

THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

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The 1982 Constitution of the People's Republic of China,¹ like its many predecessors, purports to establish a government that appears quite recognizable to Westerners. It bears an obvious relation to both the United States² and Soviet constitutions,³ though it has some unusual

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1. I have used the following sources for the Chinese texts of the constitutions: 1949 Common Program, 1 XIAN FA ZELIAO XUANBIAN, SELECTED MATERIALS ON CONSTITUTIONAL LAW [hereinafter referred to as CONSTITUTIONAL MATERIALS]; the 1954 constitution is found in *id.* at 150; the 1975 constitution is found in *id.* at 293; the 1978 constitution is found in *id.* at 303; and the 1982 constitution is found in the official pamphlet edition, which contains the report of the drafting committee. I have used the following English translations from which all translations in the text are taken: Common Program, FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 34 (A.P. Blaustein ed. 1962); 1954 constitution, SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1 (J. En-pao Wang ed. 1976); 1975 constitution, *id.* at 65; 1978 constitution, official translation in separate booklet published by Foreign Languages Press (1978); 1982 constitution, official translation in separate booklet published by Foreign Languages Press (1982).

2. Most constitutions are modeled to some extent on the United States Constitution because it is one of the oldest and easily the best known. The similarities with the Chinese constitution lie primarily in the structure of the constitution. In both, the powers of the most important organs of government are set out in general terms, and the organs are similar: Congress, the Administration and the Judiciary. Yet there are differences, particularly in the Administration where, in China, the existence of the bureaucracy is recognized (arts. 30-32). And there are some additional institutions in China such as the Central Military Commission (art. 93) and the Procuracy (arts. 129-133). China is a unitary rather than a federal state, so the treatment of local matters is quite different. Still, the document as a whole is close to the form of the United States Constitution and it includes a bill of rights. *See infra* note 7.

3. The principal similarity of the Chinese constitution to that of the Soviet Union seems to me to lie in the presence of ideological statements and the prominence of economics, in other words, the clear recognition of Marxism as the official doctrine of the state. Thus, the preambles in both constitutions refer to the struggle to overturn capitalism and to establish socialism. Both define themselves as socialist states. China: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants." Art. 1. The U.S.S.R.: "The Union of Soviet Socialist Republics is a socialist all-people's state expressing the will and the interests of the workers, the peasants, and the intelligentsia, and of the working people of all the nations and nationalities of the country." Art. 1. The Soviet constitution devotes chapter II to the "Economic System." The Chinese constitution devotes thirteen articles in its first chapter, "General Principles," to economics. Arts. 6-18.

There are also institutional similarities. The Chinese procuracy is obviously of Soviet origin. *See Ginsburgs & Stahnke, The Genesis of the People's Procuracy Procuratorate in the People's Republic of China*, THE CHINA Q. 1 (1964); *The People's Procuratorate in Communist China: The Period of Maturation, 1951-1955*, *id.* at 53 (1965); *The People's Procuratorate in Communist China: The Insti-*

characteristics. Power is said to belong to the people, but it is exercised by what looks like an indirectly elected parliament, the National People's Congress.⁴ Congress enacts—or formally approves—legislation. But in addition, it elects the President, who is the head of state; the Premier, who is head of the government, that is, the bureaucracy; and the top officials in the courts, the procuracy, and a number of other organizations.⁵ Congresses at lower levels, such as the provinces and counties, exercise similar powers at their levels. That is, they choose the local administrative chiefs such as governors in the case of provinces, mayors, countyheads, etc. They also choose the presidents of the courts and the chief procurators at their levels.⁶ Citizens are guaranteed the usual political rights such as freedom of speech, assembly and religion,⁷ as well as the new social and economic rights such as the right to remunerative employment, retirement benefits and the like.⁸

The most unusual feature is Congress. It is not really a parliament in the usual sense, both because it is too large (around 3,000 members)⁹ and because it meets too seldom (once a year) actually to initiate legislation

tution Ascendent, 1954-1957, id. at 82 (1968). The use of standing committees of larger bodies, such as a congress, to do the real work of those bodies, is also a common feature of the two constitutions. See the provisions on the Presidium of the Supreme Soviet, arts. 119-124. The Standing Committee of the National People's Congress is dealt with primarily in articles 65-69.

4. Art. 59. The actual process of election is controlled by the Election Law for the National People's Congress and Local Congress of 1979. CONSTITUTIONAL MATERIALS, *supra* note 1, at 336, amended by Fifth National People's Congress, Dec. 10, 1982, translated in SUMMARY OF WORLD BROADCASTS, PART III: THE FAR EAST, (Dec. 18, 1982 FE/7212/C/1) [hereinafter cited as SWB].

5. Arts. 62 & 79. The term that the Chinese now translate as "President" [*Zhuxi*] is normally translated as "Chairman," as in "Chairman Mao." I do not know the reason for the change.

6. Art. 101.

7. Art. 33 provides that all citizens are equal before the law; art. 34 gives the right to vote, and to be elected, to all citizens over 18 years old, except to those "deprived of political rights according to law;" art. 35 gives rights of "freedom of speech, of the press, of assembly, of association, of procession and of demonstration;" art. 36 gives freedom of religious belief; art. 37 declares that the freedom of persons is inviolable, that no one can be arrested except by order of the court of procuracy, and that unlawful searches of the person are prohibited; art. 38 guarantees personal dignity; art. 39 protects against unlawful searches of houses; art. 40 guarantees the confidentiality of correspondence; art. 41 gives the right to criticize and make complaints to officials.

8. Art. 42 declares that citizens have the right and duty to work; art. 43 declares working people have the right to rest; art. 44 says the state will prescribe a system of retirement for workers and staff in enterprises and organs of the state; art. 45 declares that citizens have the right to material assistance from the state and provides for the blind and other disabled persons; art. 46 declares that citizens have a right to an education.

9. The number varies from session to session. See C.E. WENG, CONTEMPORARY CHINESE POLITICS 109 (2d ed. 1958) [hereinafter cited as WENG].

on its own.¹⁰ In fact, it is not intended to initiate legislation. Its primary function is to elect and remove the important officials of government, including a standing committee that can act as Congress when the latter is not in session.¹¹ The actual control of the government is in the hands of the Premier and the top officials of the ministries. Legislation is supposedly the task of the Standing Committee of the National People's Congress.¹² The Premier, government officials and Standing Committee are responsible to Congress, but only in an ultimate sense: Congress selects them and can remove them from office.¹³ There is no parliamentary responsibility in the sense of a system whereby a government that fails to get a majority in parliament on a vote of confidence falls. The process of election of Congress is unusual. The Constitution provides that citizens elect representatives to local people's congresses directly.¹⁴ These congresses elect delegates to the congress of the next superior level and so on up the line to the National People's Congress. At present there are only three levels in the process: the local congresses, provincial congresses (or the equivalent), and the National People's Congress.¹⁵ Thus, citizens vote directly for members of local congresses. These congresses elect the members of the provincial congresses, and the latter choose the members of the National People's Congress.

In other words, the constitution purports to establish a rather interesting system of government. One might wonder how a large number of problems that seem to be presented will be resolved. For instance, how will the Chinese solve the problem of divided control between the local congresses and top level officials in Peking? The problem is most obvious in the case of the courts. While, as indicated, local courts are appointed by local congresses and are responsible to them,¹⁶ appeals from their decisions lie to the higher courts and in some cases to the Supreme People's

10. The point is made by the Chinese themselves. See, e.g., Wang, *The New Constitution Strengthens the Standing Committee of the National People's Congress*, in A GUIDE TO THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA [*Zhonghua Renmin Gongheguo Xian Fa Jianghua*] 110 (1983) [hereinafter cited as CHINESE CONSTITUTION.]

11. Arts. 61 & 67.

12. Art. 67. There are some statutes that only Congress can enact—notably amendments to the constitution, arts. 62(1) & 64.

13. Art. 62(5)-(8) (power to appoint); art. 63 (power to dismiss).

14. Art. 59.

15. Art. 5 lists the level below the national level; art. 97 sets out the election process. See also FOREIGN BROADCAST INFORMATION SERVICE (FBIS), Electoral Law of the PRC for the NPIC and Local People's Congresses of All Levels, in DAILY REPORT 12 (Jul. 27, 1979).

16. Arts. 101 & 128.

Court in Peking. These higher courts are charged with supervising the lower courts.¹⁷ Who controls? The courts or the Congresses? The same problem exists in all ministries because all ministries exercise ultimate control over local levels, and yet local officials are said to be responsible to the local congresses that appoint them.

