
NO PAIN, NO GAIN: Steps Toward Securing the Future of China's Legal System

Peter Corne

INTRODUCTION

Laws that embody norms transplanted from foreign legal systems normally face substantial implementation problems. The experience of many Asian countries during the colonial and post-colonial periods shows that legal regulation is less relevant to social reality than are customary norms.¹ Imported legal concepts may not correspond with entrenched societal values. Consequently, people may be unwilling to adjust their behavior to fit the new legal standards.

This is the case in the People's Republic of China (PRC), which since 1978 has been establishing a legal system substantially drawn from continental and common law prototypes. China has pinned its future on its adoption of Western economic models, and for continued economic development it needs to further amplify economic linkages with the West and Japan. Thus, a legal system acceptable to foreign investors has become a key factor in attracting Western and Japanese support. However, the adoption of such a system necessarily entails a clash between the norms as expressed in law, and pre-existing attitudes as they have evolved under current and past regimes.

This article briefly outlines the key problems China faces in establishing a legal order. Many of these problems are derived from the persistent gap that exists between the legal concepts imposed by the regime and social values. Analysis is complicated by the profound influence of Marxism, itself largely a Western construct, on China's underlying normative reality over the last half century.² Not only has China been adopting Western legal norms against a cultural background unfamiliar with—or even hostile to—the impartial application of universal rules, it has been applying them in the context of a political system that for many years denied law any role whatsoever in societal regulation.

¹ For an analysis from this perspective of various Asian countries other than the PRC see Chiba, M., ed. *Asian Indigenous Law in Interaction with Received Law* (London: KPI Limited, 1986).

² With respect to China, “underlying normative reality” does not merely refer to customary law. It is rather a body of attitudes that has evolved as a result of the interaction between customary norms and socialist ideology and policy.

In this article I tentatively seek to explain, at least in part, why a huge discrepancy continues to exist between law in the PRC *on its face* and reality in China, how law is actually being applied in practice in order to bridge this normative gap, how this process of “applying law to reality” has tended to result in inconsistent implementation of law, and how lack of legal autonomy contributes to the problems of implementation.³ I assert that there is a grave risk that the existence of these features may affect the future integrity of China’s developing legal system, as the ultimate likely result is the undermining of the legitimacy of law and of the development of government based on law. Current and prospective attempts to address some of these issues will be touched upon.

THE PRC LEGAL SYSTEM: Why Input Does Not Correlate with Output

China’s formal legal structures are heavily compromised in the course of their execution in order to incorporate customary practices. Extra-legal norms intrude and gradually become an important factor shaping the content and the implementation of legal norms. Generally, it is fair to say that extra-legal norms are allowed to intrude to a far greater extent than they do in the course of implementation in developed countries.

The intrusion of extra-legal norms is permitted, if not encouraged, because legal flexibility is considered a virtue. China’s leaders consider law to be a flexible device used to implement policy initiatives. As legal certainty is not accorded a high priority, law is not insulated from extra-legal influences. Thus, at each stage of implementation following enactment, laws that are normally rather broad in nature are manipulated by administrative authorities charged with implementation so that they tolerate and even incorporate such influences.

Laws are subject to adjustment through reinterpretation. This leads to the distortion and compromise of legal norms as expressed in the original law. One form of reinterpretation, administrative specification, is the process by which law and regulations are interpreted, at one level, by State Council departments, and at another level, by local people’s congresses and

³ For a fuller elucidation of the author’s ideas on this topic, see *Foreign Investment in China: The Administrative Legal System*, published by Hong Kong University Press in 1997, on which this article is based. Sections of this article are excerpted from the author’s chapter “Creation and Application of Law” appearing in the loose-leaf publication *Doing Business in China* published by Juris Publishers, and from the author’s article published in the May 2000 issue of *China Law and Practice*.

administrative bodies, which apply them to local reality. Law is in effect brought down or adjusted to local normative reality. Apart from administrative rules (*guizhang*), this is often carried out by the formulation of normative documents (*guifangxing wenjian*), many of which are created and applied by local governments at the county level and below in the form of administrative measures (*xingzheng cuoshi*).

