

# The Role of Economic Contracts in Communist China<sup>†</sup>

Gene T. Hsiao\*

A REVOLUTIONARY country has no place for the "rule of law" as it is known in the contemporary West. The revolutionary is a zealot. He demands fast and determined action; for him, the normal processes of legislation and court litigation are too tedious and costly. Not long after the success of the Bolshevik Revolution, the Russian Commissar for Justice, Stuchka, stated: "There is no place for revolution in the present understanding of law; and as the German revolutionary peasants sent their doctors of laws packing, and the Spaniards cursed their jurists (*togados*), and so must the proletarian revolution also be on guard against its jurists."<sup>1</sup> More than three decades later, Mao Tse-tung declared:

Throughout the Chinese countryside a new upsurge in the socialist mass movement is in sight. But some of our comrades are tottering along like a woman with bound feet, always complaining that others are going too fast, too fast. They picked on trifles, made inappropriate complaints, expressed endless worries, and *set countless pure norms and prohibiting rules*, thinking that this is the correct way to guide the socialist mass movement in rural areas. No, this is not the correct way; it is wrong.<sup>2</sup>

What is the correct way? "Comprehensive plauning, more active leadership—that is our way."<sup>3</sup>

Mao's distaste for law arose from his ardent desire to revolutionize China on the basis of a planned economy under the constant guidance

---

<sup>†</sup> This article is a product of a long-term study on the Chinese Communist legal system. The author wishes to thank the Rockefeller Foundation, the Air Office of Scientific Research, the Center for Chinese Studies, and the Project with which he is currently associated, for their support of his undertaking. In preparing this study, the author was confronted with many problems, including the lack of systematized procedural laws in China and the absence of press reports of cases decided by either regular courts or administrative tribunals. Consequently, most source materials cited are news releases, academic articles, and official reports. Due to the large and varied role of economic contracts, the discussion must confine itself to the essential aspects.

\* Assistant Specialist in the Center for Chinese Studies, University of California, Berkeley; concurrently a member of the University's Project for the Comparative Study of Communist Societies.

<sup>1</sup> Stuchka, *The Revolutionary Part Played by Law and the State—A General Doctrine of Law*, in *SOVIET LEGAL PHILOSOPHY* 21 (Babb transl. 1951).

<sup>2</sup> Mao Tse-tung, *On the Question of Agricultural Cooperation*, in 2 *CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN* (Compilation of Laws and Regulations of the Chinese People's Republic) [hereinafter cited as FKHP] 1 (1955). (Emphasis added.)

<sup>3</sup> *Id.* at 23.

<sup>4</sup> MAO TSE-TUNG, *The Chinese Revolution and the Chinese Communist Party*, in 2

of the Communist Party leadership.<sup>4</sup> Mao's rejection of the rule of law does not, however, mean denial of *the role of law*.<sup>5</sup> A planned economy cannot operate without rules regulating the activities of its various economic sectors. Thus sixty-six per cent of the more than 4,000 statutes and regulations issued by the Peking regime up to 1958 dealt with the national economy.<sup>6</sup>

With the passage of most means of production into state and collective ownership, the system of contract in China, as in the Soviet Union and other Socialist countries,<sup>7</sup> has largely become a public function of the state.<sup>8</sup> This, however, is not surprising: The power to contract is an indispensable part of the property right.<sup>9</sup> Thus this article first outlines Communist China's economic bureaucracy. The second section analyzes the relationship between property and contract in order to provide an understanding of the contract institution in China. The third section examines the relationship of the national economic plan to the system of contract.

Socialization of the means of production is based on the need for a planned economy. Since the plan is not self-executing, its successful implementation requires that its general principles be translated into specific terms. This function is performed by economic contracts, of which the two most important are the contract of delivery in the industrial sector and the contract of purchase and supply in the agricultural sector. The exchange of goods between the industrial and agriculture sectors is achieved mainly through an intermediary—the system of commerce. Moreover, since the national economic plan does not cover the operation of all sectors of the economy, the contract of purchase and supply, in addition to its function in the agricultural sector, has served to consolidate diverse economic activities. Hence, the last section treats commercial economic contracts and the system of commerce separately.

---

SELECTED WORKS [hereinafter cited as WORKS] 615-54 (in Chinese, 1953); MAO TSE-TUNG, *On the People's Democratic Dictatorship*, in 4 WORKS 1473-86 (1960).

<sup>5</sup> For a discussion of socialist thought on the function of law, see FRIEDMANN, *LEGAL THEORY* 251-55 (3rd ed., 2nd Impression 1957).

<sup>6</sup> Tu P'ei-shan, *On the Work of Legislation in Our Country*, CHENG-FA YEN-CHIU (Political-Legal Studies) (Chinese People's Republic) [hereinafter cited as CFYC], No. 1, 1958, p. 55. Another official figure showed that up to July 15, 1957, 2022 of the 4018 statutes and regulations issued by the regime, dealt with the national economy. Kuang-ming Jih-pao (Peking) [hereinafter cited as KMJP], Aug. 3, 1957, p. 1.

<sup>7</sup> See GRZYBOWSKI, *SOVIET LEGAL INSTITUTIONS* 85-96 (1962). Grzybowski also relates some experiences of East European countries with the contract institution.

<sup>8</sup> Liu Wen, *The Role of Law in the Socialist Transformation and Socialist Economic Construction of Our Country*, CFYC, No. 4, 1962, pp. 31-33.

<sup>9</sup> For example, American courts have uniformly ruled that the "right to acquire and possess property necessarily includes the right to contract." 1 ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* 53 n.1 (1914).

## I

## A PROFILE OF THE ECONOMIC BUREAUCRACY

Theoretically, the Socialist state is created to pave the way for its withering away. In his 1937 essay, *On Contradiction*, Mao restated Stalin's theme: "To consolidate the dictatorship of the proletariat or the people's dictatorship is precisely to prepare the conditions for liquidating such a dictatorship and advancing to the higher stage of abolishing all state systems."<sup>10</sup> In reality, however, the state has created a huge bureaucracy that largely controls the economy's production and distribution. For this reason, it is essential for an understanding of the system of contract to sketch the structure of the state economic organization within China.

*A. The Government Hierarchy*

The Peking government is superficially divided into three branches: the people's congresses as the legislative bodies, the people's councils as the executive organs, and the people's courts as the judiciary.<sup>11</sup> The executive branch of the central government, supervised by the State Council, consists of nine staff offices, two national banks, seventeen administrations, three boards, one news agency, eight commissions, and thirty-six ministries.<sup>12</sup> Of these, three staff offices, the two banks, eleven administrations, one board, four commissions, and twenty-nine ministries are directly concerned with the nation's economic planning, production, distribution, and exchange.<sup>13</sup>

---

<sup>10</sup> 1 WORKS 317 (1953). In *On the People's Democratic Dictatorship*, Mao further stated: "Do not you want to abolish state power? Yes, we want to, but not at the present time. We cannot afford to abolish state power just now. Why not? Because imperialism still exists. Because, internally, reactionaries still exist and classes still exist." 4 WORKS 1480 (1960). This dialectical formula of the statements made by Mao is based on the work of Stalin who in 1930 said: "We stand for the withering away of the state. At the same time we stand for the strengthening of the dictatorship of the proletariat, which is the mightiest and strongest state power that has ever existed. The highest development of state power with the object of preparing the conditions for the withering away of state power—such is the Marxist formula. Is this 'contradictory'? Yes, it is 'contradictory.' But this contradiction is bound up with life, and it fully reflects Marx's dialectics." 12 STALIN, WORKS 381 (1955).

<sup>11</sup> CHINESE PEOPLE'S REPUBLIC CONST. ch. 2.

<sup>12</sup> These figures are based on official statistics for 1964. 1964 JEN-MIN SHOU-TS'U (The People's Handbook) (People's Republic of China) 273-75 (in Chinese). In March 1965 the State Council reestablished the State Capital Construction Commission and added a Ministry of Building Materials Industry to its bureaucracy. Jen-min Jih-pao (Peking) [hereinafter cited as JMJ], March 28, 1965, p. 2.

<sup>13</sup> The Ministries of Interior Affairs, National Defense, and Public Security are not included in these twenty-nine ministries. To a limited extent, they are also engaged in production. For example, the Army has its own "production corps" and military farms. Fei-ch'ing Yen-chiu (Studies of Chinese Communist Affairs) (Taipei), June 30, 1965, p. 119. Articles 6 and 30 of the Labor Reform Regulation of September 7, 1954, authorized the Ministry of Pub-

In the planning area, the State Planning Commission has since 1956 been charged with formulating long-range economic plans; the State Economic Commission, which was created in that year, has mapped out annual plans on the basis of these long-term plans.<sup>14</sup> Organizationally and functionally, these two commissions have their counterparts in all production units and local governments.<sup>15</sup>

In the industrial sphere, seventeen industrial ministries oversee the areas of marine products, metallurgy, chemistry, machine building, construction, coal mining, petroleum, geology, textile, light industry, forestry, water conservation, and electricity.<sup>16</sup> Most of these ministries have their counterparts at local governmental levels (provinces, special districts, and *hsien*—county), and all of these ministries have subordinate production units—companies, factories, or mines. Working under the general supervision of ministerial bureaus, these production units are called “state enterprises,” for they are capitalized by the central government. Those production units which are capitalized by local authorities and operate under the direct supervision of local industrial departments or bureaus are “local state enterprises.”<sup>17</sup> Both types of enterprises are juristic persons and therefore can be sued.<sup>18</sup> State organs (ministries, their subordinate bureaus and local counterparts) may assume juristic personality if they receive a budget from the state which allows them to participate in civil relations. The state itself is not a juristic person. It participates in civil relations as a “special subject” and therefore is not responsible for any civil liability.<sup>19</sup>

---

lic Security to direct the operation of labor reform institutions and to include their labor production into the general national production plan. CHUNG-YANG JEN-MIN CHENG-FU FA-LING HUI-PIEN (Compilation of Laws and Decrees of the Central People's Government) [hereinafter cited as FLHP] 33, 36 (1954). A State Council decision of August 3, 1957, empowered local public security organs and local administrations of civil affairs, which are under the jurisdiction of the Ministry of Interior Affairs, to reeducate and accommodate vagrants and unemployed people through labor. 6 FKHP 243-44 (1957).

<sup>14</sup> Proposal of the Premier for Reorganization of the Finance and Economic Departments Under the State Council, May 11, 1956, ratified by a resolution of the Standing Committee of the National People's Congress, May 12, 1956, in 3 FKHP 79-82 (1956). For a brief description of the changing organization of planning administration, see Pfeffer, *The Institution of Contracts in the Chinese People's Republic (Part I)*, *The China Quarterly*, April-June, 1963, pp. 153, 159-62, 164-67, 170-72.

<sup>15</sup> Provisional Organic Rule for Planning Committees of the Local People's Councils, February 18, 1956, in 3 FKHP 54-58 (1956).

<sup>16</sup> JEN-MIN SHOU-TS'U, *op. cit. supra* note 12, at 273-75.

<sup>17</sup> Government Administration Council Regulation of Sept. 2, 1952, in FLHP 98 (1952).

<sup>18</sup> CHUNG-HUA JEN-MIN KUNG-HO-KUO MIN-FA CHI-PEN WEN-T'I (Basic Problems in the Civil Law of the People's Republic of China) [hereinafter cited as CIVIL LAW TEXTBOOK] 68 (in Chinese, 1958). This is the only textbook so far available on the subject of civil law in Communist China. It was prepared by the Central Political-Judicial Cadres School in Peking.

