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Legal Reforms in China

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Contents

Abstract

Even though China has no rule of law tradition, it has been making rapid progress – since 1978 when the policy of opening-up was adopted – in setting up a legal system that is supportive of a market economy. This paper contains a comprehensive overview of legal reforms in China. Section 2 summarizes the reforms over the last 20 years and describes the prospects for further reform. Section 3 describes constitutional reforms since 1949, including the important reform of March 1999 which has written into the Constitution the principle of the rule of law. This section also describes reforms in various areas of public law, including criminal law and criminal procedure; administrative law; regulatory powers of the government; and describes the changing role of the People's Congress. Section 4—which is the lengthiest—describes reforms in private law. Successively, the paper reviews corporate legislation, securities, competition, consumer protection, labor law, intellectual property, finance and guarantees. Section 5 covers social security as well as environmental protection. Section 6 discusses legal reforms that affect rural areas. Section 7 covers judicial reform issues, including combating corruption; open trials; the lay assessor system; township courts; dispute resolution issues; and the enforcement of judgements. Finally, section 8 concludes by discussing how to promote legality in China and the role of lawyers.

Kurzfassung

Obwohl China keine langfristige Erfahrung mit Gesetzgebung hat, die eine Marktwirtschaft begünstigt, hat es seit der Politik der Öffnung im Jahr 1978 große Fortschritte in diesem Bereich gemacht. Dieser Beitrag bietet einen Überblick über die entsprechenden Gesetzesreformen in China. Teil 2 faßt die Reformen der letzten 20 Jahre zusammen und beschreibt die Aussichten für weitere Reformen. Teil 3 beschreibt die konstitutionellen Reformen seit 1949 einschließlich der wichtigen Reformen vom März 1999, welche in der Verfassung das „Principle of the Rule of Law“ verankerten. Dieser Teil beschreibt auch Reformen verschiedener Bereiche des öffentlichen Rechts, einschließlich des Strafrechts und der Strafverfahrensweise, der Verwaltungsgesetze, Eingriffsrechte der Regierung und der veränderten Rolle des Volkskongresses. Teil 4 beschreibt Reformen bezüglich des Privatrechts. Nacheinander wird ein Überblick über die Gesetze zu Körperschaften, Sicherheiten, Wettbewerb, Verbraucherschutz, Arbeitsrecht, Schutz geistigen und intellektuellen Eigentums, Finanzierungsrechte und Garantien gegeben. Teil 5 behandelt Aspekte sozialer Sicherung und des Umweltschutzes. Teil 6 diskutiert Gesetzesreformen, die die ländlichen Gebiete betreffen. Teil 7 beschäftigt sich mit rechtlichen Reformen zur Korruptionsbekämpfung, öffentlichen Gerichtsverfahren, dem Sachverständigensystem, Gemeindegerichten, Streitschlichtungs-verfahren und der Durchsetzung von Gerichtsurteilen. Zum Schluß wird in Kapitel 8 diskutiert, wie die Einhaltung der Gesetze in China gefördert und die Rolle der Anwälte gestärkt werden könnte.

1 Introduction

The market, the rule of law and democracy are inseparable. Economic growth needs the support of democracy and the rule of law. Without rule of law, there is no market economy. Even though China has no rule of law tradition, it has been making rapid progress since the policy of reform and opening-up was adopted in 1978 in setting up a legal system that is supportive of a market economy. There are now clear signs that China is moving towards the rule of law, and away from the rule of personality. On March 17, 1996, the Fourth Session of the Eighth National People's Congress (NPC) approved the Ninth Five-year Plan for National Economic and Social Development and the Long-term Development Program for 2010, setting the ambitious goal of „ruling the country by law and establishing a socialist country ruled by law". In March 1999, China reaffirmed its rule of law strategy by incorporating it in the Constitution. This represents a milestone in the development of China's democracy and legal system.

The rule of law strategy refers to rule by law rather than by the will of leaders, implying that everybody has to obey the law, with no exception being made for leading politicians and their children. Therefore, all State organs, all political parties, groups and individuals must abide by the constitution, laws and regulations, and exercise their powers within the limits of the law. To promote the rule of law, it is essential to speed up legislation, strictly enforce the law, and enhance public awareness.

A precondition for establishing the rule of law is to protect human rights. China has ratified a series of International Conventions, including 17 international human rights conventions. It signed the International Convention on Economic, Social and Cultural Rights (CESCR) and the International Convention on Civil and Political Rights (CCPR) separately in 1997 and in 1998. The 15th National Congress of the Communist Party of China decided in September 1997 to ensure „that the people enjoy extensive rights and freedom endowed by law, and that human rights are guaranteed and respected". According to a survey based on interviews with 2,430 urban residents in 53 cities around China conducted by the State Commission for Economic Restructuring, a vast majority of the urban population agreed that the economic conditions of city residents have been improving quickly. However a majority does not seem satisfied with their social and political positions, and feel that their personal dignity could be enhanced. More than one third of those interviewed felt that their social status was below average and another third expressed the wish to have a stronger political voice. The idea that social status is largely decided by the political position is popular among the people.[1] It means

[1] Lu Jingxian, „Survey generally positive", 03/05/1998, China Daily.

that more and more people are beginning to focus on their political rights in addition to their civil rights and social rights.

Historically, the Chinese legal system has been influenced more strongly by legal systems belonging to the Civil Law family than by those belonging to the Common Law family. At least in the field of private law, the Chinese legal system has mostly had legal transplants from Civil Law countries. For instance, both the Qing Dynasty and the Kuo-Min-Tang administration drafted the Civil Code based on the models of the Japanese and the German Civil Codes. Therefore, China follows the civil law tradition in drafting its new Civil Code. Nevertheless, the common law system is going to play more and more important roles in the process of private law legislation in the future. For example, China will draft trust legislation based on the common law system. Owing to its special circumstances, the Chinese legal system differs from other major legal systems. For instance, the leadership of the Communist Party of China, the ruling party, has to be reflected in the process of establishing the rule of law in China. Some Chinese scholars are against transplanting legislation from abroad. However, it is my view that the Chinese legal system would be improved by making reference to the international legal experience and legal culture, so that it can adapt to the new market economy and to the political requirements of democracy.

The present paper presents a survey of legal reforms in China. Section 2 contains an overview of the reforms over the last 20 years and of prospects for further reform. Section 3 describes constitutional reforms (including the March 1999 reform) and reforms in the field of public law, including criminal law and criminal procedure; administrative law; regulatory powers of the government; and the changing role of the People's Congress. Section 4—which is the lengthiest—describes reforms in private law, including corporate legislation, securities, competition, consumer protection, labor law, intellectual property, finance and guarantees. Section 5 covers social security as well as environmental protection. Section 6 discusses legal reforms that affect rural areas. Section 7 covers judicial reform issues, including combating corruption; open trials; the lay assessor system; township courts; dispute resolution issues; and the enforcement of judgements. Finally, section 8 concludes by discussing the promotion of legality and the role of lawyers.

2 Legal Reforms in China

2.1 Legal reforms over the last 20 years

From 1978 on, China abandoned its policy of „taking class struggle as the guiding principle“. The rigid planned economic system began to be loosened. Market-oriented reforms started first in rural areas and were then expanded to urban areas. Various theories about the relationship between government plans and the market have officially been adopted in China. Initially, the planned economy was viewed as the leading force in the national economy and the market economy as a necessary complement to planned economy. Later, it was thought that the planned economy and market machinery should be combined. Finally, the viewpoint that China should practice market economy was adopted. With the deepening of the economic reforms, Deng Xiaoping argued that there should be laws to go by, that laws should be strictly followed and implemented, and that the violation of the laws should be punished. Many fundamental laws were passed during this period, including the Constitution of 1982, Criminal Law of 1979, Criminal Procedure Law of 1979, Civil Procedure Law of 1979, Contract Law of 1981, and the General Principles of Civil Law of 1986. However, since the goal of economic reforms was not clear until 1992, legislation during this period tended to be very general, and was still heavily influenced by the ideology of the planned economic system.

In early 1992, Deng Xiaoping gave his major speech on the adoption of the regime of market economy during his inspection tour in Southern China. From then on, China defined the establishment of a socialist market economy as the goal of economic restructuring in China. To promote the market economy, the Standing Committee of the 8th NPC endeavoured to develop an appropriate legal system for the socialist market economy. During its term, the 8th NPC passed 85 laws and adopted 33 resolutions on various legal issues. The quality of the laws made during this period improved markedly. Many of these laws embody the legal principles of a modern state. However, the notion of the „market economy legal system“ was not comprehensive enough to guide legislative reform.

After 20 years of efforts, China has developed the framework for a socialist legal system with the Constitution as its core and private, public and social laws as its mainstay. More than 300 pieces of legislation and law-related decisions on the basis of the Constitution have been passed by the NPC and its Standing Committee, over 700 administrative regulations have been adopted by the State Council, and about 6,000 local regulations have been made by local legislature. China has created the basic conditions for establishing the rule of law. It should not be forgotten that such a process has taken industrialized countries a century or even longer to complete.

I divide the current state of the Chinese legal system into 3 categories:

i. *Private Law*, including General Principles of Civil Law and laws related to Contracts, Competition, Corporations and Partnerships, Commercial Banking, Insurance, Negotiable Instruments, Securities, Patents, Copyrights and Trade Marks, Guarantees, Consumer Protection, Chinese-Foreign Joint Ventures (Equity Participation and Cooperation), Wholly Foreign-Owned Enterprises , Village and Township Enterprises, State-Owned Enterprises, Bankruptcy Law (for Trial Implementation), Management of Real Estate in Urban Areas, Product Liability, Auctions, as well as Adoption and Marriage.

ii. *Public Law*, including legislation on Police, Judges, Administrative Sanctions, Administrative Supervision, Administrative Procedure and State Compensation, Elections , Regional National Autonomy, the Organic Laws on Residents' Committees in Urban Areas and Villagers' Committees, Central Banking, Budget, Statistics, Auditing, Prices, Individual Income Tax, Arbitration, Criminal Law, Criminal Procedure, Prisons, Civil Procedure and Martial Law.

iii. *Social and Environmental Law*, including Labor Law and legislation on the Protection of Disabled Persons, Minors, Mothers and Infants, the Rights and Interests of the Elders, the Rights and Interests of Women, as well as Environment Protection, Forests and Grassland.

2.2 Prospects for further legal reform

Despite the achievements mentioned above, some legislation fails to satisfy the requirements of the market economy, human rights, rule of law and democracy, and therefore needs to be reformed. In 1997, China's President Jiang Zemin reiterated that China should strengthen legislation, improve the quality of laws and form a socialist legal system with Chinese characteristics by the year 2010. To pursue this goal, the 9th NPC and its Standing Committee will draw up legislative plans for the next five years and for period up to the year 2010. Chinese top legislature has included the drafting and revising of 89 laws in its four-year legislation programme, aiming at „establishing an initial legal system that suits the development of socialism with Chinese characteristics" before 2002. The Standing Committee of the Ninth NPC will draft and examine 63 laws before its term of office expires in 2002. The second part of their programme will be to conduct research on the drafting of 26 laws and deliberate them when conditions „are mature", which means that they will likely be prepared, but not passed during this legislative term. Major new laws to be examined include rules for the adoption of legislation and supervision law.

The legal tradition in China, whether under the feudal autocratic society or under the planned economic regime, overly stressed control instead of freedom, and duties of the

individuals instead of the rights of the individuals including human rights and fundamental freedoms. Today, it is generally accepted that the essence of the law is to safeguard the individual rights. Thus, legislation shall be oriented on rights. Chinese legislation is expected to give more attention to the protection of individual rights, which is essential to improve the quality of legislation. Of course, the crucial issue is how to balance individual rights and social stability.

China – a developing country of 1.3 billion people – has unique historical conditions and a great variety of nationalities and a huge territory. Economic development has to be conditional on political and social stability. Thus, legislation should be based on those Chinese realities. However, the development of the market economy in China and the globalisation of the market will determine that China needs to transplant advanced legislation, cases and doctrines prevailing in most foreign countries. Of course, this uniformity will take place not only in the fields of private law and commercial law, but also in the field of public law, especially in the field of human rights. All these will greatly accelerate the process of modernisation and democratisation of legislation in China.

Under the Chinese Constitution, the NPC and its Standing Committee have the authority to make the law. The State Council has the authority to enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes. The people's congresses of provinces and municipalities directly under the Central Government, and their standing committees, may adopt local regulations, which must not contravene the Constitution, the statutes or the administrative rules and regulations, and they shall report such local regulations to the Standing Committee of the NPC for the record. People's congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomy regulations and specific regulations of autonomous regions shall be submitted to the Standing Committee of the NPC for approval before they go into effect. Those of autonomous prefectures and counties shall be submitted to the standing committees of the people's congresses of provinces or autonomous regions for approval before they go into effect, and they shall be reported to the Standing Committee of the NPC for the record. Additionally, some important cities like Shenzhen have been authorised by the Standing Committee of the NPC to enact some local legislation, especially in the field of commercial law.

In line with the law, draft laws may be put forward by the government, the people's courts and procuratorates in the case of judicial laws or the special committees of the NPC. The signatures of 30 deputies are enough for the tabling of a legislative motion, but generally, these deputies are not able to draw up a complete draft law. In line with the law, draft laws may be put forward by the government, the people's courts and procuratorates in the case of judicial laws or the special committees of the NPC. The signatures of 30 deputies are enough for the tabling of a legislative motion, but generally, these deputies are not able to draw up a complete draft law. During its recess, the 155 member Standing Committee holds sessions lasting seven to ten days

every two months. There are nine Special Committees with 211 members altogether under the NPC who work full-time to assist the NPC and its Standing Committee in their legislation and supervision. Draft laws normally go through three reviews, and sometimes it takes years before they are promulgated. For instance, the Securities Law was deliberated more than four times before it was adopted by the Standing Committee of NPC on 29 December 1998.

Since 1998, the 9th NPC and its Standing Committee have introduced some reform measures to improve the democratisation and transparency of legislation. The following are some of these measures: (i) Each and every law draft must be deliberated for three times before it is passed by the Standing Committee. In the past, the law drafts only needed to be deliberated twice before they were passed by the Standing Committee. (ii) Some important law drafts, like the revised Organic Law on Village Committees, or the legislation on Contracts , have begun to be published to solicit the public opinions. (iii) The top legislators have routinely and regularly devoted some time to get legislation advice and opinions from grass-roots people. (iv) The Law Committee of the Standing Committee is recognised as the only authority to deliberate the law drafts before the law drafts go to the Standing Committee for voting. (v) The top legislators have begun to encourage the legal scholars to be involved in the legislation process. Quite a lot of critical opinions have been adopted by the legislator.

According to China's present legislative practices, most laws are drafted by government departments, some by NPC committees and some by both NPC committees and government departments. Some bills drafted by government departments contain too much consideration of their own interests. As far as the local legislation is concerned, many local officials use legislation as a tool for increasing the interests of their own localities. This has not only resulted in the overlapping of, even conflicts between, various laws, but has also impaired the unity of the rule of law, and hampered the implementation of the laws in China. Legislation law is expected to stop such irregularities.

3 Public Law

3.1 The March 1999 Amendments to the Constitution

Since the founding of New China in 1949, the First, Fourth and Fifth NPCs promulgated four constitutional amendments in 1954, 1975, 1978 and 1982. The existing 1982 Constitution was amended twice, in 1988 and 1993. The existing Constitution, formulated in 1982, is a good one that complies with China's specific national conditions. In China, the Constitution, representing the fundamental law of the State, plays a very important role in the life of the State. It is China's highest legal authority, and provides a series of basic rules which can be followed by the Chinese people of various ethnic groups, all government institutions, the armed forces, all political parties and social organisations, as well as all enterprises and institutions.

The Constitution itself does, however, need to make progress in line with changes taking place in China, and it is essential to revise certain sections that do not conform to the currently existing practicalities, in accordance with the demands of China's political, economic and social life. But it must also take into account the experience gained from reform, opening-up and modernisation construction. Safeguarding the dignity of the Constitution and ensuring its proper enforcement requires the establishment and improvement of a legal system that will ensure the principled regulations prescribed in the Constitution are legally carried out. A society ruled by law is becoming a reality in China, and the blatant trampling of the Constitution during the turbulent „cultural revolution“ (1966-76) will never be repeated. However, the authority of the Constitution is still not completely enforced, and a few problems still exist. A number of departments in enterprises and various locations do not act in line with the law, carry it out strictly, or crack down on those violating the law, and a few officials even overtly defy the Constitution and laws and abuse both for their personal gain. Protectionism and severe corruption also exist in some areas of society. All these phenomena and forms of misconduct have impaired the dignity of the Constitution and laws, and are obstacles to the ongoing reform, opening-up and modernisation construction. People have expressed their strong disapproval about such activities, and these problems must be solved in earnest. Jiang affirmed that abuse of power by any government organ or staff member is forbidden.

After soliciting opinions of lawyers, economists and scholars about amendments to the Constitution, the Standing Committee of the Ninth NPC submitted amendments to China's Constitution proposed by the Central Committee of the Communist Party of China (CPC) to the Second Plenary Session of the Ninth NPC for adoption on March 5, 1999. The constitutional amendments were passed by the Second Session of the Ninth NPC with the support of more than two-thirds of the NPC's 2,979 deputies.

It is the third time China has revised its present Constitution since it was adopted in 1982. China made amendments to part of the Constitution in 1988 and in 1993. Since the 15th National Congress of the CPC, China has entered a new phase in the reform and opening-up process and in its modernisation drive. The amendments highlighted ideological and policy breakthroughs achieved during the 15th National Congress of the CPC in 1997. Incorporation of Deng Xiaoping Theory, ruling China by law, detailing the important role of the non-public ownership economic sector in the Constitution, and ensuring basic efficient economic and distribution systems in the Constitution will have a profound effect on the development of the market economy and the establishment of the rule of law and democracy.

The changes were made without breaking the original style of the present Constitution. The drafters have only made necessary changes. They are also proof of China's determination to establish the rule of law. The draft made six major changes to the present Constitution of 1982. Three of the changes were in the preface. The major amendments are the following:

(i) Deng Xiaoping Theory has been incorporated in the preface of China's Constitution and put on a par with Marxism, Leninism and Mao Zedong Thought in providing ideological guidance for the nation. It is of great importance to assimilate Deng's Theory, which dictates that China be ruled by laws and basic economic and distribution systems as significant elements in the primary stages of socialism which are part of the Constitution, and that China will continue to head down the same road.

(ii) Developing a socialist market economy, the core of Deng's theory, has been written into the Constitution.

(iii) The amendment replaces *„China is currently in the primary stage of socialism“* with *„China will be in the primary stage of socialism over a long period of time.“* This change reflects a lesson learned from the past. Most of the mistakes China made resulted from a misperception. China went beyond its limits too many times.

(iv) A new sentence, *„The People's Republic of China should implement the principle of ruling China by law, governing China according to law and making it a socialist country with rule of law“*, was added to Article 5. This new sentence means that leadership changes in China will no longer result in changes of ruling style.

(v) Article 6 is updated by a new sentence: *„In the primary stage of socialism, China should uphold the basic economic system in which public ownership is dominant and diverse forms of ownership develop side by side. It should also uphold the distribution system with distribution according to work remaining dominant and with a variety of modes of distribution coexisting.“* This article supports the development of the non-State sector.

(vi) The terms of Article 6 are reinforced by changes made to Article 11. It says „*the non-public sector, including self-employed and private businesses, within the domain stipulated by law, is an important component of China's socialist market economy. China should protect the legitimate rights and interests of the self-employed and private enterprises, and China should also exercise guidance, supervision and management over them in accordance with the law*."

(vii) The draft amendment also legalised the reform pattern of rural China. According to it, "*Rural collective economic organisations should carry out the two-tier operation system that combines unified management with independent management on the basis of the household responsibility contract system with remuneration linked to output."*

(viii) The term *„counter-revolutionary activities"* in Article 28 will be replaced with *„crimes endangering national security"*. This is to comply with a new term used in the 1998 Criminal Law.

3.2 Improvements in criminal law and criminal procedure

Rising unemployment and corruption are two problems facing China. The country needs to crack down on corruption and other crimes. China revised the Criminal Code of 1979 in 1997. In view of new problems and conditions, it has expanded the coverage of its Criminal Law to include new crimes of infringement on human rights. The principle of legally prescribed punishments for a specific crime and the principle of suiting punishment to crime have been clearly defined in the new Criminal Law. To prevent encroachment on citizens' rights during judicial processes, the Criminal Law has included crimes of infringement upon citizen's rights of person and upon their democratic rights. Under the crime of dereliction of duty, the criminal law has been supplemented with crime of perversion of law by judicial personnel. All these additional regulations have played an important role in cracking down on criminal activities against human rights, including violation against citizens' rights resulting from corruption in judicial work. The new Criminal Code has been improved considerably compared to its old model. However, due to limited time available for the drafting process, part of it is not well organised. As a result, after its promulgation, the law has received criticism from the academic groups and the judicial world. It is necessary to amend the Criminal Code.

In 1996, China revised the Criminal Procedure Law of 1979 to perfect the criminal justice procedure by adding provisions on protecting human rights of suspects. To safeguard citizens' right to personal liberty, the criminal procedure law introduces the presumption of innocence, which means that every uncondemned person is regarded as innocent by law. It abrogated the custodial interrogation system and the so-called exemption from prosecution after arrest. This was based on an understanding and upon recognition that such previous stipulations do not conform with the principles of rule of law and have infringed upon the rights of citizens. It stipulated that no citizen may be arrested by public security organisations without approval of the people's procuratorates or permission of people's courts. To protect the rights of criminal suspects and the accused in a criminal action during investigation, prosecutorial work and trial,

the Criminal Procedure Law allows them to petition for withdrawal, the right of using their native language in litigation and the right to complain about judicial functionaries who violate their procedural rights or who subject them to indignities during the action. Lawyers' early involvement was also recognised by the new Criminal Procedure Law. Therefore, prosecutors, those who indict criminal suspects on behalf of the State and exercise supervision of criminal, civil and administrative procedures in accordance with the law no longer have a right to investigate a case before defence lawyers do so. Both sides can start their investigative procedures at the same time, eventually meeting in court to debate the case. Undoubtedly, it has now become more difficult for prosecutors to present a convincing case. The litigants have the right to legal aid, the right to ask for a lawyer and the right to refuse to answer questions not relevant to the case. Informing litigants of their legal rights is of great significance in the protection of human rights in criminal procedures. Litigants can complain to local procurator-generals or higher people's procuratorates in cases where prosecutors have failed to inform them of their rights. In early 1999, the Supreme People's Procuratorate (SPP) stressed that China's 160,000 prosecutors should inform litigants of their rights when investigating and handling cases. All of this represents a new challenge for every prosecutor.

China passed the Prison Law in 1995. The basic human rights of prisoners are important and deserve legal protection. Penalising the inmates is a way of helping them onto a road of self-repentance and self-reform with compulsory means. Prisons in Beijing and Tibet have been praised by visitors from many countries and international organisations. However, there will be a lot to do to improve management and conditions of Chinese prisons and reform-through-re-education centres.

3.3 Improvements in administrative law

The rule of law strategy has created the precondition for handling administrative affairs in line with the law. To some extent, the core of rule of law is to ensure that administrative affairs are conducted strictly in accordance with the law.

To ensure the government practises the rule of law, it is essential to correct illegal acts and improper activities of administrative bodies through a legal system which allows public challenge of the actions of those bodies in order to protect the people's rights and interests. This is the essence of handling administrative affairs in accordance with the law. The right of the individual to contest administrative and governmental decrees was already recognised in theory as early as the 19th century in some countries. But due to the overemphasis of monarchs' powers, governments were often remiss in correcting illegal actions and improper administrative activities. Even in advanced European and North American countries, the legal system for contesting administrative actions was not established until the 20th century. The establishment and implementation of these legal controls over administrative procedures is part of the natural process in the development of a country's democratic politics.