Higher administrative bodies also practice specification by issuing administrative rules or normative documents to regulate certain technical areas under their jurisdiction. These documents, which normally are revealed to a limited segment of the Chinese bureaucracy, reflect prevailing policy and provide much of the detail missing in higher statutes or regulations. These directives are interpretations of statutory law and in some instances, contradict the literal wording of the relevant statutes. History has shown how these documents have been issued to redefine statutes in the face of temporary changes in China's economic climate.

Higher administrative authorities also possess another device through which they can construe law and regulations in a way that may reflect departmental policy and/or the social reality of the regulated. This device is known as "administrative interpretation" (*falu de jieshi*). Whereas "specification" involves the enactment of implementing legislation, administrative interpretation is an authoritative supplement and accretion to legislation. In the PRC, only the enacting body, its representative, or the controlling organ is competent to interpret any piece of legislation in a manner that is generally binding. Thus the State Council and its subordinate ministries and departments have the authority to make interpretations concerning the specific application of administrative rules and regulations not subject to judicial and procuratorial work.⁴ Similarly, responsible departments under local people's governments are charged with making interpretations concerning the specific application of laws and regulations of a local character.⁵

Broad discretions further enable implementing agencies and/or their officials to often substitute extra legal norms, such as preferential treatment by way of "*guanxi*" (connections), for the norms espoused by the law. Blatant non-

⁴ The Resolution on Strengthening the Legal Interpretation of Laws ("the Resolution"), passed by the Standing Committee of the Fifth National People's Congress as an amendment to the 1955 Standing Committee Resolution on the Interpretation of the Law, Item 3.

⁵ Item 4, the Resolution.

implementation of law is another device that reduces the impact of law on normative reality. This is very apparent in the PRC in the area of taxation.

Sometimes tacit policies of non-implementation arise out of attempts by local governments to ameliorate the effect of central legislation that is seen to be unreasonably restrictive in its impact and thereby harming business growth. One recent example in 1998-99 was the tacit countermeasures that were taken at the local level in Shanghai's Waigaoqiao Free Trade Zone to soften the impact of a general tightening up of foreign exchange controls, particularly on foreign currency flowing in and out of free trade zones in China.

This situation is perpetuated by weak and perfunctory legal supervision by the courts, administrative agencies and party organs charged with this function. China has taken steps toward instituting a system of general administrative accountability by providing in the *Administrative Litigation Law* of 1989 for review of the *legality* of certain *specific* administrative acts (i.e., orders against specific objects) and not abstract administrative acts (i.e., instruments of a universal binding nature).⁶ Review of the legality of abstract administrative acts, the legality of internal specific administrative acts or the *appropriateness* of specific administrative acts is not within the jurisdiction of the courts, the latter two items being left to administrative bodies under the *Administrative Reconsideration Regulations*, as amended, of 1999, which are forums of questionable partiality in this context.

In Article 126, the PRC Constitution of 1982 provides for the judiciary's independence and freedom from the interference of other state organs, as do Articles 3 and 49 of the *Administrative Litigation Law*.⁷ Thus, courts are in theory accorded a measure of *functional* independence, although actual *structural* independence is precluded by their subservience to the National People's Congress (NPC) and, by implication, to the Chinese Communist Party (CCP). Practice, particularly at the local level, does not, however, reflect functional independence, particularly as appointments and funding of courts and judges are inexorably linked to local government. The trial judge is moreover very susceptible to pressures, both internal and external to the court, as his decision is only preliminary and may at any time be overridden by an adjudication

⁶ That is, acts in relation to a specific person or matter.

⁷ In a recent survey, 79.3 percent of lawyers and 80 percent of judges stated that "judicial independence" in this context means freedom from interference from administrative organs and social bodies, and not from the party.

committee within the local people's court under the principle of democratic centralism.

