

# **Chinese Policy Laws and Separation of Powers**

Litong Chen

## **I. Policy Laws and Their Characteristics**

### **A. What Are Policy Laws?**

Policy laws are laws which are enacted to implement policies of policy makers or policies which are directly executed and enforced as laws. Strictly speaking, every piece of law in China is enacted at the sole discretion of its policy maker – the Communist Party of China (“CPC”) to implement CPC’s policies. However, at the whole spectrum of Chinese laws, policy laws, compared with the Contract Law, the General Principles of the Civil Law, the Civil Procedural Law, the Criminal Procedural Law as well as other universally accepted general and ordinary laws (hereinafter collectively referred to as “general laws”), are arbitrary, unpredictable and non-transparent in both making and enforcement. Generally, there are two forms of policy laws:

#### **1. Policy-laws:**

Policy-laws are enacted by either congresses (central or regional) or administrative departments in the form of law to carry out the political policies set by CPC. “In many legal systems, legislators often attempt

to achieve a policy through granting rights or imposing penalties, and legal analysis consists of the study of the system of rights set up by the law. But the notable feature of policy-laws is that they do not grant rights and are not justifiable by courts. At most, they express values that are expected to inform judicial decision-making.”<sup>1</sup> Therefore, the provisions of the laws are like political slogans. People can hardly use the laws to assert their rights. The most significant policy-law is the Constitution of the People’s Republic of China (“Constitution”) or some provisions of the Constitution fall into the category of policy-law. For example, “the state promotes the nationwide use of Putonghua.”<sup>2</sup> “All state organs and functionaries must rely on the support of the people, keep in close touch with them, heed their opinions and suggestions, accept their supervision, and work hard to serve them.”<sup>3</sup>

## 2. Law-policies

Law-policies are not set in the form of law. On the contrary, they are “...meetings, notices, instructions, and speeches that are given legal effectiveness because they emanate from authoritative government and Party bodies.”<sup>4</sup> Some other forms are decisions, notes, decrees<sup>5</sup> or

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<sup>1</sup> DONALD C. CLARKE, *The Law, the State and Economic Reform*, in *THE CHINESE STATE IN THE ERA OF ECONOMIC REFORM: THE ROAD TO CRISIS 195* (Gordon White ed., 1991).

<sup>2</sup> Zhong hua ren min gong he guo xian fa, 《中华人民共和国宪法》 [Constitution of the People’s Republic of China] art. 19 [hereinafter CONSTITUTION].

<sup>3</sup> *Id.* art. 27.

<sup>4</sup> Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *NW. J. INT’L L. & BUS.* 391; *see also*, Meng Qinguo, *Some Issues relating to Policy laws*, *Tianjin Shehui Kexue* [Tianjin Social Science] No. 2 at 55 (1990), (translated as Shortcomings of Policy laws, in *Joint Publications Research*

directions.<sup>6</sup> The policies might be used as legal authorities to decide rights and/or duties (like civil laws), even life or death (like criminal laws) or speed up or retard enforcement of laws (like procedural laws).

For example, after the December 1978 Meeting of the Third Plenary Session of the Eleventh Central Committee of CPC, private economic elements such as individual industrial and commercial households (“individual households”) began to emerge.<sup>7</sup> However, it was still outlawed to hire people for the purpose of preventing rekindling of exploitation system.<sup>8</sup> The situation continued until 1981 when the promulgation of Several Decisions on Widely Opening Employment Resources, Activating Economy, and Solving Job Issues of Cities and Towns<sup>9</sup> was made, by which individual households were permitted to employ only two assistants. Some special craftsmen could hire five apprentices.<sup>10</sup>

However, the limit of seven employees (assistants plus five apprentices) was quickly broken through by some brave entrepreneurs

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Service, No. 90083, May 17, 1990, at 21).

<sup>5</sup> *Pi shi* (批示), which is usually in writing.

<sup>6</sup> *Zhishi* (指示), which is usually oral.

<sup>7</sup> Guang dong hong dun xin xi (广东红盾信息), *Dang dui si ying jing ji zheng ce de li shi fa zhan*, 《党对私营经济政策的历史发展》[The Historical Development of Party’s Policy about Private Economy], available at [http://www.gdgs.gov.cn/news/gslt/show\\_content.asp?id=339](http://www.gdgs.gov.cn/news/gslt/show_content.asp?id=339) (last visited March 20, 2005).

<sup>8</sup> *Id.*

<sup>9</sup> Zhong gong zhong yang, guo wu yuan guan yu guang kai men lu, gao huo jing ji, jie jue cheng zhen jiu ye wen ti de ruo gan jue ding, 《中共中央、国务院关于广开门路，搞活经济，解决城镇就业问题的若干决定》，available at

[http://www.chinacourt.org/flwk/show1.php?file\\_id=2072&str1=%B8%E3%BB%EE%BE%AD%BC%C3](http://www.chinacourt.org/flwk/show1.php?file_id=2072&str1=%B8%E3%BB%EE%BE%AD%BC%C3) (last visited March 20, 2005).