Shortly after new China was founded, Article 19 of the Joint Program of the Chinese People's Political Consultative Conference of September 20, 1949, stipulated that „people and people's groups have the right to accuse any State organ or any public servant for violating the law or dereliction of duty“. As a matter of fact, this stipulation prepared for the establishment of the right to appeal. Article 97 of New China's first constitution in 1954 stipulated that „citizens of the People's Republic of China have the right to accuse anyone in State organs who violates the law and who is derelict in the performance of his duties, in both written and oral forms. People whose losses result from the violation of their rights by functionaries of State organs have the right to be compensated“. Article 41 of the constitution of 1982 reiterated this. Article 3 of the Civil Action Law (Trial) promulgated in March 1982 stipulated that „administrative cases should be tried by the people's court under the appropriate law“. That marked the official establishment of the right to appeal in China.

In 1989, China passed the Administrative Procedure Law. Its implementation was of great significance in China's legal history. It ushered in a new era of civil rights protection using the judicial process. When the legitimate rights of citizens or non-governmental institutions are violated by administrative authorities, they are often the weaker ones in face of those powerful organisations which are in charge of enforcing government policies and laws. Now, in addition to the administrative review mechanism, judicial remedy is also available to citizens and others under the law.

The State Compensation Law passed in 1994 and implemented the following year is another landmark in China's legislation. Its implementation gave citizens a specific law to consult when asking for compensation from the State, as set by Article 41 of the Constitution. Both governments officials and individuals have realised the importance of administrative procedure and have gradually grown to trust the rule of law. Consequently, the government has succeeded in winning trust and respect among the individuals.

In line with a market economy, many other administrative laws and regulations in China have been established or revised. Major administrative laws to be adopted include the administrative appeals law, the law on civil servants, and the law on government departmental purchasing. In the process of purchasing materials and products for the government departments, some people were found to be skimming funds or conducting other purchasing fraud. The law on public procurement to be drafted is expected to regulate purchasing activities. The law on language and words will stipulate the appropriate use of different Chinese languages and encourage the spread of putonghua (standard Chinese) nationally. The law on population and family planning is to be drafted as well. Mass media law is to be drafted to safeguard the basic rights of the citizens and to supervise the state powers and the social responsibility of mass media. Currently, the mass media industry is still mainly under the control of the administrative regulations of the central government and of the local governments.

3.4 Government intervention in the market and the rule of law

Undoubtedly, the government should intervene in the market economy. However, government intervention in the market economy must move towards the rule of law, which means that traditional economic administration must be transformed in several aspects.

To achieve these goals, the private and public legal relationships the government has entered shall be distinguished and separately executed by different government agencies. Corporations with administrative functions were converted into enterprise groups by the end of 1998. In the long run, the NPC is the best institution to act as the agent for state property. The solely state-owned enterprises shall be restricted exclusively to special industries of national and public interest, and most of the state enterprises shall be encouraged to be restructured into public limited liability companies. In the latter case, the shares held by the government should be defined as the non-voting preference shares.

To avoid corruption, government agencies and servants should be forbidden to start up businesses or get associated with business people. The relatives and friends of the government officials who are involved in the business, are obliged to disclose their connections with the government officials together with their business. China should increase crackdowns on crime, especially in administrative departments, to safeguard justice and the law, and to ensure a clean and honest government in the future.

Governmental agencies can only intervene in the market at five levels: to respect an enterprise’s autonomy, to protect fair competition between and among enterprises, to exercise micro-control over the national economy as a whole, to facilitate enterprises to enjoy legal rights and interests, and to fulfil the business opportunities and other legitimate interests to enterprises. Only when the previous levels of intervention have been exhausted can the latter levels be addressed by governmental agencies. Too much government intervention bears market and commercial risks. Therefore, excessive government intervention including cultivating market systems, adopting mandatory savings and formulating certain industrial policies is not only a cause of East Asia's stunningly high economic growth during the past three decades, but also serves to explain the current financial and economic crisis. Generally speaking, every market economy demands the free market mechanisms and private law autonomy to play the primary role in the allocation of resources, while government intervention and public law should be of a complementary, subsidiary and secondary nature. At present, the government is playing a leading role in kick-starting the economy. It is essential to make sure whether the governmental actions fall within the appropriate levels and forms demanded by the principles of rule of law and market economy. The author believes that micro-control legislation should give more attention to the controller rather than the controlled.

The principles of legitimacy, efficiency, fairness and human rights shall be respected when the administrative powers are used. However, lax implementation of the laws and officials’

reluctance to abide by them have not been tackled properly by the government. At present, the practice of diluting the application of the laws in some areas has aroused great concern and vigilance among the public. It is wrong to consider legal means, economic means and administrative means as three different vehicles for the government to regulate the economy. However, this notion still prevails in China. As matter of fact, both economic means and administrative means are legal means, and there are no economic means or administrative means without a legal basis. The author advises the legislator to enact the Act on Administrative Procedure, under which enterprises are entitled to presume that their applications have been approved by the government if there has been no answer from the government after certain period from the date of application. To make government decisions sound and rational, a committee consisting of scholars, officials and public interest representatives shall be introduced as a significant decision making body concerning certain issues of significance. The author emphasises that, generally speaking, administrative power only has binding force in the sphere of public law. If there is a conflict between administrative power and human rights, the latter shall prevail. In China, the government is defined as the people's government by the Constitution. Therefore, all government agencies must protect and respect the human rights when they mobilise the power to intervene in the market. To have an efficient, honest, accountable government, it is essential to make economic administration more transparent and bring government agencies under the effective supervision of the public.

The first session of the 9th NPC made a decision to restructure the government departments. Following the principle that restructuring should be carried out in an active but prudent manner, all government departments have worked out programmes to determine their functions, structure, and authorised size. This indicates that important progress has been achieved in the institutional structure reform drive. According to the new programme, more than 200 functions that used to belong to government departments will be transferred to enterprises, organisations and local governments. More than 100 other functions will be distributed among State Council departments. Two hundred lower-level departments, a quarter of the total, will be cut, and the State Council has been downsized by 47.5 percent. Job assignment and providing proper arrangements for redundant personnel are difficult but necessary to make the best use of public servants and improve their overall quality. The surplus leading officials will be provided with suitable arrangements within three years.

3.5 People's Congress: from rubber stamp to tough supervision

According to the Constitution, all power in China belongs to the people, and the organs through which people exercise State power are the NPC and the local people's congresses at all levels. This system of people's congresses is the fundamental political system of China. However, the People's Congress was been called *„rubber stamp“* for many years, even though it has been recognised as the supreme authority for the people to exercise their powers. Although NPC has made *„significant progress“* in formulating laws, it has been rather weak in supervising State administrative, judicial and procuratorial work. At present, failure to abide by the law,

laxity in law enforcement, law-breaking by law-enforcement personnel and acceptance of bribes remain severe in some areas and departments. In recent past years, the NPC and local congresses have strengthened their authority of supervision. The NPC is determined to strengthen supervision over law enforcement and the administration of justice by government departments, and over the work of the State Council, the Supreme People's Court and the Supreme People's Procuratorate so as to ensure that administrative departments perform their official duties in accordance with the law and that judicial and procuratorial organs administer justice fairly. Another task facing the NPC is reviewing local legislation to make sure it conforms with the Constitution.

Here, more details will be given to Congress supervision over the judicial activities. According to Article 128 of the Constitution, the Supreme People's Court is responsible to the NPC and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which have created them. It is a constitutional power of people's congresses to oversee the operation of judicial departments. Even though the Constitution is silent on whether the Congress is competent enough to conduct supervision over individual cases, strong criticism against judiciary activity from the Congress has motivated the nation-wide Congress supervision over the judicial activities.

Li Peng, Chairman of the NPC Standing Committee, has called for people's congresses at various levels and related standing committees to select and supervise cases with a great social impact in order to ensure justice. Xiao Yang, president of China's Supreme People's Court, stresses that to win the Congress’s confidence, a sound supervision system, involving in particular the legislature and advisory body, is an important guarantee of the impartiality of the people's court. The Supreme People's Court invited some members of the Standing Committee of the NPC as well as some members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC) to give instructions on its work. The move is regarded as a practical measure for the Supreme People's Court to rectify itself by directly soliciting criticism and suggestions from the NPC and the CPPCC. The SPC issued a set of regulations placing the court and its subordinates under the supervision of the people's congresses. The courts should submit work reports to the people's congresses for discussion and quickly responding to suggestions and criticisms. The SPC also pledged to carefully investigate all allegations of court personnel misconduct or mishandled cases brought forward by the congresses. The congresses at different levels have also been invited to attend high-profile trials. A special liaison office for the NPC was opened in the SPC in September. It is necessary for the SPC to continue to standardise and systematise court supervision by the congresses.

However, on many occasions, it has been difficult to get co-operation from officials. At the same time, there has been no legal procedure for people's congresses to follow when they exercise their power. But there have also been some cases in which some deputies exceeded their authority. In attempt to combat judicial corruption, the NPC is drafting a law to increase supervision over the daily work of law enforcement departments. The law is expected to clarify

methods and procedures for people's congresses at all levels to investigate problems that arise at various levels of the legal system. The legislator hopes that the law, temporarily named the individual legal case supervision law, will help guarantee justice. The draft law indicates people's congresses are entitled to get information from judicial departments, or summon officials to answer questions, or set up investigation teams when they believe cases have been unfairly handled. The draft law bans individual deputies from taking individual actions, which could lead to the abuse of power. Only the people's congresses can exercise the right of supervision. The law forbids people's congresses from undermining the independence of judicial departments. People's congresses cannot change legal decisions of courts or demand punishment of anyone. People's congresses are not judicial departments. They only supervise the handling of cases and demand that judicial departments act in accordance with the law. People's congresses should only investigate cases of serious public concern.

In Beijing, a regulation authorises the Standing Committee of the Beijing People's Congress (BPC) to hear and discuss the work reports of the judicial departments, and to ask judicial bodies to turn over their files and report significant events.

Of course, people's congresses themselves must be democratic and transparent to the public. Under Chinese Constitution, local people's congresses, whose representatives are elected by the general public, are the top legislative bodies and represent the rights and interests of local people. Representatives' work must be put under full supervision by the public. The public cares about performance of the representatives they elect, and voters are eager to know if these representatives are expressing their wills. China has made great progress in making agendas for judicial procedures transparent. Comparatively, legislative organs lag behind judicial institutions in agenda openness. Since 1998, the Municipal People's Congress of Dalian has opened its agenda to ordinary citizens. Although only a small number of people, altogether 24 to date, have audited the local people's congress meeting, this achievement is an initiative for further reform of China's legislative bodies and improving China's democracy. The author argues that the people's congresses at various levels including the NPC should be open to the public either by the present audit, or by special TV broadcast of all the meeting agendas except the issues unsuitable for disclosure according to the law.

In addition to the supervising role of the people's congress, it is also necessary to intensify the supervision of media and the public. Only in this way will China be able to establish a supervision mechanism in which the people take a leading role, check corruption and ensure the realisation of people's democratic rights as specified by the law.

4 Private Law

4.1 Re-emergence of the principle of private autonomy

Influenced by the ideology dominant in former Soviet Union, China had not recognised private law, the principle of private autonomy, private property and freedom of contract during the period of the planned economy. Lenin once said, *„We do not recognise any private law. Every law in Soviet Union is public law by its very nature“*. This was also the case in China. Therefore, private law was regarded as equivalent with capitalist law, and individual rights were considered capitalist rights. In that period, everything was public, including property, personal diaries, letters or even one's life itself. To utter the word *„private“* in public would have been a political mistake 20 years ago. A farmer would have been labelled a *„capitalist roader“* if caught planting a fruit tree in his backyard merely to earn more than his meagre income from the People's Commune, a utopia that ruled out anything private. Under the central planning system, the government decided on corporate affairs and allocated the factors of production, national incomes and even small consumer commodities. The State's will was worshipped as a commandment, while market competition was categorised as the source of chaos. Prior to 1978, the Chinese economy was monopolised by the State, and the existence of private enterprises was illegal.

Market-oriented reform has greatly dismantled the highly centralised planned economy, and the *„iron hand“* of a centralised economy is giving way to the *„invisible hand“* of the market. Such reform was motivated by the late Deng Xiaoping's famous pragmatism that *„it doesn't matter if a cat is black or white as long as it catches the mouse“*. In other words, private ownership, be it capitalist or socialist by nature, has proved a stimulus to the Chinese economy, which was on the brink of bankruptcy in 1978. Therefore, the then *„capitalist roader“* farmers could not have imagined in 1978 that they were to contract plots of land, let alone trees, from the government. As long as they fulfilled government quotas, farmers could sell surplus grain or fruit to the market for additional income. It was the rural contractual system, which allowed farmers to claim private gains, that heralded the dawning of an era in which ideological bias has given way to practical thinking. In addition to farmers' private interest, other forms of private business have come in full steam. According to the State Statistics Bureau, nearly 30 million private businesses had been registered by 1997, employing about 68 million people. By 1997, foreign investors, once dubbed *„devils“*, had spent US$303 billion in establishing 236,000 firms nationwide. Limited liability companies and publicly held companies with their origins in the West, have taken root in China. By 1997, 680,000 companies had been opened with a registered capital of 1,730 billion yuan (US$208 billion). In order to offer convenience and opportunities to grassroots people, to encourage more people to become shareholders, stock markets have grown fast and steadily. Therefore, the Communist Party has affirmed the need for diversified instead of

sole State ownership to propel the economy, and replaced State ownership with public ownership as the basis of socialism, while *„Public ownership“* refers not only to pure State-owned business, but also to State or collective elements in business that have been structured to allow private and foreign elements.

As private business prospers, the force of contracts has become increasingly stronger than government planning. Even the State enterprises have to conclude contracts with other State enterprises. Either they have been invested in by the central government or by the local governments. Competition has been recognised as a remedy for poorly run industries. As economic infrastructure changes, the philosophy of legislation has to be re-adjusted. Universal principles of fairness, justice and openness have taken the upper hand over State monopoly, governmental intervention in company affairs and discrimination. Consequently, the justification of private law has begun to be recognised, individual rights have gained legislation’s respect, and the principle of private autonomy has finally re-emerged in China.

4.2 Codification of civil law

In China, the General Principles of the Civil Law were adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, and became effective as of January 1, 1987. They contain nine chapters consisting of 156 articles. Chapter 1 deals with the basic principles. Chapter 2 deals with citizens (natural persons), including the capacity for civil rights and capacity for civil conduct, guardianship, declarations of missing persons and death, individual businesses and lease-holding farm households, and individual partnership. Chapter 3 deals with legal persons, including general stipulations, enterprises, official organs, institutions and social and economic associations as legal persons. Chapter 4 deals with civil legal acts and agency. Chapter 5 governs civil rights, including property ownership and related property rights, creditors' rights, intellectual property rights and personal rights. Chapter 6 deals with civil liability, including civil liability for breach of contract, civil liability for infringement of rights, and methods of bearing civil liability. Chapter 7 deals with limitation of action. Chapter 8 deals with application of law in civil relations with foreigners. The final chapter deals with supplementary provisions. This law is rather general, and it is very difficult to find the corresponding provisions this law makes when civil law disputes arise from civil society. A detailed and concise civil code is needed to further the legal reforms towards the rule of law.

To implement the principle of private autonomy, *Prinzip der Privatautonomie, L’autonomie de La Volonte Humaine*, in the Chinese legal system, it is necessary to improve Chinese private law, including civil law and commercial law. But it is not determined yet whether China needs a separate Commercial Code independently of the Civil Code, as is the case in France, Germany, Spain and Japan. In my opinion, it is unnecessary to work out a separate Commercial Code. The Civil Code could serve as the basic law of the civil society and market economy, in addition to which some special legislation, like company law, securities law, negotiable instruments law, insurance law, etc., could be devised. If civil law is considered the

general private law, commercial law can be considered as special private laws. To safeguard private rights, Chinese private law scholars and the legislator will work on the gradual codification of the civil laws.

Chinese legislature will draft the Property Law, which is to become an integral part of the Civil Code. Under Article 75 of the General Principles of the Civil Law, a citizen's lawful property shall be protected by law, and no organization or individual may appropriate, encroach upon, destroy or illegally seal up, distrain, freeze or confiscate it. But the wording is somewhat different compared with the case of State property. For Article 73 says that State property is sacred and inviolable, while the words *„sacred and inviolable“* are not used regarding the protection of private property. Furthermore, Article 74 says that collectively owned property shall be protected by law, where the qualified term *„lawful“* is not used. It seems that the legislator purported to treat ownership with different legally binding forces on the basis of different owners. Such an attitude is obviously detrimental to the rationale of equality and fairness.

In the field of tort, more and more cases have been brought to the courts of justice. For instance, after years of sitting in the visitor's section covering courtroom stories, many Chinese reporters are now finding themselves moving into the defendant's seat. The increase in the number of media people involved in defamation cases is the result of a new wave of critical and investigative reporting in China. But it is not likely that the situation will be as frenetic as it was ten years ago. In 1987 and 1988, following the promulgation of the General Principles of Civil Law, Chinese courts handled more than 1,000 defamation lawsuits involving the media. All these cases boil down to a conflict between personal rights and the freedom of the press. Lacking a press law, courts deal with alleged defamation involving the media in accordance with the relevant clauses in the Chinese Constitution, the General Principles of Civil Law and relevant judicial interpretations issued by the Supreme People's Court. In a recent interpretation, the court clearly stated that as long as the major facts of the reports are true and accurate, the media should not be charged with defamation. Supervision by the media is different from that by judicial sectors, for it puts more emphasis on bringing illegal actions to light and urges relevant departments to carry out further investigations. The media do not have the same power to force people to co-operate in their investigations as the judicial sector does. The requirement to eliminate mistakes completely would be tantamount to depriving reporters of their right of supervision. However, reporters should try their best to find out the facts. Tort legislation is expected to be more detailed on the basis of referring to the successful experience in other countries.

Contract law helps ensure market order and safeguard the lawful rights of contracting parties. China adopted the Law on Economic Contracts in December 1981, the Law on Economic Contracts Concerning Foreign Interests in 1985 and the Law on Technology Contracts in 1987. Therefore, China used to have several contract laws relating to domestic contracts, overseas-related contracts and those on technology transfer. Provisions of these fragmented contract laws, drafted more than a decade ago, when the market was still regulated under the

planned system, fail to provide appropriate and satisfactory solutions to many problems that have cropped up during China's economic reform and opening-up to foreign businessmen and the market. For instance, the contractual relationships between Chinese entities and foreign businessmen have to be governed by the Law on Economic Contracts Concerning Foreign Interests of 1985, while the same contractual relationships between Chinese entities have to be governed by the Law on Economic Contracts. It is obviously contrary to the equality principle in the market economy. Another illustration is that the freedom of contract has not been comprehensively reflected.

To modernise Chinese contract legislation, it is necessary to draw up a comprehensive contract law, which is indispensable to the market economy. The draft has been discussed twice in the NPC Standing Committee, and has been revised by legal experts several times since it was first put forth in January 1995. The full text of the draft has been carried in the newspaper in September 1998, so as to solicit views from all quarters. After several years of efforts, China adopted the unified Contract Law in March 1999. It will go into effect from October 1999. Contract law will become part of the Chapter on obligations in the future Civil Code.

The unified Contract Law has incorporated many advanced international commercial law practices to promote the continued development of the market economy. Both the principle of contract freedom and moderate governmental intervention are confirmed in this law. The procedure of entering contract, including offer and acceptance, and the liability for negligence during contract negotiation is clearly defined. To protect the consumers, this law imposes several restrictions on the standard-form contracts. The doctrine of unnamed agency and undisclosed agency, which is widely recognised in the common law family, has also been introduced in this law. Verbal contracts are commonly used by small businesses. Oral contracts are given legal validity by the legislation at the strong request of legislators. The law provides solutions for multi-party and overlapping debt, which continues to plague the Chinese economy, as well as for protecting the economy against the adverse effects of the ongoing financial crisis engulfing most of Asia. It is a big issue during drafting as to how to draw a fine line between Change of Circumstances, namely, overwhelming changes in external circumstances which are beyond the control of debtors, and normal business risks. To avoid misuse of this system, Contract Law ultimately deleted it.

On the basis of current Marriage Law, a Family and Marriage Law will be drafted. The current General Principles of Civil Law will become the basis of the section on General Principles in the future Civil Code. The task of codifying the civil laws will be completed by the year 2010. Additionally, trust law is being deliberated by the Standing Committee.

4.3 Corporate law

4.3.1 General issues about company and enterprise law

The notion of *„company“* did not exist in China during the central-planning era. Most of the de facto industrial enterprises were just called *„factories“*, and were merely the government's affiliates responsible for manufacturing goods. Establishment of a modern corporate system, which is at the core of a market economy, has been promoted by China's progress in legislation. The Company Law of 1993 is important in protecting the interests of both companies and shareholders. The law clearly defines the creation of corporations, corporate governance structure, corporate finance, shareholders' rights, etc. Improving current corporate legislation is a very practical issue. Of course, many relevant laws, including Bankruptcy Law, need to be revised, and the law on proprietorship, namely solely-owned enterprises, should be adopted.

China has witnessed a great boom in township enterprises in the past 20 years. To support and guide the development of township firms, and to boost economic development in rural areas, a law on these township enterprises was formulated. There are also many Co-operative Partnership Enterprises in China. Legislation on co-operative partnership enterprises is necessary as well.

In line with the opening-up policy, laws and regulations on foreign-funded firms and Sino-foreign joint ventures have been launched which are introducing foreign investment into China. The country is trying to reform its current three pieces of legislation on foreign investment, which are independent of the general Company Law of 1993. The author argues that the current three pieces of legislation on foreign investment ought to be included in the general Company Law of 1993, general Company Law of 1993, so as to put foreign-invested companies and domestic-invested companies on a par.

4.3.2 The responsibility of directors and managers

The Chinese Corporation Act of 1993 has some provisions concerning corporate governance structure, including the general meeting of shareholders, the board of directors, and the board of supervisors. Broadly speaking, the general meeting of shareholders and the board of supervisors are substantially powerless in China, while the responsibility of directors and managers is rather weak. Here, this article will focus on the responsibility of directors and managers even though it is very essential to hold directors and managers accountable to the corporation and its shareholders so as to guarantee corporate financial security and economic boom in China.

Under the traditional planned economy, legislation was silent on the duties and obligations on the part of directors and managers of State enterprises and collective enterprises. Precisely speaking, State enterprises were not real business enterprises. On the contrary, they

were the branches of government agencies. The duties of directors and managers of State enterprises is not to make profit for the State investor, but to fulfil the production plans decided by the government agencies. It was very common for the directors and managers who caused damage to one enterprises to be appointed to manage another enterprise. Legal liability, including civil liability, was rarely imposed on the directors and managers at fault, including corrupted directors and managers.

After 1978, China embarked on a gradual but progressive introduction of the market economy. Consequently, State enterprises began to be re-defined as business legal persons. Considering the fatal deficiencies in the traditional governance structure of State enterprises, the Chinese Corporation Act of 1993 made a number of provisions relating to the duties of directors, supervisors and managers from Article 59 to Article 63. Additionally, Chapter 10 of the Chinese Corporation Act of 1993 has some provisions concerning legal liability against them, including civil, criminal and administrative liabilities.

After more than four years of implementation since 1 July, 1994, corporate legislation has demonstrated significant effects in making directors and managers perform their duties in the best interest of corporations and the shareholders. However, there are quite a number of problems with the corporate governance structure.

Most of the purely private corporations in China are closely held corporations or family controlled corporations. Shareholders do not encounter great difficulties in holding directors and managers accountable to them. The idea of shareholder sovereignty and shareholder democracy is deeply rooted among the investors of private close corporations.