<sup>19</sup> For a discussion of juristic personality, see *id.* at 68-72.

In the field of transportation, there are the Ministries of Railways, Communications, and Post and Tele-Communications with their networks all over the country. In agriculture, the Ministry of Land Reclamation directs the production of state and military farms,<sup>20</sup> while the Ministry of Agriculture guides rural production in general.

At the base of the governmental hierarchy are more than 70,000 rural people's communes,<sup>21</sup> with approximately 700,000 subordinate production brigades<sup>22</sup> and several million production teams.<sup>23</sup> Originally intended to be an all-embracing socio-economic organization, the commune has since 1959 undergone a series of changes.<sup>24</sup> It generally performs two basic functions. As a governmental unit, it fulfills the role of a *hsiang* (town) administration.<sup>25</sup> As an economic unit, it operates certain types of industry and commerce and controls the production of its brigades and teams. A brigade generally consists of about 150 households, the same size as an agricultural producers' cooperative, which was the form of agricultural collective before August 1958. Together with its subordinate production teams, the brigade cultivates the land and carries on various side-occupations.

The exchange of products between the communes, representing the agricultural sector, and the state, representing the industrial sector, is achieved through the system of commerce. Due to its importance to the institution of contract, this system will be explored in more detail in the last section of this article.

### B. The Party Pyramid

Political control of this huge economic bureaucracy is assured by the pyramidal arrangement of the Party structure on both a geographical and a production basis. The Party organization in charge of Party work in a defined area is the highest of all the constituent Party organizations

<sup>20</sup> Proposal of the Premier, *supra* note 14, at 81.

<sup>21</sup> The number of people's communes was recently estimated to be "more than 74,000." Peking Review, No. 44, 1963, p. 9. Another was "more than 70,000." Po I-Po & LIAO LU-YEN, SOCIALIST INDUSTRIALIZATION AND AGRICULTURAL COLLECTIVIZATION IN CHINA 24 (1964). In 1959 it was reported that there were "over 26,000" communes in the countryside. JMJP, Oct. 6, 1959, p. 2.

<sup>22</sup> JMJP, Aug. 29, 1963, p. 1 (editorial).

<sup>23</sup> Ching-chi Yen-chiu (Economic Studies) [hereinafter cited as CCYC], Nov., 1964, p. 20.

<sup>24</sup> THE DEPARTMENT OF MARXISM-LENINISM, CHINESE PEOPLE'S UNIVERSITY, LUN JEN-MIN KUNG-SHE YÜ KUNG-CH'AN CHU-I (On the People's Commune and Communism) *passim* (in Chinese, 1958); 1 TANG, COMMUNIST CHINA TODAY 457-84 (1961); Hsiao Yeh-hui, *New Changes in the System of Operation and Management of the Chinese Communist Rural Communes*, Fei-ch'ing Yen-chiu, March 31, 1965, pp. 1-17.

<sup>25</sup> *Hsiang* is an intermediate administrative subdivision between the *hsien*—county—and the villages.

in that area; the same is true of the Party organization in charge of Party work in a particular production, work, or social unit as opposed to the constituent Party organizations in that unit.

Geographically, Party organizations parallel state administration organizations, level by level. Industrially, a primary Party organization exists in every production unit, including the communes. Socially, the Party penetrates all civic bodies, such as schools and mass organizations.<sup>26</sup> Functionally, the authority of the Party organizations at all levels is divided into three branches: the congresses as the representative bodies, the committees as policy-making organs, and the secretariats as the daily executives.

Persons eighteen and above and proved to be "progressive elements" are recruited into the Party; those from fifteen to twenty-five may be recruited into the Youth League, and those from nine to fifteen, into the Pioneers. Workers are organized into unions, peasants into communes, women into the All-China Federation of Women, the aged into the "happy gardens," and babies into nurseries. Wherever a group of people exists, there is an organization; wherever an organization is present, there is a Party unit.

The organizational links between the Party and the state administration and mass organizations are the Party fractions and the primary Party organizations within the state administrations and mass organizations. Through the fractions, the Party controls its ranking members who hold responsible positions in non-Party organizations; in return, the members of fractions feed the Party's policies and decisions into state or mass organization programs. Through the primary Party organizations, the Party commands its rank-and-file members who hold various posts in non-Party organizations; through these members the Party carries out its mass line.<sup>27</sup> The far-reaching extent and dialectic structure

---

<sup>26</sup> Official Chinese Communist writings regard cultural and social groups as production units.

<sup>27</sup> For a discussion of the Party's mass line, see LIU SHAO-CH'U, LUN TANG (On the Party) (in Chinese, 1950). The essence of the mass line is summarized by the Constitution of the Communist Party of China (1956) as follows: "The Party's ability to continue to give correct leadership depends on whether or not it can, through analysis and synthesis, systematically summarize the experience and opinions of the masses, turn the resulting ideas into the policy of the Party and then, as a result of the Party's propaganda and organizational work among the masses, transform this into the views and action of the masses themselves, testing the correctness of Party policy, and supplementing and revising it in the course of mass activity. It is the duty of the Party leadership to ensure that in the endless repetition of this process of 'coming from the masses and going back to the masses' the level of the Party member's understanding and that of the masses are continually raised and the cause of the Party and the people is constantly advanced." 2 CONTEMPORARY CHINA 110 (Kirby ed. 1958).

of these fractions and primary Party organizations ultimately merge at the apex of the Party pyramid: the seven-man Standing Committee of the Politburo of the Central Committee.<sup>28</sup>

In the initial stage of the regime, the Party did attempt to establish a legal order modeled after the Soviet pattern. Headed by the then Chairman of the Party's Law Committee, Ch'en Shao-yü (also known as Wang Ming), a group of forty-one outstanding politicians and lawyers formed in the summer of 1949 an association for the study of law.<sup>29</sup> This was followed by the founding of a number of law colleges and law journals.<sup>30</sup> In 1954, to replace the temporary courts, including the notorious people's tribunals which had carried out many massive purges,<sup>31</sup> the regime set up a system of law courts with the Supreme People's Court in Peking, high courts in provinces, intermediate courts in special districts, and primary courts in *hsien*.<sup>32</sup> At the Eighth National Party Congress of 1956, Liu Shao-ch'i, Vice-chairman of the People's Republic, pronounced the end of "revolutionary legality" and called for a stabilized legal order as well as the systematic enactment of laws and codes.<sup>33</sup> In November 1956 it was reported that the regime had finished drafting a criminal code and had put it into experimental practice. In June 1957 it was announced that the Standing Committee of the National People's Congress had completed drafting most of the civil code.<sup>34</sup> However, neither of these codes was ever adopted by the legislature.

The "anti-rightist" campaign in 1957, in reaction to the "hundred

<sup>28</sup> See the COMMUNIST PARTY OF CHINA CONST., in 2 CONTEMPORARY CHINA 105-39 (Kirby ed. 1958); 1 TANG, *op. cit. supra* note 24, at 105-92; Schurmann, *Organization and Response in Communist China*, 321 *Annals* 51-61 (1959); Schurmann, *Organizational Principles of the Chinese Communists*, *The China Quarterly*, April-June 1960, pp. 47-58.

<sup>29</sup> KMJP, June 18, 1949, p. 1.

<sup>30</sup> One of the first law colleges established in Peking was the Chinese University of Law and Political Science. KMJP, Aug. 9, 1949, p. 4. The nation's law journal, *Cheng-fa Yen-chiu*, was founded in 1954.

<sup>31</sup> General Organic Rule for the People's Tribunals, July 20, 1950, in 1 FLHP 71-72 (1950); Provisional Organic Regulation for the People's Courts, Sept. 4, 1951, in 1 FLHP 79-85 (1951).

Purges were highlighted by the movement of land reforms, the "five anti" movement against bribery, tax evasion, fraud, theft of government property, and theft of state economic secrets, and the movement for the suppression of counterrevolutionaries. See generally WALKER, *CHINA UNDER COMMUNISM* 128-53, 214-32 (1955); Lo JUI-CH'ING, *Wo-kuo SU-FAN TOU-CHENG TI CH'ENG-CHIU HO CHIN-HOU TI JEN-WU* (The Achievements of Our Country's Struggle for the Suppression of Counterrevolutionaries and Our Future Tasks) 1-30 (in Chinese, 1958).

<sup>32</sup> Organic Law of the People's Courts, Sept. 28, 1954, in 1 FKHP 123-32 (1954). For a discussion of this system, see McAleavy, *The People's Courts in Communist China*, 11 *AM. J. COMP. L.* 52 (1962).

<sup>33</sup> POLITICAL REPORT OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA TO ITS EIGHTH NATIONAL CONGRESS 51-2 (in Chinese, 1956).

<sup>34</sup> KMJP, Nov. 24, 1956, p. 1; KMJP, June 23, 1957, p. 3.

flowers" movement,<sup>35</sup> crushed all efforts to normalize legal procedures. Contrary to what the "rightists" had desired—a stable legal order—ranking non-Party politicians and lawyers had to sign a "socialist self-reform pact" in March 1958, pledging "to give our hearts to the Party." This dramatic "oath-taking" ceremony was held as part of a mass slogan-calling demonstration led by such prominent figures as the ex-President of the Supreme People's Court, Shen Chün-ju, and the Minister of Public Health, Li Te-ch'uan.<sup>36</sup> Since then, the Party has taken direct command of every important aspect of the nation's economic, political, and legal life.<sup>37</sup> Reports of the President of the Supreme People's Court and the Procurator General to the Third National People's Congress reaffirm that implementation of the Party's lines, including the mass line, is the basic duty of the judiciary.<sup>38</sup> From the regime's point of view, whether a case is adjudicated by a court whose bench is predominantly occupied by Party members, or by a quasi-judicial organ whose operation is directed by the Party, or by a Party committee itself, makes little difference, if any at all, so long as adjudication is in the interest of "production"—goal-defined work as Professor Franz Schurmann well defined it.<sup>39</sup>

## II

### PROPERTY AND CONTRACT

Historically, the development of contract has largely been associated with business transactions.<sup>40</sup> Although a definition independent of time and place for this complex institution has never been and perhaps never

<sup>35</sup> The purpose of the "hundred flowers" movement was to allow intellectuals "free expression" in matters concerning arts, literature, and science. Mao Tse-tung, *On the Correct Handling of the Contradictions Among the People*, in 5 FKHP 1-34 (1957). When criticism of the Party's dictatorship reached alarming proportions, thousands of intellectuals were suppressed under a State Council decision of August 3, 1957. 6 FKHP 243-44 (1957). For an evaluation of this movement, see MU, *THE WILTING OF THE HUNDRED FLOWERS* 119-302 (1962).

<sup>36</sup> KMJP, March 17, 1958, p. 1; *The Correct Path of Self-Reform*, JMJP, March 17, 1958, p. 1 (editorial).

<sup>37</sup> The doctrine, "Politics [meaning the Party] take command," was a product of that period. In line with this doctrine, the legal society in Peking has emphasized that Party policy is "the soul of law." There are many articles discussing this matter. See, e.g., Chang Ta-chih, *Policy Is the Soul of Law*, CFYC, No. 3, 1958, pp. 57-59.

<sup>38</sup> Ta-kung Pao (Chinese People's Republic) [hereinafter cited as TKP] Jan. 1, 1965, p. 4.