In China the characteristics pertaining to legal implementation can be understood to arise as a result of an adjustment by regulators to their own expectations and to the expectations generally held in the society around them. These expectations may vary widely from the regulatory norms generally espoused in law. Enforcement practice thus adopted reinforces the expectations held by the regulated of *actual* regulatory behavior rather than of the law. In this way, agency personnel settle the shared understandings that constitute actual regulation. These shared understandings are the true normative framework underlying administrative regulation not reflected by explicit legal doctrine.

THE IMPLICATIONS OF CONTINUED LEGAL DISLOCATION

The existence of the features outlined above is not meant to suggest that for a period of time during the development of its legal system, normative dislocation in China should not be expected. Similar to many other developing countries, China's legal system is to a large degree not a product of its indigenous social, cultural, political and economic conditions. But this process is occurring in China in an unusual social and normative context. An authoritarian regime is imposing foreign-inspired legal norms against a background of fragmenting popular value systems. During the twentieth century, China has experienced the disintegration of the Confucian and the Maoist collective belief systems and the emergence, after the failure of the utopian project, of unprecedented levels of cynicism and disillusionment. Law is being infused into a society that is rapidly being engulfed by a normative vacuum. The establishment of a properly functioning legal system may be China's only hope for future social order.

Continued normative dislocation has potentially grave consequences for the legitimacy of law and the legitimacy of government based on law. It does not augur well for a government that is attempting to regain lost legitimacy through the development of a modern legal system. The law's overt purpose is to assist China's modernization by replacing policy decree and customary practices with a stable universal framework of normative behavior. However, in practice the reverse is occurring; law in its application to society is being readjusted in accordance with extra-legal norms and policy exigencies in the course of implementation. It does not appear that regulators and the regulated are internalizing the norms and ideals underlying the legal regime. Enforcement

patterns still tend to reflect whether or not one can attract the patronage of the “right official” for the personalized “quick fix” rather than codified substantive or procedural norms.

This promotes an atmosphere of uncertain and haphazard implementation, which undermines the legal norms that the legislature and China’s leadership want to promote. Ultimate outputs do not correlate with legal inputs. In this context, legal norms are rendered virtually meaningless. Such patterns of legal enforcement, so prevalent in the PRC, serve to subvert the development of a system in which legal norms can be consistently and predictably applied. They also threaten China’s future economic development as they deprive the market of a dependable and consistent normative basis on which rational economic activity can be conducted.

Law is still relatively undifferentiated from administrative and direct political planning and control. However, the normative content and operation of the legal system must be analytically and functionally separate from politics for a “general legal order,” as coined by Talcott Parsons, to arise. Parsons uses this term to describe a legal system that is “applicable to the society as a whole rather than to a few functional or segmental sectors, highly generalized in terms of principle and standards, and relatively independent of both the religious agencies that legitimize the normative order of the society and vested interest groups in the operative sector, particularly in government.”⁸ Such a “general legal order” must override special status and provide a universal system of rights and obligations independent of kin and locality allegiances. In China, law appears universal in form, but loses this feature in the course of specification and implementation when it becomes the servant of such allegiances.

Failure to properly institutionalize legal rules and the means of enforcing them augurs badly for the regular operation and future development of legal institutions. If Parsons is correct in his assertion that a legal system must develop a high degree of functional autonomy for society to continue to evolve, further evolution of Chinese society will be inhibited by the inability of the PRC’s legal system to break free of the polity and achieve an adequate measure of true functional specialization.

⁸ *Ibid.*, 351.

PROPOSALS FOR FURTHER DEVELOPMENT AND REFORM

Further Separation of Law and Polity

It is apparent that law must be allowed more autonomy so that it can normatively control the forms of political and economic action, rather than *vice versa*, as is presently the case. China must allow a separation between law and polity so that the nascent legal structures are not further undermined and a viable and legitimate legal system is able to emerge. There is however a question as to whether and to what extent legal autonomy would be tolerated within the socialist model. Although structural separation would probably not be tolerated by the party in the foreseeable future, a greater degree of functional separation might be achievable.

