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# CONTEMPORARY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

by

*Beverly May Carl\**

ON December 15, 1978, the President announced that the United States would extend diplomatic recognition to the People's Republic of China. This means that direct banking, shipping, and airline services will now be possible. It also effectively opens for American companies a market of approximately one billion people.

These new opportunities are of special importance to companies in Texas and the surrounding states. Coastal States Gas Corporation of Houston, Texas, has already concluded a contract to buy 3.6 million barrels of Chinese oil at a cost of \$50 million.<sup>1</sup> In December 1978, China agreed to buy seven drilling rigs from LTV Corporation for more than \$40 million.<sup>2</sup> Exxon, Mobil, Pennzoil, Union, and other United States corporations are currently negotiating on what could be a \$5 billion effort to develop China's oil reserves, which may run as high as 100 billion barrels.<sup>3</sup> Such developing commercial transactions will naturally require the services of United States lawyers.

In November 1978, a delegation of twenty-four lawyers from the Section of International Law of the American Bar Association spent eighteen days in the People's Republic of China. All these attorneys were international specialists. The group consisted of a mix of in-house counsel, private practitioners, and academics. Seven members of the delegation spoke Chinese.

The group visited Peking, Nanking, Shanghai, Canton, and several other Chinese cities. They had extensive discussions with lawyers from the Chinese Council for the Promotion of International Trade (CCPIT), the law faculty of the University of Peking, the legal staff of the Chinese Institute of Legal Studies, and five judges of the People's High Court in Shanghai. They also talked with the chairwoman of one of the mediation committees of a neighborhood organization in Shanghai.

The delegation toured a ship building facility in Shanghai, a pig iron factory near Nanking, a silk factory, and numerous small handcraft factories. Near Yang Chow, one day was spent on a commune viewing agricul-

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1. Boyd, *China Could Become Spectacular Market for U.S. Goods*, Dallas Times Herald, Dec. 17, 1978, at A-9, col. 1.

2. Wall St. J., Dec. 21, 1978, at 10, col. 1.

3. Boyd, *supra* note 1.

tural activities and farmers' homes, as well as commune factories, schools, and medical clinics. At each factory and commune detailed discussions were had with the managers about the source of capital investment, treatment of profits, rules of organization, wages and bonuses, as well as methods of dispute resolution.

The following overview of Chinese law is the result of my experience as a member of that delegation.

## I. BACKGROUND

### A. *Summary of Chinese Legal History*

A study of China raises fascinating jurisprudential questions about the role of law and lawyers in a society. Some individuals have naively claimed "China has no legal system." This conclusion assumes a rather narrow view of "what is law."

In fact, traditional China did not have a formal legal system. No civil or commercial codes existed. Courts and lawyers played little, if any, role in the resolution of disputes. Court sanctions were imposed on individuals who violated criminal norms, but judges were quite unimportant outside the realm of penal law. Such judges as did exist were usually not law trained; rather they were frequently classical scholars in the Confucian mold who considered learning legal rules as beneath them. A profession did develop of persons who were expert in penal laws and who advised the judges. However, these legal experts were prohibited from representing private clients. Nonetheless, any society that has endured as long as the Chinese civilization obviously develops some method of authoritative decision-making and of rule application. China did this in ways that may seem strange to the western legal mentality.

The basic technique of social control in traditional China was education along the lines of Confucian ethics or morality—filial duty to family, to employer, and to the emperor. Harmony with nature and with the people around one were the supreme philosophical goals. Balance (yin and yang) in all things was the only acceptable way to live. This religious-philosophical outlook created an inner sense of obligation that provided the prime means of social control for several thousand years.

Directives were issued by the emperor or his delegate; usually obedience by the mass of the population flowed as a natural concomitant of the Confucian filial duty to the ruler. With the goals of harmony and balance, open, and possibly acrimonious, legal disputes appeared quite unacceptable. Moreover, the Bhuddist and Taoist religions, which intermingled with Confucianism in the Chinese minds, tended to produce a relativistic approach: "I am not wrong and you are not wrong. We are both right from our individual perspectives." If this be so, then any decision by a court that says "you are wrong and I am right" is obviously out of tune with the universe. Consequently, the objective of dispute resolution became not to decide who was right, but rather to reach a compromise solu-

tion that saved the face of both parties and restored harmony in the world. To do this, parties sought out a wise and respected person in the village as mediator. His job was to gather facts and arrive at a compromise solution acceptable to both parties. Inter-family disputes were similarly resolved by the clan. Going to a lawyer or a law court was considered disgraceful.

Only in the twentieth century did China begin to adopt a system for formal legal codes, patterned primarily on the German model. After the Communists took over the mainland of China, those foreign based codes became void. Taiwan, on the other hand, still uses these codes with the amendments necessary to reflect modern reality. Mainland China today has no civil code, no procedure code, no commercial code, and no penal code. Courts play but a minor role in the society and few lawyers exist.

This reduced role of lawyers can in part be explained by the nature of a socialist economic system. A very high percentage of American legal work is in the field of private commercial law. Obviously, this would not exist in China. The same may be said for the complexities of United States income and estate tax law. Wills and succession become nearly meaningless in a nation where no one is permitted to accumulate large amounts of property. The absence of private automobiles eliminates a good deal of legal business in the field of torts; a comprehensive scheme of workers' compensation also substitutes for many of our tort remedies. To a large extent, the substantive matters that make up the bulk of business of an American lawyer just do not exist in China. Marriage, divorce, and custody are important legal questions in China and a modern Family Code was adopted in 1950. We understand some amendments are now being prepared to this code.

The Chinese approach to law should be contrasted with that of the Soviet Union. Initially, the leaders in the U.S.S.R. hoped that law and lawyers could be abolished in their new society. Reality eventually convinced them otherwise, and the Soviets ended up keeping their basic Civil Code, which had been patterned on the Napoleonic Code. The objective of law in the Soviet Union became "socialist legality," and an effort has been made to interpret the old codes in light of the Marxian objectives. Lawyers do exist in the U.S.S.R. (although less than in the United States), and courts are considered an important means to resolve disputes. Although previously judges did not have to be law trained, in recent years newly appointed judges in the Soviet Union have had a legal education. The eastern European countries have taken an approach to law similar to that of the Soviet Union.

China's approach to law, then, represents something unique even for the Communist world. In view of the traditional pattern in China, however, one may argue that the Communist techniques of rule making, norm application, and dispute resolution are not really so different from those that have existed throughout Chinese history. Although the Chinese government has passed through a period of repudiating Confucius, it appears the nation's current rulers are using essentially similar techniques of social

control. If state and society are substituted for father or head of clan, the concept of filial obligation still seems evident. Each enterprise and each political cadre receives directives, orders, and notices from the central authorities; to a large extent these may be considered as analogous to laws. Confucian philosophy called on education to form the moral man; the present government likewise uses education and "re-education" to form the good citizen, to rehabilitate the criminal, and to "reform" political dissidents. Mediation is still the main method of resolving ordinary civil disputes in China.