<sup>10</sup> *Id.* art. 4.

who needed more people to work with, and there came forward some so called super individual households which, by exceeding limitation of seven employees,<sup>11</sup> were facing serious criminal prosecution.<sup>12</sup> It is Deng Xiaoping who condoned them by a speech.<sup>13</sup>

## **B. Characteristics of Policy Laws**

### **1. Policy Laws Are Made and Enforced in Response to the Calls of CPC or Its Leaders**

Deferral to the calls of CPC or its leaders is a kind of political task. Policy-laws are usually made and enforced to fulfill the tasks while law-policies directly executed and enforced by administrative agencies and judicial systems as laws. The making of policy-laws usually peaks annually with the plenary session of the CPC's Central Committee and several work meetings which are jointly held by the Central Committee of CPC and the State Council on diversified subjects such as economy, finance, agriculture and so on. Policy-laws (as well as general laws) are thus enacted to carry out the spirits of the conferences and meetings.

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<sup>11</sup> See, *supra* note 7.

<sup>12</sup> *Id.*

<sup>13</sup> Deng Xiaoping (邓小平), *Zai di san jie zhong yang gu wen wei yuan hui shang de jiang hua* (《在第三届中央顾问委员会上的讲话》), [The Speech at the Third Plenum of Central Consultant Committee], *Deng xiao ping wen xuan di san juan* (《邓小平文选》第三卷), [The Selected Works of Deng Xiaoping III], Ren min chu ban she (人民出版社), [Ren Min Press], 91 (1993). Mr. Deng Xiaoping stated in a speech at a meeting of Central Advisory Committee: "Sometime ago, that people-employing issue was really stirring and everybody was deeply worried. My opinion was that we should wait to see in two years. Can this affect our big picture? If you move him, the people would say policy has changed, and they will feel unsafe. If you resolve a "Silly Seeds" while make people feel unsafe, nothing is good. Let Silly Seeds do business for a while, nothing is to worry about. Can it hurt socialism?"

The making of law-policies is much more frequent than policy-laws because law-policies can be made by a single leader either in writing or orally.

## **2. Policy Laws Are Ambiguous and Usually Incur Arbitrariness in Interpretation**

Whether or how policy laws are executed usually depends on authoritativeness of the underlying policies and the concerned policy makers behind. Almost inevitably, provisions of rights and duties in policy laws are not clearly defined and provided. Instead, they are full of slogan-styled languages. For example, “the 1985 State Council rules on enlivening state-owned enterprises (the ‘Enterprise Rules’) merely express some generalized wishes and policy goals, such as that enterprises should obtain good leadership, increase their ability to reform themselves, and take effective measures to cut costs and raise productivity...and it is unimaginable (at least at present) that anyone could go into a Chinese court with a claim that some right he had was violated by the improper implementation of these rules.”<sup>14</sup>

For another example of Chinese compulsory education, literally, Chinese compulsory education exists in name only or “[w]ithin the future five years, China can execute free nine-year compulsory education.”<sup>15</sup>

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<sup>14</sup> CLARK, *supra* note 1, at 195.

<sup>15</sup> Zhou, zhaojun (周兆军), *Zhuan jia: zhong guo you neng li zai wu nian nei shi xing jiu nian zhi mian fei yi wujiao yu*, 《专家:中国有能力在5年内实行九年制免费义务教育》[Expert: China Is Capable

Almost no children can go to school without money paid first although the concerned laws otherwise stipulate – “the state runs schools of various types, makes primary education compulsory and universal, develops secondary, vocational and higher education and promotes pre-school education.”<sup>16</sup> “The state shall not charge tuition for students receiving compulsory education.”<sup>17</sup> “The State Council and the local people's governments at various levels shall be responsible for raising funds for the operating expenses and capital construction investment needed for the implementation of compulsory education, and the funds must be fully guaranteed.”<sup>18</sup> However, if anyone sues central and/or local governments for being denied of opportunities of compulsory education, probably no court would hear the case. Besides political reasons, there are some technical difficulties in initiating the proceedings – the State does not charge tuition and it is schools (both public and private) that charge money which might not be necessarily called as tuition. By the same token, it would not be more possible to sue because “funds for education are not fully guaranteed.” What is more, the piece of policy law did not provide private cause of action.

### **3. General Laws Usually Defer to Policy Laws in Interpretation**

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of Executing Free Nine-year Compulsory Education within Five Years], available at <http://www.chinanews.com.cn/news/2005/2005-03-13/26/549905.shtml> (last visited March 20, 2005).

<sup>16</sup> CONSTITUTION, *supra* note 3, art. 19.

<sup>17</sup> Zhong hua ren min gong he guo yi wu jiao yu fa, 《中华人民共和国义务教育法》 [the Compulsory Education Law of the People's Republic of China] art. 10 [hereinafter Compulsory Education Law]

<sup>18</sup> *Id.* art. 12.

