme law creating agency. This is not a role which the lawyers or the law reformers are equipped to play. It is a role for those engaged in the area of socio-economic reform. It is this truism that has guided the Chinese communist party, leading it to prepare, as a prelude to the changes that were introduced since 1966, a socio-economic structure locked into a common political philosophy. The ideas regarding socio-economic organization in China were derived from a common political creed. To that extent, the party has provided the country with a common foundation. It is upon this common base that the socio-legal supra-structure rests. The common denominator which underpins the functionaries at the three apices of the triangle are therefore subjected to certain types of stimuli which are, or are at least assumed to be, common to all. By a process of consistent re-education, it is believed that the equilibrium among the several forces can be maintained. Any shifts in the stimuli must be gentle and programmed. The disquieting tendencies recently rumbling out of China are indicative of changes that have occurred suddenly and unexpectedly. The fact that they were neither gentle nor programmed has led, in some quarters, to a breakdown of certain stabilizing aspects of the society. That fact alone is supportive of the general thesis that the cornerstones of a stable basic socio-legal unit could be founded principally upon a common socio-economic base. It is this that makes the Chinese model somewhat attractive to the developing Third World while being a threat to the stability of the First World; the First World institutions have been derived from different philosophical bases and rest on very different foundations. As such, neither the institutions by themselves nor the foundations by themselves could now be changed without changing the entire socio-economic system. That means both the socio-economic substrata and the institutions of the supra-structure would have to be changed. It is this that makes any comparison between the Chinese system and any other system unreal. Equally unreal will be an attempt to evaluate the Chinese system in the light of any other system. The core-question simply is one of functionality within its own framework.

Postulating the foregoing model to explain the functions and the purposes of the basic socio-legal unit in China, it becomes evident that harmony through internal consistency appears to be its avowed goal. By subjecting the law-creating organs, the law-enforcing and adjudicating organs, and the vast multitude of the citizenry to the same kind of external stimuli denoted by Q, the Chinese basic socio-legal unit appears to be an attempt to achieve approximate equality among the three types of institutions<sup>54</sup> that a legal system must necessarily possess. In the Chinese model, decentralization appears to be the key that maintains uniformity in the type of stimuli which fashions the frame of reference within which the three roles are played. Once an internal congruence is struck among these three elements, then it could be assumed that this congruence would lead to internal stability; for the criteria that leads to law making, will be the criteria that would guide law enforcement and adjudication. This same criteria would determine the degree to which it is beneficial to obey the rules. And in the final analysis, it is the same society that plays these three roles, but against different scenes. The fact that every actor in each of these three roles is assumed to come from a common socio-economic background, which espouses common political goals, is said to be fundamental to the success of the dispute settlement process in China.

It is this fact that places a limit upon the concepts of freedom in China, a concern of civil libertarians elsewhere, by subjecting individual rights to a highly politicized code of social ethics, derived from Marxism-Leninism and Maoism. The security and the maintenance of this frame of reference is fundamental to the maintenance of modern China. It is this that makes anti-party activities under the Chinese law tantamount to anti-state activities elsewhere.

There is another aspect of this model which merits attention. The pivotal point which the external stimuli occupy, leading to internal stability, permits the agency which controls the stimuli to effectuate social change within a revolutionary framework by merely adjusting the external stimuli according to social needs. It is this that makes the interdependence of the various roles that the production units play, an important one. It is this interdependence which leads to the interplay of several extralegal forces which ultimately determine the goals of the basic socio-legal units. These goals often broaden into the grand design and purposes of the Chinese legal

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54. Namely, the law creating institutions, the institutions which form the legal bureaucracy and the citizens of the vast social institution—the human society.

system as a whole. The goals themselves may determine the nature and the character of the rules of law. Goals are constantly in a state of flux in China, and will remain so, so long as the evolutionary process of Chinese institutions remain linked to the notion of the "continuing revolution" within the dictatorship of the proletariat. The law and legal institutions too must accordingly change, with the change of emphasis of the assumptions upon which the Chinese society rests at the level of the infra-structure.