Would the party voluntarily subject itself to the Rule of Law? Would not this go against the idea of the party's leading role? It should be noted that legal autonomy is already nominally enshrined in the Constitution of the PRC.⁹ Even the Constitution of the CCP states that the party must act "in accordance with the law"¹⁰ so such a development is not altogether out of the question. Already there has been intermittent public debate on this issue during periods of relaxation of government censorship of such discussion.¹¹ Further, as society evolves and social order becomes increasingly difficult to maintain, the party must for the sake of its credibility forge some kind of social contract with its people, as the vestiges of its former legitimacy are being swept away. For the sake of its survival the party must sooner or later allow a much greater degree of legal autonomy than it does presently.

The authority to specify and interpret law is the source of enormous power—power that can be easily abused and which administrative organs are anxious to protect. Administrative bodies should no longer be charged with the power to issue official interpretations with respect to their own rules and regulations. Moreover, they should be able to enact implementing rules only if they have been specifically entrusted with this power by an organ of state power, that is, the NPC, its standing committee or their equivalents at the local level. This power should not be expressed in terms so broad that it gives administrative bodies *de facto* lawmaking power. The concept of "void for uncertainty" should

⁹ Article 126, Constitution of the PRC (1982).

¹⁰ General Programme, Constitution of the CCP (1982), translated in *Beijing Review*, 1982, No. 38, 8.

¹¹ There have been similar exhortations in the press as recently as 1999, usually at significant risk to the authors.

be introduced so that a supervisory body charged with overseeing the validity of rules and regulations can declare vague entrustment clauses invalid.

Enhancement of Drafting Procedures

Apart from entailing a major commitment at the political level, such a transformation would be facilitated if changes were made to the content of some legal regimes. Some structural measures would achieve a greater degree of functional legal autonomy. First, legal drafting must be further improved so that laws are more certain and less subject to the vagaries of *ad hoc* interpretation. Legal drafting, although greatly improved from ten years ago, still tends to be characterized by such features as principle-like pronouncements, vagueness and ambiguity, broadly worded discretions, undefined terms, omissions and general catch-all phrases, that assist flexibility in the issue of lower implementing documents. The current attitude towards lawmaking still tends to favor short-term flexibility and the advantages of vagueness over long-term considerations. This is particularly true in the case of administrative laws for which adaptability is upheld as a meritorious feature. Consequently, most economic law in China is meant only to brush stroke basic policy, allowing any problems that arise to be solved on a case by case basis.

In the case of controversial legislation, such as the PRC Bankruptcy Law (1986), PRC Security Law (1995), PRC Securities Law (1999) or PRC Legislation Law (2000), some of these features (in particular, “omissions”) are a result of compromise (or lack of it) between institutional power-brokers. An example is the status of statutory interpretations issued by the Supreme People’s Court and the Supreme People’s Procuratorate in the *Legislation Law*. Rather sketchy provisions appear in Chapter 4. Statutory interpretations have been issued by the National People’s Congress or its Standing Committee only seven times since 1982, the most well known being the interpretation issued last year on the *Hong Kong Basic Law*. In fact, the Supreme People’s Court through its Gazette has unofficially assumed the role of interpreting national law.¹² In the 1997 draft of the *Legislation Law*, the Supreme Court was limited to the role that was originally set out in the 1981 *Resolution on the Interpretation of Law* issued by the National People’s Congress (“the Resolution”) of only providing interpretations arising from application of the law to concrete cases. Apparently, the Supreme People’s Court wished to eliminate the right of interpretation of the Supreme People’s Procuratorate and avoid the situation of conflicting interpretations emanating from both bodies following the *Criminal Procedure Law*. The Procuratorate was said to have countered with accusations

¹² See Nanping Liu, *Judicial Interpretation in China* (Sweet and Maxwell, 1997).

that the Supreme People's Court frequently exceeded its power of interpretation anyway. The result was a stalemate, the dropping of the article on judicial interpretation and the retention of the status quo.