However, in the sphere of State enterprises, the supervision machinery is too weak to identify and curtail management corruption. Some directors and managers use their positions and powers to seek personal gains, or to seize corporate property, to operate businesses on their own or on behalf of others which are similar to the business of the corporation they are holding their position in, or to transfer profitable business to their relatives and friends, or to purchase goods from their relatives and friends at prices higher than the market price, or sell products to their relatives and friends at prices lower than the market price. Some directors and managers control the power to appoint and dismiss financial supervisors. As a result, financial supervisors are under the direct control of directors and managers, and always keep several different accounting books. Some perfect machines have been sold out by directors and managers as wasted steel, while some raw materials purchased by directors and managers could be consumed by the corporation for several hundreds years. Some directors and managers made great profits during the restructuring of corporate assets.

Many corrupted directors and managers in State enterprises are famous business people, and have occupied several leadership positions at the same time, including the president, CEO, chief of government agencies, secretary of the Communist Party Committee, etc. In some State

enterprises, the presidents and the general managers hold supreme power concerning management. Nobody, including the board of supervisors, workers and shareholders, could challenge their authority inside the enterprises.

The irresponsibility of directors and managers has resulted in the insolvency and bankruptcy of many a state enterprise. An investigation conducted by Anhui authorities in 1997 revealed that directors and managers were to blame for the insolvency or bankruptcy of more than half of 110 State enterprises. The former general manager of Anqing Paper Industry Corporation was very authoritarian during his term. He decided to establish three branches at the expense of around one million US dollars, and no profit was generated from them. He also invested over one million US dollars in technology innovation, but no qualified product has been produced so far. He purchased a lot of waste paper for the enterprise from his lover at an extremely high price.

There are various doctrines to explain the nature of the relationship between the director and the corporation, and the nature of the obligations incurred by directors. In the Common Law family, some scholars argue that the director is the trustee of the corporate property, while others maintain that the director is the agent of the corporation, and it has also been claimed that the director is an independent fiduciary. In the Civil Law family, the director is often considered the mandatory of the corporation, and the company is regarded as the mandator of the director. Doctrine of mandate is very popular not only in Japan, but also in China. [2] Despite different doctrines, the mainstream argument of Chinese corporate law scholars is that directors and managers owe two basic duties to companies: (i) duty of loyalty; (ii)duty of care, diligence and experience. In principle, these two fundamental duties are owed towards the corporation as a whole, instead of to individual shareholders. Only in this way are the directors able to manage the corporation in the best interest of the corporation, which always means the long term interest of the shareholders. Therefore, the interest of individual shareholders could be advanced via corporate interest. And it is also possible for the directors to bear civil liabilities towards shareholders as third parties in some circumstances. The legal position of the managers is much similar in terms of their duty owed towards the corporation.

Many people in China expect that Corporate legislation will promote modern corporate governance structure, and enforce the responsibility of directors and managers. Theoretically speaking, compared with a sole shareholder, several shareholders are able to monitor directors and managers more effectively. However, things have not always worked out to this effect. Since the State enterprises are always the majority shareholders, there is no effective check and balance over directors and managers within them. Therefore, it is very difficult for these majority shareholders to effectively supervise the directors and managers in the daughter corporations.

[2] Liu Junhai, The Protection of Shareholders' Rights, Press of Law, 1997, p.216-p.218.

One important strategy for coping with this problem seems to be to restructure the State assets, and transform most of the State enterprises into modern corporations with a large number of individual and institutional shareholders. If the State is still the biggest controlling shareholder in corporations, there will be no real modern corporations. In addition to lowering the percentage of the State-held shares, it is feasible to define State share-holding as non-voting participation preferred shares. Not only will this lower the agency cost for State share-holding and ensure the right to dividends and net assets enjoyed by the State, but it will also prevent the State representatives from abusing their power.

To make directors and managers accountable to the corporation and its stakeholders, it is urgent to deal with the loopholes in current legislation and enforce the responsibility of the directors and managers through various means, in particular, the shareholders' derivative actions. Of course, it is fair to ensure that the directors and managers are entitled to reasonable reimbursement while strengthening their liability.[3]

4.3.3 Shareholders' right to bring derivative actions

Corporate interest is the fundamental guarantee for the interest of stakeholders, including shareholders, creditors and employees. Thus, the corporate governing bodies should assert corporate claim directly in case of corporate interest being damaged. However, boards of directors tend to refuse or at least to be reluctant to do so in some circumstances in which members of the board of directors themselves are the wrongdoers. This is also the case with the board of supervisors when supervisors are closely and privately associated with the wrongdoer director. It is true that separation between ownership and management has become increasingly dominant in modern Chinese corporations, which implies that the powers enjoyed by management including the board of directors and managers, have been expanding.

Where the corporation itself fails to assert corporate claim against directors, it is necessary and urgent to endow shareholders with the right to bring derivative actions, which represent an effective machinery to check and balance management and to safeguard corporate and stakeholders' interests. That is why derivative actions were first established by the Equity in Common Law system. In the USA, derivative action is one of the most effective means to enforce directors' and managers' responsibilities. Under the influence of the USA, Japan introduced the system of derivative actions with Articles 267, 268a, 268b, 268c of the Commercial Code in 1950, and improved it in 1993. Shareholders' derivative action is also protected under Article 214 and 215 of Company Law in Taiwan, China.

[3] In China, many corrupted directors and managers are around 59 years old, and this aspect is referred to as „the effect of 59". Some people think that Chinese directors and managers enjoy much less reimbursement compared to their Western counterparts. They believe the unreasonably moderate reimbursement is the major underlying reasons for the directors and managers to becoming corrupt.

Although attitudes vary among different jurisdictions with regard to the scope of the subject matter for the derivative actions, civil liability of directors and managers is the predominant cause of derivative actions in almost every jurisdiction. This is and will continue to be the case with China. However, due to the lack of experience with commercial corporations in the past decades of the planned economy, the Chinese Corporation Act of 1993 is silent on this issue. But this attitude of the legislator has not barred the Courts of Justice from hearing shareholders' derivative action. For instance, several shareholder derivative actions have been accepted up to now by Haidian Court of Justice, Beijing. Based on the experience of offering advice to this court, the author believes that the time is ripe to improve current legislation relating to the shareholder's right to take derivative actions. Shareholder derivative actions should cover all the liabilities owed by directors to companies, while introducing the business judgement rule to protect due freedom of management. In China, both the individual and the corporate shareholders as well as the State shareholder should be permitted and encouraged to take derivative actions. Even in the wholly State-owned corporations, the State shareholder also enjoys the right to take derivative actions against the directors and managers. Unfortunately, the State shareholder has rarely asserted any corporate claim against the corrupted or grossly negligent directors and managers. Starting from early 1998, central government has been sending special auditors to some giant State enterprises and the corporations controlled by State enterprises. In my opinion, one of the major tasks of the special auditors is to investigate the performance of management and take derivative actions against the wrongdoers.

The right to bring derivative actions against directors and managers is significant for shareholders. The functions of derivative actions can be demonstrated either by the concrete cases or by their effect as a deterrent. The proper exercise of derivative actions will contribute a lot to making directors and managers accountable to the corporation and the stakeholders. Needless to say, there is much to do among the academic community, legislature and the courts. Generally speaking, shareholders in China have not been very active in taking derivative actions. This could be due to the following four aspects:

i) benefits arising from winning the suites go to the corporation instead of the plaintiff shareholder, so that some shareholders feel that the incentive to take derivative actions is not sufficient;

ii) sometimes the plaintiff shareholder needs to pay considerable attorney fees;

iii) the plaintiff shareholders are always the outsiders of the management, knowing much less about the corporation than the directors and the manager;

iv) shareholders who are dissatisfied with the management prefer selling his shares out to taking derivative actions;

v) some courts are reluctant to accept shareholder derivative actions on the ground of lacking detailed legislation.

To fully realise the effects of deterring, compensation and education, it is necessary for the legislator to design the proper machinery to curtail the abuse of derivative actions, such as the qualifications of the plaintiff shareholders, conditions precedent to action, security for expenses, on one hand, and to overcome the obstacles to derivative actions, including ensuring the shareholder's right to information regarding the corporation and strengthening the plaintiff shareholder's right to be reimbursed when he wins the suite, on the other hand. Before detailed regulations are issued, the courts should change their conservative and inactive ideas, and hear the derivative actions lawfully and fairly. There are sufficient sources of law the court can use to make proper judgements. First, the court could refer to the Corporation Law of 1993, which contains various provisions concerning the liability of directors and managers, corporate status and property rights, shareholders' rights, etc. Second, the court could refer to the corporation statute, which is the corporate Constitution that is legally binding for directors, managers and shareholders. Third, the court could refer to the basic principles contained in the General Principles of Civil Law of 1986, including the principle of equality, the principle of reasonableness and fairness, and the principle of respect for social ethics and public interest.

4.3.4 Strengthening corporate social responsibility

Corporate social responsibility does not simply and merely mean traditional corporate altruism or corporate philanthropy. As a process concept, it demands the corporate decision-making process to consider and reflect social interest and social rights. As a substantial concept, it demands the outcomes of corporate decision-making to be reasonably accountable to social interest and social rights. Depending on one's point of view, corporate social responsibility can be classified as legally and morally based social responsibility, profit-sacrificing and profit-promoting responsibility, or relational responsibility and social activism.

Under the traditional planned economy, political responsibilities of State enterprises towards the workers were exaggerated. The purpose of State enterprises was not profit maximisation, but to fulfil the production task fixed by the government plans. Following the introduction of the market economy in China, the value of profit maximisation was recognised by many enterprises, including private enterprises and State enterprises. A number of corporations have produced some negative effects, threatening morality and social justice. Financial frauds, environmental pollution, impure foods and defective products, plant explosion and industrial disasters, vicious closures of plants, high incidence of corporate wrongdoing and corporate crimes point all too clearly to a lacking sense of corporate responsibility.

The main philosophy for ignorance of corporate social responsibility can be summarised as follows: profit-maximisation is the exclusive supreme purpose of corporations; corporate profit expansion necessarily means the growth of general social interest; corporate interest is

equivalent to the shareholder's interest; and the market is competitive, perfect, and therefore totally reliable. As far as the institutional arrangement is concerned, the conventional formula of profit maximisation within law is generally the guiding star for traditional corporate law. Social expenditure not designed to benefit the business is either prohibited by the law or is open to challenge from the shareholders using the doctrine of ultra vires.[4] Beside corporate law, traditional private law and public law framework are primarily designed for individuals, or at best, for the abstract personality, without fully considering the substantial differences between corporations and human beings. Despite the efforts made by the legislator and the judiciary in recognising and adopting corporate social responsibility, difficulties exist in this respect.

Corporate power, especially corporate decision-making power, is by far the most important justification for holding corporations socially responsible. Careful examination of traditional theory about the nature of corporations, including concession theory, contract theory, doctrine of nexus of contract, theory of legal entity, theory of artificial entity, theory of social enterprise and theory of political system, could suggest a redefinition of the nature of corporation as a social enterprise with legal entity which can provide another legal justification for corporate social responsibility. It is important to note that corporate interest is not simply equal to shareholders' interest and shareholders are not the only stakeholders with regard to corporation interest, but that non-shareholder groups are also entitled to shape the direction and process of corporate decision-making, and to share the benefit from the success of corporations. Separation of ownership and management, and the emergence of modern management-controlled corporations are revolutionary steps in modern corporate history. However, they aim at increasing wealth in the aggregate for shareholders. Social rights and social justice mandate the corporate law reform in the direction of taking care of the non-shareholders' interest at the levels of both decision making and distribution of corporate gains.

In fact, corporations are most suitable actors to respect and promote certain social rights, such as the right to work, the right to a clean environment, the right to breath fresh air, etc. The existence of market failure and limited capacity of legal control determines that the enforcement of corporate social responsibility will definitely increase overall social wealth and efficiency and promote the realisation of the social rights. And bona fide performance of corporate social responsibility will in return provide the justification for the overall long-term interest of all corporations and even the existence of the corporation system.

Directors and managers should be aware of the significance of building corporate conscience in favour of social justice and social rights. Considering that the philosophy of traditional corporate law is to maximise profit for the shareholders while ignoring corporate social responsibility, it is more important and fruitful to systematically and comprehensively

[4] For the evaluation of the court holding in Dodge v. Ford Motor Co. and its subsequent development, see James J. Hanks, „Playing With Fire: Non-shareholder Constituency Statutes in the 1990s", 21 Stetson Law Review 97 (1991).

institutionalise corporate social responsibility in the legal framework. It is most important to reform traditional philosophy and recognise both profit-maximising as a commercial goal and corporate social responsibility as a non-commercial goal as the dual purposes of corporations. The traditional doctrine of ultra vires could be re-interpreted so as to defeat the challenges from shareholders against corporate resolutions for taking corporate social responsibility, especially profit-sacrificing social performance. In fact, the first paragraph of Article 14 of Chinese Corporation law of 1993 can be interpreted as the umbrella provision requiring corporate social responsibility.[5]

As far as corporate governance structure is concerned, social policy, social rights and social justice should be given top priority through the corporate decision-making process. Employees, consumers and other non-shareholders' representation on the corporate governing bodies should be made more effective. Like in the Norwegian corporate assembly system, traditional general meetings of shareholders can be reformed to comprise both shareholders and a minimum percentage of other non-shareholder groups. Routine representation from employees, consumers, users (including computer users, pollution-causing fertiliser users), local community, governmental agencies and other non-shareholder groups can be introduced into the board of directors. Senior executives with specific responsibilities of social characters can be appointed and removed by society. Corporate audit mechanism can be reformed in the course of securing more socially responsible management. A reasonably fair, detailed and practicable guideline for striking a balance between shareholders' interest and non-shareholder groups' interest is undoubtedly necessary. Needless to say, it is very interesting to re-examine the nature of corporate statutes, which are traditionally made by shareholders or their representatives, and allow corporate statutes to be shaped by non-shareholder groups and the public.

Directors' traditional duties, such as the duty of due diligence, care and skill, the duty of loyalty, including not engaging in self-interested transaction, are owed to the shareholders' interest and aim at securing management efficiency. They appear to deserve reform so as to maximise the effect of non-commercial goals of the director's powers and duties, and encourage directors to undertake corporate social responsibility to a substantial extent. Detailed legal rules regulating the conflicts of interest between shareholders and non-shareholder groups arising from corporate socially responsible performances might be enacted for the management to follow.

Corporate social responsibility is a reasonable price to pay in exchange for maintaining corporate legal personality and shareholders' limited liability. Whenever corporations use certain tricks to avoid their due social responsibility, such as the salaries owed to their employees, the monetary debt owed to their creditors, or the duty of establishing trade unions, their corporate veil shall be pierced, and the immunity enjoyed by shareholders, including parent corporations,

[5] This paragraph reads as follows: „ A corporation must in conducting its business operations abide by the laws, follow professional ethics, strengthen the development of the socialist spiritual civilization, and accept the supervision of the government and the public."

shall be deprived so as to oblige corporations and their shareholders to fulfill social responsibility.

To encourage corporations to take socially responsible initiatives, strict and systematic legal requirements about social disclosure of corporate affairs, especially corporate social responsibility issues, might be introduced and enforced. The remarkable success of sunshine campaigns in political life in holding governments and politicians accountable to the people has constantly reminded us of the significance of public disclosure about corporate affairs. However, the current disclosure principle in corporate and securities legislation is basically concerned with corporate financial performance with a view to protecting shareholders, securities investors, and at best creditors. Therefore, public disclosure norms can be redesigned in order to promote social interest in addition to the interest of creditors, shareholders and public investors. The range of those entitled to have access to corporate information shall be broadened so as to include every citizen, every member of the grass-roots people. Of course, a balance should be struck between public disclosure and protection of business secrets possessed by corporations.

It is justified and practical for the government to introduce a package of incentive measures to encourage corporations to take social responsibility more voluntarily and comprehensively. The government may mobilise its available resources to grant subsidies and tax privileges, or help to build popular corporate image at local, national or global level for the socially responsible corporations. The national governments and international organisations have a very active role to play in developing and executing the incentive programmes. The re-examination of the market-related factors that link manager's income to shareholder welfare, such as the option for shares scheme, may lead us to consider linking manager's income to corporate social performance.

Punishment and reward measures are equally useful for enforcing corporate social responsibility. It is well known that the targets pursued by the legal liability system are deterrence, compensation and education. For the reform of criminal liability system, equity fine is an effective leverage to ensure the non-profitability of non-compliance in every occasion. The imposition of equity fines would require a corporation to issue shares to a public body which would sell them in the stock market, finally resulting in diluting the market value of shares and share option enjoyed by the management staff, and making it possible for the corporation to be taken over.[6]For the reform of the civil liability system, the punitive compensation mechanism recognised by Article 49 of Chinese Consumers' Rights and Interests Protection Act can be extended to all corporate commercial wrong doing in favour of the affected non-shareholder groups. The range of plaintiffs of derivative action mechanism can be enlarged from shareholders to stakeholders, especially non-shareholder groups. The application scope of non-

[6] See also, J. E. Parkinson, Corporate Power and Responsibility: Issues in the Theory of Company Law, Oxford University Press, First Edition (London, 1993), p.357.

fault civil liability can be broadened. The directors and managers' administrative liability system can also be reformed accordingly.

Governments and courts assume crucial roles in enforcing corporate social responsibility. Relevant government agencies, such as the social affairs agency, the corporate registration and supervising agency, the State planning agency, the charity supervising agency, the environment agency, the labour agency and the State-owned corporations supervising agency, might pay more attention to watching, monitoring and supervising corporate performances to guarantee socially responsible corporate citizens. Judges and attorneys might be competent and experienced enough to deal with the disputes concerning corporate social responsibility. NGOs in favour of corporate social responsibility could also be encouraged. The employers' organisations have a lot to do in strengthening corporate social responsibility through their self-disciplining machinery, such as drawing up a Code of Corporate Social Responsibility. Industrial or professional business associations, trade unions, consumer organisations, environment organisations and other non-shareholder groups could also make considerable contributions.

International co-operation enforcing corporate social responsibility should be further strengthened. In addition to domestic legislation, the international instruments concerning social rights, including but not limited to CESCR, should clearly and firmly recognise corporate social responsibility. And the international instruments on multinational corporations, international investment and international trade should change their traditionally inactive attitude toward corporate social responsibility. Considering the serious social problems caused by some multinational corporations, the weakness of current legal control and the strategies employed by the multinational corporations to escape social responsibility, it is time that the requirement of social responsibility was integrated into the foreign investment legal system at the level of host States and international jurisdictions. Considering that the standard of corporate social responsibility requirements in the home country of multinational corporations is possibly higher than that in the host country, it is justified to impose a medium standard on the multinational corporations that conduct business in a developing or less developed host country. For instance, if the minimum wage standard for workers in the home country is 1,000 USD, while that standard in the host country is 200 USD, 600 USD shall be the minimum wage standard for workers in the multinational corporations operating in the host country. If the environmental protection requirements in the home country are stricter that in the host country, the same rules shall be applied. In this way, the social responsibility requirements on multinational corporations are neither too hard nor too soft, and therefore reasonable, fair and practicable.

4.3.5 Corporatisation of state enterprises

In 1978, State-run factories accounted for the bulk of China's industrial production. State coffers were the sole source of their input and also the only destination of their incomes. The types of product, production volume and price were all decided by State planners; and workers' welfare, including housing and pension, was doled out exclusively by the State. Reform of State-

owned enterprises is the key to China's economic reform drive. Its goal is to make firms responsible for their own gains and losses in the market place. China has been involved in the painful restructuring of the State factories since late 1970s. In the initial stage of the reform, the government just wanted to encourage State firms to be more active in expanding production and earning profits. The goal of reform has recently been clarified to be the establishment of the so-called „modern enterprise mechanism". By government definition, this mechanism refers to a package of standards including clear ownership, independent rights for business operation, and shrewd management.

The reforms have resulted in the government's diminishing intervention in firms' operation and increasingly more rights for enterprises to make decisions about their business. The enterprises were first allowed to retain part of their profits after finishing the government's assignments. Then the government stopped taking profits directly from firms and adopted a more efficient system by turning most of the levies on firms into taxes. The new State Enterprises Act of 1988 provided a legal basis for the State enterprises' independent management. Relevant regulations on the transitional period of State firm reform had also been established. Special laws and regulations have been drafted on the transfer and assignment of State-owned land resources.

From early 1992 on, some State enterprises began to be restructured into modern corporations on pilot basis. Chinese Corporation Act of 1993 provided solid legal foundations for the State enterprises to be transformed into different business corporations, including wholly State-owned corporations, closely held corporations and publicly held corporations. It should be noted that the majority of State enterprises are still governed by the State Enterprises Act of 1988 and its subordinate regulations of 1992, which means that Corporation Act of 1993 has nothing to do with these State enterprises. It is true to say that State Enterprises Act of 1988 was obviously influenced by the traditional planned economy, while the Corporation Act of 1993 is the product of adopting a market economy in China.[7] The author argues that most of the State enterprises should be transformed into corporations with more than two shareholders, or even listed corporations, except for the State enterprises in the major economic sectors, such as finance, railways, power and telecommunications.

4.3.6 Protection of private enterprises

China's private sector emerged in the late 1970s and has grown quickly in the past 20 years. The sector's output reached 847 billion yuan (US$102 billion) in 1997. Private businesses paid 54 billion yuan (US$6.5 billion) in industrial and commercial taxes in that year, accounting for seven percent of China's total, according to the All-China Federation of Industry and Commerce (ACFIC). As China's State sector is undergoing massive reorganisation, the country needs the private sector to thrive to absorb workers trimmed from State firms. In 1997, the

[7] The author strongly suggest that the State Enterprises Act of 1988 and its subordinate regulations of 1992 should be appealed, and that every State Enterprise should be governed by the Corporation Act of 1993.

private sector created 3.53 million jobs for the new labour force and workers laid off by State firms, and employed at least three million laid-off workers in 1998. An average of 3,000 private firms are being founded in Jiangsu Province in eastern China each month. Recent statistics show there were 1.4 million private enterprises in the province by the end of June, 1998.

However, in a country whose corporate circles have been dominated by public-owned enterprises for decades, there is still much discrimination against private firms, although their status has been enhanced considerably over the last 20 years. Traditionally, private businesses have been categorised as a mere *„supplement“* to the State sector. Their development has therefore been restricted, so that the dominant status of the State sector can be guaranteed. For example, banks are generally reluctant to lend to private firms, and local governments are not willing to give them listing quotas. Although the overall situation is favourable for the progress of privately-owned enterprises, they are facing difficulties in some areas because of structural weaknesses.

At its 15th National Congress in September 1997, the Communist Party of China decided to raise the status of the private economic sector. The amendments to the Constitution of 1999 demonstrate China’s commitment to allow for a higher profile for the private economic sector. According to the amendment to the Constitution, the private sector is an *„important component“* of the socialist market economy. The former Constitution says the private sector *„complements“* the socialist economy. The amendment will allow private enterprises to compete more effectively with other entrepreneurs in the market, and has actually paved the way for developing private businesses. It should be noted that a mixed economy of this kind will exist in China for a long time. This means that public ownership, private ownership and foreign capital will co-exist simultaneously in one company or enterprise in the primary stage of socialism. As an example, a listed company reflects the existence of a mixed economy. Private entrepreneurs have hailed the amendment as a milestone in the development of the private economy. They feel much safer now. The Constitutional amendment is expected to create more favourable conditions for the development of China's one million private enterprises.