## and Execution

In order to crack down organized crimes, serious violent crimes and serious theft crimes, the Opinion of the Supreme People's Procuratorate on Prosecuting Organizations Actively Participating in "Severely Cracking down" Struggles and Streamlining Economic Market Orders<sup>19</sup> was issued on April 7, 2001 for the purpose of "thoroughly learning and following the spirit of the speech of the leaders of the Central Committee."<sup>20</sup> Clause two of the opinion provides: "serious criminals shall be cracked down more severely within prescribed sentencing volume and more quickly within prescribed time limitation."<sup>21</sup> The legal guidelines of "more severely" and "more quickly" should be combined with "two basic" principles – as long as basic facts are clear and basic evidence is confirmative, arrests and prosecutions should be made quickly according to law. *Do not be entangled with minor details and nonessentials.*" (emphasis added).<sup>22</sup> This Opinion is in conflict with the Criminal Procedure Law of the People's Republic of China,<sup>23</sup> which provides that: "In conducting criminal proceedings, the People's Courts,

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<sup>19</sup> Zui gao ren min jian cha yuan guan yu jian cha ji guan ji ji can jia "yan da" zheng zhi dou zheng he zheng dun gui fan shi chang jing ji zhi xu gong zuo de yi jian 《最高人民法院关于检察机关积极参与“严打”整治斗争和整顿规范市场经济秩序工作的意见》， available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=37108&str1=%D1%CF%B4%F2](http://www.chinacourt.org/flwk/show1.php?file_id=37108&str1=%D1%CF%B4%F2) (last visited March 20, 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Zhong hua ren min gong he guo xing shi su song fa, 《中华人民共和国刑事诉讼法》, [The Criminal Procedural Law of the People's Republic of China] [hereinafter the Criminal Procedural Law].

the People's Procuratorates and the public security organs must rely on the masses, base themselves on facts and take law as the criterion”<sup>24</sup> rather than “basic facts.” The Criminal Procedural Law also provides that: “In the decision of all cases, stress shall be laid on evidence...”<sup>25</sup> instead of “basic evidence.” What is most important, what is the criterion to distinguish between the facts which are major and significant and “minor details and nonessentials?” What if a minor detail and nonessential happens to conflict with a major and significant fact? Under this situation, shall a criminal be put into jail or even executed?<sup>26</sup>

#### **4. Policy Laws Are Imperial in Nature**

Policy laws reflect the adherence and fancy to the efficiency and fearsomeness of imperial decrees<sup>27</sup> which were personally issued by emperors in feudalism dynasties. As a matter of fact, people usually attach more importance to the decrees or directions of leaders than general laws or seek the decrees or directions to trump general laws or the other decrees or directions. Some dilemmas which could have not been resolved for a long time can be raveled out in a very short time or at least appear so.

For example, for a long time it had been well known that

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<sup>24</sup> *Id.* art. 6.

<sup>25</sup> *Id.* art. 46.

<sup>26</sup> It is quite possible for the concerned criminals to get executed because the Opinion deals with “organized crimes, serious violent crimes and serious theft crimes”.

<sup>27</sup> *Sheng zhi* (圣旨)

nationwide peasant workers in China were owed a lot of payments for odd jobs. It is difficult for each single peasant to sue for only several hundred bucks because he may not know how to hire, or cannot afford hiring a lawyer, or does not have evidence because of not knowing how to secure evidence especially for oral contracts. Collecting money might bring in threats and physical harms exerted by contractor-debtors without even being subject to any liabilities.<sup>28</sup> Many stories of miserable peasant workers had been exposed frequently, however vainly until October 24, 2003 when Premier Wen Jiabao visited a peasant family on a field trip.<sup>29</sup> During visiting, the peasant complained of the owing by a local contractor. Premier Wen thus directed on the spot that the problem be resolved immediately. Therefore, 2,240 yuan (about \$270) which had been owed for one year was totally paid off around 11 pm that day.<sup>30</sup> Thanks to the continuous directions of the General Secretary Hu Jintao and Premier Wen Jiabao, a nationwide campaign was launched to deal with the problem.<sup>31</sup> According to January 17, 2004 report of

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<sup>28</sup> Lai, Zhikai & Huang Xiuzhen, Hai nan qin fan jian zhu nong min gong quan yi shi jian diao cha yu si kao, [The Investigations and Thoughts on the Incident of Infringement upon the Interests and Rights of Construction Peasant Workers in Hainan], available at [http://www.agri.gov.cn/llzy/t20040802\\_227974.htm](http://www.agri.gov.cn/llzy/t20040802_227974.htm) (last visited March 20, 2005).

<sup>29</sup> Sun Jie & Huang Huo, Wen jia bao zou fang san xia ku qu fu di, zong li wei nong min zhui wu gong gong zi, [Wen Jiabao Visited the Three Gorges Inner Areas, the Premier Urged for Payment of Defaulted Remuneration to Peasant Workers], XINHUA WEB, Oct. 24, 2003, available at <http://www.sjzdaily.com.cn/gzmg/20031210/GB/gzmg%5E1%5E1%5Ewb10-002.htm> (last visited Feb. 19, 2005).