Development of a Better Body of Procedural Law

There are three main ways through which administrative bodies have been able to exercise a power of discretion. The first is through taking advantage of discretion as already expressed in law, i.e., through application of law, and the lack of well-developed procedural law. Many developed legal systems have safeguards in place that either limit the degree of vagueness of a discretionary power, or put procedural rules in place to ensure that there is always an element of transparency in the way discretion is exercised. China in certain areas is gradually starting to promulgate laws and regulations that promise some increase in procedural transparency, but the country still has a dearth of procedural law.

Well-established administrative procedures allow courts to check on the exercise of discretion used in the course of legal implementation. However, in the PRC there is no underlying principle of fairness, natural justice or due process, although the beginnings of a concept of natural justice have appeared in the *Administrative Punishment Law*, promulgated in 1996 (in the form of hearings for those who are the intended object of a punishment order), and in other local regulations.¹³ This makes it very difficult for a review body to check on the exercise of discretion. With respect to discretionary acts, no adequate procedural safeguards currently exist. There have also been attempts to draft a procedural law, but reports indicate that these efforts have become bogged down.

Although Article 54-2(c) of the *Administrative Litigation Law* provides that an administrative decision should be quashed if statutory procedures have not been followed, in practice, courts very rarely overrule the decision of an administrative body on the basis that the act was executed illegally for procedural reasons. This may be because the courts rarely investigate whether an act is illegal in a procedural sense. They normally focus merely on the substantive aspects of the administrative act.

¹³ Another example, Article 15 of the *Guangdong Province Administration Provisions Concerning Cadres on the Chinese Side of Enterprises with Foreign Investment*, announced in *Wen Wei Po*, July 22, 1988, which provides that "in respect of the handling of cases, the enterprise trade union must be consulted and the person in question must be given the opportunity to give an explanation in a hearing."

Even if courts notice that something is procedurally amiss, perhaps reflecting their comparative lack of status to courts in many other legal systems, they have tended to avoid confronting this problem as they fear *qingmian wenti* (making the administrative body lose face) and the fact that the administrative body normally finds such a judgment very hard to accept. In such cases, courts tend to resort to *biantong banfa*—adopting appropriate adaptations according to specific conditions—meaning that they avoid ruling in a court judgment that an administrative act is invalid on the basis that the administrative body has contravened the procedural law. Rather, they prefer to rule that the administrative act still stands, but that “in future” the administrative body should pay more attention to procedure. This in effect means that courts are prepared to overlook administrative procedural irregularities.¹⁴

Enhancing Accountability

Under the present circumstances, given the vagueness of law and the impediments to supervision of its implementation, the government cannot be made truly accountable for its acts. This helps to explain the law’s apparent lack of normative binding force. The vague nature of Chinese law allows administrative bodies to use their discretionary powers to apply normative systems different from those the legal drafters intended. Thus, the current situation leaves much to be desired in terms of transparency as well as accountability.

At the same time, the government should be made accountable for its interpretation and implementation of law so that the regulated are more certain about the actual criteria being applied by administrative bodies to assess whether or not behavior is legal. Without an elevation of certainty and consistency, the new legal norms will never become properly established as the reference against which “correct” or “appropriate” behavior is assessed.

For this to occur, rulemaking must be better supervised and subject to stricter guidelines. Rulemaking at the level of the State Council and many local congresses and governments is not presently subject to anything more than very rudimentary procedural law, and this is manifested in vague drafting processes out of which it is difficult to ascertain whether an instrument has been legally enacted. Lack of procedural law also contributes to the ease with which administrative agencies at the central and local levels can amend, repeal

¹⁴ Jiang Ming An, Wang Dian Quan and Liang Jing Tang. *Xingzheng Anli Jingxi* (Analysis of Administrative Cases) (Beijing China People’s Public Security University Press, 1990), 41.

and re-enact legislation in accordance with the whims of departmental policy. China needs to introduce more detailed procedural laws and rulemaking at each level that clearly define the criteria that must be satisfied for normative documents to possess binding legal effect.