Such questions, and many others, are interesting for students of government, but unless there are some radical changes in China, we shall never know the answers. The constitution seems to bear no relation to the actual government of China. Citizens enjoy neither civil¹⁸ nor economic rights.¹⁹ Congresses are in fact rubber stamps that do as they are told by whoever is in power at their level.²⁰ The meetings of a congress are ceremonial occasions. No doubt they afford a welcome opportunity for their members to travel, see friends, and make contacts. Perhaps they are significant as meeting places for important people because congress members are normally persons of some significance. In that way they may serve as significant parts of the actual government of China.

But it is fairly clear which governmental structures exercise power in China, at least in a formal sense, and the National People's Congress and

17. Art. 127.

18. It is perhaps enough to cite the case of Wei Jingsheng, one of the leaders of the short-lived "Peking Spring" movement, when some young people expressed themselves very freely in making criticisms of the government. Wei was sentenced to 15 years on what seem to me to have been trumped-up charges. See Jones, *Due Process in China: The Trial of Wei Jingsheng*, 9 REV. OF SOC. L. 55 (1983). To be sure, this was before the 1982 constitution, but freedom of speech was also guaranteed in the 1978 constitution, art. 45, and the people who put Wei in prison are the people who still govern China and who promulgated the 1982 constitution. Wei is still imprisoned. For reports on a number of political prisoners, see AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS 5-51 (1984). One might also note the "Cultural Pollution" campaign of 1983-84. See Schram, *Economics in Command? Ideology and Policy Since the Third Plenum*, THE CHINA Q. 418, 437-48 (1984). This was used to dampen discussion in at least one university. But citation is otiose. Some of the "freedoms" are so qualified in the text that they are meaningless. Thus, art. 36 guarantees freedom of religion but states that "Religious bodies and religious affairs are not subject to any foreign domination. . . ." In practice, this means that many persons cannot practice their religion, notably Roman Catholics and Tibetan Buddhists.

19. China is a poor country and does well to keep its citizens from starving to death. It does not always succeed in that. "Retirement" as such is not guaranteed to farmers and perhaps some kinds of workers. All are supposed to get material assistance when they are old. Art. 45. But one hears that one of the reasons peasants are not cooperating with the birth-control program is that they believe sons are the only dependable social security. It might be added that China has a significant unemployment problem, although it is disguised by such terms as youth waiting for assignment. See, e.g., WENG, *supra* note 9, at 255.

20. The Chinese would of course deny this. I can only say that I have never seen any evidence of independence. Even Professor Weng who has tried to find examples of independent action regards Congress as pretty subservient. See WENG, *supra* note 9, at 111.

the local congresses are not among them. China is a country that is governed by a highly centralized bureaucracy that is more or less under the control of the Communist Party.²¹ The Army remains a great power that is not usually directly involved either in the government or Party, but that may become so at any time. Of course it is not clear at all just how control is exercised either within the Party or by the Party on external organizations such as ministries, to say nothing of the Army. The situation at the lower levels is especially murky, but it is difficult to understand how things work even at the more visible top levels. Deng Xiaoping is nominally an official who is chairman of a committee that supervises the Army; he is subordinate, on paper, to Congress. He has never held the very top posts in either the government or Party. Yet it is quite clear that if Deng were to go to E Mei Shan to contemplate nature and observe the sacred monkeys for an extended time, E Mei Shan is where the government of China would be. Congress could continue to hold performances in Peking or not. It would not affect the way things ran. For that matter, the Politburo could continue to hold its meetings and make pronouncements, but unless it was clear that Deng agreed, it would not be wise to rely on these actions.²²

What is true of the 1982 constitution was also true of its predecessors. The written constitution was not the place to start if one wanted to know what the government of China was really like. One might say that the written constitution had little to do with the actual constitution, that is, the real structure of government. Though it should be said that the 1975 and 1978 constitutions were a little closer to reality than the rest, because they both emphasized the importance of the Communist Party.²³ In other respects, however, they shared the remoteness from reality of their fellows. In view of this, it is tempting simply to dismiss Chinese constitutions as trumpery designed to provide an occasion for flights of oratory at the time of their adoption.²⁴ There is much to be said for this point of

21. This does not mean that every order from the center is automatically obeyed nor that local organizations have no independence. As a matter of fact, they are often quite resistant and hard to control. But the organizational chart is quite clear. And by and large the center gets what it wants.

22. He is Chairman of the Central Military Commission, which was created by the 1982 constitution, art. 93. This position is subject to the National People's Congress. Art. 63(3).

23. 1975 CONST. art. 2; 1978 CONST. art. 2(24).

24. There is quite a lot of that. See, e.g., *PLA Delegates Discuss New Constitution*, SWB (Dec. 3, 1982, FE/7199/C/99):

... said that inclusions of provisions for building socialist spiritual civilization is of great significance. He said communist ideology is the core of socialist spiritual civilization of which Lei Feng was an exemplar ... every PLA fighter should emulate Lei Feng, foster a

view. Indeed, it may be the only rational position to take on the question of the content of Chinese constitutions.

This is not to say that written constitutions play no role in the Chinese polity. They clearly have one function: The adoption of a constitution is a signal that a significant change has taken place in the government or in society, and that it is conceived to be long-lasting. The first constitution, the so-called "Common Program" in 1949, signified that the Communists had won the civil war against the Nationalists and had formed a completely new government for China. The 1954 constitution showed that the new government regarded itself as firmly established. Military and political control were complete. There was no significant problem with foreign or domestic enemies, and the foundations of a socialist state had been laid. The 1975 constitution indicated that what might be called the leftist faction believed that it had won decisively the bitter intra-party struggle of the Cultural Revolution and was in a position where the adoption of a new constitution would solidify its control. The 1978 constitution indicated how mistaken the leftist faction was, and affirmed what was apparently believed to be the permanence of the coalition that overturned the "Gang of Four." This belief was in turn pretty firmly exploded by the end of the same year in the Third Plenum of the Eleventh Session of the Central Committee. This signaled the establishment of Deng's primacy. The change was confirmed by the 1982 constitution whose promulgation purports to indicate a complete rejection of the Cultural Revolution and all "leftist" ideas and a return to the good old days of the 1950s. If the former pattern continues, then the failure to promulgate a new constitution when Deng passes from the scene might indicate a belief—or perhaps just a hope—of the ruling powers that they would continue to govern. Or it might mean that a fight was going on and it was not yet clear who had won. Of course something might have happened to the Chinese polity and it might mean that a more impersonal and permanent system of government had been established. Whatever

deep love for the motherland and the people, and for labour, science and socialism, display the communist spirit and be a vanguard in building socialist spiritual civilization. . . .

See also the reactions of Chinese People's Political Consultative Conference observers at the National People's Congress: "all an historic event . . .," "an achievement gained through a struggle and a summary of experience," "It is paid for with blood." FBIS, Report CPPCC meeting in Renmin R: Bao, in DAILY REPORT K8 (Dec. 9, 1982). Peng Zhen in presenting the constitution to Congress said, "When our one billion people all cultivate the consciousness and habit of observing and upholding the constitution and fight against all acts violating and undermining the Constitution this will become a mighty force." SWB (Dec. 7, 1982, FE/7202/C/16).

happens, the promulgation of a new constitution, or the failure to promulgate one, will be an event of great political significance.

There is not much question that constitutions play this role in China. The question is, do they have any other significance, since they do not establish or describe the apparatus of government nor determine the rights of citizens. It seems pretty clear that they perform at least one additional, though related, function. Apart from merely signaling a change in power or in the political and economic conditions of the country, constitutions also tend to show the direction that their promulgators plan to take in governing China. This will take the form both of indications of actions that the new government plans to take and of a basic ideological statement. The result is that constitutions can indeed be regarded as the source of law in the People's Republic of China just as they are declared to be.²⁵ But the term "constitution" has a different meaning from the one normally given to it in the West. The constitution is not written for the ages. It is a statement of current policy. When the policy changes, the law *ipso facto* changes. Indeed the change in the operative rule may antedate the change in the wording of the constitution. For instance, when, in the 1950s, the ownership of agricultural land was converted from cooperative and individual property to commune or collective property, and then in the late 1970s and 1980s was changed back again, it was because the rulers of China believed that collective or individual operation of the land, as the case might be, was the best way to solve the problem of increasing agricultural production at that time. Once this decision was made, an appropriate system of land ownership was adopted. Eventually the constitutions were changed to reflect the new policy. But the law in an operative sense had changed long before. Policy in China *is* law. It does not merely influence law.²⁶

25. The preamble, in its last paragraph, states that the constitution "is the fundamental law of the state." It must be taken by all as "the basic norm of conduct." One of the articles by Wang Zhengzhao and Lin Yuhui in a book on the constitution prepared by the People's Daily Press, CHINESE CONSTITUTION, *supra* note 10, at 12, which is entitled *The New Constitution is our Country's Basic Law*. It says that the constitution is the basic law because (1) its content sets out the basic principles of law such as the necessity for constructing socialist modernization, the nature of the state, and the economy, but it does not go into detail; (2) any law that is in conflict with it is without effect; and (3) it is enacted and amended in a different way.

