

**THE EVOLUTION OF PUBLIC PENSION  
REGULATION IN CHINA:  
REGULATORY RESPONSIVENESS AND SYSTEM  
REFLEXIVITY IN A CHANGING SOCIAL  
ENVIRONMENT, 1949 - 2009**

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## LIST OF ABBREVIATIONS

ACFTU	All-China Federation of Trade Unions
ALL	Administrative Litigation Law
ARL	Administrative Review Law
ARP	Administrative Review Provisions
COE	Collectively Owned Enterprise
FDI	Foreign Direct Investment
FFE	Foreign-funded Enterprise
IPA	Individual Pension Account
IPD	Implicit Pension Debt
ITC	IT Centre
LIT	Labour Inspection Team
MHRSS	Ministry of Human Resources and Social Security
SCSI	Supervisory Committee of Social Insurance
SIL	Social Insurance Law
MLSS	Ministry of Labour and Social Security
MSIB	Municipal Social Insurance Bureau (Shanghai)
MSIC	Municipal Social Insurance Commission (Shanghai)
NPC	National People's Congress
OPC	Old-age Pension Commission
OPRPO	Old-age Pension Reform Promotion Office
PIA	Pension Insurance Agency
PLV	Petition by Letters and Visits
POE	Privately Owned Enterprise
PPLV	<i>Provisions on Petitions by Letters and Visits</i>
PRC	The People's Republic of China
CCP	The Chinese Communist Party
CPPCC	Chinese People's Political Consultative Conference
MOL	Ministry of Labour
SOE	State Own Enterprises
PAYG	Pay-As-You-Go
SIA	Social Insurance Agency
SMLSSB	Shanghai Municipal Labour and Social Security Bureau
TIC	Telephone Inquiry Centre

## ABSTRACT

Over recent decades, the public pension system has been a major concern of the Chinese governments given the rapidly ageing population of this country. However, despite the voluminous body of literature on this issue, very little research has used regulatory theory to examine the Chinese public pension system while paying attention to the changing social environment of the country. In particular, the evolving role of the Chinese state, as an important regulator of the public pension system, has not been sufficiently studied.

This thesis is an exploratory study to address this research deficiency. It poses one main research question—in what ways has the public pension regulatory system in China evolved in response to a changing social environment? Based on systems theory and its implication for social and regulatory evolution, a new analytical framework integrating two principal concepts of *system reflexivity* and *regulatory responsiveness* is developed. Two descriptive tools—*regulatory process* and *regulatory space*—and two sets of normative attributes are respectively assigned to the two concepts. Based on these, two subsidiary research questions are posed. Five historical periods spanning from 1949 to 2009 are presented as data to unfold the analysis.

Informed by the descriptive accounts in response to the research questions, the analysis leads to the finding that the evolution of the public pension system in China has exhibited very significant variation in *system reflexivity* and *regulatory responsiveness*, while the interactive relations of the regulatory system and the changing social environment have also varied significantly. Based on the finding, a number of implications are subsequently drawn. First, the exploratory research implies, on its own accord, that *system reflexivity* and *regulatory responsiveness*, as two important perspectives of regulatory theory developed in Western democracies, can serve as a useful analytical apparatus

for studying regulatory issues in China even though the social contexts surrounding the regulation at issue have been different from those of the Western countries.

Second, the analysis shows a significant, positive correlation between *system reflexivity* and the degree of differentiation in the state and non-state institutions within the regulatory system. This further implies that *reflexivity* and the degree of social differentiation allowed for by the state's general approach to socio-economic intervention have been interdependent in China. Further, the analysis also reveals a significant, positive correlation between *responsiveness* and *reflexivity*. This, together with the temporal precedence of changes in *reflexivity* to changes in *responsiveness*, further implies that the variation in *reflexivity* has had significant impacts on the *responsiveness* of the public pension system to the social environment in China.

Finally, the analytical outcomes also reveal which components of the regulatory system are characterized by low *reflexivity*, and how this has led to the declining *responsiveness* of the regulatory system. The implication of this empirical evidence is two-fold. It provides practical guides for future improvements on the regulatory system at issue, and invites more research of similar interest to further evaluate the evolution of the Chinese public pension regulation vis-à-vis the dynamic social contexts.

## DECLARATION

This is to certify that:

- I. the thesis comprises my original work towards the PhD, which contains no material that has been accepted for the award of any other degree or diploma in any university or other institution;
- II. to the best of the candidate's knowledge, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis; and
- III. the thesis is less than 100,000 words in length, exclusive of tables, flowcharts, footnotes, bibliographies, or other illustrations.

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# CHAPTER ONE: INTRODUCTION

## 1. The Research Subject and the Research Problem

Over recent decades, the provision of public pensions for retired workers has been a major concern of Chinese governments as it has been for many other nation states around the world. On the face of it, in China the importance of the public pension scheme and its reform stems from the aftermath of the ‘one-child’ policy and the prolonged life-expectancy of the Chinese population generally,<sup>1</sup> which have contributed to the ever-rising government outlays for pension benefits and a growing shortfall of pension funds under the Pay-as-You-Go (PAYG) system.<sup>2</sup> These are grave current problems which continue to raise substantial concerns among Chinese governments and among the society at large.<sup>3</sup> However, it is important to note that these current issues are just part of the many challenges that have been confronting China’s public pension system over the years. A closer look into the development of the Chinese pension

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<sup>1</sup> In 2006, the population aged over 65 accounted for 8.05%. See: Chunxia Cong, 'A Study of the impact of extending retirement age on the balance of old-age pension fund (延长退休年龄对养老保险基金缺口的影响分析)' (2010) 231(1) *Developing* (发展) pp. 11-14. It is projected that the rate will reach 20% by 2050 if this demographic trend continues. The net result of this demographic trend is the worsening old-age dependency ratio, and the ever-increasing pension outlays since early 21st century.

<sup>2</sup> In the early 1980s, every retiree was supported by 13 working-age people. Now the ratio is about 1: 9 on average, and 1: 3 in urban cities, but in 20 years since now it will become across the whole country and 1: 1.6 in urban cities where the ‘one-child’ policy has been most strictly followed. See, for example: Lingbo Zeng, 'Investment Return Rate and China's Reform in Pension Fund System (投资回报率与中国养老体系的基金制改革)' (2006) *Social Security: Problem and Research* (社会保障问题研究) pp. 294-311.

<sup>3</sup> Given the rapidly ageing population, the Chinese central government has been under increasing pressure to improve the public pension system since the beginning of the 21st century, i.e., to consolidate the government’s fiscal and budgetary stance in preparation for the forthcoming ‘silver tsunami’. For more information concerning China’s population ageing see: [http://www.china.com.cn/aboutchina/zhuanti/zgrk/2008-05/04/content\\_15054797.htm](http://www.china.com.cn/aboutchina/zhuanti/zgrk/2008-05/04/content_15054797.htm) first retrieved at 10 December 2010. However, in spite of increasing government outlays on public old-age pension over the past 10 years, the current pension system in China is increasingly troubled by three inter-related problems, i.e., high contribution rate, high replacement rate and low coverage rate. These, together with the systematic problem of low-level pooling, have largely impeded the efforts of the Chinese central government to achieve its policy goal of building up a sustainable public pension system. For a strong argument against the sustainability of the current pension system, see: Martin Feldstein and Jeffrey Liebman, 'Realizing the Potential of China's Social Security Pension System' in a S W Jiwei Lou (ed) *Public Finance in China: Reform and Growth for a Harmonious Society* (The World Bank, Washington, D. C., 2008) pp. 309-313.

system tends to reveal that since the late 1970s, when China embarked on its economic liberalization and reform, the public pension system has been an important theatre of reform in response to many problems and issues.

China's present public pension system has evolved from the retirement pension scheme first established in 1951 under the *Labour Insurance Provisions*, which were primarily designed to cover the urban labour force engaged in the industrial and commercial sectors predominantly owned by the state. In the mid-1950s, the coverage of the retirement pension program was further expanded to millions of industrial and commercial workers in the cities as a result of the large-scale nationalization program colloquially known as 'The Socialist Transformation Movement'. Following the completion of this program, the public pension system became part of the 'iron rice-bowl', i.e., high welfare benefits and a life-long employment system endorsed under the centralized planned economy<sup>4</sup> until the outbreak of the Cultural Revolution in 1966, whereby the retirement pension scheme was reduced to an enterprise-based welfare program.<sup>5</sup>

After the end of the Cultural Revolution in the late 1970s, the highly centralized economic system, including the pension scheme within the ambit of the 'iron rice-bowl', proved to be inconsistent with the economic policies that aimed at

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<sup>4</sup> The origin of the phrase 'iron rice bowl' dates back to early 1957 in a government report concerning a study tour to Soviet Union. In this report, the special employment system including the centralized model of hiring and job assignments by the government as well as other supplementary labour and employment practices are succinctly referred to as the 'iron rice bowl'. It was a metaphor alluding to the impenetrable employment practices under the centralized planned economic system where allocation of production factors like labour are presumably the government responsibility. For a detailed account of this system see: Yimo Zhou, 'Liu Shaoqi's Reflections on the 'Iron Rice Bowl' and 'Life-Long Employment' (刘少奇关于“铁饭碗”与“终身制”的思考)' (1988) (48) *Outlook* (瞭望) pp. 12-14.

<sup>5</sup> The pension scheme established by the *Labour Insurance Provisions* was terminated soon after the Cultural Revolution because of the political turmoil which paralysed the ACFTU (i.e., All China Federation of Trade Unions) and the Ministry of Labour. The former was then responsible for running the pension scheme while the latter was then responsible for policy guidance and research. In 1967, the operation of pension funds was frozen, and in 1969, the Ministry of Finance further issued an internal circular to all SOEs, i.e., *Suggestions for Reforming the Accounting Rules in SOEs* (draft) ordering them to stop paying pension contributions that had been required under the *Labour Insurance Provisions*. Rather, costs for paying retirement pensions were listed as non-operational expenses.

increasing the productivity and efficiency in the state-owned enterprises (i.e., SOEs).<sup>6</sup> The key issue was how to externalize the provision of social benefits and remove the financial burden from individual enterprises.<sup>7</sup> In the latter half of the 1980s, along with the reform initiatives in the corporate governance system, the ‘iron rice bowl’ concept was largely replaced by a market-based corporate management system, and the public pension program also underwent a number of pilot reforms in response to these new changes in the economic system.<sup>8</sup> From the mid-1990s, in tandem with the restructuring of the SOEs, and based on the outcomes of the pilot reforms, the public pension system was finally revamped and meshed with the broader economic transition towards the establishment of a market economy.<sup>9</sup> The state adopted a ‘three-pillar’ model based on financing from contributions both by the enterprise and by the employee, with the regional or local governments being the final guarantors of

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<sup>6</sup> As early as late 1970s, this problem was identified as an important obstacle to the improvement of efficiency and productivity. In early 1980s, the problem of the ‘iron rice bowl’ was further recognized by more scholars in the academia and officials in the governments. For more details of this issue, see, for example, Fang Hu, 'Ideology and Institution of the 'Iron Rice Bowl' ( “铁饭碗” 思想与 “铁饭碗” 制度) ' (1979) (2) *China Labour* (中国劳动) pp. 25-26; Weifu Zhang and Xian Yang, 'Are 'Big Pot' and 'Iron Rice Bowl' presenting the superiority of socialism? ( “大锅饭” 、 “铁饭碗” 是社会主义制度的优越性吗?) ' (1983) (5) *Journal of Peking University(Humanities and Social Sciences)* pp. 31-34.

<sup>7</sup> Back in early 1980s, scholars and government officials began to discuss the feasibility of externalization of pension payment, i.e., to transfer the responsibility of providing and managing pension schemes to the government. This process is largely referred to ‘socialization of social insurances’ (社会保险的社会化). For an early discussion of the issue, see: Xiaohan Zhou, 'Discussion of How to Reform the Labour Insurance System (关于劳动保险制度改革的探讨) ' (1983) (7) *Journal of Financial Research* 65; Jichang Zhang, 'Pension Funds Ought to be Managed Through Social Pooling (退休养老金应实行社会统筹) ' (1985) (20) *Zhe Jiang Economics* (浙江经济) p. 28.

<sup>8</sup> These pilot programs were initiated in different regions of China in early 1980s. For example, the pilot program of social pooling of pension funds started in Zhe Jiang in 1984. See: Zhongdi Pan, 'Social Pooling of Retirement Pension Funds and Old-Age Insurance (试论退休费统筹与养老保险问题) ' (1988) (5) *Economy of Zhe Jiang* pp. 6-8. Programs of the similar nature were also rolled out in Shanghai in late 1986, see: Huazhang Feng, 'Social Pooling of Retirement Pensions for SOEs in Shanghai (上海市全民所有制企业实行退休统筹的情况) ' (1987) (6) *China Labour* (中国劳动) pp. 12-15. Apart from those regional pilot programs, some industrial Ministries also formulated their own internal pooling funds for pension. These industries included the hydro-power industry and the industry of urban-rural infrastructure construction by 1986. See: Huijuan Feng, 'The Development of Retirees and the Evolution of the Retirement System in China (我国退休职工队伍的变化和退休制度的沿革) ' (1986) (9) *China Labour* (中国劳动) pp. 23-25.

<sup>9</sup> For this particular point see: Pu-de Qin, 'Social Insurance Regime under the Market Economy: Reforms in State Owned Enterprises (市场经济条件下国有企业社会保险制度改革研究) ' (1998) (9) *Economic Issues* (经济问题) pp.20-23.

the public pension programs.<sup>10</sup> The impact of this reform was two-fold. First, the SOEs were largely released from the responsibility of providing pension benefits. Instead, they were only obliged to fulfil the contributory obligations as required by the local governments. Second, the responsibility of providing pension benefits and managing pension funds was transferred to thousands of regional and sub-regional governments which began to take the lead in regulating the pension scheme.

In the early 2000s, with the completion of the restructuring of SOEs and a wave of privatization, industrialization and urbanization, China's economic reforms gradually tapped into the 'deep water' of social reform—that of constructing a *harmonious society*.<sup>11</sup> A range of socio-economic problems emerged which impacted on the existing public pension system. These included: the adaption of the public pension programs in private enterprises where incentives for contribution were low;<sup>12</sup> the question of coverage for dislocated farmers who had lost their farm-land due to urban planning;<sup>13</sup> the availability of pension

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<sup>10</sup> The hall-mark of the new development stage is the *Decision on Reforming the Old-Age Insurance for Enterprise Employees* 《关于企业职工养老保险制度改革的决定》 issued by the State Council in 1991. According to the *Decision*, the new old-age pension scheme for enterprise employees should be jointly funded by the enterprise (the employer), the employee and the state. The contribution rate for the enterprise is not defined by the *Decision* while the rate by the employee is defined as 3% (subject to change). Besides, article 8 of the *Decision* also stipulates that the employer can provide supplementary pension plans for their own employees, which will form the third pillar, i.e., commercial insurance plans like annuity plans. Furthermore, article 8 and article 9 of the *Decision* also stipulate the terms of reference of the labour authorities concerning the collection, operation and distribution of the pension funds. In a word, this government document served as a blue-print of China's public pension schemes throughout 1990s.

<sup>11</sup> The biggest challenge facing the current public pension system lies in the philosophy of its original design, i.e., putting efficiency before equity. This philosophy was endorsed in the context of vast reforms of the SOEs in mid 1990s. However, in the first decade of the 21<sup>st</sup> century, the issue of equity in social insurance and social security emerged as fast economic changes have remapped the social context of the environments. Lack of equity and social inclusion has become an important issue to be addressed by social regulation. This particular view is best illustrated by Fuzong Yue. See: Fuzong Yue, 'The Issue of Social Security: From the Perspective of a Harmonious Society (和谐社会视野下的社会保障问题)' (2007) 159(5) *Theory Journal* (《理论学刊》) pp. 75-79.

<sup>12</sup> See for example, Chunlan Gao and Guohui Lv, 'Private Enterprises and Social Insurance: Difficulties in Implementation (私营企业社会保险实施难点分析)' (2004) 16(3) *Journal of Changchun University of Technology (Social Sciences Edition)* pp. 6-8; Wen-jing Gu, 'Implementation of Social Insurance: Institutional Barriers to Private Enterprises (私营企业社会保险实施的制度障碍分析)' (2007) 20(1) *Journal of Wenzhou University (Social Science)* pp. 48-52.

<sup>13</sup> The gravity of the social problem, i.e., social safety net and old-age pension, is expounded by a substantial literature. To get a glimpse of the issue see for example: Jinxiong Chang, 'Study on the Protection of Rights and

plans for migrant workers who were institutionally excluded from any public pension program;<sup>14</sup> and the articulation of contributory years for retirees who had worked in different regions across the country.<sup>15</sup> In addition, there was the problem of worsening social equity due to the widening gap between the rich and poor, and particularly the problems of old-age poverty in the countryside.<sup>16</sup> All of these problems arose from deep social changes over the previous few decades.

As a consequence, the public authorities responsible for the Chinese pension system were confronted with a dual problem. Not only were they required to deal with emergent problems such as the shortage of pension funds resulting from the ageing population and rising old age dependency, but they were also required to do so in the context of a wider set of problems arising from China's rapidly changing socio-economic environment as a whole.

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Interests for Dislocated Farmers during the Process of Urbanization (城市化进程中失地农民合理利益保障研究)' (2004) (3) *China Soft Science* (中国软科学) pp. 5-10; Xinyong Chen and Dengjun Lan, 'Constructing a Social Security System for Dislocated Farmers (失地农民社会保障的制度建构)' (2004) (3) *Policy Research* (政策研究) pp. 15-21.

<sup>14</sup> This problem has attracted a huge number of studies over the recent years. The gist of the social problem is that under the current social insurance system, entitlement to social benefits is largely contingent on a person's status of residency, i.e., the so-called 'household registration system' and the number of years of employment and contribution. However, distribution of pension benefits normally occurs at the place of registered residence while years of contribution in different places are not articulated in China before the end of 2010. Given the mobile nature of the migrant workers, they may not qualify for the minimum years of contribution as the vast majority of the workers may move around many places throughout their career life. For a detailed account of the problem see, for example: Yalan Huang, '土地流转背景下农民养老保障的诉求及制度设计的调查研究' (Masters' Thesis, Nan Jing University of Science and Technology 2010)

<sup>15</sup> By the end of 2010, contributions made in different regions or places are not possible for articulation. This had led to many problems concerning the entitlement to pension benefits, particularly for those workers who have moved around several workplaces during his or her career life. See for example: Junmei Xiao, 'Research on the Retreating Problem of Migrant Rural Workers' Pension Insurance (农民工养老保险退保问题研究)' (Master Thesis, Wu Han University of Science and Technology, 2007)

<sup>16</sup> This worsening scenario of social inequity in China has been developing for about two decades. One indicator of this trend is China's Gini Coefficient which has surpassed 0.5 in 2010. See: Yaping Cong and Changjiu Li, *China's Gini Co-efficient Surpassing 0.5--Sever Polarization of the Poor and the Rich* (中国基尼系数已超0.5 财富两极分化)

<<http://finance.ifeng.com/news/special/shourufenpei/20100521/2216871.shtml>> at 5 December 2010. The worsening social equity together with the institutional obstacles in the social insurance system has led to the even serious problem of old-age poverty in China's countryside. For this particular point of view, see, for example, Ning Wang and Ya'er Zhuang, 'Study on Old-age Poverty and Old-age Security in China's Rural Areas (中国农村老年贫困与养老保障)' (2004) (2) *Northwest Population Journal* (西北人口) pp. 55-58; Xiaochun Qiao, Kaidi Zhang and Lujun Sun, 'Study on the Characteristics of China's Old-age Poverty (中国老年贫困人口特征分析)' (2006) (4) *Population Journal* (人口学刊) pp. 3-8.

## 2. Current Literature on the Regulation of the Chinese Public Pension System

There is a substantial body of literature dealing with the general topic of China's pension reforms and administration.<sup>17</sup> Notwithstanding its widely differing research interests and approaches, it is possible to differentiate and classify this body of literature into three main strands.

The first strand largely consists of the sociological and economic studies of China's pension system, and primarily focuses on the arrangements of China's public pension schemes. Some studies target the substantive parameters of the pension scheme, such as the setting of the retirement age, the amount of contribution rates and the life expectancy of the schemes' members and so on.<sup>18</sup> The purpose of these studies in general has been to test the viability of these parameters vis-à-vis the development of the pension programs in China, and to propose practical solutions relating to the change or adjustment of the substantive terms of the pension plans. Some studies have used the approach of comparative research to test the financial sustainability of the current public pension programs by benchmarking the good practices of other countries.<sup>19</sup>

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<sup>17</sup> Using CJNI, the largest on-line database of academic research, the author found 86 doctoral theses and 490 master's theses (using the key words: 'pension' and 'China') by the end of 2010. Then the author used the same key words and checked the number of journal articles, finding 2091 results matching the research command. The author also used 'Google scholar search' employing the same key words (in English), finding another few hundreds of articles written in English. These outcomes indicate that 'China's pension programs', as a general topic, is a heavily researched area.

<sup>18</sup> For example, see: Lingbo Zeng, 'Investment Return Rate and China's Reform in Pension Fund System (投资回报率与中国养老体系的基金制改革)' (2006) *Social Security: Problem and Research (社会保障问题研究)* pp. 294-311; Yunshu Tang, 'Consolidate and Downsize the Individual Pension Account' and its Impact on Pension Benefits ( "做实做小" 个人账户对个人养老金水平的影响) ' (2007) 24(5) *Statistical Research (统计研究)* pp. 41-47; Chunxia Cong, 'A Study of the Impact of Extending Retirement Age on the Balance of Old-age Pension Fund (延长退休年龄对养老保险基金缺口的影响分析)' (2010) 231(1) *Developing (发展)* pp. 11-14; Zengwen Wang, 'Enhancing the Retirement Age and Reducing the Substitution Rate: the Research of the City Staff Basic Pension Expenditure (提高退休年龄与降低替代率: 城镇职工基本养老金的财政支出研究)' (2010) 31(2) *Northwest Population Journal (西北人口)* pp. 18-26.

<sup>19</sup> Just to list two typical examples of these studies: Fangfang Wu, 'The Comparison Research on the Pension Systems in East Asia (Three Nation States and Two Regions): Implications for China (东亚三国两地养老保障模式比较研究以及对我国的启示)' (Master's Thesis, Wu Han University of Science and Technology, 2007); Sha Yang, 'The Research on the Multi-pillar Pension System Reform Model of World Bank (世界银行多支柱养老金制度改革模式研究)' (Master's Thesis, Hunan Normal University, 2009).

Policy proposals in these studies have tended to focus on the choice of different plans such as PAYG, defined benefits (DB), defined contribution (DC), funded plans, nominal accounts or a mixture of them.<sup>20</sup> Others have adopted an empirical approach, and focused on practical problems experienced during the implementation of the pension programs; for instance, non-compliance by employers or employees.<sup>21</sup> Proposals from these studies largely have led to characterization of the degree of non-compliance in the system and possible solutions relating to improvements on implementation techniques.<sup>22</sup>

The second strand of literature has tended to approach the pension problems from a legal-political perspective. Apart from the substantive terms of the pension programs, these studies have focused on the legal and administrative arrangements relating to public pension for the purpose of identifying the loopholes within the system.<sup>23</sup> Problems identified in this approach include the inefficiency of the administrative agencies managing the system,<sup>24</sup> the limitation of the fund pooling system,<sup>25</sup> the high rate of contribution and the difficulty of

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<sup>20</sup> See for example, Martin Feldstein, 'Social Security Pension Reform in China' (1999) 10(2) *China Economic Review*, pp.99-107; Xue Li, 'The Study on China's Elderly Security Problems Under the Trend of Population Ageing (人口老龄化趋势下的中国养老保障问题研究)' (Master's Thesis, Ji Lin University, 2004).

<sup>21</sup> For this particular research see, for example: Cherrie Jiuhua Zhu and Chris Nyland, 'Marketization and Social Protection Reform: Emerging HRM Issues in China' (2004) 15(4) *International Journal of Human Resource Management*, pp. 853-877; Cherrie Jiuhua Zhu and Chris Nyland, 'Marketization, Globalization, and Social Protection Reforms in China: Implications for the Global Social Protection Debate and for Foreign Investors' (2005) 47(1) *Thunderbird International Business Review* pp. 49-73; Ingrid Neilsen and Russell Smyth, 'Who Bears the Burden of Employer Compliance with Social Security Contributions? Evidence from Chinese Firm Level Data' (2008) (19) *China Economic Review*, pp. 230-244.

<sup>22</sup> See for example: Gaby Ramia, Gloria Davies and Chris Nyland, 'The Compliance Challenge: Implications for Social Security in the People's Republic of China' (2008) 61(1) *International Social Security Review* pp. 1-19.

<sup>23</sup> For this specific group of research, see for instance, Shang-yuan Zheng, 'Openness, Normalization and Standardization of Pension--From Policies to Laws: Evolution of Social Insurance Legislations in China (公开、规范与定型——养老保险制度从政策到法律: 中国社会保险立法的进路分析)' (2005) (9) *Law Science*, pp.99-106; Si-bin Yang, 'Comments on China's Social Insurance Legislation (中国社会保险法制建设评述)' (2007) (3) *Finance and Trade Research* pp. 136-142; Shangyuan Zheng and Haiming Li, 'Analysis on the Difficulty in Legislation Concerning the Basic Pension Schemes (基本养老保险立法之疑难问题研析)' (2009) (4) *China Court (法治论坛)* pp. 2-39.

<sup>24</sup> See, for example: Peihua Huang, 'From Fees to Taxes: Reforms of Extra-Budgetary Revenues and Inter-governmental Fiscal Relations (费改税: 中国预算外资金和政府间财政关系的改革)' (2000) (6) *Comparative Economic and Social Systems* pp. 14-21.

<sup>25</sup> See, for example: Lanrui Feng, 'Socialization of Social Security and Provincial Pooling of Pension Funds' (社会保障社会化与养老基金省级统筹)' (2002) (10) *China Social Security* pp. 54-57.

compliance by business firms,<sup>26</sup> and what is perceived to be the insufficient empowerment of the implementation agencies by the central government.<sup>27</sup> Proposals arising from these studies range from minor changes like lowering contribution rates,<sup>28</sup> and designing new and less onerous plans to attract more participants,<sup>29</sup> to more systematic reform initiatives like the unification of all of the different public pension plans across the whole country through national legislation,<sup>30</sup> lifting fund pooling to state level through governmental integration,<sup>31</sup> and the transformation of the contributory obligation to a tax obligation that can streamline the collection process and strengthen enforcement at same time.<sup>32</sup>

The third strand in the literature normally has adopted the approach of historical institutionalism and focuses on the historical development or evolution of the public pension system in China. These studies try to link the temporal developments and reforms of China's pension system to the specific institutional contexts, particularly those relevant to the actors within the ambit of the pension regulation system such as business firms, labour and governments.<sup>33</sup> Problems identified by this group of researchers tend to be

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<sup>26</sup> See, for example: Wenjing Gu, 'The Impact of the Extension of Social Insurance Coverage on the Competitiveness of Private Firms (社会保险扩面对私营企业竞争力的影响)' (2006) (6) *Contemporary Economic Research* pp. 39-42.

<sup>27</sup> See, for example: Xiangdong Cai, 'Problems and Issues concerning the Enforcement of Social Insurances (社会保险的强制性在执行过程中存在的问题分析)' 2007 (6) *Public Administration and Law*, pp. 31-33.

<sup>28</sup> See, for example: Li Wang, 'Appropriately Lowering the Contributory Rates of Social Insurance for Business Firms (适当降低企业社保缴费比例)' (2005) (12) *People's Forum* p. 56.

<sup>29</sup> See, for example: Xuhui Liu, 'Study on the Pension Insurance Schemes for Migrant Workers (对农民工社会养老保险制度的探究)' 2007 (2) *Agricultural Economy* pp. 22-23.

<sup>30</sup> See, for example: Shuyin Wang, 'Discussion of Some Problems and Issues Concerning Legislation of Social Insurance in China (关于我国社会保险立法若干问题的探讨)' (2007) (6) *Labour Security World* pp. 49-51.

<sup>31</sup> See, for example: Xiuquan Gong, 'National Pooling for China's Basic Pension Insurance: Transition Cost and Development Path (中国基本养老保险全国统筹的制度转换成本与路径研究)' (2007) 165 (6) *Population & Economics* pp. 64-69.

<sup>32</sup> See, for example: Gongcheng Zheng, 'The Issue of Transforming Fees to Taxes in Social Security and its Relation to Pension (社会保障中的费改税及养老保险问题)' (2001) 1511 (31) *Review of Economic Research* p.38.

<sup>33</sup> See, for example: Yanfeng Ge, 'Constructing the Social Insurance System in the Process of Reforms and Developments (Part A)' (1998) (1) *Sociology Research* pp. 98-110; Yanfeng Ge, 'Constructing the Social Insurance System in the Process of Reforms and Developments (Part B)' (1998) (2) *Sociology Research* pp. 93-100; Peter Saunders and Xiaoyuan Shang, 'Social Security Reform in China's Transition to a Market Economy'

associated with the impacts of economic reforms in arenas other than the pension or social insurance system, such as restrictions on pension entitlement by the household registration system,<sup>34</sup> low-level of fund pooling because of legislation through delegation,<sup>35</sup> social inequality resulting from the urban-rural dual economy,<sup>36</sup> irrational government intervention,<sup>37</sup> and ideational backwardness in pension regulation and legislation.<sup>38</sup> As the primary purpose of these studies has been to explain the existing disparity of substantive entitlements to public pension benefits, proposals advanced by these studies are quite similar to those of the first two groups.

### 3. Limitations of the Literature, and the Aims of this Thesis

Although the current literature provides an extensive and rich body of scholarship in relation to the regulation of China's public pension system, there are several limitations which merit attention. First, the sociological-economic scholarship tends to focus on the substantive terms of the pension plans and their evolution while not addressing the institutional framework of the regulatory system. Second, the historical institutional scholarship tends to focus

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(2001) 35(3) *Social Policy & Administration* pp. 274-289; Julia Kwong and Yulin Qui, 'China's Social Security Reforms Under Market Socialism' (2003) 27(1/2) *Public Administration Quarterly* pp. 188-209; Zhang Xu, 'The Difficulty of Extending Pension Programs to Non-State-owned Enterprises and its Solutions (非公企业扩面中的问题及对策)' (2003) (2) *China Social Security*; Ka Lin and Olli Kangas, 'Social Policymaking and its Institutional Basis: Transition of the Chinese Social Security System' (2006) 59(2) *International Social Security Review* pp. 61-76; Xiaohong Qin, 'China's Social Security System: Reforms and Developments' (2007) 270(5) *Contemporary Finance & Economics* pp. 18-22.

<sup>34</sup> Zhaiwen Peng, 'China's Social Insurance and Employment Promotion: Historical Developments and Problems' (2008) (8) *China Labour* pp. 11-15

<sup>35</sup> See for example: Shengqian Wang, 'China's Social Security System: Reforms and Developments (Part A)' (2000) (5) *Chinese Public Administration* pp. 10-13; Wang Shengqian, 'China's Social Security System: Reforms and Developments (Part B)' (2000) (6) *Chinese Public Administration* pp. 7-10.

<sup>36</sup> For example, Yifang Huang, 'China's Old-age Pension Insurance: Equality and Efficiency' (2002) (4) *Economic Review* pp. 63-74; Li Yunhua, 'China's Social Insurance: Institutional Deficiency of Equality (中国社会保险制度之公平性缺失问题研究)' (2006) (1) *Jianghuai Tribune* pp. 36-42.

<sup>37</sup> See for example: Bo Wang, 'Social Insurance Legislation: Government Intervention and Legal Principles' (2008) 9(3) *Journal of University of South China (Social Science Edition)* pp. 64-66.

<sup>38</sup> Song Binwen, Liu Hui and Ding Kang, 'Legal Construction for China's Social Insurance: Macro-level Orientation in the 21st Century' (2003) (07) *Administration and Law* pp. 24-26; Qiang Li, 'Comments on the China's Social Insurance Legislation' (2004) 22(2) *Journal of Fo shan University (Social Science Edition)* p. 4; Su-yun Hu, 'Definition of Ideas and Principles: Behind the Debate over the Social Insurance Law (Draft)' (2008) (3) *Social Outlook* pp. 14-16.

heavily on institutional contexts surrounding the pension system to explain substantive changes to the public pension schemes while neglecting the evolution of the regulatory system. Third, while the legal-political studies focus more on the regulatory regime and institutional framework of the pension system, they tend to analyse the problems by using theories adapted from traditional civil law, administrative law or constitutional law instead of any theory based on regulation. This tendency is ascribed by some Chinese scholars to the limitation of the theoretical framework and analytical techniques of the Chinese legal-political scholarship in addressing pension regulation in China.<sup>39</sup> As we will discover below, the *compartmentalization* of this research has tended to *obscure certain important questions* which mainly arise from the *intersection* of the matters otherwise dealt with as separate areas of research. Notwithstanding the huge volume of literature on the topic, little research has incorporated the dynamics of the institutional frameworks into their study while using some more advanced and less conventional theoretical tools to unfold their analysis.