To get rid of various forms of discrimination from which the private economy suffers, China has recently taken some measures to remove obstacles hindering the private sector's development. Earlier in 1999, for the first time, 20 Chinese private firms were granted licences to handle foreign trade on their own by the Ministry of Foreign Trade and Economic Co-operation. This is a clear signal that the private economy is beginning to get the same economic status as State economic sectors in the field of foreign trade. From now on, they will be able to compete with their State-owned counterparts on an equal footing in the international market, and will help spur China's exports. The People's Bank of China, China's central bank, has started to permit lending rates offered by the commercial banks to fluctuate in a wider range around the benchmark rate set by the central bank. Many regions, like Jiangsu province, have loosened restrictions on loans and encouraged firms to participate in restructuring state-owned enterprises. To put private enterprises and their public-sector counterparts on equal footing, it is crucial to

create an operational regulatory and legal environment. First, an atmosphere which supports competition on an equal footing should be created and a policy of equal treatment for different economic sectors should be adopted. This would demonstrate the principle of fair competition in a market-oriented economy. Second, a good financing environment should be formulated. Since many private firms have long been afflicted by obsolete equipment, backward technology and poor management, as well as a shortage of funds, it is necessary for the financial institutions to back the development of private sector. A secure and effective loan guarantee mechanism should be established; a variety of loans should be made available; and venture capital capabilities should be developed. Third, it is necessary to develop a favourable legal environment to boost the private sector.

In an effort to cultivate promising growth areas for its economy in the face of flagging economic growth, China is drafting the Wholly Owned Enterprise Law to protect the interests of private enterprises and enhance taxation administration aimed at such firms. It will mainly govern the structure and management of non-corporate private enterprises invested and owned by individuals. China already has a law targeting affairs of overseas-funded businesses, which include wholly owned foreign firms. Since the private firms have long been accused of having irregular accounting books, a practice that can enable them to evade tax obligations, legislation should also contain clauses stipulating standardised accounting management by such firms. In my opinion, Wholly Owned Enterprise Law should cover not only proprietorships, but also one-man companies including wholly State-owned ones.

4.3.7 Legislation on investment funds

In China, the vitality of the emerging knowledge economy depends on the development of science and technology. It is necessary to encourage risk investment to cultivate and develop Hi-tech enterprises. However, the government is the main source of investment and investment risks, and is inadequate to support the commercialisation of scientific research results. Additionally, the government has no preferential policies for companies engaging in risk investment. In reality, China has permitted several securities investment funds to be established. Given this situation, it is necessary to draft the legislation on investment funds which should govern not only the industrial investment funds, but also securities funds. Both open-ended and closed-ended funds should be available to the investors.

4.4 The securities law of 1998

Equity markets in China are products of reform and opening up. Although excessive speculation will result in significant losses for some investors, the equity market has played very positive roles in terms of turning idle money in society into productive capital, adjusting the industrial structure and offering investment opportunities for people. China now has two stock exchanges, one in Shenzhen and the other in Shanghai, with a total market capitalisation of two

trillion yuan (US$240 billion), 38 million accounts and a daily transaction volume of ten billion yuan (US$1.2 billion). Although China's securities market has existed for a long time, it is still gripped by many problems such as high potential risks and a chaotic market order. Before the Securities Law was passed on December 29, 1998, its draft had been examined by the Standing Committee of NPC four times. The first Securities Law is to take effect on July 1,1999. The law establishes principles for securities and bonds issuance and transaction in the manner of openness, justice and fairness. It also lays out legal procedures for stock issuance and listings on the market. It is expected that the Securities Law will significantly standardise securities markets which are still disordered, and guard against financial risks while protecting the legal rights of investors.

The debate during the process of legislation concentrated mainly on the question of futures. There should be futures trading in securities according to international practice, but some people believe that the stock markets in China are under-developed for futures, which are too speculative. After seriously studying the lessons from the Asian financial crisis and the global financial turmoil, the legislator believes that China does not have the conditions for allowing futures trading in securities.

The Securities Law forbids the banking sector to participate in the trading of stocks. The reason is that banks possess big amounts of funds while individual investors only have limited capital. If banks were to participate in the stock markets, this would mean unfair competition. For hedge funds can mobilise great amounts of capital from banks in a very short time so as to attack a certain market. To prevent this situation, there will be unequivocal stipulations in the law that the operations of the banking and securities sectors shall be separated and banks shall not participate in dealing in stocks.

4.5 Macro-economic control legislation

To set up a healthy macro-economic control system, promoting a balanced allocation of resources is an important aspect of economic reform. To accelerate the reform, the NPC has passed a series of laws on such issues as pricing, auditing, accounting, statistics and metrology. The division of central and local taxes represents a significant step forward in reforming China's fiscal mechanisms. Backup laws and regulations have been mapped out on supervising tax collection. The Budget Law has helped strengthen government administration and macro-economic control measures to guarantee sound economic development. In this regard, China will need to adopt public procurement law, fixed assent investment law, etc.

Most macro-economic control legislation pays enough attention to the function of the market. For instance, the Price Law, which went into effect on May 1, 1998, provides a legal benchmark on how to regulate pricing behaviour in the market. Both business people and price administrators are clear about how far they can go in price-setting and price management. Even though government intervention is necessary, so that a very small proportion of prices will be

fixed or guided by the government, the prices of the vast majority of goods and services will be set by producers themselves. At present, nearly 95 percent of commodities in China's domestic market are being priced through market competition.

4.6 Competition law

Market competition can contribute to the healthy growth of a market economy and help optimise resource utilisation, but only when conducted in an orderly manner and adhering to the law. To promote the market economy and guarantee fair competition, the Anti-Unfair Competition Law was put into effect on January 1, 1994. This law has played an important role in forming and safeguarding a unified and orderly market economy. However, there are some loopholes in the law. Although the Anti-Unfair Competition Law lists many kinds of unethical competition, such as trademark piracy, the illegal transfer of commercial secrets and price cartels, it is difficult for law enforcement departments to judge whether certain forms of competition are unethical or not. Thus, this law is not powerful enough to settle rampant and newly emerged deceitful competition. To keep up with the rapid development of the market economy, it is necessary to revise the Anti-Unfair Competition Law.

In practice, monopoly has seriously hindered the normal operation of market competition. The current monopoly in China usually takes two forms: administrative monopoly motivated by administrative power, which is unique to China, and economic monopoly motivated by economic power. Strong administrative monopolies, which were inherited from a planned economy, need to be broken up. Legal measures should also be put in place to prevent economic monopolies, even though they are not particularly prevalent in China at present. To create a fairer and more rational market competition mechanism, to boost technical innovation and to lay a sound foundation for the mushrooming of small and medium-sized firms, it is urgent to draft anti-monopoly law. The drafting of an anti-monopoly law has been listed in the 1998-2003 legislative plan of the Standing Committee of the Ninth NPC. The new anti-monopoly law and the Anti-Unfair Competition Law will constitute the two main pillars of a complete legislative framework on market competition. In the future, the law on protecting commercial secrets also ought to be adopted.

4.7 Consumer law

To provide a solid legal basis for consumers to defend their own interests, China passed the Law on the Protection of Consumers' Rights and Interests on 31st October 1993, and it was put into implementation on January 1, 1994.

Consumers enjoy nine aspects of rights, including the right to personal safety and safety in buying or using commodities or in receiving services, the right to correct information on the commodities they buy or use or on the services they receive, the right to choose their own

commodities or services, the right to fair trade, the right to receive compensation for personal and property damages incurred as a result of the purchase and use of commodities or receipt of service, the right to form social groups to safeguard their legitimate rights and interests, the right to obtain knowledge related to consumption and to the protection of their rights and interests, the right to demand respect of their personal dignity and national customs and habits, and the right to exercise supervision over commodities and service, and over the work of protecting their rights and interests. Additionally, under Article 49 of this law, business operators found to have committed fraud in providing goods or services shall, as demanded, compensate the consumer with a sum doubling what has been paid for such commodities or services.

Chinese consumer legislation has the highest level of public awareness in the country. It has been warmly welcomed since its implementation. Over the past five years, more and more consumers have become aware of their own rights and resorted to the law to solve disputes. In the event of disputes with producers regarding their rights and interests, consumers may pursue the following avenues in settling the disputes: (i) Holding reconciliation talks with the producers; (ii) Requesting consumers' associations to help in mediation; (iii) Filing petitions with relevant administrative departments; (4) Applying to arbitration bodies for arbitration proceedings pursuant to relevant agreements reached with the producers; and (5) Instituting legal proceedings in people's courts.

Official statistics indicate that between 1994 and the third quarter of last year, commercial and industrial officials across the country had handled 2.7 million complaints from consumers and recovered 1.8 billion yuan (US$217 million) in compensation for them. So far, the bureau had resolved 57,000 cases involving infringements of the rights and interests of consumers. Every consumer has easy access to service centres which collect complaints and help bring about prompt solutions to disputes. To step up the protection of consumers' rights and enforcement of the law, the State Administration of Industry and Commerce set up a Consumers' Rights and Interests Protection Division in 1998. This division will handle cases of serious infringement of consumers' rights and interests, and cases of fake products, as well as drawing up regulations.

The China Consumers Association (CCA), an NGO, has played very effective roles in the protection of consumers. In 1998, CCA resolved 96.7 percent of all complaints received from some five million consumers, and retrieved 506 million yuan (US$61 million) of financial losses for consumers and helped those harmed by fraud in sales receive indemnity of five million yuan (US$602,410)., up 6.8 percent from 1997. Of these cases, 67.3 percent were about product quality of farm supplies, the service sector and housing. Complaints about farm supplies, such as feed, seeds and chemical fertiliser, witnessed an increase of 30 percent in 1998, several times the increase in complaints about other products, which averaged 6.8 percent. In the service sector, consumers were most unsatisfied with services provided by restaurants, beauty salons, intermediary agencies, post and telecommunications bureau and indoor-decoration firms. Complaints over construction quality and property management increased by some 50 percent in

1998, and could threaten to diminish consumers' enthusiasm to buy their own houses. Cases involving personal injury and financial losses climbed by 16.7 percent to 1,516 over 1997, in which 1,214 people were injured, 70 disabled and 33 killed while using consumer goods. Complaints from consumers who were badly treated or wrongly detained by department stores as shop lifters have increased. The number of complaints about medical services more than doubled in 1998 over the figures in 1997. The outdated laws and regulations concerning medical negligence were to blame for the slow settlement of such disputes.

The Law on the Protection of Consumers' Rights and Interests will help promote fair competition among enterprises and weed out the selling of fake and shoddy products, cheating in sales, and other forms of illegal business practice. However, consumers are still the underdogs in disputes, especially in those involving large firms. It is necessary to introduce the small claim court of justice and special consumer disputes arbitration body to accelerate the resolution of small claims consumer disputes. Another very controversial topic in China is the scope and calculation of non-pecuniary compensation to the injured consumers by the businessmen.

4.8 Labour law and the protection of labour rights

4.8.1 Introductory remarks

China attaches great importance to the protection of labour rights. In addition to the labour rights listed by the Constitution including the right to work(Article 42), the right to rest (Article 43) and other labour rights, the Labour Law of 1994 codifies many of the general principles of labour reform, setting out provisions on promotion of employment, labour contracts and collective contracts, working hours, wages, vocational safety and health, special protection for female and juvenile workers, vocational training, social insurance and welfare, dispute resolution, supervision and inspection and legal responsibility. This Law entered into force on January 1, 1995. In addition to this Law, China has enacted a large amount of labour legislation at both of national level and regional level.

China has been a member State of the International Labor Organization (ILO) since 1983, and is a signatory to a number of ILO conventions. As of 28 August 1997, China has ratified 18 pieces of ILO Conventions. These ratified Conventions include No.7, No.11, No.14, No.15, No.16, No.19, No.22, No.23, No.26, No.27, No.32, No.45 No.59, No.80, No.100, No.144, No.159, and No.170. Labour rights are an important part of social rights recognised by CESCR. The list of labour rights prescribed by the CESCR is basically the same as that in Chinese Constitution and legislation.

Today, China is undergoing a historic economic transformation from a traditional centralised, planned economy to a modern market economy. Responding to economic reform, the industrial relationships will inevitably experience fundamental changes, and labour

legislation and the protection of labour rights will undoubtedly need to be brought into the process of reform. Only when the labour rights are properly protected can the market economy machinery be successfully and irreversibly established. In this regard, one point is clear and important: labour legislation reform and enforcement must serve the goal of establishing industrial democracy.

4.8.2 The right to work

Both the right to work and state responsibility for productive employment have been confirmed in Article 6 of CESCR. This right is recognised by Article 42 of the Constitution. The right to work implies the obligation on the part of governments to promote employment. Chapter 2 of the Labor Law obligates the State to create conditions for employment and increase opportunities for employment by means of the promotion of economic and social development. China has enacted some special legislation on the employment of the disabled, the personnel of national minorities, and demobilised army men. Such special stipulations shall prevail when they are in conflict with the common stipulations in the Labor Law.

Although the labour and employment situation in China is basically stable, more and more laid-off workers will come out due to the restructuring of state enterprises. While lay-off is generally conducive to economic development, conforming to the long-term interests of the working class, the right to work as a human right shall be respected. Namely, there must be another „rice bowl“ after laid-off workers have lost their „iron rice bowl“. According to a survey conducted by the State Commission for Economic Restructuring, the general attitude is that lay-off is understandable, but hard to accept. The survey found that 63.5 percent of the interviewed think it is understandable from the State economic growth point of view, but 52.5 percent find it unacceptable from the individual and family viewpoint. Social stability is crucial to the current reform of China. Discontent could be the root of social chaos and deserves more attention, according to the survey. [8]Therefore, Jiang Zemin promised in his report to the 15th Party Congress that the government would take active measures and rely on all quarters of society to show concern for laid-off workers, help them with their welfare, organise job training, open up new avenues of employment and promote the Re-employment Project. It is a top agenda for governments to try harder to find employment for laid-off workers and guarantee their basic living standards in the coming years.

[8] Lu Jingxian, „Survey generally positive“, 03/05/1998, China Daily.

It is the obligation of the government to help laid-off workers find new jobs. To ease the pressure on laid-off workers from State enterprises, the Re-employment Project aiming at helping jobless people find work through training has been launched nation-wide, and a series of preferential policies have been implemented by the government for laid-off workers having started their own businesses since 1995. In the two years before 1997, five million people took part in the project, and half of them found jobs. The central government is to set up a special fund to promote re-employment. Some provinces, such as Hubei, Zhejiang and Inner Mongolia, have already effectively set up such funds. In early 1997, the Labor Ministry issued a directive ordering provincial officials to create new jobs for more than half of the local jobless workers. The rules apply to China's pilot cities chosen for implementing bankruptcies. Under State guidance, these cities urge debt-laden State enterprises to declare bankruptcy. While ending loss-making operations, this restructuring does exact a toll. The government has expanded the number of these key pilot cities to 111 from 58 in 1997. The four million jobless and laid-off workers will gain new employment opportunities through a re-employment project. In the future, the governments should play a more active role in designing macro-economic policy, promoting job opportunities and helping workers adjust to the market economy, which includes training schemes.

In addition to the governments, NGOs can play an active role in the Re-employment Project. Despite the effective Re-employment Project, there are still some difficulties, due partly to the attitudes of many laid-off workers. It is urgent for redundant workers to update their out-of date attitudes towards employment and accept new concepts in re-employment. The laid-off population has urged the establishment of a mature, open, fair and free labour market in the long run. In fact, an active labour market is taking shape in China. It is a wise alternative to encourage tertiary industries, especially the labour-intensive service trade, to absorb some of the surplus labour force. The private sector is another important channel for re-employing labour force.

Promotion of re-employment for the laid-off worker is important. However, workers do not need to lose their *„rice bowls“* in each and every event of transfer of state-owned undertakings. To reasonably protect the employment rights enjoyed by employees in the event of transfer of state-owned undertakings, it seems necessary to challenge the traditional doctrine and introduce the doctrine of acquired rights contained in European Directive 77\187\EEC in Chinese legislation. Under traditional contract law doctrine, freedom of employment contract should be respected, but the employment contract is coloured with strong personal characteristics, and there is no obligation for the transferee to accept the transferor's employment contract without the transferee's consent. Under the doctrine of acquired rights, the employee's right to be free from dismissal and to be informed and consulted should be respected. Although the flexibility of the doctrine's application is necessary to facilitate the transfer of the assets of insolvent businesses, false or unnecessary insolvency proceedings as a means to avoid the transfer rule and undermine the protection of the employees should be prevented and remedied. It is also necessary to distinguish the transfer of an economic entity and the transfer of a mere activity when the phrase *„transfer of an undertaking“* is defined in legislation.

4.8.3 The right to wage payment

The right to obtain remuneration for labour is listed as one of the essential labour rights by the Labor Law (Article 3). Chapter 5 of this Law lays down some solid grounds concerning the right to wage payment. First, the distribution of wages shall follow the principle of distribution according to work and equal pay for equal work. Second, the employer shall independently determine its form of wage distribution and wage level for its own unit according to law and based on the characteristics of its production and business and economic results. This is an important private autonomy enjoyed by the employer. Third, the level of wages shall be gradually raised on the basis of economic development, while the State shall exercise macro-regulations and control over the total wages. To ensure that the workers get their legitimate payment on time and in full, the Labor Ministry issued the Provisional Regulations on Wage Payment on 6 October 1994, and a set of additional regulations thereafter.

In some enterprises, the provision of subsidised services, such as housing and medical care, is very widespread, and compensation beyond the basic wage constitutes a considerable portion of an enterprise's labour expenses. In reality, the income tax laws often make some employers feel it is desirable to provide greater subsidies and services rather than higher wage rates.

To ensure the basic needs of the worker and his family, to help improve workers' performance and to promote fair competition between enterprises, the Labour Ministry issued the Regulations concerning minimum wages in enterprises on 24 November 1993, which clearly stipulate the fixing and adjusting of the minimum standards of wages, the payment of the wages, and the legal liabilities for those who violate the regulations. On 8 October 1994, the Labour Ministry promulgated a notice on implementing the system to ensure minimum wages. To date, all the provinces, autonomous regions, and municipalities except Tibet have issued and implemented the lowest standards for wages in their own areas, thus establishing, by and large, a minimum-wage guarantee system that complies with China's actual conditions.[9] However, due to the restrictions imposed by the current economic development level, in poorer, rural areas, minimum wage standards are relatively moderate, and are slightly higher than average living expenditures. Of course, minimum wage standards should be sufficient to provide a basic standard of living for a worker and his family members. At least for the time being, minimum wage figures do not include free or heavily subsidised benefits that some state-sector employers may provide in kind, such as housing, medical care, and education. In the long run, free or heavily subsidised benefits should be reformed according to the market economy and universality requirements.

[9] Progress in China's Human Rights Cause in 1996, Information Office of the State Council of the People's Republic of China, March 1997, Beijing.

4.8.4 The right to take rest, have holidays and leave

Chinese Labor Law mandates a working hour system under which workers shall work for no more than eight hours a day and/or more than 44 hours a week on average. In case of piecework employees, the employer shall rationally fix quotas of work and standards on piecework remuneration in accordance with the working hour system (Article 37). And again, China reduced the national standard workweek in May 1995 from 44 hours to 40 hours. Workers are entitled to at least one day off in a week or a 24-hour rest period weekly (Article 38). Where an enterprise cannot follow these stipulations, it may adopt other rules on working hours and rest with the approval of the labour authority (Article 39). Working hours may not be extended in violation of the legal provisions.

As far as the workers' right to have holidays is concerned, the employer has the obligation to arrange holidays for workers in accordance with the law during the following festivals: (1) the New Year's Day; (2) the Spring Festival; (3) the International Labour Day; (4) the National Day; and (5) other holidays stipulated by laws and regulations (Article 40). And the State shall practise a system of annual vacation with pay. Therefore, workers who have kept working for one year and more shall be entitled to annual vacation with pay (Article 45). Yet, the concrete measures remain to be formulated by the State Council.

To deal with the threat of extending working hours motivated by profit maximisation, Chinese Labor Law has very detailed rules concerning the due cause and process for extending working hours, and the corresponding wage standards for extended working hours. Firstly, Labor Law does not allow overtime work in excess of three hours a day or 36 hours a month (Article 41). Secondly, a scale of remuneration is guaranteed for overtime work that is higher than the level for normal working hours under various circumstances.

Enforcement of regulations regarding overtime work is generally satisfactory, but it varies according to region and type of enterprise. Workers are forced to work long overtime hours at some small-scale foreign investment enterprises and private enterprises, particularly in southern China and the SEZ's.

4.8.5 The right to obtain protection of occupational safety and health

Chinese workers also enjoy the right to obtain protection of occupational safety and health according to Article 3 and Chapter 6 of Labor Law. To protect workers' safety and health, China enacted the Mine Safety Law on 7 November 1992, and issued the regulations regarding its implementation. The Regulations Regarding Management of Hidden Causes for Accidents was issued on 22 August 1995. The Labor Ministry also issued some regulations to promote safety in production, including the Regulation for Supervising Industrial Safety in Mines, which stressed the importance of measures to remove the danger of industrial accidents and designed a system to investigate reasons for accidents.

Workers have the right to refuse to operate if management command the operation in violation of rules and regulations or force workers to run risks in operation; workers have the right to criticise, report or file charges against the acts endangering the safety of their life and health (Article 56).The Trade Union Law explicitly recognises the right of unions to „suggest that staff and workers withdraw from sites of danger“ and participate in accident investigations (Article 24). In my interpretation, to make the safety of workers respected by management, workers should not risk losing their jobs having removed themselves from such dangerous situations.

Labor Law imposes very strict obligations on the part of the employer. It also requires that workers observe some obligations. For instance, the workers to be engaged in specialised operations must receive specialised training and acquire qualifications for such special operations (Article 55).

China has increased funding for the improvement of working conditions. The enforcement of occupational safety and health regulations varies in terms of different areas and enterprises. While safety standards are generally much higher in state-owned enterprises, it is especially urgent to substantially improve the supervision of small-scale private, township and village enterprises, where many accidents occur in practice. Shortage of financial resources to maintain equipment, lack of concern by management, and a traditionally poor understanding of safety issues by workers have contributed to accidents resulting in injuries and deaths that happened in the process of their work and cases of occupational diseases. Some rural enterprises fail to meet national dust and poison standards. Some factories using harmful products, such as asbestos, fail not only to protect their workers against the ill effects of such products, but also fail to inform them about the potential hazards. Thus, there is still a long way to go in enforcement of the law.

4.8.6 The right to develop job skills and to attend job training

Chinese workers enjoy the right to receive training in vocational skills according to Article 3 and Chapter 8 of Labor Law. It is a very significant right for today’s Chinese workers. In reality, the shortage of skills of certain professions abases the competitive edge of many laid-off workers in the labour market to a large degree. Only ten percent of China’s 300 million-strong industrial employees have reportedly attended polytechnic schools, while the rest of them have accepted, at most, high-school education. Most redundant workers are poorly educated and have no more than one single professional skill, which confines them to the same line of work, and at worst makes them doomed victims in the enterprises’ streamlining effort to restore efficiency.

Both the government agencies and employers have obligations to promote vocational training under Article 68 of Labor Law. The Labor Ministry and the State Economic and Trade Commission have further issued a decree making technical training a legal obligation of employers. Some weaknesses with the current vocational training system should be improved by reform. For instance, school-based vocational training systems are always unable to respond quickly to the changing market demand for skills, while skill training organised by local labour authorities or employers seems to be encouraged, which sounds more realistic in enriching laid-off workers' expertise.

4.8.7 Labour contract and the right to bargain collectively

Labour is not a commodity. The labour contract, which is quite different from common civil contacts, is very essential to ensuring workers' rights. Article 16 of the Labor Law mandates that a labour contract shall be concluded where a labour relationship is to be established. The principles to be followed in concluding and modifying a labour contract are equality, free will and unanimity through consultation. Of course, no labour contracts shall run counter to legislation, especially the mandatory provisions concerning workers' rights. Considerate protections are available to workers concerning the term of a labour contract, and the termination and revoking of a labour contract by the employers.