<sup>30</sup> *Id.*

<sup>31</sup> Shijiazhuang Daily, Hu Jin tao wen jia bao zuo chu zhong yao pi shi, fang zhi xin tuo qian nong min gong gong zi, [Hu Jintao and Wen Jiabao Made Important Directions: New Incidents of Default of Remuneration to Peasant Workers Should Be Avoided] April 6, 2004, available at <http://www.sjzdaily.com.cn/gzmg/20031210/GB/gzmg%5E1%5E117%5ER03b1003.htm> (last visited Feb. 19, 2005).

Xiahua News Agency, within two months, the concerned departments and organizations were deployed by the Central Committee of CPC and the State Council to react promptly to clean up defaults.<sup>32</sup> According to the preliminary statistics of January 17, 2004, what had been defaulted in the past several years as much as 21.5 billion yuan (about \$2.59 billion) or 68% of the total owing was paid. The owing of 2003 was paid as much as 89%.<sup>33</sup>

In order to “win the campaign,” all courts in China were mobilized urgently to collect the peasants’ hard-earned money.<sup>34</sup> For example, Hebei Provincial High Court issued an urgent notice requiring all levels of courts in Hebei Province to concentrate time and manpower to try cases of defaulting peasant workers.<sup>35</sup> Before the Spring Festival of 2004, “each court shall promptly try the cases and promptly enforce the judgments as long as they are involved in defaulting peasant workers.”<sup>36</sup>

Yes, everyone should applaud justice being done for those peasant workers. However, it is natural for people to ask: what if Premier Wen had not visited the peasant family or the peasant had not been brave enough to make the complaint? What if this peasant did not have

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Xue han qian* .

<sup>35</sup> Sun Yingming & Han Yuanheng , Sheng gao yuan: tuo qian min gong gong zi an yao kuai shen kuai ban ge ji fa yuan jiang pai chu gan rao cong su zhi xing, [Provincial High Court: Cases of Defaulting Remuneration to Peasant Workers Should Be Tried and Payment Enforced Promptly; Various Courts Shall Promptly Enforce Judgment by Eliminating Interference], SHIJIAZHANG DAILY, April 6<sup>th</sup>, 2004, available at <http://www.sjzdaily.com.cn/gzmg/20031210/GB/sjzrb%5E1447%5ER02Bc002.htm> (last visited Feb. 19, 2005).

<sup>36</sup> *Id.*

legitimate claim against the debtor? What will the results of similar cases be after the campaign is over? Why did not the people's courts uphold justice before the decrees and directions being issued? With policy laws getting upper hand of general laws, the dividing line between the administration, the judicial system and CPC was blurred once again. The President, Premier and the General Secretary of CPC functioned like judges while judges act like administrative officers.

There are many reasons to explain why judges were too lazy to hear cases of miserable peasant workers, and "policy laws" should be one of the reasons. Policy laws cripple functionality of judicial system and damage the spirits of the rule of law. Policy laws manifest a status quo: in China, power is superior to law. Let's assume it is Premier Wen who owes money to the peasant worker and refuses to pay off his debt. It would not be difficult to imagine what the result will be. Actually the situation was just relieved not completely resolved. Peasant workers are still literally shedding blood for collection of what they are owed.<sup>37</sup>

## **II. New Tendency in Policy Laws**

"Under Mao, policy alone as articulated and applied by CPC had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy. It was imprecise,

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<sup>37</sup> Lai, supra note 28.

exhortational, tentative, and subject to unlegislated revision.”<sup>38</sup> After adoption of the Constitution in 1982, as Stanley Lubman argued that, “Reform has brought a fundamental new orientation toward governing China that has generally been followed”<sup>39</sup> because the Constitution “recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CPC policy directives, even though the implementation of legislation still depends on CPC policies and changes in them.”<sup>40</sup> The observation is not exact. Actually, policy laws are still rampant although taking on new characteristics.

#### **A. Policy Laws Become More Ideologically Neutral than Ideologically Inspired.**

During the Mao era, “ideology penetrated every aspect of life in society. In this period, major economic policies were ideologically inspired; in other words they were derived from and evaluated against, ideological fundamentals. The Great Leap Forward, the People’s Commune the pursuit of the higher degree of public ownership, self-reliance and ‘politics in command’ in economic activities in the Cultural Revolution best characterized this orientation.”<sup>41</sup> Policy-laws

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<sup>38</sup> LUBMAN, *supra* note 4, at 384.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> FENG CHEN, *ECONOMIC TRANSITION AND POLITICAL LEGITIMACY IN POST-MAO CHINA* 15 (State University of New York Press 1995).

as instruments to implement policies and law-policies having legal binding force as laws inevitably became a weather vane to test whether socialist east wind overpowered capitalist west wind or vice versa.

With the adoption of the “Reform and Open Door” policy and the advent of private economic elements, because class struggles between capitalism and socialism were no longer regarded as primary social conflicts, CPC’s policies become more pragmatic and are thus primarily focused on economic issues. Therefore, there appeared a lot of economic policy laws.

