CHINESE PARTNERSHIP

FANG LIUFANG*
TRANSLATED BY XIA YUANTAO, SANG BINXUE, AND DANIAN ZHANG

I

INTRODUCTION: CHINESE PARTNERSHIP IN HISTORY

As early as the Spring and Autumn period (770-476 B.C.), Guan Zhong[1] (?-645 B.C.) established a business partnership with his close friend Bao Shuya in Nan Yang. After he had become an important political figure, Guan Zhong recalled this period with great emotion. He said, "[w]hen I was poor, I did business with Bao Shuya. Although I retained most of the profits, Bao never saw me as greedy. He was aware of my poverty."[2] This unusual friendship has been appreciated by many generations of Chinese. People still refer to friends who have full confidence in one another as "a friendship between Guan and Bao." Few Chinese, however, ever thought of such friendship as a model partner relationship. By receiving most of the profits, Guan was actually taking other partners' interests, a practice characterized as "societa lenina" (the lion's share) under Roman law, and behavior considered immoral by Chinese standards. As for Bao, he could have rightfully asked for a return of the profits taken by Guan Zhong, but because he knew that Guan's family was poor, he was willing to sacrifice. Therefore, partners put a greater priority on the personal relationship between themselves than on profits.

Sima Xiangru (179-117 B.C.), the famous scholar of the Western Han Dynasty, and his fiancee, Zhuo Wenjun, went through a difficult period after they had run away to get married. They had "nothing but the bare walls of their house."[3] They first had to sell all their carriages and horses, and then bought a bar, of which Zhuo Wenjun was the proprietress. The two of them started a life of business partnership. The only daughter of a noble family, Wenjun stood behind the counter to sell spirits as a female manager and saleswoman. Sima Xiangru, formerly a famous literatus, had to wear an apron and work among ordinary laborers to wash drinking vessels.[4] In feudal China, a society which deprecated merchants, such behavior was extraordinary.

---

* Lecturer, Legal Research Institute of People's University, Beijing, China.

1. Guan Zhong was prime minister of the state of Qi during the Spring and Autumn period. Because of his policy of legal reform, Qi became the hegemon among the various kingdoms of the time. Confucius said, "If there had been no Guan Zhong, we would long ago have become a defeated nation of slaves under the rule of outsiders."

2. SIMA QIAN, SHIJI (RECORDS OF THE GRAND HISTORIAN), Guan Zhong liezhuan (biography of Guan Zhong).

3. SIMA QIAN, SHIJI (RECORDS OF THE GRAND HISTORIAN), Sima Xiangru liezhuan (biography of Sima Xiangru).

4. *Id.*

People have praised the courage of Xiangru and Wenjun in disdaining the feudal ethical code and running away from home for the freedom of love, but very few have noticed that they were among the first husband-wife partnerships in China.

A Yuan (1279-1369) verse goes like this: "I would have been willing to find an acquaintance and form a partnership to make a living."[5] This piece of verse tersely and vividly describes the two features of partnership: First, partnership is a form of operating business with profit-making as its purpose; second, parties who form a partnership understand each other, or at least are acquainted.

Mr. Fu Yiling, the leading scholar of Ming-Qing (1368-1911) socioeconomics, points out that doing business in the form of partnership was a very common phenomenon in those dynasties.[6] At that time in the southeast part of China, an Anhui merchant generally used the form of family partnership to do business, that is, the partners were blood relatives of the same ancestor (*tong zong*) or from the same clan or branch (*tong zhi*). A Shanxi businessman used a form of commercial partnership called "Huo Ji" in which one partner contributed all capital while others ran the business. Although they had never pledged to keep good faith, they never embezzled the partnership property.[7] This form of doing business, in which one contributed capital but the enterprise was run by others, was very similar to the "commenda" in medieval Europe, in which the partner who contributed capital was the "hidden" or "dormant" partner who did not participate in the operation of daily business. This is clear evidence of the evolution of form from general partnership to limited partnership. In coastal Fujian province, "pooled capital and partnership were very common among businessmen in the ocean trade because both greatly reduced the risk of ocean trade and solved the problem of initial capital shortages."[8]

In 1956, an eminent historian, the late Mr. Deng Dou, conducted a survey in Men Tou Gou, a western suburb of Beijing and collected 137 written partnership contracts from the Ming (1368-1644) and Qing (1644-1911) Dynasties. Mr. Deng discovered that at that time partnership with shares was the principal form by which residents of that district operated coal mines.[9] A close examination of six partnership contracts detailed in Mr. Deng's article indicates that partnership in the area of Men Tou Gou during the Ming and Qing Dynasties had the following features:

(1) Partners were usually old family friends, that is, their fathers were bosom friends. A partnership contract from the Shunzhi period (1644-1660) of the Qing Dynasty reveals that as early as the Ming Dynasty, the ancestors of the two partners in the

5. *Quoted from hehuo* (partnership entry) in the dictionary CIYUAN.

6. FU YILING, MINGQING SHIDAIDE SHANGREN JI SHANGYE ZIBEN (MERCHANTS AND COMMERCIAL CAPITAL IN THE MING-QING PERIOD) 28, 75.

7. Shen Sixiao, "Jinlu."

8. FU YILING, MINGQING SHEHUI JINGJI SHI WENJI (COLLECTED ESSAYS ON THE SOCIOECONOMIC HISTORY OF MING-QING) 220.

9. Deng Duo, *Cong Wanli dao Qianlong* (*From Wanli to Qianlong*), LISHI YANJIU (HISTORICAL RESEARCH), No. 10 (1956).

contract had formed partnerships to mine coal in the same area. Despite the fact that dynasties had changed, the two families' descendants continued the partnership relationship and business of their ancestors. Fu Yiling notes similar relationships: "Some people borrowed money at high rates of interest in order to do business away from home but then died on the way. Creditors' heirs never counted on getting back the principal and interest that had been lent out several decades before. However, when the descendants of debtors learned the truth, they worked hard and made money to pay off their ancestors' debts. Thus, rich families were willing to contribute to such a partnership because they believed that the kind of persons who were willing to pay off the debts of the deceased would never let the living down."[10]

(2) Partnership contracts usually included bona fide clauses which required partners to maintain unanimity, be modest and willing to give ground in their dealings with each other, and which prohibited any partner from infringing on another partner's interests. For instance, such clauses usually stipulated that partners should "work together with one heart, keep on being partners to the end, carry on business forever, be of one heart and one mind, take great pains to operate the business, preserve harmony, be selfless, never quarrel wilfully, and never be selfish and seek private gains."

Since the ideology of "the autonomy of private law" had never been introduced in Chinese feudal society, rulers on the one hand interfered excessively with the private affairs of ordinary people by means of criminal prosecution and on the other hand granted no equal protection to the private rights of ordinary people. Ordinary people could rely only on moral concepts to discipline themselves in the course of cooperation. The traditional morality of China advocated "emphasizing righteousness and deprecating selfish interests," and "giving precedence to others." Therefore, the core of self-discipline was that each person should relinquish some of his interest, and maintain the stability of the group through mutual tolerance.

(3) Partnership contracts usually provided detailed terms of investment and interest division. The investments of money, land, and coal mines were all converted into shares[11] and interests were distributed proportionately. If every partner's investment was in terms of money, then the interests were divided only after their share of capital was paid back. One of the partnership contracts also provides: "Every partner should pay his entire subscribed share on time. Otherwise, he cannot assert an ownership right in the coal mine that is bought by other partners, and if a partner has paid only a part of his subscribed share, the other partners will pay back the money for his investment after the production of coal. He is no longer considered a party to the partnership contract."

(4) Partnership contracts had provisions on violating the agreement. For example, "A person who goes back on his promise is fined 10 taels of silver" or "50 piculs of rice . . . ."

(5) Partnership contracts were written in a standard form. They were in the form of regular script in small characters. In addition to the partners, the "drafter" and the "witness" also signed their names; and the time of signing was written clearly at the end of the paper.