Article 33 of the Labor Law permits workers in all types of enterprises to bargain collectively. This provision has superseded the 1988 legislation that only allowed collective bargaining by workers in private enterprises. Therefore, workers and employers at all types of enterprises are required to sign individual as well as collective contracts. The issues covered by collective contracts mainly include labour remuneration, working hours, rest and vacations, occupational safety and health, and insurance and welfare.

The parties to collective contracts are the staff and workers of an enterprise as one party, and the enterprise as the other party. However, a collective contract shall be concluded by the trade union on behalf of the staff and workers with the enterprise; in enterprises where the trade union has not yet been set up, such a contract shall be concluded by the representatives elected by the staff and workers with the enterprise.

Under Article 35 of the Labor Law, legally concluded collective contracts shall have binding force to both the enterprise and all of its workers. The standards on working conditions and labour payments agreed upon in labour contracts concluded between individual workers and the enterprise shall not be lower than those as stipulated in collective contracts. In other words, individual contracts must be drawn up in line with the terms of the collective contract. No clause of any individual labour contract between an employee and an employer is allowed to contravene the collective agreement.

In China, the national employers' organisation, the All-China Confederation of Industry and Business (ACCIB), mainly serves as a self-disciplining body for private sector employers and a bridge between the government and the private sector employers. It has not undertaken the job of negotiating with the workers' organisation, ACFTU, yet. In the long run, it seems feasible for ACCIB to be reformed as competent enough to conduct regular collective bargaining with ACFTU. Only in this way could the mechanism of power and interest balance between the trade union and the employer confederation be established.

Since it is difficult to draw clear distinctions between labour and capital in the state-owned enterprise sector due to traditional ideology and practical difficulties, the concept of collective bargaining is a relatively new one. Thus, collective bargaining is still experimented in many state-owned enterprises, while in foreign and private invested enterprises where capital interests are clearly delineated, collective bargaining can be implemented relatively easily.

4.8.8 The right to organise trade unions

The principle of freedom of association is recognised as a means of improving conditions of labour and of establishing peace by the Preamble to the Constitution of the International Labor Organization. More recently, the Declaration of Philadelphia has reaffirmed that freedom of association is essential to sustained progress. As a further step toward translating the abstract principles into reality, Article 8 of CESCR imposes the legal obligation on the part of the State Parties to ensure the right of everyone to organise trade unions.

Although China has not yet signed the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize, the freedom of association and the right to organise are guaranteed by the Constitution and legislation. Article 35 of the 1982 Constitution provides for the freedom of association. To guarantee the significant position of trade unions in political, economic and social life, and to recognise the rights and obligations of trade unions, China enacted Trade Union Law on 3 April 1992. In addition to the Trade Union Law, Article 7 of the Labour Law also recognises that workers shall have the right to participate in and organise trade unions in accordance with the law. Trade unions shall represent and safeguard the legitimate rights and interests of workers, and independently conduct their activities.

Under Trade Union Law, the workers may decide whether or not to join the union in their enterprise. Workers may choose for their own reasons not to join trade unions. And the workers who have not joined unions are not be discriminated. However, it is illegal for the enterprises to combat the workers' right to participate in and organise trade unions. Anti-union discrimination is prohibited by legislation, and union representatives may not be transferred or terminated by the management during their term of office.

Trade Union Law requires that a higher level trade union organisation be in charge of leading and directing the lower level trade union organisations (Article 11) and the establishment of unions at any level be submitted to a higher level trade union organisation for approval (Article 13). The All-China Federation of Trade Unions (ACFTU) was established as the highest level organisation (Article 12).Therefore, the top organisation and the bottom organisations have formed a pyramid structure of trade union.

Unions are assigned various functions by Chinese legislation in safeguarding workers' interests, including helping to implement the collective contracting and equal consultation system, acting as mediators or go-betweens with management in cases of work stoppages or slowdowns, backing workers in the fight against some enterprises that violate employees' rights, and dispensing social welfare funds. Of course, unions are also required to help members establish stable relations with employers, promoting the development of their enterprises. But the primary task of unions is to maintain labour rights.

Workers in collective and state-owned enterprises have historically been highly unionised. However, the history of unionisation in the private sectors is not very long. In fact, due to diversification in types of enterprise over the last decade of reform, there are still many non-unionised workers especially in collectives, township and village enterprises, private and individual enterprises, and foreign investment enterprises. Where there are trade unions in such enterprises, their influence is not as strong as their counterparts in state-owned enterprises. And some unionised foreign businesses have had somewhat pragmatic relations with the trade unions. Therefore, ACFTU has been continuing to supervise and urge the establishment of unions in overseas-funded and other non-state enterprises. After several years of joint efforts made by ACFTU, workers and governmental agencies, unionisation is making great progress in foreign-funded and private domestic enterprises in China.

To achieve the goals of the Trade Union Law, more efforts are expected to enforce it thoroughly. The trade unions should raise their working efficiency, improve the quality and quantity of their personnel, and explore new democratic management methods to supervise managers and protect workers' rights. In some places, there are not enough union officials to handle the increasing amount of work caused by the rapid growth of enterprises. Some unions have been headed by top managers, deputy managers, department managers, or managerial cadres. Due to the problem with divided loyalty, predominant managerial presence in the union structure seems unable to counteract the emerging offensive of organised employers. Consequently, wildcat strikes initiated at grass-roots level will possibly increase in number and violence. To avoid this sort of negative consequence, unions should be more faithful to the employees they represent, and the union officials should be as independent of management as as possible. Of course, it is also essential for enterprises and their management including directors and supervisors to support and co-operate closely with trade unions.

4.8.9 The academic exploration on the possibility of legalising the right to strike

Article 8(d) of CESCR requires the State Parties to respect the right to strike. The 1982 Constitution is silent on this right, which had been included in the 1975 Constitution (Article 28) and 1978 Constitution (Article 45). Neither is the right to strike neither part of the Labor Law. Is it possible to legalise the workers' right to strike?

Perhaps the attitude of the 1982 Constitution can partly be explained as follows. Firstly, the basis of the socialist economic system of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of „from each according to his ability, to each according to his work."(Article 6). And all working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country (Article 42). Therefore, the nature of labour has been changed, the socialist political system has eradicated contradictions between the proletariat and enterprise owners, and the industrial conflicts between the employers and the employees existing in the market economy have been eradicated. The legislator might consider it impossible and meaningless for the workers, namely, the owners or the masters of the enterprises, to go on strike which would finally hurt the interests of workers themselves as well as social productivity.

Secondly, the drafting of the 1982 Constitution was influenced more deeply by the 1954 Constitution than by the 1975 Constitution and the 1978 Constitution, because the former was the first Constitution of New China, and was considered more scientific and democratic than the latter two which were fundamentally affected by the disastrous ideas of the Cultural Revolution from 1966 to 1976. Thus the six freedoms listed in Article 35 of the 1982 Constitution are identical with stipulations in Article 87 of the 1954 Constitution, which did not include the right to strike. On 26 November 1982, Mr. Pengzhen, the then deputy director of the Commission on Constitution Amendment, reported to the fifth session of National People's Congress: „The 1954 Constitution was a very good Constitution. This Constitution (the 1982 Constitution) has inherited and developed the principles stipulated in the 1954 Constitution." However, he did not mention the 1975 Constitution and the 1978 Constitution. This is an illustration of the historical connections between the 1954 Constitution and the 1982 Constitution.

However, strikes and work stoppages have occurred in several locations in recent years. Strikes have usually happened in the overseas-funded and other non-state enterprises that abuse workers' rights very seriously. Workers have mainly used strikes and work stoppages to protest at unpaid back wages and excessive overtime hours.

The potential conflict of interests between the shareholders (including management) and the employees exists in almost every market economy society. The non-public sector is an important component of the Chinese socialist market economy. Therefore, industrial

relationships are not confined to the public sector anymore. In fact, both public and private enterprises have gained more and more economic power and private autonomy during the economic reform. To strike a balance between employers and employees, it seems feasible to recognise the workers' right to strike. On one hand, this right to strike shall be respected; on the other hand, the possibility of misusing it shall be prevented or remedied so as to protect the public interest and social productivity. It should be realised that strike is an indispensable and effective legal means to protect the rights of the working class. Justified strike is a normal economic and cultural phenomenon, rather than being an ugly or antisocial issue in the market economy.

4.8.10 Supervision and inspection of labour rights violations

Despite the relatively good laws, some violations of labour rights have occurred in the past years. Some workers were forced to work overtime, some did not get overtime wages. Some had to work in bad conditions without any insurance for accidents during work, and some were the victims of body checks. Some were tortured if they make a mistake, and some didn't have the right to enjoy maternity leave. A number did not even have labour contracts. Some were threatened with dismissal, and others were dismissed without notice, for no reason, and without even being paid wages still due. Most violations were found in overseas-funded, privately owned or township enterprises, which generally hire plenty of cheap workers, while labour rights are usually better protected in state-owned companies. Of course, even among the private sector enterprises, malicious employers compose only make up a very small part.

To guarantee the implementation of various laws and regulations that protect the labour rights, Chapter 11 of the Labor Law authorises local governments and trade unions to supervise and inspect the implementation of labour rights. NGOs also are encouraged to expose and bring to court any acts in violation of labour rights.

However, the rapid growth of China's non-state sector has outpaced the evolution of government regulatory structures and resulted in inadequate labour inspection and enforcement regimes in some areas. More input of personnel and financial resources is expected. Furthermore, a small number of local authorities have paid too much attention to maintaining a friendly investment climate. They are not tough enough in dealing with the accused employers when their warnings to companies are neglected. All of these issues should be overcome in the future.

4.8.11 Employee participation schemes

In addition to the labour rights recognised by CESCR and the ILO instruments as basic human rights, employee participation schemes are also being practised in China. Although they are not required by CESCR and the ILO instruments, their implementation could greatly help to safeguard the labour rights and improve the general well-being of the employees. Employee participation schemes could be divided into managerial participation and financial participation.

China has a long tradition of encouraging workers' involvement in the enterprise decision making process. In 1960, Chairman Mao Zedong encouraged enterprises to implement the famous *„Angang Constitution"*, which emphasised workers' participation in the enterprise governance structure. The 15th Chinese Communist Party Congress declared again that China should uphold and improve the democratic management system of enterprises and institutions with workers' conferences as its basic form so that workers could participate in reform and management and protect their legitimate rights and interests. Even when the state-enterprises are restructured, the principle of relying on the working class must be adhered to wholeheartedly.

Under the above mentioned philosophy, many managerial participation systems are provided for by the legislation. For instance, in addition to unions, the assembly of staff and workers or their congress is a very important form for workers to take part in democratic management or consult with the employers on an equal footing about the protection of labour rights (Article 8 of Labor Law). Workers' congresses are held periodically in most collective and state-owned enterprises. They have the authority to remove incompetent managers and approve major decisions affecting enterprises, notably wage and bonus distribution systems.

Chinese Corporation Law has also introduced the employee representative system on the corporate governing bodies, aiming at giving employees a say in the corporate decision making process. This is an important aspect of industrial democracy which has not been stipulated in the Labor Law. However, there is a lot to improve in terms of employee representation on the corporate governing bodies. For instance, only the limited liability corporations and wholly state-owned corporations are required to have the employee representatives on the board of directors, while the publicly held corporations are required to have the employee representatives on the board of supervisors, and the percentage of the employee representatives on the board of supervisors is fixed by the corporate constitution instead of the legislation. Thus, it is important to strengthen employees' right to participate in corporate governance bodies especially in the publicly held corporations. Workers' participation has a history of several decades in some European countries, and models of participation generally correspond to different corporate structures, such as one-tier systems and two-tier systems. Yet, even today, this is a controversial issue throughout the world. The worker's right to be informed and consulted is also quite essential. The European works councils may also offer some useful experience to Chinese legislation.

As a form of financial participation, the employee share ownership scheme serves the same purpose of industrial democracy as decision-making participation. Since it is an incentive measure open to every employee in certain corporations, the employees can show considerable enthusiasm and interest in it. The system of employee share ownership has been tried out in some corporations in China for several years. In addition to encouraging employee share ownership, other employee financial participation schemes could be promoted. For instance, a large number of different forms of joint stock co-operative ventures have appeared in the urban and rural areas of China. They are new phenomena arising in the process of reform, and have the advantages of both corporations and co-operatives. In these enterprises, each and every member has the double status of employee and shareholder. This is considered one of the major strategies for reforming the small-sized state-enterprises. Of course, the structure of the employee share ownership programme and the status of the employees holding their corporation shares need further examination by the legislator. In the future, the collective economy that features, in the main, the association of workers in labour and their association in capital will be specially advocated and encouraged by the Chinese government.

Corporate social responsibility toward the workers' interest is an important part of modern industrial democracy. Employees' interests play a very important role in the range of corporate ends and purposes.

4.9 Intellectual Property Law

China started to draw up laws and regulations on intellectual property rights in the late 1970s. China has made substantial progress in ensuring its success as the protector of intellectual property rights, even though it only introduced the world standard for IP 20 years ago. Since 1982, the State has introduced trademark, patent and copyright laws as well as regulations for the protection of computer software, and instituted a law against unfair competition. The Trademark Law came into effect on March 1, 1983, and was first revised in 1993. The Patent Law came into effect on April 1, 1985, and was first revised in 1992. The Copyright Law came into effect on June 1, 1991. The revised Criminal Law took effect in October 1997 and allows for a three to seven-year prison sentence for offenders. The competent authority of intellectual property rights also drew up some administrative rules in this regard. For instance, the State Copyright Administration (SCA) issued the Implementation Regulations on the Administrative Punishment of Copyright Violators in early 1997, which give the State a larger role in protecting copyright. China has joined many international conventions and organisations such as the World Intellectual Property Organization, the Paris Union, the Patent Co-operation Treaty and the Berne Convention for the Protection of Literary and Artistic Works. Intellectual property rights protection in China has basically reached the standards stipulated for developing countries by the Trade-Related Intellectual Property Negotiations.

On April 1, 1998, the China Patent Office was renamed the State Intellectual Property Office (SIPO). It is a sub-ministerial department directly attached to the State Council. The new office will take on greater responsibility for improving China's trademark, copyright and patent application and management, and other aspects of intellectual property rights. It will also co-ordinate regional intellectual property rights departments in intensifying the enforcement of laws and regulations. Trademark and copyright-related affairs are managed respectively by the State Administration of Industry and Commerce, and the State Press and Publication Administration. SIPO will work with these two departments to improve intellectual property rights protection nation-wide. The office will also improve services to enterprises and research institutions, to help them with patenting their technology and products. Additionally, the SIPO is empowered with the mandate to co-ordinate IP issues, such as copyright, inventions, trademarks and patents, with other countries.

Currently there are 580 patent agencies, with more than 4,800 authorised agents in China. In tandem with the new legislation, domestic enterprises have also shown greater awareness towards IP protection. According to statistics released by SIPO, there has been a 25 percent yearly growth of patent applications. Most of these applications have come from a number of large, efficient and profitable industrial enterprises. Coastal areas and economically-developed regions have also taken the lead in these matters.

Meanwhile, China has ensured the success of IP by strictly enforcing its laws. Over the last six years, courts nation-wide have handled 22,860 IP disputes, reaching verdicts on 21,830. In accordance with Chinese law, and in agreement with international procedure, the courts have increased the legal protection of intellectual property rights for cases of plagiarism, illegal copying and forgery as well as for breaches of contract. In late 1998, the Supreme People's Court (SPC) made an interpretation to clearly defines the charges and punishment for illegal reproduction and fraudulent sales, which took effect on December 24, 1998. Hence, a nationwide campaign against pornographic audio and video products and pirated publications has been going on since late 1998. Many places known for trading illegal publications in Beijing have been raided, and more than 100,000 pirated VCDs have been seized. The Copyrights bureau's statistics indicate that since 1994, officials have seized more than 29 million copies of illegal publications and over 35 million pieces of illegal electronic publications and audio-visual products. Over the past five years, a total of 78 illegal VCD-manufacturing lines have been dismantled and more than 20 million VCDs smuggled into China have been confiscated. Moreover, the Supreme People's Court plans to set up a web site on the Internet, providing information about various court verdicts in IP cases.

China's Supreme People's Court, the higher people's courts and intermediate people's courts in 22 provinces and regions have set up special sections to handle the intellectual property cases fairly and in a highly professional way. Beijing is the first Chinese mainland city to have its own special intellectual property courts. It officially separated intellectual property courts from civil and criminal ones at its higher and intermediate people's court levels in August 1993.

During the last five years, the city has handled 1,374 intellectual property cases and finished 1,371, among which 335 were on patents, 534 on copyright, 50 on trademarks, 380 on technical contracts, and 56 on unfair competition. About 70 percent of these cases involve foreign parties.

Francois Curchod, deputy director-general of the World Intellectual Property Organization (WIPO), has declared that China has made „tremendous progress“ in protecting intellectual property rights, and has promoted greater awareness of intellectual property. Of course, the Patent Law, the Trademark Law and the Copyright Law need to be further revised to meet the international protection standards. For example, after China joined the World Copyright Convention and the Berne Convention, legal protection facilitated the entry of works with foreign copyrights into Chinese market and opened up the door for international copyright trade. However, the protection of domestic copyright holders is far from complete. For instance, Article 43 of the Copyright Law stipulates that a radio or television station, in broadcasting published sound recordings for non-commercial purposes, need not obtain permission from, nor pay remuneration to, the copyright owners, the performers or the producers of the sound recording. The notation of „non-commercial“ is so general and obscure that some people may be able to take advantage of this ambiguous term to infringe other people’s copyright. Legal liability for piracy and copyright infringement need to be more clearly defined.

4.10 Financial law

The financial crisis suffered by many Asian countries shows that it is very crucial to re-examine the significance of the rule of law, and to devise the effective legal strategies to cope with the crisis. Many scholars in China have been aware that uncontrolled financial crisis may lead to economic crisis, political crisis or even social crisis. Although China has been fortunate enough to avoid the financial turmoil of the past year, and Chinese Currency, RMB, has not been devaluated, the financial rule of law is rather weak, and the accountancy of financial governance remains to be strengthened. Therefore, it is necessary to improve the financial laws so as to adopt legal strategies to cure and prevent financial crisis.

In the financial sector, the People's Bank of China has been identified through legislation as the central bank of China. At the same time, policy banks and commercial banks have been established. Given the fact that China's financial market is not up to standard at present, it is necessary to split authority over sectors. This practice would help to prevent risks spreading among the banking, securities and insurance sectors and fend off excessive speculation on the stock market. To achieve this end, it is imperative to ensure the division of authority among different sectors through legislation. The limits of authority for different kinds of financial organisations should be stipulated by law. Any acts against the rules should be punished. A regulatory mechanism needs to be set up to implement the division of power among different financial organisations. In late 1998, the China Insurance Regulatory Commission was established to oversee the insurance industry, which had previously been regulated by the People's Bank of China. Therefore, China has three financial watchdogs directly under the

central government, the China Insurance Regulatory Commission, the People's Bank of China and the China Securities Regulatory Commission. They carry out their own jobs while co-operating with one another. Such an arrangement facilitates the improvement of regulatory levels and the heightening of regulatory efficiency.

In August 1998, the central bank launched a sweeping reshuffle to give full play to its role in financial adjustment and as a financial regulator. Restructuring involved the abolition of all its provincial- and municipal-level branches and the setting up of nine regional branches in Tianjin, Shenyang, Shanghai, Nanjing, Jinan, Wuhan, Guangzhou, Chengdu and Xi'an. The new branches, which started operating at the beginning of this year, are expected to drive the wheels of regional economic development and protect the central bank from interference by local governments. As a result, the central bank will implement monetary policies and regulate banks more independently. The central bank should pay more attention to the use of the market for indirect control and carry out macro-control more effectively. Faced with a buyers' market, monetary policy in the future will continue to focus on expanding domestic demands including investment and consumption.

The private law reform measures for the purpose of risk control and spreading include, but are not confined to, the commercialisation and corporatisation of State-owned banks, the compulsory adoption of guarantee machinery in lending activities, legislation on the rescue scheme for the insolvent companies, the inherent legal problems with the debtor-creditor relationship of the indirect financial market and the possibility of encouraging direct capital market, including stock markets, investment funds, one-man companies and other private enterprises, the strategies against the bubble companies and irresponsible capital market intermediaries, like lawyers and accountants, the strengthening of the responsibilities of directors, managers and employees of banks and other financial institutions and the implications of corporate social responsibility for securing financial stability and health. The central bank should permit the lending rates of commercial banks to fluctuate in a wider range. For healthy and sustained economic development, the financial sector is also expected to accelerate the pace of its opening up in an enthusiastic and safe manner.

To standardise the financial market and monetary policy, and to fend off financial risks, financial legislation should be improved.

4.11 Guarantee Law

4.11.1 Introduction

In China, guarantee mechanisms were almost unknown in the highly centralised planned economy. Since China decided to adopt the socialist market economy in 1992, guarantee mechanisms have been increasingly introduced in commercial transactions. It is well-known that

secured transactions are safer than the unsecured ones for the interest of creditors. Under Article 36 of the Commercial Banks Law of 1995, when commercial banks grant a loan, the borrower should offer a guaranty. In practice, it is quite normal for the borrower to provide security or seek a third party to provide security when applying for a loan from a bank.

In China, secured transactions are regulated mainly by Chinese Guarantee Law, which was adopted by the Standing Committee of the Eighth National People's Congress (NPC) on June 30,1995, and has been in effect as of October 1, 1995. Although the General Principles of Civil Law does make some general provisions regarding the guarantee arrangement, such provisions are rather simple, and are even silent on the relevant legal machinery, such as the registration of mortgage and auction of guarantee property. To remedy the defects and loopholes of the General Principles of Civil Law, the Guarantee Law has come into being. One of its immediate purpose is to promote the accommodation of funds and the circulation of commodities, and to ensure the enforcement of creditor's rights. The negative economic phenomena of „triangle debts" that occurred several years ago put considerable pressure on the legislator to draft the Guarantee Law. [10] The indirect purpose is to contribute to the healthy development of the Chinese market economy. In establishing and fulfilling guarantee activities, the principles of equality, free will, fairness, honesty and credibility shall be followed. That means the traditional philosophy of private autonomy plays the major role in governing the secured loan activities. Under the Guarantee Law, a creditor may establish guarantee by means of suretyship, mortgage and pledge.

4.11.2 Suretyship

Suretyship means that a surety and a creditor agree that the surety shall perform the obligation or bear liability when the debtor fails to perform his obligation. Suretyship may take two forms. The first one is general suretyship, while the second one is suretyship of joint and several liability. If there is no agreement regarding the mode of suretyship, the second mode shall be applicable to the suretyship. In practice, the debtor is sometimes called the principal. He is supposed to assume primary liability for all obligations stipulated by the principal contract. The surety may be referred to as the guarantor. In this article, however, the notion of guarantor is a broader concept embracing surety, mortgagor and pledger. The creditor is sometimes called the beneficiary, because a suretyship contract is concluded or a bond is issued or provided in favour of the creditor.

[10] So-called „triangle debts" refers to a chain of defaulted debts by a sequence of corporations and banks.

The creditor with suretyship could enjoy the additional assurance of the suretyship obligations to ensure that his credit is satisfied. Therefore, suretyship offers double security means for the creditor both from his surety and debtor. However, like suretyship in many other countries, suretyship in China has an accessory nature, which means that the creation, transfer and termination of suretyship contract or bond is closely connected to that of principal contract, and the strength and scope of suretyship liability is subject to the principal debt under suretyship. For instance, the surety will only be obliged to meet a claim if the borrower defaults. Moreover, the amount of indemnity to be satisfied by the surety shall not exceed that which the borrower would have to pay towards the creditor.

Another point should be mentioned here. The suretyship formulated by the Guarantee Law, as a traditional one, is quite different from the so-called Demand Guarantee or Guarantee on First Demand governed by the ICC Uniform Rules for Demand Guarantees (URDG) of 1991, because Chinese suretyship requires the default of the principal in order for the creditor to claim against the surety.

