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RESEARCH ARTICLE

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Reflections on the Legal Features of the Socialist Market Economy in China

Abstract China's socialist market economy is a market economy co-existing with a large public sector of the economy, affected by the State as a policymaker, a regulator and an important actor along with private ones; general interests in principle prevail over individual ones. A major role of the law is of providing the tools for administrative leadership and efficient macro-control. Legal and policy documents concur in indicating a model for the developing Chinese legal system: not as Western-style "rule of law" (r.o.l.); more and better socialist laws; effective supervision at all levels; intense macro-control over private economy; more efficient, law-abiding administration and legal institutions. The governing authorities are at different levels, according to the size/impact of each specific business, and each of them has or may have a say beyond the law, so implementing full macro- and micro-control on the market at various levels, through a substantial number of "policy checks" at appropriate junctions or in blank areas of the law. Differentiated "modes" of the law could be the results of a coordinated absorption within the socialist frame of values, mechanisms, norms, formants hailing from different sources.

Keywords socialist market economy, rule of law, public policy, economic law

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1 Legal Framework for the Socialist Market Economy

In a previous writing,[1] I have analyzed the role of law in China, as others have done[2] in recent years. I now elaborate in the following notes on the peculiarities of the legal environment in the socialist market economy.

The reflections that follow will be based on available data, mostly legislation and policy documents, to identify significant features of the law, corresponding to specific ways of action of the socialist soul within the Chinese market and legal system.

The Chinese socialist market economy is a market economy co-existing with a large public sector of the economy, which is affected by the State as an important policymaker, a market regulator and a market actor; general interests in principle prevail there, over individual ones.[3] The Constitution of the Communist Party of China (CPC) mentions those elements as the basis for the economic development,[4] and related statements are found in other policy documents.[5]

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[1] Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13(1) Ann. Surv. Int'l & Comp. L. 35 (2007), developed from a conference paper presented by the author in Macau (2004), titled as *The Rule of Law and the Role of Law in the Chinese Context*, in *Law, Order and Culture: Chinese and Western Traditions*, 4 Matteo Ricci Institute Studies Series, Matto Ricci Institute (Macau), at 91–end (2007).

[2] For all, I cannot but mention the research by R. Peerenboom on China-and-the-law issues, best represented by his book *China's Long March toward Rule of Law*, Cambridge University Press (Cambridge), 2002.

[3] According to the 2004 Amendment to art. 11, China's Constitution: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."

[4] *The Constitution of the CPC*, as amended in 2002 (Chinese-English text), Foreign Language Press (Beijing), at 3–33 (2002).

[5] Such as: "[We] believe that market economy is a stage that cannot be surpassed during socialist development. In terms of social development, the essential difference between the socialist system and the capitalist system does not lie in the role of the planning and the market plays in allocation of resources. The planned economy does not belong to socialism, since the capitalist system also uses the planning methods. The market economy does not belong to equal capitalism either, since the socialist system also uses market means. Planning and market, both of which are ways to regulate the economy, are indispensable at certain development phases of a commodity economy, which is based on socialized production. The most essential difference between a socialist market economy and a capitalist market economy is that the former is linked to the basic socialist system and is a part of socialist economic mechanism…" The statement can be found in the form of an editorial answer to a question from the public on the meaning of "socialist market economy," at http://www.china.org.cn/english/features/Q&A/161615.htm (last visited March 17, 2007).

A few years after Deng's "opening up" policy and the start of legal reforms—especially with private, market-related laws, previously interstitial in a basically administrative legal system—enthusiasm hit some Western circles and scholars, who predicted the coming full advent of the rule of law in China, in the form of a Western-like conception of the law. The last couple of decades' development and research made clear that the Chinese legal system is being developed for purposes different from implementing the Western-style rule of law. It is now suggested that the Chinese transition may lead to a different form of r.o.l., with a still relevant degree of unpredictability as of today.[6]

I have previously submitted[7] that the Chinese system could become in the medium term a mature one of "rule by law" (r.b.l.) or "socialist rule of law" (s.r.o.l.), borrowing its general frame and some basic mechanisms from the Soviet experience,[8] with additional features hailing from Chinese specificities and from the needs of market economy. The r.o.l. is not *per se* a goal for Chinese leaders; it rather serves other strategic purposes: fostering economic development; reinforcing the central government's control over China's huge, not yet well coordinated peripheral apparatus; ultimately, protecting political stability during the transition, and the CPC leadership and legitimacy during these historic changes—managing with a gradual, strong and prudent attitude.

The socialist legal frame will very probably, thus, be enhanced. This should especially happen for the areas of law related to strong public interests,[9] to allow the government to efficiently implement its macro-policy and discharge its supervisory/regulatory duties over China's both private and public sectors of the

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[6] See the presentation of Gianmaria Ajani at the Beijing Conference of the IALS in October 2005, on Chinese legal reforms and r.o.l. The author stated the unpredictability of outcomes at present, with the Chinese audience highly appreciating his presentation. See also the chapter on *China and the Rule of Law* in this book (in Italian), Diritto dell'Asia orientale (East Asian laws), UTET (Turin), 2007.

[7] See Castellucci, fn. 1.

[8] See Castellucci, fn. 1, especially ch. II 5 and II 6.

[9] A good example of the above could be given by the environmental protection laws: The area is very sensitive and its importance is increasing, as it lays at a crux of important socio-political issues, incl. economic development, protection of environment and future generations, health, civil and military security, and others. All the laws in that area are modeled on the general environmental protection law of 1989, a typical socialist legal instrument; flexible enough to allow a strong centralized control over the peripheral administration and at the same time to allow political and administrative discretion, according to the variable needs of the public interest, in a vast and fast-changing world. See Ignazio Castellucci, *La tutela dell'ambiente nell'ordinamento giuridico della Repubblica Popolare Cinese: un* case study *sul funzionamento del sistema* (Protection of the Environment in the Legal System of the People's Republic of China: A Case Study on the Function of the System), (1) *Rivista Giuridica dell'Ambiente* (Journal of Environmental Law) 59 (2003).

economy, with an appropriate degree of administrative discretion in areas of significant public interests. Administrative and public economic laws are likely to be paramount in the future, and grow in quantity, quality and effectiveness.

External influences also play a role, of course, like the participation of China to the international economy and its international obligations, such as those hailing from its WTO accession. In those areas many state-of-the-art pieces of legislation have been enacted, influenced by the most sophisticated international models. Legality-enhancing formants are being reinforced,[10] e.g., increasing the presence of professional judges in the people's courts: better laws, courts, lawyers, and a policy favorable to a stricter law-enforcement could produce outcomes comparable with Western ones in the medium term, if still featuring, compared to their Western homologues, significant amounts of regulatory/supervisory sets of rules and institutions.

I concluded in that essay already mentioned that a complex model of r.o.l. emerges, with differentiated areas of effectiveness of purely legal rules and enforcement tools, vis-à-vis political/administrative influences. My conclusions do not differ much from those of R. Peerenboom's world-famous book on the subject.[11] Recent data seem to confirm them.

