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Introduction: The Chinese Legal System Since 1995: Steady Development and Striking Continuities

Donald C. Clarke

In March 1995, *The China Quarterly* published a special issue devoted to developments in the Chinese legal system. That issue canvassed a wide range of subjects: the legislative process,[1] the implementation of legislation via the interpretive practices of courts and administrative agencies[2] as well as through the enforcement of civil judgements,[3] the personnel staffing the system in the role of legal advisers,[4] criminal law and human rights,[5] the key area of foreign trade and investment law,[6] and finally China's place and role in the international legal order.[7]

Over a decade later, it seemed appropriate to revisit the Chinese legal system in order to assess developments since the mid-1990s, and that is what this Special Issue sets out to do. Many of the original authors were invited to submit contributions, and new authors were brought in as well. In addition, a number of legal scholars from China were asked to participate as commentators, and their comments appear here. The authors were not asked to do whatever they had done before; instead, the subject matter of the contributions was dictated by their perceptions of the current important issues in Chinese law as well as their own interests. Although not all subjects of importance are covered here, it is fair to say that all subjects covered here are important.

As Stanley Lubman noted in his introductory essay to the 1995 special issue, "prediction of the future configuration and fate of Chinese legal institutions [is] risky,"[8] and it is interesting to compare how the legal system looked to a group of specialists over ten years ago with how it looks today. Reviewing the essays in

1 Murray Scot Tanner, "How a bill becomes law in China: stages and processes in lawmaking," *The China Quarterly*, No. 141 (1995), pp. 39–64.
2 Anthony R. Dicks, "Compartmentalized law and judicial restraint: an inductive view of some jurisdictional barriers to reform," *The China Quarterly*, No. 141 (1995), pp. 82–109.
3 Donald C. Clarke, "The execution of civil judgments in China," *The China Quarterly*, No. 141 (1995), pp. 65–81.
4 William P. Alford, "Tasselled loafers for barefoot lawyers: transformation and tension in the world of Chinese legal workers," *The China Quarterly*, No. 141 (1995), pp. 22–38.
5 Donald C. Clarke and James V. Feinerman, "Antagonistic contradictions: criminal law and human rights in China," *The China Quarterly*, No. 141 (1995), pp. 135–54.
6 Pitman B. Potter, "Foreign investment law in the People's Republic of China: dilemmas of state control," *The China Quarterly*, No. 141 (1995), pp. 155–85.
7 James V. Feinerman, "Chinese participation in the international legal order: rogue elephant or team player?" *The China Quarterly*, No. 141 (1995), pp. 186–210.
8 Stanley Lubman, "Introduction: The future of Chinese law," *The China Quarterly*, No. 141 (1995), pp. 1–21 at p. 14.

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the 1995 special issue, Lubman pointed to a number of factors clouding the future of Chinese law reform, in particular the "growing weakness of the Chinese apparatus of state" and the declining power of the central government over the rest of the country.[9] Yet from the vantage point of today it is hard not to be impressed by the staying power of the Chinese state. Murray Scot Tanner's article refers to several studies arguing that "the wave of decentralization of power that occurred in the 1980s has, in important ways, been reversed since the early 1990s, thus reviving the Chinese central state's capacity in finance, administration and personnel, monitoring, and coercion."[10] A decade ago, for example, government revenues were 10 per cent of gross domestic product – a "pathetic figure," in the words of economist Arthur Kroeber. Today they are 20 per cent.[11] If local protectionism has not significantly declined, it does not seem to have significantly worsened either. China has become neither a de jure nor a de facto federal state. Thus, to the extent law reform depends on a strong central state, the prospects are perhaps a little better today – certainly not worse – than they were in 1995.

At the same time, however, certain continuities are striking. My article in 1995, for example, called attention to the severe problems courts faced in enforcing their judgements.[12] Benjamin Liebman in this issue finds the situation essentially unchanged, as are the institutional features of courts, such as local control, that contribute to their problems.[13] Murray Scot Tanner shows that the public security apparatus remains as decentralized today as it was in the mid-1990s. My article finds unchanged the state's suspicion of bottom-up approaches to the solution of legal problems. And Lubman's observation that "legality remains an ideal only inconsistently supported by the leadership, and has still not been clearly distinguished from bureaucratic regularity" could have been written today, as extra-legal detentions of Party officials continue under the *shuanggui* system.