(6) In partnership contracts, names of some influential local officials often appear. For example, one contract clearly states that a 30 percent interest belongs to "Master" Wang of the Board of Revenue, who, according to the contract, neither signed nor contributed capital. In another contract, a Manchu nobleman, Soufu, signed a partnership contract which granted him an interest share equal to that of the other twelve partners although he had invested nothing in the partnership.

The fact was that partners had to have officials and aristocrats as their guardians. Otherwise, their jointly managed coal mines could not survive extortion by corrupt officials. In a certain sense, those officials and aristocrats

10. *Id.*

11. In the contracts discovery by Deng Dou, share (*gufen*) was called *ri*, daily, or day, a usage relatively unfamiliar to most Chinese.

used their power as investments, and this "investment" meant that they would get continuous "legal" bribery.

In modern society, partnership has not disappeared because of the rise of companies. Quite the contrary, partnerships have been as important as companies, and both are considered major components of equal importance in the industrial and commercial world.

Indeed, from its inception to its peak, the dominant enterprise group in the history of modern Chinese industry—the Rong family (Rong Desen, Rong Zhongjin)—used partnership, i.e., companies with unlimited liability or general partnerships. In 1896, the Rong family started a cocoon factory with another partner. Shortly after that, they set up their own cocoon factory with their own investment.[12] In 1900, when the Rong brothers were planning to build Pao Xing Flour Factory in Wu Xi, Chu Zhongfu, a former Guangdong prefect[13] "supported their plan and was willing to participate in their partnership."[14] In 1921, the establishment of Shen Xin, a general company in Shanghai, marked the peak of the Rongs' enterprises, but it was actually still a partnership of the Rong brothers. From 1903 to 1922, the Rong brothers set up sixteen factories. With the exception of the Zhen Xin Cotton Mill, which was built in 1903 in the form of a limited liability company, the rest of their enterprises were all partnerships. Indeed, it was this Zhen Xin limited company that greatly disappointed the Rong brothers, for the conflicts in interests among shareholders were so sharp and "the companions quarreled so seriously that a suit arose."[15] The Rong brothers decided that they would never again use a limited company. After this, "every company of the Rongs was operated in the form of either an unlimited company or partnership with independent shares and decentralized production."[16] To the Rong family, which believed that partnership was a major factor in their success, the advantages of partnership were: (1) The shares could be transferred only among partners. Therefore, the interests belonged to the partners themselves, or, to put it colloquially, "all meat is cooked tenderly in my own pot;" and (2) the managing director had fairly centralized power free of supervision by a board of directors or board of shareholders.

According to survey statistics produced in 1933 by the Resources Committee of the Nationalist Government, out of 2400 factories in seventeen provinces, 994 (40.82 percent) were partnerships; 682 (28.21 percent) were companies; 561 (20.21 percent) were sole proprietorships; and 163 (8.13 percent) were government owned and administered.[17]

---

12. XU WEIYONG & HUANG HANMIN, RONGJIA QIYE FAZHANSHI (A HISTORY OF THE DEVELOPMENT OF THE RONG FAMILY ENTERPRISES) 7 (1985).

13. When officials retired to their native places, they retained considerable prestige and influence and their presence in management could be considered a form of investment.

14. *Id.* at 31-32.

15. 1 RONGJIA QIQE SHILIAO (HISTORICAL MATERIALS ON THE RONG FAMILY'S ENTERPRISES) 53.

16. XU WEIYONG & HUANG HANMIN, *supra* note 12, at 32.

17. 81 JINDAI ZHONGGUO SHILIAO CONGKAN XUJI (SUPPLEMENT TO COLLECTED MATERIALS ON MODERN CHINESE HISTORY) 174.

On the eve of the founding of the People's Republic of China, there were 1.3 million industrial and commercial enterprises. About 10,000 were companies; the rest were sole proprietorships or partnership enterprises. Among the 10,000 companies, there were 1250 (11.7 percent) unlimited companies not substantively different from partnerships.[18]

According to the State Statistical Commission's 1956 survey, there were 533,700,000 private shareholders with investments in industrial enterprises. The enterprises they managed were 53.8 percent partnerships and 38 percent sole proprietorships. Those organized as companies constituted only 8.2 percent.[19] However, since the end of the 1950's, China's economic system has followed an ever-ascending spiral of centralization; and the age-old economic form of partnership vanished for nearly thirty years.

II

PARTNERSHIP IN CHINA IN THE 1980'S

A. The Social Background of Revival of Partnership in the 1980's

In the 1980's, China began a reform of its economic system with the goals of opening to the outside world and revitalizing the domestic economy. Developing a commodity economy has been regarded as a stage socialism cannot bypass. "Revitalizing domestically" means reducing the government's direct interference in economic life, eliminating or loosening some restrictive policies, and allowing private and collective enterprises to exist in certain spheres, while concurrently enlarging the "autonomy" of state enterprises. Developing a commodity economy means allowing free competition and equal opportunity competition under the control of the law of value so that the state's economic plan will become more flexible and more elastic.

In this active commodity economy environment, various kinds of associations, such as "personal business associations" and "capital business associations," were formed. Partnership, "as old as the first exhibition of the gregarious instinct of man," rose again and showed its vigor and force.[20]

Although the resurgence of partnership began in the early 1980's, in most cases people still avoided using the term "partnership" because the word had been connected with the private ownership economy. People instead tried to invent terms with socialist characteristics, such as "cooperative operation organization (*hezuo jingying zuzhi*)," "new economic association (*xin jingji lianheti*)," "commune members' joint enterprise (*sheyuan lianying qiye*)," and "joint household business (*lianhu qiye*)". Before January 1987, there had been no enterprises registered in terms of partnership. Owing to the variety of

---

18. Xue Muqiao, *Siying qiye zhanxing tiaoli qicao jingguo jiqi shuoming* (*An Explanation of the Process for the Drafting of the Temporary Regulations on Private Enterprise*), in 2 ZHONGYANG CAIJING ZHENGCE FALING HUIBIAN (COLLECTION OF CENTRAL GOVERNMENT GOVERNMENT FINANCE POLICIES AND LAWS) 178-79 (1950).

19. WOGUODE GUOMIN JINGJI JIANSHE HE RENMIN SHENGHUO (OUR NATION'S NATIONAL ECONOMIC CONSTRUCTION AND THE PEOPLE'S LIVELIHOOD) 92.

20. Jaeger, *Partnership or Joint Venture*, 37 NOTRE DAME LAW. 138 (1961).

terms for partnership, each term was connected to a certain economic regulation. Therefore, even if we separate ourselves from the economic laws and regulations and study only the *General Principles of the Civil Law of the People's Republic of China* ("*General Principles*"), it will not be sufficient to describe the whole picture of partnership. Many terms in the *General Principles,* e.g., "unit," "organization," "individual industrial and commercial household," "rural contract and management family," and "joint operation," are from recent economic policies and regulations. The provisions in the *General Principles* concerning partnerships are based on existing economic regulations.

B. Five Major Forms of Partnerships in the 1980's

1. *Laborers' Cooperatively Operated Organization in Urban Areas ("Co-op Organization").* This term is from Several Provisions by the State Council Concerning City and Township Laborer Cooperatively Operated Organizations ("The Provisions") issued in 1983.[21] By the end of 1985, there were 270,000 co-op organizations with 3.17 million people.[22] This figure equalled, respectively, 2.2 percent of the total individual industrial and commercial households and 17.7 percent of the total people engaged in them.[23] Compared to the total number of individual industrial and commercial households ("IICH's"), the number of co-op organizations is not significant. Taking into consideration that on average 11.7 people work in one co-op organization, roughly eight times the average size of an IICH, the business scale of the former is much larger than that of the latter. In August 1985, this author looked at the statistics of IICH and co-op organizations in Wuxi County, Jiangsu Province, and found those statistics to be very close to

21. ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (BULLETION OF THE STATE COUNCIL), No. 10 (1983) [hereinafter BULL. STATE COUNCIL].