26. The 1954 constitution recognized the existence of state, cooperative, individual, and capitalist ownership, art. 5. The formation of cooperatives was encouraged, arts. 7 & 8. But individual ownership of land by peasants is protected, art. 8. It was anticipated that no more than one-third of the peasant households would form "lower-level producer cooperatives," in which the individuals retained ownership but farmed cooperatively and split the profits, by the end of 1957. However, in

Presumably this is a perfectly correct way of looking at law and the constitution in a Marxist society. Law is an instrument that the ruling class uses to exert social control. It is an aspect of the superstructure.²⁷ The only real law is dialectical materialism. The governing structure in a country like China is the Communist Party, which establishes—and disestablishes—institutions as seems desirable in order to achieve the ultimate goal of communism. A constitution is a general summary of present policy. Laws are more particularized statements of policy. For this reason, an ideological statement is even more important than a concrete statement of economic or social policy because it serves as the basis of such policies. Particular policies must be appropriate to the current stage of society's development. This stage will be made clear in the ideological statement. For example, the most important change in the 1975 constitution from the 1954 constitution was the change in the phrase "China is a people's democratic state"²⁸ to "China is a state of the dictatorship of the proletariat."²⁹ This indicated that there had been a change

1955 Mao decided that the pace should be accelerated and the country was almost completely collectivized by 1957, having passed through cooperatives into socialist collectives in which there was no individual ownership and peasants were rewarded for their work. Communes that unified political and economic control appeared in 1958. See M. MEISSNER, *MAO'S CHINA* 140-60, 230-41 (1977) [hereinafter cited as MEISSNER]. But the constitutional provisions on land ownership were not changed until 1975. The 1978 constitution stated that there were two types of ownership of the means of production: state ownership and collective ownership (communes), art. 5. Within the commune there was ownership by: the commune, the production brigade and the production team. Farming of private plots for personal needs subject to predominance of the collective economy was permitted, art. 7. In 1977, prior to the time the constitution was promulgated, "household contracting" had begun in some areas. Under this system the procurement contract was made with an individual household rather than a team or brigade. Once its quota was met, it could dispose of the surplus for its own benefit. The system has many variations. By 1982 it dominated in China. The changes were effected by a series of Central Committee Documents. The constitutional change recognizing (more or less) individual responsibility was promulgated in December 1982. 1982 CONST. art. 14. For a summary of these developments, see Walker, *Chinese Agriculture During the Period of Readjustment 1978-83*, *THE CHINA Q.* 783, 786-89 (1984).

27. See Wang Shuwen, *The Basic Characteristics of the New Constitution*, *CHINESE CONSTITUTION*, *supra* note 10, at 21. He states that constitutions are important component parts of the superstructure. According to Lenin, there are two types: the "real constitution" and the "written constitution." The real constitution determines the nature, content and character of the written constitution. Wang then indicates how the four written constitutions (the Chinese never call the Common Program a constitution) reflect their real constitutions. The only good ones are those of 1954 and 1982. The latter reflects the conclusions of the Third Plenum such as the four basic policies and the Four Modernizations.

28. 1954 CONST. art. 1.

29. 1975 CONST. art. 1. This change in phrasing was the principal subject of the publicity in favor of the 1975 constitution when it was promulgated. See Cohen, *China's Changing Constitution*, 76 *THE CHINA Q.* 794 (1978) [hereinafter cited as Cohen].

in the nature of the state and society. Even more important, it was regarded as emphasizing the fact that there would be a continuation of the class struggle against, among others, enemies at home. And in turn this meant a continuation of the Cultural Revolution. On the other hand, the switch to the phrase "People's democratic dictatorship" in the 1982 constitution³⁰ signals the elimination of the class struggle, and that indicates that the Cultural Revolution will not be revived. At least in the current stage of development, the policy of advancing the Four Modernizations rests on this foundation. The various measures in furtherance of foreign trade, including the Joint Venture Law³¹ and the individual responsibility system, are aspects of the Four Modernizations campaign. Thus the ideological statement is the basis of a general statement, which serves as the basis of concrete statutes.

Of course, one cannot regard any of these ideological or policy statements as permanently binding, but if a statement is fairly recent and seems to be in accord with current conditions and attitudes, it is a good indication of where the leadership expects to go. A clear statement of policy may, in consequence, be of considerably more value than a more detailed set of rules. As a result, the preamble is generally the most important part of the constitution. Thus the statements in the preamble to the 1982 constitution that emphasize the importance of modernization and the necessity to make use of foreign capital and almost to eliminate class struggle³² may be rather more significant to a person who is contemplating a joint venture than a whole portfolio of legal materials of the usual type.

A description of Chinese constitutions is, therefore, a description of the way the documents called constitutions relate to the social, economic and political conditions that existed when they were promulgated and to the actions taken and contemplated by those who promulgated them. It has a continuing relationship with those conditions, and changes accordingly. A Chinese constitution must, in consequence, be seen as part of a

30. Art. 1.

31. Enacted July 1, 1979, translated in SWB (July 16, 1979, FE6/63/C/22).

32. The preamble to the 1982 constitution keeps the concept of the class struggle, but only just. After making it clear that the exploiting classes no longer exist as a class, it states that the class struggle will have to go on for a long time against foreign and domestic enemies. However, in the official commentary, it is pointed out that according to the 1981 census, 99.97% of those over 18 years old had the right to vote and be elected. In other words, they were not "exploiters" who had been deprived of their political rights. The exploiting classes have diminished greatly in size. Still the country has to fight the enemy within and without. So, dictatorship is preserved. *Id.* at 56.

process and can only be understood if one has some sense of this development. This has been true since the very beginning of the People's Republic of China.

The People's Republic of China came into existence formally in 1949 immediately after the enactment of the Common Program.³³ The Common Program was, as indicated above, a response to the victory of the Communists in their long war with the Nationalists. Its purpose was to solemnize this victory and to indicate where the country was to go. The main task of the new government was to assure its control and to eliminate the effects of decades of war and neglect. At the same time the government was committed to Marxism-Leninism-Mao Zedong Thought. It wished to establish the basis for socialism in China, but without scaring people. The program began by declaring that China was a people's democratic state that carried out the people's democratic dictatorship on the basis of an alliance of workers and peasants.³⁴ The tasks of the new nation were to complete the war of liberation,³⁵ to destroy the special rights of imperialist countries in China, and to confiscate bureaucratic capital and return it to the ownership of the democratic society. The nation should gradually change feudal and semifeudal ownership into a system whereby the farmers owned the land. It should protect rights and advance China from an agricultural into an industrial country.³⁶ It must establish equality of the sexes³⁷ and eliminate counter-revolutionary and imperialist Guomindang antirevolutionary activity. In necessary cases, it must, according to law, take away the political rights of persons involved in such activities.³⁸ In foreign affairs, China is united with those countries which love peace and freedom and particularly the Soviet Union and the People's Democracies.³⁹ There were a number of more particular provisions connected with the establishment of new social conditions such as the necessity for workers to participate in

33. The Common Program was enacted by the Chinese People's Political Consultative Conference on September 29, 1949. 1 COLLECTED LAWS AND REGULATIONS OF THE CHINESE CENTRAL PEOPLE'S GOVERNMENT [Zhongyang Renmin Zhengfu Faling Huipian] 17 (1945-50). The People's Republic of China came into being on October 1, 1949. Central People's Government Announcement of the People's Republic of China, *id.* at 28.

34. Art. 1.

35. Art. 2.

36. Art. 3.

37. Art. 6.

38. Art. 7.

39. Art. 11.

management.⁴⁰

The policy was carried out pretty much as written. By 1954, all significant opposition was quelled except in Taiwan; a successful war had been fought against the United States; the economy was rehabilitated and progressing; nationalization had begun.⁴¹ As the preamble to the 1954 constitution announced, "the necessary conditions have been created for planned economic construction and gradual transition to socialism." Thus the time was ripe for a new constitution—the first to be given the name of "constitution." The preamble stated that during this time of transition to socialism, there was to be a "broad people's democratic united front." State ownership, cooperative ownership, individual ownership, and capitalism could all exist, though it was implied that capitalism was only temporary. In foreign affairs, "China has already built an indestructible friendship with the great Union of Soviet Socialist Republics and the People's Democracies."