<sup>39</sup> SCHURMANN, *INDUSTRIAL MANAGEMENT IN COMMUNIST CHINA* 9; yet to be published, a mimeographed copy is available at the Center for Chinese Studies, University of California, Berkeley. For a discussion of the Marxist concept of production, see HUNT, *MARXISM PAST AND PRESENT* 46-72 (1955).

<sup>40</sup> HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 459-582 (1918); PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 628-70 (5th ed. 1956); TAI YEN-HUI, *CHUNG-KUO FA-CHIH SHIH KAI-YAO* (A Concise History of Chinese Law) 137-61 (in Chinese, 1960).



will be formulated,<sup>41</sup> in practice, contract is essentially an instrument for the distribution of wealth: economic goods and personal services.<sup>42</sup> Thus its existence is dependent upon property and its function is determined by the system of ownership.

In studying the system of ownership in China, Peking's lawyers maintained that a distinction had to be made between the form of ownership and the right of ownership. The form of ownership is deemed to be the foundation of production relationships, determining the nature and content of the right of ownership; the right of ownership, considered a product of the class struggle, protects the interests of the dominant classes. As such, it is in the sphere of law and will wither away following the disappearance of the state from society.<sup>43</sup> In short, the relationship between form and right is one of the economic base to its superstructure.<sup>44</sup>

### *A. The Form of Ownership*

The 1954 Constitution of the Chinese People's Republic, article 5, prescribes four forms of ownership in the means of production: state (all the people), collective (co-operative), individual, and capitalist.<sup>45</sup> The first two forms constitute the foundation of the socialist economy; the other two forms are subject to "transformation" and finally to elimination.<sup>46</sup>

Although article 6 of the Constitution limits state ownership to "all mineral resources and waters, as well as forest, undeveloped land and

<sup>41</sup> For a general definition of contract in common law as well as civil law, see 17 C.J.S. 537-40 (1963); VON MEHREN, *THE CIVIL LAW SYSTEM* 466 (1957).

<sup>42</sup> 1 ELY, *PROPERTY AND CONTRACT* 51-54; 2 *id.* at 555-650. "Wealth, in a commercial age, is made up largely of promises." POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 133 (1st rev. ed. 1959).

<sup>43</sup> CIVIL LAW TEXTBOOK 115. *But cf.* MARX, *CRITIQUE OF POLITICAL ECONOMY* 12 (Stone transl. 1904): "At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before."

<sup>44</sup> For a discussion of the Marxist theory of law, see Kelsen, *THE COMMUNIST THEORY OF LAW* 1-61 (1955).

<sup>45</sup> Article 26 of the First Constitution of Peking (1949), known as the Common Program, divided the "new democratic" economy into five sectors: state, cooperative, individual, state-capitalist, and capitalist; but mentioned nothing concrete about ownership.

<sup>46</sup> An opposite view was expressed by Yang Hsien-chen, ex-Dean of the Senior Party School in Peking. He argued that the economic foundation of the transition period consisted of five sectors described in the Common Program; the sum total of these relationships of property constituted a "comprehensive" economic foundation on which rose corresponding superstructures. Before the extinction of classes, these superstructures would not merely serve the socialist sector, but the entire economy. His opponents replied that the existence of the socialist sector in the transition period is to eliminate other sectors, not to serve them. Ai Shih-ch'í, *Refuting Comrade Yang Hsien-chen's "Theory of the Comprehensive Economic Foundation,"* JMJP, Nov. 1, 1964, p. 6. Yang has been politically disgraced.

other resources which the state owns by law," in reality socialization of national capitalist industry and commerce has tremendously expanded the scope of state property.<sup>47</sup> With the exception of cultivated land,<sup>48</sup> the state now owns all major industries, which include railways, airlines, ships, highways, harbors, banks, postal services, tele-communications, and broadcasting enterprises.<sup>49</sup> Socialization of these enterprises took the form of a joint state-private operation,<sup>50</sup> allowing the expropriated national capitalists to receive "fixed dividends."<sup>51</sup>

Agricultural collectivization was completed in the rural areas with the founding of the people's communes in August 1958.<sup>52</sup> The merger of the communes with local government administrations raised the question of whether or not commune ownership was a form of state ownership. This question provoked a protracted debate.<sup>53</sup> In a resolution of December 1958, the Party replied that commune ownership, although having elements of state ownership, would remain a form of collective ownership pending its transition to state ownership.<sup>54</sup> Finally, in February 1959, the Party adopted a new form of collective ownership for the communes based on the three-level communal structure—the commune, the production brigade, and the production team.<sup>55</sup> This is known as "three-

<sup>47</sup> Mao Tse-tung distinguishes foreign capitalism from Chinese capitalism. According to Mao, foreign capitalism is imperialism; Chinese capitalism consists of two branches: bureaucratic and national. Bureaucratic capitalism is subject to outright confiscation, whereas national capitalism is subject to "socialist transformation." 2 WORKS 615, 633; HSUEH, SU & LIN, *THE SOCIALIST TRANSFORMATION OF THE NATIONAL ECONOMY IN CHINA* 166-85 (1960).

<sup>48</sup> There are several thousand state farms which in total occupy less than 5% of China's total cultivated land. CCYC, Sept., 1964, p. 14.

<sup>49</sup> CIVIL LAW TEXTBOOK 136.

<sup>50</sup> This is considered an advanced form of state-capitalist ownership. HSUEH, SU & LIN, *op. cit. supra* note 47, at 208. *But cf.* 2 LENIN, *SELECTED WORKS* 286 (1961): "... [S]ocialism is nothing but state-capitalist monopoly."

<sup>51</sup> By a State Council Regulation of Feb. 8, 1956, the rate of dividends ranged from 1 to 6%, depending on the original capital investment, for a period of seven years (1956-1962). 3 FKHP 282 (1956). By another State Council decree of July 28, 1956, the rate was set at 5%. 4 *id.* at 355, 358 (1956). At the Third Session of the Second National People's Congress, payment of such dividends was extended to 1965. JMJP, April 17, 1962, p. 1.

<sup>52</sup> Resolution of the Politburo of the Central Committee of the Communist Party of China, adopted Aug. 28, 1958, JMJP, Sept. 10, 1958, p. 1. Communes were preceded by agricultural producers' co-operatives.

<sup>53</sup> The Institute of Economics of the Chinese Academy of Sciences, *Discussions Concerning the Nature of Ownership of the Rural People's Communes*, CCYC, Dec., 1958, pp. 1-23.

<sup>54</sup> Central Committee of the Communist Party of China [hereinafter abbreviated as CC/CPC] Resolution adopted Dec. 10, 1958, in 8 FKHP 23 (1958).

<sup>55</sup> CC/CPC Resolution of Feb. 16, 1959, quoted in Wang Shu-wen, *A Study of the System of Three-Level Ownership with the Production Brigade as Its Foundation in the Rural People's Communes*, CFYC, No. 1, 1961, p. 29. In some areas the commune consists of only two levels: the commune proper and the production brigade or team. See T'ao Chu, *The People's Communes Are Marching Forward*, Hung-ch'i (Red Flag) (People's Republic of China), No. 4, 1964, p. 7.

level ownership" with each level possessing a given amount of collective property. Land, first owned by the production brigade, is now owned by the production team.<sup>56</sup>

The "basic" socialization of industry, agriculture, and commerce does not deprive individuals of all means of production. As early Soviet experience has shown, the existence of the private sector in subsidiary husbandry, the handicraft industry, or other family side-occupations, makes necessary the possession of *some* means of production by individuals.<sup>57</sup> As of 1961 there were approximately ten million professional handicraftsmen in rural areas.<sup>58</sup> In 1965 it was reported that there were about ten million tailors, carpenters, blacksmiths, and the like in the countryside and about three to five millions in urban areas.<sup>59</sup> Many of them were organized into co-operatives. In the agricultural sector, the population, consisting of more than 500 million or over 110 million households,<sup>60</sup> is once again allowed to use "self-retained" land—small plots—for raising domestic animals and growing vegetables.<sup>61</sup> These plots comprise about five per cent of China's 1.6 billion *mu* of cultivated land.<sup>62</sup>

In his latest report on the work of government, Chou En-lai clearly indicated that the private sector will continue to exist under the commune

<sup>56</sup> Wang Shu-wen *supra* note 55, at 29-32; KMJP, Aug. 6, 1962, p. 4.

<sup>57</sup> There were four types of private ownership of the means of production in the Soviet Union, though they differed from private ownership in the capitalist world particularly with respect to the limitations imposed upon the rights of ownership. 1 Gsovski, *SOVIET CIVIL LAW* 568-69 (1948). The existence of the private sector in a socialist economy is partially due to the ambiguity of property classification; in borderline cases it is difficult to determine exactly what is a means of production. Hsiao, *Legal Institutions, Problems of Communism*, March-April, 1965, pp. 112, 114. Recent Soviet civil legislation has modified the law of property. See generally Westen, *The New Codes of Civil Law, Problems of Communism*, March-April, 1965, p. 34; Bloembergen, *Personal Property: Downward Trends, Problems of Communism*, March-April, 1965, p. 42.

<sup>58</sup> Pi P'ing-fei, *Handicraft Industry Is An Important Part of the National Economy*, TKP, Aug. 28, 1961, p. 3.

<sup>59</sup> TKP, Feb. 15, 1965, p. 1 (editorial).

<sup>60</sup> Mao Tse-tung, *On the Question of Agriculture Cooperation*, in 2 FKHP 1, 5 (1955). T'ao Chu, *supra* note 55, at 3.

<sup>61</sup> Under the CC/CPC resolution of Feb. 16, 1959 *supra* note 55, commune members had no right to use "self-retained" land. Restoration of this right to peasants was reportedly taking place after the promulgation by the Party of the Draft Regulation for the Operation of the Rural People's Communes of Oct. 12, 1961. This regulation, amended by the Party at its Tenth Plenary Session of the Eighth Central Committee (Sept. 24-27, 1962), has not been released by the mainland press. The Union Research Institute in Hong Kong obtained portions of the regulation from its interviews with refugees from the Chinese mainland. See also Hsiao Yeh-hui, *supra* note 24, at 1-2.

<sup>62</sup> CCYC, Sept., 1964, p. 12. Each *mu* is the equivalent of 0.06 hectare or 0.16 acre. China Reconstructs (People's Republic of China), May, 1965, p. 35. Wang Hsiang-chun, *On the Question of the Planned Management of Our Nation's Agricultural Production*, CCYC, Mar., 1965, p. 33.

system.<sup>63</sup> The regime limits this sector, however, to the handicraft industry and family side-occupations; its policy for the handicraft industry is to allow the co-existence of state, collective, and individual ownership, with collective ownership as the principal form.<sup>64</sup>

### B. The Right of Ownership

In the tradition of the civil law countries, including the Soviet Union, the right of ownership in China is defined as the right to possess, use, and dispose of property.<sup>65</sup> By possession is meant *de facto* control of an object. There is possession by the owner and possession by nonowners. Nonowner possession is either legal—according to the law or with the owner's consent, such as by a contract—or illegal—in which case the owner is entitled to restitution of the property. The right to use may be exercised by a nonowner, according to a contract, as well as by the owner. Disposition determines both the legal and *de facto* status of a thing.<sup>66</sup> Divorce of these three elements from ownership does not necessarily mean the extinction of ownership. Nor is the exercise of the right of ownership unlimited; the right is generally subordinated to the law and the national economic plan.<sup>67</sup>

Under the four main forms of ownership described above, the right of ownership has different applications. A state organ or enterprise can possess, use, and dispose of state assets in order to realize the national economic plan, but it does not own them. Underlying this practice is the Soviet theory that these property rights of the enterprise are derived from its operative-administrative functions, not from ownership, which belongs to the state alone.<sup>68</sup> The power of the enterprise to dispose of state assets is limited to working capital;<sup>69</sup> transfer of fixed assets is governed by administrative procedure rather than civil law norms.<sup>70</sup>

Exercise of the right of collective ownership requires consideration

---

<sup>63</sup> "Within a considerable long period of time, the overthrown landlords, bourgeoisie, and other exploiting classes will remain powerful." *Report on the Work of Government to the First Session of the Third National People's Congress* (Dec. 1964), Hung-ch'i, No. 1, 1965, pp. 4, 11. Words like "landlords" and "bourgeoisie" are used very narrowly, for no private individual is permitted to own land or to legally operate a factory.