22. Renmin ribao (People's Daily), Aug. 18, 1986, at 1. This report did not use the phrase cooperative operation organizations (*hezuo jingying zuzhi*), but called them "cooperative organizations in the private economy" (*geti jingjide hezuo zuzhi*). There are essentially two reasons for this. First, people in China have recently developed disparate views on the economic character of cooperative organizations (*hezuo zuzhi*). (In China, at the time of enterprise registration with the industrial and commercial authorities, the registering organization must confirm whether the economic character, i.e., the form of ownership, of the registrant is by the whole people (i.e., the state), collective, or individual.) One view is that the cooperative organization is a new form of collective ownership. This view can find some theoretical foundation in various phrases in The Provisions. Another view considers that cooperative organizations are individually owned but managed as partnerships. This view obtains verification from the present reality of life in China, based on the present stipulations of the Industrial and Commercial Bureau (*gongshang ju*).

In August 1986, although the *General Principles* had been issued, they had not yet taken effect. Therefore, there was no complete legal foundation on which to consider a cooperative organization as an individual partnership (*geren hehuo*); still, one could not ignore the stipulations of the *General Principles* concerning individual partnerships and continue to call them cooperative organizations. So, People's Daily adopted a comparatively veiled term, "cooperative organizations of the individual economy" (*geti jingjide hezuo zuzhi*).

23. According to materials in GONGSHANG XINGZHENG GUANLI ZAZHI (ADMINISTRATIVE MANAGEMENT OF INDUSTRY AND COMMERCE), No. 10 (1986), through the end of 1985, there were 11,780,000 individual (*geti*) industrial and commercial households. Including the owner, those engaged in these enterprises totalled 17,660,660 or 1.5 people per enterprise.

the national statistics provided by the State Administration for Industry and Commerce ("SAIC"). Besides, this author also calculated the registered capital of 100 co-op organizations in three counties and found that the average amount of registered capital is 13,000 yuan (at present exchange, about US $3,300). This is 11.5 times more than the average registered capital of local IICH's.

Co-op organizations have seven clear legal characteristics.

(1) The organizers of the co-op organization are mainly "individuals engaged in industry and commerce," "waiting-to-be employed youth," and "idlers in the society" who have urban household registration.[24] Citizens with rural residency registration can also apply to engage in co-op operations in nearby small cities or townships.[25] There should be no fewer than two members in a co-op organization. The Provisions, however, do not have a limitation on the maximum number of "co-op members." It writes suggestively that "the scale may not be too big."[26]

(2) On the basis of consensus discussion, the members of the co-op organization conclude agreements or articles of association. The essential terms of agreements or articles of association include the rules for joining and resigning from the co-op organization[27] and the proportions for the distribution of "after-tax profits" (*shui-hou ying yu*).[28] On the basis of the stipulated proportions, the distribution should be divided into four parts: reserve fund (*gong ji jin*), public welfare fund (*gong yi jin*), labor dividend (*laodong fengong*), and share capital dividend (*gujin fen hong*). The percentage of the share capital dividend should not exceed 15 percent of the share total investment.[29] The percentage of the other three parts may be decided by the members. Because of the lack of reliable means of financial supervision, the limitation on the size of the share capital dividend barely means anything in the practical implementation of The Provisions.

(3) "Ownership of the share capital and other property remains in the hands of individuals but is centrally managed by the co-op organization."[30] There can be two interpretations of this language. First, every member retains independent ownership of his investment, regardless of its character; second, since members' investments "are centrally used and managed by the co-op organization," the ownership that is "retained by the individual" refers not to the particular property invested, but to the share of total investment constituted by that portion. As for the property that is "centrally used and managed by the co-op organization," the member cannot individually maintain an exclusive right. He can only hold profit rights to his share in the co-op organization. "Still belonging to the individual" is an abstract right, not a concrete material one. This understanding is close to the conception in common law that divides trust property into legal title and equitable title.

Comparing the investment provision in The Provisions with the partnership provision in the *General Principles,* published two and a half years later, reveals striking similarities. Article 32 of the *General Principles* provides that "partners' investment is managed and used collectively by the partners. The property accumulated by the partnership is owned by all." Article 1 of The Provisions is, except in two places—the words "member" and "partnership organization" substituted by the word "partner" and the deletion of the words "still owned by the individual"—similar in intent and grammatical structure to the first sentence of article 32 of the *General Principles*. The second sentence of article 32 of the *General Principles* recognizes that "the property

24. The Provisions, art. 1.
25. *Id.* art. 12.
26. *Id.* art. 2.
27. *Id.* art. 8.
28. *Id.* art. 6.
29. *Id.*
30. *Id.* art. 1.

accumulated by partnership is owned by all," thereby filling the lacuna in "the regulations."

(4) A member's responsibility for the debts of the co-op organization is not limited to his investment. If the property invested and accumulated by all is not enough to pay the debts, partners are jointly and severally liable (*liandai zeren*) for the default.[31]

(5) The Provisions do not impose any restraint on the number of "helpers" that "cooperative organizations" can employ other than stipulating that they may not exceed ten trainees.[32] Compared to co-op organizations, IICH's have more restrictions. They cannot have more than five "trainees" or hire more than two "helpers."[33]

Therefore, the IICH's with large capital and big ambitions all want to become co-op organizations in order to hire more people. As a matter of fact, it is not unusual for some co-op organizations to hire more than 100 people. Because the shareholders always underreport the number of their employees, the statistics for people hired belie the number of people actually hired.

(6) A co-op organization must register at the local SAIC in order to become qualified to do business. At the time of application, the members must bring their residence registration (*hukou*) and their co-op organization agreement or articles. After examination of these documents, the office decides whether registration will be allowed.[34]

(7) "If its rights and interests are infringed, the co-op organization may bring a lawsuit to the court."[35] This means that the co-op organization can sue or be sued in its own name, instead of the members being joint plaintiffs or joint defendants. However, the Code of Civil Procedure has not literally recognized that an organization without the status of a legal person can be a party to litigation. Therefore, the rights of partnerships in civil litigation need further legislation in order to be confirmed.

After the *General Principles* became effective on January 1, 1987, most co-op organizations ought to have been re-registered as individual partnerships. On November 27, 1986, the SAIC sent out The Circular for Carrying out the *General Principles* and Administration of Personal Partnership Registration ("The Circular").[36] The beginning of The Circular points out that "at present, individual partnerships exist in various economic forms. A large portion, 80-90 percent, of the co-op organizations are in fact partnerships. Another part are individual industrial and commercial households. A smaller part are collective ownership enterprises."[37]

The Circular requires that each co-op economic organization be investigated. Those that meet the conditions of individual partnership and IICH will be issued IICH licenses.[38] The issuance of new registrations will be finished by the end of 1987.[39] Therefore, the word "partnership" will replace the word "co-op organization," and the entity will be regarded as a part of the IICH for purposes of industrial and commercial administration. It will

---

31. *Id.* art. 9.
32. *Id.* art. 10.
33. Guowuyuan guanyu chengzhen fei nongye geti jingji ruogan zhengcexing guiding (Several Policy Related Decisions by the State Council Concerning Urban, Non-Agricultural, Individual Economy), art. 5, *reprinted in* BULL. STATE COUNCIL, No. 16 (1981) [hereinafter Policy Decisions].
34. *Id.* art. 4.
35. *Id.* art. 16.
36. ADMINISTRATIVE MANAGEMENT OF INDUSTRY AND COMMERCE, No. 3 (1987).
37. *See* The Circular in *id.*
38. *Id.* art. 2.
39. *Id.* art. 3.

probably be an independent group only for purposes of commercial and industrial statistics.