In this respect, the study of Fangzhou Li<sup>40</sup> and the contribution by Beland *et al.*<sup>41</sup> are exceptions. In these two studies, equal attention has been paid to the substantive terms of the pension plans and the institutional contexts of the regulation as well as the historical background of the regulatory systems. In particular, Li's contribution has provided numerous insights into the co-variation of the pension system and its surrounding socio-economic contexts, while Beland's work has shed much light on the impact of political and bureaucratic institutions on pension reforms. However, the subject matter of the

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<sup>39</sup> Shangyuan Zheng and Haiming Li, 'Analysis on the Difficulty in Legislation Concerning the Basic Pension Schemes (基本养老保险立法之疑难问题研析)' (2009) (4) *China Court* (法治论坛) pp. 2-39.

<sup>40</sup> Fangzhou Li, 'The Gaming of Interests and Orientation of Policies in the Evolution of China's Social Security System (中国社会保障体制变迁过程中的利益结构与政策取向)' (PhD Thesis, North West China University, 2006).

<sup>41</sup> Daniel Beland and Ka Man Yu, 'A Long Financial March: Pension Reform in China' (2004) 33(2) *Journal of Social Policy* pp. 267-288.

former research is social security, and the pension system is treated only as a sub-system of the broader subject matter. Consequently, the discussion of the pension system is insufficient both in depth and in length. Beland's research focused on the interaction between the government authorities regulating pension programs and the policy makers in the Central Government. However, it failed to extend the discussion to other actors within the ambit of the entire regulatory process. Furthermore, neither of the works used theories of regulation to examine, explain or interpret the relations between the interested actors within the regulatory space. In point of fact, little research has ever systematically adopted any regulatory theory to study the regulation of public pension in China.<sup>42</sup>

Given these qualities in the current literature on the regulation of the Chinese public pension scheme, i.e., the tendency to neglect the institutional framework of the regulatory system, and the deficiency of theoretical and analytical tools to explain and examine the evolution of the system, one question will invariably

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<sup>42</sup> In December 2010, the author first used 'Google Scholar Search' to research for articles or theses concerning pension regulation in China. By using key words 'pension', 'regulation' and 'China', only two articles were found, both of them are journal articles written in Chinese. After checking their abstracts, it was found that one of them is about the regulation of annuities, which are supplementary pension plans similar to commercial pension schemes lying beyond the scope of this thesis. The other article addresses the regulation of public pension funds, but the discussion is too short to make any systematic insights into the regulatory process of the pension schemes. For these two journal articles see: Lin Zhang and Huiping Wang, 'Research on Investment and Regulation of Pension Fund of China (论我国养老保险基金的投资与监管)' (2005) 135(26) *The Theory and Practice of Finance and Economics* pp. 44-47; Xinglong Zhu and Wanjie Ren, 'The OECD Enterprise Pension Funds Regulation and Its Influence to ChinaOECD (国家企业年金基金监管模式及其对我国的启示)' (2008) 175(24) *Reformation and Strategy (改革与战略)* pp. 138-141. The author then used 'regulation' (规制) as the subject (主题) to search doctoral and master theses in CNKI, the largest electronic academic on-line data base of China. Altogether 32 PhD theses and 161 master theses popped up as of by the end of 2010. The author then used 'pension' (养老金) as the subject to search within these results, with 10 results. However, by examining the abstracts of these 10, it was found that 8 of them primarily focus on the regulation of corporate annuities plans, i.e., supplementary pension plans in China. These plans are normally categorized as the 'third pillar' of the pension system, which is largely operated by commercial insurance companies. In this sense, they do not belong to public pension plans to be discussed in this thesis. The rest two hit squarely on public pension schemes. However, neither of them used any regulatory theory to explain or interpret the regulation of China's public pension schemes. For the latter two, see: Xin Ma, 'Go to the Market--the Target Model of Social Security Law (市场化——社会保障法制建设的目标模式)' (Master's Thesis, East China University of Politics and Law, 2002); Qingguo Li, 'Study on the Improvements of China's Legislation on the Management of Pension Funds (论我国养老保险基金投资立法的完善)' (Master's Thesis, Capital University of Economics and Business, 2004)

arise—how can one be sure that the policy proposals advanced by the literature concerning substantive reforms to the public pension system be successfully translated into real practices? In other words, if the policy proposals advanced by the above literature are taken as concrete responses to the problems or challenges confronting the pension system in China, is the regulatory system *per se* capable of generating or translating these solutions into real practices to address the problems continuously emerging from the changing society? If yes, to what extent? If not, why? Failure to address these questions will invariably compromise the validity of the research concerning the substantive terms of the pension programs and the effectiveness of the proposals advanced by the researches. In fact, to further entrench research over a complex subject embedded in a dynamic social environment (such as the public pension regulation in China), multiple research perspectives focusing on the substantive changes of the legal rules, the underlying institutions of the regulatory regime and the regulatory approaches embedded in the social contexts are required.<sup>43</sup>

In this thesis, the author tries to address this research deficiency by placing more focussed attention onto the public pension system in China, while applying new analytical techniques derived from regulatory theories to examine, explain and interpret its evolution; in particular, the evolution of the regulatory

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<sup>43</sup> This special approach drawing on multiple perspectives of legal, regulatory and socio-economic research, has recently been used by a number of Australian scholars for labour law, corporate governance and corporate law. See especially, Richard Mitchell, Anthony O'Donnell and Ian Ramsay, 'Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law' (2005) (23) *Wisconsin International Law Journal* pp.417-476; Shelley Marshall, Richard Mitchell and Anthony O'Donnell, 'Corporate Governance and Labour Law: Situating Australia's 'Regulatory Style'' (2009) 47(2) *Asia Pacific Journal of Human Resources* pp.22-38; and Christopher Arup, 'The Global Financial Crisis: Learning from Regulatory and Governance Studies' (2010) 32(3) *Law & Policy* pp.363-381. Although the subjects of these studies differ from the one of this thesis, the validity of the approach of research is established. One question of interest may be: whether or not research approaches similar to this can be applied in the special social context of China for its public pension regulation. The answer is partly affirmative. A number of studies have examined relevant labour and socio-economic regulations in China. See, eg, Sean Cooney, 'China's legal protection of workers' human rights' in C. Fenwick and T. Novitz (ed), *Human Rights at Work: Perspectives on Law and Regulation* (2010) pp.149-169; Ying Zhu, Sean Cooney *et al.*, 'New Developments of Labour Law and Industrial Relations in China' in G. Ramirez-Gaston B. (ed), *Labour Relations in the World* (2008), pp.579-606; and Feng Xu, 'The Emergence of Temporary Staffing Agencies in China' (2009)30(2)*Comparative Labor Law and Policy Journal* pp.431-461. However, the Chinese public pension regulation has not yet been studied in this way.

system in response to the problems and issues brought forward by changes in the Chinese society. It seeks to deal both with practical issues, such as how to explain the emerging regulatory problems facing the public pension system, and how the regulatory system has evolved to address these problems and challenges, in addition to theoretical issues, such as how to apply regulatory theories to illustrate the evolution of the regulatory system against the general settings of the social changes in China. Also in mind is the hope that by examining the evolution of the regulatory system and the accompanying social changes in China, some implications will be drawn regarding the relationship between regulatory systems and social change.

#### **4. General Outline of the Thesis**

The thesis is constituted in three major parts. Part A (Chapter Two) establishes the theoretical framework, analytical tools, data and methodology of the thesis. The chapter draws on the international literature concerning regulatory theories, and in particular theories concerning the co-evolution of the regulatory system with the changing environments of the society, for the purpose of delineating an analytic approach that will be used to examine the subject matter. A set of more detailed research questions will be proposed after the literature review. Based on the research questions, selection of data and research methodology will be further addressed in the same chapter.

Part B (Chapters Three to Seven) provides a descriptive account of the evolutionary process of public pension regulation in China. The data presented in each of these chapters will be examined against the analytical framework established in Chapter Two.

Part C (Chapters Eight and Nine) analyses and compares the findings of the data presented in Part B. Chapter Eight presents the findings regarding the research questions raised in Chapter Two, while Chapter Nine is a concluding chapter.

**PART A:**

**THEORETICAL FRAMEWORK,  
ANALYTICAL TOOLS, RESEARCH  
QUESTIONS, METHODOLOGY, AND  
DATA**



# **CHAPTER TWO: LITERATURE REVIEW AND RESEARCH DESIGN**

## **1. Introduction**

This chapter is comprised of two main parts—a literature review and a research design—to address further the research subject and aims presented in Chapter One.

The literature review includes five sections. In the first section, the term ‘regulation’ is defined to fit the research subject and aims of the thesis. Second, based on the definition of ‘regulation’ derived in the first section, the general literature concerning the concepts of ‘society’ and ‘regulation’ is examined further to identify some basic theoretical postulations concerning their co-evolution. This is followed by the third section which includes an in-depth review of the impact of the theoretical postulations discussed in the second section on recent research. In the fourth section, new developments in recent research of regulation will be further reviewed to show their relevance to the study of this thesis. The fifth section sums up the literature review and shows the implications of the review for the research design of the thesis.

The second part of the chapter sets out the research design. This is constituted by four sections. The first section sets out the general analytical framework in light of the literature review, while in the second section a number of research questions are raised based on the analytical framework identified in section one. The third and fourth sections further address the research method and data selection of the thesis.

## 2. Literature Review

### 2.1 Definition of 'Regulation' for the Thesis

As noted, the subject of the research is the public pension system in China. Unlike private annuity or superannuation plans, public pension schemes are typically public goods provided through the public sector to the general population. By virtue of these attributes, the terms and conditions of the public pension schemes are generally defined by the state or government authorities through legislation or rule-making, which may further establish certain binding and enforceable relations of obligations and rights between the state and the social participants. In light of these inherent qualities in the research subject matter, the thesis opts to view 'regulation' mainly from the perspective of state and government actions,<sup>1</sup> and treats 'regulation' as state working with private actors to realize public purposes.<sup>2</sup> From a broader perspective, this particular definition of 'regulation' may be more generally related to social governance with involvement of the state.<sup>3</sup>

It is particularly important to note that this special definition of 'regulation' broadly includes two major forms of state intervention: one of law-making by legislatures and enforcement through judicial courts, and the other through rule-making by government authorities or public agencies that are also delegated

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<sup>1</sup> Regulation is a serious subject of study among several disciplines across the social sciences. Definitions of 'regulation' vary with the concerns of the specific disciplines. For a more detailed account of the different perspectives of regulation, see: Jacint Jordana and David Levi-Faur, 'The Politics of Regulation in the Age of Governance' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, Cheltenham, 2004) pp. 1-28; John G. Francis, *The Politics of Regulation: A Comparative Perspective* (Blackwell Publishers, Cambridge, Massachusetts, 1993) p. 5.

<sup>2</sup> This definition of 'regulation' assumes the state to be a purposeful actor with certain social and economic objectives, and that it seeks to realize them through interactions with other actors in the society. For this particular point, see: Jacint Jordana and David Levi-Faur, 'The Politics of Regulation in the Age of Governance' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, Cheltenham, 2004) pp. 1-28.

<sup>3</sup> For an early version of this approach of regulation involving the state as an important actor, see: Terence Daintith, 'Legal Analysis of Economic Policy' (1982) (9) *Journal of Law and Society* p.191; and 'The Techniques of Government' in Jacinta Jowell and David Oliver (eds), *The Changing Constitution* (3rd ed, Oxford University Press, 1994).

with enforcement powers.<sup>4</sup> The former is more conventionally referred to as ‘law’, while the latter is largely associated with regulatory activities through public administration.<sup>5</sup> Although they differ in terms of formulation, adjudication and enforcement, both of these forms are to be treated as ‘regulation’ for the purposes of this thesis, so long as they are introduced by the state to influence the social community.

## ***2.2 Interaction of Regulation and the Society***

### *2.2.1 General Theories concerning State Intervention and Society: Sociology of Law and Sociological Jurisprudence*

A basic starting point for investigating the interaction between the regulation defined in the previous section and society is the advent, in the Enlightenment Age, of sociological studies of law which was then the prevalent form of social regulation.<sup>6</sup> During that period and onward, sociologists began to borrow theories and methods from social sciences in order to study legal institutions and legal behavior.<sup>7</sup> This critical process of reflection finally led to the empirical finding in the late 18<sup>th</sup> century that rather than being an isolated body of normative rules, law was broadly related to society, its cultural contexts,<sup>8</sup> and its

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<sup>4</sup> The distinctive features of these two types of state intervention was heavily studied and explained during the rise of the so called ‘regulatory state’ in the 1970s and onwards. For a more detailed account of their differences and commonalities, See, eg, Lloyd N. Cutler and David R. Johnson, ‘Regulation and the Political Process’ (1975) 84(7) *The Yale Law Journal* pp. 1395-1418; James O. Freedman, ‘Crisis and Legitimacy in the Administrative Process’ (1974-1975) *Stanford Law Review* pp. 1041-1076; William F. West, ‘Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness’ (1984) 28(2) *American Journal of Political Science* pp. 340-360.

<sup>5</sup> These two different categories of state regulation actually reflect the different perspectives of legal scholarship and regulatory scholarship. However, this does not mean the divide between the two perspectives is not to be bridged. As a matter of fact, it has been established through empirical studies that many laws have the same property characteristic of *regulation*. For these particular view points, see: Christine Parker, ‘Introduction’ in Christine Parker, et al. (eds), *Regulating Law* (1st ed, Oxford University Press, Oxford, 2004) pp. 1-5.

<sup>6</sup> Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, 2008) p. 1.

<sup>7</sup> Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford, Hart, 2005) pp. 1-3.

<sup>8</sup> This view was first expounded by De Montesquieu in his *Spirit of Laws* (1748) while later writings in the 19<sup>th</sup> century further extended the periphery of this finding to economics such as the Classical School’s notion of the relations of human conduct and legal punishment and Bentham’s approach to law based on utilitarianism. For

historical antecedents.<sup>9</sup>

This finding was then substantiated and expanded by various sociologists, such as Karl Marx,<sup>10</sup> Eugen Ehrlich,<sup>11</sup> and Max Weber in the 19<sup>th</sup> century.<sup>12</sup> In spite of its various theoretical and methodological differences, this research tended to indicate that although law in the form of normative rules was largely based on pre-set doctrines or principles,<sup>13</sup> it was also a social phenomenon whose actual *consequences* and *effects* could be studied,<sup>14</sup> while the *validity* of the doctrines and principles underlying the law were also open to testing by science.<sup>15</sup> In other words, law has both a *normative* dimension, as embedded in underlying doctrines and principles, and a *factual* dimension reflected by its real consequences and effects; and both of these dimensions were fluid within a dynamic social context.<sup>16</sup> In the latter half of the 19<sup>th</sup> century, these important

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a detailed account of these developments, see: Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, UK, 2008) pp. 4-6.

<sup>9</sup> Sir Henry Maine's work *Ancient Law* fits well here as it traced the connections between Roman jurisprudence and the dynamics of legal changes and evolutions in British law. This historical and comparative approach further cemented the methodological validity of social science in legal studies.

<sup>10</sup> The theoretical groundwork was first laid down by Karl Marx whose major works gave a systematic analysis of social structure and the hierarchy of social subsystems in terms of their essential importance to social organization. It was since the publication of Karl Marx's major works, that a new social perspective which classifies law and legal institution as secondary structure of social organization was established. This perspective challenged the conventional ideology that identified law as the primary source of social ordering.

<sup>11</sup> Eugen's major contribution consists in his 'living law', i.e., rules in social relations recognized by people as binding on their conduct. This finding sharply contradicted the postulate held by his contemporary jurists that defined law as the command of a sovereign state to be applied and interpreted by judges whereby legal decisions were largely made in accordance with pre-set doctrines and principles regardless of their actual consequences. See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers, New Brunswick, 2002).

<sup>12</sup> Weber's sociological definition of law called attention to the fact that law in the first place, is a body of norms to be complied within the society, while the external guarantee of coercion through enforcing physical or psychological punishments is just the means to make compliance with the norms more certain. Consequently, unlike the rules and principles that had been presumed by earlier jurists and philosophers to be authoritative on their own accord, law shares the same property of other social norms whose effectiveness is largely dependent on the subjective considerations of the members of the social community. See: Stephen M. Feldman, 'An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law' (1991) 16(2) *Law and Social Inquiry* pp. 205-248; and Richard Swedberg, 'Max Weber's Contribution to the Economic Sociology of Law' (2006) 2(1) *Annual Review of Law and Social Science* pp. 61-81.

<sup>13</sup> This view was a typical legal positivist definition of law. For a brief discussion of legal positivism see: Sharyn L. Roach Anleu, *Law and Social Change* (Sage Publications, London, 2000) p. 6.

<sup>14</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, Cambridge, 1936).

<sup>15</sup> *Ibid.*

<sup>16</sup> For instance, Weber found that law shared the same property of other social norms whose effectiveness was largely dependent on the subjective considerations of the members of the social community. This further

findings further paved the way for the emergence of a new discipline of social science relating to law and society, i.e. sociological jurisprudence.

Although the origin of sociological jurisprudence is commonly grounded in the work of Roscoe Pound,<sup>17</sup> the theoretical foundation of this discipline was first laid down by Oliver Holmes in the late 19<sup>th</sup> century.<sup>18</sup> According to Holmes, legal institutions should rely on social science and scientific methods to help sort out which policy ends were more instrumental to a specific society and more responsive to the actual feelings and demands of the particular time.<sup>19</sup> In the early 20<sup>th</sup> century,<sup>20</sup> this particular view of law and legal institutions, together

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suggested that law can be created, modified or changed in line with people subjective consideration of the law. According to Weber, in the context of a modern society, this process was called 'legitimization', which was largely made possible through rationalization which can be further classified into substantive rationality which was based on certain values and conceptions of justice, and formal rationality which was based on rituals and procedures. See for example, Sharyn L. Roach Anleu, *Law and Social Change* (Sage Publications, London, 2000); Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, UK, 2008).

<sup>17</sup> For more detailed discussion of Roscoe Pound's contribution to the birth and development of sociological jurisprudence, see, eg, Edwin W. Patterson, 'Roscoe Pound on Jurisprudence' (1960) 60(8) *Columbia Law Review* pp. 1124-1132; Julius Stone, 'Roscoe Pound and Sociological Jurisprudence' (1965) 78(8) *Harvard Law Review* pp. 1578-1584.

<sup>18</sup> The most important contribution of Holmes' thoughts was that his central ideas on law are based on a rejection of the doctrine of legal formalism which, like legal positivism, treats law as both internally and logically consistent body of rules immune from the variables of its surrounding social institutions. Influenced by the pragmatic tradition in the United States, Holmes tried to reveal that besides logic, legal judgments were equally influenced by assumptions and preconceptions of the part of judges. This thought can be best summarized by Holmes' famous comment on judicial decision, i.e., 'The life of law has not been logic; it has been experience.' For a detailed account of Oliver Holmes' thoughts of social change and legal reform see: A. Javier Trevino, 'The Influence of Sociology on American Jurisprudence: From Oliver Wendell Holmes to Critical Legal Studies' (1994) 18 (1&2) *Mid-American Review of Sociology* pp.23-46.

<sup>19</sup> Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, UK, 2008). What was actually suggested by Holmes was a more pragmatic and scientifically informed model of law in the society. For this particular point, see: A. Javier Trevino, 'The Influence of Sociology on American Jurisprudence: From Oliver Wendell Holmes to Critical Legal Studies' (1994) 18(1&2) *Mid-American Review of Sociology* pp.23-46.

<sup>20</sup> It is important to note early into the 20th century there was a wide-spread methodological turn in natural and social sciences. Until the end of 19th century, many natural and social science disciplines had been strongly obsessed with the idea that some universal rules were governing both the social and natural worlds. However, not long into the 20th century, many disciplines like biology, economics, political science, etc., took a sharp methodological turn and abandoned the attempt to seek those 'eternal truths' by deducing knowledge from predetermined conceptions. Instead, many disciplines of social sciences launched a host of attempts to reformulate their methodology and subject interests. By the same token, legal study was heavily influenced by this new theoretical turn. Armed by Karl Marx, Max Weber and Oliver Holmes, legal studies began to turn back on the prevailing ethos of legal thought— legal positivism and formalism, both of which tenaciously confined legal study to 'doctrinal analysis' while viewing the force of law being derived directly from textual sources as statutes or precedents. See: A. Javier Trevino, 'The Influence of Sociology on American Jurisprudence: From Oliver Wendell Holmes to Critical Legal Studies' (1994) 18 (1&2) *Mid-American Review of Sociology* pp. 23-46;

with the new developments in sociology, led further to the finding that law could be used as an instrument to shape and influence society.<sup>21</sup>

Harmonizing Holmes' pragmatic model of law with the instrumental view of law developed by the sociological scholarship, Pound came up with the idea of *social control* treating law as 'the ordering of human relations in politically organized societies in terms of the fulfillment of the claims, demands, and desires, which people individually or collectively seek to satisfy.'<sup>22</sup>

According to Pound, law was a powerful instrument for realizing social ends and order, and was the most conspicuous and most effective form of social control,<sup>23</sup> although in factual terms law needed to reflect the social facts upon which it proceeded and to which it was applied.<sup>24</sup> On the basis of this particular concept of *social control*, Pound further set out a number of programs to examine how law could be used better to serve this control function in society.<sup>25</sup> In the mid-20<sup>th</sup> century, these programs were further aided by the advent of systems theory in social science, which not only explained what society was and how it worked, but also clarified the co-evolutionary relationship between law and society.

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Hon. Mr Justice Michael McHugh, 'The Law Making Function of the Judicial Process' (1988) (62) *Australian Law Journal* pp. 15-31.

<sup>21</sup> The idea that law can be used to influence social changes first originated from an American sociologist Edward A. Ross, who developed a broad theory of social control in the first decade of the 20th century. According to Ross, social control is a society's capacity to regulate itself without recourse to force. Instead of coercive control, social control is a form of social dominance over individuals, which seeks to harmonize the different interests and activities while the process of the control consists of the operation of various social institutions, such as education, art, beliefs, public opinion, religion, custom, and law.

<sup>22</sup> Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, New York, 2008) p. 101.

<sup>23</sup> Roscoe Pound, *Social Control through Law* (Transaction Publisher, New Brunswick, 1942) p. 20.

<sup>24</sup> Roscoe Pound, 'Sociology of Law and Sociological Jurisprudence' (1943) 5(1) *The University of Toronto Law Journal* pp.1-20.

<sup>25</sup> These largely included: the actual social effects of law for the purpose of adequate legislation; the effectiveness of law in view of its enforcement function; and the validity of law in terms of social control. See: Roscoe Pound, 'The Call for a Realist Jurisprudence ' (1931) 44(5) *Harvard Law Review* pp. 697-711.

### 2.2.2 Systems Theory

Systems theory was first introduced by biologists in the early 20<sup>th</sup> century to interpret the mechanisms of growth for living beings,<sup>26</sup> and was later introduced into the sphere of sociology by Talcott Parsons.<sup>27</sup> In the closing decades of the 20<sup>th</sup> century, systems theory was developed in socio-legal studies to reveal the relationship between law and other social systems, especially the co-evolution of social and legal contexts.<sup>28</sup> However, this systems theory was to differ considerably from that of Parsons.

According to systems theory, attributes of social institution differed across different developmental stages. In the pre-modern and less industrialized age, the society was largely characterized by a highly ‘stratified’ structure based on hierarchical social ordering.<sup>29</sup> In the modern age, however, the human society underwent significantly faster expansion than it had in the pre-modern age and its responsiveness to the natural environment also increased significantly. Although causes contributing to this expansion were many, the key institutional change within the modern world was the differentiation of society into various sub-systems.<sup>30</sup> The following diagram further illustrates this key institutional change and its impact on social evolution.

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<sup>26</sup> See, eg, Alan L Hodgkin and Andrew F Huxley, 'A quantitative description of membrane current and its application to conduction and excitation in nerve' (1952) 117(4) *Journal of Physiology* pp. 500-544.

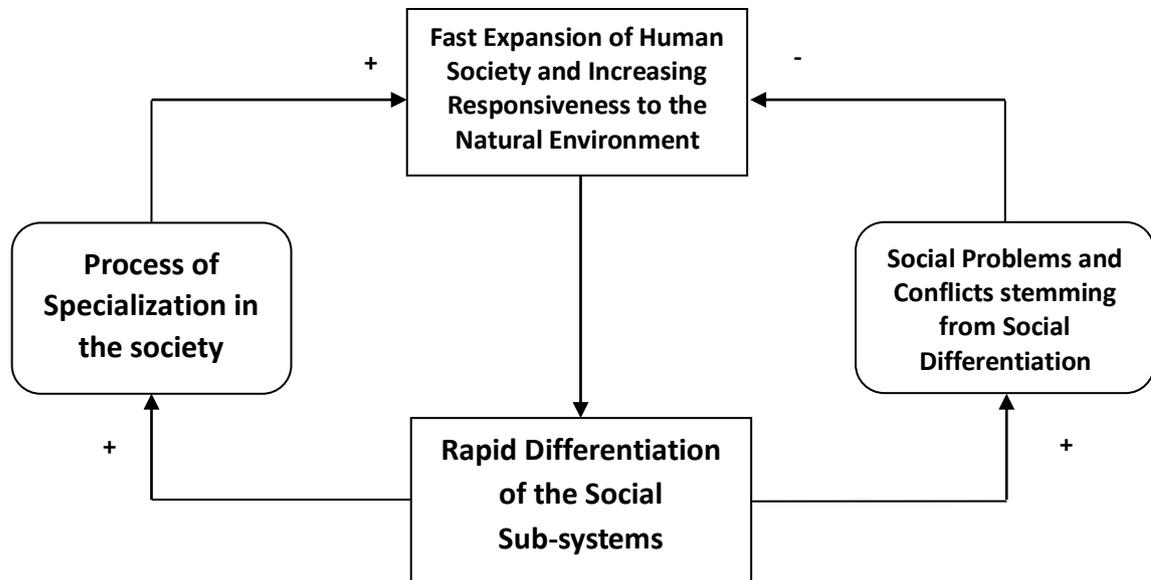
<sup>27</sup> Parsons' contribution to systems theory is considerable. He managed to develop a functionalist model of society. For his major works, See, eg, Talcott Parsons, *The Social System* (The Free Press, Glencoe, 1951); and Talcott Parsons and Edward Shils, *Toward a General Theory of Action* (Harvard University Press, Cambridge, 1951).

<sup>28</sup> This further development was largely grounded in the work of Nicholas Luhmann whose contribution to the application of the systems theory in law and regulation was apparent to Teubner. Luhmann's works helped explain the operation of the legal institution within the context of the modern society with its ever-increasing differentiation and complexity. See, eg, Niklas Luhmann, 'The Self-Reproduction of Law and its Limits' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1986) pp. 111-127; Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin, 1988) pp. 335-348; and Niklas Luhmann, *Social Systems* (Stanford University Press, Stanford, 1995).

<sup>29</sup> For this particular point of view, see especially, Donald J Treiman, 'Industrialization and Social Stratification' (1970) 40 (2) *Sociological Inquiry* pp. 207-234.

<sup>30</sup> For this particular point of view, see: Niklas Luhmann, 'The Self-Reproduction of Law and its Limits' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1986) pp. 111-127.

**Flowchart 2.1: The Evolutionary Pattern of Modern Society Suggested by System Theory<sup>31</sup>**



As shown in the above flowchart, within the context of modern society, rapid social expansion (indicated by the box on the top) is closely accompanied by equally rapid differentiation of sub-systems (indicated on the bottom). The impact of this process on the evolution of human society is two-fold. It speeds up, on one hand, the process of specialization of the sub-systems (indicated by the box on the left), which positively contributes to further expansion of human society (indicated by the arrows with ‘+’ signs); and increases, on the other, the chances of social conflicts between the growing sub-systems (indicated by the box on the right),<sup>32</sup> whose influence on the expansion of human society is

<sup>31</sup> This flowchart is constructed by the author according to a number of works concerning systems theory. Prominent theorists include Herbert Spencer and Talcott Parson. See, e.g., Rumney, Jay, *Herbert Spencer's Sociology* (Transaction Publishers, Rutgers, 2nd ed, 2009), pp. 67-88; Parsons, Talcott, *The Social System* (The Free Press, 1951). Also compare below nn 32-35 and accompanying texts.

<sup>32</sup> Consequently, as this process of differentiation continued, the responsiveness of human society to the natural environment increased as result of the specialization of the sub-systems. These were pointed out by Luhmann. See: Luhmann, Niklas, ‘Differentiation of Society’ (1977) 2(1) *The Canadian Journal of Sociology* 29-53. In particular, it was stressed that ‘functional differentiation increases and differentiates the horizon of possibilities of each subsystem...thereby accelerates evolution’. However, as the human society rapidly expanded, the conflicts between the sub-systems also increased drastically as the differentiation continued. This is particularly true in the *modern* society characterized by accelerating differentiation as problems stemming from the conflicts of the differentiated sub-systems become more frequent and complicated. A

negative<sup>33</sup> (shown by the arrow with the ‘-’ sign indicating the negative impact on social expansion).

In the 1950s, these concepts were first introduced by Parsons into the realm of legal research, thus triggering new work concerning the role of law in particular social contexts featuring differentiation of various functioning sub-systems.<sup>34</sup> In the following decades, some sociologists, such as Luhmann, better explained the mechanism of interaction among the sub-systems. Borrowing the term ‘autopoiesis’ from biology, Luhmann argued that these sub-systems were like the ‘autopoietic’ entities in nature that were operationally closed and cognitively open to the social environment and to each other. This allowed them to communicate and interact with each other, and enabled them to co-exist in the overall social system, while operating according to their own rules and norms that were self-referential and self-reliant.<sup>35</sup> In particular, it was recognized that law was to play an important role within this particular social context characterized by rapid differentiation—providing general rules for social

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number of sociologists have tried to interpret the relations between social conflicts and social differentiation. For an overview of this particular research, see: Hans Haferkamp and Neil J. Smelser, 'Introduction' in H Haferkamp and N J Smelser (eds), *Social Change and Modernity* (1st ed, University of California Press, Berkeley, 1992) p. 10.

<sup>33</sup> For these points concerning differentiation and social evolution, See, eg, George Ritzer, *Contemporary Sociological Theory and its Classical Roots: The Basics* (2nd ed, McGraw-Hill, Boston, 2007) pp. 96-97; Dietrich Rueschemeyer, 'Structural Differentiation, Efficiency, and Power' (1977) 83(1) *American Journal of Sociology* pp.1-25; and Hans Haferkamp and Neil J. Smelser, 'Introduction' in H Haferkamp and N J Smelser (eds), *Social Change and Modernity* (1st ed, University of California Press, Berkeley, 1992) p. 7.

<sup>34</sup> According to Parsons, every society confronts four sub-system problems: adaption, goal attainment, integration and pattern maintenance. To deal with these four systematic problems, modern society is composed of four relatively autonomous subsystems that have differentiated to perform designated functions, i.e., the economy, the polity, the societal community and the fiduciary or value system. With this scheme, the social system and its various subsystems are conceived as open systems engaging in dual process of interchange via various media including: money in the economic system, power in the polity, normative influence in the societal community and value commitment in the fiduciary system. In addition to the above, law is also sub-system, and it serves an important integrative function that regulates not only the interaction among the members of the society consisting of these four subsystems (social integration) but also the institutional structure of society and the exchange among the sub-systems (societal integration). See, for example, Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, Cambridge, UK, 2008).

<sup>35</sup> See, especially, Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, New York, 1988) pp. 335-348; Patrick Capps and Henrik Palmer Olsen; 'Legal Autonomy and Reflexive Rationality in Complex Societies' (2002) 11(4) *Social & Legal Studies* 547-567; Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) *Law & Society Review* 291-301.

interaction and the development of self-organizing social systems. It would be futile for law instrumentally to direct these systems to produce particular substantive outcomes for society. This might still be attempted but it would have the effect of overloading the law and undermining its legitimacy.<sup>36</sup>

These, together with the legal and sociological scholarship discussed above, provide the theoretical groundwork for the development of two different concepts concerning regulation and the role of the state in the general context of social evolution, i.e., responsive regulation and reflexive law. Although they differed on what the role of the state should be in socio-economic regulation, they both advocated a special, learning model of regulation. The concept of 'responsive regulation' focused on the learning of state institutions from society, while 'reflexive law' emphasized the learning of all social systems. The similarities and dissimilarities of these two concepts are discussed in detail in the following sections.

### *2.2.3 Responsive Regulation*

The legal concept 'responsive regulation' was first introduced into the scholarship of sociological jurisprudence by Selznick who traced the development of law against the evolution of society. This concept identified a process through which state authorities, i.e., the polity, the judiciary and the executive, were to carry out more integrated state interventions in order to realize substantive goals desired by society.<sup>37</sup>

According to Selznick, the ultimate aim of law and regulation was to facilitate social change and development by satisfying and responding to justifiable claims, needs and interests of the society at large. For this purpose, legal

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<sup>36</sup> See especially, Niklas Luhmann, 'Differentiation of Society' (1977) 2(1) *The Canadian Journal of Sociology* pp. 29-53.