## **B. Ideological Rhetoric Remains Intact in Some Certain Areas**

Although most policy laws are ideologically neutral, socialism-capitalism mental wrestling still exists in the areas which are critical to the national welfare and the people’s livelihood<sup>42</sup> such as the banking industry (the State-owned banks *per se*). “The government has stated on many occasions that it is not prepared to reform the banking system until the experiment of economic development has been completed”<sup>43</sup> because “the fundamental tenet of socialist policy was too sacred to be sacrificed in the early days of the experiment.”<sup>44</sup> The State-owned banks as well as other important state-owned enterprises are always placed at the top of the totem pole to be favored and pampered

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<sup>42</sup> Guo ji min sheng.

<sup>43</sup> I.A. TOKLEY & TINA RAVN, BANKING LAW IN CHINA 3 (Sweet & Maxwell 1997).

<sup>44</sup> *Id.*

with private enterprises and entrepreneurs disfavored and discriminated.

For example, to implement the spirit of 1997 Central Financial Work Meeting of the Central Committee of CPC and the State Council, the People's Bank of China ("PBC") issued the Guiding Opinion on Improving Financial Services in Support of National Economic Development<sup>45</sup> on May 26, 1998 requesting all banks (including city banks, policy banks as well as other commercial banks) to increase extension of loans to agriculture, forestry and irrigation construction,<sup>46</sup> and actively support the development of middle and small-sized enterprises and promote reemployment.<sup>47</sup> However, Clause 2 demanded "*concentration of funds to guarantee most important tasks*" which were to ensure development of the big and medium-sized State-owned enterprises via reform.<sup>48</sup> Specifically, banks shall support textile, coal, oil, and petroleum industries and 512 key industrial enterprises to mitigate their loss and make them profitable (*emphasis added*).<sup>49</sup> Apparently, if funds are concentrated to support the State-owned factors, how could banks have more money to support agriculture, forestry, irrigation construction, middle and small-sized enterprise, which are usually private companies? As a matter of fact, lack of loans has been

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<sup>45</sup> Guan yu gai jin jin rong fu wu, zhi chi guo min jing ji fa zhan de zhi dao yi jian, [Guiding Opinion on Improving Financial Services in Support of National Economic Development], (1998), available at [http://www.chinalawedu.com/news/2003\\_11%5C5%5C1553488193.htm](http://www.chinalawedu.com/news/2003_11%5C5%5C1553488193.htm) (last visited March 20, 2005).

<sup>46</sup> *Id.* art. 1.

<sup>47</sup> *Id.* art. 3.

<sup>48</sup> *Id.* art. 2.

<sup>49</sup> *Id.*

being a critical issue to bottleneck the development of private sectors.<sup>50</sup> From 1991 to 1997, the investments of private entities amounted to 15% to 27% of the whole country's total investments while the loans they got were only 0.87% of the total loans extended by banks.<sup>51</sup>

### **C. Policy Laws Become Difficult to Enter Well Defined Legal Realms**

After the 1982 Constitution was adopted, law-making became frequent and prompt. The more general laws are made, the more legal relations are stipulated, the less areas policy laws could exert influence on. For example, on January 10, 2001, the former General Secretary of CPC Jang Zeming brought about the “rule of moral”<sup>52</sup> as one of guiding lines to rule the country at National Conference of Publicity Ministers.<sup>53</sup> However, “rule of law”<sup>54</sup> at least as a conception has been too well developed and leave little space for “rule of moral” to be pervasive. Therefore, “rule of moral” was not too much dwelled on let alone put into the Constitution as a piece of policy-law.

However, another theory “Three Representatives”<sup>55</sup> raised by Jang

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<sup>50</sup> Guangzhou Economic and Trade Web, Ru he rang xiang qi tiao chu er guo you de guai quan – xiang zhen qi ye de suo you zhi bia ge , [How to Let Village Enterprises Jump out of the Vicious Circle of “Secondary form of State-ownership” – the Ownership Reform of Village and Town Enterprises], available at <http://www.gzii.gov.cn/left2/qygl/xdgl/2001.4/0405001.htm> (last visited March 3, 2005).

<sup>51</sup> *Id.*

<sup>52</sup> *Yi de zhi guo*

<sup>53</sup> PEOPLE'S DAILY, January 10, 2001, at 1. (By checking at the newspaper's website, the editor failed to locate any article in Page 1 as the claimed source material. Instead, the editor found on Page 9 possible source article titled *New Century Initiative*.)

<sup>54</sup> Xian fa [Constitution] art. 5, cl. 1 (P.R.C.). *Yi fa zhi guo*.

<sup>55</sup> The CPC shall be the representative of the demand for developing China's advanced productivity,

Zeming encountered less difficulty to get popularized than “rule of moral”, and ended into the Constitution as a guiding theory juxtaposed with the Mao Zedong Thought and Deng Xiaoping Theory.<sup>56</sup> A search of “*San ge dai biao*”<sup>57</sup> within the law database of the Supreme People’s Court<sup>58</sup> indicated that 561 items (including general laws, regulations, policy laws and judicial interpretations) mentioned “Three Representatives.” However, within the same database, only 14 items, which are all policy laws, refer to “rule of moral”. One of the most important reasons to explain the big difference is that “Three Representatives” is metaphysical and not in conflict with those well-developed legal conceptions and definitions. Therefore, policy laws become difficult to play a role of substantive laws because they can hardly re-stipulate retrospectively the rights and duties which have been well defined by general laws. On the contrary, policy laws function more like procedural laws to affect enforcement of general laws.