2. *IICH's.* In the late 1970's, IICH's numbered 180,000. By the end of 1985, that number had increased to 17,600,000, a ninety-six-fold increase.[40] IICH's were established in the 1980's according to the Policy Decisions for Non-agriculture Individual Economy Policy in Urban Areas ("Policy Decisions")[41] issued by the State Council on July 7, 1981. Because the regulation is applicable not only to people in urban areas,[42] but also to non-agricultural people in the countryside,[43] the IICH can be defined as citizens—either individuals or family members—engaged together in non-agricultural or profit-making activities, who use property owned by individuals or owned in common by family members and who are liable without limitation for debts.

Registration is required for an entity to become an IICH. The procedure is as follows:

Application must be in writing, and the residents' committee[44] approves the application in writing. Then the local SAIC examines it. If the bureau approves, it issues a business license.[45] The law prohibits those who have not registered from engaging in commercial activities.[46] Moreover, "those who were profiteers or criminals are not allowed to manage such a business by themselves."[47] Citizens who are qualified to apply to become an IICH are "youth waiting for jobs (*daiye qingnian*) and those retired people who have technical skills or management experience."[48] Furthermore, there are in fact some people who obtain permission to become an IICH while continuing to work without pay in their other jobs (*liuzhi tingxin*) or after resigning (*cizhi*).

Policy and legislation do not use the same terms for this individual economy. The Policy Decisions call them "individual operation households." The regulations of industrial and commercial administration and the *General Principles* both call them "individual industrial and commercial households."[49] Some regulations simply state "individual households."

The Policy Decisions point out that "generally speaking, an IICH can be operated by one person or members of a family."[50] In regard to the "one-person enterprises" or "one-family enterprises," the *General Principles* imposes two different sets of responsibilities on the IICH. Therefore, in fact IICH's

40. *See supra* note 22.
41. *See supra* note 33.
42. Policy Decisions, art. 1.
43. *Id.* art. 16.
44. Special Editor's note: Residence committees are responsible for the activities of people within a given apartment block or section of a street. They serve quasi-legal functions by mediating disputes and perform other such supervisory and administrative tasks as may be assigned. *See* M. WHYTE & W. PARISH, URBAN LIFE IN CONTEMPORARY CHINA 22-25, 70-71 (1985).
45. Policy Decisions, art. 4.
46. *Id.*
47. *Id.* art. 15.
48. *Id.* art. 4.
49. *General Principles,* art. 26.
50. Policy Decisions, art. 5.

are composed of individual enterprises with one person's capital and partnerships. The IICH and partnership are also two overlapping concepts. Some IICH's meanwhile are concurrently partnerships. In my opinion, there are not many IICH's that overlap with partnerships. The reasons are as follows:

First, in 1985, the average number of people in each IICH, including the owner, was 1.5.[51] Suppose one "household" has one owner. In addition to the "owners," there are 5,880,000 people engaged in IICH's. However, each owner is allowed to hire two assistants and five trainees who should be deducted from the 5,880,000 people. The remainder is the number of IICH's operated as partnerships.

Second, the regulations of industrial and commercial administration do not permit people from such families who have jobs or go to school to engage in such activities. Therefore, in each nuclear family (i.e., a family of husband, wife, and minor children, and/or unmarried adult issue) the partnerships of family enterprises can exist with at least two family members who have no job or do not go to school. There are few such nuclear families in the cities, and not many in the countryside.

Of course, if we regard the close relations of the IICH as family members and regard as partners those relatives who either are silent investors or actually engaged in enterprise activities and enjoy a share of the profit, then partnership constitutes a still larger percentage of the IICH system. But because law does not allow those not registered by the SAIC to engage in profit-making activities, there is no legal basis to regard as partners relatives who engage in enterprise activities in the name of the people who have the license rather than under a joint name.

Article 29 of the *General Principles* provides two ways to pay the debts of an IICH: "Individually operated [IICH's are deemed to] use individual property; family operated [IICH's] use family property." Yet, there are no provisions in the *General Principles* or other legislation in force that define "family," or that distinguish individually operated from family operated IICH's and individual property from family property.

2. *Some Rural Commodities Economy Associations ("RCEA") (New Economic Associations), Peasant Joint Investment Enterprises.* Rural commodities economy associations are a form of joint association among peasants or between peasants and collective economic organizations "under conditions of non-interference with a unit's or individual's ownership of the means of production, or in which the style of family operation is preserved."[52] This is an extremely broad concept. Among these new associations, some are

51. *See supra* note 23.

52. ZHONGGONG ZHONGYANG ZHENGZHIJU (POLITBUREAU OF THE CENTRAL COMMITTEE OF THE CHINESE COMMUNIST PARTY), *Dangqian nongcun jingji zhengce ruogan wenti (Several Questions in the Present Rural Economic Policy,)* in JINGJI ZHENGCE FAGUI XUANBIAN (SELECTED ECONOMIC POLICIES AND LAWS) 289 (1984).

collective enterprises with the status of legal persons; some are just associations internally joined instead of legally dealing with third parties in the name of the association. Some others are partnerships among citizens, or between citizens and corporations.

The definition of an RCEA given by the National Statistics Bureau is "an economic organization that some peasants voluntarily set up before, during, or after production (harvest)." Its policy is voluntariness and mutual benefit between laborers, joint operation, and joint management. It has a definite organizational scope and workplace, and a fixed number of persons. It also has a relatively stable economic program and accounting and distribution systems. Seasonal economic associations must conduct operations for more than three months. However, it does not include those collective enterprises or projects within enterprises under joint contract to individuals and peasant families; nor does it include individual laborers who recruit assistants and trainees.[53]

By the end of 1984, there were about 467,000 such associations in villages, which means the average was 190 for each county and six for each village. A total of 3,557,000 people were employed, with each such association composed of 7.6 persons on the average. The gross income for the associations in 1984 was approximately 8,170,000,000 RMB. This means that each person in such associations produces an average income of 2,300, which is 24 percent higher than that of the specialized households and individual enterprises in the countryside.[54]

By the end of 1985, there were 480,000 associations with 4,200,000 persons and a gross income of 13,000,000,000 RMB,[55] which is 200,000,000 RMB more than the total income made in 1953 by all private enterprises in China. There are 250,000 building and industrial associations, which is 100,000 more than the total number of the private industrial enterprises of the whole country in 1953. There are 3,070,000 people in the building and industrial associations, which is 840,000 more than the total number of people in the private industrial enterprises of the whole country in 1953.[56]

Statistically, peasants' joint venture enterprises (*nongmin hezi qiye*) are included in the category of rural and township (*xiangzhen*) enterprises. In 1983, taken together, the "nearly 2,000,000 people" engaged in the 500,000 peasant joint venture enterprises, produced output valued at 30 billion RMB.[57]

---

53. TONGJI ZAZHI (STATISTICS), No. 7, at 47 (1985).

54. Nongmin ribao (Peasant Daily), May 22, 1985.

55. Renmin ribao (People's Daily), June 14, 1986.

56. In 1953, the total operational income (total value of production) of all private industrial enterprises was 13,109,000,000 RMB. (The present exchange rate is 3.75 RMB-US $ 1.) This income was generated by 2,230,000 people working in 150,000 enterprises. *See* THE ESTABLISHMENT OF OUR NATIONAL ECONOMY AND THE PEOPLE'S LIVELIHOOD 73 (1958).

57. *See* BULL. STATE COUNCIL, No. 5, at 148 (1984).

4. *Some Jointly Operated Enterprises (*Lianying qiye)

a. Qualifications for members of joint operations. Under articles 51 to 53 of the *General Principles,* members of joint operations are limited to "enterprises and institutions."

According to all of the provisions referring to enterprises in the *General Principles,* enterprises are economic organizations qualified as legal persons. Sole proprietorships or partnerships are not recognized as enterprises in the *General Principles.* Under article 41, "enterprise legal persons" are enterprises owned by the whole people (that is, state-owned enterprises), enterprises with collective ownership, and enterprises involving foreigners. There is no express provision about whether private enterprises can be set up as legal persons, but it can be affirmed that "enterprise legal person" does not include private enterprises. In section 4(3) of Regulations on Registration for Corporations, which was promulgated before the *General Principles,* it is expressly stipulated that "individual enterprises cannot on their own apply to establish a company (*gongsi*)". This not only means that a single natural person cannot independently launch a corporation, it also signifies that a single private organization of an economic nature cannot establish a corporation.