Central and Local Governments: The Police and the Courts

An important aspect of the legal system not examined in the 1995 special issue was precisely the feature that distinguishes a state legal system from other rule systems: the element of enforceability through physical coercion. In this issue, Murray Scot Tanner and Eric Green examine the public security system through the lens of central–local relations. As the authors point out, most studies of central–local relations have focused on economics. Yet coercive force is a core element of state power in general and the legal system in particular, and our

9 *Ibid.* pp. 14–15.
10 See Murray Scot Tanner's article in this issue.
11 Arthur Kroeber, "The underestimated party-state," *Financial Times*, 26 February 2007.
12 Clarke, "The execution of civil judgments in China."
13 See Benjamin L. Liebman's article in this issue.

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knowledge is greatly enriched by understanding how central–local dynamics affect its exercise.

The authors begin by observing that in a formally unitary state such as China, one can view local officials, including the police, essentially as agents of the centre. The legitimate right of the centre to direct the actions of local officials is not seriously contested; what is more doubtful is its ability to do so. But the centre's ability and inclination to monitor its local agents is not uniform across sectors. First, some agents and actions are more easily monitored than others. The centre can monitor whether a promised amount of tax revenue has been handed over. But the goals of police work – such as maintaining social order and respecting the rights of citizens – are more difficult to quantify and potentially contradictory. Those that are easily quantified, such as arrests made or proportion of cases solved, may be easily manipulable or not necessarily things one wants to maximize unconditionally.

Secondly, government bureaucracies often operate according to certain stylized "lessons from history," even though the history may be contested. In China, the historical lesson that dominates thinking about central–local relations in police work is the abuses of centralized security forces during the Chinese Soviet Republic in the 1930s. As a result, China did not go down the Soviet road of a centralized police force, and Party leaders remain essentially outside the jurisdiction of the ordinary police.

Tanner and Green conclude that the presence of these two factors has led to "a relatively decentralized and feudal system of law enforcement and state coercion that constitutes a major obstacle to building the rule of law in China."

The authors also point to some specific institutional features of the public security bureaucracy that contribute to local control. While public security organs at superior levels of government are supposed to exercise leadership in "professional" matters over corresponding organs below them, those organs are subject horizontally to local political power in matters of organization, personnel and finance. The local Party committee has the power to resolve disagreements among local courts, police and procurators. Local governments have wide discretion over hiring – sometimes consistently with applicable rules, sometimes not. Unlike senior PLA officers and provincial Party secretaries, provincial public security chiefs are apparently not rotated. And since the late 1950s, the bulk of the budget for public security forces has been paid by local governments.

Entrenched local control makes monitoring difficult, and police misconduct is common. Recently, the spread of the internet and other communication technologies as well as the relaxation of controls over the media has made monitoring outside normal channels more feasible, at least in principle. But as Tanner and Green point out, this confronts the centre with a dilemma: its only choice may be "to accept local Party control and all that these dangerous incentives imply for the Party's future, or risk trying to strengthen non-Party oversight and monitoring institutions and information networks, perhaps even

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making common cause with social forces that could further erode one-party control over society." So far, they conclude, the centre has chosen to accept the dangers of local Party control: "during the past three years, the Party leadership has, if anything, backed away from building up such hard-to-dominate institutions rather than make a serious effort at mobilizing them to strengthen the centre's monitoring capacity."

I have devoted considerable space to the analysis of Tanner and Green because it resonates strongly with Benjamin Liebman's study of the court system, suggesting that there are important lessons to be drawn here about the legal system as a whole. Liebman's contribution provides a valuable status report on the role of courts in the Chinese legal system, noting both important continuities and incipient developments that may turn out to be quite significant.