<sup>64</sup> JMJP, March 2, 1962, p. 1 (editorial).

<sup>65</sup> CIVIL LAW TEXTBOOK 123; cf. GERMAN CIVIL CODE art. 903 (1900); FUNDAMENTAL PRINCIPLES OF CIVIL LEGISLATION OF THE USSR AND THE UNION REPUBLICS art. 19 (1962) (U.S.S.R.).

<sup>66</sup> CIVIL LAW TEXTBOOK 123-24.

<sup>67</sup> *Id.* at 124-25.

<sup>68</sup> *Id.* at 135, 139; BERMAN, JUSTICE IN THE USSR 114-17 (1963); Kiralfy, *Attempts to Formulate A Legal Theory of Public Ownership in the USSR*, 8 SOVIET STUDIES 236-53 (1957).

<sup>69</sup> SHENG MU-CHIEH, SHE-HUI CHU-I KUNG-YEH CH'I-YEH TI LIU-TUNG TZU-CHIN (The Working Capital of Socialist Industrial Enterprises) 3-6 (in Chinese, 1956).

<sup>70</sup> CIVIL LAW TEXTBOOK 136.

of state, collective, and individual interests. First and foremost, the collective has the duties to fulfill the state plan, pay taxes, and perform contract obligations. Second, it has the duty to expand production, and third, the obligation to increase the income of its members.<sup>71</sup>

In the initial stage of the agricultural producers' cooperatives, forerunners of the communes, peasants were required to surrender their land, draft animals, and large farm implements—which they had either originally owned or received not too long before through the land reform (1949-1952)—to the cooperatives as shares in the common pool.<sup>72</sup> A statute of March 17, 1956, collectivized with compensation all other means of production owned by peasants except for small plots.<sup>73</sup> Under a law of June 30, 1956, these plots were put under collective ownership without compensation, though the peasants retained the right to use them on a redistributed basis.<sup>74</sup> With the establishment of the people's commune, this right was briefly suspended.<sup>75</sup> But it was soon restored due to the regime's economic failures (1959-1961).<sup>76</sup>

The right of capitalist owners to the payment of "fixed dividends" was not mentioned at the latest session of the National People's Congress. Though due to expire this year,<sup>77</sup> presumably the payments will continue for a while. Such a payment, however, is considered not a right but a "privilege of exploitative nature."<sup>78</sup> As such, it can be revoked at any time the state wishes. Article 11 of the Constitution provides permanent state protection for individual ownership of the means of subsistence; Article 9 provides state protection for ownership of the means of production by handicraftsmen and other nonagricultural individual working people *according to law*. But ultimately, the scope of individual ownership depends on the regime's economic program, for the power to classify property as means of production and means of subsistence has given the state the flexibility to socialize whatever property it deems essential for state interests.<sup>79</sup>

---

<sup>71</sup> *Id.* at 155-58. These general conditions were provided for in the Law of June 30, 1956, establishing the advanced agricultural producers cooperatives. 3 FKHP 292 (1956).

<sup>72</sup> CC/CPC Resolution of Dec. 16, 1953, JMJP, Jan. 9, 1954, p. 1.

<sup>73</sup> In 2 FKHP 624 (1955).

<sup>74</sup> In 3 FKHP 292 (1956).

<sup>75</sup> See note 61 *supra*.

<sup>76</sup> The Party admitted these failures at the Ninth Plenary Session of its Eighth Central Committee (Jan. 14-18, 1961). 1961 JEN-MIN SHOU-TS'E (People's Handbook) (People's Republic of China) 11-12.

<sup>77</sup> See note 51 *supra*.

<sup>78</sup> CIVIL LAW TEXTBOOK 170; Sung Tse-hsing, *On Fixed Dividends as a Special Category of Surplus Value*, CCYC, Jan.-Feb., 1957, pp. 19-24; Chiang Shih-yung, *On the Nature of Fixed Dividends*, CCYC, Jan.-Feb., 1957, pp. 25-37; Mao Tse-tung, *On the Correct Handling of Contradictions Among the People*, in 5 FKHP 1, 10 (1957).

<sup>79</sup> This classification of property is based on a Soviet doctrine. 1 GSOVSKI, *op. cit. supra* note 57, at 565-69. Chinese legal theorists, however, have introduced the qualification that

Transfer of goods within the state sector does not involve change of title; it can be done by an administrative order. But a transfer of goods from one sector to another involves alienation of ownership. Contract, in this instance, becomes indispensable.

### III

#### PLAN AND CONTRACT

Modern production calls for planning. In the socialist context, the plan is meant to be an all-embracing socio-economic program based on the socialization of the means of production.<sup>80</sup> This was envisaged by the founders of Marxism.<sup>81</sup> Assailing the Darwinian concept of free competition, Engels declared, "Only conscious organization of social production, in which production and distribution are carried on in a planned way, can elevate mankind above the rest of the animal world."<sup>82</sup> This attitude is consistent with their constant criticism of the "anarchy" of capitalist production and the recurrent economic crises that ensued.<sup>83</sup> Indeed, without making such a suggestion, they could not have established their own case. They were inhibited, however, from accepting the idea of state planning—which would inevitably lead to state capitalism—save as a temporary expedient, for they were committed to the belief that the state would eventually wither away.<sup>84</sup> Moreover, Marx and Engels never elaborated principles of planned production and distribution. In fact, they considered speculation on the arrangement of a future society "unscientific."<sup>85</sup> Lenin was later to complain, "Not a single book has been

---

in defining a specific thing as either a means of subsistence or of production, one must not rely on abstract concept, but instead should concretely analyze the purpose of the owner and the manner in which the thing is used. CIVIL LAW TEXTBOOK 164; Kuan Huai, *On the Individual Ownership of Our Country's Citizens*, CFYC, No. 3, 1962, pp. 17-22.

<sup>80</sup> "Organized planned economy is impossible so long as the means of production remain for the time being in the hands of the capitalist-owners. The scattered, diminutive individual economies of peasants and craftsmen must also be socialized if the entire national economy is to be embraced by a single state plan." VYSHINSKY, *THE LAW OF THE SOVIET STATE* 198-99 (Babb transl. 1948).

<sup>81</sup> "[T]he colossal productive forces created within the capitalist mode of production . . . are only waiting to be taken possession of by a society organized for co-operative work on a planned basis . . ." ENGELS, *ANTI-DÜHRING* 208 (Foreign Lang. Pub. House, Moscow, ed., 1962).

<sup>82</sup> Engels, *Introduction to Dialectics of Nature*, in 2 MARX & ENGELS, *SELECTED WORKS* 75-76 (1958). "The life process of society, which is based on the process of material production, does not strip off its mystical veil until it is treated as production by freely associated men, and is consciously regulated by them in accordance with a settled plan." 1 MARX, *CAPITAL* 80 (Foreign Lang. Pub. House, Moscow, ed., 1957).

<sup>83</sup> ENGELS, *supra* note 81, at 371-78.

<sup>84</sup> HUNT, *op. cit. supra* note 39, at 122-23.

<sup>85</sup> As early as 1846 the two young revolutionaries had already said, "Communism is for us not a stable state which is to be established, an ideal to which reality will have to adjust itself." *The German Ideology*, in MARX & ENGELS, *BASIC WRITINGS ON POLITICS AND PHIL-*

written about state capitalism under communism. It did not even occur to Marx to write a word on this subject; and he died without leaving a single precise statement or definite instruction on it."<sup>86</sup> Consequently, the working order of a planned economy and the role of law in that society was first developed by the Soviet Union.<sup>87</sup>

### A. The National Economic Plan

The past fifteen years have witnessed three planning stages in China. The first is the period of 1949-1952, in which the regime initiated an experiment in regional economic planning in Manchuria while preparing for the second stage, the First Five Year Plan (FFYP). Though scheduled for the period of 1953-1957, the drafting of the plan itself was not completed until February 1955.<sup>88</sup> The third stage covers the period from 1958 to the present, including the Second Five Year Plan (1958-1962).<sup>89</sup> But for various reasons, "China had no Second Five Year Plan only five *ad hoc* annual plans during that period."<sup>90</sup> Thus only the FFYP can serve to analyze the relationship of plan to contract.

The FFYP was ratified by the National People's Congress in 1955, giving it the force of law. It consists of a preamble, which sets forth the general tasks of the plan, and eleven chapters covering the allocation of investment and the targets of production, the operation of industry, agriculture, transport, and communications, domestic commerce and foreign trade, labor productivity and cost, the training of cadres, the development of scientific research, the people's living standard, the problem of local planning, and the practice of economies.<sup>91</sup> Ostensibly, this plan embraces all aspects of the nation's economic life. In reality, it deals only in generalities. First, it neither controls every single move-

---

OSOPHY 257 (Feuer ed. 1959). Later, Engels asserted that "the utopia begins only when one ventures, 'from existing conditions,' to prescribe the *form* in which this or any other antithesis of present-day society is to be solved." Engels, *The Housing Question*, in 1 MARX & ENGELS, SELECTED WORKS 628 (1958).

<sup>86</sup> 3 LENIN, SELECTED WORKS 737 (1960).

<sup>87</sup> For a discussion of the initial stage of Soviet economic planning, see CHAMBERLIN, *THE SOVIET PLANNED ECONOMIC ORDER* (1931).

<sup>88</sup> Li Fu-ch'un, *Report on the First Five Year Plan for the Development of the National Economy*, in 2 FKHP 276, 279 (1955).

<sup>89</sup> In the Eighth National Party Congress of 1956, Chou En-lai proposed the Second Five Year Plan. Chou En-lai, *Report Proposing the Second Five Year Plan for the Development of the National Economy*, in 4 FKHP 107-51 (1956). The State Council accepted this proposal in the following year without disclosing its details. State Council Resolution of Feb. 7, 1957, in 5 FKHP 80 (1957).

<sup>90</sup> Choh-Ming Li, *China's Industrial Development: 1958-1963*, *The China Quarterly*, Jan.-March, 1964, p. 3. The Third Five Year Plan is reportedly scheduled to begin in 1966. Hung-ch'i, No. 1, 1965, p. 3.