#### **D. Makers of Policy laws Become Multilateral and Multilevel**

Policy laws come from the concerned policies, and the policies come from the “great mind or minds” of CPC. However, when personality cult faded away, the making of a policy is less single-minded

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the representative of onward direction of China’s advanced culture; and the representative of the basic interests and rights of China’s most people.

<sup>56</sup> CONSTITUTION, art. Preamble.

<sup>57</sup> “Three Representatives” in pinyin.

<sup>58</sup> <http://www.chinacourt.org/flwk/>

(e.g., Mao Zedong Thought, and Deng Xiaoping Theory). “The passing of Deng Xiaoping from the scene, removing the one person still able to impose overall policy, will almost inevitably trigger a new level of struggle even within the various factions which support the dominant marketization program.”<sup>59</sup>

Therefore, central and local leaders, due to different conflicting directions, orders, notes or speeches, usually make policy laws multilaterally and at multilevel, which usually incur policy law shopping. It is not strange for the opposite parties of a case to seek law policies from different leaders (in legislature, administration and/or judicial systems) to trump general laws and each other decrees and/or directions. It is not unusual that a finished case is overturned upside down just because the decree(s) and/or direction(s) or the leaders behind are so powerful (e.g., the chief justice of a court where the case is heard, the mayor of a city or governor of a province where the hearing court is located).

#### **E. More Policy Laws Are Made for Private Interest Rather than Public Interest**

“This unification in China between the realms of economy and politics is nowhere better illustrated than in the powerful role in ‘business’ played by top government and party leaders, and especially by

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<sup>59</sup> Robert Weil, *Read Cat, White Cat: China and the Contradictions of “Market Socialism”*, MONTHLY REVIEW PRESS, 15.

their family members, who use their official positions for personal benefit. These are the very elements who have led the market reform drive, based on the combination – not the opposition – of state power and private investment, and it is they, more than any others, who have enriched themselves as a result of their own policies.”<sup>60</sup> “Red-hat businessman”<sup>61</sup> and “prince party”<sup>62</sup> are public secrets in China. They leverage their special official status and/or connections to acquire special interests and privileges. Almost all of the sons and daughters of former and current advanced leaders are well placed in governmental and/or business posts. It is also not a surprise to find a connection between the success of a legendary businessman and the support of a cadre(s). Policy laws (law-policies *per se*) are thus hijacked for rent-seeking.

### III. Conclusions and Suggestions

“Reliance on ‘policy laws’ is undemocratic, disorderly and a source of instability; ‘policy laws’ do not set precise limits on legal and illegal behavior nor define the legal consequences of failure to comply, and they are procedurally unclear.”<sup>63</sup> “This criticism parallels western views that when Party policy takes precedence over law, law loses its rationality and

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<sup>60</sup> *Id.*

<sup>61</sup> Han Fudong, 韩福东, Qing li hong ding shang ren na ge ban fa geng you xiao, 《清理红顶商人哪个办法更有效?》[Which Way Is Most Effective to Clear up Red-Hat Businessmen?], Yan Zhao du shi bao, 《燕赵都市报》[Yan Zhao City Paper]. *Hong ding shang ren*, 红顶商人, [Red-Hat Businessmen] refers to businessmen with government background or connections

<sup>62</sup> *Tai zi dang* (太子党) refers to the sons and daughters as well as other descendants of Chinese advanced leaders. The word is a kind of taboo for CPC, and rarely used in governmental media.

<sup>63</sup> LUBMAN, *supra* note 4 at 391.

the need to be internally consistent and orderly, and reflects the use of law as a ‘mere instrument.’”<sup>64</sup> The reason why a policy can be enacted into law arbitrarily or enforced as law directly is that CPC and its administration as both the policy maker and law maker are not checked and balanced. It does not need for CPC or its administration to go through any vetogates<sup>65</sup> before a policy becomes a law because there are no vetogates. By the same token, policy laws do not have any tiny chances to be scrutinized by judicial reviews because the Chief Justice and the Chief Prosecutor are subject to the leadership of CPC and can be removed freely from their posts.

How to deal with the problem? A natural response would be to end the CPC’s one-party ruling, which however is not a good remedy. Policy laws in China are imperial or of feudalism fundamentally. Any political parties nurtured in such a feudalism context would naturally follow suit – they would not be less frustrated by not having final say on every policy making or would be as similarly perplexed by vetogates as CPC vis-à-vis the Kuomintang.<sup>66</sup> The Soviet Russia’s shock therapy seemed not successful in democratic construction either – reliance on the

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<sup>64</sup> *Id.* supra note 4 at 391-392; see also YUANYUAN SHEN, CONCEPTIONS AND RECEPTIONS OF LEGALITY: UNDERSTANDING THE COMPLEXITY OF LAW REFORM IN MODERN CHINA, IN THE LIMITS OF THE RULE OF LAW 21, 29 (Karen G. Turner, James V. Feinerman, and R. Kent, eds. 2000).