The *General Principles* explains neither the meaning of "institution" (*shiye danwei*) nor the basic difference between institution and enterprise (*qiye*). Academically speaking, an institution is a social organization (such as a hospital, school, or research institution) whose main goal is not profit-making and which has no direct connection to commodity production and exchange. "Institution" does not include administrative offices (*xingzheng jigou*). The latter is called a government agency legal person (*jiguan faren*).[58] In China, all "institutions" are legal persons either with ownership by the whole people (that is, state-owned) or with collective ownership.

Thus, the joint operation defined in the *General Principles* is economic association between enterprise legal persons or between enterprise legal persons and institution legal persons. Participants in joint operations are mainly from the social organizations with public ownership. More precisely, except those involving foreigners, enterprises with private economy characteristics cannot become participants in a joint operation.

The relevant rules of the State Agency of Industry and Commerce also state that "according to the original ownership nature of each party to the association [institutions receiving state funding will be treated as being owned by the whole], the ownership nature of the economic combination will be classified as joint operation (*lian ying*) by the whole people, collective joint operation, and state-collective joint operation."[59] This is consistent with the definition of joint operation in the *General Principles.* There are still a few small

58. Minfa tongze *General Principles,* art. 50.

59. Jingji lianhe zuzhi dengji guanli zanzing banfa (Provisional Rules for Managing the Registration of Economic Joint Organizations), art. 8, No. 13 (1986).

differences. The "enterprises" in the *General Principles* also include equity joint venture enterprises with foreigners (*zhongwai hezi jingying qiye*), Sino-foreign jointly operated enterprises (*zhongwai hezuo jingying qiye*) and wholly foreign-owned enterprises (*waizi qiye*).[60] These enterprises can undertake joint operations with domestic enterprises and institutions, but such joint operations are not included in the SAIC's classifications.

b. *Comparison with other regulations.* The limitation on the qualifications of joint operation members in the *General Principles* conflicts with some current economic policy and economic regulation. Sections 4 and 5 of the 1980 Current Regulations on Classification of Economic Organizations, issued by the SAIC, affirm that "state-private joint operations" and "collective-private joint operations" are a type of economic form in which "the means of the production and products or income" are owned "jointly by the state and private individual" or owned "jointly by the collective and private individuals."[61]

Another State Council document of 1983 points out "brigade and state-owned enterprises, supply and marketing cooperatives, peasant joint operated enterprises, and small family industry can all make joint operations among themselves."[62]

Section 4 of Some Regulations on Cooperative Operations (*hezuo jingying*) by Urban Laborers issued by the State Council in 1983 provides: "Under the principle of equal and mutual benefit, co-op organizations may undertake joint operations with each other or with national economic organizations, or with individual households."[63]

The 1984 circular, "Rural Work," issued by the CCP's Central Committee states: "Encourage peasants to invest in various enterprises, encourage the collective and peasants, under the policy of voluntariness and mutual benefit, to concentrate their money and jointly initiate various enterprises."[64]

A memorandum of a meeting in 1984 of the SAIC provides that "individuals engaged in joint operations with national and collective enterprises may do so according to the State Council's Provisions on Urban Laborers' Cooperatively Operated Organizations.[65]

In 1985, the SAIC issued The Circular on Some Questions about Current Regulations on Administration of Company Registrations. It points out that cooperatively managed joint operations and jointly managed companies formed by "enterprises owned by the whole people or collectively owned enterprises with individually operated ones should be registered."[66]

---

60. *General Principles*, art. 41.
61. SAIC, "Current Regulation on Classification of Economic Organizations," §§ 4-5 (1980).
62. BULL. STATE COUNCIL, No. 5 (1984).
63. *Id.*, No. 10 (1983).
64. People's Daily, Feb. 21, 1984, at 1.
65. ADMINISTRATIVE MANAGEMENT OF INDUSTRY AND COMMERCE, No. 4, at 10 (1985).
66. *Id.*, No. 22.

In 1986, the State Council's Regulations on Certain Questions About Prompting Horizontal Economic Associations[67] declared that economic associations are not restricted by the system of ownership.

In reality, there exist in the Chinese economy many economic associations between natural persons and legal persons. Some of these kinds of associations are set up as corporations, others as partnerships, and some merely as contractual relationships. For instance, among the commodity economy associations in the countryside there are many joint operations between natural and legal persons. Another instance, the nationally famous "Jinxiang guahu enterprises," is a linking up of a private enterprise with a collective enterprise that has the status of a legal person.[68] The private enterprise uses the factory name, introduction letters, invoices, and bank account number of the linked enterprise and conducts business as a branch factory or subsidiary of the linked enterprise. Meanwhile, it has to pay 70 percent of national taxes, 2.5 percent of public accumulations, and 0.5 percent of administration fees to the linked enterprises.[69] Some of these linked enterprises are partnerships formed by a collective enterprise legal person, which contributes its commercial reputation as investment, and a private enterprise which contributes cash and property as its investment. The two organize a partnership. Some are licensing agreements between collective enterprise legal persons and private enterprises for the use of an enterprise's name. In other licensing agreements, the collective enterprise guarantees to a third party the private enterprise's civil acts. Regardless of type, they all share the characteristic of being an economic association between a natural person and a legal person.

In the *General Principles,* partnership among citizens and partnership among legal persons are totally separate. The former, as a form of personal business association (*ziranren jiheti*), is in the chapter on "citizen." The latter, as a part of joint operation, is in the chapter on "legal person." This leaves two lacunae in the law. First, since partnership between natural and legal persons cannot be characterized as either a partnership of individuals or a joint operation, its status in the *General Principles* is unclear. Second, according to the Regulations on Registration of Corporations, individuals and personal partnerships may set up companies jointly with enterprise legal persons.[70] The company is a legal person. However, the company initiated by a natural person jointly with a legal person does not belong to the categories of enterprise legal person with ownership by the whole people, or of collectively owned enterprise legal person, or of enterprise legal person with foreign component, which are all listed in section 2, chapter 3 of the *General Principles.* Neither are such companies the kind of joint operations illustrated in section

67. BULL. STATE COUNCIL, No. 8 (1986).

68. Jingji ribao (Economic Daily), June 9, 1986.

69. *Id.*

70. Gongsi dengji gunali zanxing guiding (Temporary Regulations on Registration of Companies), art. 2.

4, chapter 3 of the *General Principles*. This is another hole in the *General Principles* that needs to be filled in.

c. *Some characteristics of legal person partnerships.* The *General Principles* divides joint operation into three parts: "organizing new economic entities with legal person status," "new enterprises without legal person status," and "new enterprises independently operated under the control of contract."[71] It also regulates corresponding scopes of property liability, namely "independent liability," "joint and several liability borne by individually owned and jointly managed property," and "individual liability." The three kinds of joint operation defined in the *General Principles* illustrate the characteristics of, respectively, company legal person, partnership, and bilateral contract. Therefore, in theory joint operation can be divided into "company legal person," "legal person partnership," and "bilateral contract" (*shuangwu hetong*). "Legal person partnership" joint operation is discussed below.

i. *Legal capacity of a legal person to be a partner.* Can a legal person become a shareholder of unlimited liability in another enterprise? The laws vary from country to country. On the one hand, section 55 of the Japanese Commercial Code and section 22 of the old Republic of China Corporation Law expressly prohibit a legal person from being a partner in another enterprise. Section 20 of the Private Enterprise Interim Regulations of the People's Republic of China, which was enacted after 1949 but later abolished, had a similar provision. On the other hand, legislation of some other countries establishes no such limitations. For example, section 6 of the Uniform Partnership Act of the United States provides: "A partnership is an association of two or more persons to carry on as co-owners a business for profit."[72] Under section 2 of this Act, "person" includes individuals, partnerships, corporations, and other associations. According to the commercial law of the Federal Republic of Germany, partnership is not limited to natural persons. "Such legal entities as corporations of limited liability, with or without stockholders, can become members of a partnership. A general partner or a limited partner can become the member of another partnership."[73] Under section 434 of the Civil Code of Soviet Russia, the members of a partnership are mainly composed of legal persons that are state-owned enterprises and collectively owned enterprises.[74]

The *General Principles* does not clearly state that legal persons may become partners. However, it can be inferred from article 52 of the *General Principles* that the civil law affirms the capacity of a legal person to become a member of a partnership. Since both legal persons and natural persons are entitled to become members of a partnership, they both have the same rights and duties toward the partnership. As a result, it is unnecessary to establish separate rules for individual and legal person partnerships.