2 Reinforcing the Socialist Frame

The *2004 Outline for Promoting Law-Based Administration in an All-Round Way*, of the State Council ("2004 Outline") indicates that the fully law-based administration of the country should be reached by improving administrative law-awareness and law-abiding behavior, administrative law-enforcement and supervision mechanisms, rather than creating checks-and-balances and/or entrusting legality checks to courts and procuratorates—almost unmentioned in

[10] The obvious reference is to Sacco's theory of legal formants. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1–34, 343–401 (1991).

[11] R. Peerenboom also hints in the general conclusions of his *China's Long March toward Rule of Law* (mentioned at fn. 2), that a subsequent development after the mentioned state is reached could be a substantial political transformation of China, with a new role for the Party/parties and a subsequent shift towards what this author labeled the "neo-authoritarian" model of rule of law. I recognize this as a possible development, but also that this could not be the case at all. The coming stage of the Chinese legal environment, which I indicated as r.b.l. or socialist r.o.l. ("socialist-statist" model of r.o.l. in Peerenboom's classification) could be reached within a decade or maybe a little bit more. Beyond that, I share Ajani's views on the impossibility of making accurate forecasts on what will be coming next.

the document.[12]

This is not surprising, in a socialist environment, where the role of the government and its administrative laws, rules and procedures is paramount. The 2004 Outline is certainly, thus, a far more crucial document than it would be in any Western context. The idea of law-based administration, however, is related to the other one that politics shall indicate the path free from legal constraints, to "govern the country according to law and rule the country by virtue";[13] the law-based administration and its development will be led by the CPC and its own concept of "virtue."[14] The outcomes of a well-known case decided by the Intermediate Court of Luoyang (2003) and then by the High Court of Hunan (2005)[15] in recent years also suggest that the Chinese legal system is developing within the conceptual frame of a r.b.l./s.r.o.l. macro-model. A model characterized by an almighty legislature, rigid separation of functions, no checks-and-balances, no judicial legality check of normative acts; a model featuring a (very socialist) legislative supervision mechanisms[16] laid to ensure the legality of laws and regulations vis-à-vis higher-ranking norms, that should be made more efficient and reinforced reasonably soon.

The State Council's *White Paper on the Rule of Law in China*, issued on February 28, 2008 ("2008 White Paper"), is a very general document, bearing a great political and strategic significance. Its very existence underlines the Chinese senior leadership's attitude, favorable to a stronger and more mature legal system. The analysis of the document suggests that the selected path of

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[12] The need to implement effective institutional supervision by the People's Congress as well as democratic supervision by the political entities is stressed in the Outline's sect. IX para. 27, before the indication of the need for administrative organs to accept the supervision of the courts according to the law, which only follows in the very short para. 28.

[13] 2004 Outline, ch. III, at 13. In the original text, *yi fa zhi guo*, related to the law (*fa*), reveals its difference from *yi de zhi guo*, related to virtue (*de*), as the same term *yi* corresponds to two different ideograms and concepts: The former conveying the idea of day-to-day management and the latter more related to a higher-lever inspiring, leading or authoritative principle.

[14] On the "virtuous" approach of the CPC to country governance as a purely r.b.l. approach. See Castellucci, fn. 1 at 47–50.

[15] A young, legally trained judge of the Intermediate Court of Luoyang declared a piece of provincial legislation of Hunan illegal and void, being contrary to national law. The provincial people's congress made an official protest to the intermediate court, considering the judge's position as a serious political mistake and a serious breach of the law. The High Court of Hunan reviewed the case and confirmed the applicability of the national law over the provincial one, but criticized the first judge as she had no right to declare the provincial law invalid. See Jim Yardley, *A Young Judge Tests China's Legal System*, Int'l Herald Tribune, November 28, 2005.

[16] As provided in the Legislation Law of March 15, 2000. See Castellucci, fn. 1.

development is still aimed at some Chinese declination of the r.b.l./s.r.o.l. model.

Strong statements can be found there on the fundamental role of law for civilization, and on the Chinese people's desire of a society based on the organic unity of the Party, the people and a law-based system of governance.[17] The document's Chapter I reinforce the law's general legitimacy and its key role in society, indicating the millennia-old Chinese *legal* tradition—after Confucius, Mencius and Xunzi also came, after all—as a significant contribution to the *legal* civilization of mankind.[18] It also indicates that in modern times "people with lofty ideals tried to transplant to China the modes of r.o.l. from modern Western countries, but failed"[19]—in a clear refusal of such Western models.

In fact, the 2008 White Paper states that during the Cultural Revolution the legal system "had severely been damaged," and that China is now reinforcing it, with thick socialist features,[20] including enhanced administrative supervision,[21] legislative supervision for consistency among different-ranking laws and regulations,[22] full enforcement of the Country's Constitution.[23] It also confirms the 2004 Outline objectives of law-based administration[24] and law-awareness of civil servants.[25] Substantial mentions are made of the importance of courts, of mediation and conciliation bodies, and of improving judges' and procurators' professionalism.[26]

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[17] See the 2008 White Paper, foreword.

[18] See fn. 17, introductive lines of ch. I, *Historical Course of Building a Socialist Country under the Rule of Law*.

[19] Id.

[20] Id. "The CPC, after learning painful lessons from the cultural revolution, made an important decision to shift the focus of national affairs to socialist modernization. It also made clear the importance of the principle of governing the country by law… it is necessary to strengthen the socialist legal system. The socialist idea of the r.o.l. has been gradually established, with the r.o.l. at the core, law enforcement for the people as an essential requirement, fairness and justice as a value to be pursued, serving the overall interests as an important mission, and with the leadership of the CPC as a fundamental guarantee… The CPC has markedly improved its governance capability… The Party has constantly enhanced its consciousness and firmness in governing the country in a scientific and democratic way, and by law."

[21] See the end of ch. I: "…fairly complete supervision systems and rules have been established; and the composite force and effectiveness of supervision have been constantly strengthened."

[22] Id. ch. II.

[23] "The Constitution, as the fundamental law of the State, has supreme legal authority. To implement the basic principle of governing the country by law, it is first of all necessary to implement the Constitution in an all-round and thorough way."

[24] See fn. 17, ch. V.

[25] See fn. 17, ch. VIII.

[26] See fn. 17, ch. VI.

A major role of the law in relation with the market economy is that of providing the leaders with an efficient tool for macro-control: Chapter IV of the White Paper is devoted to the relations between the law and the socialist market economy, stressing the central position in the Chinese "civil law system compatible with the building of a socialist market economy"[27] of the law on property ownership. It also mentions other market-related laws, such as the ones on Contracts, and the General Principles of Civil Law, and makes a specific mention of the 2007 Anti-monopoly Law as being aimed at intensifying government and public supervision.[28] In fact, according to the 2008 White Paper the role of the socialist law in the economic field seems to be the one of providing the leadership with an efficient tool for macro-control.[29]

The White Paper's indications on implementing the Constitution and enhancing legality thoroughly should also be put in a socialist framework. On one side, the SPC has been seen taking the lead in the "legalization" of the Chinese legal system;[30] on the other side, the tension towards legal enforcement of Constitutional rules detectable about a decade ago[31] seems to have eased, with the return of the system to the consolidated socialist principle of the unenforceability of Constitutional provisions.[32]

More in general, a line of policy has been laid recently to consolidate the court system's role as a part of the socialist governance system, rather than as pure law-enforcement circuit protecting legal rights and exercising some degree of

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[27] See fn. 17, ch. IV.