<sup>65</sup> WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, Foundation Press, 68.

<sup>66</sup> *Guo min dang* (国民党) took power in China prior to CPC before 1949. Before getting defeated militarily and retreating to Taiwan, it adopted policy of *Yi dang xun zheng* (一党训政) [One party admonishes administration].

iron hand to govern seems to become a natural choice for both the governor and the governed.

It would be likely harmful to refuse taking any reforming measures under the pretext of “maintaining the internal consistency of its official economic ideology under the ‘umbrella’ concept of ‘socialism with Chinese characteristics.’”<sup>67</sup>

To reform, there would be tons of proposals from different perspectives. However, no proposals would be constructive without taking into account Chinese reality or constructiveness should be measured against how realistic they are in promoting Chinese democracy. For policy laws, it would be unrealistic to propose CPC to be immediately self-disciplined and eradicate policy laws completely. Policy laws are a reflection of feudalism in imperial concentration of powers. Therefore, it would be difficult for those who either make suggestions or are suggested to design a road map without letting CPC initially get used to separation of powers.

#### **A. Strengthen Legislatures from Professionalizing Congresspersons**

To professionalize congresspersons (in both central and local legislatures) is to let them capable of being independent both in mind and

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<sup>67</sup> CHEN, *supra* note 22, at 13.

life. In China, all congresspersons are part-time politicians.<sup>68</sup> As a matter of fact, to be a congressperson is regarded by some of them a political honor rather than a duty.<sup>69</sup> A congressperson could be an actress, farmer, sanitary worker, teacher, soldier, or bus driver. There is no qualification requirement for education let alone legal education and training. Some of them do not understand some basic terminologies like GDP.<sup>70</sup> “Lack of time for congresspersons to research bills ... makes legislatures function like rubber stamps.”<sup>71</sup> Such a legislature would be easy to pass any bills without any hesitation or could not check any policy laws within perimeters of rule of law. Within 56 years from 1949 to 2005, probably not even one bill was ever voted down by the National People’s Congress (“NPC”) as well as the regional people’s congresses.

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<sup>68</sup> Zhang Xiujuan, 张秀娟, *Ren da dai biao jian zhi he zhuan zhi de li bi feng xi*, 《人大代表兼职和专职的利弊分析》 [The Analysis of the Pros and Cons about the Full-time and Part-time of NPC Representatives], available at <http://news.163.com/05/0309/11/1ED8F0SU00011211.html> (last visited March 20, 2005).

<sup>69</sup> Lu duoxiang, 陆多祥, *Shi lun ying xiang ren da dai biao zuo yong fa hui de yin su ji dui cei*, 《试论影响人大代表作用发挥的因素及对策》 [About the Factors Affecting the Functionality of NPC Representatives and Suggestions], available at <http://zgrdxw.peopledaily.com.cn/gb/paper8/21/class000800001/hwz226141.htm> (last visited March 20, 2005).

<sup>70</sup> He, Jindong (贺劲松) and Liu, Jing (刘菁), *7% he wo men he jin, ren da biao ping shuo GDP zeng zhang*, 《“7%和我们很近” 人大代表评说 GDP 增长》, [“7% Is Near Us” People’s Congresspersons Comment on GDP Growth], Xinhua News Agency, March 9, 2003, available at [http://news.xinhuanet.com/newscenter/2003-03/09/content\\_766858.htm](http://news.xinhuanet.com/newscenter/2003-03/09/content_766858.htm) (last visited March 9, 2005). It was reported: “Representative Xin Xiyu (a peasant from San Li Qiao Village, Dan Jiang Kou City, Hu Bei Province): After hearing what we were discussing in the past two days, I understood that GDP is the total market value of the products produced by the State within one year for us to consume, and the most important indicator to scale whether a country’s economic situation is good or not. The poultry farm in our village sells about 30,000 chickens annually with sales volume as much as over 100,000 yuan, which is equal to some contributions to the State’s production value. In the GDP, you got a piece of contributions from grass-roots people, for which, I feel extremely proud.

<sup>71</sup> Li Lin, 李林, *Jian chi he wan shan quan guo ren da de hui qi zhi du* 《坚持和完善全国人大的会期制度》 [To Stick to and Perfect the Congress Time System of NPC], available at <http://www.china-review.com/tbzt/0502002.htm> (last visited March 20, 2005).

It seems natural for CPC as well as its administration not to draw on the collective wisdom which might be experienced through a vetogate because there is hardly any wisdom to draw on.

To professionalize legislatures also means that people who work in administrative agencies and judicial systems can not be elected as congresspersons any more as they are. Actually, all of the advanced leaders in both administration and judicial systems (e.g., the President, the Premier, the Chief Justice and the Chief Prosecutor) are all congresspersons. In the Tenth NPC, cadres<sup>72</sup> amount to 32.44% of NPC representatives,<sup>73</sup> which certainly incur a conflict of interest between three branches of government – judges, prosecutors and administrative officers make laws for them to execute and enforce, and vote for (or vote on at least) their own work reports.