---

71. *General Principles*, arts. 51-53.
72. UNIF. PARTNERSHIP ACT, § 6(1), 6 U.L.A. 22 (1969).
73. N. HORN, GERMAN PRIVATE AND COMMERCIAL LAW 244 (1982).
74. SU'E MINFA DIAN (CHINESE TRANSLATION OF SOVIET CIVIL CODE) (1980).

ii. *Liabilities of a legal person as a member of a partnership.* Article 52 of the *General Principles* provides:

> Where joint operations do not qualify as legal persons, each party who participates in joint management shall assume civil liability with the property each party owns or manages. The liability of each party shall be determined either in accordance with the proportion of funds which each party has furnished or by reference to the partnership agreement.

"The property each party owns or manages" includes not only "the property owned or managed" by each party as a legal person, but also the common property owned by each party as a member of the partnership. It is obviously narrow and incomplete to understand "the property owned or managed by each party" as referring merely to the investment by the parties in the jointly operated enterprise.

Regardless of whether a partner is a legal person or a natural person, the property owned individually or jointly by the partners will be used as security for debt. Thus, if the property jointly owned by the partners is insufficient to repay the debt, the partners as individuals and as a unit are liable for the debt with all their property down to their last coin and last piece of land.

Article 52 of the *General Principles* also provides: "The parties shall be jointly and severally liable if the law or agreement so provides." In addition, article 87 of the *General Principles* provides "if jointly liable, each debtor has the duty to repay the entire debt. Any party who has fulfilled its debt obligation is entitled to compensation from all other jointly liable debtors for their share of the debt." Under the regulations of the SAIC, jointly operated enterprises of this kind shall present a Certificate of Investment or Document of Joint Liability[75] at the time of its registration. The articles of association of such an enterprise must expressly provide "a specific schedule of joint economic liability."[76] However, the regulations "establish no minimum requirements for registered capital and the enterprise can also be exempted from declaring its registered capital."[77] However, under the item "registered capital" in the business license, the parties shall clearly indicate that "the partnership members are jointly liable";[78] and under the item "form of accounting," the parties shall clearly indicate that it is a "not an independent accounting enterprise." Under articles 12 and 87 of the *General Principles* and the pertinent provisions of the SAIC, the characteristics of partnerships with joint liability between legal persons can be summarized as follows:

> 1. Joint and several liability is the combination of each individual partner's liability with the common liability of all members of the joint operation. Creditors of the joint operation are entitled to request one, several, or all the members of the joint operation, concurrently or sequentially, to repay part or all of the debts.
> 2. Joint and several liability is applicable only when the property of the partnership is insufficient to satisfy its debts. The partners shall first repay the debt with their

75. Jingji lianhe zuzhi dengji guanli zanxing banfa (Temporary Rules for Managing the Administration of the Registration of Economic Joint Organizations), art. 3.
76. *Id.* art. 4.
77. *Id.* art. 5.
78. *Id.*

common property and then be severally liable for repayment of the debt with each partner's individual property. Should the property of the partnership be sufficient to repay all the debts of the partnership, the problem of several liability will not arise. This is also true in security [suretyship] cases, since the creditor will have no reason to require the debtor and his guarantor to be jointly liable when the debtor is able to repay all his debts by himself.

3. Joint and several liability is a kind of external liability. No joint and several liability exists internally unless the parties to the partnership provide otherwise in the agreement. After satisfaction of all the debts of the partnership by one partner, this partner cannot require other partners to be jointly and severally liable to him on this ground. He can only require other partners to pay him the proportion for which the other partners are liable in accordance with the partnership agreement.

4. The joint and several liability of partnership is a legal duty. Any provision in the partnership agreement which stipulates that the partners are not jointly and severally liable is without legal effect. However, the burden of the debt repayment to be borne by each partner can be provided for in the partnership agreement, but only the partners in the agreement are bound by it. When the creditor requests the repayment of the debt, it is not necessary for him to take the debt repayment agreement among partners into consideration. If the partnership property is not sufficient to repay the debt, the creditor is entitled to require any individual partner to repay all the debt. After the satisfaction of the creditor, the joint and several liability of all the partners turns into liability in proportion to the fixed shares of each individual partner. Under such circumstances, the prior arrangement of proportion of debt repayment among the partners is of great significance.

Through further analysis of joint and several liability, another problem presents itself. If both the partnership debt and a partner's individual debt exist at the same time, how should the sequence of repayment be determined? It becomes an acute problem in a case in which both the partnership and the individual partners are insolvent, and if more than one creditor is submitting claims. Although the *General Principles* and other existing laws in China do not have provisions which address this issue, a rather well-considered rule was established early in the judicial practices of the People's Republic of China. An instruction issued by the People's Supreme Court of China in 1957 made it clear that when "both partnership and partners who are also sole proprietors of other businesses are in debt and the latter is insolvent, the partnership's property should be auctioned off and the proceeds used to satisfy the claims of the partnership's creditors first. Then, each partner shall pay his or her own debt with his share of the proceeds or remaining property."[79] There are obvious similarities between this Supreme Court instruction and certain provisions of the partnership laws of the United States and Britain.

Partnership law in the United States and Britain adopted the general principle of "firm creditors in firm assets and individual creditors in individual assets."[80] In other words, partnership property will be used to repay the partnership debt first and individual property will be used to repay individual debt first, which can also be called the "dual priority" rule. Section 5(7) of the United States Bankruptcy Act provides: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and

79. *Quoted in* FANG LIUFANG, GEREN HEHUO (PARTNERSHIPS OF INDIVIDUALS) 38 (1986).
80. J. WYATT, BUSINESS LAW 539 (1979).

the net proceeds of the individual estate of each general partner to the payment of his individual debts."[81] In West Germany, the law provides that "a partnership can be a party to legal proceedings, although it does not, strictly speaking, have any legal personality. The possibility of partnership bankruptcy is favorable to the partnership's creditors, who are paid off out of partnership assets before the personal creditors of the members."[82]

The dual priority rule is a necessary supplement to the principle of joint and several liability. Recognizing only the partnership's unlimited joint and several liability to its creditors, without applying the dual priority rule, may make it impossible for the creditors of the individual partners to get any repayment from the property of the individual partners. The dual priority rule protects the interests of both the creditors of the partnership and the creditors of the individual partners. It is worth noticing that the rule makes it possible for both parties to have an equal opportunity to get repayment from the common property of the partnership and the property of the individual partners.

It should be pointed out that no matter whether the partner is regarded as a natural or legal person, it makes no difference with respect to the liability of the partnership. The general liability as to the members of the joint operation is also applicable to such "individual partners" as co-op organizations, IICH's, and "commodity economy joint entities."

iii. *The rapid development of joint operations in China in the 1980's.* Since there are no statistics by category on partnership-like joint operations, the scope and speed of the development of such operations formed by legal persons can only be generally estimated.