Generally speaking, any individuals, legal persons, or other organisations capable of assuming debts may act as a surety for a loan. However, under Chinese Guarantee Law, several exceptions exist. First, no state organ may act as a suretyship, except in the case of securing loans, for onlending from a foreign government or an international economic organisation as is approved by the State Council. The rationale here is to avoid the chaos that could possibly ensue and negative effects on the proper functioning of the state organs in the event of discharging surety obligations from the limited financial budget allocated by the State. Second, institutions such as schools, kindergartens, hospitals and other social welfare organisations may not act as a surety for a loan. Third, branches and functioning departments of an enterprise as a legal person may not act as a surety for a loan either.

In practice, it is even more difficult to seek a surety for a transaction than to seek a target bank to extend loan. For this very reason, motivated by local economic interest, some local governments may try to compel a bank, financial institution or enterprise situated in this community to act as a surety for the loans toward the community. Since suretyship is supposed to be established on the basis of freedom of contract, any bank, financial institution or enterprise is entitled to refuse such unreasonable demands.

A suretyship shall cover the principal claim and the interest thereof, default fine, compensation for damage and expenses for enforcing the claim, unless the suretyship contract makes other provisions. If there is no agreement or the agreement is ambiguous with regard to the guarantee scope in issue, the surety is presumed to be responsible for all the debts incurred by the debtor.

The Guarantee Law says nothing about the consequences of the default of the surety. This aspect will depend upon the interpretation of legislation on the basis of civil law principles by

the judge. The author argues that, unless agreed to the contrary, if the surety refuses to satisfy a well-founded claim, he shall be under obligation to satisfy not only the original suretyship liability under the suretyship contract, but also the interest accrued since the claim was made by the creditor, and the costs of the trial since the surety received formal demand for payment from the creditor.

In practice, some corporate sureties suffer seriously from the default of borrowers when the borrowers can neither repay the loan nor compensate their sureties for the undertaking of suretyship liability. A large and prosperous corporation situated in Jinhua city, Zhejiang province, went bankrupt in 1997 due to its suretyship liability to a creditor in the interest of an insolvent corporation. Therefore, many corporations are becoming much more serious about the rights they enjoy as sureties.

4.11.3 Mortgage

Mortgage means that a mortgagor secures the creditor's rights with mortgaged property without transference of its possession. If the debtor defaults, the creditor, as the mortgagee, shall be entitled to convert the property into money to offset the debts or have priority in satisfying his claim from the proceeds of auction or sale of the property. Either the debtor or the third party could act as the mortgagor.

Mortgage usually covers the principal claim and the interest thereof, default fine, compensation for damage and expenses for enforcing the mortgage, unless the mortgage contract makes other provisions in this respect.

Mortgage of maximum amount is a special type of mortgage. Under this arrangement, a mortgagor and a creditor agree that the mortgaged property shall be used to secure the creditor's claims which successively occur in a given period of time and to the extent of the total amount of the claims. Therefore, the common rules concerning common mortgages are applicable to the mortgage of maximum amount together with the special rules peculiar to the latter.

4.11.4 Pledge

Due to the influence of legislation and theories in the former Soviet Union, the General Principles of Civil Law of 1986 did not distinguish between mortgage and pledge. The latter is included in the concept of mortgage. However, mortgage and pledge differ greatly from each other. One of the differences is that a pledgor needs to transfer the possession of his pledged movable to the creditor, while a mortgagor is not obliged to do so. Since different features demand different rules, the Guarantee Law adopted a new approach, setting the legal rules for mortgage and pledge separately. There are two types of secured transaction with pledge. One is loans secured with pledge of movable, and the other is loans secured with pledge of rights.

Pledge of movable means that a pledgor transfers the possession of his movable pledged property to the creditor as a security for debt. If the debtor defaults, the creditor, as the pledgee, shall be entitled to convert the property into money as repayment of the loan or enjoy priority of having its claim satisfied with the proceeds of auction or sale of the pledged property. Either the debtor or the third party could act as the pledgor. The major difference between pledge and mortgage is that that a mortgagor does not need to transfer his mortgaged property to the creditor, while a pledgor must transfer the pledged property to the creditor so as to serve as a security for the principal contract. A pledge contract shall be concluded in writing by a pledgor and a creditor. It shall become effective upon the delivery of the pledged property to the possession of the pledgee. To avoid unfair detriments to the debtor's legitimate interest, a pledge contract is forbidden to stipulate that ownership of the pledged property shall be transferred to the pledgee if the loan is not repaid in time. Such a legal requirement is basically modelled on Article 1229 of the German Civil Code and Article 349 of the Japanese Civil Code.

4.11.5 The relatively independent nature of guarantee contracts

Guarantee contracts may take various forms, including the contracts concluded separately in writing, the letters and telex of guarantee nature between the parties, and the guarantee clauses contained in the principal contracts. Given the development and widespread use of modern communications technologies, especially email, the electronic mail system, correspondence using these technologies should also be regarded as a sort of written form.

Compared to a principal contract, the guarantee contract is called an ancillary contract. Due to its ancillary nature, a guarantee contract shall generally be null and void if the principal contract happens to be null and void. However, this ancillary nature is not absolute. The obligation of the guarantor and that of the principal debtor are relatively independent. Private autonomy implies that the contracting parties may freely agree in the guarantee contract that it shall remain valid even though the principal contract is declared null and void. It is also possible for a guarantee contract to be null and void due to its failure to satisfy the legal requirements peculiar to guarantee contracts imposed by the Guarantee Law.

Once a guarantee contract is found to be null and void, the debtor, the guarantor or the creditor who is in default shall bear civil liability on the basis of his respective fault.

4.11.6 Conclusion

In China, more and more credit or unsecured transactions have been replaced by secured transactions. More and more individuals are finding that they have begun to be involved in the legal machinery of secured transactions. It is true that the security or guarantee machinery has not only benefited the commercial banks, but also the general public including the public depositors of the bank. Another far-reaching consequence is that the foundation of the Chinese market economy and rule of law could be further improved by the enforcement of the Guarantee

Law. For instance, when the security machinery instead of the administrative order or the leader's instruction is really respected in the financial world, the civil society and economic democracy will become stronger and the political state will become more civilised. In the face of financial crisis suffered by some Asian countries, Chinese banks are basically fortunate for various reasons. It is believed that guarantee mechanism will be given top priority in preventing, reducing and resolving the financial risks in the coming years. Of course, there are still some loopholes in the current legislation. As economic reform deepens and China continues to open up to the outside world, guarantee legislation and the security machinery will definitely witness a gradual and more positive reform process in the right direction. Right now, the Supreme People's Court is drafting a detailed interpretation of the Guarantee Law.

4.12 Globalisation of the Chinese economy and the country s wish to join the WTO

China is willing to join the World Trade Organization, and is willing to continue to observe its pledges. However, other countries should consider China's position as a developing country and should not make unreasonable demands or requests.

Since adoption of the reform and opening-up policy in 1978, China's annual foreign trade volume has soared from US$20.64 billion to US$142.36 billion. The proportion of China's exports in global trade increased from 2.89 percent in 1995 to 3.6 percent in 1997, making China the world's tenth largest exporter. Its trade in goods such as textiles, clothes, shoes, TVs, refrigerators and washing machines now exerts a great influence on the international market. China has established sound economic relations with more than 230 countries and regions. The ratio of imports and exports to gross domestic product increased from 12.6 percent in 1980 to about 37 percent in 1997. China still needs to import advanced technology, raw and processed materials, and capital and commodities. In the meantime, China's low-cost but good-quality commodities and services are well-received in the global market. Exports of manufactured goods are now far in excess of exports of primary materials, and mechanical and electrical products head the export list. Additionally, the volume of service exports rose from US$2.78 billion in 1984 to US$24.3 billion in 1997, increasing its share of the world total from 0.69 percent to 1.7 percent. The Chinese government should also grant more Chinese firms foreign trade rights and reduce the number of exports subject to licensing administration. In the long term, it is feasible to offer opportunities to every Chinese businessman, either individuals or corporations.

Over the last two decades, an increasing amount of foreign investment has flown into almost every industry all over China. By 1997, direct foreign capital inflows into China had amounted to US$226.5 billion, accounting for 40 percent of all direct foreign capital absorbed by developing countries. The establishment of 19 State-approved Sino-foreign joint-venture or co-operative retail and chain stores and more than 200 local-level jointly or solely foreign-owned and co-operative retail stores have helped raise the efficiency of China's distribution system and

facilitated the development of its market economy. Approval has been given to more than 200 jointly or solely foreign-owned law firms to start practices. Foreign advertising agencies and consultancy firms are mushrooming throughout China, and the accounting and auditing sectors are opening wider to foreign companies in many big cities. China has introduced foreign investment in tourist infrastructure construction, upgrading the service level of the sector. China has also allowed foreign companies access to transportation, real estate and the exploration and production of onshore oil. And it has given foreigners permission to run financial institutions in Hainan Province and 23 cities. By the first half of 1998, 178 foreign financial institutions had set up branches in China with total assets of US$37.4 billion. After foreign-funded banks were permitted to engage in renminbi business in Shanghai's Pudong New Area in 1997, China extended this experiment to Shenzhen August 1998. The State has authorised nine foreign insurance companies from eight countries to start operations in Shanghai and Guangzhou. China will further open its service sector by allowing more foreign companies to establish trading joint ventures in major cities in coastal areas or in central and western regions. Moreover, qualification bottom lines for foreign companies will also be lowered. To encourage direct foreign investment, foreign-funded investment corporations will be granted more business rights in 1999. Other measures coming up next include preferential policies to encourage multinationals to set up research and development centres and branches to produce complementary products in China. China will also design some policies to encourage multinationals to acquire Chinese enterprises.

The investment environment has to be further improved. Efforts should also be made to protect the interests of foreign investors and enable them to compete with Chinese enterprises on an equal basis. A strategy should be developed to absorb more investment from industrialised countries. Meanwhile, small-sized State-owned, collectively-run and private enterprises should be allowed to attract foreign capital. By February 1998, 42 Chinese enterprises had been listed in overseas stock markets, raising US$9.56 billion. So far, integration of the Chinese economy in the world economy has proved successful. Nevertheless, economic globolisation has also exerted considerable pressure on China.

China has also explored various ways of raising finance in overseas capital markets. With the influx of foreign investment in recent years, some people have wrongly claimed that the foreign-owned enterprises had cornered China's domestic market. Statistics indicate that in 1995, industrial products by foreign-funded enterprises accounted for only 7.9 percent of the domestic market share. Although multinational companies mainly focus their attention on occupying China's domestic market, they have helped the country by introducing sufficient capital, updated technology and advanced managerial experts, and have also contributed to creating several new job opportunities, easing the pressure of unemployment. Therefore, while encouraging the access of foreign-owned enterprises to China's market, the government should encourage the State-owned enterprises to build their competitiveness rather than put a lid on the development of multi-national enterprises.

4.13 Special Industry Law

China is the world's most populous country, and more than 80 percent of its population live in rural areas. China's further development depends largely on the development of these regions. Agricultural Law has been launched to guarantee the basic role of agriculture and the interests of rural businesses and residents. A law to promote agricultural technologies has greatly developed the application of science and technology in agriculture. Laws regarding forests, water, water conservancy and flood prevention have played an important role in China's agricultural development. Agriculture's fundamental role in the national economy has been confirmed by relevant laws and regulations.

Science and technology are essential to China's overall development. To promote progress in these fields, the country has set up laws on science and technology development, technological contract and utilisation of science and technology in production. To guarantee the smooth development of infrastructure, laws regulating post and telecommunications, electricity, railways and highways have been inaugurated. It is urgent to draw up legislation on Internet information.

5 Legal Reforms in the Field of Social Law

5.1 Social security law

5.1.1 Introduction

China should further improve the laws on social security and establish a sound social security system. With the development of the socialist market economy and the intensification of competition, bankruptcy of enterprises and unemployment will become increasingly common phenomena. The reform of the labour and social security system is an inseparable part of the reform of the State-owned enterprises. Only when the problems arising out of the reform of the labour and social security system have been dealt with successfully will it be possible to smoothly carry out the reform of the State-owned enterprises. To give legislative support to the ongoing reform of State-owned enterprises, the drafting of the law on social security has been put on the working agenda of the Ninth NPC Standing Committee. Moreover, the legal system for the protection of various vulnerable groups, such as the elderly, women, children and disable persons, should be further strengthened.

5.1.2 Legal position of the right to social security in the Chinese legal framework

Access to an adequate level of social protection is recognised as a basic human right in the Declaration of Philadelphia, in subsequent ILO declarations and in a number of international labour standards. It is also widely considered to be instrumental in promoting human welfare and social consensus on a broad scale, and to be indispensable for economic growth and social solidarity. Hence, Article 9 of CESCR recognises the right of everyone to social security, including social insurance.

Since the right to social security is perceived as a human right, the welfare system will have to leap forward from a ‘from above’ model to a ‘from below’ one. Krzysztof Drzewicki and Allan Rosas predict that there may be a gradual shift from the traditional Scandinavian welfare model, emphasising benefits and services to be granted ‘from above’ through policies and annual budgets, towards a more rights-centered approach ‘from below’, stressing the inalienable right of each and every individual to a basic subsistence and to a right to live in an ‘environment of

solidarity' while preserving ample room for individual choice and voluntary solutions.[11] This also holds for China.

Article 45 of the Constitution considers social security legislation as a very important item among the human rights. Unlike other collective social rights, it is perceived to be an individual right, for the word „citizens" is used here instead of „people". This has several implications. First, unemployment can also emerge in socialist society. Under the traditional centralised planned economy, people were unwilling to accept unemployment, since "unemployment" was considered a terrible word. It was regarded as a unique economic symptom in Western countries.[12] Second, it means that social security that has long been incurred by employers or working units can be and should be transferred to society. The close tie between the employees and the state employers could be cut down to some extent. We can say that the 1982 Constitution began to be aware of the threat to society that unemployment poses and therefore paved the road for the market oriented reform afterwards.

To endorse this constitutional provision, to meet both socialist market economy demands and national conditions, the Labor Law declares that the State shall develop social insurance undertakings, establish a social insurance system, and set up social insurance funds. The target is to ensure that workers may receive assistance and compensations under such circumstances as old age, illness, work-related injury, unemployment and child bearing. Jiang Zemin again emphasised in his Report to the 15th Party Congress that China needs to build a modern social security system, to introduce old-age pension and medical insurance systems by combining social pools with individual accounts, and to improve the unemployment insurance and social relief systems so as to provide basic social security. The objective of social security legislation reform is generally perceived to provide better benefits and extend their coverage as much as possible with the existing available resources in the primary stage of socialism in China. It is equally important to design sustainable social security schemes, and to manage and administer them efficiently. In addition to reforming and developing social insurance systems, China has also begun to introduce safety nets, social assistance and poverty prevention.

5.1.3 History of social security reform

China's traditional social security system has taken shape since 1949. For several decades, the central or local governments have taken responsibility for pensions and medical care, supplied to workers through State enterprises. Only those working in State firms are covered, while the rural population and employees in foreign-funded and private companies are

[11] Krzysztof Drzewicki & Allan Rosas, „Social Rights in A United Europe", Social Rights As Human Rights: A European Challenge, edited by Krzysztof Drzewicki, Catariana Krause & Allan Rosas, Institute for Human Rights, Abo Akademi University(Finland), 1994, p.18.

[12] For many years, whenever and wherever some people had no job, this was referred to as „which means waiting for a job" instead of „which means unemployment. Even today, the laid-off workers in the state-enterprises are called „, which means the workers leaving their posts.

excluded from such social security. Even for the workers in State enterprises, social security is not always safe. Since more State enterprises are operating in the red, they are unable to pay all pensions and medical fees. The massive financial burden caused by pensioners and laid-off workers has obstructed many enterprises' reform drive.

After China had adopted the reform policy and opened up to the outside in 1979, the old pension system under the economy planned by the central government was unable to meet the socialist market economy's demands. In 1984, China began to manage workers' pensions in line with the principle of overall consideration. This marked the beginning of a comprehensive reform of the traditional social security system.

Since the end of 1994, attempts have been made to establish an effective mechanism for old-age care and medical insurance. There are a number of experiments with pension funding in some pilot cities, and progress has been made. According to the original plan, the cost of public medical care and pensions was to be shared by the State, enterprises and individuals. But units in different areas have usually mapped out distinct standards on how much each participant in the pension plan and medical insurance should pay. Some people complain that they have paid more than others.

Chinese social security work has made great progress. So far, many provinces and autonomous regions in China have introduced multi-level social security systems covering pensions, unemployment, child-birth, medical care and major diseases. However, the current social insurance coverage does not meet the needs of the expanding socialist market economy. For instance, ensuring the collection of funds and guaranteeing a basic living standard for retired workers from enterprises in financial difficulties are major challenges to be faced in the expansion of the insurance programme. Some retired employees in state-owned firms in the red have not received their pension money, or the correct amount of pension money, on time.

To address these issues, starting from 1997, the State Council has decided to implement unified guidelines on funding pensions and medical health care, and greatly expand the coverage of social insurance schemes across all domestic sectors.

5.1.4 The level and structure of social insurance

China is a developing country. The level of social insurance can only be in proportion to the level of social and economic development and social affordability. Restrained by the level of economic development, China cannot afford a high-level cradle-to-grave social security system, and the Norwegian model can only act as a goal for China to pursue far off in the future.

Therefore, Chinese social security system can only meet the basic demands of the most needy under special circumstances. China has to adopt a multi-tier social insurance system, which means that the State, employers and employees have to jointly shoulder the expense of

establishing a social security system. Apart from the basic social insurance system controlled by government, employers are being encouraged to set up supplementary insurance for workers according to their practical situations. This implies that whether and how to develop the system falls within the employers' autonomy. No administrative order from the government is permitted. China also advocates that workers get individual insurance in form of saving accounts, or use their own savings to buy commercial insurance.

5.1.5 The types of social insurance

Under Article 73 of the Labor Law, workers are entitled to social insurance benefits under the following circumstances: (1) retirement; (2) illness or injury; (3) disability caused by work-related injury or occupational disease; (4) unemployment; and (5) child bearing. The survivors of the insured workers shall be entitled to subsidies for survivors. The social insurance amount that workers are entitled to must be paid in full and on time.

Industrial accident insurance was experimented with in some pilot areas in 1995. China promulgated the Provisional Measures on Insurance for Enterprise Employees Suffering from Industrial Injuries to ensure that workers get due compensation if they are injured in the course of industrial production. By the end of 1996, over 31 million workers were covered by industrial accident insurance, a growth of 18.66 percent over 1995's figure. Maternity insurance was experimented with in some pilot areas in 1995. As far as unemployment insurance is concerned, it is mainly limited to State-owned enterprises in urban areas, which are having difficulty covering the costs. A quarter of the country's urban employees still remain outside the plan. Most are workers in overseas-funded or private enterprises, self-employed businessmen or rural workers working in cities. In the future, unemployment insurance should cover all employees in every economic sector. Of course, unemployment insurance is not the only remedy for unemployment. It should be combined with the re-employment project, so that more unemployed people will be encouraged to take new jobs.

5.1.6 Pension insurance

Old-age pensions or retirement social insurance benefits are the keys to a sound social security system in China. The pension insurance system is provided for by both the Labor Law and the Law on Protection of the Rights and Interests of the Elderly.

In addition to the common purposes to be achieved through social security in many countries, pension insurance reform in China is also supposed to pave the way for deepening economic reform and to cope with an aging society. Effective pension plans are expected to significantly reduce the pressure caused by increasing numbers of laid-off workers and an ageing population. Reform of state enterprises faces an unavoidable obstacle: the massive payments they are obliged to make for retired and laid-off workers. The weight of payments for retirees and laid-off workers has often frustrated enterprises' ambitions for reform. To resolve this

problem, a sound social security system must be established. It is true that the unified pension plan will not only form an essential part of the social security system, but will also break the chains shackling State enterprises' in their restructuring efforts.

However, the current pension system is only suitable for those working in State firms, excluding most employees in overseas-funded and private companies. And pension assistance provided to employees of State firms in the red is still not enough. In order to standardise old-age pension management and provide adequate security for every retired person, to maintain social stability and healthy reform, and to help develop a unified labour market, China has decided to set up a unified nation-wide basic pension insurance system to replace the current flexible pilot programmes before the end of 1998. The Labor Ministry has won the approval of the State Council to unify the pension insurance system and to collect pension insurance funds in the rest of the provinces. In principle, the transition to the unified system should be accomplished by the end of 1997, but certain areas may be given an extension of one year with the State Council's consent. The next step is for local governments to unify the factory workers' pension system as soon as possible.

Under this plan, the old-age pension consists of two parts -- workers' individual accounts and funds provided by the employers. Retirees get money from individual pension accounts and the overall social welfare programme. Clear proportions will be fixed for payments by enterprises and individuals. And the pension fund should be administered by provincial or prefecture finances rather than county finances. In this way, the fund can be deployed within a larger framework so that more retired people may benefit from it.

The fundamental pension system will cover all retired workers in both State and private enterprises. Self-employed business people and rural workers who have moved into cities can also be eligible for the pension plan after they reach retirement age.

5.1.7 Social medical insurance

Medical care is a big problem both for State enterprise reform and individual welfare. Many workers in State enterprises can only enjoy basic medical service thanks to the financial ability of their enterprises. A number of enterprises cannot pay the medical expenses of their staffs. As a result, some families with medical problems are being driven into poverty due to the high cost of treatment. To raise doctors’ salaries, hospitals have been inclined to increase charges for medical checks and prescribe patients expensive medicines imported or made by jointly-funded pharmaceutical companies. Since the medical expenses are born either by the State or by the enterprises, some workers would like to get more medicines of unnecessary amount and quality. Therefore, the financial burden incurred by the State and the enterprises is becoming heavier and heavier. For instance, in 1978, total expenditure on the national workers’ medical service was 2.7 billion yuan; in 1994, it amounted to 55.8 billion yuan.

To address this issue, China began to experiment with the medical insurance scheme in Zhenjiang city and Jiujiang city in December 1994. In 1996, the State Council decided to spread this scheme to more pilot cities. By the end of 1996, more than 7.9 million workers were covered by social medical insurance, an increase of 12.6 percent over the 1995 figure.

In 1997, the State Council decided to implement unified guidelines on funding medical health care, and to greatly expand the coverage of medical insurance across all domestic sectors. In this way, the medical insurance funds will be managed within an overall planning system so that participants will not only be able to enjoy basic medical care, but will also be protected against the consequences of more serious diseases which often result in severe financial difficulties for patients' families.

5.1.8 Supplementary pension system

In China, some enterprises have begun on a voluntary basis to set up their own pension funds for their employees. The State has also issued guidelines on the basic conditions, funding and operating methods of the supplementary pension system. And it has launched pilot projects in enterprises with mature conditions. Until the end of 1996, the supplementary pension system was carried out among more than three million employees from 15,000 enterprises. Two billion yuan ($240 million) has been put into supplementary insurance.

Building a supplementary pension system is like opening a collective account for employees. The funds come from allocations from the enterprises and a portion of income from the employees. The employees will receive pensions when they retire. Such a system can effectively ease financial burdens on the government. It helps harmonise relations between enterprises and employees, and encourages workers to enhance enterprises' productivity. It also helps improve the capital market and supports the nation's thirst for construction funds by raising and reinvesting the funds in supplementary insurance systems.

However, the rapid development of this system still faces obstacles. The government's preferential policy on developing enterprise supplementary insurance has not been adequately introduced and enforced. The definitions of premiums and methods of fundraising and management are still not very systematic or scientific. Some enterprise managers are short-sighted and ignore the significance of this system. Some pension funds are still low due to poor investment strategies and inefficient management. Some employers have not taken action regarding this issue. It seems necessary to introduce some enabling policies and to popularise the importance of the enterprise supplementary insurance among the business community and the work force. Of course, it is crucial for the pension funds to be managed more effectively.