[28] Id.

[29] Id. i.e., "Exercising macro-control over the economy by means of law is a major characteristic of China's socialist market economy… [major economic laws] put forth provisions on macro-control in their corresponding fields… The construction of legal systems for macro-control effectively gives full scope to the guiding role of national development plans and industrial policies, and thus elevates the level of macro-control."

[30] The Supreme Court has been active for years in promoting—if surely not the "thick" values of the judicial activism seen elsewhere—the growth of a "thin" legality, developing interpretations/opinions seen as a product of a *de facto* normative function, controversial for some time. See Chunying Xin, *Chinese Courts History and Transition,* Law Press (Beijing), at 102 (2004): "…judicial interpretation has gone far beyond its legal limits… [becoming] a very important source of law other than laws… and administrative regulations."

[31] See *SPC's Reply to the Shandong High Court on the Case Qi Yuling v. Chen Xiaoqi* (in relation to the constitutional rights to education and to one's own name), reported in the People's Court Daily on August 13, 2001. A mention to previous cases related to constitutional protection of labourers' rights, see Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, Butterworths (Hong Kong), 1998; 2nd ed., at 48 (2004).

[32] The Supreme Court's negative opinion on direct enforcement of constitutional provisions has been issued on December 18, 2008, withdrawing the previous SPC's interpretation issued in the *Qi Yuling* case, along with 27 other ones.

checking/balancing action vis-à-vis the government.[33]

The system is also likely to enhance its mechanisms balancing and/or softening strict legality principles, e.g., the "democratic" or "political" supervision mechanisms (of the Party), and the "institutional" (administrative) ones. The increased professionalism of Procuratorates, for instance, might somehow be balanced by the test-introduction in 2003 of a "democratic" supervision by a political committee.[34]

More generally, the recent Law on Supervision of August 27, 2006 (effective since January 1, 2007) stresses the fact that the People's Congresses Standing Committees at all levels shall exercise their political supervision over government as well as courts and procuratorates,[35] "focusing on the overall situation of the State, taking economic development as the central task, uphold leadership by the CPC, uphold Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, uphold the people's democratic dictatorship, uphold the socialist road, and uphold reform and opening to the outside world,"[36] also allowing the Standing Committees the power to interfere with courts' and procuratorates' activity.[37]

The Outline, the White Paper, the Law on Supervision and other legal and policy document clearly concur in indicating a model for the Chinese developing legal system: no Western-style r.o.l.; more and better socialist laws; effective supervision at all levels; intense macro-control over the private economy; more efficient, law-abiding administration and legal institutions. More and more spillover effects and cultural changes in favor of legality should come within the public, too.

To sum up, we can assume that the scenario for the next future is the one described by the scholarly works I already mentioned,[38] basically confirmed by the 2008 White Paper; and that it will remain as such for a substantial period of

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[33] This new policy has been devised by the present President of the SPC, Wang Sheng Jun, in charge since 2008. Wang abandoned his predecessor's Xiao Yang inclination towards the role of the court system as a law-enforcement circuit, rather enlarging the standards for court work to include party interest and public opinion in addition to purely legal ones, to pursue "socialist harmony" in society. Wang's vision is stated in *Fully Implementing the Work of the 17th Party Congress and Resolutely Carrying Out the Work of the Courts*, in 求是 (Seeking Truth), August 2008; see also 南华早报 (South China Morning Post), October 23, 2008.

[34] As reported in the white paper *Building Political Democracy in China*, issued on October 19, 2005 by the State Council, ch. 10, titled as *Judicial Democracy*. According to the central government, "the pilot work of instituting people's supervisors (or procuratorates) is proceeding smoothly," *2008 White Paper*, ch. VI.

[35] Law on Supervision, art. 5.

[36] Id. art. 3.

[37] Id. art. 14.

[38] See Castellucci, fn. 1; Peerenboom, fn. 2.

time, unless some abrupt, fundamental change in the Chinese politics brings about the need for a re-assessment.

3 Inside the Socialist Frame: Variable Geometries

A workable "thin r.o.l." environment, with thick socialist values (simply a s.r.o.l. one, without being too subtle), could be in place according to the Chinese government before 2020;[39] as well as a firm market economy, in principle separated from the government, regulated by legal rules and legal-technocratic institutions,[40] if still featuring public presence and socialist principles based on an organic view of the polity.[41]

Different approaches to law, thus, as well as different drafting styles of laws, will probably be seen for different areas, within the Chinese legal system.

This is not a completely new thing: classical socialist experiences such as the USSR and satellite countries had laws and judicial/arbitration institutions, to legally regulate at micro-level their international trade and economic activities—both within the ambit of the CMEA/COMECON, which only provided the macro-planning for member countries, and outside of it with non-socialist entities.[42] In China, legality principles related to the economic activity have been reinforced and their range of operation gradually extended, to include—in a socialist market economy—international markets as well as the newborn domestic one, all open to foreign and national individuals and private business entities. This non-traumatic transition is paralleled by progressive insertion of references to "the private sector of the economy" in China's Constitution article 11.[43]

On the other hand, even Western jurisdictions have public sectors of the

[39] The 2004 Outline, II. 3, indicates "a decade or so" (with "unremitting efforts") as the required time to have a law-based administration fully implemented. It will not surely take less than that.

[40] The 2004 Outline, II. 3 and II. 6.

[41] Id. III. 4: "we must uphold the *intrinsic unity* among the Party that exercises leadership, the people that are the masters of the country and the country that is governed according to law… we must combine, *in an organic manner*, our efforts to *govern the country according to the law and rule the country by virtue*, in order to promote, in full swing, the development of the socialist political and spiritual civilization" (emphasis added).

[42] See Kazimierz Grzybowski, *Soviet Private Int'l Law*, 10 L. E. Eur., Sjthoff (Leiden), 1965, ch. III, *The Trading State*, at 69–110, and the sources cited therein.

[43] Art. 11 had been rewritten first in 1988, when the original reference to the protection of "urban and rural workers' individual business" became a reference to "the private sector of the economy," indicated as a complement to the socialist public economy; in 1999, in addition to the reference to "ruling the country by law," the private sector of the economy became "important"; it eventually became "encouraged" in 2004, with the current text of art. 11.5.

economy; many also have a special administrative sector of the law, with specialized administrative courts, aimed at protecting citizens *vis-à-vis* the State as well as protecting the State's prerogatives and its actual administrative activities from unnecessary impairments.[44]

Moreover, Western liberal-democratic full r.o.l. legal systems also allow areas where r.b.l. mechanism operate; e.g., in the Italian legislation on special detention for Mafia criminals very important decisions are entrusted to the Minister of Justice on the modes of the special detention, in an area—deprivation of individual liberty—traditionally part of those where full legality principles should rule.[45] Most Western countries feature legislations imposing restrictions and r.b.l. decisional mechanisms, on national interests or national security grounds, on trade[46] as well as on fundamental liberties.[47]

Even areas of operation of "rule of men" principles can be identified in most jurisdictions, usually in relation with the polity's perceived vital interests and/or as a response to critical situations.[48] It should also be noted that many sensitive

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[44] See Achille Mestre, *Le Conseil d'Etat protecteur des prerogatives de l'administration—Etudes sur le recours pour excès de pouvoir* (Protecting the Administration's Prerogatives—a Study on Recours for Excess of Power), the Bibliotheque de Droit Public (vol. 116), LGDJ (Paris), at 287 (1974); Sabino Cassese, *Le basi del diritto amministrativo* (The Foundations of Administrative Law), Garzanti (Milan), at 38 (1989); Mario Nigro, *Giustizia amministrativa* (Administrative Justice), II Mulino (Bologna), at 26–27 (1983). It is observed that administrative law and courts are related not only to rule of law principles, also having been developed as guarantees for the authoritative prerogatives of the "administrative state."