## **B. Strengthen the Judicial System from Making It Equal with Administrative and Legislative Powers**

Because the President,<sup>74</sup> the Chairman of the Standing Committee of NPC,<sup>75</sup> the Chief Justice,<sup>76</sup> the Chief Prosecutor<sup>77</sup> are all elected by

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<sup>72</sup> Cadres can be understood as public servants from legislature, administration, judicial systems, and the State-owned enterprises.

<sup>73</sup> *Zhong guo xin wen wang* (中国新闻网), *Quan guo ren min dai biao da hui* (全国人民代表大会), [National People's Congress], available at <http://www.china.org.cn/chinese/zhuanti/2003zgjk/372273.htm> (last visited March 3, 2005).

<sup>74</sup> CONSTITUTION, art. 62.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

NPC,<sup>78</sup> theoretically they should have the same footing in execution of powers. However this is not the case in reality.

Actually, in CPC system, cadres are placed in the hierarchy of power pyramid. From the top down to the bottom, it is ranked as the General Secretary, the Standing Committee of Political Bureau, the Political Bureau, the Central Committee, and the National Representative Conference of CPC.<sup>79</sup> Customarily there is only one member assigned from the Standing Committee of the Political Bureau to lead the Standing Committee of NPC as its chairman, and one to preside over the Political Consultation Conference.<sup>80</sup> The remainder is all concentrated in the administrative areas (e.g., the President, the Premier, the Commissioners of the State Council).

The two highest judicial representatives (i.e., the Chief Justice and the Chief Prosecutor) are only at the level of the Central Committee,<sup>81</sup> which is lower in hierarchy than the Political Bureau, the Standing Committee of the Political Bureau and the General Secretary. Thus, in CPC's cadre system, the Chief Justice and the Chief Prosecutor are

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<sup>78</sup> *Id.*

<sup>79</sup> Zhong guo gong chang dang zhang cheng 《中国共产党章程》 [The Articles of Association of the Communist Party], available at [http://news.xinhuanet.com/ziliao/2002-11/18/content\\_633225.htm](http://news.xinhuanet.com/ziliao/2002-11/18/content_633225.htm) (last visited March 20, 2005).

<sup>80</sup> The conference is held at the same time with NPC as an embodiment of the People's democracy for the purpose of offering advice and opinions to NPC.

<sup>81</sup> Xin Hua Wang, 新华网 [Xin Hua Net], Shi liu da shou quan fa bu: zhong guo gong chan dang di shi liu jie zhong yang wei yuan hui di yi ci quan ti hui yi gong bao (ming dan), 《十六大授权发布：中国共产党第十六届中央委员会第一次全体会议公报（名单）》 [The 16th Convention Authorizes to Announce: the Communiqué of the First Plenum of the Sixteen Central Committee of the Communist Party of China (name list)], available at [http://news.xinhuanet.com/newscenter/2002-11/15/content\\_630949.htm](http://news.xinhuanet.com/newscenter/2002-11/15/content_630949.htm) (last visited March 20, 2005).

subordinate to not only the President (which is in administration), the Chairman of the Standing Committee of NPC (in legislature), but also the Premier, the Deputy Premiers, and even Commissioners of the State Council (all in administration).<sup>82</sup>

As a matter of fact, the Standing Committee of the Political Bureau and/or the General Secretary decides the nominations of the candidates for Chief Justice and Chief Prosecutor. In addition, the Central Political and Legal Work Committee of the Central Committee is responsible for coordinating works among the Supreme Court, the Supreme Prosecutorate, the Ministry of Public Security and the Ministry of Justice. Its head is usually the member of the Standing Committee of the Political Bureau, who usually functions more than a coordinator. Local governments have the same design.

“Judicial independence is normally thought of as independence from political control of the judicial process, but it would be more accurate to describe it as independence from control by superior officials, whether or not political, to the end of diffusing judicial power.”<sup>83</sup> It is almost impossible for the judges and prosecutors to be truly independent with so many administrative and legislative bosses hanging above. As

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<sup>82</sup> Di shi jie quan guo ren min dai biao da hui di yi ci hui jian kuan 《第十届全国人民代表大会第一次会议简况》 [The Briefing of the First Plenum of the Tenth National People's Congress], available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=311512&pdm=010110> (last visited March 20, 2005).

<sup>83</sup> RICHARD A. POSNER, *THE FEDERAL COURTS CRISIS AND REFORM*, 16 Harvard University Press (1985).

far as policy laws are concerned, what a court can do is just to follow let alone to conduct judicial reviews.

Therefore, my proposal is to let two members of the Standing Committee of the Political Bureaus to assume the posts of the Chief Justice and the Chief Prosecutor respectively so that the two heads of the judicial system might be equal with the counterparts in legislature and administration.

The two proposals about strengthening legislative and judicial sectors of course are not enough to root out policy laws, and far more enough to let democracy and rule of law have their day in China completely. However, every long march begins from the first step. Separation of powers would be the first step to make, which might not be perfect but essential and realistic.