The amount that has stayed the same since I looked at courts in the 1995 issue is remarkable, given the scope of change that has occurred elsewhere in Chinese society. The authority of courts remains essentially unchanged; they remain "one of a number of bureaucracies with the power to resolve disputes, and lack significant oversight powers over other state actors."[14] Despite occasional noises made about reform, their funding and personnel remain under local control. Intervention by Party or government officials in a wide range of cases remains common. And despite the vast growth in the scale of economic activity since 1995, there has been no matching growth in litigation. Never important in an absolute sense in the resolution of economic disputes to begin with, courts have in the last dozen years perhaps become even less important relative to other institutions.

At the same time, however, change is evident. Courts have become increasingly used for rights-based litigation[15]; judges increasingly look horizontally to other judges, rather than vertically to political authorities, for guidance in deciding cases[16]; and courts have increasingly come into conflicts with other institutions, such as the media.[17] None of these trends is inexorable or means that the Chinese legal system will become like that of Western countries. But as Liebman points out, the very fact that the role of courts in Chinese society is increasingly contested is itself a significant development.

A central question driving Liebman's analysis is that of why the party-state has allowed the developments he describes to occur. What role does it expect courts to play, and what role *can* courts play in a non-democratic political system?

14 *Ibid.*

15 By "rights-based litigation" I mean litigation designed to vindicate certain political, economic or social rights against powerful institutions, whether state or non-state – essentially the programme of the *weiquan* movement. I do not mean litigation designed to enforce, say, contract rights against a breaching party.

16 Benjamin L. Liebman and Tim Wu, "China's network justice" (9 January 2007), available at http://ssrn.com/abstract=956310.

17 Interestingly, Liebman (in this issue) reports that when courts and media have conflicting understandings of a case, political authorities typically trust the media more than the courts – or at least, for whatever reason, accept the media's view as determinative.

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Here Liebman's discussion parallels in important ways that of Tanner and Green. Like the police, the courts are an organ of state power largely outside the control of the central government. They answer to local government in almost all matters. At the same time, however, they play a role that is useful to the centre. In addition to serving as institutions for the resolution of grievances, the proper handling of which can reduce dangerous social tensions, courts are also one of many state institutions used by the government for the supervision of other state institutions. Thus, the state is willing to allow courts a modest increase in power if it enhances their supervisory function.

But as Tanner and Green show, the state willingly gives up monitoring capacity if it carries with it the danger of evading control and challenging the Party's political monopoly. Just as the state has forgone the possibility of citizen supervision over the police through, for example, the internet, so it rejects the possibility of enhanced court supervision of other branches of government through increased independence for the judiciary.

While not fundamentally disagreeing with the story told in Liebman's article, Shen Kui in his comments offers an alternative interpretation. Certainly, he agrees, "judicial reform has not yet brought about any significant change in the position or role of courts in China's political system." Yet he suggests that the yardstick of judicial independence is not the only one against which the court system should be measured. He notes that court reform has in fact gone further than reform of people's congresses[18] or the Communist Party, and that this success has bred expectations of even more progress. Indeed, courts do seem to be special in the sense that they are one institution of which the expectations of a generally cynical society remain remarkably high – and well above performance. Shen agrees that the role of courts is increasingly contested, but sees this as a great achievement of reform.

Law and the Economy: What Role for Non-State Institutions?

My own contribution to this special issue is a review of legislation relating to commercial activity in the past few years. As with many of the other aspects of the legal system covered in this issue, rapid change in some areas coexists with surprising continuities in others.

China's legislative institutions have been extremely busy, and the work of foundational legislation seems almost complete. There are laws and regulations providing for a variety of business organizations; there are laws and regulations about contracts, banking, secured lending, bankruptcy, real estate and securities.

18 Although it is common to say that the people's congresses are no longer the meaningless rubber stamp they once were, this is not the same as saying they have moved very far away from that position. See, for example, Peter Ford, "China's congress follows the script, literally," *Christian Science Monitor*, 12 March 2007; Kristine Kwok, "'Fake' representatives need training: deputy," *South China Morning Post*, 13 March 2007 (quoting complaint of NPC deputy that many representatives lack the training to do their job of reviewing legislation, and that once bills come to the NPC it is already too late to make any major changes).