All this does not mean that China is devoid of anything comparable to our statutory laws. By 1954 a Constitution had been adopted and over one thousand economic regulations had been enacted and published as a collection. Work in the legal area was, however, disrupted and virtually halted during the Cultural Revolution and the heyday of the "Gang of Four." Law schools were closed and many of their library books destroyed. Only recently has the Law School of the University of Peking reopened. Likewise, the work of the Institute of Legal Studies stopped for a ten-year period.

With the coming to power of the Hua government and the "smashing of the Gang of Four," the Chinese leaders had decided that the creation of a modern legal structure, at least in some fields, was a prerequisite to the nation's technological advancement. In the spring of 1978 a new Constitution was adopted by the National Peoples' Congress. The November 10, 1978, issue of the *Peking Review* reported a call by the Chinese Communist Party for a discussion on additional ways to strengthen China's legal system.<sup>4</sup> This rekindled interest in law and lawyers made it an especially appropriate time for our delegation to visit China. Chinese officials were anxious to tell us about their plans for new laws—a penal code, a commercial code, a patent law, etc. Likewise, they seemed eager to ascertain whether there was anything in our system that they could usefully copy.

Despite our mutual excitement about these developments, a word of caution is in order. There appears to be a deep distrust of lawyers in the Chinese culture. Many have difficulty in seeing how a lawyer can contribute to the nation's welfare. Attorneys are frequently perceived as creating obstacles and hindering deals that two reasonable nonlawyers could easily conclude. One of the members of our delegation decided that he was going to have new business cards printed for China that would say "trade specialist" rather than "attorney at law."

Since lawyers are suspect, what is the value of a legal education? Some highly competent lawyers we met had never been to law school. The feeling is still strong that two business enterprises should be able to resolve a conflict by amicable negotiations, rather than resort to lawyers and courts. If American lawyers are to work effectively with Chinese officials, we will probably have to show them the usefulness of an attorney as a planner and as one who can help to prevent conflicts in advance.

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4. PEKING REVIEW, Nov. 10, 1978, at 5.

### B. *Economic Backdrop*

Between 1952 and 1971, China doubled her national income.<sup>5</sup> Her per capita GNP grew at an average rate of five to six percent yearly.<sup>6</sup> Contributing to this increase was a reduction in the population growth rates to two percent per year.<sup>7</sup> Usually, rapid economic growth in a developing nation tends to increase the maldistribution of income; but China succeeded in spreading the new wealth around fairly well through the use of small scale local industries operated by the peasants and through a de-emphasis on material incentives. Her aim was a gradual elimination of differentials in pay.

In the mid 1970's, however, economic stagnation set in. One source claimed a zero growth rate for 1976.<sup>8</sup> Chairman Hua stated that as a result of the "interference and sabotage" of the Gang of Four, between 1974 and 1976 the nation lost about 100 billion yuan in the gross value of industrial output, 28 million tons of steel, and 40 billion yuan in state revenues. "The whole economy was on the brink of collapse."<sup>9</sup> Reportedly, there had been no wage increases in the industrial sector for fourteen years.<sup>10</sup>

China's present government is now placing its emphasis on economic growth. The new slogan is "Strive for the Four Modernizations," that is, attempt simultaneously to improve industry, agriculture, defense, and science and technology. It is anticipated the government will increase its investment in agriculture, industry, and higher education, which will leave less for defense and foreign aid. The stress is currently on the practical rather than the ideological. Modern technology is to be acquired from the developed world. Greater incentives will be provided for workers to produce. Education will be directed toward technical competence rather than political purity. These steps may well permit the rise of a new elitism, but the present rulers seem willing to incur this risk.

The Four Modernizations campaign is viewed as requiring links to Japan, the European Economic Community (EEC), and the United States, because only these countries can provide the products and expertise that China needs. China has recognized the EEC and hopes it will be China's major trading partner. The factories we visited used primitive technology, and Chinese admit their technology is twenty to forty years behind the times.

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5. U.S. DEP'T COMMERCE, BASIC DATA ON THE ECONOMY OF THE PEOPLE'S REPUBLIC OF CHINA 14 (OBR 72-047, Sept. 1972) [hereinafter cited as BASIC DATA].

6. WORLD BANK, ATLAS: POPULATION, PER CAPITA PRODUCT, AND GROWTH RATES 6 (1977).

7. BASIC DATA, *supra* note 5, at 14.

8. Wall St. J., Sept. 22, 1977, at 18, col. 4.

9. Hua Kuo-feng, *Unite and Strive to Build a Modern Powerful Socialist Country! Report on the Work of the Government*, in DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 14 (1978).

10. Wall St. J., Sept. 22, 1977, at 18, col. 4.

## II. THE LEGAL FRAMEWORK

A. *International Trade, Investment, Licensing, and Shipping*

The legal staff of CCPIT told us the three principles underlying Chinese law on foreign trade and shipping are: (1) independence and initiative; (2) equality and mutuality; and (3) respect for international contracts. Nevertheless, it appears that the intense desire for outside trade and technology may well erode Mao's treasured concepts of independence and self-reliance.

*Patents and Trademarks.* There is no system in China for the protection of foreign patent rights. The lawyers from CCPIT, however, stated that China will provide adequate protection for patents. At present, it was suggested that the necessary protections should be written into the contract. The government, it was claimed, would protect the patent rights in accordance with such a contract.<sup>11</sup> China is considering enactment of a modern patent protection law.

The Regulations on Trademarks have not been implemented for four years "because of the Gang of Four," but this will now be done. China has recently decided that United States trademarks may be registered even in the absence of a treaty between the two nations because the United States will, in fact, reciprocally permit registration of Chinese marks.<sup>12</sup>

*Maritime and Shipping Law.* Maritime and shipping law was one of the main areas of interest to the Chinese. The CCPIT lawyers told us that China does not recognize the Hague rules and is not bound by them. On the other hand, for bills of lading China refers to the "laws applicable in international practice." Disputes concerning insurance, charters, collisions, and salvage are handled by the Maritime Arbitration Commission.<sup>13</sup> At present foreign arbitrators cannot be selected, but China is willing to reconsider this matter.

China is not a member of any of the international conventions limiting liability in maritime cases. However, China has a 1959 statute that sets the maximum amount of liability at (a) the value of the ship after the accident, plus (b) the value of the freight, including luggage, plus (c) the cost of repairs. This limitation on liability does not apply if the injury was intentionally caused by the defendant or was attributable to his "fault" (gross negligence?).

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11. See also Lubman, *Trade Between the United States and the People's Republic of China: Practice, Policy, and Law*, 8 L. & POL. INT'L BUS. 1, 49-51 (1976).

12. See Regulations Governing Trade Marks § 12(1) (April 10, 1963).

13. See Decision of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission Within the Chinese Council for the Promotion of International Trade (Nov. 21, 1958, St. Council, 82d Sess.), and Provisional Rules of Procedure of the Maritime Arbitration Commission of the Chinese Council for the Promotion of International Trade (Jan. 8, 1959, CCPIT, 7th Sess.), both reprinted in CCPIT, MARITIME ARBITRATION COMMISSION (n.d.).

*Environmental Law.* The aforementioned limitation on liability for ship accidents does not apply in the case of oil pollution. Insurance is available for oil pollution risks from the Chinese Import-Export Insurance and Ocean and Air Transport Company. The CCPIT lawyers mentioned vegetable oil pollution. We asked what damage would flow from vegetable oil. They replied they knew of such a case and that the vegetable oil spill had smothered some of the sea life (plankton?).