In the body of the constitution, China was again defined as a "people's democratic state led by the working class and based on the alliance of workers and peasants."⁴² Article 4 is perhaps the most significant. It provides: "The People's Republic of China, by relying on the organs of state and the social forces, and by means of socialist industrialization and socialist transformation, ensures the gradual abolition of systems of exploitation and the building of a socialist society." Several sections follow in which it is stated that different groups, such as individual workers and capitalists, will be "helped and guided" to enter into cooperatives or state-controlled activity.⁴³ Capitalists are forbidden to engage in "unlawful activities which injure the public interest, disrupt the social-economic order or undermine the economic plan of the state."⁴⁴ "Feudal landlords" and "bureaucratic landlords" continue to be deprived of political

40. Part IV, Economic Policy, arts. 26-40, sets out the government's policy, which is, essentially, to permit and encourage capitalism under state control, while making the state economy the principal factor. Art. 32 deals with workers' participation in management.

41. MEISSNER, *supra* note 26, at 59, 60, 73-80, 92-97.

42. Art. 1.

43. Art. 7 states that the state encourages, "guides and helps" the development of cooperatives, which are "the chief means for the transformation of individual farming and individual handicrafts." Art. 8 provides that the state "guides and helps" individual peasants to form cooperatives. The policy of the state in regard to rich peasant economy is to eliminate it. Under art. 9, handicraft workers are to be "guide[d] and help[ed]" into cooperatives. Under art. 10, the good aspects of capitalist industry and commerce are permitted but the state "encourages and guides their transformation into various forms of state-capitalist economy."

44. Art. 10.

rights. Treasonable and counter-revolutionary activities are suppressed.⁴⁵

Socialist transformation, in the sense of a change in ownership relations, came very quickly thereafter. By 1958 almost all agricultural land had been collectivised and all industry had come under state control. The individual sector of the economy had ceased to be of much importance.⁴⁶ In some ways it was time for a new constitution. Indeed, the issue was raised by Mao Zedong.⁴⁷ But the completion of the transition to socialism (if that is an accurate description of what happened) was almost immediately succeeded by a number of disturbances that delayed the adoption of a new constitution.

The two most important occurrences were the Great Leap Forward in 1958⁴⁸ and the Cultural Revolution in 1966.⁴⁹ These two events were very complex. Opinions vary enormously as to what caused them and what they mean. There is no space to discuss these matters here. There is, however, one element that is common to both of these events that has been very important for Chinese constitutional development. This is the issue of the persistence of and the necessity for the class struggle in China after the goals of nationalization of the economy and the establishment of political and military control had been achieved.

There is no question that the exploiting classes in the usual sense of the term had been eliminated. Many members of those classes—landlords, capitalists, officials in the former government, etc.—had been killed or imprisoned. Their ownership rights in the means of production had been confiscated and their organizations were destroyed. But China's revolution was not complete. Both agricultural and industrial production were far too low. What should be done to improve them? If one believed that the class struggle was essentially over, then the emphasis would be on physical conditions. One might feel that the chief obstacles to China's march towards socialism were essentially the objective material condi-

45. Art. 19.

46. D. PERKINS, MARKET CONTROL AND PLANNING IN COMMUNIST CHINA 13-17 (1966).

47. JOINT PUBLICATIONS RESEARCH SERVICE, MISCELLANY OF MAO TSE-TUNG THOUGHT [Maoze dong sixiang wan sui] (1949-1968) PART I, 138 (Feb. 20, 1974). It is reported that Mao said on December 12, 1958, "The issue of integrating politics and the commune, for example, was not passed by the People's Congress, nor is it in the constitution. Many parts of the constitution are obsolete, but it cannot be revised now. As for surpassing the U.S., we will formulate a written constitution."

48. The Greap Leap is discussed in MEISSNER, *supra* note 26, at 204-52.

49. The Cultural Revolution is discussed in MEISSNER, *supra* note 26, at 309-58.

tions of poor transportation, a low educational level, poor technology, and lack of skilled personnel and of capital to make improvements and the like. In short, one might concentrate on what could be called "productive forces."

On the other hand, if one believed that the basic problem was always political and that development comes from changing ownership relationships, or, one might say, the class struggle, then the problem was to locate the class that must be struggled against. One could, of course, continue to badger the survivors of the old exploiting groups and their descendants. And, as a matter of fact, the constant harassment of persons with a bad class background was a feature of Chinese life until quite recently. But it is obvious that this is not enough because these people had little power. Who did? High officials and members of the Communist Party. If these people were harboring feudal or bourgeois thoughts, they must be struggled against. They had become an exploiting class.⁵⁰ But ultimately—according to one very influential view—the battle was subjective. We must all struggle to rid ourselves of restrictive feudal or bourgeois thinking, to rid ourselves of the ego.⁵¹ If these political problems were attacked first, the solution to economic and social problems would appear.

Of course, it does not do to regard the upholders of these views as completely separate. All Marxists believe in the importance of the class struggle and that political questions, as they understand the term, are very important. No one in China questions the necessity for improved irrigation and the use of computers. But there are great differences in emphasis and these differences are reflected in the constitutions that have been promulgated since 1975.

It is not clear just who was in control of China in 1975, but it is pretty clear that the group favoring emphasis on the class struggle was in control of the media. Apparently this group also controlled the government sufficiently to cause a new constitution reflecting their views to be

50. See the discussion of "old classes" in Whyte, *Inequality and Stratification in China*, 64 THE CHINA Q. 698-705 (1976).

51. See report on Jiang Qing by Roxanne Witke in COMRADE CHIANG CH'ING 339 (1977): Chiang Ch'ing concluded her remarks on a cherished subject, the problem of the Ego. That subjective aspect of revolutionary transformation was always (and most emphatically in our interview) at the forefront of her consciousness, and seemingly was her sense of the heart of the Cultural Revolution. Making revolution, she said in effect, was simultaneously an introverted and extroverted experience, a personal and public affair. Conflicts were not only external—between the enemy and ourselves—or internal—among ourselves, as Chairman Mao had argued. They must be waged *within* oneself—*against* the so-called Ego.

promulgated, because the preamble made it very clear that this constitution was the product of those who emphasized the class struggle. It provided:

Socialist society covers a considerably long historical period. Throughout this historical period, there are classes, class contradictions and class struggle, there is the struggle between the socialist road and the capitalist road, there is the danger of capitalist restoration and there is the threat of subversion and aggression by imperialism and social-imperialism. These contradictions can be resolved only by depending on the theory of continued revolution under the dictatorship of the proletariat and on practice under its guidance.⁵²

These ideas are pervasive in the 1975 constitution. It is what might be called a very Maoist document.⁵³ Almost all traces of the former social system had disappeared.⁵⁴ The Communist Party is the core of leadership of the whole Chinese people. "The working class exercises leadership over the state through its vanguard, the Communist Party of China."⁵⁵ References to capitalists and other parties had disappeared. Essentially the only property relationships that are recognized are collective or state property,⁵⁶ though very grudging permission is given for private plots and handicrafts.⁵⁷ The emphasis is on struggle. Administrators must "put proletarian politics in command, combat bureaucracy, maintain close ties with the masses and wholeheartedly serve the people. Cadres at all levels must participate in collective productive labour."⁵⁸ "The proletariat must exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture."⁵⁹ Article 13 more or less describes and endorses the Cultural Revolution. It provides: Speaking out freely, airing views fully, holding great debates and writing

52. 1975 CONST. preamble.

53. Though there is some question whether or not Mao approved of it since he did not attend either the meeting of the Party Central Committee prior to the meeting of the National People's Congress at which the constitution was promulgated, or the Congress itself. See M-h Yao, *The Fourth National People's Congress and Peiping's Future Direction in THE NEW CONSTITUTION OF COMMUNIST CHINA* 324, 327-8 (M. Lindsay ed. 1976).

54. There is no reference to capitalism or, for that matter, to landlords except as persons deprived of political rights. Art. 14.

55. Art. 2.

56. Art. 5.

57. Art. 7. Private plots are permitted so long as the "development and absolute predominance of the collective economy of the people's commune are ensured." Art. 9 permits ownership of income from work, savings, houses, and "other means of livelihood."