[45] A special law implementing a stricter regime of isolation has been enacted in Italy for the detention of members of terrorist or criminal organizations, with the insertion of a specific art. 41-*bis* in the general penitentiary law no. 354 of 1975. According to this piece of legislation, isolation of detainees and other restrictions on their visits, correspondence, receiving of goods, contacts with other inmates etc. can be discretionally reduced by a governmental decision, in the form of a decree of the Ministry of Justice—and not by a judicial decision. This regime prevents or should prevent the imprisoned heads of criminal organization from keeping operational contacts with their organizations; in fact, the enactment of these special rules has been one of the reasons of the early 1990s bloody mafia attacks to the State, in an attempt to force the State to repeal these rules.

[46] Such as the Exon-Florio Act of 1988 (amended in 1992) empowering the US President or his designee agency to veto corporate mergers, acquisitions and other corporate/financial transactions that might result in forms of foreign control over US industries engaging in national security productions, see Wenbo Gu, *A Comparative Study on Foreign Investment Legal System in China*, 5(3) Front. Law China, 452–83 (2010).

[47] See the US legislation following 9/11, such as the *Patriots Act.*

[48] Every modern state features areas of intervention for the executive power which are ruled by few legal general principles only, even being in some cases basically law-free, *de facto* if not *de iure*, and not just in emergency situations—such as military, intelligence and other security-related activities. Also, several legal traditions, statutory laws and constitutions leave political and trade-union activities almost free from legal interferences.

situations can be identified, more and more related to the economy, in which Western governments decide on contingency to switch to the "r.b.l. mode" and course of action.[49]

A major transition like the current Chinese one certainly puts some kind of vital interests at stake, and strains on current social, political, legal institutions; It is reasonable to expect legal mechanisms to be different, in structure and level of technicality, and at work with variable importance vis-à-vis political/ administrative protocols, according to the sensitiveness of the many different regulated areas.

The progressive stabilization of the socialist market economy may in the event bring about a progressive enlargement of the areas of stricter legality principles; but certainly not the abandonment of the general socialist approach for the general frame and for the basic legal infrastructure of the system.

Using Peerenboom's terminology,[50] without any sharp lines, due to the fuzzy edges of both categories and classifiable items, the next foreseeable status of Chinese legal system could have a fragmented appearance, with a "socialist-statist" environment for the general frame and public interest issues; a "communitarian" one for personal status, family issues; and a "neo-authoritarian" one in a middle area, within the realm of private economy, as "socialist" features loosen their grip on market mechanisms.[51]

The differentiated "modes" of the Chinese law (and their respective models of r.o.l.) could be the results of a coordinated absorption within the socialist framework of values, mechanisms, norms, formants—and their typical expressive forms or drafting style—hailing from different traditions: cultural, customary heritage; Western-modeled or transplanted "technical" laws; socialist rules and governance mechanisms.

This almost necessarily includes entrusting the preferential management of mentioned areas to institutions/mechanisms staffed with the corresponding

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[49] As demonstrated, e.g., by summer 2008 developments related to the fate of the Italian flag airline; or by the many policy actions and consequent enactment of laws and regulations taken by Western governments, incl. the US, to rescue national banks and financial institutions during the global financial crisis in fall 2008.

[50] See Peerenboom, fn. 2 at 103–09.

[51] A known pattern, after all, in many developing countries, within their legal systems or with coordinated portions of diversified legal heritages: postcolonial rulers at the helm, managing public interests with top-level sets of laws being a direct expression of their political power; colonial, "technical" laws and courts for market-related areas, somehow closer to the r.o.l., if still subordinated to the political power; and the operation for personal status and family issues of customary/religious laws, communitarian in spirit and often escaping the control of the official legal system. This pattern of law is analyzed in throughout the book, in Italian, of Rodolfo Sacco and Marco Guadagni, *Il diritto africano* (African Law), UTET (Turin), 1995.

differentiated operators: mediation/conciliation committees with respected, authoritative mediators for family/private matters; courts and legal professionals for market-related cases with no significant public interest involved; government, with politicians and bureaucrats when public interest is involved.

Obviously, lines may be fuzzy; the different normative areas are overlapping; more than one of these mechanisms could be involved in singular cases or areas of the law (e.g., both mediators and the law system for family matters; both the law and politics/bureaucracy for administrative matters). Just as obviously, a "wrong" choice of the troubleshooting institution by the interested party is likely to lead to unsatisfactory results—as it happens in any pluralist environment,[52] and it also happens in *present* Chinese reality: The complex system described is already in place, irrespective of its shortcomings and of its expected development, simplification and reinforcement along stronger lines of legality.

4 Chinese Law Studies Should Make Extensive Recourse to the Soviet Law and Economic Studies.

Analyses with respect to the USSR and its satellite states, before and after 1989, can at least partially be applied, *mutatis mutandis*, as a grid or as a comparative tool to observe present-day Chinese legal system, including its regulation of the still very important public sector of the economy and the general frame of its market economy. The full understanding of the Chinese legal environment mandates an appropriate understanding and consideration of the political element,[53] affecting Chinese legal system's outcomes through its different institutions, directives, rules, inner logic and operational paths.

Also, economic theories framed within the socialist general scheme (with Chinese characteristics) could be developed by economists and political scientist, and then become familiar to lawyers, as additional tools to develop the law of the socialist market economy. As an interesting example of this, I'd like to mention the idea of a law-abiding "scientific" administration, seeking efficiency, standardized procedures, responsiveness is stressed repeatedly in the 2004

[52] The literature on legal pluralism is very vast. See Marco Guadagni, *Legal Pluralism*, in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, at 542 (1998); John Griffiths, *What is Legal Pluralism*? 24 J. Legal Pluralism & Unofficial L. 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 Law & Society Rev. 869 (1988).

[53] On "the additional formant" (with respect to the Western legal systems), see Gianmaria Ajani, *Le fonti non scritte nel diritto dei paesi socialisti* (The Unwritten Sources of Law in Socialist Countries), Giuffré (Milan), 1985: An accurate analysis is presented throughout this book of the political, policy and administrative factors that in a socialist environment intervene to interact with the written legal rule (normally drafted with an appropriate, distinctively socialist style) to produce the final outcome.