<sup>37</sup> See: Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1st ed, Harper & Row, New York, 1978).

regulation was to inherit the tradition of sociological jurisprudence which highlighted the importance of the factual dimension of law—the context and consequences of the law, as well as the normative dimension of the law—the ‘substantive justice’ and the legitimate policy goals justifying the purposive state intervention.<sup>38</sup> This normative postulation of legal regulation might still be consistent with the view of Parsons who argued that law served the function of integration in society by regulating the interactions of the sub-systems whose conflicts and differentiation were the major causes of social problems.<sup>39</sup>

In Selznick’s idea of responsive regulation, it was the public authorities (i.e., the political, the judicial and the executive) that were to carry out this special function of integration. To be more specific, when a social problem arises, it first needs a general policy through the political process. To translate the policy into a regulatory solution, it also needs the legislative process to formalize the policy, turning it into operating laws or rules. Further, while implementing the laws or rules, the judiciary and the executive would be required to observe the real social consequences of the regulation so as to evaluate the effectiveness of the laws and rules in light of the purpose of the policy.<sup>40</sup> This process helps to bring the normative aspiration of the regulation in line with the factual consequences of what the regulation intends to achieve, thus creating a virtuous cycle of *social control* characterized by a loop of substantive regulatory responses and desirable outcomes that facilitate social change.

However, despite these vigorous postulations concerning regulation and law, the

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<sup>38</sup> Ibid p. 73.

<sup>39</sup> Although Parsons’ discussion of law was parsimonious, his influence on the study of law and society was two-fold. First, in factual terms, the system theory offered a functional-institutionalist perspective to examine what constitutes the society, how the society works, and how the law works within the social environments. For some, this, gives a good schema through which the dynamics of law, social environments and social changes can be examined. For others, it is a rosy picture, associated with a benign view of American society in a previous age. See, eg, Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Leiden, 2007) p. 6.

<sup>40</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1st ed, Harper & Row, New York, 1978).

particular concept developed by Selznick limits regulatory activities to the political, legal and governmental institutions.<sup>41</sup> As suggested before, in a modern society accompanied by rapid differentiation of function and interest, the political, legal and executive functions are just sub-systems within the entire social system. They may or may not be able to produce outcomes consistent with the expectations and attitudes of the regulatees.<sup>42</sup> Nor are the social communities always so ready to obey rules that may possibly affect their interests and values.<sup>43</sup> To address these problems or changes, better institutions and structures may be required to induce the interested sub-systems to join in the process of contemplation, reflection and negotiation, which forms the regulatory loop indicated by the postulation of Selznick's 'responsive regulation'. This particular normative dimension of regulation which highlights the importance of the structure and institution of regulation was discovered and expounded by Teubner who came up with an alternative concept of legal regulation, i.e., reflexive law.

#### *2.2.4 Reflexive Law*

Unlike Selznick's 'responsive regulation', Teubner's 'reflexive law' is largely derived from the legal and sociological science of Continental Europe, particularly the work of Luhmann and Habermas.<sup>44</sup> While agreeing with

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<sup>41</sup> One salient feature of responsive law is the postulation that the purposes, goals, values and principles of law should be set through political process. See: Peter Vincent-Jones, 'Responsive Law and Governance in Public Services Provision: A Future for the Local Contracting State' (1998) 61(3) *The Modern Law Review* pp. 362-381; Christine Parker, 'Legal Pluralism, Privatization of Law and Multiculturalism' (2008) 9(2) *Theoretical Inquiries in Law* pp. 349-369.

<sup>42</sup> Over the recent decade, there has been increasing empirical evidence which has shown the limitations to the effectiveness of legal rules made by public authorities and institutions. See, for example, Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (1st ed, Cambridge University Press, Cambridge, 2007) pp. 4-5; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-regulatory" World' (2002) 54 *Current legal problems* pp.103-146.

<sup>43</sup> For a more detailed account of the limitations of legal regulation through public or bureaucratic institutions, see: Collin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* pp. 38-60.

<sup>44</sup> According to Luhmann, the modern society distinguishes itself from traditional societies by a high degree of functional differentiation and professional specialization. This particular structure has enabled the modern society to be more resilient and responsive to the fluctuating environment due to the increased differentiation and specialization and the freedom of communication between the sub-systems. The net result of this, as

Selznick that the purpose of law and regulation was to facilitate social evolution and change, Teubner did not highlight the supremacy of state law in shaping the normative system of the society. Nor did he start with treating law as a sub-system affiliated to the polity in the domain of *social control*. Rather, the idea of ‘reflexive law’ presumed the autonomy of various social sub-systems and treated them as *autopoietic*, that is, to be both operationally closed and cognitively open.<sup>45</sup>

According to Teubner, in a highly differentiated society which is complex and plural, the co-existence of the sub-systems that are both differentiated and *autopoietic* should be taken as given. The statist model of legal regulation, which sees it as primarily aimed at providing substantive justice and solutions, would not address social conflicts and problems in a pluralized modern society.<sup>46</sup> Within this new context, the legal system should duly respect the autonomy and specialization of the differentiated sub-systems, and seek to construct an organizational framework or institution that could engage the sub-systems in the discussion and reflection of problems, thus facilitating the

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Luhmann suggests, is the ever-increasing complexity of the society and the ability of the sub-systems to reflect and learn both autonomously and in tandem. In addition to Luhmann’s systems theory, Habermas further expounded the role of modern law in the highly differentiated and complex society. According to Habermas, the growing functional differentiation has led to the autonomy of numerous subsystems and a high degree of pluralism in the society, with each subsystem having its own differentiated normative system. As a result, conflicts of these normative systems become an importance source of social problems. To address these problems, the legal system needs to co-vary with this social reality by limiting its role to engaging these sub-systems in dialogues and discussions, i.e., a democratic process of deliberation and contemplation. Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* pp. 239-285; Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) *Law & Society Review* pp. 291-301.

<sup>45</sup> As foreshadowed above, autopoietic theory derives much of its substance from systems theory in evolutionary biology. At the core of the autopoietic theory lies the assumption that society is comprised of a number of autonomous subsystems. They exchange information with the environment and with each other while making sense of the information flow only according to their own norms. For more background, see: Humberto Maturana and Francisco Varela, *Autopoiesis and Cognition: The Realization of the Living* (Reidel, Dordrecht, 1980); Patrick Capps and Henrik Palmer Olsen, 'Legal Autonomy and Reflexive Rationality in Complex Societies' (2002) 11(4) *Social & Legal Studies* pp. 547-567.

<sup>46</sup> See, especially, Teubner, Gunther, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443-1462. In particular, it was pointed out that ‘the “new” legal pluralism is characterized by specialized institutions that bind law to a multitude of functional subsystems and formal organizations.’

solution through their own reproduction or regulation.<sup>47</sup> But it should be understood that these systems do not interact directly with each other or function to serve the wider society.

The role of ‘reflexive law’ would be limited to encouraging the learning in these systems and the exchanges between them. Teubner used the term ‘reflexive’ to distinguish this from the substantive or purposive law of the state. According to this view, law might play a part in ‘meta-regulation’ or the regulation of regulation, though this would be regulation without substantive law prescribed by the state.<sup>48</sup>

It was suggested that this role of engaging other sub-systems and providing them with an optimal structure for contemplation and discussion was *per se* a result of differentiation of the legal system, and this therefore also underwent a process of specialization just as the same process that had occurred in the other sub-systems.<sup>49</sup>

### *2.2.5 Relevance of Responsive Regulation and Reflexive Law to the Thesis*

As shown in the discussion above, ‘responsive regulation’ and ‘reflexive law’ were two different concepts of legal regulation that emerged in the late 20<sup>th</sup> century. The central normative postulation of responsive regulation is that state regulation should open itself to the surrounding social environments and try to

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<sup>47</sup> Because of this difference in the fundamental view regarding the role of law in social ordering, reflexive law takes ‘a step back from direct interference in the determination of substantive values’ that are treated by responsive law as guides for the solution of social problems and conflicts among different subsystems. In another word, instead of ‘imposing specific values on other subsystems when attempting to solve social conflict’, reflexive law serves to solve social problems by promoting other sub-systems to engage in thinking and self-reflection. Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) *Law & Society Review* pp. 239-285.

<sup>48</sup> For this particular view point, see especially, Parker, Christine, ‘Meta-Regulation: Legal Accountability for Corporate Social Responsibility’, in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* Cambridge University Press, Forthcoming; University of Melbourne Legal Studies Research Paper No. 191. Available at SSRN: <http://ssrn.com/abstract=942157>.

<sup>49</sup> For this point, see, especially, Teubner, ‘The Two Faces of Janus’, above n 46 pp.1447-1448.

facilitate social changes in response to justifiable claims of the society;<sup>50</sup> while reflexive law maintains that state regulation should enable other sub-systems to engage in the process of thinking (reflection) so as to facilitate changes or solve problems themselves in the changing society.<sup>51</sup>

Despite their different normative postulations regarding how state regulation are to be carried out,<sup>52</sup> however, the underlying foundations of these two concepts have some important common grounds that fit the research subject and aims of this thesis. First and foremost, each of them views regulation from a specific perspective that corresponds with the perspective of the thesis (i.e., they treat regulation as involving the state as well as other parts of society, often characterized now as a combination of public and private regulation).<sup>53</sup> Clearly in China it is impossible to discuss regulation without considering the state. Second, each of them posits that changes in the social systems are the objects to which regulation is to respond. This is relevant to the challenges of the increasing complexity and diversity of the social environment in China where the public pension regulation is situated. Third, each of them takes an evolutionary approach to regulation which indicates the co-variation of regulation and the changing social context without assuming that it will follow a particular path. This also corresponds with the general view reflected in a broad research subject such as one concerning the regulation of public pension in China.

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<sup>50</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1 ed, Harper & Row, New York, 1978).

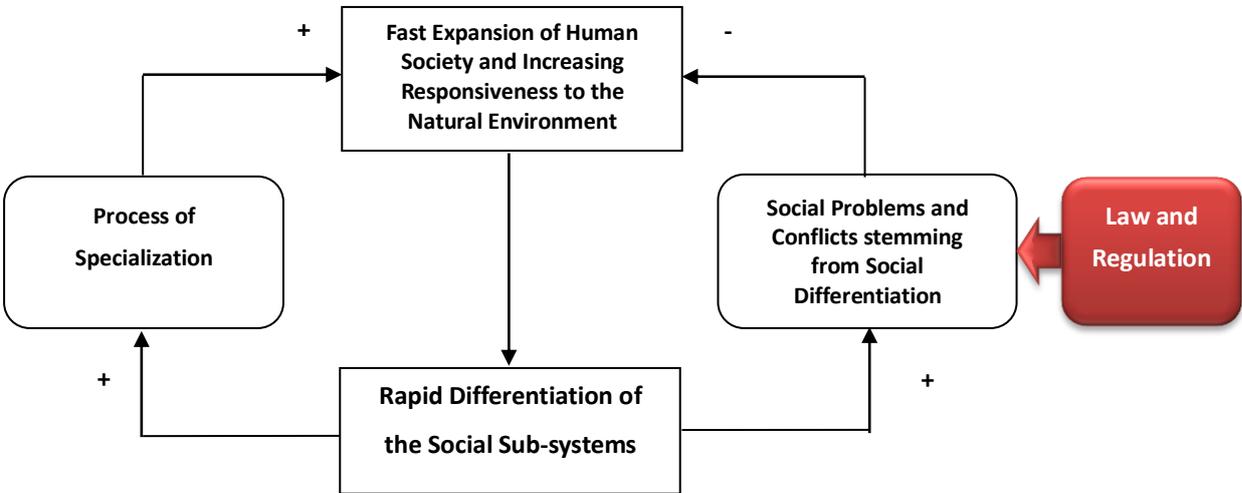
<sup>51</sup> Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* pp. 239-285; Niklas Luhmann, 'The Self-Reproduction of Law and its Limits' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1986) pp. 111-127.

<sup>52</sup> Selznick's responsiveness model highlighted the role of legal and political institutions in shaping social regulation while Teubner's reflexivity model underlined the significant role of legal institutions in forming the regulatory framework that may encourage solutions to social changes or problems.

<sup>53</sup> Although the forms of state involvement under Selznick's responsive regulation and Teubner's reflexive law do differ, both of them agree on the normative force of law for solving the disputes and problems within the society. See, for example, Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* pp. 239-285; Christine Parker, 'Legal Pluralism, Privatization of Law and Multiculturalism' (2008) 9(2) *Theoretical Inquiries in Law* pp. 349-369.

Finally, systems theory, upon which these two concepts of regulation and law have relied, may also shed some light on the nature of the social changes that have been accompanying the regulatory system of the public pension in China. The following diagram further illustrates this particular point.

**Flowchart 2.2: The Potential Implications of Systems Theory, *Responsive Regulation* and *Reflexive Law* for the Research**



As shown in the above diagram, systems theory has revealed the general pattern of social evolution in the context of *modernity*, while both *responsive regulation* and *reflexive law* were built on this general evolutionary social context, and both adopted the position that the main target of state regulation was the ‘social problems and conflicts stemming from social differentiation’. In addition, although they tended to agree that regulation involving the state was likely,<sup>54</sup> they did not suggest that this was to bring forth particular substantive changes to

<sup>54</sup> To reiterate: Although Teubner rejected the state-centred view of law and regulation, and expanded legal institution to more social sub-systems and their interactive mechanisms that may contribute to the validity of laws and regulation, he did not exclude the state and the public institutions from the realm of social regulation. Rather, he argued that the regulatory system was not *restricted* to official state laws or rules. In other words, although the state still retained its important role in social regulation it needed to change the traditional regulatory approaches to suit the new context of accelerating social differentiation. See, especially, Teubner, ‘The Two Faces of Janus’ above n 46 p.1451.

the general pattern of the social evolution. Rather, it was highlighted by both that the law and regulation were to play a facilitative role to social change and evolution.<sup>55</sup> However, there was no necessary progressive or normative logic to social evolution.

Given the commonalities of these two strands of literature as well as their relevance to and implications for the research subject and aims of the thesis, the next section continues to review these two important concepts and their impact on later research in the scholarship of regulation.

### ***2.3 Impact of Responsive Regulation and Reflexive Law on Regulatory Research from the 1990s***

As we have noted, the concept of responsive regulation builds on Pound's sociological jurisprudence, while the idea of reflexive law and regulation is based on the legal and sociologist philosophy developed in Continental Europe. In spite of their different normative orientations,<sup>56</sup> and the many ensuing critiques of both,<sup>57</sup> they have had immense impact on the development of ideas

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<sup>55</sup> See: Teubner, *Substantive and Reflexive Elements in Modern Law*, above n 51; and Nonet and Selznick, *Law and Society in Transition: Toward Responsive Law*, above n 50.

<sup>56</sup> For instance, Teubner challenges Selznick's responsive law by questioning the ability of political and legal systems to rationalize their substantive solutions. Instead, it emphasizes the reflexive rationality of the law and regulation, i.e., the procedural and institutional framework that conducts the regulatory process. Meanwhile, Nonet and Selznick also warned when referring to those laws enriched with procedures but devoid of substantive and purposeful objectives: '[T]he spectre of a multitude of narrow-ended, self-regulating institutions, working at cross-purposes and bound to special interests; of a system impervious to direction and leadership, incapable of setting priorities; of a fragmented and impotent polity in which the very idea of public interest is emptied of meaning.' See, Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1 ed, Harper & Row, New York, 1978) p. 103.

<sup>57</sup> As a matter of fact, there have been both theoretical and empirical evidence which calls for attention to the risk of advocating an ideal of law that takes no responsibility for promulgating substantive values, and is only concerned with processes. For example, Ronen Shamir has shown that many corporate social responsibility initiatives which had assumed that values could come out of corporate management and market process, tended to subordinate social values to market values. See: Bronwen Morgan, *Social Citizenship in the Shadow of Competition* (Ashgate Dartmouth, Aldershot, 2003); Ronen Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) *Theoretical Inquiries in Law* pp.371-394. As a matter of fact, a purely reflexive model of law which promotes a highly process-oriented approach to social regulation also has its limitations in the sense that the 'deconstruction of procedural and substantive rights, the dissolution of the normative legality' could have the same flaws inherent in the legal formalism. See, for example, William E. Scheuerman, 'Reflexive Law and the Challenges of Globalization' (2001) 9(1) *Journal of Political Philosophy* pp.81-102; Wolf Heydebrand, 'Process Rationality as Legal Governance: A Comparative Perspective' (2003) 18

about social regulation and governance since the 1980s.<sup>58</sup>

Selznick's idea of 'responsive regulation' turned the attention of scholars to the *responsiveness* of regulation reflected by the course of actions in the regulatory system,<sup>59</sup> and the qualities of the regulation of being open to the social environment,<sup>60</sup> being facilitative to social needs and claims,<sup>61</sup> and being

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(2) *International Sociology* pp. 325-334. But Teubner endeavoured to provide an answer to this accusation in his 1984 rejoinder.

<sup>58</sup> Some studies have indicated how these two models of regulation have contributed to the theoretical basis for the rise of the 'regulatory state' and the 'post-regulatory' state all around the world. For example, Christine Parker compared the two models of legal regulation and concluded that in a modern pluralist society both models should be incorporated to enhance the effectiveness of social regulation. See: Christine Parker, 'Legal Pluralism, Privatization of Law and Multiculturalism' (2008) 9(2) *Theoretical Inquiries in Law* pp. 349-369; Colin Scott also incorporated the reflexivity of regulation in the discussion of the rise of post-regulatory state, identifying Teubner's metaphor of autopoiesis as an essential basis for the development of new regulatory techniques and institutions over the recent decades. See: Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar, Cheltenham, 2004) pp. 144-176; Peer Zumbansen viewed responsive regulation and reflexive law from an evolutionary perspective and gave a detailed account of their contribution to the regulatory reforms since the fall of welfare state in Europe from 1970's. See: Peer Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56(3) *American Journal of Comparative Law* pp. 769-808. For similar arguments see: Patrick Capps and Henrik Palmer Olsen, 'Legal Autonomy and Reflexive Rationality in Complex Societies' (2002) 11(4) *Social & Legal Studies* pp. 547-567; Simon Deakin, 'Reflexive Governance and European Company Law' (2009) 15(2) *European Law Journal* pp. 224-245; Peter Vincent-Jones, 'Responsive Law and Governance in Public Services Provision: A Future for the Local Contracting State' (1998) 61(3) *The Modern Law Review* pp. 362-381; Micheal Moran, 'Review Article: Understanding the Regulatory State' (2002) 32(2) *British Journal of Political Science* pp. 391-413.

<sup>59</sup> This strand of literature is voluminous. It originated in the early 1990s concerning how to *deregulate*, and move beyond the traditional model of regulation—'command and control'. See, eg, John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 (2) *British Journal of Criminology* pp. 222-238; John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press, Oxford, 2002); Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Aldershot, 2003); John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* pp. 884-898; Valerie Braithwaite, 'Responsive Regulation and Taxation: Introduction' (2007) 29(1) *Law & Policy* pp. 4-10. Although the 'responsive regulation' adopted in these works differ from Selznick's idea of 'responsive regulation', they all placed the focus on the actions, instruments and practices of regulation in response to different types of problems and issues incurred in enforcement and implementation, rather than those normative postulations of regulation.

<sup>60</sup> For this particular viewpoint, See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1st ed., Oxford University Press Oxford, New York, 1992) pp. 3-6; Peer Zumbansen viewed responsive regulation and reflexive law from an evolutionary perspective and gave a detailed account of their contribution to the regulatory reforms since the fall of welfare state in Europe from 1970's. See: Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56(3) *American Journal of Comparative Law* pp.769-808; and Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar, Cheltenham, 2004) pp. 144-176. The central argument of this strand of literature is that in the context of an evolving society, the state should increase its openness in public administration and social regulation to better adapt to the changing social context.

<sup>61</sup> This view is also embraced by the regulatory literature of recent decades. See above nn 53-54 and accompanying texts.

capable of maintaining the integrity of the regulatory system alongside the social changes.<sup>62</sup> Furthermore, the process of state intervention and regulation was no longer viewed as a *static* process for certain fixed goals. Rather, it was recognized that regulation was an evolving, learning and, therefore, *responsive* process which took place within the changing society.<sup>63</sup>

In contrast to Selznick's 'responsive regulation', Teubner's 'reflexive law' further facilitated a number of reforms in private law and socio-economic regulation,<sup>64</sup> and inspired later studies to examine the dynamics of regulation by exploring the institutional and structural factors underlying the social system.<sup>65</sup> Following this line of research, studies concerning the *reflexivity* of the regulatory system—qualities of being facilitative to communications and

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<sup>62</sup> This particular strand of literature largely relates to the regulatory issue of 'control' and 'accountability' as they are viewed as essential components of the regulatory process to maintain the integrity of the regulatory regime. See, eg, Greg Tower, 'A Public Accountability Model of Accounting Regulation' (1993) 25(1) *The British Accounting Review* pp. 61-85; D. D. Dill., 'The Regulation of Public Research Universities: Changes in Academic Competition and Implications for University Autonomy and Accountability' (2001) 14(1) *Higher Education Policy* pp.21-35; and Joseph McCahery, Sol Picciotto et al., *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* (Oxford University Press, Oxford,1995).

<sup>63</sup> This particular viewpoint which relates evolution of law and regulation with the evolving social context was heavily discussed both by Selznick and Teubner in their works concerning responsive regulation and reflexive law. See, eg, Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* pp.239-285. In this article, Teubner agreed with Selznick's view concerning a learning model of law. This view was later theorized by the scholarship of political science as a process of 'social learning'. For a detailed discussion concerning 'social learning', see: Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25(3) *Comparative Politics* pp.275-296.

<sup>64</sup> Teubner's idea of 'reflexive law' has influenced both legal practices and regulatory strategies in the closing decades of the 20<sup>th</sup> century. In particular, it influenced the development of some important arenas of company law such as corporate social responsibility, labour law, privacy law and a variety of regulations. For a detailed account of Teubner's contribution to legal and regulatory philosophy and practices, See, eg, Eric W. Orts, 'A Reflexive Model of Environmental Regulation' (1995) 5(4) *Business Ethics Quarterly* pp. 779-794; Catherine Barnard, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' (Working Paper 294, ESRC Centre for Business Research, University of Cambridge, 2004); Simon Deakin, 'Reflexive Governance and European Company Law' (2009) 15(2) *European Law Journal* pp. 224-245; Nina Cankar and Simon Deakin, 'The Reflexive Properties of Corporate Governance Codes: The Reception of the 'Comply or Explain "Approach in Slovenia"' (Working Paper 371, Centre for Business Research, University of Cambridge, 2008); and Simon Deakin, 'The Regulation of Women's Pay: From Individual Rights to Reflexive Law?' (Working Paper 350, Centre for Business Research, University of Cambridge, 2007).

<sup>65</sup> For this particular point of view, See, eg, Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate, London, 2003) pp. 121-122. In this book, the author discusses the attributes of 'reflexive law' and the mechanisms through which internal and external forces influence the regulatory system and its evolution.

negotiation (among all relevant social stakeholders),<sup>66</sup> being transparent<sup>67</sup> and being conducive to self-regulation<sup>68</sup> gradually gained attention in regulatory scholarship.

The net result of these parallel developments regarding *regulatory responsiveness*<sup>69</sup> and *system reflexivity*<sup>70</sup> further contributed to increased interest of scholarship in the regulatory system, particularly the working of the *regulatory process*, and the accompanying institutions embedded in it—the so called *regulatory space*. These developments further provided regulatory research with descriptive and analytical tools to explore, examine and explain the *responsiveness* and *reflexivity* of regulation.

## ***2.4 Regulatory Process and Regulatory Space***

### ***2.4.1 Regulatory Process***

Early discussions of regulatory process date back to the early 1960s when the main topic of various studies related to economic regulation and its difference

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<sup>66</sup> This postulation concerning law and regulation is one of the typical 'reflexive' properties expounded by Teubner although the original version of democratic dialogue, communication and negotiation within the social communities is generally ascribed to Habermas.

<sup>67</sup> This particular view concerning regulatory reflexivity and transparency and their significant role in public administration and social governance has been widely accepted. In particular, it is recognized that that regulatory transparency is included as part of the normative postulations of Teubner's reflexive law and regulation. See, eg, Thomas N. Hale, 'Transparency, Accountability and Global Governance' (2008) 14(1) *Global Governance* pp. 73-94.

<sup>68</sup> Fostering self-regulation is also recognized as one of the salient features of 'reflexive law', and it is argued that self-regulation is an important objective that reflexive regulation intends to achieve through institutional design and construction. For this particular point of view, See, eg, Julia Black, 'Constitutionalising Self-regulation' (1996) 59 (1) *The Modern Law Review* pp. 24-55; Marius Aalders, 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment' (1997) 19 (4) *Law & Society* pp. 415-433; Darren Sinclair, 'Self-regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19 (4) *Law & Policy* pp. 529-559.

<sup>69</sup> Regulatory responsiveness generally refers to the substantive and purposeful aspects of regulation based on a certain normative idea aimed at addressing a certain social problem. See: Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California University, Berkeley and Los Angeles, California, 1992) p. 336.

<sup>70</sup> System reflexivity focuses on the procedural and structural aspects of the regulation so as to identify the optimal regulatory system that can engage all stakeholders of the social problem in the process of conceiving the solution. See: Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* pp. 239-285.

from traditional adjudication.<sup>71</sup> However, these studies did not provide a clear-cut flow of government actions in response to social problems awaiting regulatory solutions. Rather they tended to suggest that the substantive objectives stipulated in government policies needed proper implementation and administration procedures before they could be successfully translated into the desired outcomes.<sup>72</sup>

Since the late 1970s, and in the context of the decline of the welfare state in Europe and changes in the model of governance and provision of government services, research on ‘regulation’ gradually became a joint enterprise of various academic disciplines including political science,<sup>73</sup> and public administration/management,<sup>74</sup> in addition to economics. The net result of these

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<sup>71</sup> Marver H. Bernstein, 'The Regulatory Process: A Framework for Analysis' (1961) 26(2) *Law and Contemporary Problems* pp. 329-346; Mark S. Massel, 'The Regulatory Process' (1961) 26(2) *Law and Contemporary Problems* pp. 181-202.

<sup>72</sup> For this particular point of view, See, eg, James O. Freedman, 'Crisis and Legitimacy in the Administrative Process' (1974-1975) *Stanford Law Review* pp. 1041-1076; Lloyd N. Cutler and David R. Johnson, 'Regulation and the Political Process' (1975) 84(7) *The Yale Law Journal* pp. 1395-1418; William F. West, 'Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness' (1984) 28(2) *American Journal of Political Science* pp. 340-360; Christine Parker, 'Introduction' in C Parker, et al. (eds), *Regulating Law* (1st ed, Oxford University Press, Oxford, 2004) pp. 1-5.

<sup>73</sup> The literature of political science tends to approach the regulation from the very beginning of the regulatory process, i.e., the origin of regulation. This includes the public interest theory and the private interest theory. These theories tend to focus on why regulation is initiated and by whom. For a detailed discussion of these theories, see: Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (1st ed, Cambridge University Press, Cambridge, 2007) pp. 26-27; Steven P. Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98(1) *Columbia Law Review* pp. 1-168; and Wesley Magat, Alan J. Krupnick and Winston Harrington, *Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior* (Resources for the Future, Washington, D.C., 1986) pp. 47-8. Another strand of literature approaches regulation from an institutional perspective and focuses on the dynamics of policy change, institutional change and their potential impact on regulation. See for example, Carter A. Wilson, 'Policy Regimes and Policy Change' (2000) 20(3) *Journal of Public Policy* pp. 247-274; Colin J. Bennett and Michael Howlett, 'The Lessons of learning: Reconciling Theories of Policy Learning and Policy change' (1992) 25 (3) *Policy Science* pp. 275-294.

<sup>74</sup> The main contribution of the literature of public administration and management is two-fold. First, it establishes the compatibility of administrative process and regulatory process, making possible the examination of regulatory activities through the lens of public administration. See for example, Steven P. Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98(1) *Columbia Law Review* pp. 1-168. Second, this body of literature also provides critiques of the traditional model of government provision of public services vis-à-vis the new reforms in the so called ‘regulatory state’ together with the ensuing new regulatory instruments and techniques. See, for instance, John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40(2) *British Journal of Criminology* pp. 222-238; Jenny Job, Andrew Stout and Rachael Smith, 'Culture Change in Three Taxation Administrations: From Command-and-Control to Responsive Regulation' (2007) 29(1) *Law & Policy* pp. 84-101; John Bellett Howe, *Government Promotion of Job Creation in Australia: Regulatory Objectives, Instruments and Law* (University of Melbourne, Faculty of Law, Melbourne, 2004).

research programs was the further deconstruction of regulatory process into several components which include: policy formulation,<sup>75</sup> legislation and rule-making,<sup>76</sup> implementation and enforcement,<sup>77</sup> review and evaluation,<sup>78</sup> accountability<sup>79</sup> and correction.<sup>80</sup>

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<sup>75</sup> This strand of literature is largely contributed by political scientists who apply the institutionalism approach to examine and theorize the dynamics of government policies. See, for example, Colin J. Bennett and Michael Howlett, 'The Lessons of learning: Reconciling theories of policy learning and policy change' (1992) 25 (3) *Policy Science* pp. 275-294; Carter A. Wilson, 'Policy Regimes and Policy Change' (2000) 20(3) *Journal of Public Policy* pp. 247-274; Michael Howlett and M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2003); Adrian Kay, *The Dynamics of Public Policy: Theory and Evidence* (Edward Elgar Cheltenham, UK, 2006)

<sup>76</sup> The rule-making function in the regulatory process is sometime referred to as 'administrative legislation' which may either take the traditional model of law-making by the legislature or the non-traditional model of legislation by delegation. See, for instance, Ralph F. Fuchs, 'Procedure in Administrative Rule-making' (1938) 52(2) *Harvard Law Review* pp. 259-280. However, it is also highlighted that regulatory rules differ from parliamentary statutes or court decisions. See: Laura I. Langbein and Cornelius M. Kerwin, 'Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence' (2000) 10(3) *Journal of Public Administration Research and Theory* pp. 599-632.

<sup>77</sup> Literature of this component is huge. It involves a variety of techniques, instruments and philosophies of implementation and enforcement of regulatory rules for the purpose of compliance by the target group. The most salient postulates made over the recent decades are those related to or based on the model of 'responsive regulation', i.e., a regulatory strategy that seeks to address different types of non-compliance by differentiated punitive measures starting from soft persuasion up to business decapitation. See, for instance, John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40(2) *British Journal of Criminology* pp. 222-238; John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press, Oxford, 2002); Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Aldershot, 2003); John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* pp. 884-898; Valerie Braithwaite, 'Responsive Regulation and Taxation: Introduction' (2007) 29(1) *Law & Policy* pp. 4-10.

<sup>78</sup> This strand of literature is largely contributed in the combined research of politics and public administration. The central argument of this school of thought is that the public authorities should always be engaged in observing and evaluating the consequences of their previous policies for the purpose of adjusting policy instruments or reforming the policy regimes and paradigms. This process is generally referred to 'social learning'. See, for instance, Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25(3) *Comparative Politics* pp. 275-296; Ian Greener, 'Social Learning and Macroeconomic Policy in Britain' (2001) 21(2) *Journal of Public Policy* pp. 133-152; Colin J. Bennett and Michael Howlett, 'The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change' (1992) 25 (3) *Policy Science* pp. 275-294. Apart from political science, the public administration literature also suggests the important role of feedback in policy implementation and regulatory activities. See, for instance: Samuel J. Yeager, Jack Rabin and Thomas Vocino, 'Feedback and Administrative Behavior in the Public Sector' (1985) 45(5) *Public Administration Review* pp. 570-575; and Claudio Radaelli, 'Diffusion Without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment' (2005) 12(5) *Journal of European Public Policy* pp. 924-943.

<sup>79</sup> The accountability system refers to the *ex post* control exerted by the political authorities over the regulatory agencies and staff. It aims at both addressing implementation problems and identifying potential problems within the regulatory institutions. For detailed account of the accountability system of regulation, see: John McMillan, 'The Role of Administrative Review Bodies--A Commentary' (1999) 58(1) *Australian Journal of Public Administration* pp. 76-79; John Uhr, 'Three Accountability Anxieties: A Conclusion to the Symposium' (1999) 58(1) *Australian Journal of Public Administration* pp. 98-101; Collin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* pp. 38-60.

In spite of their different academic interests and research methodologies, scholars working in this broad field tended to agree that the regulatory process was a dynamic and evolutionary process forming a learning and adjustment loop continuously processing and addressing ever-changing problems in the society at large within a specific domain of regulation.<sup>81</sup> While this particular view corresponded with the normative postulations of Selznick's 'responsive regulation' insofar as it still treated law and regulation as purposive instruments of state intervention, it further compared legal regulation to a dynamic, learning and responsive processes that could identify, address and correct its own problems by introducing different categories of changes and reforms respectively aimed at implementation and enforcement, rule-making and legislation, and/or policy formulation. These changes ranged from amending regulatory instruments or redressing mistakes stemming from implementation, and modifying rules or regulatory institutions, to re-defining policy goals and paradigms.<sup>82</sup> Then within the concept of reflexive law, it was made clear that these changes would not be occurring within the substance of the law. Rather the law, if it had a regulatory role at all, would be encouraging other social systems to learn and adapt.