58. Art. 11.

59. Art. 12.

big-character posters are new forms of carrying on socialist revolution created by the masses of the people. The state shall ensure to the masses the right to use these forms to create a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness, and so help consolidate the leadership of the Communist Party of China over the state and consolidate the dictatorship of the proletariat.⁶⁰

The standing committees of local congresses are replaced by "revolutionary committees."⁶¹ In regard to legal procedure, the constitution provided that: "The mass line must be applied in procuratorial work and in trying cases. In major counterrevolutionary criminal cases the masses should be mobilized for discussion and criticism."⁶²

It is difficult to determine the extent to which China was actually governed by these precepts, but there is no question that between the time when the constitution was adopted in 1975 and the death of Mao in September 1976, the "leftists" who, as indicated above, seem to have controlled the media, made strenuous efforts to promote these views. During the summer before Mao's death, there was a vigorous campaign against Deng Xiaoping and his doctrine of emphasizing "productive forces."⁶³ There was a lot of favorable publicity given to the Cultural Revolution with perhaps a hint at its revival.⁶⁴ This period is included in what the present government calls ten years of turmoil. It could also be classified as a period in which the doctrine of viewing the class struggle as the key link was the keystone of official government policy.⁶⁵

Almost immediately upon Mao's death, things began to change. The group—later characterized as the Gang of Four—who had presumably been behind this constitution were imprisoned and new people began to take over.⁶⁶ One of the first notable changes in policy involved educa-

60. Art. 13.

61. Art. 22.

62. Art. 25.

63. The discussion of the campaign against Deng Xiaoping is based upon *Two Systems, Lessons of Teng's Crimes*, CHINA NEWS ANALYSIS (1976). See also B. BRUGGER, CHINA: RADICALISM TO REVISION 1962-1979, 170-96 (1981).

64. See, e.g., *The Great Cultural Revolution Will Shine Forever*, PEKING REV., at 14 (July 2, 1976), *The Making of a Young Actress*, *id.*; *Advance Along the Road of the Great Proletarian Cultural Revolution*, *id.* at 16.

65. See, e.g., the translation of the official commentary to the 1975 constitution in SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 93-95 (J. En-Pao Wang ed. 1976), where it is said that "our main task is to . . . persist in continued revolution. . ." and a statement of Mao Zedong is quoted: ". . . there are still classes, class contradictions and class struggles. . . ."

66. See B. BRUGGER, *supra* note 63, at 194-96, 201, 202.

tion.⁶⁷ The entire system of university admissions was changed. In the early 1970s admission was, in theory, based primarily on work experience and political reliability and not on academic qualifications as we understand the term. The course of study emphasized practice more than theory and the length of time spent in the university was shortened. In 1977, soon after the fall of the Gang of Four, this was changed to a system that based admission on an extremely competitive examination more or less of the western type. The courses of study became much more academic and longer. There were changes in other fields as well. Foreign contacts were encouraged and imports increased.⁶⁸ There were purges of those who had sided with the Gang of Four, and there was a "reversal of verdicts" of those who were said to have been unjustly accused of various things—usually counter-revolutionary activity—during the Cultural Revolution.⁶⁹ The government was a rather strange alliance. It included both Deng Xiaoping and Hua Guofong, the man who had replaced him after his downfall in April 1976.⁷⁰ In the midst of all this, the 1978 constitution was promulgated.⁷¹ It reflected the unresolved conflicts in the government.

The new constitution retained the general ideological line of the 1975 constitution, but there were some modifications. Thus, in the preamble, China is still said to be a country under the dictatorship of the proletariat and the Cultural Revolution is still a great victory. But there is a slight relaxation in the cry for the class struggle. Intellectuals are now included in the worker-peasant alliance by means of the "mass line," which was to be expanded and strengthened as a sort of united front. The big task is to preserve the revolution and to make China a modern country by the end of the century by achieving the Four Modernizations.

In the text there is the same compromise. Most of the language is the same as in the 1975 constitution, but some changes have been made. For instance, the rural people's commune is no longer defined as "an organi-

67. See Pepper, *Chinese Education After Mao: Two Steps Forward, Two Steps Back and Begin Again?*, THE CHINA Q. 1 (1980).

68. See, for instance, the statement about a 26.8% increase in exports in the first half of 1979 and the establishment of new institutions to encourage trade and the import of technology, in *Quarterly Chronicle and Documentation*, THE CHINA Q. 881, 886 (1979).

69. See *Quarterly Chronicle and Documentation: (b) The Campaign Against Lin Biao and the 'Gang of Four'*, and *id.* (c) *The Leadership*, THE CHINA Q. 157, 158, 173 (1979).

70. Deng was rehabilitated and reappeared as Vice-Chairman of the Party by mid-1977. B. BRUGGER, *supra* note 63, at 202-03.

71. The 1978 Constitution is discussed in detail in Cohen, *supra* note 29.

zation which integrates government, administration and economic management.”⁷² Instead, it is a “socialist sector” of the economy.⁷³ In the article on improving production, instead of saying that the state by “grasping revolution . . . improves the people’s material and cultural life step by step . . .,”⁷⁴ the 1978 constitution says that the state “adheres to the general line of going all out, aiming high and achieving greater, faster, better and more economical results in building socialism . . . and it continuously develops the *productive forces* so as to consolidate the country’s independence and security and improve the people’s material and cultural life step by step.”⁷⁵ The term “productive forces” was anathema to the Gang of Four because it indicated that one was not emphasizing the importance of the class struggle as the key to development.

The 1978 document also eliminated the statement that the proletariat must “exercise all-round dictatorship over the bourgeoisie in the superstructure.”⁷⁶ Education and science again became primary aims of the state.⁷⁷

There were some structural changes as well. The procuracy was restored⁷⁸ as well as the use of “people’s assessors” in the trial of cases.⁷⁹ The accused had a right to a defense, and while the masses were to be drawn in for discussion and suggestions in major counter-revolutionary or criminal cases,⁸⁰ there was no statement that the mass line must be generally used.⁸¹ In the part dealing with the legislature, the powers given to the National People’s Congress and to its standing committee are set out in much more detail⁸² than in the 1975 constitution.⁸³ It was believed by some that these provisions strengthened Congress.⁸⁴

It is hard to say whether any of these changes in the language of the constitution would have had any effect whatever on the actual government of China even if the constitution had remained in effect. But as it

72. 1975 CONST. art. 7.

73. 1978 CONST. art. 7.

74. 1975 CONST. art. 10.

75. 1975 CONST. art. 11.

76. 1975 CONST. art. 12.

77. 1978 CONST. art. 13.

78. 1978 CONST. art. 43.

79. 1978 CONST. art. 41.

80. *Id.*

81. 1978 CONST. art. 22.

82. 1978 CONST. art. 25.

83. 1975 CONST. arts. 17 & 18.

84. Cohen, *supra* note 29, at 809-12.

happens, before the year 1978 was out, the political situation changed radically. The Third Plenum of the Eleventh Central Committee Meeting of the Party was held in December.⁸⁵ Its report announced the end of the class struggle and made the Four Modernizations the country's main task. This meeting signaled the basic victory of Deng Xiaoping and his group in the struggle for control of the Party—though mopping up operations still go on. In August 1980, the Central Committee of the Communist Party recommended the establishment of a committee to revise the constitution.⁸⁶ Soon thereafter the National People's Congress established a constitutional revision committee.⁸⁷ The 1982 constitution is what they came up with. In June 1981, at the Sixth Plenum of the Central Committee, Hua Guofeng resigned as Party Chairman and Hu Yaobang, a follower of Deng, was selected to replace him.⁸⁸ These events indicated that the Deng group was in firm control of both the Party and the government, at least at the top levels.

In the period since Deng took power, the most visible aspect of political life in China has been the emphasis on the Four Modernizations. Or, one might say, industrialization at almost any cost. This campaign, if one can call it that, pervades every aspect of Chinese life. In fact, though not in name, collective ownership of agricultural land is being scrapped in favor of a sort of limited individual ownership under the label of the "individual responsibility system."⁸⁹ Foreign investment is sought ea-

85. The Third Plenum is discussed in B. BRUGGER, *supra* note 63, at 218-19.

86. Proposal of the Central Committee of the Chinese Communist Party Regarding the Revision of the Constitution and the Establishment of a Constitutional Revision Committee [*Zhongguo Gongzhan Dang Zhongyang Weiyuanhui Guanyu Xingai Xianfa He Chengli Xianfa Xingai Weiyuanhui*] of August 30, 1980, in CONSTITUTIONAL MATERIALS, *supra* note 1, at 375.

87. Resolution of the Third Session of the Fifth National People's Congress of the People's Republic of China Regarding the Revision of the Constitution and the Establishment of a Constitution Revision Committee [*Zhonghua Renmin Gongheguo Ti Wu Jie Quanguo Renmin Daibiao Da Hui Ti San Ze Huiyi Guanyu Xingai Xianfa He Chengli Xianfa Xiugai Weiyuanhui*] of September 10, 1980, CONSTITUTIONAL MATERIALS, *supra* note 1, at 379.