Article 11 of the 1978 Constitution obligates the state to protect "the environment and natural resources" and to "prevent and eliminate pollution and other hazards to the public." The government is now working on an environmental protection law.

*Imports and Exports.* Japan and China have signed a \$20 billion trade accord under which the Japanese will construct a \$4 billion steel mill outside Shanghai and export at least \$10 billion worth of machinery and technology to China in the next thirteen years. Britain has just sold \$315 million worth of coal mining equipment to China. West Germany is negotiating a \$4 billion deal to build and upgrade coal mines and hopes to construct a \$14 billion steel complex in Hopei province. United States businessmen sold \$83 million worth of goods at last month's Canton Trade Fair. The United States will probably sell a total of \$700 million to China this year, the bulk in wheat, cotton, and soybeans.<sup>14</sup>

The lack of a commercial code was mentioned as one of the biggest obstacles to the development of further international economic relationships. Repeatedly, we were told that drafting such a commercial code was a top priority for the government.

*Joint Ventures, Turn-key Projects, Management Contracts and Equity Investments.* Prior to our visit, China had already been authorizing several kinds of joint operations with foreign companies. First is a straight assembly or processing arrangement. The foreign firm provides the materials for assembly or processing inside China; the finished product is then re-exported to the foreign company, which pays the Chinese enterprise a fee for the work done. Chinese labor costs about \$25 per month, about one-fifth the average wage for an unskilled factory laborer in Hong Kong. In Shumchun, near Hong Kong, Chinese workers are producing handbags, ready-wear clothes, and artificial flowers from materials provided from a company in the crown colony.<sup>15</sup>

A second kind of joint venture consists of the foreign company's providing the required capital equipment to the Chinese enterprise and the foreign concern receiving payment therefor in the form of reduced prices for the output of the Chinese factory. In the case of minerals, this may consist of a promise to sell a stipulated amount of the mineral or ore to the foreign company at a certain price.

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14. TIME, Nov. 27, 1978, at 8, 11 (Asian ed.).

15. *Id.* at 11.



The third category of permissible arrangements are licenses or turn-key contracts. Under the latter, the foreign company builds the factory, turns it over to the Chinese, and leaves. In Nanking, we talked with some foreign technicians who were just finishing two years constructing a synthetic fertilizer plant. That factory is about to be turned over to the Chinese. The foreign company will receive its money, pack up, and go home. One of these technicians expressed doubts about the ability of the intelligent but technically unsophisticated Chinese workers to keep the plant running. The foreign company, however, would have its money and "wouldn't care what happens afterwards." Someday an American lawyer may represent the Chinese government in negotiating these technology transfer contracts. This fertilizer case raises the prospect that, in future contracts, the representative for the Chinese side should insist upon a clause requiring the foreign company in a turn-key project to continue providing necessary technical services even after completion of the project.

A new type of joint venture structure was approved during our visit to China. A one-half billion dollar contract was concluded for Inter-Continental Hotel Corporation to build some 5,000 hotel rooms. The United States company will put up the money, construct the hotels, and train the staff. Inter-Continental's financial input is treated as a loan repayable over a ten-year period in equal annual installments. The loan is guaranteed by the Bank of China. However, in addition to interest on the loan, Inter-Continental will reportedly receive a share of the profits.<sup>16</sup>

In addition, the Fluor Corporation has just been awarded a cost plus contract to develop a large copper mine. Fluor will design and manage the copper mine and concentrator. The project value is estimated at \$800 million.<sup>17</sup>

Several months ago it was announced that China would enter joint equity investments in Hong Kong and Macao with foreign private firms. At the end of our trip it was reported that a French economic delegation had been told in Peking that foreigners will be allowed to make direct equity investments in China providing that the Chinese hold at least fifty-one percent of the ownership interest.<sup>18</sup>

*Finance.* China, in a reversal of its former policy, is now willing to borrow money from abroad. Recently she accepted \$15 million in development aid from the United Nations.<sup>19</sup> The Bank of China is opening a branch in Luxembourg. Full trade relationships, including letters of credit, have been established with the Bank of Chicago. Because the United States government has frozen Chinese assets,<sup>20</sup> the Chinese depos-

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16. Wall St. J., Nov. 9, 1978, at 16, col. 2.

17. *Id.*, Dec. 8, 1978, at 7, col. 1.

18. *Id.*, Nov. 27, 1978, at 1, col. 3.

19. TIME, Nov. 27, 1978, at 8, 19 (Asian ed.).

20. See Somerfield, *Treasury Regulation of Foreign Assets and Trade*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 265 (2d ed. W. Surrey & D. Wallace 1977).

its for the time being will probably not be located within the United States, but with a big international bank, such as the Bank of Chicago, this presents no practical problem.

In general, China accepts the international practice as to letters of credit. But, we were told, China does not accept the ICC rules about payment against a set of documents. China does not agree as to the effect of all these documents.<sup>21</sup>

China is currently negotiating a number of foreign loans from private and public sources. According to *Time Magazine*, if all these loans materialized—tens of billions of dollars—China would instantly be transformed from a good credit risk into a country with a dangerously high debt load.<sup>22</sup> In any event, foreign private banks may not be willing to lend on the concessional terms being asked by China.

*Settlement of Disputes with Foreigners.* In 1954 China adopted a statute creating a Foreign Trade Arbitration Commission with jurisdiction over disputes arising from contracts and transactions in foreign trade with foreign companies.<sup>23</sup> The arbitrators are drawn from the Chinese Arbitration Commission. The Chinese far prefer to settle disputes through mediation, or amicable negotiations between friends. However, they now indicate they are willing to go to arbitration and possibly in the future may consider the use of courts. Recently, the CCPIT cooperated with the American Arbitration Association to resolve a dispute through joint conciliation. The matter involved an allegedly defective shipment by a United States firm to China.

An award of either the Chinese Foreign Trade Arbitration Commission or the Maritime Arbitration Commission "has the force of law and there is no need to register and keep it in a court of law."<sup>24</sup>

In case an award which is to be executed in China is not executed by one party after the expiration of the fixed time, the other party may petition the People's Court of the People's Republic of China to enforce it in accordance with the law. In the twenty years and more since the founding of New China, there has never been a single case that has to be enforced by the People's Court. The Chinese foreign trade and maritime enterprises are state-owned enterprises. They respect the arbitration awards. Where it is their obligation to execute an award, they will do it themselves.<sup>25</sup>

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21. See also Lubman, *supra* note 11, at 27 n.62.

22. TIME, Nov. 27, 1978, at 8, 19 (Asian ed.).

23. See Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade (May 6, 1954, Gov't Adm. Council, 215th Sess.), and Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (March 31, 1956, CCPIT, 4th Sess.), both reprinted in CCPIT, FOREIGN TRADE ARBITRATION COMMISSION (2d Impression 1961).

24. Jen & Liu, Arbitration in China 8 (n.d., current as of 1978) (prepared by Foreign Trade Arbitration Commission & Maritime Arbitration Commission).