Outline,[54] in pursuit of an administrative ideal combining legality, impartiality and technocratic efficiency (Singapore-style, to some extent? Just to mention a possible, very Asian reference model for the Chinese transition). The 2004 Outline devises a standard of "scientific" efficiency which is not only related to the organization of the governmental apparatus and work, but also to the appropriateness of the administrative solutions and decisions,[55] with a view to an effective, orderly implementation of socialist values and of top-down disseminated policies at all levels of governance.

This specific indication of the Outline on searching discretional but still efficient or "scientific" (socialist) solutions, which doubtless carries with it a reference to some objective dimension of administration, is very interesting. Is the Chinese legal environment bound to produce, maybe at a later stage of sophistication, its own socialist economic analysis of law?[56] Fascinating as it might be, this "economic analysis and management of the socialist law" probably will not materialize very soon; in fact, it could as well not materialize at all. The rule of politics can hardly suffer the rigors of a different rule; be it r.o.l., of Confucian virtue or of economic, scientific theories—even socialist ones. Still, economic and political doctrines could come to play at least some persuasive or supplementary roles.

However, a functioning law-based administration seems to be the first necessary step before any additional levels of sophistication can be devised. Terms like "scientific," "efficient" are likely to function, meanwhile, as general clauses for techno-bureaucrats, including those with market control responsibilities; new legitimizing tools for decisions conforming to political/administrative directives, in addition to the older general clauses of socialist tradition. "Efficient" might be more convenient or acceptable than "socialist," for some administrative decision affecting market activities, e.g., when FDI is involved.

5 Different Partitions between Market Laws and Administrative Laws in Western r.o.l. and in Chinese s.r.o.l.

The area for market legal institutions in a socialist context will have to be

[54] See chs. II. 3 and III. 5.

[55] Id. III. 5.

[56] This would require the development of theoretical descriptions, general directives and the consolidation of accepted praxes for what amount to a "socialist efficient" solution, especially in relation to the market economy. Its lines of thought, rules and outcomes would not necessarily be similar, of course, to the ones of the Western economic analysis of law—the guiding economic principles being different from their respective underlying ideologies.

mapped, and boundaries demarcated between what we may call the private law and the administrative dominion; fuzzy areas, areas of overlapping, friction, pluralist interaction of the different "modes" of the law will have to be identified. In fact, the very relation between public and private law in China might be based on several different or altogether reversed concepts with respect to those of Western traditions—the latter having developed with the public powers of the administrative state coming much later in the picture, with respect to a common law of peers, whereas the socialist model is a development of a basically administrative state, with private law merely interstitial at the origins.

These original, fundamental differences cannot but have momentous consequences in the whole system: Many areas of law in the Western concept are essentially related to private affairs, economy and market institutions, in a socialist approach are part of, or bordering what can be considered as administrative matter, having some relevant impact on public interest. It is the case, for instance, of large areas of property or antitrust law.

It is also the case of any reasonably large economic operation, be it the entry of a foreign subject in the domestic market or a single transaction having some impact in its context. One important operational difference between liberal and socialist markets may thus be identified in the need for the latter to place a substantial number of "policy checks" at appropriate junctions or in blank areas of the law. Rules on licensing, allowing access to market operations, and rules on authorization for single transactions may effectively serve the purpose, interacting in the common course of business with the laws on contracts, property, competition, and others.

A quite clear example is given by the government's ability to identify, and modify regularly if deemed appropriate, the different areas or sectors of the country's economy and infrastructure where foreign investment is allowed, restricted, prohibited.

As another example, the law on property ownership clearly regulates the enjoyment of a condo apartment, and the rights and obligations of owners amongst each other and the management, in a very detailed fashion; but it does not stipulate the conditions for acquiring property or whether it can be acquired freely or subject to some kind of authorization or other administrative check. In summer 2007 and then again 2010, the Ministry of Foreign Commerce as well as local governments and major municipalities regulated the property market enacting limitations in the acquisition of property by foreigners—including limiting the number of apartments foreigner individuals or entities may buy to the number of apartments they strictly need for personal or direct use—to contrast speculative operations on real estate and the soaring prices of housing,

especially Beijing, Shanghai and Shenzhen.[57]

One more example is given by administrative praxes and policies of both central and local governments, often requiring foreign investors willing to establish a Chinese subsidiary with higher levels of capital injection vis-à-vis those stipulated in the relevant investment laws, according to the nature and size of the prospective business.[58]

6 Substantial Differences in Legal Concepts, Principles, Rules as Well as in Outcomes

Major Chinese market-related laws should be compared with Western homologues, first of all to identify their position across the public-private divide and the related degree of interference of public powers, so to speak; and then to compare and detect differences in architecture, general clauses, concepts, and of course rules and their implementation in the relevant circuits (administration, courts, arbitration, scholarly writings).

Contract, property, competition laws are immediate candidates for such an approach; I will devote a few notes to them shortly. I will also spend a few lines in relation to banking and insurance services.

As I stated in the opening, identifying some of the peculiarities of the socialist market legal infrastructure is the subject-matter of this writing. No pretention, thus, to provide here any detailed legal analysis in any of the areas of law just mentioned.

Other market-related important laws may also be scrutinized for the indicated purposes, such as the ones on labor, securities, guarantees; and other ones also having an impact on private activities, such as environmental protection, land management, energy, business licensing etc.

The appearance of the law on contract (1998) is surely more related to a "neo-authoritarian" or even communitarian approach to law, rather than to a "statist-socialist" one: The law is a unified one, substituting the three old laws on economic contracts based on the dynamics of the public sector of the economy. In this new architecture private and public market actors are put as a general rule

[57] As widely reported in the press, see Gavin Bowring, *Beijing Acts to Cool Shenzen Property Boom* (August 28, 2007), at http://www.ft.com (last visited November 11, 2008); see also a collection of related press releases (June 25, 2007), *China's Property Market Cooling Measures*, at http://www.reuters.com/article/2008/06/24/us-property-summit-china-cooling-measure-idUSS P14005720080624 (last visited November 11, 2008).

[58] See Jie Chen & Jianwei Zhang (in the Fenwick & West LLP), *2008 Update to Guide to Establishing a Subsidiary in China*, at 3–4, at http://www.fenwickwest.com/publications (last visited January 21, 2011).

on an equal footing on the market place.

In addition to its quantitative and qualitative state-of-the-art technicality,[59] what strikes the discerning observer is the provision of an auto-integration mechanism for lacunae which makes this law more neutral and technical than most Chinese laws. Article 124 provides that lacunae in the law related to contractual types not provided for in the law shall be filled by recourse to the general part of the law of contract, and by analogy with other contractual types provided for in the laws. The general Chinese rules for integrating the lacunae in the laws, instead, are those laid in articles 6 and 7 of the *General Principles of Civil Law*, open-ended provisions referring to party policy and judicial/administrative discretion—these rules, however, should also apply to the integration of the general part of contract law, article 124 being only related to the discipline of new contractual types.

The features of the contract law, its auto-integrating mechanism, the reference to "trading practices" made in its article 125, the likely "users" of this piece of legislation (business people and lawyers, courts, arbitrators) make the outcomes of this law, even in case of complex/new contractual structures not expressly disciplined by the law, more likely to be similar to those obtainable elsewhere. Also, in China the *General Principles of Civil Law* (GPCL) provisions making void of every juristic act not corresponding to the legal standards are substituted in the contract law with more usual remedies hailing from the void/voidable scheme (art. 47–51).