88. See *Quarterly Chronicle and Documentation*, THE CHINA Q. 547, 548 (1981).

89. See Schell, *A Reporter at Large: The Wind of Wanting to Go It Alone*, THE NEW YORKER 65-73 (Jan. 23, 1984) [hereinafter cited as Schell]. See also *supra* note 26. The Chinese would, of course, deny that land farmed under the individual responsibility system is "owned" by the cultivator because it cannot be sold or even rented. Even if the peasants were not busy finding ways around these prohibitions—as one assumes they are—the rights they do have constitute ownership as this term is defined in the RESTATEMENT OF PROPERTY § 10 comment b (1936). The recent *Circular of the Central Committee of the Chinese Communist Party on Rural Work During 1984*, THE CHINA Q. 132 (1985), allows households to enter into contracts to use land for 15 years or more. This is "ownership" by almost any definition. While land "may not be bought or sold, may not be leased to a third party and may not be transferred as building plots for housing or for any other non-agricul-

gerly and foreigners are even permitted to develop and, in effect, to own China's natural resources such as oil.⁹⁰ Internally, private capitalism at a low level, such as handicraft industry, hauling, restaurants, etc., is permitted.⁹¹ It is reported that shares will soon be sold in Chinese enterprises and that both Chinese and foreigners will be permitted to buy them.⁹² In other words, private and even foreign ownership of the means of production is now permitted (although considerable intellectual energy is expended to deny this). Education is also being emphasized and changed. Its chief goal now is to produce high-quality experts in large numbers. Education is now an elite system that relies on competitive examinations, foreign experts and foreign training for its staff, a complete reversal of the radical egalitarian theories of Chairman Mao. The new officials in the Party and government, at least at the top levels, tend to be people with university educations.⁹³

In valuating these changes, it is instructive to look back at the campaign that was conducted against Deng Xiaoping during late 1975 and 1976.⁹⁴ That is roughly the period between the promulgation of the 1975 constitution and the death of Mao. This campaign began with the attack on Deng's theories of education. It was alleged that he advocated that there be more attention to theory, less to practice. He advocated downplaying the worker-peasant teams. He was accused of having said, "The greatest tragedy of these years is that study has been abandoned and everything is work and trade."⁹⁵ He is supposed to have said that universities should train scientists and cadres and "universities" which train people to become peasants and workers should be abolished.

The general attack on Deng's ideas that followed in the next few months quoted speeches in which Deng is alleged to have criticized campaigns as a waste of time that harmed old Party members who were

tural use," *id.*, the contract can be transferred with the consent of the collective. *Id.* It is said that the peasants expect the leasehold to become "property" after 15 years and in the meantime there is a brisk trade in them. Kueh, *The Economics of the 'Second Land Reform' in China*, THE CHINA Q. 122, 128 nn.10-12 (1985).

90. The Joint Venture Law is available in both English and Chinese in 1 CHINA'S FOREIGN ECONOMIC LEGISLATION 1 (1982).

91. See Schell, *supra* note 89, at 43-58.

92. As to possible foreign ownership of shares in Chinese concerns, see *Peking firms may seek Hong Kong listing*, South China Morning Post, July 6, 1984, at 1.

93. See WENG, *supra* note 9, at 251-54.

94. This is based on CHINA NEWS ANALYSIS No. 1044 (June 18, 1976). See also B. BRUGGER, *supra* note 63, at 177-95.

95. CHINA NEWS ANALYSIS, No. 1044 (June 18, 1976).

falsely accused of being revisionists. He objected to the criticism of intellectuals. He emphasized science and technology. In general he advocated the development of productive forces as opposed to the class struggle. He said, quoting Mao, "The criterion of good or bad is whether production force is released or tied down."⁹⁶ He advocated purchasing foreign technology on credit, using Chinese resources to pay for it. He advocated the use of material incentives both in industry and agriculture to raise production.

Thus the positions for which Deng was criticized have become the official program of the Chinese government and the basis of the 1982 constitution. This could have been predicted: So long as Deng and his group are in power, this will continue to be the program (unless they change their minds). If what have been his opposition are in power, one can expect a shift in emphasis from productive forces to the class struggle. At any rate, these are the principles that govern China now and they form the basis of the new constitution just as the ideology of previous groups has governed the constitutions they promulgated and the policies they followed.

The ideological message of the 1982 constitution is very clear. The preamble begins with the usual history of the struggle of the Chinese people against feudalism and imperialism. However, it emphasizes China's long and glorious history and the role of Sun Yat-sen in overthrowing the Manchus. These are both new features of the standard history. Then there is a summary of the history of the People's Republic of China. The Cultural Revolution—emphasized in the 1975 and 1978 constitutions—is ignored. In sum, the "people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is, in essence, the dictatorship of the proletariat, has been consolidated and developed."⁹⁷ The basic task at this stage is to achieve the Four Modernizations.⁹⁸ The class struggle is basically over. It is essential to rely on workers, peasants and intellectuals in achieving modernization; there must be a "broad patriotic united front."

In the constitution's text, this message is continued. Article 1 states that China is a people's democratic dictatorship. This phrase is apparently a code term that means that the class struggle is down-played. It is especially valuable for intellectuals and former capitalists—two groups

96. *Id.*

97. 1982 CONST. preamble.

98. The Four Modernizations are: industry, agriculture, defense, and science and technology.

very important for the Four Modernizations—who can be classified as “people” or even “workers,” but who are a little difficult to characterize as “the proletariat.” If these groups participate in the dictatorship, then they are less likely to be targets of it. In the case of the dictatorship of the proletariat, anyone who is not a member of the proletariat is a likely target for dictatorship. The consequences can range from inability to get work or an education to execution as an enemy.

The Four Modernizations are not mentioned by name in the text, but their spirit governs. In the 1975 and 1978 constitutions, the state administers the individual economy in an effort to eliminate it. Now the individual economy is a complement to the “socialist public economy,” and “the state protects the lawful rights and interests of the individual economy.”⁹⁹ Article 14 summarizes the present economic program:

The state continuously raises labour productivity, improves economic results and develops the *productive forces* by enhancing the enthusiasm of the working people, raising the level of their technical skill, disseminating advanced science and technology, improving the system of economic administration and enterprise operation and management, instituting the socialist system of responsibility in various forms and improving organization of work.¹⁰⁰

State and collective enterprises are given some independence.¹⁰¹ Foreign investment is allowed.¹⁰² The state awards achievements in scientific discoveries. Article 25 provides: “The state trains specialized personnel in all fields who serve socialism, increases the number of intellectuals and creates conditions to give full scope to their role in socialist modernization.”¹⁰³

All of this is in line with the preamble and with what Deng preached before he got to power and practiced thereafter. In other words, China is a state that is dedicated to the principles of Marxism-Leninism-Mao Zedong Thought, but which at the present time must concentrate on building up its productive forces. When the aims of the Four Modernizations are achieved, China will presumably be able to advance to a stage closer to socialism. Because the intellectuals by that time will be in control of both Party and state, their positions would seem to be assured, so

99. 1982 CONST. art. 11.

100. 1982 CONST. art. 14.

101. 1982 CONST. art. 16.

102. 1982 CONST. art. 18.

103. 1982 CONST. art. 25.

that this would be socialism with a very different face from that contemplated in 1975 and 1978.

The activities of the government since the 1982 constitution was promulgated are in accordance with these aims. And that is perhaps one of the points to notice about Chinese constitutions. To say that policy is law is not to say that China's political system is lawless, or unpredictable, or subject to the whim and caprice of its leaders. The official policy of a country like China is normally hammered out after lengthy discussions. Once established, it is likely to continue for a long while. If a group that is in power wishes to change policy, there will probably be many signals. And if an opposing group comes to power, it is likely that one will know beforehand much of what it plans to do. Still, there is more uncertainty and more change than there is in a system such as that of the United States, in which policy tends to be crystallized into "law." The policy against over-concentration in industry is held in varying degrees of esteem by different administrations, but none has felt it possible formally to repeal the antitrust laws. But in China, every policy, every law, can be completely changed within a very short time.