Recently, there have been legislative improvements in this area. Chapter Five of the *Legislation Law* generally restates the principles of review of inconsistent enactments introduced in other legislation and directs that lower level enactment bodies should file these instruments with higher level bodies. Responsibility for repeal of inconsistent or illegal lower level enactments is also accorded to specific higher level bodies.

To an extent it is helpful, for example, to have stated with some degree of certainty the principles defining what type of enactment prevails over another, and for the relevant body responsible for review of inconsistency or illegality to be nominated in each case. For example, in the case of an inconsistency between a local regulation issued by a local people's congress ("local regulation") and an administrative rule issued by State Council department ("departmental rule"), the State Council is responsible for formulating an opinion, and where it deems the departmental rule should apply, it should request the Standing Committee of the National People's Congress to make a ruling. Or where a departmental rule conflicts with a law, the National People's Congress is empowered with the right to cancel or amend the offending rule. An example is the provision in the *State Administration of Industry and Commerce Certain Provisions Concerning the Prohibition Against the Infringement of Trade Secrets*, enacted in 1995, which arguably illegally expands the application of the provisions of the *PRC Anti Unfair Competition Law* of 1993 on commercial secret protection from "business operators" to employees. A further example is the *State Council Supplementary Notice on Issues Concerning the Trial Implementation in Several Cities of State Owned Enterprise Bankruptcy and Merger and Reemployment of Staff and Workers* of March 2, 1997, which claims to override the priorities and rights of creditors expressed in the *Civil Procedure Law* of 1991, *PRC Enterprise Bankruptcy Law* of 1988 and *PRC Security Law* of 1995.¹⁵

No actual mechanism for putting these principles into effect has yet been established. The bodies mentioned lack the resources to take on a checking or review function on any scale at present. And one of the key proposals in the

¹⁵ See Donald Clarke, "State Council Notice Nullifies Statutory Rights of Creditors," *East Asian Executive Reports*, April 15, 1997.

1997 draft of the *Legislation Law*—the creation of committees at various levels of people’s congress and in the State Council, and the granting to citizens, social and party institutions, enterprises and other units of the right to apply to such committees for the invalidation or amendments of legislation—was dropped. One can only hope that the *Legislation Law* will provide the impetus for implementing legislation that creates such bodies in the near future. Otherwise, in practice, there will be no mechanism by which the principles on legislative consistency can be implemented by way of formal application.

This situation is already acute because the people’s courts lack the power to formally strike down inconsistent or illegal enactments. The best that they can do, pursuant to Article 52 of the Administrative Litigation Law, is to refrain from applying inappropriate rules issued by central government departments or local people’s departments.

Administrative review bodies are in a slightly better position in this regard than the courts, as pursuant to Article 27 of the *Administrative Review Law*, they may, in the course of administrative reconsideration of a specific administrative act, ask the appropriate body to repeal an “illegal” abstract administrative act that the review body has detected and on which the specific act is based. Repeal by way of application by an actual party to reconsideration is limited however to “other normative documents” below “rule” status, according to Article 7.

China’s lack of an independent legal tradition and the current low status of the courts will make it very difficult to extricate the courts from the webs of party and governmental influence, which permeate their decision-making processes and undermine their value as a supervisory institution. While recommending that the courts should be vested with the powers to review the appropriateness of an act and to declare laws, regulations and rules invalid, it is conceded that under the present regime it is unlikely that operation independent from party influence would be permitted in practice. At this point, it should be acknowledged that there appear to be attempts underfoot by the Supreme People’s Court to increase the standard of judges by making appointment criteria more transparent, and to make the position of judges and of courts less susceptible to local governmental influence by prying judges away from financial dependence on local government and toward centralized funding. China’s legal profession has, comparatively speaking, made great strides in distancing itself from governmental influence in its activities, although residual strong-arm tactics on the part of the party, such as a directive not to act for members of the banned *farengong* sect, was reportedly issued last year.