#### 2.4.2 Regulatory Space

Like the concept of 'regulatory process', the idea of 'regulatory space' first

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<sup>80</sup> Correction, as part of regulation and state intervention, is enshrined and expounded in the literature of policy and public policy by Peter Hall. In explaining how social learning leads to policy changes, Peter categorized different policy changes into 1<sup>st</sup> order change, 2<sup>nd</sup> order change and 3<sup>rd</sup> order change. To be more specific, the 1<sup>st</sup> order change refers to changes to policy and regulatory tools. The 2<sup>nd</sup> order change refers to categorical change of regulatory instruments, and possibly institutional changes, while the 3<sup>rd</sup> order change is a fundamental change to the policy paradigm, i.e., paradigm shift. See: Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25(3) *Comparative Politics* pp. 275-296.

<sup>81</sup> This regulatory loop is first suggested by Selznick's responsive law/regulation, and then confirmed by the scholarship of public administration which establishes the compatibility between a regulatory process and an administrative process. See: Steven P. Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98(1) *Columbia Law Review*, pp. 1-168. Furthermore, the public policy literature of social learning and policy learning also strikes a concord with the similar argument of the public administration literature. See above n 78 and accompanying text.

<sup>82</sup> See above n 80 and accompanying text.

originated in the domain of economic regulation, and was first proposed by Hancher and Moran.<sup>83</sup> In their opinion, the dynamics of a certain regulatory process are highly dependent on the interaction of the actors inside the regulatory system. Therefore, to examine and explain regulatory activities, attention must be given to the ‘relative power of the included’<sup>84</sup> as well as the institutional assumptions which ‘govern their interaction’.<sup>85</sup>

In the late 1990s, this idea was further examined by Colin Scott who related it to ‘sociological and political theories which emphasize the role of institutional structures... in shaping change and public policy outcomes,’<sup>86</sup> and argued that depicting the ‘regulatory space’, i.e., the procedures and institutions in relation to the actions and interactions of the interested state and non-state actors within the regulatory system,<sup>87</sup> might serve as a viable instrument for examining the *reflexivity* of law and regulation in a complex modern society.<sup>88</sup>

Subsequently, this idea of ‘regulatory space’ has become a widely accepted concept in regulatory research. On one hand, it is applied in regulatory research in a variety of socio-economic arenas, such as health and safety,<sup>89</sup> economic competition,<sup>90</sup> environment protection,<sup>91</sup> public administration,<sup>92</sup> and risk

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<sup>83</sup> Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, Oxford, 1989) pp. 271-299.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid* pp.278-9.

<sup>86</sup> Colin Scott, 'Analyzing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Summer Public Law* pp. 329-353.

<sup>87</sup> This broad definition of ‘regulatory space’ is based on the work of Bettina Lange. See: Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12(4) *Social & Legal Studies* pp. 411-423. For a more detailed account of the construct of ‘regulatory space’, see: Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd ed, Oxford University Press, Oxford, 2012) pp. 63-65.

<sup>88</sup> Scott above n. 86, p. 352.

<sup>89</sup> See, eg. J. Paterson, *Behind the Mask: Regulating Health and Safety in Britain's Off-shore Oil and Gas Industry* (Ashgate, London, 2000).

<sup>90</sup> See, eg. Tony Ballance and Andrew Taylor, *Competition and Economic Regulation in Water: The Future of the European Water Industry* (IWA Publishing, London, 2005).

<sup>91</sup> See, eg. Bettina Lange, 'National Environmental Regulation? A Case Study of Waste Management in England and Germany' (1999) 11(1) *Journal of Environmental Law* pp. 59-86.

control;<sup>93</sup> while on the other, it is also used to explore the dynamics of regulatory systems, regulatory changes, and regulatory reforms.<sup>94</sup> From the early 2000s in particular, some regulatory studies have even used this concept to analyze and depict the evolution of regulation alongside the changing social context.<sup>95</sup>

In sum, like the concept of ‘regulatory process’, ‘regulatory space’ as an important concept has become an essential tool of regulatory scholarship, which is useful not only for analyzing various regulatory activities and their *reflexivity*, but also for depicting and interpreting regulatory changes and interactions with the society.

## ***2.5 Summary of the Literature Review and Implications for the Research Design concerning China’s Public Pension System***

Having examined the literature concerning *regulatory responsiveness* and *system reflexivity* since the late 20th century, we can largely discern a switch of research interest from the normative postulations to the factual aspects of regulation.<sup>96</sup>

In the late 1970s and the early 1980s, the emergence of the ideas of ‘responsive regulation’ and ‘reflexive law’ led to an idea of how to conceptualize the

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<sup>92</sup> See, eg, Christopher Hood and Colin Scott, 'Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-Image Developments?' (1996) 23(3) *Journal of Law and Society* pp. 321-345.

<sup>93</sup> See, eg, Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford University Press, Oxford, 2001).

<sup>94</sup> For this particular way of applying ‘regulatory space’ to regulatory change, See, eg, Jenny Kent, 'PSASB: Constructing Regulatory Space for Accounting Change (Master's Thesis, Deakin University, 2000); Laura D MacDonald and Alan J Richardson, 'Identity, Appropriateness and the Construction of Regulatory Space: The Formation of the Public Accountant's Council of Ontario' (2004) 29(5-6) *Accounting, Organizations and Society* pp. 489-524; and Robert MacKenzie and Miguel Martinez Lucio, 'The Realities of Regulatory Change: Beyond the Fetish of Deregulation' (2005) 39(3) *Sociology* pp. 499-517.

<sup>95</sup> See, eg, Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12(4) *Social & Legal Studies* pp. 411-423; and Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd ed, Oxford University Press, Oxford, 2012).

<sup>96</sup> To be more specific, the literature focusing on the process of regulation has put forward an evolving and learning mode of purposive state interventions, and examines the responsiveness of regulation against the working of the process. The literature of regulatory space focuses on the institutional structures of the regulation, and in particular examines the interactive relations of the different actors within the regulatory process so as to mirror the reflexivity of the entire regulatory system.

problems and issues in response to the changing social environments. The proposed solution of ‘responsive regulation’ and ‘reflexive law’ further formed the normative foundations of *responsiveness* and *reflexivity* of regulation. According to Selznick’s ‘responsive regulation’, *regulatory responsiveness* was embedded in the normative qualities of regulation reflected by the course of actions taken by public authorities to open the regulation to the social environment, to achieve the desired goals of the regulating policy in response to the claims and needs of the society, and to maintain the integrity of the regulatory system alongside the social changes;<sup>97</sup> while from Teubner’s point of view, *system reflexivity* was embedded in the normative qualities of the regulatory system to facilitate communications among all relevant social stakeholders, to increase transparency of the actions taken by both state and non-state actors, and to develop mechanisms of learning and self-regulation.<sup>98</sup>

In line with these normative postulations, later research began to focus on how to examine and explore these normative qualities in regulatory activities. This further led to some new concepts concerning the factual aspects of regulation, i.e., ‘regulatory process’ and ‘regulatory space’. The net result is that from 1990s onwards, ‘regulatory process’ and ‘regulatory space’ have become essential tools to regulatory research for describing and analyzing a range of research issues and questions, including but without limitation to, *responsiveness* of regulation, *reflexivity* of regulatory systems, and changes in regulation alongside changes in the social environments. The implications of the literature review for this thesis, whose research subject is closely related to a special body of regulation in China, are at least four-fold.

First, although it might be objected that the regulatory system in China (including law) simply operates as a command-and-control model (i.e., it is

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<sup>97</sup> See above nn. 60-62.

<sup>98</sup> See above nn. 66-68.

purely authoritarian),<sup>99</sup> and that this allows little scope for broad social and institutional involvement in the pursuit of public policy and administration, it is important to note that regulatory activities in China have become considerably more complicated and nuanced particularly since the 1980s and 1990s.<sup>100</sup> But that is not necessarily a consistent trend and part of the task is to examine the experience.

Second, as suggested by the review in the foregoing sections, the special perspective of regulation embedded in the normative postulations of *regulatory responsiveness* and *system reflexivity* fits the general subject matter and aims of this thesis on a number of important grounds. In particular, they have provided this research with some important guides concerning what regulation should do within a dynamic social context. Although they have so far not been systemically applied in the social context of China where the constitution of the regulatory system is presumably different from those of the Western democracies (i.e., the origins of these two concepts of *responsiveness* and *reflexivity*), the normative postulations of these two concepts and their potential importance to Chinese socio-economic regulation have been gradually recognized by some domestic scholars in China.<sup>101</sup> In particular, scholars have

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<sup>99</sup> See, eg, George J. Kominiak, et al., *The "Command and Control" Philosophy of the Communist Party of China*, Sandia National Laboratories (1996); Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* (Greenwood Press, 1997); and Peng Liu, 'From Decentralised Developmental State Towards Authoritarian Regulatory State: A Case Study of Drug Safety Regulation in China' (2010) 8(1) *China: An International Journal* pp. 110-137.

<sup>100</sup> See, eg, Ian Weber and Lu Jia, 'Internet and Self-regulation in China: the Cultural Logic of Controlled Commodification' (2007) 29(2) *Media Culture Society* pp. 772-789; Pitman B. Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation' (2004) 29(2) *Law & Social Inquiry* pp. 465-495; and Zhihong Gao, 'Harmonious Regional Advertising Regulation?: A Comparative Examination of Government Advertising Regulation in China, Hong Kong, and Taiwan' (2005) 34(3/Fall) *Journal of Advertising* pp.75-87.

<sup>101</sup> For example, some domestic scholars in China have begun to recognize the importance of using *reflexive law* in regulating social organizations. See, eg, Xiao Wang and Yanhua He, 'Constructing Supervisory Mechanisms over Social Organizations from the Perspective of Reflexive Law (由反思法视角构建社会团体监督机制)' (2005) (6) *Entrepreneur World* pp. 76-78. Some studied *reflexive* practices of legislation in China to illustrate the relevance of this legal model to China's public administration and economic regulation. See, for example, Meisun Yu, et al., 'Legislation, Social Debates, Public Lobbying and Judicial Activities: New Experiments of Constitutional Democracy in China (立法的社会论争和民间游说与司法互动——我国宪政民主制度的新尝试)' (2004) (2) *Information and Research of Legal Documents* pp. 12-29. Others have used these concepts to interpret the evolution of competition law in China. See, eg, Yong Huang and Shan Jiang,

tentatively argued that introducing *reflexive* and *responsive* practices into legislation and public administration, if that is possible, may be proactive in China's socio-economic reforms.<sup>102</sup> This has not only encouraged the author to study these two concepts further, but has also turned his attention to the limitation of this research—the lack of systemic empirical evidence—to support various normative suggestions. In other words, some in-depth research of an exploratory nature is required to identify and underpin any *reflexive* and *responsive* elements of regulation in the specific social context of China.

Third, as suggested by the literature review, 'regulatory process' and 'regulatory space' are two important concepts developed by later research since the closing decades of the 20<sup>th</sup> century. Although their focus is largely placed on factual aspects of regulation, they provide regulatory scholarship with more concrete approaches to describe regulation and its evolution. In particular, over recent years, some non-Chinese scholars have begun to employ these analytical tools to describe and explain problems and issues of socio-economic regulations in China.<sup>103</sup> This further suggests that *regulatory space* and *regulatory process*, as two descriptive tools of regulatory research, can be suited to different regional

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'Thirty-Year Development of China's Anti-monopoly Law under the Yardstick of 'State-Market': Toward 'Autonomous-Responsive' Law ('国家—市场'尺度下的反垄断法三十年——迈向“自治-回应”型法)' (2008) 23(3) *Legal Forum* pp. 13-19.

<sup>102</sup> In recent years, there has been some growing awareness of *responsive* and *reflexive* regulation in China. Apart from the articles presented in the previous note, a few master's degree theses also began to address these concepts. See, eg, Jianli Dong, 'Exploratory Research of Responsive Model of Law (回应型法律模式探究)' (Master's Degree, South-west University of Political Science & Law, 2010); Ying Wei, 'Study on Responsive Law (论回应型法)' (Master's Degree, South-west University of Political Science & Law, 2008); and Zhong Liu, 'On the Legal Formal Rationality and its Crisis and Solution under the Background of Modernity (论现代性背景下的法形式合理性及其危机与解决)' (Master's Degree, East China University of Political Science & Law, 2008). Although most of them mainly focused on the theoretical aspects of these two concepts, all of them tended to suggest that 'responsive regulation' and 'reflexive law' had some important implications for China's reforms in various arenas, such as the legal system, public administration and policy-making, etc.

<sup>103</sup> For example, some overseas scholars studied environmental regulation in China by using similar descriptive tools of regulatory procedures and organizations. See, eg, Benjamin Van Rooij, 'Organization and Procedure in Environmental Law Enforcement: Sichuan in Comparative Perspective' (2003) 17(36) *China Information* pp. 36-64. Others have used the same tools to illustrate the development of the legal system and legal profession in China. See, eg, Ethan Michelson, 'The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work' (2006) (40) *Law & Society Review* pp. 1-38. Others examined regulation of food safety. See, eg, Waikung Tam and Dali Yang, 'Food Safety and the Development of Regulatory Institutions in China' (2005) 29(4) *Asian Perspective* pp. 5-36.

studies given certain adaptations in light of the specific social contexts of the region. They can be used to help diagnose problems with regulation in China, the fact for example that despite all the signs of a strong central state, regulation does not prove to be wholly effective.

Finally, given the normative foundation of *regulatory responsiveness* and *system reflexivity* to regulatory research, and the descriptive usefulness of *regulatory process* and *regulatory space* in analyzing regulatory system and evolution, it is arguable that both normative postulations and descriptive tools are essential to the enquiry of this thesis which aims at addressing a specific domain of regulation—public pension, and its evolution within a dynamic social context in China. Although so far there has been a *scarcity* of research integrating all these above perspectives in studying regulatory activities in China, the *viability* of these concepts to the research subject, as shown in the foregoing sections, is supported not only by the new developments in regulatory scholarship, but also by the methodological developments in sociological jurisprudence and sociology of law, which has incorporated both normative and factual aspects of law into research on regulation.

### **3. Research Design**

#### ***3.1 Analytical Framework: Combining Responsive Regulation, Reflexive Law, Regulatory Process and Regulatory Space into an Integrated Analytical Approach***

As noted in the literature review, the scholarship of regulation and social evolution is a special research area intersecting with sociology of law, sociological jurisprudence and systems theory, while in terms of methodology, both the normative aspects of *regulatory responsiveness* and *system reflexivity*, and the factual aspects of them—the performance and operation of the ‘regulatory process’ and ‘regulatory space’—are essential to the research. These

special properties revealed by the literature provide this thesis with some important theoretical and methodological guides concerning how to depict, explain and analyze, on one hand, the interactive relations between regulation and the changing social environment, and the responses produced by the regulatory system to the changes in the society, on the other. In particular, in the context of a modern society, many of the regulatory responses are made with the involvement of the state in the form of deliberate interventions in the social sphere to realize certain policy goals or objectives. Yet they appear to be miscalculated or they meet resistance from the regulatees. Partly this is because the state is not unified, there are divisions between the national, provincial and city governments, but also because from time to time the non-state actors exert influence. Therefore, the interactions between the changing social environment and the evolving regulatory system are to be examined in the general evolutionary context suggested by systems theory (i.e., the evolutionary pattern of modern society depicted in Flowcharts 2.1 and 2.2 of the literature review). Furthermore, as noted in the literature review, these regulatory responses are reflected both by the course of actions within the ‘regulatory process’ and by the changes in the ‘regulatory space’.

In light of these guides and the research subject and aims identified in the Introduction, the author of this thesis seeks to incorporate these important theoretical postulations and methodological approaches into the analytical framework of this study. In particular, this framework integrates the normative postulations derived from Selznick’s ‘responsive regulation’ and Teubner’s ‘reflexive law’, and the descriptive tools developed by recent research concerning ‘regulatory process’ and ‘regulatory space’ into the concepts of *regulatory responsiveness* and *system reflexivity* to examine the co-evolution of the public pension regulation with the changing social environment in China.

The following table illustrates the structure of this particular analytical

framework as utilized in this thesis.

**Table 2.1: The Integrated Approach of Regulatory Responsiveness and System Reflexivity**

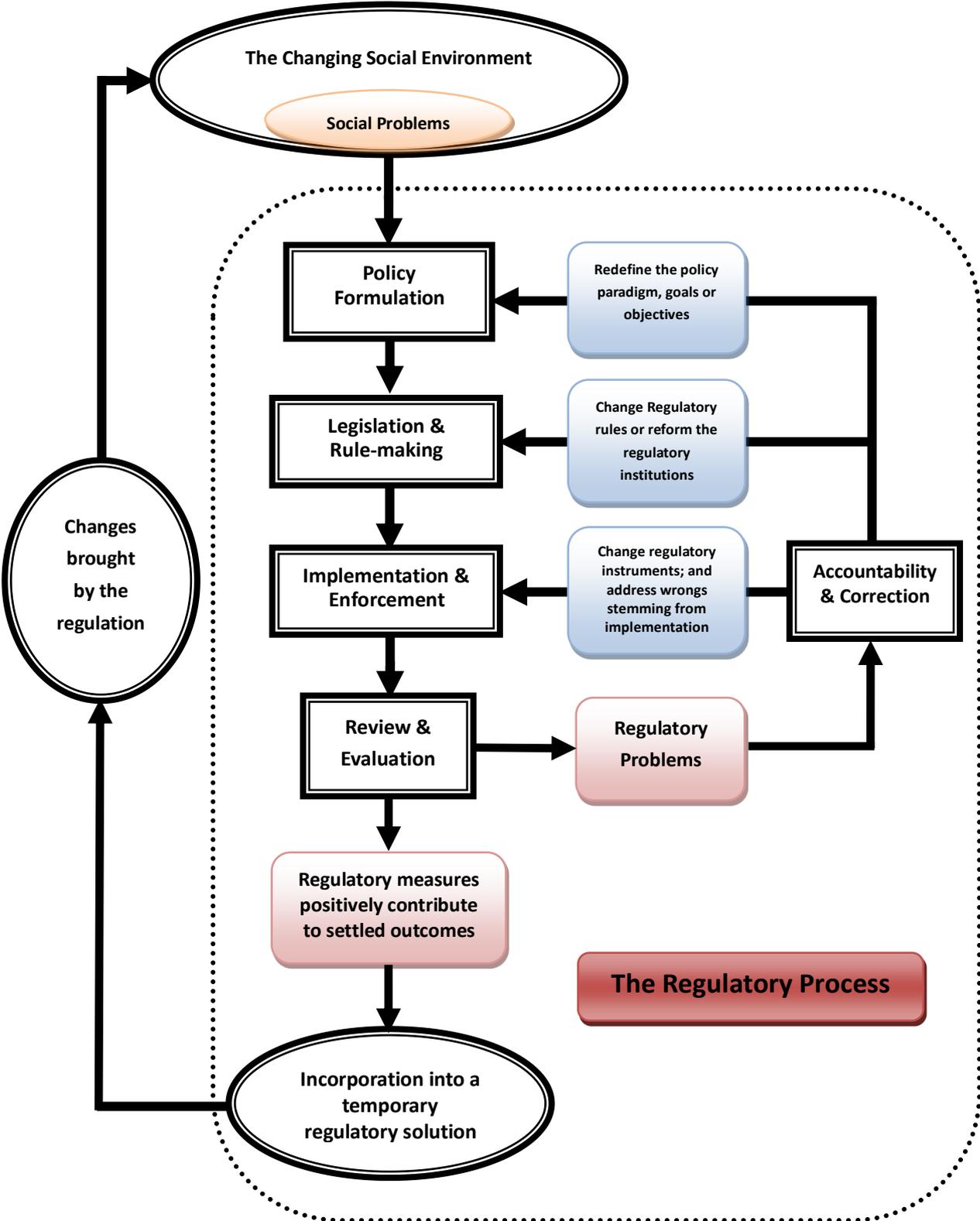
	<b>Normative Postulations</b>	<b>Descriptive Tools</b>
<b>Regulatory Responsiveness</b>	<p>Selznick’s ‘responsive regulation’ which holds that regulation should be implemented in a way that facilitates social changes by:</p> <ol style="list-style-type: none"> <li>1) opening itself to the changing social environment;</li> <li>2) responding to the emerging problems stemming from the changing social environment; and</li> <li>3) maintaining its own institutional integrity.</li> </ol>	<p>The ‘regulatory process’ consisting of the 5 key components—policy formulation, legislation &amp; rule-making, implementation &amp; enforcement, review &amp; evaluation, and accountability &amp; correction.</p>
<b>System Reflexivity</b>	<p>Teubner’s ‘reflexive law’ which holds that the state should regulate by designing and constructing institutions and procedures to engage the different actors to be affected by the regulation in order to:</p> <ol style="list-style-type: none"> <li>1) facilitate their communications and negotiations;</li> <li>2) increase the transparency of the regulation; and</li> <li>3) develop mechanisms of self-regulation.</li> </ol>	<p>The ‘regulatory space’, i.e., the institutions and procedures governing the interactions of the different actors, throughout the regulatory process.</p>

As shown in the above table, the integrated approach adopted have involves two important concepts—*regulatory responsiveness* and *system reflexivity*. Each of these has its own specific normative postulations and descriptive tools. ‘Regulatory responsiveness’ largely draws on the normative postulations embedded in Selznick’s responsive regulation, and is primarily reflected in the dynamics of the ‘regulatory process’. ‘System reflexivity’ normatively relies on Teubner’s reflexive law, and is primarily described in the constitution of the ‘regulatory space’.

Furthermore, according to the Selznick’s ‘responsive regulation’, the process of

regulation was said to be open to the changing social environment, while the ‘regulatory process’, as revealed by later research, was largely composed of five different stages or components which formed a dynamic procedure that could process and address ever-changing problems arising from the society at large. Following these general views concerning the ‘regulatory process’ based on ‘responsive regulation’ and various studies concerning the operation and functionality of the five components of the ‘regulatory process’, the author further proposes a flowchart to illustrate the process of regulation based on Selznick’s ‘responsive regulation’.

**Flowchart 2.3: Regulatory Process in a Changing Social Environment<sup>104</sup>**



<sup>104</sup> This flowchart is constructed by the author of this thesis on the basis of the literature concerning responsive regulation and regulatory process discussed in this chapter.

As shown by the flowchart, the ‘regulatory process’ reflecting the normative postulations of Selznick’s ‘regulatory responsiveness’ is connected to the social environment (indicated by the big oblong circle on the top of the flowchart) whose dynamics and changes lead to social problems (indicated by the small oblong circle within the big one) that are to be addressed by the regulatory process (encircled by the dashed line in the chart).

The ‘regulatory process’ is generally constituted by five components—policy formulation, legislation and rule-making, implementation and enforcement, review and evaluation, accountability and correction—that are set in the rectangles with arrows indicating their sequence. In particular, ‘policy formulation’ refers to the process generating the regulatory policies in response to the relevant social problems or issues.<sup>105</sup> ‘Legislation and rule-making’ refers to conversion of the policies into laws or rules for the purpose of realizing the goals and objectives embedded in the regulatory policies.<sup>106</sup> This is followed by ‘implementation and enforcement’ undertaken by some public agencies or authorities.<sup>107</sup> Measures at this stage may typically involve actions by the agencies or authorities taken towards the *regulatees*, and activities within or among the agencies and authorities, though the purpose of both is related to implementing or enforcing the regulation.<sup>108</sup> Following this is the process of ‘review and evaluation’ that is to serve the function of examining the feedback stemming from the ‘implementation and enforcement’ stage of the process.<sup>109</sup> It

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<sup>105</sup> See, eg, Arthur Earl Bonfield, (1990), ‘State Administrative Policy Formulation and the Choice of Lawmaking Methodology.’ (1990) 42(2) *Administrative Law Review* pp. 121-180; Donald C. Langevoort, ‘The SEC as a Bureaucracy: Public choice, Institutional Rhetoric, and the Process of Policy Formulation’ (1990) 47(3) *Washington and Lee Law Review* pp. 527-540; and Cornelius J. Peck ‘A Critique of National Labor Relations Board’s Performance in Policy Formulation: Adjudication and Rule-making’ (1968) 117 (2) *University of Pennsylvania Law Review* pp. 254-275.

<sup>106</sup> See, eg, Morris P. Fiorina, ‘Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?’ (1982) 39(1) *Public Choice* pp. 33-66.

<sup>107</sup> See, eg, Anthony Heyes, ‘Implementing Environmental Regulation: Enforcement and Compliance’ (2000) 17 (2) *Journal of Regulatory Economics* pp. 107-129.

<sup>108</sup> See, eg, John T Scholz, ‘Voluntary Compliance and Regulatory Enforcement’ (1984) 6(4) *Law & Policy* pp. 385-404.

<sup>109</sup> See above n. 77 and accompanying text.

helps distinguish those regulatory measures leading to settled outcomes from those associated with problematic or disputed outcomes. The former will be maintained as regulatory measures conducive to addressing or solving the social problems that have triggered the regulation;<sup>110</sup> while the latter will be further channeled to the ‘accountability & correction’ stage which serves an *ex-post* control function of the regulatory system.<sup>111</sup> Adjustments aimed at the regulatory problems vary as the problems may stem from different components of the regulatory process, such as ‘review and evaluation’, ‘implementation and enforcement’, ‘legislation and rule-making’ and ‘policy formulation’. In light of the problems, the forms of the adjustments may also vary as suggested before.<sup>112</sup>

Applying the concept of ‘regulatory space’ to the regulatory process discussed above, the ‘regulatory space’ can be further understood in ways shown by the following table.

**Table 2.2: Regulatory Spaces throughout the Regulatory Process**

		<b>Regulatory Spaces</b>
<b>Regulatory Process</b>	Policy Formulation	Actors and institutions
	Legislation & Rule-making	Actors and institutions
	Implementation & Enforcement	Actors and institutions
	Review & Evaluation	Actors and institutions
	Accountability & Correction	Actors and institutions

As suggested by the above table, the ‘regulatory space’ is filled with different state and, importantly, non-state actors that are involved in the regulation, and

<sup>110</sup> See especially: Caroline de la Porte and Patrizia Nanz, 'The OMC – A Deliberative-democratic Mode of Governance? The Cases of Employment and Pensions' (2004) 11(2) *Journal of European Public Policy* pp. 267-288.

<sup>111</sup> See above n. 79 and accompanying text.

<sup>112</sup> See above n. 80 and accompanying text.

they operate according to the rules governing the procedures and institutions of their interaction. As the ‘regulatory space’ now spans over the entire regulatory process, all the five components—policy formulation, legislation and rule-making, implementation and enforcement, review and evaluation, accountability and correction—presumably have their own specific actors and institutions. In particular, the fourth and fifth regulatory processes assume much more significance and it is here that, if system reflexivity does actually apply, the non-state actors participating in the system are capable of initiating changes or adaptation within the regulatory system. In the Chinese public pension system, these non-state actors may include: firms, employed labour, trade unions and some social institutions involved in supervising the pension funds.

### *3.2 Development of the Research Questions of the Thesis*

Applying the analytical framework developed above to the main research subject,<sup>113</sup> the author of the thesis further develops one main research question, and two subsidiary questions in response to the research aims<sup>114</sup> set forth in Chapter One.

#### *Main Research Question:*

In what ways has the public pension regulatory system in China evolved in response to a changing social environment?

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<sup>113</sup> The main research subject of the thesis is largely indicated by its title— Public Pension Regulation and its Evolution in China.

<sup>114</sup> The main research aims are developed from a review of the current research over the basic subject—the public pension regulation in China. They include, as mentioned in the Introduction, dealing with both practical issues, such as how to explain the emerging regulatory problems facing the public pension system, and how the regulatory system has addressed these problems and challenges, as well as dealing with theoretical issues such as how to apply regulatory theories to illustrate the evolution of the regulatory system in the general socio-economic context of China’s political economy. The thesis also aims to draw some implications for the evolution of the regulatory system in the future, based on the findings concerning the evolution of the regulation and the characteristics of the social changes surrounding the regulatory system.

### *Subsidiary Research Questions:*

- 1) What does the concept of ‘regulatory responsiveness’ tell us about the evolution of China’s public pension system in a changing social environment?
- 2) What does the concept of ‘system reflexivity’ tell us about the evolution of China’s public pension system in a changing social environment?

In particular, the two subsidiary questions will be answered first in the analytical part (i.e., Chapter Eight) by using the descriptive tools of *regulatory space* and *regulatory process* with special attention to the details relating to the normative attributes of *reflexivity* and *responsiveness* (identified in Table 2.1). Then, based on the results of the analysis concerning the two subsidiary questions, the main question will be answered through in–depth analysis of the interactions between the ‘regulatory responses’ (informed by *system reflexivity* and *regulatory responsiveness*) and the changing social environment in China, while the general evolutionary pattern of modern society suggested by system theory (illustrated in Flowchart 2.2 of Section 2.2.5) will also be used to aid the analysis. Then, based on the analytical results derived from answers to the research questions, some theoretical and empirical implications will be drawn both for the Chinese public pension system and the socio-economic regulation within the particular social context of today’s China.

### **3.3 Research Method**

As noted, the research subject of this thesis is the evolution of China’s public pension regulation, and the main research question concerns the ‘responses’ of the regulation to the changing social environment. In addition, two subsidiary questions are raised: one in relation to the *responsiveness* of regulation, and the other in relation to the *reflexivity* of regulation, while the general context of a

changing social environment is also incorporated in the research questions. By virtue of these traits embedded in the research, it is quite clear that the major undertaking of this thesis is to answer the research questions through description. Meanwhile, as the research questions are largely open-end ones concerning ‘what’ the evolution of the regulation has been instead of those close-end ones involving numeric answers for statistical evaluation, it is arguable that this study is typically of ‘qualitative’ research.<sup>115</sup>

According to the general literature concerning research design, a variety of research methods are available to qualitative studies.<sup>116</sup> However, given the fact that this thesis typically raises questions in relation to social changes and regulatory changes regarding ‘process’ and ‘space’, it needs a specific method that can reflect both what happened in the society at large and what occurred to the system of the regulation in response, so as to illustrate the patterns of interactions between these two. In this regard, ‘historical method’ fits the research subject and questions of this thesis.

Historical method, also called ‘historical approach to research’ is a process of learning and knowing the background and development of a certain field of research interest.<sup>117</sup> It aims to understand ‘how things came to be’ as well as how the life, organizations, contexts, ideas and thoughts relating to the research

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<sup>115</sup> According to the general literature of research design and methodology, qualitative research and quantitative research differ on a variety of grounds, while the most important of them include: whether the primary purpose of the research is to test any hypothesis or to answer any research question; and whether the questions to be answered are close-end eliciting numeric values, or open-end awaiting descriptive accounts or texts. For these points concerning the criteria distinguishing qualitative and quantitative studies, See, eg, John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, London, 2003) p. 18; Sharlene Nagy Hesse-Biber and Patricia Leavy, *The Practice of Qualitative Research* (Sage, Thousand Oaks, 2006) pp. 6-7.

<sup>116</sup> Generally speaking, qualitative research methods include: case study, grounded theory, discourse analysis, critical discourse analysis, ethnography, phenomenology, historical method and action research. For a detailed discussion of research methods for qualitative studies, See, eg, Shoshanna Sofaer, 'Qualitative Research Methods' (2002) 14(4) *International Journal for Quality in Health Care*, pp. 329-336; and Christine Daymon and Immy Holloway, *Qualitative Research Methods in Public Relations and Marketing Communications* (2nd ed, Routledge, London, 2011).

<sup>117</sup> historical method. (n.d.). *Collins English Dictionary - Complete & Unabridged 10th Edition*. Retrieved December 18, 2010, from Dictionary.com website: [http://dictionary.reference.com/browse/historical method](http://dictionary.reference.com/browse/historical%20method).

subject have developed during given periods of time.<sup>118</sup> In particular, historical method is widely used for depicting change, especially social changes and socio-legal evolution.<sup>119</sup> In fact, both Selznick and Teubner—the proponents of ‘responsive regulation’ and ‘reflexive law’—have heavily drawn on this research method for developing these two important concepts.<sup>120</sup>

Furthermore, the historical approach to research, as a distinctive research method, has also been widely used in the scholarship of institutional studies.<sup>121</sup> The so called ‘historical institutionalism’, for example, has been long established as an important school that has made a significant contribution to institutional design, reform and evolution.<sup>122</sup> Although this thesis does not adopt the theoretical postulations of the ‘historical institutionalism’ to explain or analyze the evolution of the public pension system in China, the institutions of the regulatory system is a key subject of the research that is essential for testing the degree of ‘reflexivity’ and ‘responsiveness’ of the regulation, while

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<sup>118</sup> John Martin Vincent, *Historical Research: An Outline of Theory and Practice* (Henry Holt and Company, New York, 1911) pp. 10-11.

<sup>119</sup> There is substantial body of literature using historical method to examine social changes, legal changes and their correlations. See, eg, John Marshall Gest, *The Historical Method of the study of the law: Illustrated by the Master's Liability for his Servant's Tort* (s.n., Philadelphia, 1902) pp. 1-28; Hannis Taylor, *The Science of Jurisprudence: A Treatise in which the Growth of Positive Law is Unfolded by the Historical Method and its Elements Classified and Defined by the Analytical* (Macmillan, New York, 1908); David E. Ingersoll, 'American Legal Realism and Sociological Jurisprudence: The Methodological Roots of a Science of Law' (1981) 17(4) *Journal of the History of the Behavioral Sciences* pp. 491-503. Historical method as a distinctive research tool has been widely used in legal studies since the late 19<sup>th</sup> century and its contribution to the evolution of the legal philosophy and scholarship has been huge. For a detailed discussion of the special contribution of historical method to legal studies, See, eg, Stephen Diamond, 'Legal Realism and Historical Method: J. Willard Hurst and American Legal History' (1979) 77(3) *Michigan Law Review* pp. 784-794.