25. *Id.*

Although not currently a member of the United Nations Arbitration Convention, China is considering ratification of that Convention. About fifty nations, including the United States, belong to this Convention.<sup>26</sup> Meanwhile, China will "execute foreign arbitral awards so long as they are fair and not in violation of Chinese laws and practice."<sup>27</sup>

The CCPIT lawyers suggested that, in drafting an arbitration clause today, there were several alternatives for the place of arbitration. First, it might be in the United States or China. Alternatively, it could be in the place where the defendant is located. Finally, it could be in a third country. Generally, they feel the arbitration should be governed by the procedural rules of the nation where the arbitration is located.

### B. *Economic Law: Domestic*

*Industrial.* Much of the following data was obtained through interviews at the industrial factories visited.

*Capital and Profits.* Currently, an industrial enterprise must transfer its year-end profit to the state. In turn, the government will give back to the enterprise capital funds necessary for the coming year. For example, the iron factory receives its capital from the Ministry of Metallurgical Industries. The amount of capital transferred to the enterprise by the government does not depend upon the enterprise's profitability the prior year, but on its size, number of employees, and types of welfare programs.

The Chinese leaders, however, are now considering a revision of this scheme. The Adviser to the Chinese Economic Research Institute says the government will use the term "profit" and will determine it as a rate of return on the investment. Calls are being made for greater accountability on the part of these state enterprises. If the return on investment is too low, management will have to answer. The plant might even be closed down. Likewise, in case of losses, the employees should be able to complain to the Communist Party and have the manager of the enterprise removed. In an article entitled "Establish and Improve the System of Maintaining Earnings for Enterprise Funds" in the September 2, 1978, issue of the *People's Daily* newspaper, it was stated that a draft Decision on Problems of Accelerating Industrial Development would authorize a state enterprise to retain a certain portion of its profits once it has fulfilled the state plan. "For profitable enterprises more funds will be available [for reinvestment] and employees will receive more income." Conversely, if the enterprise incurs a loss, the employees would receive smaller bonuses.

In addition, the domestic banking system is expected to finance a larger share of internal investment. Enterprises will be required to prove economic feasibility of their projects and to repay their loans.

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26. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, cited in U.S. DEP'T STATE, TREATIES IN FORCE 261 (1977).

27. Jen & Liu, *supra* note 24, at 9.

*Business Taxes.* Most industrial enterprises are subject to a tax of about five percent on gross income. We questioned the need for such a tax when all the profits are turned over to the state anyway. It might be observed, however, that the state receives this five percent off the top, whether or not the enterprise is profitable. If the new proposals mentioned above become effective and enterprises are permitted to retain some of their profits, then this tax on gross income will become significant.

*Organization of Enterprises.* These enterprises are operated under a system of "Director's Responsibility under Party Leadership." The Shanghai Shipyard, for example, is under the supervision of both the Ministry of Transportation and the Shipyard Bureau of the Shanghai Revolutionary Committee. Similar patterns were found for other industrial enterprises; for instance the iron factory came under the jurisdiction of the Ministry of Metallurgical Industries. The managers of these factories were appointed by the appropriate ministry with the consent of the local revolutionary committee. These revolutionary committees are executive organs of the government.

The workers' organizations do not play a direct role in management. If the workers wish to have a manager or a cadre removed they have to submit such request to the ministry concerned and to the local revolutionary committee. There are indications that some factories may shift to a system of election of foremen by the workers. At the shipyard, we were told there is a yearly conference of workers' representatives. At these conferences questions discussed are production matters, welfare facilities, and proposals to remove managers.

Reportedly, the Chinese have shown some interest in the Yugoslav worker management system. Basically, this permits representation of the workers on the board of directors, selection of the managers by the workers, and division of the enterprise's earnings among the workers. One Chinese authority stated that, although it was important to strengthen the principle of socialist democracy and worker participation, China was not yet ready to follow the Yugoslav model.

*Internal Rules.* The managers at the iron factory stated that no internal rules or regulations were possible until the Gang of Four had been smashed. Now, however, the enterprise has developed a set of regulations designed to establish quality and financial controls, as well as to ensure proper repair and maintenance of machinery. We were unable to obtain a copy of these rules.

*Quotas and Wages.* To some extent production quotas are assigned by the central authorities; however, they attempt to keep the number of quotas to a minimum because of insufficient accounting and statistical data to establish reasonable quotas. Apparently, a good deal of quota setting is done at the local level.

Article 10 of the new Constitution provides: "He who does not work,

neither shall he eat" and "from each according to his ability, to each according to his work." In commenting on this provision, Chairman Hua said: "With regard to distribution, while we should avoid a wide wage spread, we must also oppose equalitarianism and apply the principle of more pay for more work and less pay for less work."<sup>28</sup>

All factories visited reported that they had an eight-grade wage system. The shipyard wages ranged from 42 yuan to 124 yuan per month (one yuan equals about 61 cents). Operators of the very large cranes fell within the middle grade level. The iron factory managers stated that the lowest grade, that of an apprentice, received 42 yuan in Shanghai and 32 yuan in Nanking. Most workers in the iron factory were in the lower grades and the average wage was 55 yuan per month. Workers in hardship posts received extra pay, as did those who worked on Sunday or holidays. Night workers do not receive extra pay, but are entitled to special perquisites.

Workers are paid bonuses if they exceed their production quotas, economize on materials, institute technical innovations, or produce goods of high quality. The bonuses are paid on an individual basis. Bonuses at the iron factory average 6.25 yuan per month; the shipyard reported monthly average bonuses of 21 yuan. Insofar as we were able to determine, managers do not participate in the bonus system.

These wage scales and bonus figures have little meaning unless one understands the economics of a worker's life. We visited workers' homes at the iron factory, at a residential community in Shanghai, and at a commune. As a general pattern, it appears that two-room apartments are made available for five or six persons. Kitchens and toilets are often shared with one other family. Public bathing facilities are provided for the entire factory or community. The apartments, houses, and furnishings we saw were simple, but adequate. Medical care and education are virtually free throughout China.

At the iron factory, we saw the home of a shop foreman and his wife, a supply department worker. They have three minor children. Both spouses together earn 150 yuan per month. Living quarters cost them 5 yuan monthly (rent, electricity, and other utilities); food about 80 yuan; and the remainder goes for clothes and savings for consumer goods. They reported saving about 50 yuan per month in a bank account which pays two to three percent interest.

In the Shanghai residential community, we visited the home of a retired worker. Retirement pay equals seventy percent of one's last wage rate. This lady reported a total family income of 190 yuan per month (including income of husband and children). About 10 yuan went for rent and utilities, 100 for food, some for clothing, and the remainder for savings. She had purchased an electric fan and was now saving for a color television. Ration cards are required for milk.

*Contracts Between Enterprises.* In contrast to the Soviet Union, the

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28. Hua, *supra* note 9, at 63.

Chinese Communists at an early stage decided to decentralize to the degree possible decision-making as to allocation of resources. A series of contracts between producing enterprises and users was the principal technique used to obtain this goal. In other words, the manufacturer would be responding to the demand of the buyer rather than those of some remote bureaucracy in Peking.<sup>29</sup> For example, the manager of the silk mill said that a contract with the purchaser is made in advance for each order and each design. The Shanghai Shipyard indicated a contract was made with the Ocean Shipping Company for every job.