In July 1980, the State Council published the Provisional Regulations for the Development of Economic Association (*Guanyu tuidong jingji lianhede zanxing guiding*)[83] which are the basis for the establishment of joint operations in 1980's. Between its publication and March 1981, more than 3400 joint operations have been set up in China as "joint management enterprises, cooperative management enterprise, domestic compensation traders, and many other forms."[84] In 1984, more than 26,000 joint operations were registered throughout the country (most of which are joint management enterprises between or among state-owned enterprises), representing a total value of 3.5 billion yuan in fixed assets, 3.9 billion yuan in circulating capital, and accounting for 840,000 employees.[85] By 1985, joint operations had spread all over the country, from city to countryside. For example, there are 387 "joint operations" in the city of Shenyang, and their members come from 5800 enterprises in twenty-three provinces, municipalities, and autonomous

81. 11 U.S.C.A. § 23(f) (West Supp. 1964) (superseded by the Bankruptcy Code).
82. 13 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 161.
83. BULL. STATE COUNCIL, No. 8 (1980).
84. *Id.*, No. 9, at 272.
85. ADMINISTRATIVE MANAGEMENT OF INDUSTRY AND COMMERCE, No. 9, at 35 (1985).

regions.[86] In 1985, the national government collected 343 million yuan as profit and tax from fourteen "enterprises groups in Wuxi,"[87] an amount almost twice the average annual income tax collected by the government from all the privately owned enterprises in China during the 1950's.[88] In Shanghai, 400 joint operations exist in various forms. Moreover, in excess of 1,000 joint operations have been established between Shanghai and other provinces, cities, and autonomous regions.[89]

The emergence of the joint operation in the 1980's in China is the result of the dramatically increasing material demands of society. On the one hand, the "hunger for consumption" makes it possible for these enterprises to boom and develop. On the other hand, some ambitious enterprises which seek to operate independently fall short of this goal because of the state's control of capital for basic construction, the shortage of energy, and the lack of capital for expansion of production. But nobody is willing to wait and lose the chance, and thus, competition causes the continual formation of joint operations. No matter what legal form the joint management enterprise groups take, within each group there is always an enterprise with a product that is highly successful. This product enables the enterprise to play the leading role in the group. People in China vividly describe this enterprise as "the dragon head," and the joint management enterprise group as the "dragon body." The "dragon head" and the "dragon body" together constitute a beneficial common entity.

5. *Partnerships with Foreign Elements.* If part or all of the property of a partnership is invested by a foreign citizen, foreign partnership, or any foreign legal person, or if any partner is a foreign citizen, foreign partner, or legal person, then the entity is considered a partnership with foreign elements. Under current Chinese law, foreign investors establishing an enterprise in China may choose from among the following forms of partnership:

According to article 41 of the *General Principles,* a joint venture enterprise using Chinese and foreign investment, a Chinese-foreign cooperatively managed enterprise, or a wholly foreign-owned enterprise established within the territory of the People's Republic of China shall all qualify for the status of a Chinese enterprise legal person. According to articles 51-53, any such enterprise legal person may choose its form of joint operation. These joint operations can in turn select the partnership form for doing business. Thus, it is possible to establish a partnership in the form of a joint operation between those entities that have obtained the status of a Chinese legal

86. Jingji ribao (Economic Daily), May 6, 1986, at 2.

87. Wuxi ribao (Wuxi Daily), Apr. 10, 1986, at 1.

88. Between 1950 and 1955, profits from private industry and enterprise totalled RMB 3,170,000,000 and accounted for 35.8% of taxes. *See* CHINA'S NATIONAL ECONOMIC CONSTRUCTION AND THE PEOPLE'S LIVELIHOOD 93 (1958).

89. *See* FAZHAN ZHONGDE HENGXIANG JINGJI LIANHE (HORIZONTAL ECONOMIC COOPERATION IN DEVELOPMENT) 45 (1986).

person—such as among joint venture enterprises with Chinese and foreign investment, Chinese-foreign cooperative joint venture enterprises, and wholly foreign-owned enterprises—and between, on the one hand, joint venture enterprises with Chinese and foreign investment, Chinese-foreign cooperatively managed enterprises, wholly foreign-owned enterprises, and, on the other hand, enterprises and enterprise legal persons with state or collective characteristics and institution legal persons.

According to articles 1 and 2 of the Law of Wholly Foreign-Owned Enterprises in the PRC, "foreign enterprises and other economic organizations or individuals" may establish enterprises in China with capital supplied completely by foreign investors. This provision's reference to "foreign enterprises, and other economic organizations or individuals" undoubtedly includes foreign corporations, partnerships, and sole proprietorships.

If a foreign investor lacks the status of a legal person under Chinese law, he can adopt only the partnership or sole proprietorship form to establish a business. If a foreign investor is unwilling to seek the status of a legal person under Chinese law, he may also choose to establish his business as a partnership on a sole proprietorship. Thus, foreign investors can establish a wholly foreign-owned enterprise as a partnership.

According to the *General Principles,* a partnership adopting the wholly foreign-owned enterprise form belongs to a category of "individual partnerships." Since the provisions pertaining to People's Republic of China citizenship in the *General Principles* are applicable to foreigners and all stateless persons within the PRC, except as otherwise provided by law, and since individual partnerships are covered in the chapter of the *General Principles* on "citizenship," the provisions on "individual partnership" may appropriately be applied to foreign investors as well.[90] In sum, a partnership with foreign elements may be formed as a joint operation or as an individual partnership.

III

CONCLUSION

The *General Principles* treats a partnership of natural persons and a partnership composed of legal persons differently. The former, referred to as "individual partnerships," is covered in the "citizen" chapter (chapter 2) of the *General Principles.* Ninety percent of co-op organizations, a part of IICH's (except sole proprietorships), and some "rural commodity economy joint entities" fall into this category. Partnerships composed of legal persons are called "commonly operated entities without legal person status," and are covered in chapter 3—"Legal Persons." Most "headquarter factories" (*zong chang*), "branch factories" (*fenchang*), "centers" (*zhongxin*), "groups" (*jituan*), and "mass entities" (*qunti*) fall into this category. Foreign investors may choose to operate under either of these formats. Under current economic

90. *General Principles,* art. 8.

regulations and policy, a natural person and legal person can form a partnership, although this type of partnership was not formally approved in the *General Principles.*

IV

OUTLINE OF CHINESE PARTNERSHIP LAW

The earliest written Chinese partnership law was the Qing Dynasty Company Law.[91] Partnerships were termed "Joint Capital Company" and "Stock Company." These companies had obvious differences from limited corporations. "Upon bankruptcy of both [joint capital and stock companies] the partners are liable without limit for any debt outstanding to creditors,"[92] while for limited corporations, liability was restricted only to the contributions of the individual shareholders.[93]

In the Civil Code issued by the Nationalist Government in 1929, partnerships were regarded as a form of contract, but in the same year the government issued a Corporations Law, which treated the joint and several liability undertaken among stockholders of "unlimited corporations" as separate "legal persons."[94]

After the establishment of the PRC, the Interim Provisions on Private Enterprises was promulgated in December 1950. Section 3 of this document provided that private enterprises should be structured in three forms: sole proprietorships, partnerships, and corporations. However, "the original five forms of corporations could remain, namely the unlimited corporation, the limited corporation, the limited stock corporation, the mixed limited corporation and the mixed stock corporation."[95] It is worth mentioning that the term "joint operation," extensively used in the 1980's, first appeared in the Interim Provisions on Private Enterprises. Section 5 of the "Interim Provisions" provides that private enterprises can "jointly operate part or parts of its business together with the foundation of the original organization and draw up articles of association for a joint operation accordingly. Furthermore, publicly owned enterprises or enterprises owned publicly and privately can also operate as a joint organization." This was perhaps the first time that a socialist country had recognized in legal terms that economic cooperation between domestic enterprises can bridge the gap between public and private ownership.