<sup>120</sup> Both Selznick and Teubner drew heavily on historical materials to illustrate the evolution of law and regulation in relation to the changing society. For instance, Selznick traced the development of law and legal institutions in three different stages throughout human history, and identified three categories of law—*repressive law*, *autonomous law* and *responsive regulation*. Teubner's concept of ‘reflexive law’ is based on critique of Selznick's ‘responsive regulation’ and historical review of socio-legal evolution.

<sup>121</sup> Historical method has been widely used in institutional studies. Examples are many, but for an overview of the relations between historical method and institutional studies, see: Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(5) *Political Studies* p. 936; and Staffan Hulten, 'Historical School and Institutionalism' (2005) 32(2) *Journal of Economic Studies* p. 169.

<sup>122</sup> The literature of ‘historical institutionalism’ is very huge. So to get a snapshot of its theoretical and methodological orientations, see: Sven Steinmo, 'What is Historical Institutionalism?' in Donatella Della Porta and Michael Keating (eds), *Approaches in the Social Sciences* (Cambridge University Press, Cambridge, 2008) pp. 150-178. Also see: Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2(1) *Annual Review of Political Science* pp. 369-404.

answering the research questions of this thesis.

In addition, historical method has also been widely used in regulatory research to examine, explain and interpret regulatory issues.<sup>123</sup> Much of the work using this method has helped form the foundation of regulatory scholarship over recent decades, while topics addressed in this work typically cover various aspects of regulation, including: policy formulation,<sup>124</sup> rule-making,<sup>125</sup> enforcement,<sup>126</sup> accountability,<sup>127</sup> review and evaluation, self-regulation and so on. Their contribution to the scholarship is either theoretical or empirical, or both.

Given the fitness, compatibility and affinity of ‘historical method’ with the research topics mentioned above (i.e., social change, evolution, institution and

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<sup>123</sup> There has been a huge body of regulatory literature completely or partly using historical method to advance theoretical or empirical arguments. See, eg, John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 (2) *British Journal of Criminology* pp. 222-238; Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56(3) *American Journal of Comparative Law* pp. 769-808; David Levi-Faur and Sharon Gilad, 'The Rise of the British Regulatory State: Transcending the Privatization Debate' (2004) 37(1) *Comparative Politics* p. 105; Declan Roche, 'Dimensions of Restorative Justice' (2006) 62(2) *Journal of Social Issues* p. 217; Edward L. Glaeser and Andrei Shleifer, 'The Rise of the Regulatory State' (Working Paper 8650, National Bureau of Economic Research, 2001).

<sup>124</sup> This strand of literature is largely related to the political science. As mentioned above, from the late 1980s and onwards, regulatory research has been open to a variety of disciplines in social science. For some typical examples of using historical method in studying formulation of regulatory policies, see: Douglas E. Ashford, 'Historical Context and Policy Studies' in D E Ashford (ed) *History and Context in Comparative Public Policy* (The University of Pittsburgh Press, Pittsburgh, 1992) pp. 27-38; Edwin Amenta, 'What We Know About the Development of Social Policy: Comparative and Historical Research in Comparative and Historical Perspective' in J Mahoney and D Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press, Cambridge, 2003) pp. 91-130; James Mahoney, 'Comparative-Historical Methodology' (2004) 30(1) *Annual Review of Sociology* pp. 81-101.

<sup>125</sup> See, eg, Curtis W. Copeland, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* (RL34354, 2008); David E. Cavazos, 'Capturing the Regulatory Rule-making Process: How Historical Antecedents of US Regulatory Agencies Impact Industry Conditions' (2008) 15(3) *International Journal of Organizational Analysis* pp. 231-250; Lisa A Robinson and James K. Hammitt, 'Valuing Health and Longevity in Regulatory Analysis: Current Issues and Challenges' (Working Paper 4, The Hebrew University, 2010).

<sup>126</sup> See, eg, Sagit Leviner, 'An Overview: A New Era of Tax Enforcement—from "Big Stick" to Responsive Regulation' (2008) 2 (3) *Regulation & Governance* pp. 360-380; Susan S. Silbey, 'The Consequences of Responsive Regulation' in Keith Hawkins and John Michael Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff, Boston, 1984); Yeonho Lee and Taeyong Park, 'Civil Participation in the Making of a New Regulatory State in Korea: 1998-2008' (2009) 40(3) *Korea Observer* pp. 461-493.

<sup>127</sup> See, for example: Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* pp. 38-60; Larissa S. Kyj, George C. Romeo and Paul S. Marshall, 'Flat Tax Proposals: A Current Review, with a History of the Arguments Pro and Con' in Cheryl R. Lehman (ed) *Advances in Public Interest Accounting: Regulation, Research, Gender and Justice* (Emerald, 2001) p. 296; Chris Berg, *Growth of Australia's Regulatory State: Ideology, Accountability and the Mega-regulators* (Institute of Public Affairs, 2008).

regulation), the author adopts this particular approach as the main research method for the thesis. In particular, the author will use materials including historical records, documents, and texts, to describe and examine changes of the social environment and evolution of the public pension system in China.

### ***3.4 Selection of Data***

Another issue that is important for research design is data selection especially when the research method has been decided. According to the literature concerning historical research for qualitative studies aimed at answering research questions, the historical data chosen for descriptive and analytical purposes needs to be both *reliable* and *relevant*.<sup>128</sup>

*Reliability* of historical data in qualitative studies specifically refers to the ‘trustworthiness, rigor and quality’ of the research data.<sup>129</sup> In light of this definition, data selection is deemed to be a serious process of screening to ensure that the data is obtained from some authentic source, and the information contained in the data source should be both complete and accurate for the research inquiry.<sup>130</sup> This is especially true for studies involving historical events of the past, as documents, records and texts may vary significantly in terms of credibility, accuracy and completeness.<sup>131</sup>

For this purpose, the author has selected the CNKI—a Chinese academic data-base—as the main data source. The reason for this choice is multi-fold. First and foremost, CNKI (China National Knowledge Infrastructure) is the

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<sup>128</sup> Although this is a common view regarding historical research, for a good study of this topic, see: Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) *The Qualitative Report* pp. 597-607.

<sup>129</sup> Ibid.

<sup>130</sup> Leo L. Pipino, TYang W. Lee and Richard Y. Wang, 'Data Quality Assessment' (2002) 45(4) *Communication of the ACM* pp.211-218.

<sup>131</sup> See especially: Michael Edmonds, Jennifer A. Hull, Erika L. Janik and Keli Rylance, *History & Critical Thinking: A Handbook for Using Historical Documents to Improve Students' Thinking Skills in the Secondary Grades* (Wisconsin Historical Society, 2005) pp. 18-9.

largest on-line academic data-base in China, and is reputed as the leading Chinese academic data-base having in stock the most complete and authoritative academic resources of various disciplines in Chinese language.<sup>132</sup> In particular, it includes a number of sub-data-bases containing full-text academic journal articles and newspapers. Many of these are produced by top-ranking publication establishments in China.<sup>133</sup> Furthermore, the CNKI also maintains a full record of unclassified government documents such as texts of laws, regulations, rules and by-laws promulgated since the founding of the People's Republic of China (the PRC) in 1949. Many of the documents contain speeches and announcements made by public officials of various state authorities concerning the government actions, legislations and regulations.<sup>134</sup> These provide researchers with a rich and credible source of secondary data, which is essential for answering research questions such as those posed in this thesis. The CNKI also contains a full-text data-base of doctoral and master's degree dissertations.<sup>135</sup> It takes in all distinguished dissertations approved since the year 2000. Although very few of these have addressed the public pension regulation in a similar fashion to the investigation undertaken here, many of them contain valuable historical accounts and records concerning the general research subject of this thesis.<sup>136</sup> In this way, they provide the author with substantial resources of academic literature on topics and subjects that may relate to the special research interest of this thesis, and may serve as

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<sup>132</sup> See especially: Y. Mie, 'Analysis on the Functions of Full-text Database's Personalized Services: A Case Study of CNKI (全文数据库个性化服务功能探析——以《中国知网》为例)' (2011) (3) *Science Mosaic (科技广场)* pp. 251-253.

<sup>133</sup> See especially: Y Jiang., 'Study on CNKI-DL Knowledge Service (CNKI 数字图书馆知识服务研究)' (2004) (3) *Journal of the China Society for Scientific and Technical Information (情报学报)* pp. 265-74.

<sup>134</sup> See especially: Jie Ma, 'Research on Knowledge Organization Mode of CNKI (中国知网组织模式研究)' (2011) (6) *Information Research (情报探索)* pp. 843-6.

<sup>135</sup> See especially: Hong Cheng, Hongjun Li, Yusheng Bai and Zhibin Xiao, 'On the Application of CNKI in the Digital Library Construction of Universities (CNKI 在高校数字图书馆建设中的应用研究)' (2010) (10) *Library Work and Study (图书馆工作与研究)* pp. 34-6.

<sup>136</sup> There has been a huge body of literature stored in CNKI concerning the research subject of this thesis. As of the end of the 2009, CNKI has over 100 select doctoral and master theses on the general topic of public pension schemes in China, while another 10,000 journal articles and documentary materials in relation to this topic.

supplementary resources to the journal articles, newspapers and government documents mentioned above. Finally, the author of this thesis is an accredited professional Chinese-to-English translator and interpreter in Australia.<sup>137</sup> His language proficiency and experience of rendering academic Chinese texts into English may also help resolve the difficulty of translating the materials available in the CNKI that are predominantly written in simplified Chinese characters.

A second issue concerns the *relevance* of the data to be presented in the study. In qualitative research involving historical method, *relevance* generally refers to how the collected historical data is related to the research subject and the research questions.<sup>138</sup> As noted above, the subject and research questions of the thesis are primarily concerned with the changing social environment and the evolution of the regulatory ‘process’ and ‘space’ defined in the literature review. Therefore, it is important to identify the relevant historical periods that are indicative of significant social changes accompanying regulatory reforms and changes. In other words, the historical materials to be collected as data for the research questions should contain substantial evolutionary change and developments both in the society and in the public pension system so that the interactive ties of the society and the regulation can be explored in order to gauge the ‘responses’ embedded in the *regulatory responsiveness* and *system reflexivity* of the regulation.

In light of this principle derived from the requirement of ‘relevance’ for qualitative research involving historical method, the author has selected five periods of time as *relevant* data spaces for historical review, while excluding, at the same time, the pension schemes for civil servants and employees of non-profit institutions from further investigation, as these schemes have been

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<sup>137</sup> The author is accredited by the National Accreditation Authority for Translators and Interpreters (NAATI), and his NAATI registration number is 62058 as of the end of 2009.

<sup>138</sup> See, eg, Gary John Previts, Lee D. Parker, and Edward N. Coffman, ‘Accounting History: Definition and Relevance’ (1990) 26 (1) *Abacus* pp. 1-16; and Postan and Michael Moissey, *Fact and Relevance: Essays on Historical Method* (Cambridge University Press, Cambridge, 1970) pp. 48-9.

very stable since the mid-1950s. These five time periods are: the New Democratic Era from 1949 to 1953, the Socialist Transformation Movement from 1954 to 1959, the late 1970s to the end of the 1980s, the 1990s and the 2000s. All the above five periods are widely recognized as important times of social changes in the PRC,<sup>139</sup> while changes and reforms in the public pension system (not including the schemes for the public servants and employees of non-profit institutions) are also deemed to be significant.<sup>140</sup>

Historical materials concerning the research subject during these five periods will be selected from the CNKI data-based and presented as five data chapters in chronological order to compare the social changes with the ‘responses’ of the regulation. Based on the historical description, the final two chapters of the thesis provide an analysis and conclusion in response to the research questions set out in Section 3.2.

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139 See, eg, Jin Tao, ‘Interactive Relationship between China's Economic Development and Structural Change: An Empirical Perspective Based on China's Economic Development in the Past 60 years (中国经济增长与制度变迁的互动关系研究--基于新中国60年经济发展经验的视角)’ (2011) (4) *Journal of Xiamen University (Arts & Social Sciences)* pp.8-16; and Bingwen Zheng, Huan Yu and Qingbo Gao, ‘Social Security System of New China over the Past Sixty Years (新中国社会保障制度回顾)’ (2010) 17(2) *Contemporary China History Studies* pp. 48-59.

140 See particularly: Shu-feng Song, and George S-F Chu, , ‘Social Security Reform in China: The Case of Old-Age Insurance’ (1997) XV(4) *Contemporary Economic Policy* pp. 85-93; Yanfeng Ge, ‘Constructing the Social Insurance System in the Process of Reforms and Developments (Part A)’ (1998) (1) *Sociology Research* pp.98-110; Tieying Li, ‘Establish a Social Security System with Chinese Features’ in J Z Yin, S L Lin, and D F Gates, (eds), *Social Security Reform: Options for China* (World Scientific, London, 2000) pp. 39-50; Julia Kwong, and Yulin Qui, ‘China's Social Security Reforms under Market Socialism’ (2003) 27(1/2) *Public Administration Quarterly* pp.188-209; and Lin Zhang, and Huiping Wang, ‘Research on Investment and Regulation of Pension Fund of China (论我国养老保险基金的投资与监管)’ (2005) 135(26) *The Theory and Practice of Finance and Economics* pp.44-47.

**PART B:**

**HISTORICAL DATA**

## **CHAPTER THREE: EVOLUTION OF PUBLIC PENSION REGULATION IN THE NEW DEMOCRATIC ERA, 1949-1953**

### **1. Introduction**

After the founding of the People's Republic of China (PRC), there was a brief period (from 1949 to 1953) generally referred to as the *New Democratic Era*.<sup>1</sup> During this short period, the so called *New Democracy* was the general state policy governing the working of the polity, the economy and socio-economic regulations. As an important policy framework, it was further entered into the *Common Program*,<sup>2</sup> i.e., the *Interim Constitution* of the new republic, whereby the tenets of the *New Democracy* were further defined and elaborated.<sup>3</sup>

Understanding the evolution of the public pension regulation during the *New Democratic Era* is essential for answering the research questions raised in Chapter Two. It was the starting point for studying the evolution of the public pension regulation, as this period witnessed not only the birth of the first formal public pension scheme in the PRC but also the establishment of the regulatory system governing the scheme. Furthermore, during this short period, the substantive terms and conditions of the pension scheme were not only implemented but also revised according to the procedural and institutional rules defined under the general policy guideline of *New Democracy*. In this way, New Democratic Era contained a substantial number of regulatory activities, reforms and changes that help illustrate the *regulatory process, spaces* and responses of the public pension system.

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<sup>1</sup> Ming Shi, 'Why Mao Zedong Prematurely Abandoned New Democratic Society: Reconsidering the Fundamental Cause ' (2008) 38(19) *Economic Research Guide*, pp.223-225; Yamacuchi Shinji and Qiao Jin, 'Why Mao Zengdong Abandoned the Ideology of New Democracy: Interpreting the Strategic Transition' (2008) (4) *CCP History Material*, pp.194-206

<sup>2</sup> *Common Program* 1949 (P. R. China)

<sup>3</sup> Shi-dong Guo, 'Common Program: The Magna Carta of the People's Republic of China' (2008) (21) *Jiang Huai Legal Order*, pp.59-60

For this purpose, the chapter begins with a discussion of the formation of the *New Democratic* policy framework and the accompanying social environment within which the policy developed. As part of the discussion, the policy framework—the goals and means of the public pension regulation—as well as the regulatory ‘process’ and ‘space’ will be dealt with. Finally, the evolution of the public pension regulation of this period will be summarized in the conclusion.

## **2. The *New Democratic* Policy and the Social Environment of the *New Democratic Era***

### ***2.1 The Birth of the New Democratic Policy Framework***

The idea of *New Democracy* was first expounded by Mao Zedong in his seminal work *On New Democracy* published in mid-1940s, in which he reinterpreted the Marxist theory of the state in the context of Chinese traditional society, and identified China as ‘a semi-feudal and semi-colonial society’ characterized by poverty, inequity, low industrialization as well as exhibiting agrarian ideologies and values.<sup>4</sup> To change this situation, Mao envisaged ‘two phases’ of revolution for China, i.e., ‘the new democratic revolution’ and ‘the socialist revolution.’<sup>5</sup> According to Mao, the *new democratic revolution* was a revolution aimed at establishing a ‘Chinese democratic republic constituted by those people who oppose *imperialism* and feudalism based upon a political alliance under the leadership by the

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<sup>4</sup> E.g., Qi Xinchao, 'The New Democratic Era: The Important Development of Mao Zedong's Thoughts on the *United Front*' (2005) (7) *Theory & The Contemporary*, pp.27-29; Ming Shi, 'Why Mao Zedong Prematurely Abandoned New Democratic Society: Reconsidering the Fundamental Cause ' (2008) 38(19) *Economic Research Guide*, pp.223-225; Zhen Zhang, 'The Philosophic Trajectory of Mao Zedong's Decision-Making Strategy ' (2008) (12) *Social Sciences in Nanjing*, pp.39-44.

<sup>5</sup> *Ibid.*

proletariat.’<sup>6</sup> Under this *New Democratic* framework, the economy, politics and culture of the state should gradually merge into a unity and this relatively steady constitution of the state would finally serve as an important prelude to the socialist revolution.<sup>7</sup>

After the founding of the PRC, this model of new democratic state was formally established by the *Common Program*, i.e., the interim constitution of the PRC, which provided direct clues to the social environment in the *New Democratic Era*.

## **2.2 The Polity**

The political system during the New Democratic Era was a multi-party cooperation system based on political consultation within the framework of the Chinese People’s Political Consultative Conference (the CPPCC),<sup>8</sup> although the leading role of the CCP in the constitution of the polity was obvious as the working class and farmers, i.e., the basis of the state regime, were then led by the CCP. According to *Common Program* which was passed by the first CPPCC, it was the CCP jointly with other democratic parties and social organizations or groups that established the first CPPCC, and the state was constituted by workers, farmers, petty bourgeoisies, nationalist bourgeoisies and other patriotic elements.<sup>9</sup> They represented ‘the people’ of the state whose rights and interests were protected by the state. Democratic laws were applied to regulate the conflicts or disputes among these groups; whereas for the ‘non-people’, i.e., feudal landlords and

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<sup>6</sup> Mao Zedong, *Selected Works by Mao Zedong* (The People's Press, Beijing, 1991), p. 362.

<sup>7</sup> Ibid.

<sup>8</sup> According to the *Common Program*, Chinese People’s Political Consultative Conference (CPPCC) is the organization of the people’s united front of democracy composed of the working class, the farmers, petty bourgeoisies, nationalist bourgeoisies and other patriotic elements. It represents the will and mind of all people in China. See: *Common Program 1949* (P. R. China) Chinese People’s Political Consultative Conference 29 September 1949, art 3.

<sup>9</sup> *Common Program 1949* (P.R. China) Chinese People’s Consultative Conference 29 September 1949, art 3.

bureaucratic capitalists, no protection of any form was to be extended by the state as they were subjected to the *dictatorship* by ‘the people.’<sup>10</sup>

### ***2.3 The Economy***

In line with the political arrangement, the economic system under the *New Democracy* was also composed of ‘the people’ working in five categories of economic units: state-owned enterprises, cooperatives, state-private joint enterprises, privately-owned enterprises, and self-employed businesses and farms.<sup>11</sup> However, it is important to note that when the PRC was founded in 1949, the economic system was characterized by a fragile industrial base, an inefficient farming sector and a volatile market.<sup>12</sup> As Mao observed, the economic basis upon which the New Democratic State was founded had been really weak<sup>13</sup> as the economy was ‘predominantly relying on agriculture and handicraft industries whereas the share of modern industry was really marginal.’<sup>14</sup> Equally poor was the farming sector. At that time agricultural production remained largely un-mechanized although farmers’ commitment to production was geared up by the ‘land reform’ which had land re-distributed among all farming households.<sup>15</sup> However, the positive effects of the land reform turned out short-lived as inequity and poverty in the farming sector soon re-emerged in many places.<sup>16</sup> In urban cities, the

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<sup>10</sup> *Common Program 1949* (P. R. China) Chinese People’s Political Consultative Conference 29 September 1949, art 3.

<sup>11</sup> Zhiming Liang, 'A Study of Liu Shaoqi's Economic Thought on the New Democracy Before and After the Establishment of the PRC (建国前后刘少奇新民主主义经济思想研究)' (Doctoral Thesis, Henan University, 2008), pp. 16-17.

<sup>12</sup> Lixin Ren, 'Study on Mao Zedong's New Democratic Economic Ideology and its Evolution (毛泽东新民主主义经济思想及其嬗变研究)' (PhD Thesis, Hebei Normal University, 2008), pp. 48-50.

<sup>13</sup> *Ibid.* 62.

<sup>14</sup> See: Shu-lian Zhou, 'Changing the Pattern of China's Economy' in L Wei and A Chao (eds), *China's Economic Reforms* (University of Pennsylvania Press, Philadelphia, 1982), pp. 44-66.

<sup>15</sup> See: Wuyun Bao, 'Reserach on the Theory of Society Orientation under the New Democracy (新民主主义社会定位问题研究)' (Master Degree's Thesis, Inner-Mongolia Normal University, 2006), p. 7.

<sup>16</sup> Deping Liu, 'Study on the economic factors contributing to the fast initiation of China's Socialist Transformation (论中国社会主义改造提前进行的经济原因)' (2009) 24(8) *Social Sciences Review*, pp.32-34.

market was then suffering serious job losses due to the aftermath of the Civil War while the threat of stagflation persisted.<sup>17</sup>

## ***2.4 Law and Government Regulation***

At the time when the PRC was founded, government regulation and law largely followed the traditions of the Republic of China (1911-1949), although the tendency of the CCP to roll out Marxist legal institutions was clear.<sup>18</sup> These two different strands of legal ideology and practices had significant influence on socio-economic regulation in the early years of the PRC.

According to orthodox Marxism, human history was an on-going process of class struggle and law was an instrument of the ruling class to dominate other classes in the society.<sup>19</sup> It was an institution highly influenced by the nature of the state, in particular the political system.<sup>20</sup> Therefore, it was by no means impartial. Rather, it reflected the will and served the ends of the ruling class, i.e., the working class and the proletariat in the new democratic

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<sup>17</sup> E.g., Ming-long Zhang, 'Evolution of Employment Institutions in China: An Overview of 50 Years since the Founding of PRC' (2000) (1) *Tian Fu New Idea*, pp.11-16; and Guan-xue Liu, 'Jobless People Hunging Around: The First Challenge of Unemployment in the People's Republic of China ' (2003) (10) *China Labour Security*, pp.46-48.

<sup>18</sup> For this particular tendency of the CCP, see, eg, Zili Cui, 'From Rule by Man to Rule by Law--The Developments and Changes of Legal Philosophy in the Construction of the Legal System in the PRC (从人治走向法治——新中国法制建设中法制理念的变迁)' (2009) (6) *Opening Up and Reform*, pp.8-10. For more details concerning the influence of Marxism, see, eg, Jian Song, 'Study on the Philosophy of Constitutional Politics of the New Democratic Era(新民主主义宪政思想研究)' (Doctoral Degree Thesis, Wu Han University, 2004), pp. 31-33; and Jianfu Chen, 'The Development and Conception of Administrative Law in the PRC' (1999) 16(2) *Law in Context*, pp.72-105. Apart from these, the influence of the previous regime (i.e., the Republic of China) was still discernible. For this point, see, especially, Yongju Li, 'Study of the Repudiation of the Six Codes (废除“六法全书”的前后与是非)' (Master's Degree, Soochow University, 2010), pp. 17-18. In particular, it was pointed out in this thesis that in the early 1950s, many legal practitioners including some judicial staff members still maintained the view that the old legal system and the Six Codes issued in the Republic of China were applicable to criminal and civil disputes in the PRC.

<sup>19</sup> Jianguo Wang, 'Study on Lenin's Philosophy of Law (列宁司法思想研究)' (Doctoral Degree Thesis, Nan Jing Normal University, 2008), p. 43.

<sup>20</sup> See, eg, Cui, Zili, 'From Rule by Man to Rule by Law--The Developments and Changes of Legal Philosophy in the Construction of the Legal System in the PRC (从人治走向法治——新中国法制建设中法制理念的变迁)' (2009) (6) *Opening Up and Reform*, pp.8-10.

state.<sup>21</sup> As a result, the social ordering was based on the classification of the people pursuant to their background (*cheng fen*),<sup>22</sup> i.e., being a member of ‘the people’—the working class, farmers, petty bourgeoisies and nationalist bourgeoisies, or the ‘non-people’—feudal landlords and bureaucratic capitalists of the old political *regime*. Among ‘the people’, problems and disputes were treated as ‘internal conflicts’ (*nei bu mao dun*) that were to be addressed by laws, policies, social norms or other soft means of ideological education (*si xiang jiao yu*);<sup>23</sup> while problems or disputes arising out of the ‘non-people’ against the ‘people’ were treated as ‘external conflicts’ (*wai bu mao dun*) that were to be addressed by punishment and violence enforced by the state.<sup>24</sup>

The model of law and government regulation under the Republic of China, however, carried a number of competing principles against the Marxist model. In particular, it carried some significant attributes of the legal system in Western democracies, such as division of power and autonomy of different state branches.<sup>25</sup> Under this model, the state was largely subdivided into several functional branches, including the legislative, the executive, the judicial, etc. Apart from delineated functionalities, they all had certain degrees of organizational autonomy within the state. After the founding of the PRC, practices and procedures of law making and government regulation developed under these principles and tenets were preserved, although the CCP was very reluctant to honour this particular constitution of state power.

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<sup>21</sup> Ibid.

<sup>22</sup> See, eg, Damei Han, 'Study of the Constitutional Politics during the New Democratic Era' (Doctoral Degree Thesis, Nan Kai University, 2001), pp.62-63; Xinghong Wu, 'The CCP's Internal Regulation of its Members' Social Status: Historical Evolution and Implications (中共对党员社会成份规定的历史演进及其启示)' (Master's Degree Thesis, Central East China University, 2006).

<sup>23</sup> See, eg, Changchun Liu, 'Study on the Development of China's Legal System in the PRC (新中国法制建设的历程)' (Doctoral Degree Thesis, East China Normal University, 2002), p.2.

<sup>24</sup> Ibid.

<sup>25</sup> See, eg, Quan Yan, 'Parliamentary Politics and the Democratic Transition in the Early Years of Republic of China (国会政治与民国早期的民主转型)' (2010) (23) *Tribune of Social Sciences (社会科学论坛)*, pp. 145-152.

Furthermore, as the CPPCC was established as the supreme state power responsible for legislating important state laws, including those aimed at socio-economic regulation, the government was constitutionally held accountable to the CPPCC for implementing the law or regulation. In addition, although all the legal codes and rules passed under the Republic of China were repudiated, a huge size of judiciary staff serving in old state was maintained, while a sizable body of legal professionals continued to serve in the legal system.<sup>26</sup>

In sum, at the early years of the PRC, although the state was then about to undergo some significant changes, the old traditions of the Republic of China still had considerable influence over the ways in which law and state regulations were carried out. In particular, although the Marxist ideology emphasizing classification of the society was entered into the interim Constitution, the division of state power was still discernible, and certain degrees of functional and organizational differentiation were also maintained in the legislative, executive and judicial branches of the state.

### **3. Policy Formulation concerning Public Pension Regulation**

Even before the PRC was founded, the CCP leadership had identified the weak industrial base of the Chinese economy as the fundamental cause of China's backwardness since the dawn of the modern age.<sup>27</sup> It was believed by the leadership of the CCP that to revitalize the national economy, the state-owned sector should take the lead in economic production,<sup>28</sup> and the government should play an active role in regulating the economy to promote

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<sup>26</sup> For this particular fact, see, eg, Xiaojun Zhang 'Reflection of the '1949-1953 Judiciary Reform' and its Later Developments--A Case Study of the 'New Law Research Institute' and its Influence over the 'Old Judicial Staff' during the Legal Reform Campaign (1949 年至 1953 年司法改革演变及若干反思——以“新法学研究院”对旧法人员的改造和 1952 年司法改革为例)' (2010) (12) *Politics and Law*, pp. 79-90.

<sup>27</sup> See: Qi-zhen Xiong, 'From New Democracy to Socialism: Conceptual Transformation of Mao Zedong' (1997) 230(3) *Journal Of Wuhan University (Philosophy and Social Sciences Edition)*, pp.105-110.

<sup>28</sup> See: Lixin Ren, 'Study on Mao Zedong's New Democratic Economic Ideology and its Evolution (毛泽东新民主主义经济思想及其嬗变研究)' (PhD Thesis, Hebei Normal University, 2008), p.20.

the development of the state-owned sector while harnessing the private sector to perform the supplementary role. This policy framework was formally accepted by the first CPPCC, i.e., the first national political congress organized by the CCP in late 1949.<sup>29</sup>

However, when the PRC was founded in 1949, the power of the central government to intervene in the economy was relatively weak as most of the industrial firms were privately-owned,<sup>30</sup> while the fragile economic and industrial base also required a stable market environment for further recovery and expansion.<sup>31</sup> As a result, the CCP leadership set down the general economic policy as ‘promoting production and boosting the economy’ by ‘enabling both public and private sectors’ (*gong si jian gu*) and ‘benefiting both the business and labour’<sup>32</sup> (*lao zi liang li*). Under this policy, the regulatory role of the central government as further defined as:

[To] accommodate and adjust the interests and needs of different economic sectors by furnishing regulatory rules, so that the economic development of the entire society will be promoted in such a way that each economic sector can take its due from the market through proper co-operation and division of work subject to the leadership of the state-owned sector.<sup>33</sup>

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<sup>29</sup> The first CPPCC was attended by 662 representatives from 46 social organizations whereby three constitutional documents were passed, i.e., the Common Program, the Organizational Law of CPPCC, and the Organizational Law of the Central People’s Government of PRC. These three historical documents are commonly regarded as the foundation of the People’s Republic of China.

<sup>30</sup> In 1949, China had altogether 123,000 privately-owned enterprises, with a net worth of 6.8 billion, accounting for 63.3% of the total industrial output, while over 1.64 million industrial workers, i.e., over 53.7% of the industrial labour, were employed by these firms. See: Hongxia Zhu, 'Study on the CCP's Policy of Socialist Transformation of the Private Commercial/Industrial Firms in the Early Years of the PRC (建国初期中国共产党对资本主义工商业社会主义改造政策研究)' (Master Thesis, Central China Normal University, 2009), p. 6.

<sup>31</sup> See, eg, Lixin Ren, 'A Comparative Study on the Theories of New Democratic Economy and Socialist Market Economy (新民主主义经济体制理论与社会主义市场经济理论之比较)' (2008) (1) *Theoretical Research (理论研究)*, pp.84-87.

<sup>32</sup> Common Program of the Chinese People's Political Consultative Conference 1949 (P. R. China) art. 26.

<sup>33</sup> *Ibid.*

In line with this policy guideline, both private business and labour were to be taken care of by the government during the New Democratic Era, although their roles in the economic regulation were perceived to be different.<sup>34</sup>

Given this policy of economic regulation, a number of regulatory issues concerning labour standards and industrial relations were further raised in Section 4 of the *Common Program*. In particular, Article 32 of the *Common Program* stipulated that ‘labour insurance system should be gradually rolled out’.<sup>35</sup> This, together with the constitutional role defined in the *Common Program*, formed the foundation of public pension regulation.

#### **4. Legislating for the Public Pension: The *Space* and *Process***

##### ***4.1 The Regulatory Space of the Legislation for Public Pension: Actors and Institutions***

Soon after the legislative agenda for establishing labour insurance was set out in the *Common Program*, the Council of State Affairs (*zheng wu yuan*), i.e., head office of the Central Government, authorized the Ministry of Labour (MOL) and All-China Federation of Trade Unions (ACFTU) to draw up the regulation of the labour insurance which included the public pension scheme for labour force in the industrial and commercial sectors.<sup>36</sup> In light of the terms of reference, Li Li-san, Minister of Labour and Deputy Director of the ACFTU,

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<sup>34</sup> From the perspective of the government, business owners were typically characterized by a duality (*liang mian xing*). They were important to the restoration of the national economy as over 60% of industrial and commercial production was then performed by the private sector, but their stance towards the new republic was not as stable as that of the labour force. As a result, for business owners, ‘to be taken care of’ meant protection mixed with ‘restriction’ in order to ‘safe-guard the long-term interests’ of the state where the working class was the real master. For these particular views, see, for example: Yong-qiang Pan, ‘The Discourse of Mao Zedong’s View on National Industry and Business during the New Democratic Revolution: A Historical Review’ (2002) (6) *Fu Jian Forum (Economic and Social Sciences Edition)*, pp.11-15; and Donghua Li, ‘Study on Li Li-San’s Labour Union Thoughts and Practices around the Establishment of the PRC (建国前后李立三劳动工会思想及实践研究)’ (Master Thesis, Hunan Normal University, 2008), pp. 21-27.

<sup>35</sup> Common Program of the Chinese People’s Political Consultative Conference 1949 (P. R. China) art. 32.