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The missing pieces – such as a comprehensive law on competition – are almost there.

At the same time, however, an important feature of a commerce-friendly legal system is missing: a good, bottom-up system for filling the gaps that will inevitably occur. The state institutions that come into regular contact with the gaps and ambiguities in the law are courts and low-level administrative agencies. It is true that the administrative agencies can and do fill in the gaps by simply making up a rule. This is a system, but not an especially good one, since there is no good way of ensuring that they act within their proper sphere of authority and without conflicting with other rules. Court decisions, by contrast, are subject to the unifying pressure of review by superior courts, but the power of courts to fill in gaps by making up provisional rules is quite limited. Often the response of courts is simply to decline to hear a troublesome case.

At the same time, there does not exist a legal environment in which non-state institutions can readily arise in response to market forces in order to deal with the infinite number of problems that state legislation does not anticipate or cannot handle very efficiently. The state remains suspicious of institutions not under its control and tends to suppress them. But the returns to formal state legislative activity are much less than they used to be; a greater appreciation of the role that could be played by non-state institutions is now called for.

Zhang Xianchu in his comment agrees that there is an impressive legal framework, but points out that a major problem remains in the implementation of this framework. He ties implementation problems precisely to the model of state-driven development: because the state has dictated all the rules in a heavy-handed, top-down manner with little sensitivity to business realities, it has in fact invited violations. He also notes that implementation is stymied by the state's flouting of its own rules, as when the State Council passed regulations overriding the distribution rules of the Bankruptcy Law. Perhaps most importantly, Zhang reminds us that the narrative of commercial legislation has recently changed in a significant way. At the time of the first special issue, this kind of legislation was not particularly controversial among the public. But economic and commercial legislation has now become subject to political debates and strongly opposed feelings.

James Feinerman's contribution looks at recent developments in a specific realm of the commercial legal system: corporate governance. Corporate governance in China's economic reform programme is a term with significance in two quite different areas. First, one can speak of it in the context of state-owned enterprise (SOE) reform. Although SOE reform had been on the government's agenda since the very beginning of the post-Third Plenum era of economic reform, it was in 1993, with the passage of the Company Law, that the government shifted to a policy of SOE reform through fundamental organizational changes. The Company Law passed in 1993 was not primarily about enabling the efficient formation of entities for the conduct of business; it was

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instead essentially about reforming existing SOEs. To the extent the Company Law had something to say about internal corporate governance, it contemplated a company in which the state's equity interest and voice was dominant.

By contrast, one can also speak of corporate governance as applied to all business entities in the corporate form, particularly those listed on public stock exchanges. The public policy concerns in this case are different: instead of being another way of thinking about the state's internal procedures governing the management of its assets, corporate governance becomes a way of thinking about – and perhaps, although not necessarily, prescribing in law – the relationship between enterprise managers, large stockholders and small stockholders.

In the decade-plus since the Company Law came into effect, the significance of corporate governance has shifted largely from the first conception to the second. In particular, recent reforms to the state shareholding system have made it possible (in a way it was not before) for the state to divest itself completely of its interest in publicly listed companies by selling its shares into the market, thus increasing the importance of thinking about corporate governance separately from the issue of SOE management.

Both Feinerman and commentator Tang Xin agree that there are many problems with China's corporate governance regime. Shareholder protections have been limited; boards are dominated by management, with independent directors few and weak; and information disclosure is unreliable. Although Feinerman finds that the 2005 revisions to the Company Law and the Securities Law offer some new protections, Tang notes in his comments the importance of actual implementation on the ground of these paper rights.