Now, however, it appears that this contract system has not been adequately enforced. On October 16, 1978, the *People's Daily* urged greater "reliance on contracts and strict legal relationships among producing organizations" as well as the establishment of contractual relationships between various units of people's communes. Hu Chiao-mu, Chairman of the Academy of Social Sciences, has called for promoting the contract system and enforcing economic legislation. Although the present contract system "has a bureaucratic streak of forms in triplicate . . . numerous tales of malfeasance disclosed recently suggest that often the paperwork is a mere formality and is not binding."<sup>30</sup> For example, the *People's Daily* reported that numerous purchasing enterprises have failed to pay the Peking Heavy Electrical Equipment Plant in accordance with their contracts.<sup>31</sup> The Peking plant now has over twenty million yuan in uncollectible receivables. As a result, this otherwise efficient plant has had to borrow funds for working capital needs and to incur the interest expense therefor. Such situations have caused Chinese officials to stress the need for a commercial code and for strict compliance with its provisions.

*Settlement of Disputes Between Enterprises.* The high court judges of Shanghai stated that disputes between enterprises were settled by the Shanghai Revolutionary Committee, not the courts. The manager of the iron factory identified the Ministry of Metallurgy as the agency to settle disputes between that plant and other enterprises. This form of administrative mediation between enterprises is no longer considered effective, and arbitration commissions or economic courts may be established. Jurisdiction of such courts would probably include all economic transactions among communes and state enterprises.

The Shanghai Shipyard director said that if they were late in performance of a contract, they had to pay a penalty, which came out of the enterprise's profits. If workers are given a larger share of profits in the future, such penalties could directly affect them. As to quality, the shipyard indi-

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29. See Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L. REV. 261 (1973).

30. Bonavia, *China Learns from Bourgeoisie*, FAR EASTERN ECON. REV., Oct. 27, 1978, at 38.

31. Ho Cho-Hsin, *Economic Contracts Should Have Force*, *People's Daily* (Peking), Nov. 9, 1978, at 2.

cated that the final decision is made by the State Inspection Bureau. If the Bureau passes a ship or a repair job, there can be no dispute as to quality.

*Agricultural Communes.* We visited the Wantou commune, located several hours outside Nanking by road. This commune encompasses 26,000 peasants and twenty-seven production teams. Fresh-water shrimp and other fish are grown in ponds; two to three crops of rice and one crop of wheat are produced yearly; pigs and vegetables are also produced. Seventy-five sluice gates and bridges have been built here. This commune has twenty-five agro-factories, producing seventy products (vacuum pumps, boilers, threshers, winnowers, electrical wire, and writing brushes). The factories also repair the farm equipment. The commune has seventy-eight electrical pumping stations, seven tractors, twenty-three rice transplantors, and seven small harvesters. These machines are shared by all teams on the commune.

The commune has twelve elementary schools, eleven high schools, one hospital, and twelve medical clinics. Six thousand children are enrolled in the schools. The commune leaders said that the life of the peasant is still "not well-to-do," that farming is not sufficiently mechanized, and that they are determined to increase grain output.

*Collective Ownership and Distribution of Income.* In the 1950's an effort was made to eliminate private farming. This proved disastrous and farmers are now permitted to own a small private plot, the size of which "shall be determined by the number of persons in the household and the total amount of land in the particular area." No person may retain land "exceeding five per cent of the per capita land-holding in the village."<sup>32</sup> Commune members may also keep a limited number of livestock for personal needs and engage in limited household sideline production.<sup>33</sup> Farmers have been earning an average of 100 yuan per year from their private plots.

The remainder of the commune agricultural land is held collectively. To cover production expenses, such as seed, fertilizer, and fodder and to buy draught animals and farm implements, the commune collected "share funds" from its members.<sup>34</sup> After a sufficient amount for reinvestment has been set aside, the profits are divided among its members.<sup>35</sup>

Communes are organized into three levels: the over-all organization is the commune; below that are the brigades; finally, brigades are divided into production teams. Originally, it was thought that the profits should be divided at the commune level. Then this was decentralized to the brigade level, and finally is now down to the production team level of perhaps a

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32. MODEL REGULATIONS FOR AN AGRICULTURAL PRODUCERS' CO-OPERATIVE art. 17 (2d ed. 1976).

33. CONST. art. 7 (1978), reprinted in DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 125 (1978).

34. MODEL REGULATIONS, *supra* note 32, art. 32.

35. *Id.* arts. 60-63.

few dozen families. The new Constitution specifies the production team as the basic accounting unit, but adds that the brigade may become the basic accounting unit when conditions are ripe.<sup>36</sup> Individual members share in the proceeds in accordance with the number of work points they have earned. Today each production team independently supervises the work of its members, directly sells its products to the state, and determines the distribution of its income. The commune itself is responsible for overall policy, for management of the commune's factories, and for implementation of the party line. The main income of the commune comes from the factories and side enterprises.

At this particular commune, we were told the gross income last year was 5.5 million yuan, of which 2 million yuan came from agriculture and the remainder from the commune factories and other side occupations. A tax of 3.5 percent is imposed on the gross income of the commune. After deducting expenses, 3.5 million yuan remained. Of that, 2 million yuan were distributed to the peasants as income and 1.4 million yuan retained for reinvestment. If a commune has a bad year, the government will subsidize it by providing food, machines, etc. It was pointed out that some areas in the north of the country had been severely hurt by the earthquake; the government gave those people materials and clothing.

*Organization.* This commune is under the supervision of a twenty-five-member Revolutionary Committee of the province and the thirteen-member Communist Party Committee. Major projects and basic policy are established by the party committee. The chairman and managers of the commune are elected by its members. They work out production plans on the basis of the targets that have been set for the county. These goals are then discussed with the peasants before final decision. Production teams are thereafter responsible for implementing the decisions.

*Sales.* As a general rule, no prior contract is made between this commune and the end users. The purchase plan is worked out by the county and leaves a certain amount of flexibility. Usually, we were told, production is in excess of production goals. The prices for these agricultural goods are set by the central authorities in Peking, but vary from region to region because of cost differentials. The state also fixes slightly higher prices for the peasants' private agricultural products.

A new law, Articles on People's Communes, is currently being revised and will be published. Some believe this legislation will allow the peasant to contract with the commune for his collective production share and to make private contracts for goods from his own plot.

*Housing.* Rural housing is privately owned. It may be bought and sold; the price, however, must be fair and must be reported to the government.

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36. CONST., *supra* note 33, art. 7.



*Individual Work.* The 1978 Constitution, article 5, also authorizes individual work by nonagricultural laborers so long as it does not involve "exploitation by others." This right may be limited by law and the Constitution directs the state to guide these individual laborers "step by step onto the road of socialist collectivization."