<sup>36</sup> Donghua Li, ‘Study on Li Li-San’s Labour Union Thoughts and Practices around the Establishment of the PRC (建国前后李立三劳动工会思想及实践研究)’ (Master Thesis, Hunan Normal University, 2008), pp.37-38.

soon set up a drafting committee, which was staffed by 5 high-ranking officials from the Ministry of Labour and the ACFTU, with both the chairperson and vice chairperson being leaders of the ACFTU.<sup>37</sup>

As indicated by the constitution of the drafting committee, the framework of the regulatory regime of the labour insurance was not solely based on government actors. Instead, the trade union was directly involved in the formation of the regulatory space of legislation. It is also important to note that during the *New Democratic Era*, the leadership of the government and of the ACFTU were largely composed of the CCP members. To further study the formation of the regulatory regime, it is important to examine the respective roles of the government and the ACFTU as well as their institutional ties with the CCP.

#### *4.1.1 The General Roles of the Government and the ACFTU*

In the *New Democratic Era*, the working class—industrial and commercial workers in the cities—served as the mainstay of the national economy. They were the most important elements in the society that could help restore economic and industrial production that was essential to the survival of the newly founded republic. Furthermore, as noted above, in the *New Democratic Era* the government had limited resources and power to regulate the economy as the majority of the industrial and commercial firms were then privately owned.

Within this particular context, the trade union became the most important assistant to the government authorities in economic regulation and administration, serving as a stabilizer between *labour* and *capital* particularly

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<sup>37</sup> See: Guanxue Liu, 'Provisions of Labour Insurance and Social Insurance for Urban Workers: Glowing Warmth of the CCP (《劳动保险条例》蕴含着党的温暖,新中国职工有了社会保险)' (2003) (11) *China Labour Security* p. 38.

in the private sector. The role of the government was then to supervise the interaction of the trade union and business while keeping the balance of interest between the two.<sup>38</sup> This special arrangement was perceived to be conducive to the restoration of industrial production as it reduced the risk of direct conflicts between government and business, thus creating a friendly environment for business investment which could benefit business, labour and the state.

Furthermore, after the founding of the PRC, the union movement reached its zenith as the majority of all industrial and commercial workers joined in trade unions under the ACFTU.<sup>39</sup> Alongside this organizational expansion, the *Trade Union Law of the PRC* was promulgated in 1950, which further legalized the function of trade unions in managing and regulating industrial relations. To better serve this regulatory role, the organization of the trade unions was also restructured in line with the government system.

#### *4.1.2 The Organizational Structure of the Government and the Trade Unions: the Organizational Framework of 'Vertical and Horizontal Management'*

The organizational layout of the People's Government followed the stipulations of the *Organizational Law of the PRC's Central People's Government* passed by the first CPPCC. According to this law, the People's Government was generally composed of four levels, the Central People's Government, regional people's governments (governments of provinces, autonomous regions, direct-administrative municipalities), subregional governments (i.e., governments at municipality, district or county levels), and

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<sup>38</sup> This can be shown by the complementary role in formulating rules regarding the resolution of industrial disputes. For instance, in November 1949, ACFTU issued Provisional Rules of Procedural Arrangements for Resolving Labour Disputes, Provisional Rules of Industrial Relations, and Provisional Rules of Collective Labour Contracts in Private Enterprises to their local branches. Although these rules were just internal orders to guide the work of their local agencies, it was also instructed that these rules be drawn to the attention of local governments so that they could be applied in industrial relation issues. The validity of these rules was honoured by local governments as they were applied throughout the *New Democratic Era*.

<sup>39</sup> Tanjing Shi, 'Chinese Trade Unions: The Past, the Present and the Problems' (2002) (02) *Cass Journal of Foreign Law*, pp.162-174.

township governments.<sup>40</sup> The labour authorities were then affiliated to the four levels of governments, while within the government system, the administrative relations typically followed the organizational principle of ‘horizontal and vertical management’ (*Tiao Kuai Guan Li*)—a special term widely used in public administration in China.<sup>41</sup> Under this framework, ‘vertical management’ referred to the administrative relations of subordination among corresponding functional departments at different territorial levels,<sup>42</sup> for instance, the relations of subordination between the Ministry of Labour of the Central Government and the labour bureaux of the regional governments. In general, the superior department had the power to order its *vertical* subordinates to perform their functional duties, or carry out policies, decrees, rules or regulations in line with their functionalities and terms of reference.<sup>43</sup>

‘Horizontal management’, however, referred to the relations of subordination between the leadership of the government and the functional divisions and departments at the same territorial level,<sup>44</sup> for example, the relations between a regional government and the regional labour bureau. Normally, the *horizontal* superior had the power to decide on a range of issues in relation to the subordinates, such as personnel issues (i.e., promotion, demotion, or removal from office), financial issues (i.e., budgetary allocations for each department), and proprietary issues (i.e., allocation of essential capital goods and equipment

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<sup>40</sup> When the PRC was founded in 1949, there were altogether 6 different levels of governments. But this administrative arrangement was soon realigned into four levels. See: Li Ge, ‘The Development and Formation of Contemporary Local Governments in China (当代中国地方政府制度的沿革和确立)’ (2007)14(4) *Contemporary China History Studies (当代中国史研究)*, pp.45-52.

<sup>41</sup> See, eg, Li-hong Ma, ‘Study of the *Vertical and Horizontal Management System* in Government Administration (论政府管理中的条块关系)’ (1998) (4) *Political Research (政治研究)*, pp. 68-74.

<sup>42</sup> Zhen-chao Zhou, ‘Break up Overlapping Functions and Duties: Possible Development Paths for Reforms in ‘Vertical and Horizontal’ Relations (打破职责同构: 条块关系变革的路径选择)’ (2005) 243(9) *Chinese Public Administration (中国行政管理)*, pp. 103-106.

<sup>43</sup> *Ibid.* 104.

<sup>44</sup> Zhen-chao Zhou, ‘Vertical and Horizontal’ Relations: An Analytical Perspective for Studying Inter-Governmental Relations (条块关系: 政府间关系的一种分析视角)’ (2006) 192(3) *Qi Lu Journal (齐鲁学刊)*, pp.144-147.

for each department).<sup>45</sup> Nevertheless, it is important to note that this power structure based on *vertical* and *horizontal* relations of subordination has been a dynamic one in the PRC,<sup>46</sup> and its variation, as will be shown in the historical data, is significant.

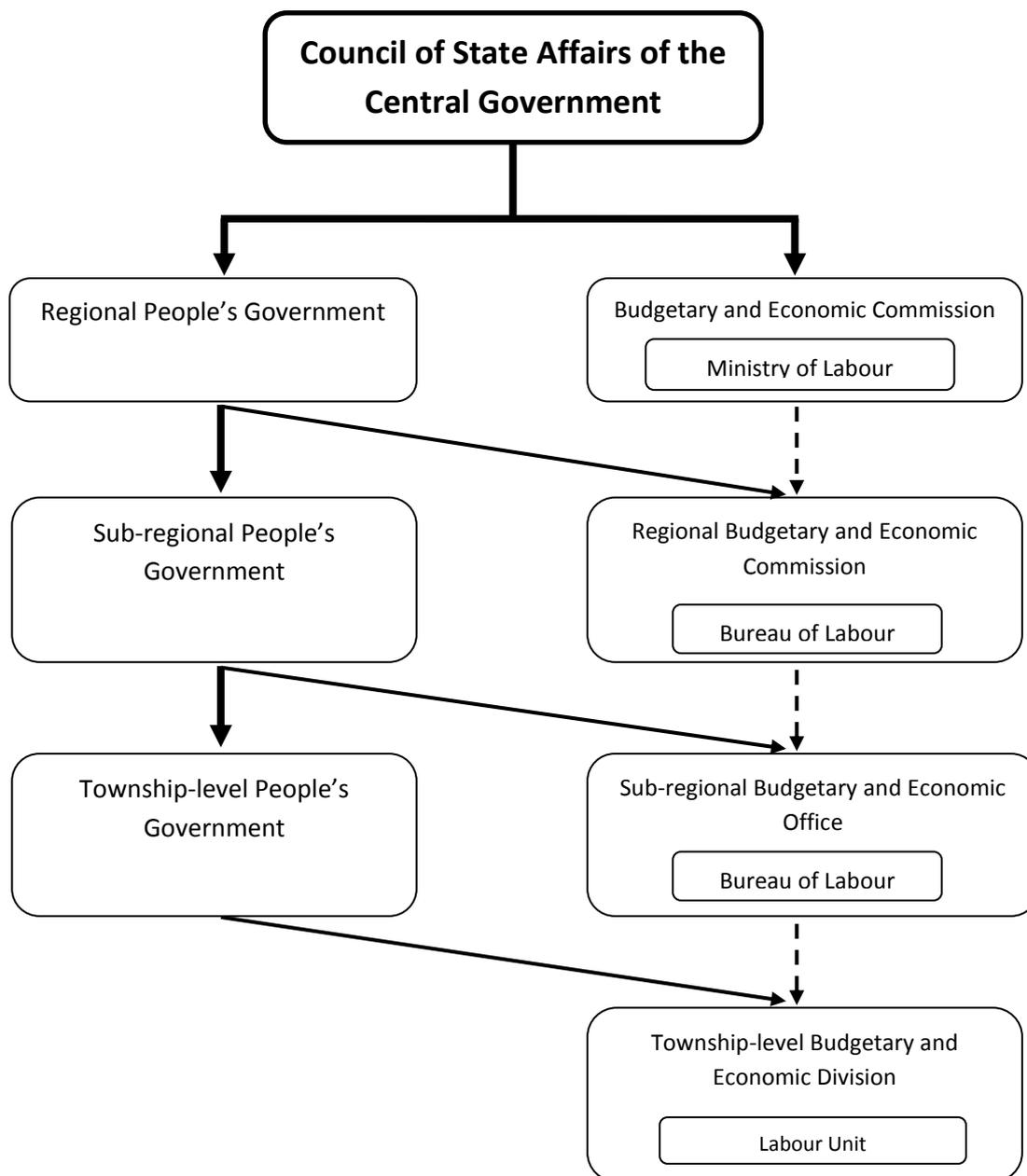
During the *New Democratic Era*, this particular organizational structure was widely adopted by the governments and other institutions, such as the trade unions (i.e., the ACFTU system) and the ruling political party (i.e., the CCP system). Drawing on this particular organizational structure of ‘vertical and horizontal management’, the system of the governments at all levels during the *New Democratic Era* is illustrated in the following chart.

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<sup>45</sup> Zhen-chao Zhou *et al.*, ‘Double Leadership in Government Administration: A Study on China's ‘Vertical and Horizontal Management’ System’ (2009) 30(3) *Dong Yue Tribune* (东岳论坛), pp.134-138.

<sup>46</sup> For this point, see, especially, Guanlei Zhu, ‘Contradiction of Vertical and Horizontal Management: A Persisting Dilemma (条块矛盾: 剪不断, 理还乱)’, *Beijing Morning Post* (Beijing), <http://theory.people.com.cn/GB/11092043.html>, first accessed on 10 December, 2010.

**Chart 3.1: The Organizational Structure of the Government<sup>47</sup>**



As shown by the above chart, at the highest level, the Council of State Affairs was the head office of the Central Government fully in charge of four functional commissions, i.e., the Political and Legal Commission, the

<sup>47</sup> This chart is constructed by the author according to the historical records concerning the government system during the *New Democratic Era*.

Budgetary and Economic Commission, the Culture and Education Commission and the People's Supervisory Commission. The Ministry of Labour was then administered by the Budgetary and Economic Commission. Further, the Council of State Affairs had the full administrative power over its immediate subordinates, i.e., regional governments and the ministries. In other words, the Councils of State Affairs had the power to decide functional, personal, financial and proprietary issues both of the Ministry of Labour and of the regional governments. This full power of administration is indicated by the bold solid lines and arrows in the chart.

At the regional level and downwards, each government was composed of the same functional departments as that of the central government. However, the administrative power on these levels was divided according to the organizational principle of 'vertical and horizontal management'. To be more specific, the regional government was the *horizontal* superior of the regional labour bureau, and had the power to decide personnel, financial and proprietary issues concerning the bureau. This relation of subordination is indicated by the solid but thin lines with arrows in the above chart. The Ministry of Labour was the *vertical* superior to the regional labour bureau and had the power to decide the functional issues of the bureau, which is indicated by the dashed arrow in the above chart. The same organizational pattern repeated at the sub-regional and township levels.

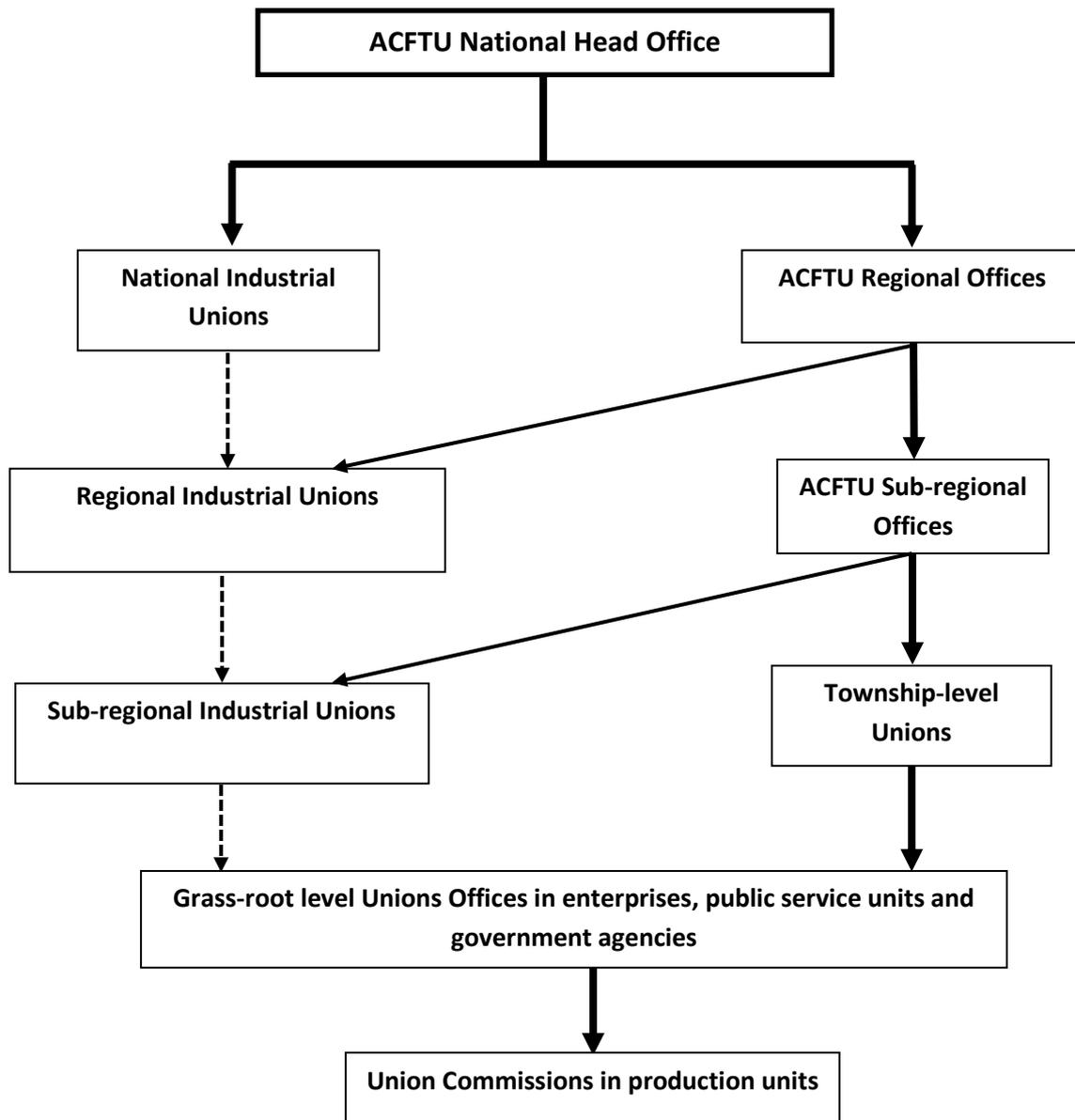
Like the government system, the trade unions also underwent some organizational restructuring after 1949 as numerous branches of the ACFTU were established across China while many pre-existing regional union organizations were further incorporated into the ACFTU system,<sup>48</sup> which also followed the same structure of 'vertical and horizontal management' as of the

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<sup>48</sup> Lei Shi, 'Study on the CCP's Cognition of Trade Unions (from 1949 to 1966) (1949—1966年间中国共产党对工会属性的认识研究)' (Master Thesis, East China Normal University, 2007), p. 7

governments, although in territorial terms, the ACFTU system had two more levels that went directly into all enterprises and production units. The organizational structure of ACFTU can be illustrated by the following chart:

**Chart 3.2: The Organizational Structure of the ACFTU System**<sup>49</sup>



As shown by the above chart, the ACFTU was the national head office of all

<sup>49</sup> Guangming He, 'The study on the worker's social insurance at the early years of the PRC (1949-1953): A case study of the *Provisions of Labour Insurance* (建国初期企业职工劳动保险研究 (1949-1953) ——以《劳动保险条例》为中心)' (Master Thesis, Central China Normal University, 2007), p.29.

trade unions in the PRC. At the top level, the ACFTU had complete authority of ten different national industrial unions that were similar to the different functional ministries of the Central Government. The National ACFTU office was also fully in charge of the regional ACFTU branches. These relations of full subordination are indicated by the bold, solid lines with arrows in the above chart.

From the regional level and downwards, the regional ACFTU offices followed the same administrative pattern of ‘vertical and horizontal management’ as of the government system. That is to say, while the regional union offices were composed of different regional industrial unions that were functionally administered by the National Industrial Unions based on *vertical* management (indicated by the dashed lines with arrows in the chart), the regional unions retained the *horizontal* administrative power over the regional Industrial Unions (i.e., the power to decide personnel, financial and proprietary issues). Under the regional unions were subregional offices, i.e., ACFTU agencies in rural counties or urban districts. The fourth echelon went down to the township level, while the grass-roots union organizations refer to unions in different work units (industrial or commercial enterprises) while their subdivisions went further into different production units of the enterprise.

#### *4.1.3 The Role and Organization of the CCP in the Regulatory Space*

In the New Democratic Era, the CCP was the sole ruling party in China. Its influence over the government and trade unions was largely confined to the political arena. In particular, its influence on the People’s Government remained relatively limited as many non-CCP members served in the government<sup>50</sup> while under the political framework established by the CPPCC,

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<sup>50</sup> For instance, among the 6 vice chairpersons of the Central People’s Government, 3 were non-CCP members, 2 out of 4 vice premiers of Council of State Affairs were not CCP members, while 14 out of 34 ministries, commissions, councils and administrations under the Council of State Affairs were chaired by non-CCP

the influence of the CCP on the government was limited to the political arena, i.e., defining those broad state policies and goals.<sup>51</sup> Furthermore, according to the *Common Program*, the CCPCC represented the highest state power where all democratic parties and organizations were represented and the peoples' government was a united government composed of many democratic parties.<sup>52</sup> Therefore, the CCP leadership and party members had to cooperate with non-CCP officers to realize the policy goals desired by the CCP. In other words, while the CCP had power to influence the formulation of important state policies, the decision to implement them was to be made by the consent of other democratic parties in the CPPCC; and once the consent was procured, it was the People's Government not the CCP that was the executive authority.

Compared with the situation of the government, the influence of the CCP in trade unions was quite similar, although after the vast organizational expansion and alignment of the ACFTU system since 1949, the leadership across all territorial levels was largely staffed by the CCP members.<sup>53</sup>

In parallel to the organizational structure of the governments and the ACFTU, the CCP's organizational arrangement was also characterized by the 'vertical and horizontal management' system. The only exception was that the CCP system had one more level than the government system.

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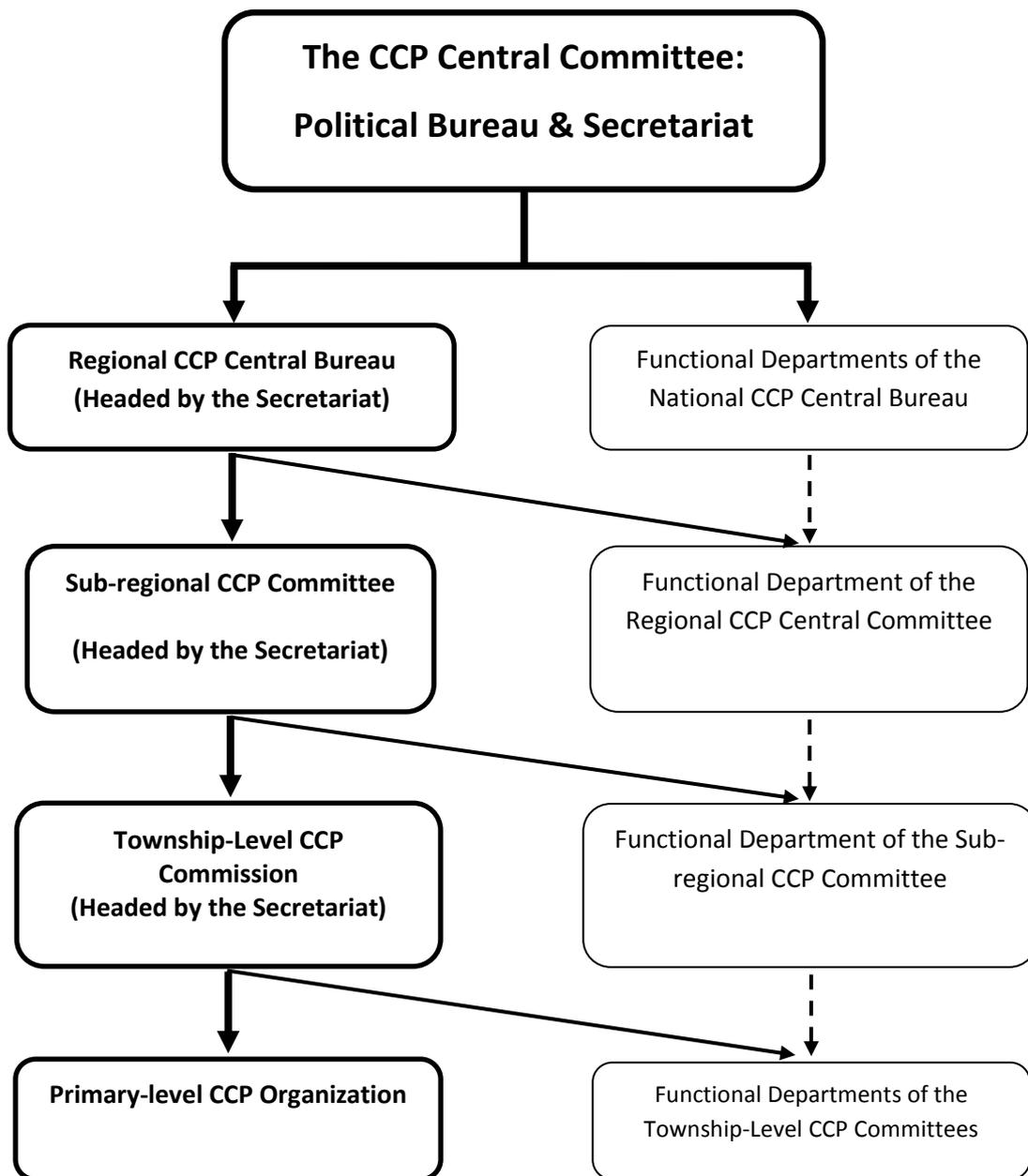
members. The large presence of non-CCP members in the Central People's Government reflected the characteristics of CCP's relation with other party under Common Program, i.e., a leading and cooperative relationship based on political consultation. See: Yibo Bo, *A Review of Some Important Decisions and Events (1) 若干重大决策与事件的回顾 (上)* (CCP Party Academy Press, Beijing, 1997)

<sup>51</sup> Xiaoyan Yang, 'The formation and development of relations between Chinese Party and Politics--Based on history and reality (中国党政关系的形成与发展——给予历史与现实的双层视角)' (Master Thesis, He Bei Normal University, 2010), p.7.

<sup>52</sup> Ibid, 9.

<sup>53</sup> Lei Shi, 'Study on the CCP's Cognition of Trade Unions (from 1949 to 1966) (1949—1966年间中国共产党对工会属性的认识研究)' (Master Thesis, East China Normal University, 2007), p. 30.

**Chart 3.3: Organizational Structure of the CCP<sup>54</sup>**



As shown by the above chart, on the national level, the CCP’s Central Committee was the leading authority of the CCP. Within the Central Committee, the Central Political Bureau was responsible for all political and organizational work, while the Secretariat was the top executive officer of the

<sup>54</sup> This chart is constructed by the author on the basis of the general literature concerning the organizational structure of the CCP during the *New Democratic Era*.

Central Committee mainly responsible for general administration, information processing and reporting. The Central Committee was fully in charge of the functional departments in similar fashion as the administrative ties between the Central Government and the functional ministries.

From the regional level and downwards, the same organizational pattern of ‘vertical and horizontal management’ was adopted within the CCP system. The regional CCP Central Committees were generally referred to as the ‘CCP Central Bureaux’. They served as regional agencies of the Central Committee to carry out decisions, policies and orders made by their superiors.<sup>55</sup> They also had their own functional departments based on *horizontal* administration. Under these regional bureaux were the CCP’s subregional commissions that went directly into various municipalities, districts or counties, townships and even villages (i.e., the lowest administrative level of the Chinese society).<sup>56</sup> All levels down to the township level had their own functional units.<sup>57</sup>

#### *4.1.4 Summary of the Regulatory Space concerning Public Pension Legislation*

As indicated in the above discussion concerning the regulatory roles during the *New Democratic Era*, trade unions and the government formed a special coupling in regulating the labour market. Although only the government had the power to pass laws, orders or decrees to regulate the labour market, the unions assisted the government in the regulation. Furthermore, the union organization under the ACFTU had an administrative structure similar to that of the government, and this potentially facilitated the unions in playing the

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<sup>55</sup> Daxi Huang, *The development path of the CCP's organizational structure: A historical review* (《中国共产党组织结构发展路径的历史考察》) (The People's Press of Tian Jin, Tian Jin, 2004), pp.65-70.

<sup>56</sup> Guangbin Yang, *Institutional structure and the rise and fall of the nation: Theoretical and empirical studies on political development with comparison* (《制度的形式和国家的兴衰——比较政治发展的理论与经验研究》) (1st edition ed, Beijing University Press, Beijing, 2005), pp.158-162.

<sup>57</sup> The organizations included in the chart only include those major functional units related to social and economic management. Besides, at regional and sub-regional levels, the organization of the functional units varies from place to place. This chart only set forward those units that were commonly available in various regions in 1949.

complementary role in business and labour regulation.

Apart from these two, it is also important to note that during the *New Democratic Era*, the CCP's presence in the leadership of the government and the ACFTU was significant while the organizational structure of the CCP was also very similar to that of the government and ACFTU. However, the leadership of the CCP was mainly confined to the political arena. In terms of legislation, it was the government and the ACFTU that were to take the lead in drafting the rules. These institutional arrangements underpinned the *regulatory space* of legislation within the public pension system during the *New Democratic Era*.

#### ***4.2 The Legislation Process of the Public Pension Scheme***

As suggested by the above discussion, the public pension legislation formed part of the so-called 'labour insurance' program which also included public health insurance, work-related injury insurance and maternity insurance. The starting point of the public pension regulation, which took place in 1950 when the drafting committee jointly formed by the Ministry of Labour and the ACFTU formulated the first draft of the *Provisions of Labour Insurance*.<sup>58</sup> However, the most salient feature at this early stage of legislation was that it was quite open to the general public with active involvement of the trade unions.

In late October 1950, i.e., soon after the Council of State Affairs initial approval, the first draft of the *Labour Insurance Provisions* was published by the press for public review and discussion which lasted for three months.<sup>59</sup> Furthermore, to ensure that advice and suggestions from the general public could be effectively incorporated into later drafts, special task forces were organized by the ACFTU

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<sup>58</sup> Donghua Li, 'Study on Li Li-San's Labour Union Thoughts and Practices around the Establishment of the PRC (建国前后李立三劳动工会思想及实践研究)' (Master Thesis, Hunan Normal University, 2008), p. 35.

<sup>59</sup> Li-san Li, '*Provisions of Labour Insurance of the People's Republic of China*(Draft): Remarks from Li Li-san, Minister of Labour' (Paper presented at the Meeting Convened by Council of State Affairs, P. R. China, Beijing, 23 Feb. 1951).

to join industrial and commercial workers in the discussions.<sup>60</sup> Altogether 141 valid responses were sent to the Ministry of Labour. Positive views regarding the general principles of the draft were voiced in most of the responses while ‘suggestions in relation to a few articles of the draft were also made in several cases.’<sup>61</sup> Based on the responses and suggestions stemming from the public review process, the drafting committee drew up a second draft, which was then submitted to the Council of State Affairs for review and discussion in late January, 1951.<sup>62</sup>

Apart from the openness of the drafting process and the involvement of the trade unions, participation by various political parties was another feature of the legislation. Many political parties participated in the reading of the second draft of the *Provisions* through sessions in the CCPCC.<sup>63</sup> In fact, to align the divided opinions from various departments of the Central Government, a co-ordinating team involving a specialist panel from the CPPCC was established to resolve the conflicts of opinions,<sup>64</sup> and it was based on the mediation by the co-ordinating team that the drafting process continued within in Council of State Affairs.<sup>65</sup>

Finally, during the legislation, the political leadership of the CCP adhered to the procedures of the legislation, and did not intervene in the legislative process,<sup>66</sup> although most of them were anxious to see the promulgation of the *Labour Insurance Provisions*.<sup>67</sup> It was the Central Government that was responsible for

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<sup>60</sup> Li-san Li, *Some Explanations on the Trade Union Law of the People's Republic of China (Draft)*, Ministry of Labour, P.R. China (1950).

<sup>61</sup> Li, 'Provisions of Labour Insurance of the People's Republic of China(Draft): Remarks from Li Li-san, Minister of Labour' above n 59.

<sup>62</sup> Ibid.

<sup>63</sup> Guan-xue Liu, 'Provisions of Labour Insurance and Social Insurance for Urban Workers: Glowing Warmth of CCP (《劳动保险条例》蕴含着党的温暖, 新中国职工有了社会保险)' (2003) (11) *China Labour Security*, p.38.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

responding to inquiries and questions from the general public, the CCPCC and other departments of the Central Government. On 26 Feb, 1951, before the promulgation of the *Labour Insurance Provisions*, it was the Labour Minister who gave a detailed account of how the drafts were formulated, publicized and revised before it was finalized.<sup>68</sup> While this was going on, the political leaders continued to read the drafts, while making some comments on the rules.<sup>69</sup>

## **5. The Implementation and Enforcement of the Public Pension Scheme**

### ***5.1 The Regulatory Space of Implementation and Enforcement: Actors and Institutions***

The 1951 *Provisions of Labour Insurance* contained 7 sections and 31 articles. Apart from those substantive terms relating to eligibility, contributions and benefit entitlement, the *Provisions* established a clear implementation and enforcement framework based on cooperation between the labour authorities and trade unions.

In general, the trade unions were mainly responsible for operating the public pension schemes, while their terms of reference further included: 1) collecting and distributing public pension contributions and benefits; 2) monitoring the implementation of public pension scheme administered by all levels of trade unions across China; 3) reviewing all the balances of public pension funds and reports as well as book-keeping; and 4) making budgetary plans and reports in relation to the implementation of labour insurance for examination by Ministry of Labour and the Treasury. The Ministry of Labour was the administrative authority responsible for supervising the trade unions, and enforcing sanctions

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<sup>68</sup> Li-san Li, '*Provisions of Labour Insurance of the People's Republic of China*(Draft): Remarks from Li Li-san, Minister of Labour' (Paper presented at the Meeting Convened by Council of State Affairs, P. R. China, Beijing, 23 Feb. 1951).

<sup>69</sup> Liu, '*Provisions of Labour Insurance and Social Insurance for Urban Workers: Glowing Warmth of CCP* ', above nn. 63-67.

against non-compliance.<sup>70</sup>

### *5.1.1 The Role of the Trade Unions for Routine Operations*

Soon after the promulgation of the *Labour Insurance Provisions*, the ACFTU issued an internal order to guide the formation of the labour insurance committees in all primary-level union organization, i.e., *Organizational Rules of Labour Insurance Committees*, whereby the composition and function of labour insurance committees were prescribed. These rules largely established the institutions of the routine operations concerning the collection and distribution of pension contribution and benefits.

According to the *Organizational Rules*, special labour insurance committees were established in all primary-level unions. The committees were made up of 3 to 15 members chaired by one director (normally the director general of the specific union) and one or two deputy directors (elected by committee members). Duties of the committees include: (i) interpreting the applications and implications of the labour insurance; (ii) registration of labour insurance; (iii) examination of claims made by workers; (iv) monitoring the payments for labour insurance claims, and contribution of funds for labour insurance from the business; (v) guiding the accounting and book-keeping in relation to labour insurance; (vi) guiding the work of labour insurance conducted by functional subdivisions of the committee.<sup>71</sup>

Apart from these rules concerning the organization and functions of the labour insurance committees, the National ACFTU Office further stipulated procedures in the *Organizational Rules* to increase the transparency of the routine operations by introducing supervisory mechanisms that could engage the

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<sup>70</sup> *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 29.