Such changes are now going on. What will happen next? If past practice continues, then this constitution will remain in force as long as the present group remains in power, unless its policies should change considerably. In the event of a significant political or policy change, there would be a formal constitutional change. This would presumably be of no surprise to the Chinese, who are at least as aware as we are of the transitory nature of their constitutions. Indeed, they sometimes say as much. A member of the Chinese People's Political Consultative Conference is supposed to have said in regard to the 1982 constitution: "Will the new constitution become a mere scrap of paper as the 1954 constitution became. . . ?"¹⁰⁴ The Chinese must also be aware of the fact that institutions of government such as the courts and congresses have no real power and that a constitutional guarantee such as a guarantee of freedom of the person or the right to have a trial uninfluenced by "Administrative organs, public organization or individuals"¹⁰⁵ and the like, is pretty empty. Officials must, in other words, be aware of the facts that not only can all their policies and laws change if they lose out in a power struggle, but also they themselves run a serious risk of personal harm if this should

104. FBIS, DAILY REPORT K8 (Dec. 9, 1982).

105. Art. 126.

happen. It has already happened to these officials during the Cultural Revolution—and before, for that matter. It seems reasonable to assume that they do not wish for it to happen again. Consequently, they seem to have a great desire for stability, and they have attempted to make this constitution different from its predecessors in order to get that stability. They have attempted to substitute law, as we understand the term, for policy. They have done this by means of certain provisions in the constitution itself,¹⁰⁶ and by means of a vigorous campaign for the “rule of law” in China.¹⁰⁷

It is difficult to know what significance to give to these or any other institutional changes in Chinese constitutions, because all we have to go on are the constitutions themselves and the Chinese commentaries. The Chinese commentators make no effort to ask how things will actually work. Instead they write about Chinese constitutions in the way an American might write about a new state constitution. They discuss every institution as if it functioned exactly as one would expect from reading the text. This is almost never true. It often seems that none of the institutions that are dealt with at length in the constitutions have any importance at all. Consequently, what does it matter if there are changes in the functions that are supposedly given to the institutions? It would matter, of course, if there were a strong desire on the part of very powerful people to have the changes mean something. There are hints in the new constitution and its official commentary that this may be the case now. What seems to be intended is to create institutions that will have some actual power and thus to create a government that is at least distanced from the Party, if not completely removed from its control.¹⁰⁸

106. Consider for example the treatment of art. 5, which provides that “no law . . . shall contravene the Constitution,” and all “state organs, the armed forces,” etc., “must abide by the Constitution and the law.” Both the Congress, art. 62(2), and its Standing Committee, art. 67(1), are to enforce this apparently. The problem of constitutionality is discussed in one standard commentary under the chapter heading “The new constitution strengthens the stipulations for defending the constitution” [*Xin Xianfa Zhajiangle Xianfa Bao Zhangde Guiding*]. The authors list four ways in which the new constitution provides this protection: (1) it strengthens the supervisory power of the Congress and its Standing Committee; (2) it gives the standing committee power to declare acts and regulations unconstitutional; (3) it provides that all agencies and citizens must respect the constitution; and (4) it requires a super-majority of Congress to amend the constitution. There is no discussion of how all this will work. There seems to be a feeling that if there are words in a statute that say someone has a “right,” then he does. See W. ZHAOZHE & C. YUNSHENG, GUIDE TO THE NEW CONSTITUTION [*Xin Xianfa Jianghua*] 224-27 (1983).

107. See *supra* note 19. See also *The Use of the Legal Weapon*, CHINA NEWS ANALYSIS (June 18, 1984).

108. The 1982 Party Constitution, adopted three months before the State Constitution, is in

The outlines of such a government are anything but clear. They may not always be clear to the authors. One clue to what is intended may be found in the seven changes in governmental institutions in the new constitution that are said by the draftsmen in their official commentary to be particularly significant.¹⁰⁹ These changes were:

1. The power of the National People's Congress is increased because more power is given to its standing committee. Because the standing committee can meet frequently and is much smaller than the Congress as a whole, it can exercise power effectively. This is something that the Congress cannot do.
2. The position of President of the Republic is restored.
3. A military affairs control committee is established. It is appointed by the Congress and responsible to it. Formerly the armed forces were under the Party's control (at least that is what the constitutions said).
4. The Premier is made responsible to Congress for the actions of the government. Each ministry operates under a system whereby the minister is responsible for the action of his ministry to the Premier. A system of auditing is instituted both at the national and local levels in order to strengthen the supervision of fiscal matters.
5. The local government authorities have been strengthened under central leadership. The congresses of provinces and cities under direct rule exercise supervisory authority over local governments, which operate under a system whereby the chief administrator is responsible.
6. The communes have been deprived of all political functions, which now go to the "township." This clarifies political responsibility.
7. Certain high officials, such as the President and members of the Standing Committee of the National People's Congress, may not serve more than two terms.

These provisions seem to be designed to create an hierarchical system of government with the apex in the Premier. Each unit has a head who is responsible to the next higher level and so on up to the top. The Premier is in turn nominally responsible to the National People's Congress, but in fact this means that he is responsible to the Standing Committee. The Committee will, in all probability, be more or less self-perpetuating be-

harmony with this view. It provides in the preamble that "The Party must conduct its activities within the limits permitted by the Constitution and the laws of the state." 25 BEIJING REV. at 8 (1982). In 1980 when this constitution was being drafted, Deng Xiaoping, in a speech delivered to the Political Bureau of the Party, stated that the Party should be separated from the government. The Party would establish general principles but would strengthen the state structure. Policy would not be a substitute for government. HSIA & JOHNSON, *THE CHINESE COMMUNIST PARTY CONSTITUTION OF 1982: DENG ZIAOPING'S PROGRAM FOR MODERNIZATION* (1984).

109. Speech by Peng Zhen printed in Chinese edition of 1982 constitution, *supra* note 1, at 66-69.

cause, in view of the indirect nature of the electoral process, radical changes in the composition of the Congress are unlikely, and the Standing Committee is clearly intended to control Congress. Hence what one has is very similar to the system of the government in an American corporation. The organization is run by its permanent bureaucracy, the President and his subordinates, but there is a very real power of ultimate supervision by a self-perpetuating board of directors. In China, however, there is the troublesome memory of a long-term power holder—Mao Zedong—that is no doubt fresh in people's minds. So no one is permitted to stay in a top job for more than two terms. One curious aspect to this system is that it is, in some ways, more in harmony with the theories of Sun Yat-sen than the government that now exists in Taiwan.¹¹⁰

Dr. Sun believed that political power should be distinguished from governmental power. A strong government was not to be feared so long as the government is ultimately controlled by the people in the exercise of their political power. Government consists of making, enforcing and interpreting rules as well as recruiting personnel for government and investigating its work. The mass of the people cannot do these things. But the people can control the government by exercising four political powers: suffrage, initiative, referendum and recall. In a country as large as China, they cannot exercise powers directly as they might, perhaps, in a Swiss canton. Hence they act through the people's Congress. The Congress is not a legislature. It does not make laws in the usual way. Rather, it elects the leaders of the government, one branch of which makes laws (the legislative yüan). The people, acting through their representatives, the Congress, can elect or remove all top officials. The people can initiate legislation or have it referred to them for approval (referendum). But the initiative and referendum are as extraordinary in China as they are in the United States. Normally people simply elect top officials of the government and supervise their work by getting periodic reports. This is, of course, the way the National People's Congress is supposed to work.

110. The Constitution of the Republic of China (Taiwan) provides for direct election to the Legislative Yüan—the body that actually legislates, art. 64, as well as to the Congress, art. 26. As indicated in the text, Dr. Sun wanted elections only to the Congress, which was to elect the Legislative Yuan. See P.M.A. LINEBARGER, *THE POLITICAL DOCTRINES OF SUN YATSEN* 89-121, 209-23 (1937) and W.Y. TSAO, *THE CONSTITUTIONAL STRUCTURE OF MODERN CHINA* 96-113, 130-45 (1947). The Tsao book reprints the translations of the texts of the Chinese Constitution of 1946 (in force in Taiwan), *id.* at 275, and the draft constitution of 1937, much closer to Dr. Sun's ideas, *id.* at 238.

There are also, to be sure, many differences between the 1982 constitution and the ideas of Dr. Sun and his followers.¹¹¹ Still, if one looks only at what the constitution says about the political as opposed to economic institutions of China and at what it says about international relations, one cannot help wondering about the possible influences of Dr. Sun—who has never been repudiated by the Communists. At the present time, even those economic provisions of the constitution that encourage individual farmers to control the land they farm and benefit from it seem to be a sort of echo of Dr. Sun's famous program of giving land to the tiller. Dr. Sun attempted to assimilate western democratic ideas and institutions into traditional Chinese ideas and institutions in order to create a system that would work in China. If the present constitution is in fact influenced by Dr. Sun, its draftsmen are emphasizing the Chinese tradition as the foundation of their government. There seems to be some hint of this in the preamble in the midst of many protestations of loyalty to Marxism-Leninism.¹¹² Connecting the present government to Chinese tradition is an obvious way of giving the government a basis for existing independent of the Party.