Still, even in the market-friendly law of contracts, some areas are bordering administrative law, with limitations on contractual/negotiations capacity for public subjects,[60] or due to public policy.[61] Provisions such as article 44 indicate

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[59] The 1999 Contract Law has heavily been influenced by the most recent comparative legal studies and legal texts, incl. *UNIDROIT Principles of Int'l Commercial Contracts and the Vienna Convention of 1980 on the Int'l Sale of Goods* (CISG). See Bing Ling, *Contract Law in China*, Sweet and Maxwell Asia (2002); Yuqing Zhang & Danhan Huang, *New Contract Law in the People's Republic of China and UNIDROIT Principles of Int'l Commercial Contracts: A Brief Comparison*, 5 Unif. L. Rev. 429 (2000); Xiao-Ying Li-Kotovtchikhine, *Le nouveau droit chinois des contrats internationaux* (The New Chinese Law of Int'l Contracts), Journal du droit int'l (Journal of Int'l Law) 113 (2002); Guy Lefebvre & Jie Jiao, *Le principes d'Unidroit et le droit chinois: convergence et dissonance* (UNIDROIT Principles and Chinese Law: Convergence and Dissonance), 36 Revue Juridique Thémis 519 (2002).

[60] One of the parties, a public-owned enterprise, may be subject to operational restrictions stemming from public planning or policy according to art. 38 of the Contract Law. See discussion in Mo Zhang, *Chinese Contract Law—Theory and Practice*, Martinus Nijhoff Publishers (Leiden/Boston), at 43–50 (2006); see also Ling, fn. 59, at 47–48 (2002), for another instance of possible interference of a supervisory organ with negotiations. Besides, even many Western public laws (e.g., the Italian one) provide for operational restrictions and invalidities in case of negotiations and contracts made by a public organ in violation of administrative rules. Law in action is indispensable to understand the scope of these rules.

that some contracts may require a public approval according to administrative regulations; article 127 allows administrative powers/supervision on contracts with considerable latitude.

It should also be considered that recourse to the GPCL, rather than or in addition to the law on contracts, could be made by the courts to deal with situations related to economic activities, acts and transactions but not related to a contract (e.g., in the important area of guarantees, with the so-called "comfort letters" or "*lettres de patronage*"). The GPCL rules could then be called in to fill lacunae or to deal with cases of invalidity.

Also, some technical issues related to the general part of the law of contract, such as the discipline of hardship—a sensitive issue indeed, having been excluded from the express legislative regulation due to the foreseeable many implementing difficulties[62]—could end up allowing recourse of courts to articles 6 and 7 of GPCL, to ground/justify a decision taken, in important cases, according to non-solely-legal criteria.

The Supreme Court recently reintroduced a mechanism of judicial intervention[63] to re-assess and re-balance mutual obligations of the parties in case of significant change of relevant circumstances during a contractual relation. This reintroduction of mechanisms for cases of hardship obviously gives courts an important power of intervention on the terms of the contractual agreement originally established by the parties; this is consistent with a centuries-old Chinese tradition in the law of contract and with the general idea of the communitarian or social function of contract.

In fact, the very *nature* of contract is different, between the *laissez-faire*, nominalist approach to the law and the socialist (market) concept of contract—with all its equitable, equality, good-faith-based implications and ramifications,[64] surely warranting a more "communitarian" than individualist approach in the application of contractual provisions. Substantial, objective equity and economic sense are privileged over the absolute respect of the contractual will of the parties. One prominent example of this, and a remarkable feature of this law is in my opinion (art. 92), stipulating an obligation of post-contract good faith which the European legal traditions have only developed through decades of research and case law, to overcome the rigor of the "classic" liberal nominalistic principle,

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[61] See art. 52, common provisions in most legal systems. The research on these general clauses, very common worldwide, should necessarily focus on the law in action.

[62] See Zhang, fn. 60 at 227–29. Zhang stresses the fact that, despite previous decisions of Chinese courts, incl. the Supreme Court, favorable to the judicial application of the *rebus sic stantibus* doctrine, the mentioned doctrine has not been inserted in the 1998 Contract Law.

[63] Through the *Interpretations on Several Issues Concerning Application of the Contract Law of the People's Republic of China*, which took effect on May 13, 2009.

[64] See Zhang, fn. 60 at 43–46; Ling, fn. 59 at 51.

which justifies contractual obligations with the will of the parties.[65]

The law on property ownership (2007) reveals that property is on both sides of the private/public divide. Article 3 of the law provides for a "dominant role" of public property, with "diverse forms of property developing side by side," and that "the State shall consolidate and develop… the public sector of the economy and at the same time encourage, support and guide the development of the non-public sectors of the economy."

This strong opening statement, and the architecture of this law, disciplining private, public and collective properties, characterizes this law: No general private property of land is provided for; urban lands are owned by the State (art. 47); agricultural lands may be owned by collective entities. No private property can exist in relation to agricultural lands, publicly or collectively owned, and this provokes complaints and also political pressure from farming communities, who cannot obtain loans by mortgaging the land they farm to finance the development of their activities.

A full private ownership of immovable property is in fact limited today to houses, rights to use construction land, rights to use other barren land received from the government—the only property that private individuals/entities can mortgage (art. 180).

The issue of property of rural land is far more sensitive,[66] in a socialist developing country[67] with several hundreds of millions of farmers, not to mention the dire difficulties to implement a cadastral office for rural lands of China and to assign individual titles to farmers having lived, worked for decades in collective units. So far, a law has been enacted in 2009 on the management of land disputes in rural areas. Expropriation of land for the purpose of residential and other development operations, especially in rural areas, and the related disputes are in fact sensitive spots of the developing Chinese land law—with takings of land and the dislodgement of local dwellers/users still occurring abruptly and for little or no compensation and very little relief provided so far by the courts.

This issue also demonstrates how often the interest of local governments still

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[65] For instance, in cases of "transferred loss," as labeled by M. Bussani & V. V. Palmer, F. Parisi in their essay *Pure Economic Loss*, at http://www.wjcl.org/113/article113-9.pdf (last visited March 28, 2011).

[66] For a discussion on the topic, see Wenyong Wu, *Discussion of the Rural Land Property System Reform According to the Rural Land Contract Management in China*, in 3(1) Management Science and Engineering 70–72 (2009).

[67] For the Russian experience during the transition, with respect to the difficulties in de-collectivizing agricultural lands, see Diane Skoda, *La propriété dans le Code civil de la Fédération de Russie* (Property in the Civil Code of the Russina Federation), Dalloz (Paris), at 506–89 (2007).

prevails over the interest of small communities and individuals, in relation to land. The impact of the law of 2009 on expropriation disputes remains to be seen.[68]

The public control on property is in general quite strong, even for private property, e.g., with the provision of a registration with a public office as the necessary requirement to acquire property ownership of immovables (art. 9); or with the impossibility of acquiring property by virtue of protracted possession.

A very active stance of public powers is identifiable in the property market, as already observed in summer 2007 and again in 2010, with the adoption of cooling measures to fight speculative bubbles and to pursue policy goals—which in Western societies would be considered by many as an undue public interference with the operation of market and private law mechanisms.