Particularly interesting is the congruence of both writers' observations with those of other writers in this issue on the question of the role of unofficial or non-state institutions in monitoring legal compliance. From 2001 to 2003, the Supreme People's Court issued a series of three documents governing shareholder suits against corporations and their managers for various violations of the Securities Law. The cumulative effect of these documents has been to limit severely the right of shareholders to bring suit for violations. No suits may be brought at all for violations of rules against market manipulation or insider trading. Shareholders may bring suit for violations of disclosure rules, but only where a government body – an administrative agency such as the China Securities Regulatory Commission or a criminal court – has already found a violation of law. In short, would-be private plaintiffs must first get a key to the courthouse from a government agency.

In addition perhaps to causing injustice in particular cases, this requirement closes off what in some countries can be an important supplement to government regulation: the promotion of public policy goals through private litigation. In this as in many other areas of law, the state has consistently opted for less effective enforcement if it could be bought only with the coin of increased and difficult-to-control public participation.

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The State and the Family: Paradoxes of a New Relationship

Michael Palmer's contribution, as in the 1995 special issue, surveys developments in family law. As the economy has changed in the last dozen years, so have the family and social relationships in general. As important as these changes is the fact that there has emerged considerable open debate about the proper scope and content of the state's rules about family and sexual life. While debate over the state's birth control policy is still stifled, almost everything else seems to be fair game, with one NPC deputy even advocating the legalization of prostitution.[19]

Unlike in some of the other fields of law surveyed here, the state seems willing to withdraw in the realm of family life and interfere less. Parties wishing to marry may now simply declare that they have the capacity to do so; the requirement of a letter from the work unit, which effectively imposed on the marriage a condition of work unit consent, has been abolished. The matching requirement of a letter from the work unit for parties wishing to divorce has similarly been abolished. In short, family law has acknowledged, and perhaps reinforced, the decline of the *danwei* as the essential intermediary between the urban citizen and the state.

At the same time, however, Palmer points out that the state has begun to insert itself into an area that until recently it had (like many Western states until recent decades) left essentially private: the sphere of domestic violence. Both the retreat and the advance of the state can, however, be explained by the rise of a single principle: that of the abstract citizen largely separated from a social context. In other words, Chinese law sees farmers who wish to marry as identical *for those purposes* to urban government workers, state-owned enterprise employees and the self-employed. It increasingly says that assault is assault, without regard for the identity of or relationship between the parties to the act. This notion of the abstract citizen is, of course, quite different from the view that traditionally prevailed in Mao-era China, when individuals were typically viewed by the law as existing within a particular social context – most notoriously, of course, class background.

Fu Hualing's comment to Palmer's contribution echoes some of these themes. He finds that Chinese legal reform largely follows a liberal paradigm, with the goal being to separate the Chinese Communist Party from the state and to limit the role of the state in the economy and society. He calls attention, however, to the paradox of Chinese political and legal reform: severe repression in core policy areas combined with freedom in peripheral areas. In family law, this paradox is reflected in the strict controls over the decision to have children, beside which the freedom of marriage and divorce "pales and becomes marginalized."[20] Thus, it is clear that the legal system's growing acceptance of the notion of the abstract citizen does not necessarily mean more freedoms for

19 Daniel Bell, "Sexual development," 28 January 2007, at http://commentisfree.guardian.co.uk/daniel_a_bell/2007/01/sexual_development.html.
20 See Hualing Fu's commentary in this issue.

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that citizen; it reflects a different principle of governance, but is as consistent with greater state control as with less.

Fu also points out that greater freedom for some in areas where the state retreats may mean less freedom for others. Many of the traditional social welfare mechanisms have been weakened by economic reform; those who are hurt by the increased social and legal acceptance of divorce, for example, have less to fall back on than before.

The Domestic and International Legal Orders: A Two-Way Street

Pitman Potter's contribution examines China's participation in the international legal order. In the 1995 special issue, James Feinerman entitled his article "Chinese participation in the international legal order: rogue elephant or team player?" Today there is little doubt that China wants at least to be seen as a team player. Potter examines two key areas of China's participation in the international legal order: its participation in human rights diplomacy and its membership in the World Trade Organization.