### C. Other Legal Areas: Domestic

*Freedom of Expression and of Religion.* Article 45 of the new Constitution provides for freedom of speech, correspondence, the press, assembly, association procession, demonstration, and the freedom to strike. Individuals also have the right to "speak out freely, air their views fully, hold great debates and write big-character posters." Recently the *Daily Telegraph* of London reported a wall poster in Peking urging President Carter to "pay attention to the state of human rights in China. China is a quarter of mankind. The Chinese people do not want to repeat the tragic life of the Soviet people in the Gulag Archipelago."<sup>37</sup> The next day, this position was vehemently attacked in another wall poster. A few days later, the President of the Chinese Supreme Court was reported as calling for free speech and human rights. In addition, he is said to have demanded prompt and complete rehabilitation of all those wronged or misjudged by courts under the influence of "the Gang of Four."<sup>38</sup>

Article 14 of the new Constitution calls for the state to apply the policy of "letting a hundred flowers blossom and a hundred schools of thought contend." The Report on this Constitution states:

Outside the ranks of the people, it is criminal to allow counter-revolutionaries to be unruly in word or deed and it is legitimate to exercise dictatorship over them . . . . Within the ranks of the people, it is criminal to suppress freedom, to suppress the people's criticism of the shortcomings and mistakes of the Party and the government or to suppress free discussion in academic circles.<sup>39</sup>

Under the hundred flowers policy, so long as the six political criteria are observed, different forms and styles in art should freely develop, different schools in science should freely contend and questions of right and wrong in the arts and science should be settled through free discussion in artistic and scientific circles through practical work in these fields.<sup>40</sup>

The extent of freedom the government will permit under these provisions remains to be seen. During our stay in China, we did see three theatrical performances that had been previously prohibited. All three were simple love stories with virtually no political content.

Article 46 of the Constitution gives citizens freedom to "believe in reli-

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37. Dallas Times Herald, Dec. 9, 1978, at A-7, cols. 3 & 4.

38. *Id.*, Dec. 16, 1978, at A-5, col. 1.

39. Yeh, *Report on the Revision of the Constitution*, in DOCUMENTS OF THE FIRST SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 173, 210 (1978).

40. *Id.* at 211-12.

gion and freedom not to believe in religion and to propagate atheism." In fact, we saw no signs whatever of religious activity during our stay. The Bhuddist pagodas and other temples visited were treated as museums. What the future will bring to religion in China remains to be seen.

*Criminal Law.* Western lawyers have been surprised by criminal trials in China, which seem to consist of repentant confessions by the defendant accompanied by accusations and discussions by his neighbors or co-workers. The reaction may result from a misunderstanding of the purpose of a trial in socialist China. Unlike our system, a trial in China is not usually where guilt or innocence is established. That determination has been made earlier by the public security agency and in most cases is not open to question.

The trial, then, is analogous to a theatrical performance. It is intended to elicit from the defendant self-criticism, confession, deep repentance, and reformed attitudes. At the same time, the masses (neighbors and/or co-workers) who participate in the trial are similarly involved in an educational process designed to impress upon them the duties of a good citizen. Article 41 of the new Constitution stipulates that "representatives of the masses participate as assessors in administering justice. With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions." This same article provides that all cases in the people's court "are heard in public except those involving special circumstances as prescribed by law."

The defendant has the right to represent himself or to be represented by another. In major cases the court may appoint someone to represent the defendant. The representative need not be a lawyer. For instance, if the defendant were deaf and dumb, the judge would appoint someone who knew sign language; if the case involved a technical matter, a technician would be appointed. Minorities are entitled to use their own language in court.

The objective of sentencing is punishment with leniency. Severe punishment is meted out to those who refuse to acknowledge their criminality; leniency to those who repent. The sentence depends on the attitude of the defendant and the degree of indignation of the masses. Possible penalties include (a) probated sentence up to three years under the surveillance of the masses, (b) penal servitude, consisting of labor reform and re-education, for a term, (c) life imprisonment, or (d) death sentence, which is imposed when a murder is harmful to the state or the people.

After the trial, either party may appeal within ten days. This applies to both civil and criminal cases. The right to the first level of appeal is automatic. The first level appellate court holds a trial *de novo*. The appellate court may decrease the penalty; alternatively, if the higher court believes the penalty is insufficient, it may return the case to the lower court with instructions to consider increasing the sentence. About twenty percent of the cases are appealed.

*Class Discrimination.* Previously, Chinese law sanctioned discrimination against individuals based on their class origin. Persons who had been landlords, rich peasants, counter-revolutionaries, or rightists, as well as their children, could be deprived of their political rights and subjected to more severe punishments.<sup>41</sup> The 1978 Constitution also provides that the state shall deprive "of political rights, as prescribed by law, those landlords, rich peasants and reactionary capitalists who have not yet been reformed."<sup>42</sup> "[A]t the same time," the Constitution continues, the state shall provide such persons "with the opportunity to earn a living so that they may be reformed through labour and become law-abiding citizens supporting themselves through their own labour." Punishment of "traitors and counter-revolutionaries, . . . and new-born bourgeois elements and other bad elements" is authorized.<sup>43</sup>

*The Procuracy.* The new Constitution revives the institution of the procuracy. The procuracy is not merely an attorney general's office, but really a type of ombudsman intended to ensure observance of the Constitution and law by all the organs of the state.<sup>44</sup>

During the Cultural Revolution, the procuracy was destroyed. This eliminated the previous systems of checks and balances between the office of public safety, the procuracy, and the courts. Thus, political cadres, as well as others, were left exposed and vulnerable. As China's current leaders admit, this permitted too much flexibility and led to grave abuses. Mr. Yeh's report on the new Constitution states,

Detention and arrests must follow legal procedures and the system of checking and approval must be strictly observed in this regard. In the trial of cases, stress must be laid on the weight of evidence and on investigation and study. To obtain confessions by compulsion and then give them credence is strictly forbidden.<sup>45</sup>

Article 47 provides that no citizen may be arrested except by decision of a people's court "or with the sanction of a people's procuratorate." The arrest may be made only by a public security organ. Apparently, the procuracy has not yet been fully re-established, but Chinese officials state this is the intention of the government.

As indicated above, the Chinese officials stressed the importance of enacting a criminal code and a criminal procedure code. Many considered this the top priority.

*Prisons.* A full morning was spent at the Shanghai Prison, the only prison in the Shanghai District. The building was constructed by the British in 1905-06. According to the Political Commissioner of the prison, many Chinese Communists had been incarcerated here before the revolu-

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41. Herbst, Book Review, 30 STAN. L. REV. 469, 471-72 (1978).

42. CONST., *supra* note 33, art. 18.

43. *Id.*

44. *Id.* art. 43.

45. Yeh, *supra* note 39, at 198.

tion and "this jail was hell." Today, he said, they follow Mao's philosophy that a "prison should be turned into schools, factories and farms." The primary goal is reform through labor and re-education.

This prison currently has 2,600 inmates, of whom 200 are women. We saw the prison workshops, which included watch-making, garment manufacturing, and printing. Also viewed were the cells, the hospital, and the exercise grounds. The cells were simple, but adequate. The working conditions in the factories were excellent for a poor nation. The prisoners appeared well fed and their clothing sufficient. Cleanliness prevailed everywhere. The inmates were working very diligently, but the atmosphere seemed one of hard work and hope, rather than despair or fear.