<sup>71</sup> *Organizational Rules for the Labour Insurance Committee* (People's Republic of China) All China Federation of Trade Unions, 1 March 1951, art. 1.

stakeholders, i.e., individual participants and business contributors.<sup>72</sup> In particular, all labour insurance committees were not only required to make monthly work plans to be examined by the superior trade union, but also they were required to make monthly reports both to the superior trade union and to the labour authority of the government.<sup>73</sup> Furthermore, it was also required that, every month, the labour insurance committee in each firm hold no less than two meetings to be attended by one or two representatives of the business firm while the records of the meetings were also to be kept.<sup>74</sup> At the same time, under each committee there was a special functional unit, i.e., a fiscal review commission, which was responsible for auditing the balances of the contributions made by the firm, and releasing the outcomes of the audits to the employees, i.e., the participants of the public pension scheme.<sup>75</sup>

### *5.1.2 Role of the Trade Unions for National Pooling of the Pension Funds*

Apart from routine operations discussed above, trade unions were also delegated with the power to manage the labour insurance funds, which were subdivided into: the *general funds* (*zong ji jin*);<sup>76</sup> *direct payment funds*;<sup>77</sup> and *pooling funds* (*tiao ji jin*)<sup>78</sup>. The *general funds* accounted for 30 per cent of all contributions, which were managed by the ACFTU for running supplementary insurance schemes across the nation, such as collective insurance schemes for union members. *Direct payment funds* were sourced from the rest 70 per cent of the contributions, which were managed by primary-level unions responsible for distributing benefits according to the *Labour Insurance Provisions*.<sup>79</sup> The *direct*

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<sup>72</sup> Ibid. art. 5.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> This particular arrangement was established by the accounting rules issued by the Ministry of Labour of the Central Government. See: *Accounting Rules for Labour Insurance* (People's Republic of China) Ministry of Labour, 10 April 1951, art. 18.

<sup>76</sup> *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 9.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid. art. 22.

<sup>79</sup> Ibid. art. 9.

*payment funds* were cleared on a monthly basis while the surpluses, if there were any, were transferred either to the regional office of the ACFTU or the corresponding national industrial unions under the ACFTU.<sup>80</sup> These surplus funds then became the *pooling funds* which were mainly used for topping up fund deficits across different regions.<sup>81</sup> In other words, when some regional ACFTU office was unable to pay out the benefits due to fund deficits, the ACFTU head-office could order fund transfers to pay off the amount by using the *pooling funds*. This further formed the basis of the national *social pooling system* for public pension transfers.<sup>82</sup>

### 5.1.3 The Role of Trade Unions in Enforcing the Labour Insurance Scheme

In addition to routine operations and fund management, the trade unions were also delegated with the power to enforce the *Labour Insurance Provisions*. As required by the *Labour Insurance Provisions* all contributions under labour insurance schemes (including the public pension scheme) were to be paid by business firms, i.e., 3 per cent of payroll, within the first ten days of each month into the designated bank accounts of the ACFTU.<sup>83</sup> In the case of non-compliance, demurrages would be charged on the due amount for the first twenty days since the due date.<sup>84</sup> If the due amount was not paid after the 20-day period, the primary level union could either notify the bank to deduct the due amount from the bank account of the business if the business was a state-owned enterprise; or report the non-compliance to the labour department of the local government that had the power to fine or penalize the non-compliant firm.<sup>85</sup>

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid. art. 22.

<sup>82</sup> Liu, 'Provisions of Labour Insurance and Social Insurance for Urban Workers: Glowing Warmth of the CCP (《劳动保险条例》蕴含着党的温暖,新中国职工有了社会保险)', above n. 63.

<sup>83</sup> *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 9.

<sup>84</sup> Ibid. art. 10.

<sup>85</sup> Ibid.

#### *5.1.4 The Role of the Labour Authorities: Supervision and Enforcement*

One of most salient features of the *Labour Insurance Provisions* was that it divided the power of supervision and operation in the implementation arena of the regulatory system. To be more specific, while all levels of trade unions served as the operational units for the public pension schemes, labour authorities of the government served as the supervisor of trade unions and business firms, while retaining the power to enforce the *Provisions* against non-compliance. The labour department of the government had the power to oversee the contribution of funds by business firms, examining the operations performed either by business or unions in relation to labour insurance, and handling disputes resulting from or relating to labour insurance.<sup>86</sup>

Furthermore, if the non-compliance or dispute was not settled within the terms of reference of the labour authorities, the case was required to be submitted to the competent court for judicial review.<sup>87</sup>

#### *5.2 Substantive Terms of the Pension Scheme Prescribed by Labour Insurance Provisions*

The substantive terms of the pension scheme, applicability, eligibility, benefit standards and so on are mainly stipulated in the first, third and fourth sections of the *Labour Insurance Provisions*.<sup>88</sup>

The first section clearly defined the objective of the rules—‘to protect the health of the workers, alleviating their difficulties incurred in every-day life’. While this objective was deemed to be important to the realization of the general policy goal of ‘promoting economic production and industrialization’ as

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<sup>86</sup> It was provided that ‘all levels of labour authorities can inspect or examine the operation of labour insurance in any business firm at any time, including the book-keeping of all cases, records, reports, etc.; and address any form of non-compliance by itself or report the case to superior labour authorities for further adjudication.’ See: *Provisions of Labour Insurance* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 31.

<sup>87</sup> *Implementation Rules of Labour Insurance Provisions* (People's Republic of China) 25 March 1951, art. 85.

<sup>88</sup> *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951.

stipulated in the *Common Program*, the *Provisions* also highlighted the small coverage of the initial scheme and the experimental nature of the insurance programs.<sup>89</sup> In fact, according to the 1951 *Labour Insurance Provisions*, the public pension scheme and other insurance schemes were only to be rolled out in a few industries such as ‘railway transport, water transport, post and telecommunications,’<sup>90</sup> and ‘factories and mining plants with over 100 employed workers’.<sup>91</sup> Furthermore, it was also stipulated in the first section that the current rules were just to initiate some pilot programs in a relatively small scope. Nevertheless, the Ministry of Labour could propose to expand the scope of the law’s application at its own discretion while decisions of whether or not to accept the proposals were to be made by Council of State Affairs of the Central Government.<sup>92</sup>

The third section set forth a number of terms concerning the public pension scheme such as eligibility, amount of retirement wage, summation of years of service, and special provisions. According to these rules, males aged at 60 with at least 25 years of service (including 5 years of service in the current enterprise) were entitled to monthly pension benefits, the amount of which might vary from 50 percent to 70 percent of his monthly wage prior to retirement. For a female worker to qualify for pension benefits, she must have had at least 20 years of service (including 5 years of service in the current enterprise) while the amount of the benefits were required to be the same as that of a male retiree. The *Provisions* also provided for a special pension allowance for re-employed retirees, in which case an additional 10 percent to 20 percent of pre-retirement wage was to be paid to the worker in addition to his or her wage. Article 15 also

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<sup>89</sup> Ibid. art. 1.

<sup>90</sup> Ibid. art. 2.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

prescribed a number of cases in which earlier retirement was allowed.<sup>93</sup>

Section 4 mainly dealt with preferential labour insurance benefits for people of work distinction. As these benefits were meant to reward model workers (*lao dong mo fang*) as well distinguished ex-soldiers, selection and examination were necessary. For this purpose, primary-level trade unions were given the power to recommend or select candidates while union organizations at regional levels had the power to decide whether or not the benefits should be granted. In terms of pensions, retirees of work distinction were entitled to monthly pension benefit ranging from 60 percent to 80 percent of his or her wage prior to retirement, while in the case of re-employment after formal retirement the pension allowance was 20 percent or 30 percent of the pre-retirement wage.<sup>94</sup> In either case, the benefits were more generous than those for an ordinary retiree.

## **6. Review and Evaluation of the 1951 *Labour Insurance Provisions***

### **6.1 *The Experimental Nature of the 1951 Labour Insurance Provisions***

As indicated in the above discussion concerning the substantive terms and conditions of the public pension scheme, the *Labour Insurance Provisions* of 1951 were experimental rules aimed at initiating some pilot insurance programs within a relatively small scope of industrial and commercial firms. Although the social community was very anxious to expand the coverage of the labour insurance programs including the public pension scheme,<sup>95</sup> the government and the trade unions were rather cautious in implementing the rules. In fact, on 26 March, 1951, i.e., one month after the promulgation of the *Labour Insurance*

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<sup>93</sup> Workers employed in industries incurring high chances of exposure to chemical substances like lead, mercury, arsenic, phosphor and acids were entitled to a multiplier of 1.5 when calculating their years of service. See: *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 15.

<sup>94</sup> *Labour Insurance Provisions* (People's Republic of China) Ministry of Labour, 26 February 1951, art. 20.

<sup>95</sup> The pension program as part of labour insurance was particularly welcomed by many, particularly those old workers and pensioners who exclaimed that 'to have labour insurance is better off than to have sons!' because it could fundamentally change the crude business practice in Old China, i.e., 'security benefits only for young workers not for old ones.' See, eg, 'Thoroughly Implement the Labour Insurance', *Workers' Daily* (Beijing), 27 Feb, 1951.

*Program*, the Central People's Government issued the *Decision on Piloting 'Implementation Rules of Labour Insurance Provisions'* (the *Decision*).

The *Decision* established a trial period starting from late March 1951 to the end of October of the year. During this period, all problems and inquiries in relation to the implementation of the *Provisions* were to be reported to competent labour authorities while advice or suggestions from all sources were to be gathered and studied for the purpose of refining the *Labour Insurance Provisions*.

The *Decision* from the Central Government further formed the basis of the review and evaluation of the *Labour Insurance Provisions* for the purpose of further revision and refinement.

## ***6.2 The Regulatory Space of Review and Evaluation in the Public Pension System***

Due to the experimental nature of the *Provisions*, the review and evaluation mechanism was introduced into the regulatory system from the very beginning as the Ministry of Labour together with the ACFTU passed some important rules to guide and regulate the operation and implementation of the public pension scheme in early 1951. These included: the ACFTU's *Organizational Rules for Labour Insurance Committees*, the ACFTU and Ministry of Labour's *Implementation Rules of Labour Insurance Provisions*, Ministry of Labour's *Accounting Rules for Labour Insurance* and *Registration Rules for Labour Insurance* in addition to the 1951 *Labour Insurance Provisions*.

Part of the review and evaluation mechanism was embedded in the implementation system, such as requirements of monthly reports by Labour Insurance Committees, and the obligation of organizing at least two meetings each month to be attended by representatives of business and labour concerning the operation of labour insurance. Nevertheless, some measures established by

the regulating rules provided further opportunities for all interested actors in the regulatory system to reflect on the real consequences of the labour insurance and pension scheme. For instance, the ACFTU's *Organizational Rules for Labour Insurance Committees* required all members of the Labour Insurance Committee to disseminate the general knowledge of the *Labour Insurance Provisions*, and to interpret or explain some technical details of labour insurance, while collecting advice or suggestions from stakeholders in relation to the real performance of the *Provisions*.<sup>96</sup> In addition, to supplement these regular mechanisms, special workshops to be attended by both union members and business representatives were organized by some regional labour authorities.<sup>97</sup>

These review and evaluation mechanisms which served to engage all relevant stakeholders in the regulatory scheme, not only enabled the social community to better understand the regulatory rules and policies of the government,<sup>98</sup> but also helped create channels through which remaining problems and issues in the regulation could be fed back to the regulating authorities, i.e., the labour departments and the trade unions.<sup>99</sup>

In sum, the review and evaluation function of the public pension regulation was

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<sup>96</sup> *Organizational Rules for the Labour Insurance Committee* (People's Republic of China) All China Federation of Trade Unions, 1 March 1951, art. 7.

<sup>97</sup> See, eg, *General Report on the Implementation of the Labour Insurance Provisions in Tian Jin Municipality*, Labour Bureau of Tian Jin (1951).

<sup>98</sup> These special mechanisms largely reshaped the mindset of the old workers. Before 1951, old-age care was largely a family business as very few business firms had adopted old-age pension schemes. Under this old regime, older workers were typically stressed by their livelihood after retirement. An old Chinese saying can best reflect this feeling of loss, i.e., 'Being old and alive is nothing but a living thief.' In fact, there was a common practice in the industrial sector that old and skillful workers normally tried to keep their know-how to themselves instead of passing it onto their apprentices due to the apprehension of premature loss of job. However, after the implementation of the pension scheme, older workers suddenly changed their mindset, and became more committed to teaching their apprentices. See, eg, Zhuxia Jiang, 'The Research on Social Security of Enterprises' Workers: Taking Suzhou Region as a Researching Object ( '一五' 时期企业职工社会保障事业研究——以苏州地区为考察对象 )' (Master Thesis, Su Zhou University, 2009), p. 33.

<sup>99</sup> During the trial period of the *Labour Insurance Provisions* in 1951, many regional governments and ACFTU regional offices organized special workshops to gather advice and opinions concerning the implementation of the *Labour Insurance Provisions*. While the main purpose of these workshops was for further revision of the *Provisions*, some misunderstandings of the regulation, particularly the misunderstanding and concerns of business firms, were cleared away through these workshops. Results of these regional workshops were largely reported to the Central Government. See, eg, *General Report on the Implementation of the Labour Insurance Provisions in Tian Jin Municipality*, Labour Bureau of Tian Jin (1951).

first and foremost performed by primary-level trade unions which were required by the regulatory rules to engage all stakeholders of the regulation, collecting their feedbacks concerning the performance of the labour insurance and the pension scheme. This feedback was then jointly processed by higher levels of trade unions and labour authorities that were responsible for advising further improvements on the regulatory rules. In addition, some workshops were also organized by regional labour bureaux to better assess the real performance of the insurance schemes, and to facilitate negotiation and communications between the social community and the government.

### ***6.3 Outcomes of the Review and Evaluation***

The Labour Insurance and public pension schemes were immediately rolled out to all eligible enterprises and workers. By the end of June 1951 (i.e., four months since promulgation of the *Provisions*) 2445 enterprises had joined the labour insurance scheme with 2,178,400 workers and employees being covered.<sup>100</sup> Public response to the *Provisions* was very affirmative as labour insurance greatly reduced workers' living stress, improving their health conditions and enthusiasm of work.<sup>101</sup> These results further increased worker productivity and the political attachment of workers to the new state.<sup>102</sup>

In spite of these positive impacts, some minor problems of the *Provisions* were also identified. These included, among other things, the limited coverage of the

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<sup>100</sup> Hua-dong Li, 'A Study on Li Li-san's Labour Union Thoughts and Practice Around the Establishment of New China' (Master Thesis, Hu Nan Normal University, 2008), p.41.

<sup>101</sup> As Zhu Xue-fan, then Deputy Director General of the ACFTU, observed 'the labour insurance may eventually cover China's 15 million to 20 million industrial workers in the years to come, and each beneficiary may have a family of 4 to 5 members on average, which means the benefits of labour insurance may finally be enjoyed by 80 million to 100 million people, i.e., one sixth or one fifth of China's total population.' See: Zhu Xue-fan, 'Labour Insurance in New China', *The People's Daily* (Beijing), 21 Feb., 1951.

<sup>102</sup> One important indicator of improved solidarity between labour and business was the drastic drop in labour disputes from 1950 to 1951 and onwards. In the latter half of 1950, labour disputes received by labour authorities amounted to 12,635 while the figure in the first half of 1951 dropped to 5,132. See: Guangming He, 'The study on the worker's social insurance at the early years of the PRC (1949-1953): A Case Study of the *Provisions of Labour Insurance* (建国初期企业职工劳动保险研究 (1949-1953) ——以《劳动保险条例》为中心)' (Master Thesis, Central China Normal University, 2007), p. 52.

public pension scheme,<sup>103</sup> over-stringent requirements on eligibility, and unclear definition of the pension allowance.<sup>104</sup> These problems, together with some other technical issues, were further addressed by the regulatory authorities in 1953 when the *Labour Insurance Provisions* were revised.

## **7. Accountability and Correction of the Public Pension System**

### ***7.1 The Revision of the Labour Insurance Provisions in 1953***

In response to the problems identified by the review and evaluation mechanisms discussed above, the Ministry of Labour and the ACFTU jointly revised the *Labour Insurance Provisions* and the *Implementation Rules Regarding the Labour Insurance Provisions* in 1953. The major changes to the pension schemes occurred to the eligibility and benefit levels of the pension scheme. To be more specific, the threshold for years of employment was lowered while the benefits standards were substantially raised. Moreover, the *Implementation Rules* of 1953 also provided clearer guides regarding accounting, book-keeping and fund management issues. The major changes in the 1953 revision compared with the 1951 legislation are summarized in the following table.

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<sup>103</sup> Zhuxia Jiang, 'The Research on Social Security of Enterprises' Workers: Taking Suzhou Region as a Researching Object (‘一五’时期企业职工社会保障事业研究——以苏州地区为考察对象)' (Master Thesis, Su Zhou University, 2009), p. 17.

<sup>104</sup> Ibid. 35.

**Table 3.1: Changes to the Public Pension Scheme in 1953**

	<b>1951 Legislation</b>	<b>1953 Legislation</b>
<b>Applicability of Labour Insurance</b>	Industrial production firms with employees over 100 and all industrial firms in the mining, telecoms and electricity, railway, navigation sectors.	All industrial production firms as well as all firms in the mining sector, transport sector, infrastructure construction sectors and all state-run construction firms.
<b>Pension Eligibility</b>	Male aged 60, female aged 50; years of employment no less than 10 year (in the current firm); and general years of employment: 25 for man and 20 for woman.	Male aged 60, female aged 50; years of employment no less than 5 year (in the current firm); and general years of employment: 25 for man and 20 for woman
<b>Pension Benefits</b>	35-50% of the worker's monthly wage before retirement.	50-70% of the worker's monthly wage before retirement.
<b>Fund Management</b>	Only principles regarding fund management by the ACFTU.	Stratified management system with detailed terms of reference for all levels of trade unions, together with the newly introduced supervisory role of the workers in complaint and non-compliance reporting.

As is shown in the table, the new changes substantially expanded the applicability of pension schemes as the new rules removed the requirement of staff size which had been a condition of eligibility under the 1951 *Provisions*. As a result of this change, the pension coverage increased from 2,178,400 people in mid-1951 to 3,815,207 people in mid-1953, while the number of firms covered by the insurance schemes rose from 2,445 in June 1951 to 4,469 by the

end of June 1953.<sup>105</sup> Although the drastic expansion of coverage could be somehow attributed to the fast economic recovery during the two years, the smooth functioning of the regulatory system and the revision of the rules also contributed to this fast expansion of coverage.<sup>106</sup> Apart from this change, the lowered condition concerning years of service also helped include many potential beneficiaries, while changes in relation to trade unions' administration system further provided more detailed guides concerning the routine operations and fund management activities.

Given these facts, it is important to note that the changes largely came as a result of the cooperation between trade unions and labour authorities, in particular, as a result of the work of primary-level unions which vastly engaged workers and business firms during the trial period in 1951. Lots of the problems, conflicts and issues arising from the public pension scheme were processed internally through the review and evaluation mechanisms inbuilt in the government-union framework, instead of being processed by some external accountability mechanisms where problems and conflicts arising from implementation of the *Labour Insurance* were to be treated as disputes or complaints to be resolved with participation of state authorities other than the unions and the labour departments.

Notwithstanding this fact, it is equally important to note that although the external accountability mechanisms did not play an important role in revising the rules of the public pension scheme, such mechanisms did exist during the *New Democratic Era*. In fact, they were regarded as exemplary models of supervision and accountability systems that served to maintain the integrity of regulation, and differed from the models adopted in the following decades.

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<sup>105</sup> Guangming He, 'The Study on the Worker's Social Insurance at the Early Years of the PRC (1949-1953): A Case Study of the *Provisioins of Labour Insurance* (建国初期企业职工劳动保险研究(1949-1953)——以《劳动保险条例》为中心)' (Master Thesis, Central China Normal University, 2007), p. 47.

<sup>106</sup> Ibid.

Therefore, to trace the complete evolutionary course of the whole regulation system of public pension, it is necessary to describe the *regulatory space* of these particular accountability mechanisms through which the integrity of the regulatory system was to be maintained.

## ***7.2 The Regulatory Space of the Accountability Mechanisms Accompanying the Public Pension Regulation***

Accountability mechanisms are *ex-post* control mechanisms of regulation which serve, on one hand, to correct mistakes and wrongs arising from the regulatory process, and to apply legal or non-legal sanctions to the people or organizations that are found to be responsible for the mistakes or wrongs. During the *New Democratic Era*, public pension regulation was part of the labour market regulation regime whose accountability mechanisms also applied to issues and problems of the public pension system.

There were two main mechanisms which served this particular function of regulation, i.e., labour arbitration<sup>107</sup> and complaint processing,<sup>108</sup> and all social stakeholders within the regulatory regime, i.e., labour, business, trade unions and employer associations were enabled to participate in these two mechanisms administered by different state authorities, i.e., labour departments, judicial courts and supervisory authorities. In particular, during the *New Democratic Era*, the supervisory authorities were special government agencies responsible for checking and sanctioning misconduct of government staff or officials.

Labour arbitration normally took place at the sub-regional level, and was largely

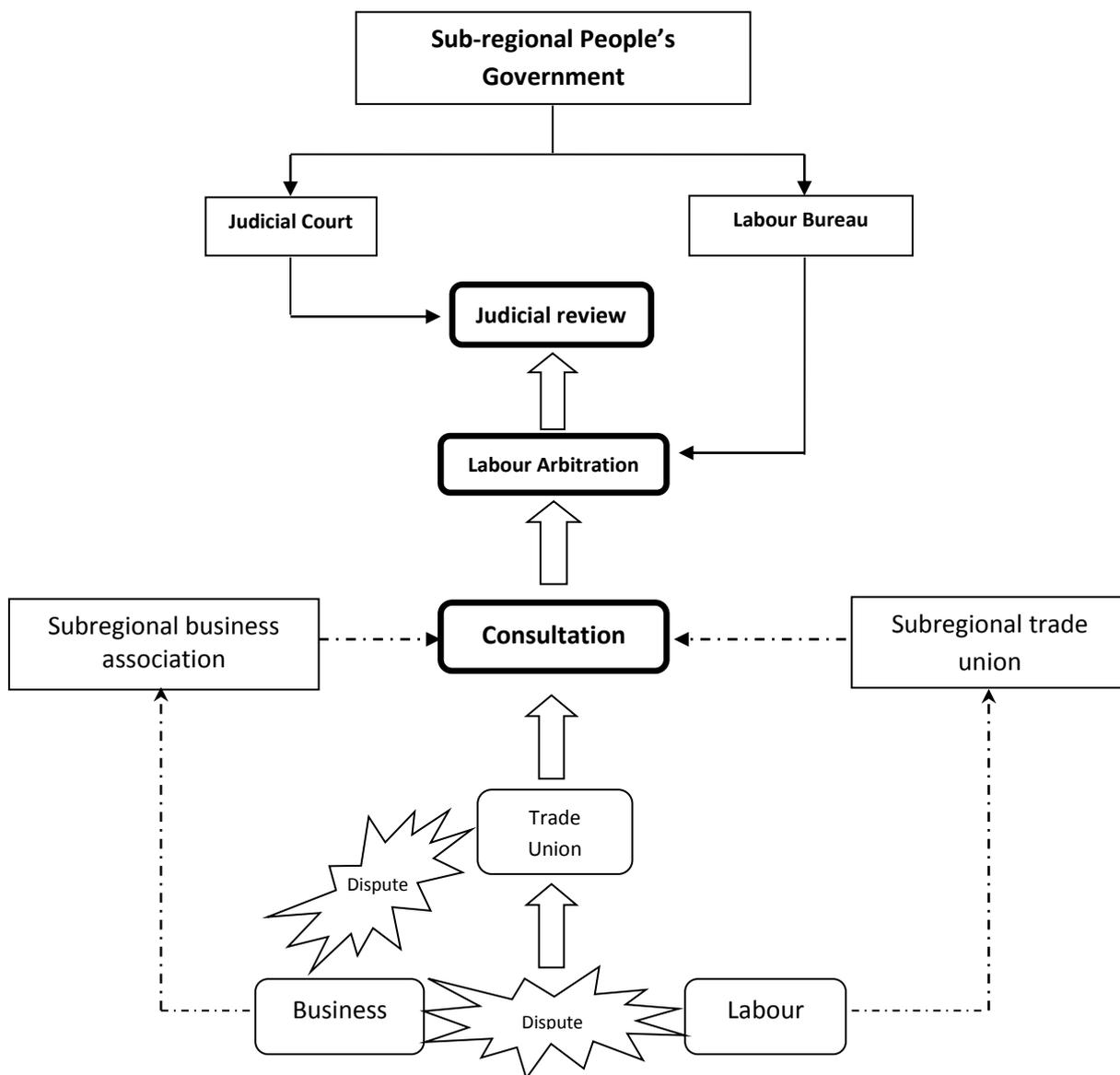
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<sup>107</sup> The labour arbitration mechanism was established by the Ministry of Labour aided by the ACFTU in 1950. See: Rules concerning the Settlement of Labour Disputes (People's Republic of China) Ministry of Labour, 16 November 1950.

<sup>108</sup> This particular mechanism was largely based on the rules passed by the Supervisory Commission of the PRC in the early 1950s. See: Ordinance of the People's Supervisory Commission of the Council of State Affairs (People's Republic of China) the Supervisory Commission, 10 March 1952.

administered by sub-regional labour authorities and judicial courts.<sup>109</sup> It mainly dealt with problems and issues arising from disputes between labour, business, and trade unions.<sup>110</sup> The following chart illustrates the constitution of the labour arbitration mechanism during the *New Democratic Era*.

**Chart 3.4: Labour Arbitration in the *New Democratic Era***<sup>111</sup>



<sup>109</sup> Rules concerning the Settlement of Labour Disputes (People's Republic of China) Ministry of Labour, 16 November 1950, art. 3.

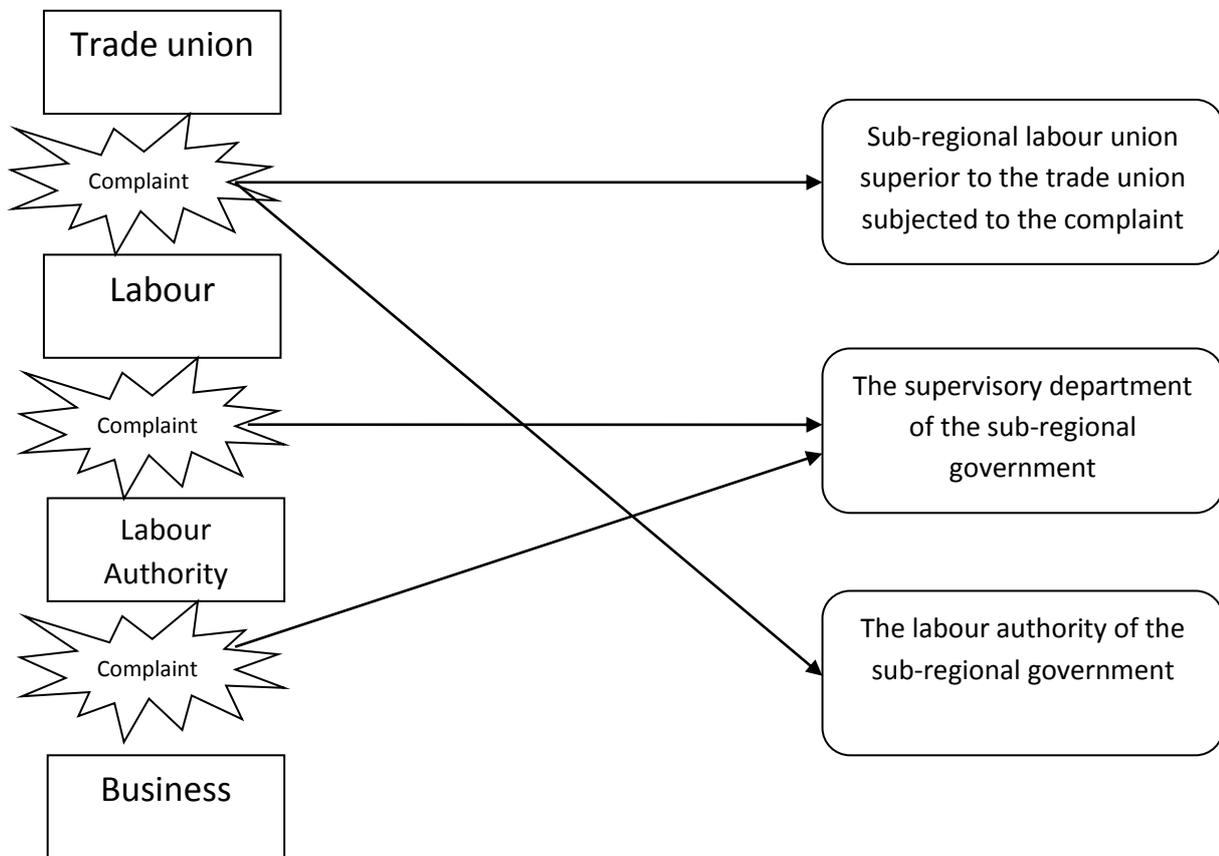
<sup>110</sup> Ibid. art. 4.

<sup>111</sup> This chart is constructed by the author. In particular it is based on a number of important rules regulating industrial relations and labour arbitration during the *New Democratic Era*, for example: Rules concerning Settlement of Labour Disputes (People's Republic of China) Ministry of Labour, 16 November 1950.

As shown by the above chart, there were two sources of disputes to be processed by labour arbitration—disputes between business and labour and disputes between trade unions and business. While in either case, consultations participated in by sub-regional union organizations and relevant business associations were usually required (indicated by the dashed lines and arrows in the chart). This arrangement aimed both at facilitating communication and negotiation between the parties to the dispute, and enabling business associations and superior union organizations to join in the process of contemplation for the purpose of resolving labour disputes. Nevertheless, if the consultation failed to settle the dispute then labour arbitration administered by the labour bureau of the sub-regional people’s government was to be initiated. In any way, judicial review by the sub-regional court was the last resort for settling the dispute.

In addition to labour arbitration, the complaint processing mechanism was also furnished to deal with problems and issues arising from conflicts or disputes between private parties and public authorities. The following chart shows this mechanism.

**Chart 3.5: Complaint Processing Mechanism during the *New Democratic Era*<sup>112</sup>**



As shown in the above chart, there were four potential parties within the complaint processing mechanism: the trade union, labour, labour authorities and business, while the supervisory department of the sub-regional government, the sub-regional trade union and the sub-regional labour authority were the three main processing bodies of possible complaints. Three types of complaints normally occurred, i.e., complaints lodged by labour against the trade union, complaints lodged by labour against the labour authority, and complaints lodged by business against the labour authority. The first group of complaints could either be submitted to the sub-regional trade union or the sub-regional labour

<sup>112</sup> This chart is constructed by the author based on a number of rules concerning complaint processing during the *New Democratic Era*, particularly: Rules concerning Settlement of Labour Disputes (People’s Republic of China) Ministry of Labour, 16 November 1950; Ordinance of the People’s Supervisory Commission of the Council of State Affairs (People’s Republic of China) the Supervisory Commission, 10 March 1952.

authority, while the remaining two groups could be submitted to the supervisory department.

Based on the above discussion concerning the accountability mechanisms, it can be seen that during the *New Democratic Era*, the accountability mechanisms could address problems and issues arising both from private parties, such as labour and business, and from private parties and public authorities. Although the role of these accountability mechanisms in the revision of the *Labour Insurance Provisions* was not significant, they did serve to reduce the tension between labour and business<sup>113</sup> while providing an institutional framework to check, monitor and sanction misconduct of the public authorities,<sup>114</sup> thus helping to maintain the integrity of the regulatory system of public pension.

## 8. Conclusion

The public pension regulation during the *New Democratic Era* was initiated in the environment of post-war recovery. In response to the weak industrial and commercial conditions of the national economy, the ruling party (i.e., the CCP) and the Central Government set the general goal of socio-economic regulation as one of ‘promoting production and boosting the economy’ by ‘enabling both public and private sectors’ (*gong si jian gu*) and ‘benefiting both the business and labour’ (*lao zi liang li*). These policy guidelines were further incorporated within the *Common Program*, i.e., the *Interim Constitution* of the new state.

It was under this particular social environment and policy framework, that the public pension regulation came into being as part of the ‘labour insurance’

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<sup>113</sup> See, eg, Donghua Li, 'Study on Li Li-San's Labour Union Thoughts and Practices around the Establishment of the PRC (建国前后李立三劳动工会思想及实践研究)' (Master Thesis, Hunan Normal University, 2008), pp. 25-26; Xiangyun Li, 'Reconstructing China's Labour Dispute Resolution System: From a Legal Perspective (重构我国劳动争议处理体制的法律思考)' (Master Thesis, South West University of Politics and Law, 2009), p. 10.