As Potter points out, China's participation in the international legal order cannot be separated from aspects of its domestic legal order. The norms of the international human rights and trade regimes must find some resonance domestically for participation to be meaningful. At the same time, complete congruence is neither to be expected nor even possible. China's policy of engagement reflects a conscious decision to be a part of the international norm-creation process instead of being faced with the choice of simply accepting or rejecting norms made by others. China wants to influence norm-creation precisely because its government does not accept the current norm structure *in toto*. Yet it must accept some parts of that structure, even parts it does not like, in order to be on the inside.

That much could perhaps be said for any country that participates in international legal institutions. But for China there is an additional element: in some areas and to some degree, international participation is a tool used by the central government to enhance its power over local governments. This is most clearly the case with China's WTO membership. Although China is a unitary state in which all power is formally in the hands of the central government, local governments often have considerable de facto powers of their own. While WTO membership does not, of course, give the central government any powers over local governments that it did not already have, it is still meaningful in that it gives added legitimacy to certain claims of the central government. Moreover, by placing itself under WTO disciplines and in effect tying its own hands, the central government can enhance its bargaining power with local governments in trying, for example, to remove local trade barriers.

In common with many of the other authors in this issue, Potter shows that while major changes have occurred in some areas, customs and practices in others remain remarkably resilient. For example, principles of transparency and

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accountability have made little headway over the years. While they have received much publicity as good policy, mandatory standards are virtually non-existent,[21] and where they exist, not observed.[22] Thus, while some WTO standards may be easily accepted, others will face much more resistance of an almost cultural kind.

In his comments, Li Zhaojie confirms Potter's observation that the PRC has essentially moved from the position of "victim-minded underdog" to that of "active status-quo keeper." The system as a whole is viewed as conforming to China's interests. He also notes the important role that international norms play in shaping China's domestic legal system. While many legal and policy reforms might have taken place even without WTO membership, it seems clear that it made them happen sooner. Even apart from the mandatory norms of the WTO, international norms are having their effect: Li observes that many proposals made and measures taken in the reform of China's criminal procedure law have their roots in the standards of international human rights law. Whether in the field of trade or that of human rights, Chinese political culture seems generally to accept an appeal to international law norms as a legitimate (if not necessarily overwhelming) argument in favour of a policy position. This certainly represents a sea change from just a few decades ago.

Julia Qin's contribution to this issue also addresses the interaction between domestic and international legal norms in a specific area: she looks at the way China's membership in the World Trade Organization and its concomitant international law obligations have affected its domestic legal system.

Assessing the significance of China's WTO membership requires an analysis of several issues. First, just how extensive are China's commitments, both relative to its pre-membership economic and political structure and relative to what has been demanded of other entering members? Secondly, to the extent that these commitments go beyond what has been required of other entering members, is their imposition unfair or otherwise undesirable, or is it an appropriate response to legitimate concerns about China's impact on world trading patterns once inside the WTO? Thirdly, to what extent will China's commitments dictate its domestic policies, and to what extent are the commitments themselves the result of domestic policies of economic reform

21 Even in such an apparently non-sensitive area such as real estate, the recently passed Property Law states in Article 18 that only right-holders and "parties with an interest" (*lihai guanxi ren*) may inspect ownership records. In effect, registration authorities have the power to refuse access if they determine that an individual's interest is not legitimate. A similar reluctance to allow unfettered public access to corporate registration records prevails at offices of the State Administration of Industry and Commerce. Law-making is similarly opaque: while various regulations call for public participation, no specific format is required and the obligation is vague. Article 12 of the State Council's 2001 Regulations on the Procedure for the Formulation of Administrative Regulations (*Xingzheng fagui zhiding chengxu tiaoli*), for example, calls for the seeking of citizen comments through such methods as discussion groups and hearings. Yet ironically, the draft text of the State Council's own regulations on transparency was kept a close secret, making meaningful citizen comment impossible. Mure Dickie, "China refuses to be open on transparency," *Financial Times*, 18 January 2007.

22 The most obvious example here is that of trials, which – almost 30 years after the 1979 Court Organization Law called for open trials – are still not truly open in the sense that courts are obliged to allow access impartially, even to those they would prefer to keep out.

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