<sup>91</sup> The First Five Year Plan for the Development of the National Economy 1953-1957, adopted July 30, 1955, by the Second Session of the First National People's Congress, in 2 FKHP 131-275 (1955).

ment of the national economy nor details rules of production, distribution, exchange, and consumption. Consequently, it was necessary to devise an instrument that would translate the general principles of the plan into specific terms and help achieve a rational division of labor among production units so that responsibility could be placed when disruptions occur. Second, the plan calls for the enforcement of the system of "economic accountability" (*khozraschet*) which is designed to achieve maximum economic benefits from minimum labor and material consumption. This system requires each economic accounting unit to be responsible for its own profits and losses.<sup>92</sup> To achieve its optimum operation, an economic accounting unit needs a certain amount of autonomy to arrange its production conditions and to co-operate with other economic units. As Stalin warned his followers, "Only bureaucrats can think that the work of planning ends with the drafting of a plan. The drafting of a plan is only the beginning of planning."<sup>93</sup> For these reasons the FFYP calls for the use of contracts among the subordinate units of an industrial enterprise, between the enterprises themselves, and between industry and agriculture.<sup>94</sup>

Contracts among units of an enterprise are essentially administrative mechanisms designed to execute the system of responsibility for production within the enterprise itself.<sup>95</sup> Contracts between enterprises, generally known as "industrial economic contracts," and contracts between industry and agriculture, called "commercial economic contracts," are in varying degrees instruments used by the state to consolidate the national economy and fulfill the economic plan.

### *B. Industrial Economic Contracts*

There are two types of contract in the industrial sector: the contract for the delivery of products and the contract for the rendering of serv-

---

<sup>92</sup> *Id.* at 161. For a discussion of this system's development in the Soviet Union and its relationship to plan and law, see SCHLESINGER, *SOVIET LEGAL THEORY* 137-40, 191-92 (1945); BERMAN, *op. cit. supra* note 68, at 110-14. For a reference to Chinese source materials, see Hsiieh Mu-ch'iao, *On Socialist Economic Accountability*, Hung-ch'i, No. 23, 1961, pp. 8-14.

<sup>93</sup> 12 STALIN, *WORKS* 357 (1955).

<sup>94</sup> The First Five Year Plan, *op. cit. supra* note 91, at 160, 228; Li Fu-ch'un, *supra* note 88, at 313.

<sup>95</sup> Fei Wu-wen, *On the System of Responsibility in Socialist State Industrial Enterprises*, CCYC, July, 1962, pp. 13-22. This system was originally designed to check irresponsibilities arising from the socialization of private ownership. Various types of contracts were used to define the responsibilities of contracting parties and to assure their mutual cooperation and coordination in the process of production. These contracts included the collective contract between management and labor, the contract of co-operation, and the contract between the master craftsman and his apprentice. See SHENG-CH'AN TSE-JEN CHIH (The System of Responsibility for Production) *passim* (in Chinese, 1950).



ices.<sup>96</sup> Of these, the contract of delivery is of far more importance because of its role in the distribution of products. It is the Chinese counterpart of the Soviet *dogovor postavki*.<sup>97</sup> Its role in the economy can be best understood through an analysis of its formation, termination, and, in case of breach, sanctions.

### 1. Formation

The contract of delivery (*kung-ying ho-t'ung*, also translated as the contract of supply) is made on the basis of a distribution plan. The subject matter of the contract is basically limited to certain essential industrial products, such as steel materials, lumber, equipment, and tools—items owned by the state.<sup>98</sup>

Before the commencement of each planning year, the State Economic Commission, which is responsible for annual economic plans, issues two documents.<sup>99</sup> One is a regulation defining the scope of distribution. Those state organs and enterprises which are listed in this regulation can apply for products by entering into delivery contracts in the form of either a general contract and a subordinate "concrete" contract, or in the absence of a general contract, a direct contract.<sup>100</sup> Those state organs and enterprises not included in the regulation can purchase the products they need only through the Department of Commerce.<sup>101</sup>

The other document is the distribution plan, approved by the State Council if the plan concerns state-controlled products, or by ministers if it concerns ministry-controlled products.<sup>102</sup> The formulation of this distribution plan, a part of the national economic plan, can be summarized as follows: The State Economic Commission will issue control figures to central economic ministries and provincial economic departments in accordance with the projected national output of certain products,

---

<sup>96</sup> One writer has suggested that in addition to these two types of contract, there is a third type, namely, "the contract of productive cooperation," by which one party supplies the other with either parts or technical assistance. This in substance is either a contract of delivery or that for the rendering of services. Sung Chi-shan, *On the Nature and Function of Our Country's Industrial Economic Contracts*, CCYC, Feb., 1965, pp. 33, 34.

<sup>97</sup> Cf. FUNDAMENTAL PRINCIPLES OF CIVIL LEGISLATION OF THE USSR AND THE UNION REPUBLICS art. 44 (1962) (U.S.S.R.). For a discussion of the specific features of the Soviet contract of delivery, see Serebrovsky and Khalina, *Civil Law*, in FUNDAMENTALS OF SOVIET LAW 160, 203 (no date).

<sup>98</sup> CIVIL LAW TEXTBOOK 229; Sung Chi-shan, *supra* note 96, at 34.

<sup>99</sup> It was formerly a function of the State Planning Commission. Provisional Rule of Operation for the State Planning Commission, ratified by the State Council on Oct. 26, 1955, in 2 FKHP 72-76 (1955).

<sup>100</sup> CIVIL LAW TEXTBOOK 229; Sung Chi-shan, *supra* note 96, at 34. The concrete contract is the Chinese counterpart of the Soviet local contract.

<sup>101</sup> CIVIL LAW TEXTBOOK 229.

<sup>102</sup> The classification of products is not available.

the estimated demand for such products, the current stockpiles, and the quantity to be on hand for the following planning year. The economic ministries and departments are required to make an "accurate calculation" of these control figures according to their actual needs and to draft their individual plans for the distribution of certain products. On the basis of these individual plans, the State Economic Commission will formulate a unified national distribution plan and inform each ministry and department of its production and supply quota. The recipient of a quota—an industrial ministry, for example—will further allocate the quota among the industrial bureaus or companies subordinate to it. Within twenty days of receiving its shares, each bureau or company is required to submit to the ministry's chief marketing administration a detailed list of products needed by the direct customers—the factories subordinate to the bureau or the company. The list must include data such as variety, specifications, and quantity. Within fifteen days of receiving these lists, the chief marketing administration will work out a procurement plan. It enters into a general contract with the supply administration of the producing ministry within twenty days.<sup>103</sup>

The supply administration of the producing ministry is required to present a draft contract of delivery in the general form to the marketing administration of the procuring ministry. If the parties fail to agree on the terms, they must submit the dispute to their superior agencies (in this instance, the ministries) for arbitration. This is known as a "pre-contract" dispute; the decision made by the ministries constitutes the final basis for the formation of the contract.<sup>104</sup> The primary duty of the parties to a general contract is to lay the ground rules for a subsequent concrete contract. The general contract designates the parties to the concrete contract, the time limitation for performance, and the means of distribution. The concrete contract is then concluded between the pre-designated parties in accordance with the general contract. As indicated above, in the absence of a general contract, a direct contract is made in lieu of the concrete contract.<sup>105</sup> Other than what has been stipulated in the distribution plan and the general contract (such as parties, price, assortment, and amount), the terms of the concrete contract or the direct contract are left for the parties to negotiate. These include the package, the procedure of delivery and inspection, and the amount of fine in case of breach.<sup>106</sup> Thus a delivery contract in its concrete or direct form has a dual nature: Those terms which are predetermined by the distribution

---

<sup>103</sup> CIVIL LAW TEXTBOOK 234-35.

<sup>104</sup> *Id.* at 235.

<sup>105</sup> *Ibid.*; Sung Chi-shan, *supra* note 96, at 34.

<sup>106</sup> CIVIL LAW TEXTBOOK 237-41.

plan and the general contract are administrative; those agreed upon by the parties are contractual in the ordinary sense of the word.

In the Soviet Union the form of delivery contracts has undergone a series of changes. As a result of the 1957 economic reform, the system of general contract was abolished and direct contracts have once again become the sole link between supplier and customer.<sup>107</sup> In China suggestions were made around 1957 to abolish or at least limit the general contract system on the ground that it is a "mandatory" contract, and therefore the parties were not actually responsible for its direct performance.<sup>108</sup> Recent information, however, indicates that the general contract remains in use.<sup>109</sup>

## 2. Termination and Sanction

It is evident from the foregoing analysis that the fundamental role of delivery contracts is to fulfill the state plan for the distribution of products in the industrial sector. Thus a breach of contract impairs the national economic plan. To forestall such occurrences, the state has adopted various measures to assure performance. These include the establishment of legal offices in state enterprises to draft contracts and give advice,<sup>110</sup> notarization of contracts if necessary,<sup>111</sup> administrative supervision by superior organs,<sup>112</sup> and financial supervision by the contracting parties' accountants and the People's Bank. Both the Bank and the accountants have the power to withhold payment for performances not conforming to plans or contract provisions; further, the People's Bank may deduct payment from the promisor's deposit when due.<sup>113</sup> Moreover, payment of a fine does not release the defaulting party from his obligation to fulfill the contract; alteration or termination of the contract is permissible only with the approval of both parties' superior organs or when there is a change in the distribution plan on which the contract was based.<sup>114</sup>

Nevertheless, contract breaches have not been uncommon. According

---

<sup>107</sup> BERMAN, *op. cit. supra* note 68, at 117-24.

<sup>108</sup> CIVIL LAW TEXTBOOK 236.

<sup>109</sup> Sung Chi-shan, *supra* note 96, at 34; TKP, Feb. 25, 1965, p. 1.

<sup>110</sup> KMJP, Jan. 29, 1957, p. 3.

<sup>111</sup> KMJP, Sept. 10, 1955, p. 2.

<sup>112</sup> Regulation of Sept. 27, 1950, art. 9, in 2 FLHP 532-533 (1949-1950).

<sup>113</sup> Payment for performance of these contracts must be made with special checks of the People's Bank, which are not cashable. Regulation of Sept. 27, 1950, art. 2, in 2 FLHP 532 (1949-1950); Regulation of Dec. 25, 1950, arts. 15, 23, in 1 FLHP 308, 310-11 (1949-1950); State Council Provisional Regulation of Nov. 24, 1962, art. 20, quoted in JMJP, Jan. 9, 1963, p. 2.

<sup>114</sup> CIVIL LAW TEXTBOOK 240; *cf.* FUNDAMENTAL PRINCIPLES OF CIVIL LEGISLATION OF THE USSR AND THE UNION REPUBLICS art. 36, § 5 (1962).

to one relatively authoritative account, an investigation of the central industrial and economic departments in the first part of 1956 revealed that failure to deliver products within the stipulated period was a major problem.<sup>115</sup> The report also mentioned problems such as defects in the products delivered, failure to meet specifications, and disputes arising from the method of calculating prices. In one case, products returned by a purchaser because of their defects were not accepted by the supplier. However, for more than a year, the parties took no action to resolve the problem. In another case, a machine tool factory in Shanghai accumulated a total fine of 150,000 *yuan*<sup>116</sup> for its failure to perform contract obligations. The factory was not ordered to make payment, however, for this would have seriously impeded its production. Planning deficiencies have also led purchasers to return goods without the supplier's consent.<sup>117</sup>

To resolve these disputes, an early regulation provided two remedies: arbitration by the parties' immediate supervisory organs, or, if that were unsuccessful, adjudication by the court.<sup>118</sup> But unlike the Soviet Union and other Socialist countries where a well-developed system of state arbitration has been established to settle such disputes,<sup>119</sup> there is no *Arbitrazh* in China, and even the role of regular courts in this respect is extremely uncertain.<sup>120</sup> Information obtained through interviews by the author with Chinese refugees suggests that the usual Party and govern-

---

<sup>115</sup> The investigator gave the following examples of failures: (1) Enterprises under the Sixth Bureau of the Second Ministry of Machine Building Industry entered into contracts with some steel works for the delivery of iron and steel products, but the supplier completed only about 75% of the delivery order within the stipulated period. (2) In the first two months of 1956 about 15% of the enterprises under the Fourth Bureau of the same ministry failed to make their deliveries according to schedule. (3) In 1955 a factory in Mukden entered into a contract with the Dairen Ship Building Co. for the supply of twenty-seven products. The factory made most of the deliveries 130 days behind the schedule. (4) Two factories made a contract for the delivery of copper plates. The supplier failed to make the delivery within the stipulated period. Consequently, the customer was forced to suspend its production for twelve days. Jen Chien-hsin, *Strengthening the Work of Economic Contracts in Order to Promote the Successful Execution of the National Economic Plan*, CFYC, No. 1, 1957, pp. 31-32.