China desperately needs an independently constituted body with the authority to deal with the problem of legislative inconsistency on an ongoing rather than an *ad hoc* basis. This body should be equal in status to the NPC and have the right of final approval over all enactments prepared by the NPC, its standing committee and the State Council. It should also be responsible for checking all *qinzhang* enacted at the national and local levels for consistency. There should be a requirement that these administrative rules be lodged with the body for filing, and their validity should be subject to the approval of the body. The same should apply to enactments of local people's congresses. The body should also be able to accept and process complaints with respect to alleged inconsistencies within laws, regulations and rules.

The exercise of administrative discretion should be made clearly reviewable by the courts to increase accountability of the executive. Courts should be able to review administrative acts for their appropriateness. This will enable them to check on the exercise of administrative discretion in circumstances where there is no question about the legality of an administrative act. Moreover, the provision of clear procedural safeguards will also assist courts in the review of administrative discretion. Although Article 54-2(c) of the Administrative Litigation Law already provides that an administrative decision should be quashed if statutory procedures have not been followed, in practice, courts have had little on which they could base a decision that an administrative act is illegal in a procedural sense. As well-established administrative procedures also allow courts to check on the exercise of discretion, the enactment of an administrative procedural law that incorporates the requirements of fairness, natural justice and due process will accord a further method by which courts can review the exercise of discretionary power.

The body proposed above should also be charged with supervising the performance of supervisory bodies. Its powers should be strictly delineated so there is no doubt as to the outcome of adverse findings of an investigation. It should be charged with the power to dismiss any government leader, supervisory officer or other administrative officer that it finds guilty of dereliction of duty (such as failure to investigate a case), including partial application of law. Cases that involve an element of bribery or embezzlement must be handed over to the PRC Procuratorate for prosecution. With regard to the limitations on investigatory powers of the Ministry of Supervision, the new supervisory body should be established on a par with the NPC, or if this is impossible, as a body inside the NPC independent of the NPC Standing

Committee with the power to investigate any leader within the NPC, State Council, the people's courts, the people's procuratorate or the CCP.

There have been attempts to draft a *Supervision Law* that reportedly grants the National People's Congress similar powers, but the controversial nature of this law has led to interminable delays since it was first proposed over a decade ago.

Abolition of Alternative Normative Regimes

The self-executing powers of administrative disciplinary sanction, administrative punishment and the party sanctioning system should be abolished, as they function as alternative normative regimes to law despite the intention that they should function to complement law. In fact, they are helping to undermine the legal system by marginalizing the relevance of legal sanctions. Administrative disciplinary sanctions and party sanctions should be reduced to the power of dismissal and vested exclusively in the independent supervisory body proposed earlier. The imposition of administrative punishment should be made subject to court order in all cases. All types of administrative detention should be abolished. Most importantly, Article 44 of the Administrative Litigation Law should be altered to allow the suspension in all cases of the implementation of administrative sanctions subject to judicial review, no matter what the circumstances.

The imposition of administrative disciplinary and party sanctions under the system practiced currently are essentially subjective, imposed at the leaders' whims. They are unreviewable in the courts but, given the nature of China's personal file system, carry grave consequences for the person at whom they are directed. Thus, the system is open to abuse through *guanxi* and political influences. Equality of treatment is alien to those who currently administer the system of administrative disciplinary sanction and this does nothing to encourage the expectation of equality before the law. If such sanctioning power is taken out of the hands of administrative agencies and put in the hands of an independent body, all officials, whether lower-ranking civil servants or leaders, will—one hopes—become accustomed to a system that embodies the concept of impartial treatment and the elimination of *guanxi* influences.