5.1.9 The management and administration of social insurance funds

Weaknesses in the governance and management of social security institutions may add to economic difficulties. Therefore, improving the governance, management, administration and operation of social security schemes is a very important task for China. Article 72 of the Labor Law says that the sources of social insurance funds shall be determined according to the categories of insurance, and that an overall pooling of insurance funds from society shall be introduced step by step. Employers and workers must participate in social insurance and pay social insurance premiums. Under Article 74 of the Labor Law, the agencies in charge of social insurance funds shall collect, expend, manage and operate the funds, and assume the responsibility to maintain and raise the value of those funds. There are altogether 3,386 institutions handling social insurance at different levels throughout China. Of course, they should continuously upgrade their management and improve their service.

Power will breed corruption without check and balance. Article 74 of the Labor Law authorises the supervisory organisations of social insurance funds to exercise supervision over the revenue and expenditure, management and operation of social insurance funds. Since the supervisory organisations are still in the process of being set up, it is quite urgent to establish them in localities to guarantee the absolute integrity of the fund. Various representatives from government, enterprise, employees, retirees and other social interest groups can be invited to enter the board room of the supervisory organisations.

For the sake of safety, the social insurance funds are required to be properly managed, and misappropriation and high-risk investment of such funds are forbidden. Right now, such funds are not allowed to be used for any form of investment except the purchase of State treasury bonds. A capital market should also be developed further so that social insurance funds can find more outlets for investment to maintain and increase their value.

5.1.10 The right to social relief and the safety net for urban poor

The social relief system has been practised in China for decades including the years under the centrally planned economy. In rural areas, local economic organisations should provide adequate food and clothing, housing and medical service, and proper funeral arrangements for elderly people who are unable to work, who have neither sources of income nor family support, or whose family supporters do not have the ability to support them. In urban areas, relief should be provided by local governments for elderly people who are unable to work, have neither sources of income nor family supporters, or whose family supporters are unable to support them. By 1996, the minimum life guarantee system had been established in 101 cities. Some 38.29

million people in need received relief funds from the state. About 4.5 million people were given special pensions and subsidies by the state.[13]

To ensure special protection for unemployed and laid-off workers, old people, children and the disabled who are unable to get help from their family, it is necessary to adopt a policy that will ensure the basic standard of living for urban residents in difficulty. This can also be financed, given the booming economy and the increasing State revenues. The minimum cost of living system is the final protective umbrella for laid-off workers in Chinese cities. In this regard, the minimum cost of living system can meet the most basic needs of poor urban families. It can also free enterprises from the heavy burden of payments for the unemployed, the laid-off and the retired. Therefore, enterprises can continue their reforms, and reduce the production costs and increase efficiency. This not only reflects the level of civilisation in our society, but also ensures social stability and solidarity.

The system has already been through extensive trials, starting with Shanghai in 1993. It was subsequently extended to 206 cities. Relief ranged from 70 yuan ($8.40) to 230 yuan ($27.70) a month according to local conditions. More than 200 million yuan ($24 million) was allocated for relief purposes in some pilot cities last year, according to incomplete official statistics released early this year by the civil affairs ministry. By 1997, the system had been tested in more than a fifth of China's administrative units at the county level.

Under the timetable announced by the State Council on 3 September 1997, the system of minimum standards of living for the urban poor will be established throughout China by 2000. The local finances are required to arrange a proportion of the budget for poverty relief. The people covered by the system are permanent urban residents with a per capita income below the local minimum cost of living set by local governments. This means that in addition to the traditional relief methods, the newly designed security mechanism will also cover those who still cannot find jobs after their unemployment insurance has expired and those whose income levels are under the minimum-living standard because of too meagre payment or limited pensions. In my opinion, such a security system should also be extended to the rural areas where some 58 million people have been mired in poverty as a result either of a chronically impoverished local economy or the impact of frequent natural disasters.

5.1.11 The right to social welfare

Under Article 76 of the Labor Law, China will develop social welfare undertakings, construct public welfare facilities, and provide workers with conditions for taking rest, recuperation and rehabilitation. The employers shall create conditions aimed at improving collective welfare and raising welfare treatment of workers. By the end of 1996, there were 1.02

[13] Statistical communique on social-economic development in 1996, State Statistical Bureau of the People's Republic of China.

million beds in social welfare institutions of various types in China, with 770,000 inmates in all. The community service network has continued to expand in urban areas, where 136,000 community service facilities have already been established, including 4,670 community service centres. Appropriate arrangements have been made for the lives and employment of ex-servicemen.[14]

5.1.12 Poverty alleviation programme in China

Social security reform should go hand in hand with poverty alleviation. China's total poverty-stricken population were 58 million in 1996, accounting for one-twentieth of the world's total. They do not have enough and nutritious food to eat or warm clothes to wear. Most of them live in remote, rocky mountainous areas with extremely harsh natural conditions.

A large-scale, well-planned anti-poverty campaign has been carried out across the country since 1993, aiming to eliminate poverty by 2000. To ensure the success of the poverty alleviation campaign, starting this year, the Chinese Government is to allocate 15.3 billion yuan ($1.8 billion) annually for a special fund, which is up 4.5 billion yuan ($542 million) on previous years' funding. China has also vowed to establish large-scale projects in poverty-stricken areas to enhance development opportunities. In another bid, the central government urged 13 provinces and municipalities in the east to assume responsibility for helping the poor in the ten less-developed provinces and autonomous regions in the west. In the poverty-reduction campaign, China has stuck to the principle of developing households or local economies. In addition, educational programmes for the poor have been carried out, dealing with population control and other problems hindering their financial well-being.

5.1.13 Direction for further reform

Despite the problems caused by the transition to a socialist market economy, structural adjustment, economic constraints and institutional capacities, China is seeking to reform and expand its social security system in order to improve benefits, extend coverage and achieve greater efficiency and effectiveness. In the long run, every individual, including members of the rural population, shall be eligible to enjoy social security on the full range of contingencies defined by international standards. Continuing economic growth, the people's support and the effective administration of the governments will ensure the ultimate success of social security reform. In return, a successful social security system will promote healthy and sustainable economic development.

[14] Statistical communique on social-economic development in 1996, State Statistical Bureau of the People's Republic of China.

Over the last few years, the focus has usually been on pension, unemployment and medical insurance. In the future, China should pay equal attention to improving industrial accident insurance and maternity insurance for women workers.

To accelerate reforms within the social security sector in line with China's growing market economy, enacting a uniform social security legislation on the basis of considering the successful local experiences and drawing upon the advanced legislation and practice in other welfare states would appear to be an urgent issue. Considering that the administrative powers concerning social security are shared by the Labor Ministry and other ministries including the Health Ministry and the Civil Affairs Ministry, it seems better to establish a uniform social security ministry in the future. In this way, both a uniform social security policy and sufficient competent staff can be guaranteed.

5.2 Environmental law and natural resources law

Environmental protection is one of China's basic policies nowadays. Relevant laws and regulations have been promulgated to protect natural resources and maintain sustainable development. Of course, the Law on Protecting Oceanic Environment and the Law on Prevention and Treatment of Air Pollution need to be revised. Endorsing current environmental legislation really is a big challenge. Government agencies and NGOs have a lot to do in this regard.

Natural resources legislation, including the laws regarding land, forests, water, water conservancy and flood prevention, has played an important role in promoting China's sustainable development. Take the example of land management law here. Since China has only 0.066 hectares of arable farmland per person, it suffers from scarcity of land resources, and construction has occupied big patches of farmland, which is very dangerous. To take the toughest measures in the world to protect the limited arable farmland, China revised the land management law of 1986 in 1998. The revised law imposes restrictions on land use and can play the role of protecting China's arable land. In principle, every province should strive to restore the full amount of farmland it has occupied for other purposes. Also, a rigorous compensation system has been put in place, whereby requisition of farmland involves a cost that may be a maximum of 30 times the output value of that patch of land in that particular year. However, it is a big challenge as to the enforcement of the revised law. For instance, in Nanma Village of Dongyang, Zhejiang Province, nearly 70 percent of the total 33.3 hectares of arable land is being destroyed or abandoned. The local authorities decided to start a fruit and vegetable marketplace and a cinema in Nanma Village aimed at *„improving local farmers' welfare“*. In line with the Land Administration Law, a county government can allot at most 0.2 hectares of arable land for non-agricultural use. Even at the provincial level, the ceiling for the use of farmland for non-agricultural purposes is fixed at two hectares. What the Nanma administration has done is obviously inconsistent with the law. Such cases must be stopped by legal means.

6 Legal Reforms Regarding Farmers' Rights

6.1 Rule of law in rural areas

Counties are the key to implementing the rule of law. It is hard to imagine fulfilling the goal of the rule of law in China without earnestly implementing it among the rural residents. County-level implementation of the rule of law is an important part of its nation-wide implementation. There are 900 million farmers in rural areas. The popularisation of basic legal knowledge in China's vast rural areas has been routine for judicial departments and publicity departments since the late 1980s and has picked up momentum since 1992. By the end of 1998, 85 percent of Chinese counties were conducting systematic popularisation of basic legal knowledge. The rule of law is the continuation and deepening of the popularisation of legal knowledge.

6.2 The farmers' right to political participation: grass-roots democratic practice of villagers autonomy in China

The main characteristic of the development of democracy in China is based on grass roots democracy which is practised by village committees, workers' congresses in factories and neighbourhood committees in cities. China should promote the development of grass-roots democracy, encourage public participation in democratic management and improve public awareness of democracy.

In the rural area in particular, democracy starts at grass-root level, because for an ordinary villager, the person who is of direct concern is not the governor or the county magistrate or even the head of the township, but the chairman of the village committee. Democratic elections in China's villages have laid a solid foundation for the development of democracy throughout the nation. Implementing local democracy is of special importance to the stability as well as the economic development of rural areas.

Traditionally, village heads would usually be hand-picked by higher government departments. For their own benefit, they tended to choose their confidants. Widespread nepotism alienated and often antagonised farmers and village officials. With their fate in the hands of their superiors, village heads had to give more consideration to the wishes of their bosses than to those of the farmers. Worse still, this practice resulted in serious corruption since proper supervision was absent.

The organisation of village committees began in Yishan and Luocheng counties in the Guangxi Zhuang Autonomous Region towards the end of 1980. The Constitution of 1982 formally confirmed the legal status of village committees, providing a legal basis for the autonomy of villages. The Organization Law of Village Committees was promulgated for trial implementation on June 1, 1987. By the June of 1998, 60 percent of China's rural areas had established such systems, in other words, China has established over 920,000 village committees in its vast countryside, employing nearly four million committee members, according to the Ministry of Civil Affairs.

The NPC Standing Committee revised the law in 1998 to adapt it to evolving circumstances following a decade in practice. Four democratic concepts - democratic elections, democratic decisions, democratic management and democratic supervision - are guiding principles for the new law. A direct election system was introduced for village committees which are grass-roots organisations serving China's 900 million rural residents. The Organic Law on Village Committees included many new provisions in terms of election procedure to ensure the justice and democracy of elections. The election of a village committee is based on universal suffrage, and people freely nominate their own candidates, who can only get elected with over half of the votes. The village committee is responsible for the open administration of village affairs, including openness in management, in financial affairs, in labour matters, and in the use of land for housing and family planning. Also there is a procedure for the removal of members of the village committee, whereby 20 percent of the villagers can request their removal, but will require support from over half of the villagers.

As result, farmers, who account for the majority of the population, are now directly involved in local administration and are enjoying more autonomy in managing their own communities. A large number of hardworking government officials familiar with local affairs and with practical agricultural knowledge have been propelled into office by running in direct elections. Questions farmers asked candidates have been to the point, like building village roads, publication of village financial accounts and scientific farming. From poverty alleviation to land use contracts and use of public funds, the competence and honesty of the village committee, as well as whether it can represent the citizen's interests, are the major concerns of farmers.

At the beginning of 1999, news about the birth of the first directly-elected township head spurred intensive debates across China. With an increasing appreciation by farmers of the openness of direct elections, the city of Suining in Sichuan Province launched a trial direct election of a township head in Buyun. As people are excited by democratic progress in rural areas, few seem to have noticed the fact that Buyun's election ran against the law, which stipulates that the authority to elect and remove the head of a township is held by the people's congress at the township level. To local residents, it is within their right to elect the representatives of local people's congresses. According to current law, the election of township officials should be the responsibility of township people's congresses. In my opinion, the above-mentioned election is justified and lawful, since representatives of local people's congresses are

essentially the agents of the local people. It is the latter, as the principal, who have more authority to make the decision.

However, behind all this encouraging news, it still cannot be said that democracy has been fully embraced. The question is how to ensure strict implementation of the law. Many cases involving fraud have been uncovered. The amended Organic Law for Villagers' Committees stipulates that a village head, deputy head and members of village committees be directly elected by citizens. No organisation can dismiss elected village officials without approval from the citizens. Despite the clear stipulation the law makes on this point, direct elections still face the hurdles of out-dated thinking in some places. And not every directly elected village head is qualified for their duties. Of course, we should not put too much blame on this election. Instead, democratic awareness of local farmers should be protected and encouraged to accelerate the democratic reform of China. Neither is election the only important factor in democracy. Supervision is just as important, but more difficult than election. Without an effective supervision mechanism, it is hard to prevent power abuse by local officials.

6.3 Farmers' right to income

The household contract responsibility system that began with the commencement of the economic reforms has worked in the past two decades. The system of contracting land to families greatly stimulated farmers' enthusiasm to raise grain production. For instance, China produced just over 494 million tons of grain in 1998, three times the output in 1952 when farmers were working for agricultural co-operatives.

Although China's agriculture has progressed impressively in recent years, farmers' incomes are still far from satisfactory. Statistics indicate that the growth rate of farmers' per-capita income has dropped from nine percent in 1996 to four percent in 1998. The gap between the incomes of farmers and urban residents is widening. This gap results from low prices and high costs of agricultural products. Despite China's adoption of a protected price system for grain, farmers' net income from selling agricultural products remains low because the policy has been watered down by some local officials. Export-oriented township enterprises, another victim of the Asian financial crisis, do not contribute to farmers' income growth as much as before. Also, because of mounting unemployment pressures, cities are no longer an ideal place for farmers to get extra money. This has, to some extent, taken a toll on farmers' income growth, and will inevitably threaten economic reforms and rural stability.

Given the situation, government at different levels should grant more preferential policies to agriculture and rural development. Renewal of farmland contracts should be completed across China. Additionally, the fees and taxes levied on the farmers by the villages and townships have continued to be burdensome. It is time to take some effective measures to take the strain off farmers and protect their legitimate income from the exploitation by the village and township leaders.

6.4 Farmers' rights as consumers should be ensured

The vast rural market offers great opportunities to manufacturers. One in six households plan to purchase durable consumer goods, according to a survey conducted in 25 counties by the State Statistics Bureau last year. Enhancing protection of rural consumers' rights will improve their living standards, and boost the vast rural markets. There are huge demands for raw materials, production tools and consumer goods in rural areas.

However, fake and poor-quality grain seed, fertilisers and farm chemicals and other products coupled with inadequate protection of rural consumers' rights have greatly dampened rural consumers' enthusiasm and caused grave economic losses for them. Rural consumers are complaining about the fake production tools, seeds, chemical fertilisers and substandard consumer goods on the market. Rural residents are often left in vulnerable positions because they have low incomes and education levels, a lack of transportation and few consumers' associations. It is necessary to examine causes hindering protection of rural consumers' rights, to promote consumers' associations in rural areas, to encourage the farmers to be aware of their consumers' rights, and to use the law to settle disputes and receive compensation.

7 Judicial Reform in China

7.1 The need for judicial reforms

An independent and fair judicial power is crucial to the effectiveness of the market economy, the rule of law, and social justice. China's reforms are going through a period of structural adjustment, which must be backed up by an effective and fair judicial system. Chinese courts hear 5.2 million criminal, civil, economic, and administrative cases annually. Courts should make efforts to deal a harsh blow to serious crimes that threaten social stability, to readjust the relationship between civil and economic affairs and eliminate social contradictions, and to guarantee the smooth implementation of major reform measures. The increasing cases relating to financial disputes, State-owned enterprise reforms, farmland contracting, agricultural development, real estate, labour disputes and social security need timely trial by the courts.

China began to pay more attention to judicial justice issues in the autumn of 1997. But the current judicial system is lagging behind in the implementation of these laws and regulations, and some malpractice still occurs in the courts. The judicial shortcomings include the judicial corruption, ineffectiveness of the judiciary, and lack of independence of the judiciary. Judges' expertise should be further improved. Some of the judges abuse their power, severely damaging justice of judicature, and tarnishing the reputation of the courts. It is necessary to improve the examination and qualification system for judges so as to raise their competence. Rampant regional protectionism is one of the judicial shortcomings. The fact that local courts do not operate on an independent basis is the major cause of this regional protectionism. In terms of personnel, funds and equipment, these courts are administrated by local governments. Under the current Organic Law of the People's Court, judges are selected by local People's Congresses. Some local governments, in an attempt to protect local interests, seek countermeasures against national law. This has resulted in unjust practices in some areas. It threatens to tarnish the dignity of Chinese law and the image of courts. Worse, it may shake Chinese people's faith in the rule of law. This problem needs a timely reform to ensure independence of judicial activities, and promote market economy.

To safeguard the independence, effectiveness, accountability, honesty and cleanness of the judiciary, China has started reforming its judicial system. Judicial reforms are also an important part of the legal and political reforms in China. Without such reforms, the market economy will be in danger of foundering. Of course, economic analysis can be used to help analyse judicial systems so as to advance the current judicial reform.

7.2 Strategies against judicial corruption

In recent years, some judicial officials abused their power for the sake of money or gave unfair judgment for personal revenge or interests, including taking bribes, corruption, embezzlement of public funds, and dealing with cases in a manner contrary to the law. In Heilongjiang Province, for instance, judges have been punished for such malpractice. Between 1993 and 1996, sentences given in 438 court cases were found to be erroneous and 460 judicial officials were penalised as a result. Their misdeeds have invited public complaints and tarnished the image of China's judiciary system. A strong public opinion is growing to fight against the abuse of power and corruption in the judicial sector, and develop a sounder system to weed out the roots of corruption in law enforcement departments.

To enforce internal supervisory mechanisms in courts and ensure justice, to give innocent people the power to redress injustice, and to discipline the judges, the Supreme People's Court issued in 1998 a new punishment regulation regarding malpractice in trial procedures to safeguard judiciary justice, according to which judges shall be put under investigation after they are found to have intentionally broken the law in court trials or carried out court verdicts and unintentional legal offences resulting in serious consequences. The new regulation is applicable in both substantial and procedural laws, intentional or unintentional violations of the law, and both ongoing and past illegal activities.

The Supreme People's Court of China set up a reporting centre in May 1998 to handle calls and mail regarding judges in the supreme court, provincial higher people's courts and intermediate people's courts. Major cases to be handled by the centre will include embezzlement, taking bribes, abusing power, concealing or forging evidence, leaking secrets, unlawful coercion, dereliction of duty and illegal collection of money.

Recently, there also have been cases in which the court retirees immediately got themselves re-employed as counsels. They used relations forged during years of working in the field to influence the judicial procedure and outcome. The Supreme Court prohibits retired judges from acting as defence lawyers or legal representatives in the region of their former service within three years of their retirement. According to a rule issued by the Higher People's Court in Yunnan Province, the plaintiff and defendant are entitled to question the qualifications of legal representatives. Violation of the regulation will bring the case to a second trial.

The top priority in the campaign against judicial corruption is to rectify the judicial discipline and working style, and re-select the leadership of the courts at different levels, in a bid to ensure a clean and disciplined court system. In 1998, Courts across China corrected 11,563 error-laden cases that were tried before 1998 and punished 2,512 judges. The Supreme People's Procuratorate punished 1,215 prosecutors, including the chief and a deputy chief of the Anti-Corruption Bureau under the Supreme People's Procuratorate. The chief, Luo Ji, was removed for depositing money confiscated in a case into a bureau account. The deputy chief, Huang Lizhi,

was removed for accepting a dinner invitation from a suspect in a case. China appointed 594 new chiefs and deputy chiefs of anti-corruption bureaux at county and prefecture levels nation-wide in the second half of 1998 as part of its effort to curb judicial corruption. The appointments were made to replace former chiefs who had failed to pass a nation-wide examination and assessment survey, and to fill existing vacancies. As part of the campaign, 1,332 new presidents and vice-presidents of county and prefecture-level procuratorates were installed to fill vacancies left by those who had been demoted. To investigate cases of judicial corruption, the Supreme People's Court appointed ten prestigious judges as superintendents who will be responsible for offering advice in handling major, difficult or misjudged cases. They are also authorised to investigate major issues concerning judicial corruption in the courts, as well as cases involving parties from different jurisdictions. They are required to forward reports and suggestions based on their investigations to the Supreme People's Court.

Another critical issue closely connected with judicial corruption is wrongly handled cases arising from authoritative judicial practice. During a revision of more than 4.41 million cases of various kinds in the first 10 months of 1998, 85,188 cases were deemed wrongly handled. Among them, 9,395 cases were corrected. The rest are being dealt with, according to the Supreme People's Court. It would produce stronger public criticisms if the occurrence of wrongly handled cases could not be prevented and substantially reduced. The goal may be achieved through legitimate procedures, accurate verification of facts, good evidence, clearly stated judicial documents, and accurate and convincing applications of the law. It is essential to establish a system for investigating and prosecuting anyone who is held responsible for unjust or misjudged cases.

According to a regulation promulgated by China's Supreme People's Court, judges misjudging cases or breaking the law in making their judgements have begun to be punished from September 1998. The ultimate aim of the regulation is to improve the supervision system within the people's courts and ensure that justice is safeguarded. The regulation applies to all judges, including presidents of the courts, presiding judges and adjudicative personnel. People's courts have the power to determine whether a case handled by its personnel is misjudged or not according to relevant regulations and laws. Judges held responsible for misjudging cases will receive a disciplinary punishment. Those who have committed a crime in the process will be dealt with accordingly by judicial departments. The investigation of violations of trial procedure laws cover past and present infringements. China's Supreme People's Procuratorate issued a similar regulation covering China's procuratorial organs in late July, 1998. Both rules are significant in building up a system for investigating misjudged cases.

7.3 The far-reaching impact of open trials and live court broadcasts on judicial reforms

According to the Chinese Constitution and laws, except for three kinds of cases -- those involving national secrets, privacy and minors -- all cases should be tried openly. The verdicts of the above-mentioned three kinds of cases must also be announced publicly. To conduct public trials means to allow ordinary people including media reporters to attend court trials. This practice has proven effective in many countries to prevent lopsided adjudication, lax enforcement of necessary judicial procedures, and prejudicial judgements against the accused. But in practice, it has not been fully followed by many local courts, and court proceedings were not publicised until a few years ago.

Of course, for many years, some courts have opened their trials to only a certain number of visitors who hold a special pass issued by the courts. At the same time, the formality required to apply for the pass is usually complicated, which keeps away a great number of visitors. In cases that require the court to open session more than once, many courts choose not to inform the public of the schedule. What is more, some local courts say they do not have courtrooms big enough to accommodate all visitors. As a result, ordinary trials are usually conducted in the presence of a very small number of visitors.

According to current Constitution and legislation, every Chinese citizen has the right to information, including the right to know the truth about any case. However, this right can only be realised if China's courts conduct trials openly before the watchful eye of ordinary citizens. If China is to establish a sound democratic and legal system, China's courts must conduct their proceedings openly, in accordance with the law.

i) Opening court trials to the public

China began to reform its judicial procedures in 1996. Conducting an open trial has been a major requirement of the reform. But no regulations have been stipulated to punish those who go against judicial principles. Perhaps this is the reason the principles are being overlooked. Some law enforcement officers and judges are not sure about their ability to make the right judgement in certain cases. Furthermore, many courts fear that the participation of ordinary visitors, especially media reporters, may make trials complicated. That is the main reason for the unpopularity of public trials.