<sup>116</sup> The Chinese Communist official rate of conversion in 1957 was US \$1.00 equal to 2.617 *yuan*.

<sup>117</sup> Jen Chien-hsin, *supra* note 115, at 33.

<sup>118</sup> Regulation of Sept. 27, 1950, art. 10, in 2 FLHP 533 (1949-1950).

<sup>119</sup> Regulations of the State Arbitration Board under the USSR Council of Ministers (1960), in Current Digest of the Soviet Press, No. 42, 1960, pp. 15-17; BERMAN, JUSTICE IN THE U.S.S.R. 124-28 (1963); Loeber, *Plan and Contract Performance in Soviet Law*, 1964 U. ILL. L.F. 128-79; Mihaly, *The Role and Activity of Arbitration Commissions in a Communist Economy: The Hungarian Experience*, 9 AM. J. COMP. L. 670-80 (1960).

<sup>120</sup> CIVIL LAW TEXTBOOK 212. Complaints have been made about the lack of a professional institution of arbitration to handle contract disputes. Jen Chien-hsin, *supra* note 115, at 31. But post-1958 publications of the Chinese mainland press have given no indication of the existence of such a state apparatus as *Arbitrazh*.

ment disciplinary means serve to sanction delinquent parties. These disciplinary measures include criticism, self-criticism, demotion, and dismissal.<sup>121</sup> It should be noted that in a totalitarian society like China's, dismissal from an official position usually results in unemployment; under a State Council decision of August 3, 1957,<sup>122</sup> the unemployed are subject to "re-education through labor."

Because enterprise directors are state employees and state property belongs to no one, the regime expects enterprise employees may lack the enthusiasm and incentive necessary to fulfill contract obligations. To remedy this situation, the regime has established a three-level hierarchy of responsibility for production within each enterprise. At the top level is the collective management consisting of the director, his deputies, the chief engineer, and the chief accountant; at the middle level are the heads of the departments of production, technology, labor, finance, supply and marketing; at the bottom are the workers. Members of the enterprise play a role in the decision-making process on the basis of "democratic management" through staff meetings. The director through staff meetings is vested with the power to use his own judgment to dispose of the enterprise's problems. In so doing, however, he acts under the unchallengeable leadership of the Party committee in his enterprise—"he must execute the majority decisions of the Party committee and be fully responsible to it."<sup>123</sup> It is not surprising, therefore, that performance of contracts was declared to be a "political task"; those who breach contracts should assume "political responsibilities."<sup>124</sup> For it is not the enterprise but the man who either performs or breaches a contract. Party control over the man can help assure performance; moreover, sanctioning the individual causes no material damage to the state. There is, however, no evidence that a mere breach of contract is a crime.<sup>125</sup>

#### IV

##### COMMERCIAL ECONOMIC CONTRACTS

In his *Critique of Political Economy*, Marx clearly distinguished distribution from exchange. "Distribution determines what proportion [quantity] of the products the individual is to receive; exchange deter-

<sup>121</sup> State Council Provisional Regulation of Oct. 26, 1957, in 6 FKHP 197-202 (1957).

<sup>122</sup> In 6 FKHP 243-44 (1957).

<sup>123</sup> *An Important Problem in Strengthening the Work of Enterprise Leadership*, JMJP, Aug. 4, 1961, p. 7; Fei Wu-wen, *supra* note 95, at 13-22.

<sup>124</sup> *Vice Minister of Commerce Wu Hsieh-chih's Report*, 1960 JEN-MIN SHOU-TS'U (People's Handbook) (People's Republic of China) 388; Sung Chi-shan, *supra* note 96, at 38.

<sup>125</sup> In the Soviet Union, "under the earlier criminal codes an official of a state enterprise who 'maliciously' broke a contract was punishable, but that provision has now been eliminated in the 1961 RSFSR Criminal Code." BERMAN, *op. cit. supra* note 119, at 146.

mines the products in which the individual *desires* to receive his share allotted to him by distribution."<sup>126</sup> Therein lies the fundamental difference between the contract of delivery analyzed above and the commercial contracts. The contract of delivery is based on the distribution plan and allows little choice to the contracting parties; commercial contracts, formulated according to the principle of equivalent exchange, allow for the meeting of minds. In his analysis of the commodity economy, Marx described exchange as the starting point of a contract,<sup>127</sup> and Soviet jurist Pashukanis expanded the concept of exchange into the "Commodity-Exchange Conception of Law," which dominated Soviet jurisprudence for almost two decades.<sup>128</sup>

However, the founders of Marxism also assumed that commodity exchange was a feature of capitalist society and of the private ownership of the means of production;<sup>129</sup> like all bourgeois institutions, it will disappear in a Communist society where the principle "from each according to his ability, to each according to his needs" prevails.<sup>130</sup> For the present, however, commodity exchange remains in China. But its nature is deemed to be "socialistic," not capitalistic; its purpose is to satisfy social needs, not to make profits.<sup>131</sup>

Exchange requires a medium. In law, it assumes the form of contract; in organization, it is the system of commerce.

### A. The System of Commerce

Agriculture and industry are both producers and consumers. They represent the two major segments of the population in the rural and urban areas. In China, the distinction between city and country is conspicuous due to the underdeveloped communication systems. Thus unless direct

<sup>126</sup> MARX, *CRITIQUE OF POLITICAL ECONOMY* 275 (Stone transl. 1904). (Emphasis added.)

<sup>127</sup> "In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognize in each other the rights of private proprietors. This juridical relation, which thus expresses itself in a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two." 1 MARX, *CAPITAL* 84 (1957).

<sup>128</sup> Pashukanis, *The General Theory of Law and Marxism*, in *SOVIET LEGAL PHILOSOPHY* 111-225 (Babb transl. 1951); SCHLESINGER, *op. cit. supra* note 92, at 147-65.

<sup>129</sup> Engels, *Socialism: Utopian and Scientific*, in 2 MARX & ENGELS, *SELECTED WORKS* 141-42 (1958).

<sup>130</sup> Marx, *Critique of the Gotha Programme*, in 2 MARX & ENGELS, *SELECTED WORKS* 24 (1958).

<sup>131</sup> Ho Chien-chang, *Products and Commodities in the Socialist Economy*, CCYC, July, 1963, pp. 30-38; Tien Kuang, *The Dialectical Development of the Natural Economy and the Commodity Economy to the Socialist 'Product Economy'*, CCYC, Jan., 1964, pp. 35-43.

exchange can be made between the two leading sectors and among individuals, an intermediary is needed to reconcile supply and demand. The system of commerce, which consists of three parallel yet intertwined organizations, fulfills this role.<sup>132</sup>

The Ministry of Commerce with its counterparts at all lower administrative levels—called either Departments or Bureaus of Commerce—represents the state.<sup>133</sup> Under these administrative units are companies for the supply and purchase of commodities.<sup>134</sup> On the collective side is the All-China Federation of Supply-Marketing Cooperatives, whose subordinate units exist side by side with the state commercial units. Its Board Chairman, P'an Fu-sheng, is a candidate member of the Party's Central Committee; its main function is to assist state commerce.<sup>135</sup> On the Party side, there is the Department of Trade and Finance Work under the Central Committee; the Department's Deputy Director, Yao I-lin, is concurrently the Minister of Commerce.<sup>136</sup> Political departments have been established in the Ministries of Commerce, Food, and Foreign Trade, the Federation of Supply-Marketing Co-operatives, the People's Bank, the Chinese Bank of Agriculture, the Chief Administration of Taxation under the Ministry of Finance, and their counterparts at the local levels.<sup>137</sup> These political units, working under the dual leadership of local Party committees and the political departments at the immediate higher level, are a strong arm of the Party's trade department. The trade department, together with its branches in all lower link organizations, supervises

---

<sup>132</sup> The First Five Year Plan declares that state commerce has an important task to perform: developing the exchange of goods between city and country, promoting the rational distribution of products between industry and agriculture, and assuring market supply. The plan affirms that the contract system is "an important form of consolidating the worker-peasant alliance under the leadership of the worker class." 2 FKHP 225, 228 (1955).

<sup>133</sup> In the initial stage of the regime, the Ministry of Trade was in charge of both domestic and foreign trade affairs. Later, this ministry was reorganized into the Ministries of Commerce and Foreign Trade along with the establishment of other ministries, such as the Ministry of Food, whose operations were formerly under the jurisdiction of the Ministry of Trade. Next, a ministry for the purchase of agricultural products was added to the state trade system. But it was soon replaced by the Ministry of Urban Service, which was soon renamed as the Second Ministry of Commerce. Finally, this second ministry was merged with the first ministry and became the Ministry of Commerce. See 1949-1964 JEN-MIN SHOU-*ts'ue* (People's Handbook) (People's Republic of China).

<sup>134</sup> According to a survey made in 1958-59, there were 44 general companies in Peking with more than 22,000 branches all over the country. But not all these companies were under the direct jurisdiction of the Ministry of Commerce. Some were subordinate to other ministries, such as the Ministry of Foreign Trade. KUNG-FEI PAO-CHENG SHIH-NIEN (Ten Years of Chinese Communist Despotism) 172 (in Chinese, Ch'en Pin ed. 1959).

<sup>135</sup> 1964 JEN-MIN SHOU-*ts'ue* 278, 281.

<sup>136</sup> Yao is also a candidate member of the Central Committee of the Chinese Communist Party. *Id.* at 278.

<sup>137</sup> TKP, June 7, 1964, p. 1; TKP, Dec. 10, 1964, p. 1.

the work of state commerce and the cooperatives.<sup>138</sup> Operationally, however, the Ministry of Commerce is the center of this entire system. In coordination with other economic ministries, it plays the leading role in the formation of contracts.

Prior to the promulgation of the First Five Year Plan (FFYP), goods were divided into several categories, some centrally controlled and others locally controlled.<sup>139</sup> The regime, however, published no definitive listing. The FFYP specified forty-six major industrial products, five food grains, six technical crops, and seven kinds of animals for planned production.<sup>140</sup> It did not specify how they were to be distributed. It was not until 1959 that a list of commodities, divided into three categories, was released. Category I embraced thirty-eight items to be absolutely controlled by the State Council through administration by the Ministries of Food, Commerce, Foreign Trade, Light Industry, and Public Health. Category II consisted of 293 items to be managed by the Ministries of Commerce, Food, Foreign Trade, Marine Products, and Public Health according to policy laid down by the State Council. Category III consisted of all items not included in the other two categories or specifically mentioned in government regulations; these were to be managed primarily by the Ministries of Commerce and Public Health.<sup>141</sup> Most of the industrial products specified in the FFYP, such as pig iron, steel, chemicals, and machines, were not included in this list. Presumably they were to be covered by delivery contracts. In any case, based on these commodity categories, there are three types of commercial contracts: *t'ung-kou ho-t'ung* (a contract for the planned purchase of commodities) for items of Category I; *p'ai-kou ho-t'ung* (a contract of purchase based on a given quota set by the state) for items of Category II; and *i-kou ho-t'ung* (a contract of purchase based on negotiation) for items of Category III.<sup>142</sup> This classification, however, is theoretical. In reality there are two basic forms: the contract of order and the contract of purchase and supply. The following discussion will concentrate on the contract of purchase and supply because it is the one most widely used in China today.<sup>143</sup>

---

<sup>138</sup> Yao I-lin, *Ten Years of Commerce*, 1960 JEN-MIN SHOU-TS'U 80.