We were told the inmates labor eight hours per day, sleep eight hours, study two hours, and have the remainder for leisure. The materials used for re-education are the writings of Lenin, Marx, and Mao, as well as the Constitution, newspapers, and radio reports. Self-study, lectures by other prisoners, and talks by outsiders are all used. Those who "reform" and perform well are praised by the authorities and awarded small gifts. We saw a testimonial by one prisoner expressing his gratitude on winning a teacup and towel. The prison authorities may also suggest to the court that "good" inmates be released early. The Commissioner described most prisoners as "good" and claimed the recidivism rate was less than one percent.

Problem prisoners receive demerits and in extreme cases may be subjected to solitary confinement. Likewise, the prison officials may suggest to the court that the inmate's sentence be increased. It is forbidden to beat or insult prisoners; they must be given enough to eat and wear as well as medical services. Inmates may wear their own clothes if they wish.

The inmates are not paid for their work. Twenty million yuan was earned last year through prison labor. The prison does, however, give the inmates pocket money, and secures a job for each inmate prior to his release. In response to our inquiry about escapes, the Commissioner said he believed there was one a number of years ago, but that "there was no point in escaping, because in this highly organized economy, there would be no place for an escapee to go." Families of inmates are allowed to visit once a month; more frequently, if special reasons exist. The family is also brought into the re-education process. Inmates may write families and friends once monthly and more frequently for good reason.

About ten percent of the prisoners were described as counter-revolutionaries. The remaining ninety percent were common criminals, imprisoned for theft, embezzlement, rape, or murder. The counter-revolutionaries, whose numbers are allegedly decreasing, were divided into three groups by the Commissioner. First are the historical counter-revolutionaries, that is, war criminals, officers of the Kuomintang, and agents for the imperialists. The lower level officers of the Kuomintang were "released long ago." Now most of the high officials have been released, and "some have been permitted to go to Taiwan." The second category was spies and agents for foreign governments. The Commissioner said there were some foreign

spies in this prison, although recently they had released two Japanese spies. The third category is the "new born counter-revolutionary." These are people who "undermine the socialistic revolution by spreading counter-revolutionary slogans or hindering production." Very few such individuals exist "now that the Gang of Four has been smashed."

Women are not imprisoned while pregnant or nursing; during this time, they serve outside the prison under the surveillance of the masses (neighbors or co-workers). After termination of nursing, a woman will be incarcerated if her sentence is a long one. If the sentence is short, the woman may be excused from the rest of the sentence, provided she was well behaved during the surveillance period.

For minor crimes, juveniles are simply "re-educated" by their families, schools, and neighbors. For serious crimes, they are sent to labor reform camps for juveniles. In the countryside, adult offenders are also frequently sent to adult labor reform camps in lieu of prisons. Persons whose criminal behavior is the result of mental illness are sent to psychiatric hospitals.

*Torts.* Formal tort law seems very undeveloped, although in practice the mediation committees discussed below may provide fairly equitable remedies in ways that do not easily fall within western doctrinal categories. As usual, the Gang of Four was blamed for many injustices, and we were told of some interesting adjustments. In certain instances, the state is providing pecuniary compensation to individuals who were wrongfully accused and imprisoned during the reign of the Gang. Last summer steps were taken to compensate work brigades whose legal rights were violated by improper transfers of laborers or materials. Reportedly, one commune was paid U.S. \$1 million for an illegal transfer of labor and materials.

Industrial workers are covered by workers' compensation, but agricultural commune members are not. Hence, an injured agricultural worker would have to seek damages from the tortfeasor. In assessing damages, however, one would have to consider the ability of the defendant to pay. This consideration particularly concerns Chinese legal thinkers in developing remedies for environmental pollution.

*Family Law.* Article 1 of the 1950 People's Marriage Law provides, "The feudal marriage system based on arbitrary and compulsory arrangements and the supremacy of man over woman, and in disregard of the interests of the children, is abolished."<sup>46</sup> The new marriage system is based on "free choice of partners, on monogamy," and "on equal rights for both sexes."<sup>47</sup> Husband and wife have "equal rights in the possession and management of family property."<sup>48</sup> Both husband and wife have the right to use his or her own family name.<sup>49</sup> Bigamy, dowries, child betrothal, and concubi-

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46. THE MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 1 (3d ed. 1973).

47. *Id.*

48. *Id.* art. 10.

49. *Id.* art. 11.

nage, are prohibited.<sup>50</sup> Prostitution is illegal and apparently both prostitution and venereal disease have been eliminated.

Divorce by mutual consent may be granted, but only after mediation and judicial conciliation efforts have failed. If one party alone wishes a divorce and if reconciliation efforts have failed, the court will decide the question.<sup>51</sup> After divorce, the guiding principle is to allow the mother custody of a breast-feeding infant. After weaning, custody should be awarded in "accordance with the interest of the child."<sup>52</sup> Both parents continue responsible for the support and education of their children following divorce.<sup>53</sup> If one party has not remarried after the divorce and has maintenance difficulties, the other party should render assistance."<sup>54</sup>

The Constitution obligates the state to provide for family planning.<sup>55</sup> A group of American birth control experts was traveling in China concurrently with us. They concluded that China had solved her population growth problems. All techniques of birth control are available. In addition, intense social pressure is placed on couples to limit their families to one or two children. Late marriage is de rigueur. Marriage requires permission of one's work team, which is normally granted only if the combined ages of the man and woman equal fifty. An intensely puritanical culture, combined with a lack of privacy (no private cars or apartments), effectively limits premarital sexual relations. We understand amendments to the marriage law are being prepared, probably to raise the legal age of marriage.<sup>56</sup>

*Equality of Women.* Women in China have certainly come a long way from the days of bound feet, female infanticide, and sales of girls into prostitution. ERA has arrived in article 53 of the Constitution, which states "women enjoy equal rights with men in all spheres of political, economic, cultural, social and family life. Men and women enjoy equal pay for equal work."<sup>57</sup> Chairman Hua has called for vigorous enforcement of the principle of equal pay for equal work irrespective of sex.

One third of the workers at the Shanghai Shipyard were women. We were told that women are not assigned tasks requiring great physical strength, but we did see women in important jobs, such as an operator of an enormous crane. Moreover, the assistant manager of the shipyard was a woman. Each shop had one or two women cadres. At the agricultural commune there was one woman on the thirteen-member party committee and five women on the twenty-five-member revolutionary committee. One

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50. *Id.* art. 2.

51. *Id.* art. 17.

52. *Id.* art. 20.

53. *Id.*

54. *Id.* art. 25.

55. CONST., *supra* note 33, art. 53.

56. Under art. 4 of the People's Marriage Law the legal age is 18 for women and 20 for men.

57. CONST., *supra* note 33, art. 53.

third of the judges in Shanghai are women. We were told that only two percent of the criminal defendants are women.

Most Americans would consider the retirement scheme discriminatory. The retirement age for men is sixty; for women it is fifty for manual workers and fifty-five for office workers.