Xiao Yang, president of the Supreme People's Court, has pointed out that courts must consciously put themselves under the scrutiny of the public eye and that the „public trials" stipulated in the Constitution must be carried out. Starting from June 10, 1998, Chinese citizens above the age of 18 have been able to audit any public trials held in the Beijing No 1 Intermediate People's Court. All that is required is to show an ID card. By doing that, the court

has become the first intermediate court in China to allow its workings to be viewed. On the same occasion, journalists are allowed to report any cases tried publicly by the court, provided that their reports are accurate and responsible. For this purpose, an attention-grabbing screen of 200,000-yuan (US$24,096) was set up at the gate of the Beijing No 1 Intermediate People's Court, listing the cases to be tried in court, in full view of an interested public. More and more local courts are beginning to permit citizens aged 18 or above to attend most court hearings.

Open trials have a far-reaching impact on propelling judicial reforms and ensuring the integrity and justice of the legal system. Open trial is the most direct, widespread and forceful kind of supervision. It can increase judicial openness and transparency, prevent darkroom operations, and ensure that justice is served. One of the major reasons for the public complaints about the courts is that the trials are secret and not transparent. The public have an opportunity to observe and supervise judicial activities. This can curb or eliminate interfering factors such as personal favours, power, and money. It is an effective way to protect judicial independence, and to impose pressure on judges, urging them to improve their professional skills. It can also improve the legal awareness of the general public. Therefore, most legal and media specialists agreed that live broadcasts of courtroom hearings have a positive impact on China's legal reform, moving the system towards greater transparency.

ii) Live court broadcasts

Xiao Yang, president of the Supreme People's Court expressly and repeatedly declared in 1998 that as long as the media respects the facts and takes an impartial stand, live coverage of trials is always welcome. More than 40 television stations across China have broadcast live court proceedings. The first was Nanjing City Television Station in Jiangsu Province. The station began broadcasting court live in April, 1994 with a weekly programme titled *„Courtroom Fax“*. More than 200 trials have been aired on the programme. The first nation-wide live broadcast of a court hearing by China Central Television (CCTV) on July 11 enjoyed an audience rating of 4.5 percent, higher than that of CCTV's noon news programme. The copyright infringement case involved ten Chinese film studios and was heard in Beijing's No. 1 Intermediate People's Court. A survey conducted in Nanjing reveals that many local residents are interested in the programme and frequently ask their friends to record it when they are unable to watch proceedings. To date, at least eleven higher people's courts and 58 intermediate people's courts have begun live telecasts of trials to increase their openness and transparency. Experts and lawyers are often invited to comment on the trials, and telephones are in place to allow viewers a chance to air their opinions.

A newly released 500-sample survey conducted by Beijing No 1 Intermediate People's Court indicates that 90.7 percent of its respondents think the trials they have attended are „just and fair“. Among the 172 respondents who have participated in courtroom actions, 92.5 percent said the judges listened attentively to the litigants. By the end of 1998, some 2,630 people had attended trials with valid identification cards. Since December 1998, all courts in Beijing have

opened their courtrooms to ordinary citizens. The survey also shows that 75 percent of respondents are satisfied with the performance of the judges. People were asked to evaluate the judges' manners, attitude towards litigants' ability to control the trial, and proper dressing.

Being exposed to the public's eyes, it is only natural for the judges to be cautious about every word they say. Since courtrooms have been opened to the public, the quality and efficiency of handling cases in court have improved. Judges usually pronounce verdicts at a later date instead of right at the end of the court session. Both the complexity of some cases and the large number of legal provisions have imposed difficulties on the timely pronouncement of verdicts. The quality of judges, which the court will routinely improve, is another reason for the late verdicts.

To improve media access to courts, the Supreme People's Court (SPC) has opened a telephone hot-line to be used by the news media this year. The hot-line is managed by spokesmen for the court. It follows the opening of a hot-line reporting on law enforcement advice and another one directed to spokesmen for the NPC. In addition to convening press conferences, the spokesmen will help reporters locate people they want to interview, clarify some facts and inform them of cases of public concern. At present, the SPC holds five to eight press conferences each year. Reporters may still cover court stories on their own. Chinese courts at all levels will gradually establish a spokesperson system.

It should be noted that although most of the public have viewed the live broadcasts of court cases, some of them have not. A number of people are worried that this practice will disrupt the trial process and deter witnesses from speaking the truth, because the latter might be afraid of retaliation or exposure to the public. Some people believe cases shown to the public should be typical cases, and ought to be used to serve an instructive function. These cases should be tried by judges of high calibre. It is stipulated in China's law that any case may be open to the public, except when the cases involve national security or personal privacy. If witnesses do not want to be exposed to the public, blurring their pictures on TV can be an ideal substitute. All these concerns show that there is still a long way to go before this vivid and direct practice can be accepted by the public.

It is also an open question as to how to avoid any negative impact of broadcasting proceedings. Some people argue that cases involving violent crime or a large number of victims and witnesses should not be broadcast, while others argue that class-suit cases, such as consumers suing a company, would be suitable for a TV audience. Defendant and plaintiff should be informed of the live broadcast beforehand and should not be forced into the project. The media should remember they are only playing a minor role in these live broadcasts. Media coverage of the cases should not improperly influence the decision reached by the courts. Televised discussions by experts should be held after rather than during the court hearing.

To fulfil the basic principle of the Chinese constitution of public trial, it is more crucial to improve people's legal awareness and judges' professional level rather than focusing on the limited space of the courtroom.

7.4 Reforms with the lay assessor system

The people's lay assessor system is an important part of the judicial system. The jury system was introduced to China at the beginning of this century, but ended with the fall of the Qing Dynasty (1644-1911). [15]China inherited the people's lay assessor system from the former Soviet Union. People's lay assessors had been instituted in regions controlled by the Communist Party of China before the founding of New China in 1949. China's first constitution in 1954 made a clear provision for such a practice in China's judicial system. However, the system was short-lived, falling victim to the *„Cultural Revolution“* (1966-1976). Although the status of the system was re-established in the 1978 constitution, it is only recently that it has again been given due attention. The Supreme People's Court has proposed to the Standing Committee of the NPC to draft laws to regulate the selection, rights and duties of lay assessors.

Unlike the jury system practised in Western countries, Chinese lay assessors share equal rights and duties with the judges in court. Forming a collegial bench with judges, they play a vital role in rendering trial judgements by a majority vote of lay assessors. They provide an effective channel for the people to participate directly in judicial activities and conduct supervision of the judicial activities.

Some courts in China have hired experts in special fields to function as lay assessors. The Beijing No 1 Intermediate People's Court started to hire IPR rights academics as lay assessors a year ago. The courts are currently paying more attention to lay assessors' proficiency in their individual fields than to their knowledge of law. This helps judges to determine the facts of a case.

The people's lay assessor system should be further improved. People's lay assessors must have a certain educational level and have acquired some legal knowledge. Some local regulations state that people's lay assessors should at least have graduated from high school. Many legal professionals maintain that in cities like Beijing and Shanghai, lay assessors should have a college education. Since most lay assessors have no systematic legal education, they feel intimidated in front of judges, especially if disagreements arise. This often results in assessors just listening to trials without making their own judgements. Lay assessors should be encouraged to make their independent judgement, and deliver their opinion in good faith.

[15] It is also argued that China may experiment with juries in the reform of its trial system.

It is necessary to improve legal education to ensure that judicial power is vested in the right hands. While lawyers must pass strict professional examinations, many judges and procurators do not have to. In this situation, judges could easily reach the wrong verdict, while paying little attention to lawyers.

As to other issues concerning the internal judicial structure, the powers of collegial benches (made up of three judges) and single judges are expected to expand, and the function of judicial committees will be limited to difficult major cases only. The practice will transform the role of the chief judges and presidents of courts from ratifying court judgements to ensuring proper trial conduct by all parties to a case.

7.5 Reforms with the township courts

The implementing of the rule of law in the rural areas is an important part of the rule of law. There are 17,411 township courts in rural areas. Township courts are a branch of the county-level courts and are independent of township governments. The courts have a lot to do to help China's 900 million farmers solve problems arising from renewal of farmland contracts and the development of the rural economy. They handled 50.27 percent of all first instance cases in China's courts in the past five years from 1993 to 1998.

However, there are still problems at different governmental and judicial levels in building up township courts. Although they are not a part of the township Party committee of township governments, some township governments have used court staff as government employees. Some court arrangements could affect the outcome of trials.

China’s Supreme People's Court has urged the courts to stamp out such malpractice, to stop getting involved in government affairs that are not part of their legal duties, and to conduct their activities in accordance with the law. It is necessary to formulate rules to rework China's to strengthen the judiciary's role, so as to help stop corruption in it and help further effect law and order in rural areas by standardising the operations of township courts, their governance, and their trial procedures.

7.6 Types of conflict resolution used in practice and speed of dispute resolutions

According to Chinese law, in the event of civil law and commercial law disputes, the private parties may pursue the following avenues in settling the disputes:

(i) Holding reconciliation talks between the parties;

(ii) Requesting third parties to help in mediation. China is well known for its successful „Eastern Experiences“ in settling most of the civil and commercial disputes by mediation machinery. One of the reasons is that there is neither a winner nor a loser in mediation process. Hence, neither of the two parties loses face;

(iii) Filing petitions with relevant administrative departments;

(iv) Applying to arbitration bodies for arbitration proceedings pursuant to relevant agreements reached with the producers. In case the parties are unwilling to solve a dispute through consultation or mediation, or fail to do so, the dispute may, in accordance with the arbitration clause provided in the contract or the written arbitration agreement reached by the parties afterwards, be submitted to a Chinese arbitration body or some other arbitration body; and

(v) Instituting legal proceedings in people's courts. If an arbitration clause not is provided in the contract and a written arbitration agreement is not reached afterwards, the parties may bring suit in the People's Court.

The parties shall implement the arbitration award. If one of the parties fails to implement the award, the other party may apply to a people's court for enforcement. If the people's court that has been requested to enforce an arbitration award finds the award unlawful, it shall have the right to refuse the enforcement. If a people's court refuses to enforce an arbitration award, the parties may institute proceedings concerning the contractual dispute in a court. In the 1980s, foreign firms strongly objected to arbitration in China because they did not have confidence in the fairness of Chinese arbitration proceedings or the means of enforcing arbitration awards. By the 1990s, the China International Economic Trade and Arbitration Commission (CIETAC) had become one of the world's business arbitration centres and is considered to be a fair forum. Since the adoption of Arbitration Law in 1994, many major cities have established independent arbitration bodies. Beijing Arbitration Commission is one of the newly emerged arbitration bodies, and arbitrates around 200 commercial cases annually.

According to the Arbitration Law of 1994, the arbitration award is finally binding on the parties, and the party that is not satisfied with the arbitration award may not bring the case to a people’s court. But labour dispute arbitration is an exception. For if the workers involved are not satisfied with the adjudication of arbitration, they may bring the case to a people’s court. If they are not satisfied with the judgement of the first instance, they may appeal to the court of second instance. Of course, it is quite burdensome for the workers to follow both arbitration and suite channels.

As far as the speed of dispute resolutions is concerned, most of arbitration bodies and courts are able to conclude the resolution of the disputes within a fixed period. The Arbitration Law of 1994 is silent on the time limit requirements for delivering the arbitration award. This issue is always dealt with by the arbitration rules of arbitration bodies. For instance, under Article 48 of the Arbitration Rules of Beijing Arbitration Commission, the arbitration award shall be made within four months dating from the formation of the tribune of arbitration. Such time limit requirements are often satisfied.

Efficiency is critical to judicial justice. According to Article 135 of the Civil Procedure Law of 1991, the trial of first instance shall be concluded within six months dating from the acceptance of the plaintiff's suite. According to Article 146 of Civil Procedure Law of 1991, the trial of first instance using the simplified procedure shall be concluded within three months dating from the acceptance of the plaintiff's suite. According to Article 159 of the Civil Procedure Law of 1991, the trial of second instance shall be concluded within three months dating from the acceptance of the party's appeal. Thus, it take the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In practice, some corporations or individuals need two or three years to reach the final court rulings. It has been reported that courts of second instance have taken around two years to deliver the final court ruling, requiring the court of first instance to rehear the case. This means that the plaintiff and the defendant had to follow another circle of trial including first and second instances.[16] It is urgent to speed up trials, reduce the judicial cost and improve the judiciary effectiveness. The Supreme people's court has realised that exceeding the time limit for concluding trials is a violation of the procedural law, and should be given the same attention as the correction of wrong judgements. During the first ten months of 1998, courts in China handled more than 4.3 million new cases and concluded more than 3.82 million.

To improve judiciary effectiveness, it is necessary not only to create awareness among judges of modern, effective practices, but also to equip the office facilities with modern technologies. Some courts, including Beijing's Higher People's Court (BHPC), have launched the construction of the Court Computer Information Network. The project of BHPC will cost about 60 million yuan (US$7.228 million). The network is going to include a supporting system especially for presidents' decision-making, a lawsuit information system, an office management system and a public information system. It will connect Beijing's more than 30 courts from municipal to county levels. Beijing sees an increase of 10,000 to 15,000 cases every year, and its courts have already run out of space for additional officials. The courts expect this network to greatly raise their efficiency by freeing them from a tremendous amount of manual operations presenting a looming threat to judicial efficiency. Beijing residents will expect to get quick judicial consultation through the network, which will also greatly improve judicial transparency by releasing typical cases and trial results, and receiving related inquiries. To offer effective and timely judicial remedy to the consumers in vulnerable positions, it is feasible to establish

[16] Chijian, „A time-consuming suite ", Democracy and Law, Vol.8, 1998.

consumers' small claims courts or general small claims courts in China. Some local courts in Suihua region, Heilongjiang Province and Changde city, Hunan Province, have experimented with establishing special courts to handle the cases concerning consumer disputes. The author believes that it is more reasonable to establish the small claims courts in China, covering not only the consumers' small claims, but also other small debt claims based on either contract or tort.

7.7 Measures against unsatisfactory enforcement of judgements

In China, the biggest danger threatening the dignity of the rule of law is the fact that it has not been possible to enforce a considerable number of rulings in civil law and commercial law cases. According to the Supreme People's Court, nearly one million cases with a total value of 190 billion yuan (US$22.9 billion) were pending throughout China by September 1998. According to high court statistics, the national incidence of un-executed cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload. In July 1998, Beijing had 9,882 un-enforced court decisions. Fifty-seven percent were civil cases, while 32.6 percent were commercial ones. The cases involve judgements valued in tens of billions of yuan. Compared with district courts, the city's higher and medium people's courts have had far more un-enforced court decisions, because of more complicated procedures and larger amounts of money involved. For several years, un-enforced court decisions have continued to damage the prestige of the law and have caused widespread criticism.

The problem with the enforcement of court decisions did not appear until the late 1980s, when cases awaiting resolution peaked in many courts across China. The situation was so bad that specific enforcement divisions had to be established in courts at all levels to cope with the problem. The debtors often try every means to conceal their real financial situations and put off repayment as long as possible. Some scofflaws have even used violence against law enforcers. Since August 1998, more than 30 incidents have been reported in Fujian Province in which about 30 law enforcers were injured during their attempts to resolve cases. Violence against law enforcement officers has become an increasingly serious problem. Four court police officers have been killed during the process of execution in the past three years.

Local protectionism is an important factor in the context of the increasing number of un-enforced cases. It is not uncommon for local governments and local people's congresses to intervene in execution. They either exert their influence from behind the scenes or stand by the culpable litigants in public. Jilin provincial government has reportedly announced a list of 94 major enterprises in its province slated for „special protection", saying they are free from any liability in court-ordered debt collecting actions. There are probably more protected enterprises at the prefecture and county levels. What makes things even worse is that some local courts have even found themselves confronting local police and local procuratorates as they tried to carry out their duties. In extreme cases, local police have even clashed with judges or taken away the

goods confiscated by the court. More than 50 such cases have been reported to the Supreme People's Court since 1992. The impetus behind these clashes usually comes from local establishment authorities.

Meanwhile, the lack of a detailed, unified regulation over court enforcement also contributes to the current difficulties. For example, the provisions on the execution of verdicts in the civil procedure law seem a bit too simple to avoid a variety of interpretations. Many cases also result from a poor level of awareness of laws and a lack of a belief in the rule of law among both the litigants and those who could have a say in law enforcement.

In December 1998, the Supreme People's Court issued a document concerning how to deal with resistance to execution of laws. It empowers the local courts with greater authority and provides practical measures to defend the law's honour. The Supreme Court is now launching a special training course for the senior judges responsible for the enforcement of judgements.

To enforce civil court orders, local courts have begun to take tough actions against debt repudiators who refuse to pay overdue court-ordered debts despite having the economic ability to do so. Initially, names of the repudiators are being published in the local press in an attempt to bring the problem to the public's attention. If the repudiators continue to ignore the court, executors from the courts may enforce compliance. Local media have given support to the campaign by publicising debtors' lists over the last two months. These tough actions have proven effective in South China's Guangdong Province, including Guangzhou, Zhan-jiang, Shenzhen, Dongguan and Foshan. For example, most of the 112 enterprises and 16 individuals whose names were publicised by Guangzhou Intermediate People's Court in the press have paid 520 million yuan (US$62.65 million) in overdue debts, accounting for 92.8 percent of the total.

In early 1998, Beijing's courts launched a mass campaign to ensure that debtors cannot repudiate their obligations. 170,000 yuan (US$20,482) in outstanding debts was repaid within one day in Fengtai District People's Court. Haidian Court announced a second order on July 17 to detain those who refused to carry out the court's decisions. On May 22, Haidian Court publicised the names of 54 units or individuals refusing to carry out court decisions involving more than ten million yuan (US$1.2 million). In addition to making the name list of debt repudiators public and compulsory means of enforcement such as detention, some local courts are restricting the daily consumption level of debt repudiators. This has also proven effective.

7.8 The authority of interpretation of legislation by judges

In China, judges are only authorised to apply the legislation in the individual cases. They are not qualified to make the law. However, since some legislation is very general or even silent on a number of detailed issues, the judges need to exercise the authority of interpretation of legislation in order to determine the legal foundations for the case they are dealing with. It is possible for the judges to abuse such authority for the sake of personal interest.

Hence, it is necessary to deprive such authority on interpretation for certain issues. For instance, considering the difficulty of distinguishing between the acts of God and normal commercial risks, the unified Contract Law has deprived the local court judges of the authority to make the interpretation as to whether certain circumstances amount to an act of God. Only the Supreme Court has the authority to make a competent interpretation with regard to this issue.

It is also necessary to require that court rulings describe the detailed logic and rationale for making the interpretation of legislation comprehensively, and to disclose the interpretation of legislation by judges to the public. In practice, many court rulings are very simple and general with their wording, while the explanations for the interpretation of the legislation are sometimes not provided. It would be beneficial to impose some rigid requirements on the drafting of the court rulings.

8 Other Essential Elements to Improve the Implementation of Legal Systems in China

8.1 Promoting sound legal awareness

China is a country with more than 2,000 years of feudal autocratic tradition. The legal system in feudal society stressed control and duties rather than rights and freedoms. This situation continued after 1949, when China was under a planned economy system. Even today, many government officials still think that the state laws are the tools of class rule rather than the code of conduct everybody must obey.

A nation-wide survey conducted by Horizon Market Research and Policy Analysis Group indicated that there are two things that concern China's urban residents most: safeguarding consumer's rights and labour protection. Thirty percent of respondents were most concerned with the law on the protection of consumers' rights and interests. Meanwhile, 25.5 percent were concerned with Labour Law and 19.1 percent with Criminal Law. However, results varied from one city to another. For example, residents in Beijing, Chengdu, Nanning, Shenyang and Xiamen were stressed Consumer Protection Law. Guangzhou residents were most concerned with Labor Law. Criminal Law was considered most important by 26.4 percent of Jinan residents of Shandong Province. Respondents' answers also varied depending on their education levels. For example, citizens who had not completed primary school were most concerned with Labor Law. In contrast, those with higher education were more concerned with consumers' rights. Moreover, only 1.8 percent of respondents were concerned with Environmental Protection Law, and most people still do not understand they can use the legal system to deal with environmental issues. A quarter of respondents could not say which law concerned them most.

This survey reflects different levels of development of the market machinery and legal awareness in various cities. However, it is a common fact in every city that, as the market economy grows, infringements on consumers' and employees' rights are increasing. Fake and poor-quality products, for instance, are more common, and labour disputes exist within many enterprises. Therefore, residents' awareness of both consumer protection and labour laws have increased. As environmental quality gets worse and worse, it is expected that more and more people will be deeply concerned with the legal protection of the environment. This is also the case with the legal awareness of human rights and the rule of law.

In addition to popularising the idea of rule of law and detailed rules, it is also essential to broaden human rights education among the grass-roots people, especially among the government officials. China started its first ever radio series on human rights on December 8, in a bid to

enhance public awareness of the human rights among its 1.2 billion inhabitants. The 24-part series, consisting of interviews and information on human rights, is being broadcast by China National Radio from 9:30 PM to 9:45 PM Beijing time every Tuesday and Wednesday.More efforts need to be devoted to human rights education nation-wide.

China's legal education system is now entering a new age. There are more than 300 law schools in ordinary universities, with about 60,000 students enrolled. Law school enrolments are to increase from the current 2.2 percent of all college students to three percent by 2000 and 4.5 percent by 2010. China urgently has to train both professional legal talents and public servants with a good legal sense.

8.2 Encouraging lawyers to play a more active role

The work of lawyers penetrates nearly all spheres of society and plays a fruitful role. In China, there are around 100,000 lawyers and more than 8,300 law firms. Beijing was counting 3,349 lawyers and 294 law firms by the end of 1998, ranking third in China regarding the number of attorneys. In addition to providing legal advice to policy-makers, Chinese lawyers have contributed to the country’s economic development by offering services in the fields of finance, bonds and securities, real estate, foreign trade and anti-dumping. Statistics from the Chinese Ministry of Justice indicate that between 1985 and 1997 Chinese lawyers handled over two million commercial cases, which is about one fifth of all cases dealt with during that period. The fruitful role of lawyers in legal and commercial life will be better considered in the future as their professional competency continues to improve.

However, with the development of legal, economic and social affairs, lawyers' expertise needs to be sharpened. It is estimated that only 25 percent of China's 100,000 lawyers have gained a bachelor's degree, with just 1.5 percent having been awarded a master's degree. There were cases where poorly qualified attorneys charged high service fees, offering a poor professional image. Such negative practices are expected to be dealt with by the lawyers’ association and the relevant authority. Legal aid legislation aiming at supporting vulnerable people who are unable to afford to hire lawyer is also expected to be adopted.

References

Chijian, *„A time-consuming suit "*, Democracy and Law, 1998, Vol.8, Beijing, in Chinese.

Drzewicki Krzysztof & Allan Rosas, *„Social Rights in A United Europe"*, Social Rights As Human Rights: A European Challenge, edited by Krzysztof Drzewicki, Catariana Krause & Allan Rosas, Institute for Human Rights, 1994, Abo Akademi University Press, Abo.

Information Office of the State Council of the People's Republic of China, *„Progress in China's Human Rights Situation in 1996"*, 1997, Beijing, in Chinese.

Junhai Liu, "*The Protection of Shareholders Rights"*, 1997, Law Press, Beijing, in Chinese.

Junhai Liu, *"Strengthening Corporate Social Responsibility"*, 1999, Law Press, Beijing, in Chinese.

Parkinson J. E., "*Corporate Power and Responsibility: Issues in the Theory of Company Law"*, 1993, Oxford University Press, London.

State Statistical Bureau of the People's Republic of China, *„Statistical communique on social-economic development in 1996"*, Beijing, 1997, in Chinese.