<sup>139</sup> See TA-HUI HSÜ-CHIH (Guide to the Assembly for the Exchange of Goods in South China) 12-21 (in Chinese, the Assembly's Office ed. 1952).

<sup>140</sup> The First Five Year Plan, *op. cit.* *supra* note 91, at 156-58, 200, 208.

<sup>141</sup> *Report of the Ministries of Commerce, Food, Foreign Trade, Public Health, Marine Products, and Light Industry on the Regulation for Control of Commodities by Category* (Feb. 6, 1959) (endorsed by the State Council, Feb. 12, 1959), in 9 FKHP 158-163 (1959).

<sup>142</sup> Kuan Ta-t'ung, *On the System of Contracts for the Exchange of Industrial and Agricultural Products*, JMJP March 9, 1962, p. 5.

<sup>143</sup> For a discussion of the contract of order. See Hsiao, *Legal Institutions, Problems of Communism*, March-April, 1965, p. 117.



### *B. The Contract of Purchase and Supply*

Though essentially a bilateral agreement under which both parties are promisees and promisors, the purchase and supply contract profoundly connotes a philosophical belief in its original Chinese name: *kou-hsiao chieh-ho ho-t'ung*. In Chinese Communist legal terminology, *kou-hsiao* is the abbreviation of *shou-kou* and *kung-ying*, meaning purchase and supply respectively.<sup>144</sup> *Ho-t'ung* simply means a contract. *Chieh-ho*, however, is not a legal word but a standard expression of the Marxist dialectic. It implies the unity of opposites. Since purchase and supply are viewed as opposites, the dialectical solution is to unite them. *Kou-hsiao chieh-ho ho-t'ung* thus means a contract that unites purchase with supply.

Presentation of this original Chinese meaning is not to show the terminological difficulties involved in this study, but to illustrate that in China the dialectic is more than merely a method of interpretation; it is the law of action.<sup>145</sup> Out of the constant practice of this law has grown the belief that realization of contract obligations can be assured only if the contract is founded on a reliable and objective basis.<sup>146</sup> This basis cannot be the supplier's oral or written promise; it must be his actual capacity to produce. Thus production is viewed as the material foundation of a contract.<sup>147</sup> Production, however, requires labor, skills, tools, and materials. So that the purchaser—in this case, state commerce—can get what it wants, it obligates itself to provide the supplier with the means of production he needs. Thus the purchaser becomes in turn a supplier and the purchase contract, a contract of purchase and supply. The dynamism of this contract is manifested in its actual operation.

#### *1. Pre-Contract Investigation*

A commercial contract operates in one of two areas, depending on the category of the commodity concerned. One type of commercial contract is centrally planned and the other is locally planned. The centrally planned area covers items of Categories I and II. The state purchases these goods

---

<sup>144</sup> Government Administration Council Order for the Planned Purchase and Planned Supply of Food Grains, Nov. 23, 1953, in FLHP 129 (1953).

<sup>145</sup> Schurmann, *The Dialectic in Action*, Asian Survey, May 1961, p. 3.

<sup>146</sup> Li Ch'eng-jui, *Extensive Practice of the Contract System*, TKP, Feb. 20, 1959, pp. 3-4; *Purchase Contracts Must Be Made On the Basis of Investigation and Study*, TKP, July 7, 1961, p. 1 (editorial comment).

<sup>147</sup> This is in line with Marxist theory which suggests that production is the starting point of history and the foundation of society. Marx and Engels, *The German Ideology*, in MARX & ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 249 (Feuer ed. 1959); MARX, *CRITIQUE OF POLITICAL ECONOMY* 11 (Stone transl. 1904).

through the contract of order (*yü-kou ho-t'ung*) which is concluded on the basis of the state's purchase plan.<sup>148</sup> Under this contract, the state obligates itself to make an advance payment to the supplier—usually an agricultural loan—in exchange for the latter's products.<sup>149</sup>

The locally planned area embraces all commodities not covered by the national plan, that is, the items of Category III. State commerce acquires these commodities through two major channels: group transactions in the form of meetings for the exchange of goods, and transactions with individual collectives. Group transactions will be discussed separately, for they are governed by a different procedure. Transactions with collectives require local state commerce to have advance information about market conditions so that it can take account of the relationship of supply and demand between various sectors of the economy.<sup>150</sup> This information includes knowledge of: (1) the need of the state; (2) the demand of the producing unit; (3) conditions of the market at large; (4) the assortment and amount of commodities currently in production; (5) those items on which production has been interrupted for one reason or another; (6) those items which are not currently in production but can be produced because of the producer's capacity; (7) the producer's production conditions—labor, skills, materials, tools, and transportation.<sup>151</sup> When this information is available, local state commercial units work out a purchase and supply plan as the basis for the formation of a contract of purchase and supply.<sup>152</sup>

## 2. *Contract with Individual Collective Units*

The local purchase and supply plan, as with many other plans, contains only general terms regarding the quantity, quality, assortment, and price of the goods which local state commerce (representing industry and foreign trade) can supply and desires to purchase. Upon receiving the plan, a commune will call either a mass meeting or a staff meeting—depending on the importance of the transaction—to discuss the terms. The meeting takes place under the guidance of the Party committee.<sup>153</sup> The key issue of the meeting is not the price, for the other party represents

---

<sup>148</sup> CIVIL LAW TEXTBOOK 222-25.

<sup>149</sup> State Council Directive of Feb. 20, 1959, in 9 FKHP 156-58 (1959).

<sup>150</sup> The First Five Year Plan for the Development of the National Economy 1953-1957, in 2 FKHP 226-29 (1955).

<sup>151</sup> Li Ch'eng-jui, *supra* note 146, at 3-4; TKP, Feb. 26, 1959, p. 3; TKP, May 16, 1959, p. 2; TKP, June 3, 1961, p. 2; TKP, July 7, 1961, p. 1.

<sup>152</sup> TKP, July 15, 1959, p. 5. There are four articles on this page of the newspaper, all being written by local state commercial units. They illustrate the process of compiling plans for purchase and supply.

<sup>153</sup> TKP, June 3, 1961, p. 1; TKP, Aug. 27, 1961, p. 1.

the state, but whether the commune can produce the desired products and get the means of production necessary to fulfill its assignment. It is therefore the duty of local state commerce to help the commune arrange its production.<sup>154</sup> For important transactions, magistrates and Party secretaries at the *hsien* or provincial levels will bring the contracting parties together to conclude the contracts.<sup>155</sup> The establishment in 1964 of political departments in commercial units made it clear that the Party supervises all transactions.<sup>156</sup>

After agreement on the general terms, each party will send a representative to conclude a contract under which local state commerce obligates itself to provide the commune with the necessary means of production in exchange for the latter's products. The contract is part of the commune's production plan; thus realization of the plan demands the fulfillment of the contract.<sup>157</sup>

### 3. Formation of Contract Through Exchange Meetings

Soon after the classification of commodities into three categories, the regime required representatives from the departments of production, circulation, and consumption at each of the administrative levels to attend meetings for the exchange of goods in Category III.<sup>158</sup> Meetings were to be held twice a year by the people's councils in ascending order, that is from bottom to top, and under the guidance of the Party committees at each level. Delegates to the meetings at the lower level were to submit to the meeting at the next higher level their plans for the supply and purchase of goods. On the basis of these plans, and in conjunction with state plans, delegates to the meeting at the higher level were to conclude pur-

---

<sup>154</sup> TKP, June 28, 1961, p. 3; TKP, April 25, 1959, p. 5.

<sup>155</sup> See, e.g., TKP, Feb. 23, 1959, p. 2; TKP, Feb. 29, 1959, p. 1; TKP, March 1, 1959, p. 1; TKP, Feb. 25, 1965, p. 1; TKP, April 10, 1965, p. 1.

<sup>156</sup> In April 1965 the six branches of the Politburo in China held a meeting and decided to let these political departments take command of finance and trade work. TKP, April 10, 1965, p. 1.

<sup>157</sup> TKP, March 23, 1959, p. 1 (editorial).

The state does not directly enter into contracts with individual producers, such as craftsmen; it does so only through the collective, largely in the form of "market trade." According to a joint decree of the CC/CPC and the State Council of Sept. 23, 1959, in 10 FKHP 289-93 (1957), market trade took the following six forms: (1) periodical marketing; (2) unscheduled small gatherings for the exchange of goods; (3) festival gatherings; (4) daily trade; (5) *huo-chan* trade; and (6) "rural services" provided for by the communes. A "*huo-chan*" is a place which provides traders with room and board for a fee. Its operator will in turn introduce traders to each other. Transactions completed in such a place are called "*huo-chan* trade."

<sup>158</sup> Ministry of Commerce Report of March 10, 1959, endorsed by the State Council on March 18, 1959, in 9 FKHP 165-68 (1959). The word "departments" as used here is a general term. They may be central economic ministries or local industrial, commercial, and agricultural units, depending on the level at which the exchange meeting is held.

chase and supply contracts with each other. These contracts are general contracts which set forth the amount and variety of the goods each party was to purchase and supply. They were then to be assigned to the lower level for execution. Finally, the lowest level, the *hsien*, was to enter into concrete contracts with its subordinate communes and other producing units.<sup>159</sup>

The first national meeting, held in Shanghai in May 1959, brought about the formation of 21,198 contracts.<sup>160</sup> The second was in August 1959 with the conclusion of more than 35,000 contracts.<sup>161</sup> A meeting in April 1964 resulted in the formation of 27,000 contracts.<sup>162</sup> It must be noted that these were general contracts made at the national level. On the basis of these general contracts, millions of concrete contracts were to be made.

Moreover, each locality has its own exchange meetings to fulfill its own local needs.<sup>163</sup> Thus the total number of concrete and direct contracts of purchase and supply annually made in China should be well into the millions. The question then arises: What is the remedy for breach and nonperformance?

#### 4. *The Problem of Breach and Nonperformance*

According to one news account, nearly ten per cent of the 21,198 contracts concluded at the first national meeting were not performed "because of difficulties."<sup>164</sup> Thus there were about 2,000 delinquent parties. The news account gave no explanation as to which parties were responsible for the breaches or how the problems were solved. The student of Chinese Communism can readily understand that behind this spectacular scene there are practical reasons for the regime not to provide formal legal remedies for these breaches of contract.<sup>165</sup>

First, because of the vast number of potential contracting parties, the enforcement of formal legal remedies would be difficult. The rural people's

---

<sup>159</sup> Vice Minister of Commerce Wu Hsüeh-chih's Report, 1960 JEN-MIN SHOU-TS'U 386-88.

<sup>160</sup> TKP, May 7, 1959, p. 3; TKP, May 23, 1959, p. 1.