The 2007 law on property is an important step, which will need follow-up action and further legislation, to implement the existing law and especially to deal with property issues in rural areas. Rather than favoring an intense circulation of immovable property, I think this law is in many respects a long-expected *Magna Charta* for the Chinese top and middle classes' needs, allowing them to purchase their family house, to obtain the necessary loans through mortgages, and to secure their right for subsequent generations; with this law the CPC secured/reinforced their loyalty, and its legitimacy as the leading force in the modernization of China.

The 2007 Anti-Monopoly Law (AML) includes many provisions modeled on the EU rules regulating competition. Still, its peculiar architecture reveals the socialist environment to which it is related. The presence of a chapter on administrative monopolies,[69] unheard of in any other major competition law in the world, while prohibiting some specific "abuses" of local public bodies adversely affecting their local market for non-local undertakings,[70] recognizes that such public bodies may anyhow have interests in their local market. According to some observers, the rules against administrative monopolies have very good chances, in the next future, to work as just "soft" law, due to the conflicting interests of the enforcing courts and of local governments/political

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[68] The issue is very popular, among property law scholars as well as in general writings on current issues in China and in the media. Among many, see, the recent papers of Mareike Schmidt, *Compensation Standard for Urban Demolition and Relocation in China*, European China Law Studies Association, 4th Annual Conference, Wien, June 20, 2009. See also Jong Lai Ching, *The "Roots" of the Real Rights Law of the PRC*. The latter writing is the author's LL.M final dissertation in the University of Macau (September 2009), still unpublished. Both writings feature interesting data and analyses and further references.

[69] Ch. V, art. 32–37.

[70] A widespread phenomenon in China, see Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan,* Cambridge University Press (Cambridge), at 139 (2005).

power supervising the courts.[71] The 2004 Outline also indicates as a fundamental principle the separation between the public administration and the economy. Both the AML and the 2004 Outline must however be coordinated with the organic theory unifying people, state, party in a superior unity (2004 Outline, II. 3 and III. 4); a theory which is part of the CPC and Chinese government general policy, and also part of the legal system, through its general clauses and through the leadership and supervision of the Party and the government on courts.

Moreover, article 1 of the AML also includes in the objectives of the AML "protecting public interest" and "promoting the healthy development of the socialist market economy." The inclusion of these "public interests" objectives in its opening article could raise some concerns for foreigners. The AML makes no distinction between domestic and foreign undertakings; still, public interest could be used sometimes to ground a discriminatory enforcement in favor of SOEs or other publicly-controlled Chinese companies,[72] many of which probably not-so-competitive vis-à-vis foreign ones.

It is very unlikely that the different public agencies with an active, regulatory or supervisory role in the same market arena would produce a dialectic game or dynamics based on conflicting and equilibrating forces in purely legal terms; it rather being likely, in that socialist environment, that they cooperate towards the common goals dictated by the unifying force of the political leadership.

The Party plays the role of a non-legal regulating/supervisory authority of the market, as well as that of a relevant market actor through its public and private controlled entities. To sum up, the AML also describes some aspects of the socialist market economy, other than regulating private undertakings' market behavior. It reveals a strong presence and influence of local potentates, having political—and then also legal—cover at some level of governance, to check whom no more than "softened" market-oriented legal rules may probably apply.

On insurance and banking services: An analysis of the Insurance Law of the People's Republic of China of 1995 reveals how the socialist context affects the law of insurance as well as some general features of the still elusive "socialist market law."

The Chinese Insurance Law 1995 (revised in 2002 and then again revised substantially in 2009) is aimed at combining public macro-control with market institutions, allowing efficiency in management and services. Market mechanisms and pluralism of supply actors are to provide efficiently those

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[71] See Maher Dabbah, *The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?* 30(2) World Competition 343 (2007).

[72] Over 90% of the listed companies in the Chinese stock markets are state-owned enterprises in which less than 25% of the voting shares have been sold to the public. See Williams, fn. 71 at 112.

services that could as well have been offered—as it was the case until the mid-1980s, and as it still happens in some developing countries—by just one State-owned insurance institution. The Chinese government manages the insurance market indirectly, nowadays, through publicly-owned as well as in principle private enterprises.

Those companies operate on the "customer side" according to market and private law mechanisms; however, they are heavily affected by public powers in their "back offices," so to speak. The operational model of private or publicly-owned insurance companies to a large extent reproduces, in a political and macro-economic sense, a model of concession or outsourcing of public functions to market entities. In fact, the basic insurance clauses and premium rates for major risks are determined by the government's financial supervision and control department.[73]

Government control is exercised on insurance industry directly from the State Council,[74] since 1998 through the China Insurance Regulatory Commission (CIRC), and not by any independent authority. The Government must review and approve the "operation strategy," which must be disclosed when seeking the authorization, of new companies intending to enter the insurance services market.[75]

The Insurance Law of 1995/2002 is based on the principle of a definite list of insurable interests. For a Chinese insurance company to develop new insurance products, or to take a new course in general conduct of business, the government supervisory mechanisms need to be activated. It seems unclear, e.g., whether a contract's performance could be insurable. Both the very big, sophisticated financial transactions and common ones like mortgage loans for the purchase of an apartment; or, even, one would wonder whether it would be possible to insure an airline ticket's cost for cancellation of travel.

Also on capitalization we can find a "policy check": The Insurance Law gives discretion to the government to determine the minimum level of capitalization of a new insurance company, with a minimum of RMB 200 million provided by the law.[76]

Public control on bankruptcy is established by article 86, providing that a court may only declare an insurance company bankrupt with the consent of the governmental financial supervision and control department. In general, a very strong set of provisions regulates crisis, insolvency, bankruptcy or substitute management of an insurance company by the government in case of

[73] Insurance Law of 1995, art. 106.
[74] Id. art. 8.
[75] Id. art. 74.
[76] Id. art. 72.

mismanagement by the common company's organs.[77]

Security for the insurance system is the State only. According to the Insurance Law of 1995/2002, insurance companies may only invest the resources obtained in the market with the collection of premiums with Chinese government bonds or bank deposits or other forms of employment as stipulated by the State Council;[78] whereas in the Western legal systems the general approach is to permit, if under supervision and with several "safety nets," a wider range of investment—in fact, a major portion of the London Stock Exchange traded volume has been traded in recent years by insurance companies.[79]

Administrative sanctions are provided for fraud and other contractual misbehavior not falling within the scope of criminal law.[80] This provision introduces an element of administrative interference in a contractual matter, obviously considered not just a private matter; and of course lays on a fundamental idea of the contractual relation much different from the "game/risk/benefit" approach so common in the Western attitude towards contractual relations.

From the above we may appreciate how insurance can be considered, other than a service to individual enterprises, one of the State's support and regulation functions for the market, in an macro-economic and policy sense—with the State governing the insurance industry, being financed with the monies collected from premiums and collectivizing risks and also taking direct responsibility for the insurance companies solvency.[81]

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[77] See ch. IV of the Insurance Law, providing for supervision, inspections and redress actions, which may be imposed on the company after failure to comply with the law, or taken directly by a governmental task-force.