Chinese partnership law of the 1980's is scattered in the *General Principles* and economic regulations and policies. Besides chapter 2, section 5, and chapter 3, article 52, of the *General Principles,* the other legal regulations and policies on partnership are the Interim Regulations on Promoting Joint

91. 6 DAQING FAGUI DAQUAN (COMPLETE LAWS OF THE QING DYNASTY) 3022.
92. Daqing gongsilu (Qing Corporations Law), art. 31.
93. *Id.* arts. 9, 29.
94. Gongsi fa (Corporations Law), art. 1 (1946).
95. *See supra* note 18.

Economic Operations of the State Council,[96] State Council Provisions on Rural Cooperative Organizations,[97] State Council Provisions on Certain Problems in Further Promoting Horizontal Economic Cooperation,[98] Finance Ministry Regulations on Certain Financial Problems of Joint Operation of Domestic Enterprises,[99] Finance Ministry Interim Rules Concerning Certain Tax Problems in the Promotion of Horizontal Economic Associations,[100] State Resource Bureau Temporary Rules Concerning Allocation and Supply of Materials and Marketing of Commodities by Economic Cooperative Organizations,[101] the State Administration of Industry and Commerce Interim Regulations on the Registration of Joint Economic Organizations,[102] and, finally, the State Administration of Industry and Commerce Directive Concerning the Implementation of the *General Principles* on Individual Partnership Registration.[103]

These laws and the legal effect of these regulations override the partnership agreement among parties. The partnership agreement should abide by the necessary provisions of relevant laws and regulations. Those provisions in partnership agreements which conflict with these laws or regulations are unenforceable. This policy is very different from the "gap-filler" provisions found in the Uniform Partnership Act of the United States.

Following the development of the commodity economy in China, partnership, the traditional method of operation, will show its vitality. And with practice, Chinese partnership law will be perfected.

V

POSTSCRIPT

Prior to April 12, 1988, when the National People's Congress approved the amendment proposed by the Central Committee of the Communist Party to confirm the legitimacy of the "private economy," statutes had carefully steered clear of such terms as "private enterprise" and "private employment." For ideological reasons, "private" enterprises are still treated differently. For example, the people in individual industrial and commercial households ("IICH's") are called "laborers" (*laodongzhe*)—this term distinguishes IICH's from "exploiters" (*boxuezhe*)—, but the proprietor (*laoban*) of a private enterprise is not considered a "laborer." Moreover, while article 11 of the Constitution originally stipulated that "through administrative management the state will supervise and help the individual economy (*geti jingji*)," thereby signifying that the government encourages and fosters the individual economy, the absence of any reference in the added

96. BULL. STATE COUNCIL, No. 8 (1980).
97. *Id.*, No. 10 (1983).
98. *Id.*, No. 8 (1986).
99. CAIZHENG (FINANCE), No. 4 (1986).
100. XINHUA YUEBAO (NEW CHINA MONTHLY), No. 4 (1986).
101. Jingji ribao (Economic Daily), Apr. 4, 1986.
102. BULL. STATE COUNCIL, No. 3 (1986).
103. *See supra* note 36.

language to having to help the private economy means that the government is willing to tolerate private economy in some respects. It treats comparatively small-scale IICH's and comparatively large-scale private enterprises differently. Thus, it is not so much that this amendment enthusiastically advocates China's developing a "private economy," as it is merely grudging recognition that the phenomenon of the private economy has existed in China for several years and that it would be even better for the lawful existence of the private economy to be controlled by law.

In subsequent legislation the distinction between individual and private was also made for partnerships. The Second Interim Provisions on Private Enterprises ("IPPE"),[104] promulgated on June 25, 1988, stipulated that private enterprises are private economic associations that employ eight or more people and are organized as sole proprietorships, partnerships, or limited companies.[105] The IPPE further provided that "the partnership enterprise is composed of two or more persons, who, according to their agreement, carry on business, share profits and losses, and who, as partners, are jointly and severally liable for the obligations of the partnership enterprise."[106] On the other side of the line are "individual partnerships," which employ seven workers or less and are considered a type of IICH, subject to the Administrative Regulations on IICH's.[107]

The question is why the line between these forms was drawn at eight employees. This special legislative device, which appears to be something with "Chinese characteristics," is in fact only the replication of an assumption by Karl Marx. Such use of Marxist theory is not strange because it is a convenient and reliable means by which some sensitive ideological issues can be solved or some statutes can be ideologically justified. This limitation on the number of employees, which first appeared in the 1981 Policy Decision on Urban Non-agricultural Individual Economy (an IICH may have one or two assistants and no more than five trainees), is based on Marx's discussion of variable capital in chapter XI of *Das Kapital*. Marx pointed out that a worker laboring twelve hours a day for a capitalist engages in the socially necessary labor required to reproduce his daily wage for only eight hours. The additional four hours are surplus labor from which is produced the surplus value for his boss. In order to possess the surplus capital sufficient to live twice as well as his workers, no longer have to work, and thereby become a capitalist, the boss needs to employ eight workers.[108] "Of course he can, like

104. BULL. STATE COUNCIL (No. 15, 1988).
105. IPPE, sec. 2.
106. *Id.* sec. 8.
107. Promulgated on August 5, 1987, by the State Council.
108. ZIBENLUN (CAPITAL), 1.321. Special Editor's Note: I could not locate the Chinese language text cited by Fang. The English text indicates that Marx calculated it would require two workers, each laboring twelve hours a day, in order for the capitalist "to live, on the surplus value appropriated daily, as well as, and no better than a labourer." Two sentences later, Marx writes that for the capitalist to "live only twice as well as an ordinary labourer, and besides turn half of the surplus value produced into capital, he would have to raise, with the number of labourers, the minimum of the capital advanced eight times." K. MARX, CAPITAL, 1.308 (1967).

his labourer, take to work himself, participate directly in the process of production, but he is then only a hybrid between capitalist and labourer, a "small master.' "[109]

This maximum combined number of seven assistants and trainees is thus very close to Marx's premise. In reality, however, the upper limit on the number of employees is very quickly broken, and in some provinces IICH's with several hundred employees have appeared. The government has adopted a lenient attitude on this matter. I have yet to read a report of an IICH being punished for hiring more than seven people. These regulations on the number of employees and the standard for distinguishing between IICH's and "private enterprise" appear to be an intriguing weaving together of strictly orthodox ideological dogmatism and flexible realism that reflects the special circumstance of the Chinese economic reform.

Before I close, two other points should be noted about partnerships. The first concerns single-purpose partnerships. According to the Interim Provisions on Leasing State-owned Small-scale Industrial Enterprises,[110] from two to five people may initiate a partnership for the single purpose of taking over the management of state-owned small-scale industrial enterprises as lessees.[111] The second relates to the problem of the inability of an individual partnership to be registered as a legal person. After a private enterprise was forced into liquidation by a local Industrial and Commercial Administrative Bureau, it was identified as a partnership rather than a corporate entity. Consequently, joint and several liability to the creditors was imposed on the general partners as shareholders.[112]

Because the government has made laws regarding enterprises one by one on the basis of enterprises' ownership system and organizational structure and their division among different governmental agencies, all sorts of disparate standards have appeared. Legislation is repetitive, confused, and rife with lacunae and mutual contradictions. This seems inescapable in a country that is trying to find a middle path between a market economy and a planned economy.

China is in the midst of carrying out experiments that have not yet matured to the point where law can be used to regularize them. People still cannot extricate themselves from the dilemmas produced by the changeover from old to new economic systems and cannot imagine a sort of comparatively stable, comparatively perfected legal form. Thus, the influence of political elements causes further confusion for legislation that is already problematical.

I think that the government ought at least to recognize that the likelihood of confusion or shortcomings in the law may cause economic reforms that originally were very significant to be changed beyond recognition. When a

---

109. *Id.*

110. BULL. STATE COUNCIL (No. 13, 1988).

111. Interim Provisions on Leasing State-owned Small-scale Industrial Enterprises, secs. 2, 7, in *id.*

112. BULLETIN OF THE SUPREME PEOPLE'S COURT (No. 4, 1988).

society's economic life lacks rules, almost any bad thing can occur. It does not matter whether it is a planned or a market economy.