*Resolution of Civil Disputes: Mediation.* Most civil disputes are settled by neighborhood mediation committees. An understanding of this system requires a portrayal of the residential community. The residential community we visited in Shanghai consisted of 76,000 people (19,000 families), eight secondary schools, nine primary schools, one cultural center, nurseries, two hospitals, sixteen clinics, one cinema, one park, one swimming pool, sixty stores, restaurants, and a post office. Most of the occupants were laborers although some professional people, for example, doctors, and government officials live there. Ninety-six percent of the former housewives in the community are now working in processing plants, making diapers, fountain pens, etc. Forty-two hundred residents are retired people for whom planned activities are provided. The common premises are cleaned once weekly by the "volunteer" labor of children and retired people.

The residential community is governed by a Neighborhood Administrative Officer, appointed by the District Revolutionary Committee, an executive organ of the state. The Administrative Officer is a cadre paid by the state. In addition, the residents of the community elect committees to implement the policies and directives of the Administrative Officer. These residential committees, called the "mass group," may also express their opinions to the Administrative Officer and to the Revolutionary Committee. The officers of the residential committees are not paid. The Neighborhood Administrative Office has no mediation or security defense group. Mediation committees and security defense groups are established by the residential committees. Again, their members are volunteers. The security defense committees cooperate with the police.

In this particular neighborhood there were sixteen mediation committees. We interviewed a chairwoman whose mediation committee consisted of seven members responsible for 1,000 families. She indicated that most disputes arose out of problems concerning children, or sharing kitchens. Upon receipt of a complaint, her committee makes an investigation, talks to witnesses and parties, and tries to re-educate any wrongdoer. If the dispute is still not resolved, her committee will ask assistance of the work teams of the two parties. Judges from the District People's Court are also available to provide technical guidance to the mediation committee. If a party believes the mediation committee and the work team committee are wrong, he may still go to court. This rarely happens, probably because of the importance of getting along with one's neighbors and work teams for many other purposes. This chairwoman told us the committee writes a report on each case, but that such a report is not reviewed. In her experience it has taken two days to two weeks to resolve disputes.

A judge at the Shanghai High People's Court said that the preferred method of dispute settlement was mediation and that every commune and residential community has a mediation committee. The chief function of the court is "to provide guidance" to the mediation committee. Consequently, the number of civil cases going to court has been greatly reduced. The main court cases today involve divorce. Even here efforts by neighbors or co-workers to achieve a reconciliation precede any court action.

*Courts and Judges.* There is no pretense of an independent judiciary in China. The highest court, the Supreme People's Court, "is responsible and accountable to the National People's Congress and its Standing Committee."<sup>58</sup> The Standing Committee of the National Congress is empowered to "interpret the Constitution and laws," "to supervise the work of . . . the Supreme People's Court and the Supreme People's Procuratorate," and to appoint or remove the Vice President of the Supreme People's Court.<sup>59</sup> The President of the Supreme People's Court and the Chief Procurator are selected by the National Congress; they also may be removed by the National Congress.<sup>60</sup> Lower courts are responsible and accountable to the local people's congresses at corresponding levels.<sup>61</sup> If the appropriate congress decides a court has wrongly applied the law, the court can be ordered to retry the case.

The judges of the Shanghai High People's Court told us they were selected by the local revolutionary committees. There are thirty judges in the Shanghai District. Terms range from three to five years, depending upon the level of the court, and the judges may be reappointed. Judges come from (1) persons who were judges prior to the revolution, (2) workers, peasants, or soldiers, who have been given short periods of training, or (3) law school graduates. It was indicated that in the future most judges should come from the third category.

There are no court costs in China. Verdicts are written and set forth the facts, the decision, and the reasons therefor.

### III. LEGAL EDUCATION AND RESEARCH

#### A. Law Schools

Mao's abhorrence of elitism and meritocracy closed scores of colleges and universities during the Cultural Revolution. The de-emphasis on higher education has produced a situation where, in a nation of nearly one billion people, only 630,000 are in college or university. Now, as part of its Four Modernizations plan, the government is embarking on a program to train 800,000 research workers over the next seven years and to send thousands of students abroad for training.<sup>62</sup> The United States and China

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58. *Id.* art. 42.

59. *Id.* art. 25.

60. *Id.* arts. 22, 23.

61. *Id.* art. 42.

62. TIME, Nov. 27, 1978, at 8, 14 (Asian ed.).



have signed an agreement to educate several hundred Chinese students in the United States.

The law school in Shanghai was shut down by the Cultural Revolution; it is now planned to re-open that school. The recently re-opened Peking University Law School currently has 200 students in the first three years. Law should be a four-year course, and next year the faculty expects to have 400 students and the full four-year program. The school has over sixty teachers and eighteen graduate instructors. Stiff entrance examinations are now required. Students are drawn from workers in the state or judicial organs, and from among graduates of high school. Students spend twenty to twenty-four hours per week in class. Each instructor prepares his own materials and may also assign library reading. Public international law is a one-year required course; private international law is also required in the fourth year.

Ninety percent of the graduates of law school go into the judiciary or the procurator's office. Less than ten percent become teachers or researchers. At present, there are an insufficient number of graduates to meet the nation's need.

#### B. *The Institute of Legal Studies*

The Institute of Legal Studies, which is under the Academy of Social Sciences, does research in both foreign and domestic law. Founded in 1958, the Institute had its work halted for about ten years during the Cultural Revolution. Now it has over 100 employees, including administrative and library personnel. The Institute is conducting special studies in the following fields: theory of law and the state, constitutional law, legal history, civil law, criminal law, procedural law, private international law, maritime law, and public international law. We were told that this Institute could assist in obtaining Chinese counsel for an American client. In addition, the Institute participates in drafting statutes and codes. The Political and Legal Committee of the Central Committee of the Communist Party prepares the final drafts, which must then be enacted by the People's Congress.

#### IV. CONCLUSIONS

The People's Republic of China appears to have solved the basic problem of providing jobs, food, clothing, shelter, medical care, and basic education to one billion people. This accomplishment is impressive, especially when contrasted with other poor nations.

The cost in terms of individual liberties is obvious; yet the visitor does not feel the presence of an oppressive dictatorship. We covered a large amount of territory and were given considerable latitude to wander at will. Chinese speaking members of our delegation seemed free to talk with anyone. The guides and the officials did not appear anxious to hide poor conditions from us. Rather they were proud of what they have accomplished so far, but added "we are a backward country; please let us have your

suggestions on how we can advance." Perhaps to some degree, the more relaxed attitude of China is attributable to the use of intense social pressure, rather than naked force of the government.

The mastermind of China's recent liberalism is Vice Premier Teng Hsiao-p'ing. Many question whether these changes will survive the passing of Teng, who is in his seventies. Some American political experts have opined that this is not merely another swing in mysterious Chinese politics. Teng has inherited the personnel apparatus created by Chou En-lai; in addition, Teng is placing his own people in key positions. He also has some contacts in the Army, although he does not yet control the military. Thus, it is thought he may be able to create a structure that will continue after his death.

If the current trend continues, law and lawyers will have an important part to play in China. The same is true of foreign lawyers who help negotiate the international business contracts. It will be important that westerners in their future business dealings provide arrangements that are mutually beneficial if another cycle of Chinese xenophobia is to be avoided. Likewise, China should exercise care in importing high technology from the west. She still basically needs labor intensive technology to ensure enough jobs for her people. Learning to think in terms of "appropriate" technology for this nation could in the long run be the best course for both the western industrialists and the Chinese importers.



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