[78] Insurance Law of 1995, art. 104,.

[79] A press release of the Association of British Insurers dated June 28, 2006 reported that about one sixth of the traded volume was dealt by the 400 member companies of the ABI, the trade association representing about 94% of the British insurance market. Available at http://www.abi.org.uk/Media/Releases/2006/06/FSA_Better_Regulation_Action_Plan_-_ABI_supports_steps_to_remove_unnecessary_regulation.aspx (last visited January 6, 2011). The figure of one sixth obviously does not include non-ABI insurance companies.

[80] See fn. 73, art. 131.

[81] At micro-level, general policy also enters the picture sometimes: It is common knowledge that courts intervene in specific situations to use the insurance indemnification as a way to provide support to disadvantaged persons, by condemning insurance companies to pay indemnifications even in cases of no-fault car accidents—a private instrument for a benevolent State to provide relief. In those cases the courts are implementing a policy, probably based on a very Chinese traditional approach, rather than applying the law (which requires fault on the insured party to entitle the damaged person to indemnification). No insurance company seems to complain about that, in aggregate terms; most of them, by the way, are publicly-owned. It will be interesting, in due course, to gauge the reactions of foreign insurers vis-à-vis such an approach.

Insurance companies are market devices created or permitted by the government to efficiently operate and disseminate insurance operations in the market.

A similar analysis and similar considerations can be done in relation to the banking system and to the general banking law, also of 1995. The legal framework for both banking and insurance activities, of course, is supplemented by the political netting of said institutions and their management with the general political system, certainly able to affect both composition and decision-making of their corporate organs.

The substantial amendments to the Insurance law of 1995/2002 enacted on February 28, 2009 will substantially enlarge the insurance system's operations and capabilities, on one side: Insurance companies are now more free to develop and offer new insurance products, and will have more options available to invest premiums collected (according to expected CIRC regulations and guidelines); re-insurance with foreign re-insurers is now allowed. This has probably been done to cater for the needs of the markets, to better protect consumers' rights and especially in consideration of China's obligations hailing from the accession to the WTO. However, the supervision mechanisms and the control powers of the CIRC have been strengthened, balancing the mentioned openings.[82]

The insurance industry, legislation and practice provides a very good example of how market institutions, mechanisms and functions may work in a different way in a socialist context, including the prudent evolution of the legal framework, to gradually allow market operations and services, more and more efficient while maintaining control over the market itself.

7 Conclusion

These short references to the Chinese socialist legal frame for the market economy, and to the elements gathered in the very cursory view taken at important market-related laws may be combined, to sketch a picture of the socialist market economy and society. This picture would, in turn, affect the interpretation and enforcement of the law, through its general clauses referring to the protection of the socialist society, economy, order and the like. The picture could be refined, of course, by deepening/widening the research. My tentative picture that follows may thus be considered little more than an exercise, subject to further research and verifications. The socialist legal system and market

[82] See the early comments (following the 2009 Enactment) of John V. Grobowski and Yiqiang Li, *Amended Insurance Law of the People's Republic of China*, in the newsletter of the law firm Faegre & Benson, at http://www.faegre.com/9798 (last visited January 6, 2011).

economy do not enable individuals to carry out freely whatever economic activities they like, but only those fitting within a general scheme devised by the public powers.

The governing authorities are several, at different levels according to size/impact of each specific business, and each of them has or may have a say beyond the law; so implementing the idea of macro- and micro-control on the market at the various levels. Big private business empires independent from public and political power do not seem a desired outcome, nor a likely one; foreign mega-investors' FDI is welcome, but also easily kept in check, with a wealth of governance tools and a grid of macro- and micro-controls at all levels, from the top one of politics down to the grassroots of distribution.

A technocratic leap forward in public management might come, but not necessarily to alleviate burdens on private actors; management and control capability could be main goals instead (e.g., to improve tax collection from the private sector). The administrative environment, however, will probably be characterized in the medium term by improved services and a better law-abiding behavior, with law-enforcement and supervisory tools, including administrative mediation/revision, litigation or other contentious processes; these will probably be the most visible results of the current development of the legal system, along with the related spillover effects and cultural changes.

Relations dominated solely by the law should eventually prevail over private individuals/entities, for minor economic transactions, family, inheritance, consumer transactions or, at most, purchase of housing; and in the commercial arena as far as no significant public interest is involved. Should some public interest get in the picture, politics may as well; e.g., when distributing consumer goods in a given region, it would still be unwise to forget liaising with local party and administrators, notwithstanding what the AML stipulates on administrative monopolies. It will take a very long time, if ever, to see an equal treatment of a government vis-à-vis a private entity, before a Chinese court acting *super partes*, applying the law roughly as it would between private citizens.

A r.b.l. mode is still part of the government's approach to the economy, with a very proactive attitude aimed at exercising control at all levels. Socialist law, administrative law and process will be very important, for the management of large, or even medium, private economic ventures.

Property policy seems so far to be based on "one apartment house for all" approach—obviously including the acceptability of more than one for someone (foreigners excluded), following one fundamental guideline of Deng Xiaoping. The law features many very general provisions and mandates registration of transactions, implying an invasive administrative presence and directive power in real estate transactions. Circulation of property and obtaining guarantees seems complicated. The system, thus, is not favoring an intense circulation of

immovables, nor speculations by individual buyers, rather favoring the radiation of the middle-class and social stability.

Private ownership of residential estate has a limited role in productive activities except for housing development (a soaring business, in itself revealing a policy). Major industrial and other economic projects should still be developed, thus, on public land (the dominant property, a key asset of the public sector of the economy), or around public resources (e.g., logging, mining); productive property concessions becoming macro-policy tools, e.g., by imposing/managing fees/rents for concessionaries.

The society that can be observed reading between the lines of the most important pieces of legislation is in my opinion made by a growing middle-class, quite conservative, happy with a stable life in one's own house, a reasonable income and the possibility to spend it in the market buying commodities and services.

A strong and well-legitimized government, with ample latitude of action to ensure the country's development, provides with a legal system apt to protect their average interests, also providing public services and managing, directing, controlling the economy. One obvious feature of a socialist market economy is clearly the ability of public powers to insert effective "policy checks" in and around the market, so to speak, controlling the access of every single economic actor to market operations, supervising its operations, keeping the ability of controlling—even of denying, in fact—specific transactions.

These "policy checks"—a key feature of the Chinese r.b.l model—are largely implemented through the administrative circuit. Through the licensing system and rules, praxes and authorization mechanisms at all levels for specific transactions, these mechanisms are in fact concurring with the purely legal rules and institutions of the socialist market.

We may try to extrapolate a theorem from the preceding lines (to be verified further, of course; or waiting to be falsified), as follows: In a socialist market economy the economic activities implying a macroeconomic dimension may be discharged by private entities, in addition to or instead of the government, if this produces more efficient management of the relevant function and related services. The government, however, will retain such powers and authority as necessary in order to keep full control of the macro-policy dimension, even interfering with the liberty of what in the Western liberal environment would be considered to be falling within the private operations domain—even to the extent of making the relevant activities reveal a nature similar to that of concessionary operations of public outsourced functions. At a low level, it might become relatively soon a world at least partially dominated by private rights.

Author

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