<sup>161</sup> TKP, Sept. 2, 1959, p. 1.

<sup>162</sup> TKP, April 19, 1964, p. 1.

<sup>163</sup> For example, in a 1964 exchange meeting in Kwangtung province, over 13,000 contracts were concluded. TKP, March 14, 1964, p. 2. In another meeting in Hopei province, more than 14,000 contracts were signed. TKP, May 8, 1965, p. 2.

<sup>164</sup> TKP, Aug. 22, 1959, p. 1. In about three months (May-July, 1959) after the conclusion of these contracts, the rate of performance was only 47.25%. It was estimated that by the end of the stipulated period "more than 90% of the contracts will be performed." TKP, Sept. 9, 1959, p. 2.

<sup>165</sup> My research has disclosed no report indicating any law suit between state organs and the communes.

commune started as an economic accounting unit and therefore potentially a contracting party. It was hoped that by establishing such an all-embracing political and economic organization, the number of rural contracting units would be reduced from more than 700,000 (agricultural producers' cooperatives) to approximately 26,000 (communes).<sup>166</sup> The adoption of the three-level ownership system, however, shifted the accounting base first to the production brigade and then to the production team.<sup>167</sup> Thus contrary to the regime's expectation, the number of rural contracting units increased to several million.<sup>168</sup>

Second, although their commercial and industrial unit counterparts are almost equally numerous,<sup>169</sup> agricultural production is much more subject to natural conditions. Human inefficiencies, natural calamities, and other elements of *force majeure* can bring about contract breaches and even total nonperformance.

Third, the rural people's commune is a semi-governmental institution. Although for the present the commune and its subordinate production brigades and teams are all economic accounting units—and thus have the capacity to assume liability—their legal status is by no means certain. In 1961 a Swiss economist quoted Foreign Minister Ch'en Yi as saying that the commune was still in the experimental phase and that it might last ten years.<sup>170</sup> More recently, a ranking member of the Party's Central Committee expressed the hope that the accounting base of the commune would eventually return to the commune.<sup>171</sup> For these reasons, administrative and political methods have been preferable to legal sanctions for solving contract problems.

Administratively, state commerce and the supply-marketing co-operatives participate in the formulation of the commune's production plan. Their official doctrine for the operation and management of state commerce and co-operatives is as follows: (1) In the relationship of production to commodity circulation, production is primary; (2) in the relationship of supplying the means of production to the commune and the purchase of agricultural and side-occupation products from the commune, supply has to come before purchase; (3) in the relationship of man to things, man is basic.<sup>172</sup> The meaning of this doctrine is twofold. Opera-

---

<sup>166</sup> Li Ch'eng-jui, *supra* note 146, at 3.

<sup>167</sup> T'ao Chu, *The Peoples Communes are Marching Forward*, Hung Ch'i (Red Flag) (People's Republic of China), No. 4, 1964, pp. 8-9.

<sup>168</sup> See notes 21, 22, 23 *supra*. Under the system of economic accountability, each accounting unit is a potential contracting party.

<sup>169</sup> No official figures are available for these units.

<sup>170</sup> Gilbert Etienne, *Retour en Chine*, in CLUBB, *TWENTIETH CENTURY CHINA* 400 (1964).

<sup>171</sup> T'ao Chu, *supra* note 167, at 9.

<sup>172</sup> TKP, July 11, 1964, p. 1 (editorial).

tionally, production precedes circulation and supply comes before purchase. This order, as indicated earlier, stems from the belief that production is the foundation of all social institutions and performance can be assured only if the contract has a material basis. Production and exchange, however, are carried out by man. Thus, in management, man precedes the thing.<sup>173</sup> Mass participation in the formation of contracts is clearly a manifestation of this doctrine. But formation is only the beginning of a contract. Execution is more important. Hence, in addition to supplying the means of production, the state takes various measures to assure performance. These measures include Party lectures on the significance of the contract and the coincidence of individual interest with collective and state interests, and the assignment of cadres to help communes organize production and collect products.<sup>174</sup> According to one report, after concluding a number of purchase and supply contracts with nine communes, the commercial bureau of a *hsien* government sent more than five hundred cadres to supervise the production of the contracting parties.<sup>175</sup> In another case, the commercial department of Honan province dispatched over 7,500 cadres to help execute nearly 30,000 contracts.<sup>176</sup>

Thus it appears that, because contracts serve to execute and promote the national economic plan, the state's primary effort is to aid and encourage successful production rather than to promulgate a set of rules to deter breaches.<sup>177</sup> Indeed, parties to a purchase and supply contract may change their purchase plans and contract terms under adverse natural conditions,<sup>178</sup> although such changes are supervised by the Party.<sup>179</sup> In individual cases, however, the state has applied sanctions.<sup>180</sup> For example, State Council decrees have stipulated that before a loan for the purchase of agricultural products is granted, the local people's council must review the recipient's performance in the previous year. If the recipient had failed to fulfill his previous contract obligations, a deduction was to be made from the loan before a new contract was concluded.

---

<sup>173</sup> See *Human Element Is Basic*, TKP, March 21, 1964, p. 1 (editorial).

<sup>174</sup> Li Ch'eng-jui, *supra* note 146, at 4.

<sup>175</sup> *Ibid.*

<sup>176</sup> TKP, March 3, 1959, p. 1.

<sup>177</sup> Except for those regulations issued in the early 1950's, the regime has not promulgated new rules providing penalties for contract breaches.

<sup>178</sup> TKP, May 23, 1959, p. 1 (editorial).

<sup>179</sup> TKP, June 28, 1961, p. 3.

<sup>180</sup> In an early case, which is one of the very few reported in the press, a supply-marketing co-operative violated contract provisions and received severe fines. In addition to the fines, however, the Trade Bureau of North China Administrative Council and the North China Federation of Supply-Marketing Co-operatives issued a joint circular letter criticizing the delinquent party. KMJP, Aug. 9, 1952, p. 2. For a discussion of contract disputes in rural areas before the establishment of the communes, see Liang Lü, *On the Question of Contract Disputes in Rural Areas*, KMJP, Oct. 23, 1956, p. 3.

Such a deduction is generally made from those production units which can afford it. Those units which have suffered serious disasters make their repayment after the new harvest or by other means.<sup>181</sup> In this way, the state implements its policy of giving priority to production in the performance of contract obligations.

#### CONCLUSION

In his *Critique of the Gotha Programme*, Marx envisaged changes in the content and form of the law in a socialist society "because under the altered circumstances no one can give anything except his labor, and because, on the other hand, nothing can pass to the ownership of individuals except individual means of consumption."<sup>182</sup> This notion was further expanded by Pashukanis when he declared that under the conditions of a planned economy, "bourgeois" law would die and "technical regulation" or "economic law" would take its place.<sup>183</sup> In making this prediction, however, he introduced two qualifications. First, he considered private law as the foundation of all law, especially bourgeois law; technical regulation, therefore, was completely devoid of private economic interest.<sup>184</sup> Second, he suggested that during the period of transition from capitalist to socialist relations of production, when state enterprises were still subordinate to the conditions of turnover, legal forms would be necessary. "Side by side with this, however . . . administrative—technical—direction in the form of subordination to a general economic plan is preserved and will undoubtedly increase as time goes on."<sup>185</sup>

Whether or not one accepts Pashukanis' contention that the founda-

---

<sup>181</sup> State Council Directive of February 10, 1959, in 9 FKHP 156-58 (1959); State Council Directive of January 21, 1960, in 11 FKHP 128-30 (1960).

<sup>182</sup> 2 MARX & ENGELS, SELECTED WORKS 23 (1958).

<sup>183</sup> Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 122, 136-37 (Babb transl. 1951).

<sup>184</sup> "The problem becomes still clearer if we contemplate it on the dynamic and historical plane. In that event, we see how the economic relationship in its actual movement becomes the source of the juridic relationship which comes into being for the first time at the moment of the controversy. It is specifically the controversy—the clash of interests—which calls to life the form of law: the juridic superstructure. In the controversy—that is to say, during the proceedings—the subjects who are economically directive come forward as parties: that is to say, as having part in the juridic superstructure. Even in its most primitive form, the court is a juridic superstructure *par excellence*." *Id.* at 147. "Human conduct can be regulated by the most complex rules, but the juridic element in such regulation begins where the isolation and antithesis of interests begins." *Id.* at 137.

<sup>185</sup> *Id.* at 178. Following Marx, Pashukanis envisaged the withering away of the state and law as primarily depending upon the removal of division of labor and other bourgeois institutions and admitted that this was a perspective of the "boundless future." *Id.* at 179; Pashukanis, *The Soviet State and the Revolution in Law*, SOVIET LEGAL PHILOSOPHY 237 (Babb transl. 1951). For a critique and comment of Pashukanis' theory, see Kelsen, *THE COMMUNIST THEORY OF LAW* 89-111 (1955); Fuller, *Pashukanis and Vyshtinsky: A Study of the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157 (1949).

tion of law is private economic interest, one may agree that his prediction as to legal forms vividly reflects the contract institution in China. As a consequence of the socialization of the major means of production, transfer of goods from one state enterprise to another by a delivery contract is indeed no more than a matter of technical regulation and devoid of private interest; and a purchase and supply contract is basically a supplement to the state's plan to consolidate diverse economic activity.

So far as the process of solving contract disputes is concerned, it appears that traditional Chinese influences may still be at work. Before the Republican Revolution of 1911, the state left a large segment of private life to be governed by the Confucianist concept of *li* and custom.<sup>186</sup> Thus, instead of law courts, family councils and guild bosses acted as mediators of property disputes. The adoption of the 1929 Civil Code by the Republican Government seemingly marked China's first reception of Roman Law.<sup>187</sup> In reality, it was basically a concession to the foreign powers that enjoyed consular jurisdiction in China. For most parts of the country, the Code was not in operation. As a matter of fact, article 1 of the Code provides: "In civil matters if there is no provision of law applicable to a case, the case shall be decided according to custom."<sup>188</sup>

Since 1949, Party cadres have replaced the family councils and guild bosses. The lack of a system of state arbitration marks a sharp departure of Chinese Communist legal practice from the practice of the Soviet Union, whose legal institutions are rooted in the Roman tradition. One should not be led to the impression, however, that the Chinese Communist government is merely a continuity of Chinese tradition. A sharp distinction exists. The government of traditional China used law as a force of stability to keep society in order; nevertheless, in mediating civil disputes, the family councils and guild bosses played an autonomous role; there was no direct communication with the state. Communist China, on the other hand, has socialized private property and thus changed the foundation of law. It uses legal instruments as a dynamic means to remold the society and to promote the economy. Party cadres represent the will of the state, which in reality is but a facade for the Party.

---

<sup>186</sup> *Li* is a rule of private conduct based on ancient Chinese culture. Cheng, *A Sketch of the History, Philosophy, and Reform of Chinese Law*, in *STUDIES IN THE LAW OF THE FAR EAST AND SOUTHEAST ASIA* 29-45 (1956).

<sup>187</sup> Lone Liang, *Modern Law in China*, in *STUDIES IN THE LAW OF THE FAR EAST AND SOUTHEAST ASIA* 46-69 (1956).

<sup>188</sup> When writing a preface for the Code, the then President of the Legislative Branch, Hu Han-min, declared: "In order to meet the geographical, economic and demographic needs of a country with so many diversified regions as China, a number of old customs must be maintained in the present Code, principally in the matter of real rights. Many of its characteristics are therefore essentially Chinese."