ASSESSMENT OF PROSPECTS FOR REFORM

There are as yet no indications at a formal level that the party may be inclined to consider a structural separation of party, legislature, judiciary and executive. The CCP Constitution retains references to its active supervision over

enforcement of the Constitution, laws and regulations of the state.¹⁶ Needless to say, the party continues to exercise “guidance” over the judiciary through its political-legal committees at each level.

The idea that the party is above the state and the judiciary has been questioned in legal circles. In 1994, for example, in an issue of the prestigious academic legal journal *Faxue Yanjiu* (*Legal Research*), PRC legal scholar Guo Daohui¹⁷ implicitly attacked the nature of the CCP’s “leading role,” arguing that its power to lead is different from state power and cannot be higher than the people’s sovereignty as represented by the NPC and people’s congresses.¹⁸ Some months later, China’s top legal newspaper, the *Legal Daily*, ran an article calling for true judicial independence and for the party to stop interfering in the conduct of court cases.¹⁹ A 2,000-word petition, drafted by a group of scholars, writers and former Communist party members, including former *People’s Daily* editors Wang Ruoshui and We Xuecan, was presented to the NPC and the CPPCC just before their 1995 session, calling for the establishment of an independent legislature and judiciary to police the government and the CCP.²⁰ There have been further attempts to petition the NPC since then.

The various flaws in China’s emerging legal system can be addressed, particularly if the sensitive issues of structural separation of powers and the total elimination of party interference are thrown open to debate. The problems identified in this article must be progressively rectified for the legal system to retain legitimacy. If the system is allowed to develop without rectification and continues to build upon the same imperfect foundations, it will continue to be considered a mere extension of the polity, embodying norms that represent political expedience, as flexible and transient as policy itself. If action is not taken, China’s legal system will continue to be undermined by normative

¹⁶ General Programme, Constitution of the CCP (1982), translated in *Beijing Review*, 1982, No. 388.

¹⁷ Guo Daohui is author of the previously cited *Zhongguo Lifa Zhidu* (The Lawmaking System in China), Beijing *Renmin Chubanshe* (The People’s Press), Beijing, 1998.

¹⁸ Guo Daohui. “Authority, Power or Right: Pondering Relations Between the Party and People’s Congresses from a Legal Perspective,” reported by Kuo, H.C. “Academic Circles Challenge China’s System of Party Leading the Government,” *Lien Ho Pao*, April 14, 1994, in *FBIS*, April 15, 1994.

¹⁹ “A Call for Judicial Independence,” *Legal Daily*, May 23, 1994, The daily was subsequently censored for running this and another article calling for legal protection of the news media. “*Fazhi Ribao* censored for Articles on the Judiciary, Media,” *FBIS*, September 2, 1994.

²⁰ “Intellectuals Call for Graft Inquiry,” *South China Morning Post*, February 27, 1995.

dislocation, reinterpretation, lack of implementation and corruption, to the extent that it will cease to command much relevance in a normative sense. Thus, action must be taken before it is too late to ensure that China secures its legal future by moving towards a more genuine “Rule of Law.”

Peter Corne is a consultant in the Shanghai office of Linklaters and Alliance. He has been a resident of Shanghai for five years, assisting foreign investors in their establishment of new vehicles, enterprise and asset acquisitions, and restructuring of existing investments. He advises numerous United States, European and Japanese multinational clients.

In addition to being an accomplished practitioner in PRC-related transactions, Mr. Corne is also well regarded in academic circles for his publications, the most notable of which is the book *Foreign Investment in China: The Administrative Legal System*, which sets out to explain the difference between law and reality in China through an analysis of China’s system of administrative regulation.

Mr. Corne is admitted to practice law in England and Wales, Hong Kong SAR and several states in Australia. He speaks Mandarin Chinese and Japanese.