Regardless, however, of whether the leaders of China are the ardent followers of Marxism-Leninism-Mao Zedong Thought that they purport

111. The most obvious difference is that Dr. Sun proposed to have the government administration divided into five divisions, or Yüan: Legislative, Judicial, Administrative, Examination and Control. Y-S SUN, *SAN MIN CHU*-1 144-49 [Lecture Six]. The first three divisions are taken from the U.S. Constitution and the last two from traditional Chinese institutions. The table of organization for the government established by the 1982 constitution of the People's Republic of China envisages a Congress which formally enacts legislation that is actually drafted by its standing committee and special committees subordinate to it, not a Legislative Yüan that is quite separate. The government supervised by the congress has three or four parts: the State Council (equivalent to Dr. Sun's Administrative Yüan); Central Military Commission; People's Courts; and People's Procuracy. (The last two are treated together). On the other hand, one of the principal features of Dr. Sun's program for China was the idea of "tutelage." China was not yet ready for direct elections nationwide because it had no experience with democracy. Hence the Guomintang controlled the country and conducted elections first at the local or county level. When all the counties in a province were electing their local government, the province was then ready to have province-wide elections. When half the provinces were democratic, there could be elections to Congress. LINEBARGER, *supra* note 104, at 210-214. The system of indirect elections established in the 1982 constitution is certainly compatible with this, although it is not exactly the same. It is curious that the idea of a standing committee of the People's Congress, which was rejected by the drafters of the Guomintang constitution, was strongly advocated—for much the same reasons given by Peng Zhen—by Professor Tsao, who seems clearly to be a disciple of Dr. Sun. TSAO, *supra* note 110, at 112-13.

112. See preamble provisions on China's long history and Sun's role in overthrowing the Manchus.

to be, or closet devotees of the Three People's Principles, it is still not clear that the governmental institutions described in the constitution will ever operate independently of the Party. The Party at the present time is not, after all, a small band of enthusiastic revolutionaries. It is an enormous bureaucracy with tens of millions of members. For thirty-five years, membership in the Party has been the principal road to power and the perquisites of power such as housing, food, education, health care, travel, and the like.¹¹³ The vast majority of persons now living in China have never known anything else. All of the persons who are in the top positions in the government are also important Party members. The two things go together. It is hard to see those Party members who are, for example, Standing Committee members, getting rid of Party control of the electoral process. Though it was suggested recently by one of the most authoritative observers of China that the current Chairman of the National People's Congress, Peng Zhen, who was vice-chairman of the committee that was said to have drafted the constitution, is attempting to make the Standing Committee of the National People's Congress a rival power-center to the Politburo of the Communist Party because Zhen is not a member of the Politburo. He is said to have significant support.¹¹⁴ If this is an accurate assessment, it is interesting. Even if it does not mean that power has shifted from the Party to governmental institutions, Zhen's attempt would mean that they, particularly the Standing Committee, have become fora in which battles for Party control might be fought. Hence they would acquire some real life as opposed to the merely formal existence they have had heretofore. Of course such importance, even if it exists, may be short-lived. Mao Zedong created extra-Party organizations, notably the Cultural Revolution Small Group and the Red Guards, when he had apparently lost control of the Party apparatus. He used these new organizations to destroy the leaders of the Party (sometimes in a very literal sense).¹¹⁵ But once this was accomplished, he simply put his men into control of the Party. The new organizations disappeared or ceased to have much power. Moreover, if there is some sort of struggle for power going on now between Deng and Peng, it is a struggle between two octogenarians. It is not clear that its outcome will have any long-term significance. Although of course it may.

There is another development that might make the institutions created

113. See WENG, *supra* note 9, at 135.

114. L. LaDanay, *China's New Power Centre?*, FAR EASTERN ECON. REV. 38 (1984).

115. See H-Y LEE, *THE POLITICS OF THE CHINESE CULTURAL REVOLUTION* 1-10 (1978).

by this constitution different from those created by its predecessors. That is the development of a legal profession. China has never had a significant legal profession in the western sense outside of the Treaty Ports such as Shanghai where there were extraterritorial courts. Even the vestiges of a western (or even Soviet) system pretty much disappeared after 1958. There were courts, but it is not clear what function they fulfilled. There was clearly no general system of criminal courts in a western sense. Nor were there lawyers.¹¹⁶ Beginning in the late 1970s, however, there has been a determined movement to change this situation. Laws and law books proliferate. Law departments are being established or re-established in universities. University-level institutions and special courses are being formed to give training in law to judges, most of whom were military men and had no legal training.¹¹⁷ If this activity continues, it will mean that there will be a very large number of people in a well-entrenched bureaucracy—the courts and procuracy (though will the security administration continue to dominate?)—who have been trained to think in terms of law as something independent of policy. There will be other trained lawyers throughout the bureaucracy. This is already true of the foreign trade organs.

It would be foolish to suppose that all of these individuals will have acquired a passionate fondness for civil rights and due process, although it is clear that at least those who have studied law in law departments have had access to western legal materials, including constitutional law materials.¹¹⁸ It does seem possible, however, that they will serve to form a core of resistance to rapid change outside the normal channels, such as to something like the Cultural Revolution. If one wished to rid oneself of an opponent, a “trial” for counter-revolutionary acts would be used rather than a mass meeting. The “trial” of the Gang of Four is of interest in this context because previously trials were not used in purges of

116. For my views on the system as of 1975, see Jones, *A Possible Model for the Criminal Trial in the People's Republic of China*, 24 AM. J. COMP. L. 229 (1976). See Peng, *Importance of Improving China's Legislation*, BEIJING REV. no. 35, 16 (1984), for an official view of the legal situation in China since liberation.

117. See, e.g., Li, *Legal Education Surges Ahead*, 26 BEIJING REV. 22 (1985); *Spare-time college helps train judges*, China Daily, Feb. 18, 1983; *Socialist legal system making good progress*, *id.*, Dec. 12, 1983; *Major plan adopted to train jurists*, *id.*, Jan. 7, 1984.

118. For example, CONSTITUTIONAL MATERIALS consists of five volumes and includes most of the major constitutional documents of the western world, including the Magna Carta, The Petition of Right, the U.S. Declaration of Independence and Constitution, and the Declaration of the Rights of Man. It had an initial press run of 15,000 copies and was freely available throughout the country.

Party leaders.¹¹⁹

Despite this apparent desire for change and the measures that seem to have been taken to bring it about, it is far too early to say whether the new constitution will in fact effect some changes or simply go the way of its predecessors. Much depends on how long Deng stays in power and on who succeeds him. To make any predictions on how the Chinese constitution will fare in the midst of these events, one must be able to predict the immediate future of Chinese politics, and few would wish to attempt that.¹²⁰ All that one can say is that from 1949 to the present, Chinese constitutions have not played a western role of describing and prescribing the forms and powers of governmental institutions and the rights of citizens, although they purport to do so. Rather, they have signaled political and ideological change. The more recent changes have involved a bitter and violent dispute over the issue of the continuation of the class struggle thirty years or so after liberation. Those who oppose continuation of the struggle are now in power. They have attempted in every possible way to prevent a reversal of their programs. Doubtless the most important method that they have used is the traditional one of purging the party and replacing supporters of the old group with their own people.¹²¹ They have devoted much attention to building up mass support. But they have also attempted to make some institutional changes in the Chinese government that may make it more resistant to change. And they constantly emphasize the importance of law as opposed to policy, and have sponsored the development of a legal system and a legal profession. Only time will tell what they have accomplished.

119. As a "trial" it was a farce, but it was interesting that the Chinese used a public show trial to get rid of defeated opponents. Previously, people just disappeared. Sometimes they were publicly attacked, but there was no trial-like proceeding. For the early purge of Gao Gang and Rao Shushi, see F. TEIWES, *POLITICS AND PURGES IN CHINA* 166-210 (1979). Two prominent leaders were accused primarily of "factionalism" and trying to seize power. They were accused anonymously at the Fourth Plenum of the Seventh Central Committee Meeting in 1954, and were publicly attacked at the National Conference of the Party in 1955. Sometime in between Gao committed suicide. There was a "verdict," but no trial. The Teiwes book discusses all of the important purges up to the Cultural Revolution.

120. Of course if one had to guess, it would be that what is likely to emerge is something like the system in the Soviet Union: stable, but very authoritarian and controlled, and rather corrupt. The Soviets are said to believe that China will have to adopt their system, though of course they do not characterize it as I have. See T. Oka, *China charts its own course*, *The Christian Science Monitor*, June 30-July 6, 1984, at 14 (int'l ed.).

121. This present campaign to "consolidate" the Party has in fact been characterized as a purge by one well-informed observer. See HSIA & JOHNSON, *supra* note 108, at 30-31.

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