<sup>114</sup> See, especially, Xinhong She, 'Study of the Administrative Supervision System in the First Ten Years of the PRC (建国头十年1949-1959行政监察述评)' (2002) 19(1) *Journal Of Jiangxi University of Finance and Economics*, pp. 72-74; Chun Cao, 'A Preliminary Study of the Auditing System in the Early Years of the PRC (浅谈新中国建立后的审计)' (1998) 150(11) *Auditing of He Bei Province*, pp. 42-43.

program. Although the initial scope of the public pension scheme was limited to a few industries and sectors, its conception and legislation underwent a rigorous process with wide participation by the social communities aided by trade unions. This *regulatory process*, together with the *regulatory spaces* accompanying the *process*, has been documented in this chapter. While the findings and implications of these descriptions are yet to be explained according to the analytical framework defined in Chapter 2, it is noteworthy that with these *process* and *spaces* in place, the public pension scheme underwent rapid expansion from 1951 to 1953; while feedback from the social communities was also positive. The working class, i.e., the main beneficiary of the scheme, expressed their praise of the scheme; and business firms, i.e., contributors to the public pension funds under the *Labour Insurance Provisions*, were also supportive to the regulation. Furthermore, with the joint efforts of the social actors and the public authorities, the public pension scheme was revised in 1953 together with the other labour insurance schemes.

As indicated in the feedback from the social community and the actual performance of the regulatory system during the *New Democratic Era*, the public pension scheme as an important part to the ‘labour insurance’ program, largely attenuated the economic concerns of old workers, and increased the commitment of labour to the new state. This, together with the positive outcomes of the other labour insurance schemes, further contributed to the fast recovery of the national economy in the early 1950s. While this outcome closely corresponded with the general goal of the government’s socio-economic regulation stipulated in the *Interim Constitution*, the positive role played by the regulation of public pension during the *New Democratic Era* was also observable.

## CHAPTER FOUR: THE EVOLUTION OF PUBLIC PENSION REGULATION DURING THE SOCIALIST TRANSFORMATION PERIOD, 1953-1958

### Introduction

The *New Democratic Era* was a short-lived period in the early years of the PRC. Although the brevity of this era was not anticipated when the new state was founded,<sup>1</sup> a number of events and incidents prompted the CCP's decision to speed up the move for *socialism*.<sup>2</sup> As a result, in 1953, the leadership of the CCP released the *Master plan for the Transformation to Socialism*. This brought forth a number of important changes in the social environment, which included, among other things, the nationalization of all private businesses in the economy,<sup>3</sup> and the establishment of the party-state system in the society.<sup>4</sup> As a result of these changes in the social environment, some systemic changes also took place around the public pension system—

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1 Even in 1951 there was wide agreement throughout the CCP that New Democracy was a socio-economic program to be put through by '3 years of preparation and 10 years of formal implementation.' See: Li-xin Ren, 'Study on Mao Zedong's New Democratic Economic Ideology and its Evolution ' (PhD Thesis, Hebei Normal University, 2008), p.80.

2 Apart from external factors such as military confrontation in Korea, economic boycotts by 'the West', and close ties with the Soviet Union, a number of internal factors and events also significantly contributed to the transition. These include the non-cooperative stance of the private sector, corruption of government officials, market failures, and the strong commitment of the CCP to the fast industrialization of China. See, especially, Yamacuchi Shin-ji and Qiao Jin, 'Study on Mao Zedong's Abandonment of the New Democratic Ideology (论毛泽东放弃新民主主义思想的战略转变)' (2008) 1(54) *Asian Study*, pp. 194-206; Jiamu Zhu, 'The Strategic Choice of Prioritizing Heavy Industries: A Prompted Transition from New Democracy to Socialism (由新民主主义向社会主义的提前过渡与优先发展重工业的战略抉择)' (2004) 11(5) *Contemporary China History Studies (当代中国史研究)*, pp. 13-24; Li-xin Ren, 'Study on Mao Zedong's New Democratic Economic Ideology and its Evolution ' (PhD Thesis, Hebei Normal University, 2008).

3 The primary goal of the *Transition to Socialism*, as indicated by the *Master Plan*, was to promote industrialization of China by nationalizing three economic sectors: the rural farming sector, the urban industrial sector, and urban commercial sector. See, especially, *Selected Important Government Documents Since the Founding of PRC 建国以来重要文献选编* (Documentary Research Office of CPC Central Committee 中央文献研究室, 1993), pp.700-01.

4 During the *Socialist Transformation*, both vertical and horizontal social integration took place as the CCP cemented its control over the trade unions and labour, the government departments, and the judiciary branch. See, eg, Shikai Wang, 'Political Movement and Economic Construction: Socialist Transformation in Chinese Urban Cities 1949-1956 (政治运动与国家建设——城市社会主义改造研究 1949—1956)' (Master Thesis, Fu Dan University, 2008), pp.33-36.

the ‘vertical management system’ in socio-economic administration, and the ‘iron rice-bowl’ in business management.

Jointly influenced by these changes, the regulation of the public pension scheme also underwent a number of adaptations in response to the new socio-economic environment. This chapter reviews the changes taking place in the public pension regulatory system, i.e., the *regulatory spaces* within each of the five components of the *regulatory process*. This will be followed by descriptions concerning the real performance of the new regulatory regime in order to further reflect the *responsiveness* and *reflexivity* of the public pension regulation after its evolution in the *Socialist Transformation* period. Finally, the evolution of the regulation summarised in the conclusion to this chapter.

## **2. Social Changes stemming from the *Socialist Transformation Movement***

### ***2.1 The Background of the Socialist Transformation Movement***

During the first three years following the founding of the PRC, the CCP adopted an accommodative policy framework toward the private sector, i.e., ‘enabling both the business and labour’ and ‘taking care of both public and private interests’ to restore economic production. However, this accommodative policy also highlighted the priority of developing the state-owned sectors while guiding and monitoring the development of the private sector.<sup>5</sup>

After three years of recovery, the economic structure of China took a drastic turn. The share of the private sector in the economy declined from over 90 percent in 1949 to less than 40 percent in late 1952, while the strength of the

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<sup>5</sup> Lixin Ren, 'Study on Mao Zedong's New Democratic Economic Ideology and its Evolution (毛泽东新民主主义经济思想及其嬗变研究)' (PhD Thesis, Hebei Normal University, 2008), p.85.

state-owned sector quintupled in the same period of time.<sup>6</sup> To the CCP leaders, the vast expansion of the state-owned sector which synchronized with the rapid economic recovery not only demonstrated the advantages of the state-owned sector and socialism for China's future development,<sup>7</sup> but also provided the state with a stronger material base that could be enlisted to expedite the transformation of the economy,<sup>8</sup> i.e., the shift from the *New Democratic* economy to a *socialist* economy. Given these conditions, the CCP quickly changed its stance towards the private sector, and the political leadership no longer viewed private business owners as important and cooperative elements of the state. Rather, they were deemed to be politically erosive and economically inefficient, i.e., in *contradiction* with the proletariat regime.<sup>9</sup>

This attitudinal change was quickly followed by the resolute action of the CCP to mobilize the people in initiating the *Socialist Transformation Movement* in late 1953. According to the CCP's Department of Propaganda, the *Socialist Transformation* could be summarized by a four-word slogan: *yi hua san gai* (i.e., one 'change' and 'three transformations'). To be more specific, 'one change' refers to socialist industrialization (industrialization through socialist public ownership) and 'three transformations' refer to the nationalization of the farming sector, the petty handicraft industry and the private industrial/commercial sector in the urban cities. Although all these three 'transformations' had vast impacts on the society in China, as far as the

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6 Xiangqian Miao, 'What Directly led to Mao's Decision to Prompt the Socialist Transformation Movement (毛泽东提前进行社会主义改造的直接原因)' (2008) (18) *Chinese Businessman* (《华商》), pp.124-125.

7 Deping Liu, 'The Economic Causes that Prompted China's Drive for Socialist Transformation (论中国社会主义改造提前进行的经济原因)' (2009) 24(8) *Social Sciences Review*, pp. 32-34.

8 Yan-na Song, 'Study on the CCP's Economic Policies towards the *Capitalist* (论社会主义改造时期党的资本主义经济政策)' (Master Thesis, Northeast Normal University, 2008), pp. 12-13.

9 A remark of Mao Ze-dong in 1953 could best show this U-turn of the CCP's stance towards the private sector: After the triumph over the landlords and bureaucratic capitalists, the major contradiction in China has become the conflict between the working class and the nationalist capitalists. To address this contradiction, the latter class shall no longer be treated as a neutral class. See: Zedong Mao, 'Decisions on How to Work with Democratic Parties (draft) 关于民主党派工作的决定 (草稿)' *Selected Works of Mao Zedong* (The People's Press, 1999 ed, 1952), p. 231.

pension regulation was concerned, the most important ‘transformation’ was the one concerning the private commercial/industrial sector as it led to the complete state-ownership of all business firms which were uniformly covered by the public pension scheme, on one hand; and to a new business management system—the so called ‘iron rice-bowl’ which served to cement state control over all business firms, on the other.<sup>10</sup>

## ***2.2 Nationalization of the Private Sector in Urban Cities***

The major means used to nationalize the private industrial/commercial firms was the so-called ‘peaceful redemption’ i.e., buying out the private business by the state,<sup>11</sup> while to make it possible, private firms were first taken over by state-owned firms, which were then called a ‘public-and-private joint ventures.’<sup>12</sup>

Following this policy, most private firms were first incorporated into joint ventures in 1953 and 1954; while in 1955 and early 1956, all of them were further converted into state-owned enterprises (the SOEs).<sup>13</sup> By the end of March 1956, 99 percent of all private industrial firms had been transformed while in the commercial sector, 85 percent of the private firms had joined in the state-owned sector.<sup>14</sup> The overwhelming majority of the SOEs in the national economy by the end of 1956 marked the completion of the

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10 In 1950s, social insurance benefits including pension entitlement was largely delivered by the *dan wei* (i.e., production units and employers), or, to be more specific, state-owned enterprises. Under this system, once a person got employed by a certain enterprise, he or she automatically became entitled to all social insurance benefits. For more details, see: Fenglei Lu, 'Study on China's Old-age Security System: Theoretical Foundation, Value Orientation and Institutional Arrangements 中国老年保障制度研究：理论基础、价值取向与制度选择' (Doctoral Thesis, Fu Dan University, 2003), p. 76.

11 Yan-na Song, 'Study on the CCP's Economic Policies towards the *Capitalist* (论社会主义改造时期党的资本主义经济政策)' (Master Thesis, Northeast Normal University, 2008), p. 16.

12 Hongxia Zhu, 'Study on the CCP's Policy of Socialist Transformation of the Private Commercial/Industrial Firms in the Early Years of the PRC (建国初期中国共产党对资本主义工商业社会主义改造政策研究)' (Master Thesis, Central China Normal University, 2009), p. 17.

13 See, for example: Anli Chen, 'Study on the Theoretical Discourse of China's Socialist Transformation: Formation, Development and Improvement (试论我国社会主义改造理论的形成、发展与完善)' (2006) 171(4) *Journal of Capital Normal University (Social Sciences Edition)*, pp. 1-5.

14 Ji-jin Shi, 'Socialist Transformation and Social Evolution in China (社会主义改造与中国社会之变迁)' (2001) (S1) *History of Chinese Communist Party: Research and Teaching*, pp. 68-72.

nationalization program. With this fundamental change of ownership in place, an important reform on business management began.

### ***2.3 Establishment of the 'Iron Rice-Bowl' System in Business Management***

As early as 1953 when the policy of *Socialist Transformation* was formally announced, the CCP had begun to experiment different ways of managing business in response to the new *socialist* planned economy.<sup>15</sup> The aim of the experiment was two-fold: to figure out a good model of business management that could better implement the economic plans from the Central Government, and to incorporate political leadership of the CCP into the management system.<sup>16</sup>

After a few years of experimentation across the whole country in the mid-1950s,<sup>17</sup> this new management model finally came into being around 1956 and 1957.<sup>18</sup> This model largely reduced the autonomy of business by

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15 Jufeng Jiang, 'The Party-Government Relationship in State-Run Enterprises: Solutions based Analysis 国营企业党政关系问题分析和对策' (1986) (4) *Comparative Study on Economic and Social Systems (经济社会体制比较)*, pp. 53-55.

16 See, especially, Li Wu, 'The Development of Enterprise-Government Relationship in 1950s (五十年代国营企业党政关系的演变)' (1996) (5) *Reform (改革)*, pp. 110-117.

17 During the *New Democratic Era*, within all state-owned enterprises, the management system was characterized by an accountability system solely based on the leadership of one top manager while the role of the CCP commission in business management was not clear defined. See, eg, Ji-shen Yang, 'Foot Steps of Chinese Enterprise Management: 50 Years of Evolution (沉重的脚印中国企业领导制度五十年变迁)' (1999) (12) *Voice of Reform (改革先声)*, pp. 49-50. However, as the management of state-owned firms involved both economic functions such as production and personnel management and political functions like ideological education and implementation of policies passed down by the CCP, the unclear line of power somehow stood in the way of implementing economic plans made by the central government. Furthermore, as the decision-making system of the economic and political functionalities in the firm followed different logics, it needed further clarification by the state regarding: 1) who shall have the final say, the top-manager (the economic functionality) or the CCP commission (the political functionality); and 2) how decisions should be made, by one person (i.e., the top-manager) or by group (the CCP commission). These problems and issues were the most important objects that the experiments sought to deal with. See, eg, Lihong Mei, 'A Review of Liu Shaoqi's Thought on Management Model of State-Run Enterprises (刘少奇国有工业企业领导制度建设思想述析)' (1999) 175(1) *History of the CCP (Si Chun Province)*, pp. 33-40.

18 During the two-year experimentation, three different models emerged as possible options for the new economic system. The first model was to subject the top-management to the leadership of the CCP commission of the firm. Under this framework, the top-manager was held accountable to the commission, i.e., the CCP commission being the sole decision-maker of all issues in the firm. The second model was to

introducing CCP commissions into the top management of the firms, while passing all power in relation to personnel management, such as employment, dismissal, remuneration and fringe benefits onto the state. In other words, the state became the sole employer of the labour force, and was responsible for allocating jobs to the working population while deciding the terms and conditions of their employment. As these terms and conditions at that time were largely characterized by stable and long-term employment accompanied by high fringe benefits (provided under the *Labour Insurance Provisions*), this particular model was colloquially known as the ‘iron rice-bowl’ system. In particular, ‘rice-bowl’ was a typical Chinese metaphor of ‘job’, while ‘iron’ in this particular context meant ‘safe’ and ‘stable’, although the expression was also indicative of moderate pay.

In the second half of the 1950s, the ‘iron rice-bowl’ was adopted by all SOEs in the urban cities. As this model aimed at minimizing unemployment while providing the working population with a high level of job security, it was welcome by the social community. This positive response from the community met with the anticipation of the policy-makers as the popular support could further cement government control over business, which was then deemed essential for realizing the economic plans. Furthermore, with the roll-out of the ‘iron rice-bowl’, the political leadership of the CCP

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maintain the existing top-manager accountability system while upholding the CCP commission as the supervisor of all production and management activities of the firm. According to this framework, the CCP commission was not directly involved in the management of the business; rather it focused on monitoring the political integrity of the staff including the top-manager. The third model differed from the above two in that it drew a clear organizational and functional line between the top-management and the CCP commission. According to this model, the top-manager was solely accountable for the economic functionality, which means the top-manager was the sole decision maker of all issues related to production and business management, while the CCP commission should strictly follow the democratic rule, i.e., group decision based on the agreement of the majority and could have the discretionary power to influence decisions over issues other than the political arena. For more details see: Li Wu, 'The Development of Enterprise-Government Relationship in 1950s (五十年代国营企业党政关系的演变)' (1996) (5) *Reform (改革)*, pp. 110-117; Lihong Mei, 'A Review of Liu Shaoqi's Thought on Management Model of State-Run Enterprises (刘少奇国有工业企业领导制度建设思想述析)' (1999) 175(1) *History of the CCP (Si Chun Province)*, pp. 33-40; Ji-shen Yang, 'Foot Steps of Chinese Enterprise Management: 50 Years of Evolution (沉重的脚印中国企业领导制度五十年变迁)' (1999) (12) *Voice of Reform (改革先声)*, pp. 49-50.

commissions was also rolled out to all SOEs, and this further cemented the CCP's political dominance of the economic system, thus integrating the business sector with the political party.

However, as indicated above, social changes brought forth by the *Socialist Transformation Movement* were not limited to the economic arena. Rather, it was a systemic movement aimed at changing society from the *New Democracy* policies to *Socialism*, and at the core of this movement, was an intention of integrating various institutions and organizations under the leadership of the political party. In this sense, the establishment of the 'iron rice-bowl' was just part of the political integration process. In fact, as we shall see below, during the *Socialist Transformation* period, the same process was duplicated in lots of social sub-systems, such as the government bureaucracy, the judiciary branch and the trade union.

## ***2.4 The Party-State Regime and the Vertical Management System***

### ***2.4.1 Establishing the Party-State Regime through Political Integration***

The Party-State regime is a special state regime characterized by a dominant political party controlling the whole state and society. During the *Socialist Transformation*, this system was established by the CCP through waves of organizational alignments to duplicate its own organizational structure of the CCP in all social sub-systems; while replacing, at the same time, the leadership of the sub-systems with the CCP *cadres*—the CCP party officials.

The government bureaucracy was the principal target of the political integration. After the completion of the Nationalization of the private sector in 1956, economic planning became one of the major functions of the Central Government. The power of government departments to plan, monitor and evaluate the economic life of the whole country increased. While this sped up the specialization of the government authorities in

regulating the society, it also raised concerns among the top leadership of the CCP, especially Mao who had little specialized knowledge in many of the new arenas of socio-economic regulation, such as urban development, monetary and fiscal regulation, and business administration.<sup>19</sup> To cement and reinforce the political influence over the government, the CCP decided in the mid-1950s to establish its own functional committees parallel to those in the Central Government, and gradually replaced the officials in the Central Government with the CCP *cadres*.<sup>20</sup> In the late 1950s, these measures were further passed down to all levels of governments<sup>21</sup> to form an integrated whole of political party, government and state.<sup>22</sup>

While the political integration continued, the same process took place in the legal system, too. It started with some educational campaigns aimed at removing the *old* and *non-socialist* ideology of law and politics from the mindset of judicial staff in the first half of the 1950s.<sup>23</sup> While in the mid-1950s, waves of personnel replacements were further initiated to re-staff the legal system, with many CCP members who had served in various CCP functionaries joining the judicial system. This was followed, in the late 1950s, by the establishment of political and legal commissions of the CCP at all levels of the judicial branch to serve the leading role. As a result of this, the legal system of the PRC was finally integrated into the political system by the late 1950s, with the CCP commissions inbuilt in legal authorities being

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19 Guangbin Yang, *Institutional Structure and the Rise and Fall of the Nation: Theoretical and Empirical Studies on Political Development with Comparison* (制度的形式和国家的兴衰——比较政治发展的理论与经验研究) (Beijing University Press, 1st edition ed, 2005), p. 205.

20 Ibid.

21 Hong Jing, 'Study on the Dynamic Construction of Party-government Relations (党政关系动态构建问题研究)' (Doctoral Thesis, Shan Dong University, 2004), p. 54.

22 Huanqing Wang, 'A Historical Review of the Relationship between the CCP and the Chinese Government since the Opening-up and Reform (改革开放以来中国共产党与政府关系的历史考察)' (Master Thesis, Urumqi Normal University, 2008), p. 3.

23 Wenlong Shi, 'The Development Path of China's Legal System in the 20th Century (二十世纪中国法制成长模式论)' (2007) (5) *Legal Science (Journal of Northwest University of Politics and Law)*, pp. 3-9.

the sole agencies carrying out the decisions of the CCP top leadership.<sup>24</sup> Likewise, the legislative power of the People's Congress (i.e., the national legislature) was also overtaken by the CCP in the late 1950s.<sup>25</sup>

Likewise, the trade union system was also incorporated into the CCP system in the second half of the 1950s. Like the government and the judiciary, the trade unions lost their organizational autonomy and functional independence during the *Socialist Transformation Movement*, while its role was further defined as 'to reinforce the Party's leadership of the working class through political propaganda and ideological education while implementing ordinances and decrees from the central and regional CCP commissions'.<sup>26</sup>

#### *2.4.2 Using the Vertical Management System for Social Control*

Along with political integration and the establishment of the party-state regime in the late 1950s, the CCP cemented its control over various social sub-systems both in organizational and in functional terms. The CCP commissions assumed leadership across all levels of governments, judicial courts and trade unions. Furthermore, the Central Committee of the CCP further centralized its power within the political system by entrenching the *vertical* management system while reducing the autonomy of regional and sub-regional CCP commissions—the *horizontal* administrative power discussed in the last chapter. To be more specific, all powers concerning functional issues, financial issues and personnel issues were further absorbed into the Central Committee of the CCP—the top leaders of the political party. Under this 'vertical management system', only the top leaders of the CCP had the power to issue orders and decrees to direct the work of the *vertically*

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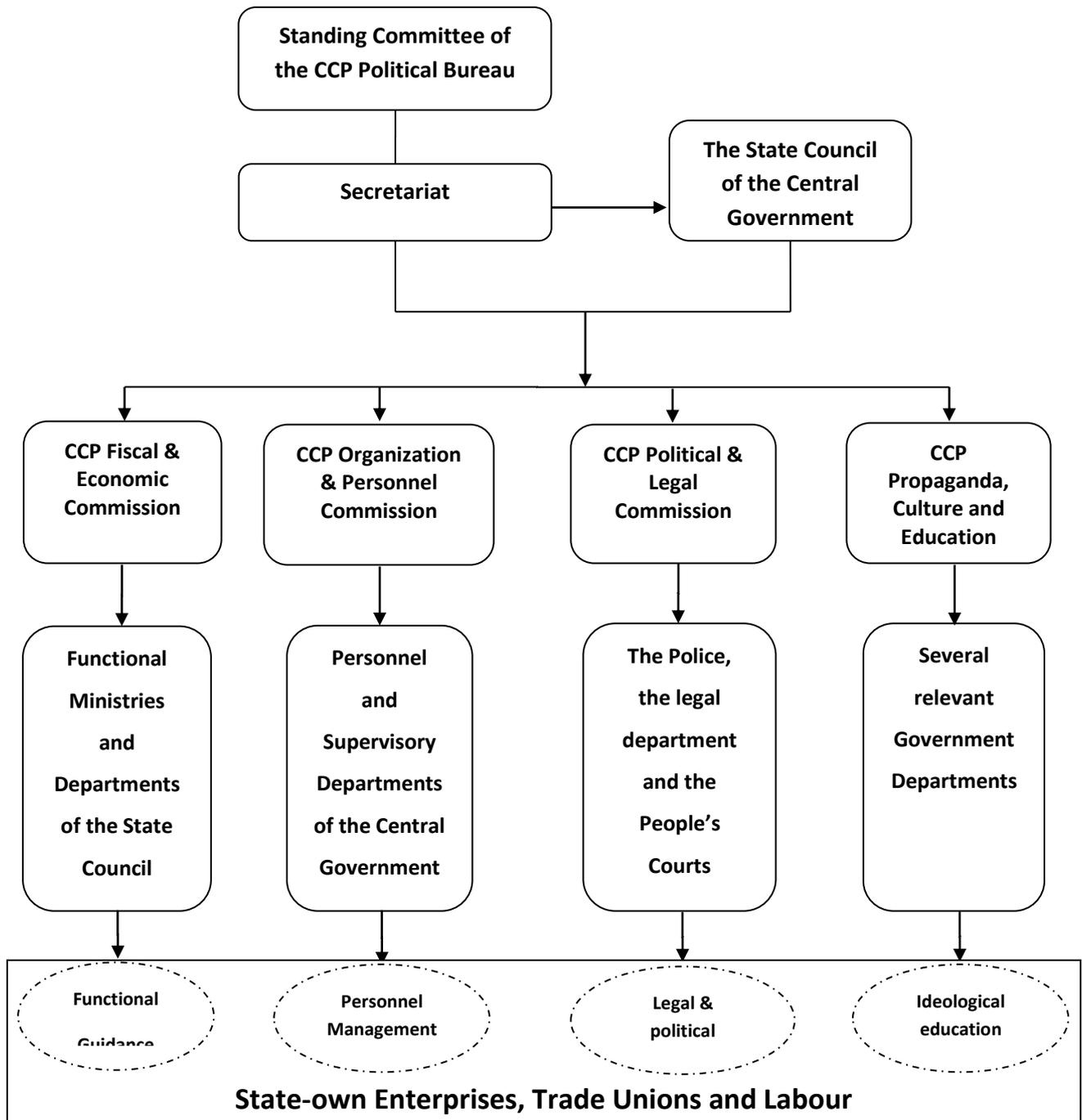
24 Rida Chi, 'The Historical Developments of China's Judiciary System and Judiciary Reforms (中国司法制度的历史演变和司法改革)' (Doctoral Thesis, Northeast Normal University 2003), p. 18.

25 Ibid. p.19.

26 Lei Shi, 'Study on the CCP's Cognition of Trade Unions (from 1949 to 1966) (1949—1966年间中国共产党对工会属性的认识研究)' (Master Thesis, East China Normal University, 2007), p. 16.

inferior CCP commissions. This highly centralized ‘vertical management system’ is illustrated by the following chart.

**Chart 4.1: The Vertical Management System**<sup>27</sup>



27 This diagram is adapted from some Chinese literature by the author. See, especially, Guangbin Yang, *Institutional Structure and the Rise and Fall of the Nation: Theoretical and Empirical Studies on Political Development with Comparison* (制度的形式和国家的兴衰——比较政治发展的理论与经验研究) (Beijing University Press, 1st ed, 2005), p. 206.

As shown in the above chart, the Standing Committee of the CCP Political Bureau was the top echelon of the ‘vertical management system’. It was the heart of the party-state regime. The Secretariat was the executive office of the Political Bureau through which the State Council (i.e., head office of the Central Government) was administered. While the Secretariat and the State Council formed the second echelon of the system, the third echelon was made up of four functional commissions organizationally affiliated to the State Council but administered by the CCP’s Political Bureau. These included: the Fiscal and Economic Commission, the Organization and Personnel Commission, the Political and Legal Commission and the Propaganda and Education Commission. The fourth echelon consisted of different functional ministries and departments of the State Council as well as the legal and judicial system, all of which were administered by the CCP functional commissions. These first four echelons mentioned above formed the central-state control and management system. Policies, commands and ordinances from the CCP top leadership were passed down to the SOEs (i.e., the fifth echelon) through the regional and sub-regional governments. Normally, there were four important aspects of management in the SOEs, i.e., functional guidance, personnel management, legal and political guidance, and ideological education. These were respectively administered according to the functional lines delineated in the chart.

### **3. Changes in the *Regulatory Space* and *Regulatory Process* of the Public Pension System after the *Socialist Transformation Movement***

The *regulatory space* of the public pension system was originally characterized by the functional autonomy of different regulatory actors serving different roles in the *regulatory process*, i.e., policy formulation, rule-making or legislation, implementation and enforcement, review and evaluation, accountability and correction. To be more specific, the policy

formulation was largely conceived by the Central Government with participation of various political parties other than the CCP. The legislation and its implementation were characterized by a structural coupling of government regulators (the labour authority) and the trade union, with the former playing a supervisory role over the latter. The review and evaluation mechanisms drew on the participation of all state and non-state actors to observe and assess the consequences of the rules being implemented. Further, within the accountability system, apart from the union-government coupling, judiciary review was furnished to supervise the performance of both.<sup>28</sup> However, these institutional arrangements changed considerably after the political integration and the establishment of the ‘vertical management system’.

First, with the party-state regime in place, the policy formulation process was completely taken over by the top leadership of the CCP. The role of the other political parties was largely marginalized as the CCPCC was no longer the highest state power of the PRC. Rather, it was reduced to an advisory role in the policy formulation process concerning socio-economic regulation and administration.

Second, after the completion of the *Socialist Transformation* period, legislation and rule-making largely came to rest in the late-1950s. The vast majority of industrial and commercial firms had been integrated into the public sector, while the public pension and other labour insurance schemes were gradually rolled out in all industrial and commercial firms following the revised *Provisions of Labour Insurance* of 1953. However, as the trade unions were further integrated into all business firms that were administered

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<sup>28</sup> According to the Provisional Procedural Rules for Resolving Labour Disputes and the Provisional Rules of Industrial Relations, disputes over pension benefits should follow the procedures of negotiation, mediation, and arbitration. However, if these above procedures failed to resolve the dispute, judicial review could serve as the last resort to settle the case.

through the ‘vertical management system’, their legislative function was largely phased out. Instead, the Central Government directly led by the CCP top leadership assumed most of the legislative power of public pension regulation.

Third, in terms of implementation and enforcement, the structural coupling of the trade unions and the labour authorities was further deemed redundant.<sup>29</sup> As a result, the supervisory role of the labour department of the government was cancelled by the State Council in the mid-1950s.<sup>30</sup> The trade union (i.e., the ACFTU) then assumed the functions of both implementation and enforcement.

Fourth, the review and evaluation process was also internalized into the ‘vertical management system.’ Problems and issues incurred in implementing the regulation were reported in the form of enquiries by primary-level trade unions through levels of governments to the Ministry of Labour which was then responsible for replying to these enquiries by giving directions or guidelines concerning how to address the problems and issues.

Finally, in terms of accountability and correction, as the state became the sole employer of labour, traditional forms of labour disputes between labour and capital were conceptually eliminated.<sup>31</sup> As a result, the dispute resolution system based on intermediation and arbitration by the labour authority and the judiciary review by local courts were also conceived to be redundant after

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29 Jiyong He, 'A Study on China's Labour Dispute Resolution System (我国劳动争议处理制度研究)' (Master Thesis, Fu Dan University, 2009), p. 20.

30 Bingde Liu, 'An Account of Labour Insurance's Piloting in Chongqing (重庆试点记事)' (2009) (10) *China Labour Security*, pp. 18-19.

31 The commonly accepted view of that time was that as all industrial and commercial firms had been nationalized, there was no longer any exploitation of labour in business firms. As, there wouldn't be any conflict of interest between the worker and the state-run business, industrial disputes would significantly decline as a result.

the *Socialist Transformation* period was completed.<sup>32</sup> In lieu of these institutional arrangements, a highly internalized form of accountability and correction mechanism of ‘*xin fan*’, i.e., petitions by letters and visits (hereunder the ‘PLV’) emerged as the major means to address social conflicts, personal grievances and complaints about malpractices of government and party officials.<sup>33</sup> In addition, popular movements aimed at bureaucratic inefficiency and malfunctioning were also mobilized on irregular basis to supplement the regular PLV mechanism.

#### **4. Performance of the Regulatory System in the Late 1950s: the *Great Leap Forward*, Household Registration and their Impacts on Public Pension Regulation**

##### ***4.1 Further Changes in the Regulatory System by the Late 1950s***

After the completion of the *Socialist Transformation* accompanied by the political integration, all power was centralized to the top leadership of the

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32 When *Socialist Transformation* was completed in 1956, both labour mediation and arbitration had been removed from labour authorities’ administrative responsibilities, thus cutting off the source of cases for judiciary review.

33 As an institutional arrangement for resolving social conflicts and disputes, direct appeals date back to pre-modern times in China. This refers to a mechanism inbuilt in the central government to address grievances of people mistreated by local officials. The Central government normally designated its own officers to tour around a specific area or region to receive, examine and review appeals from the social community. It served as an instrument of the imperial court to receive feedbacks from the society regarding the performance of the local authorities while resolving social conflicts and reducing political tension in the local communities, thus maintaining its check and balance over local governments. After the founding of the PRC in 1949, the CCP’s secretary office was designated as the special department to handle direct petitions. In 1951, the Council of State Affairs passed *the Decision to Handle Direct Petitions from the People*, in which it is required that ‘officials at all levels of governments should properly handle mails from the people and meet visitors in a hospital manner so that their petitions are well handled.’ Following these, special workforces were established both in the CCP and in the central government to deal with direct appeal from the people in the early 1950’s. However, after the CCP political integration of the governments this particular function was soon transferred to government departments, the legislative authorities (the People’s Congress), and the judiciary branch, i.e., the judiciary court and procuratorates. To be more specific, the special workforces were inbuilt in all departments at the central level: three offices designated in State Council of the Central Government; one each in the National People’s Congress, the Supreme People’s Court, and the Supreme People’s Procuratorates; while at the same time each of the functional department of the central government (ministries, offices and committees of the State Council) also established their respective offices to deal with appeals and petitions. Following the move at the central level, regional and subregional agencies were soon formed. The administration of these special workforces followed the same vertical-functional structure of the government.

CCP.<sup>34</sup> There was no longer any distinction between the political party and the government with the party-state regime in place. The legislative branch was also subjected to the CCP's leadership,<sup>35</sup> while the judiciary courts were further disengaged from the arena of social regulation and became part of the police system.<sup>36</sup>

Furthermore, with the highly centralized 'vertical management system' in place, a change gradually took place in the CCP top leadership, i.e., the growth of personal cult and decline of organizational democracy.<sup>37</sup> After the CCP's absolute control of the government, the CCP Political Bureau and Secretariat became the highest leading authority of the state. However, this centralization of power culminated in the late 1950s when the Political Bureau and Secretariat eventually became the mouthpiece of Mao.<sup>38</sup> The net result was that while the power of the societal communities was taken over by the political power, i.e., the CCP, the highly centralized power of the CCP finally fell into the hands of one man, i.e., Mao, Head of the CCP.

This concentration of power led to further fundamental changes in the general style of socio-economic regulation, from regulation through formal legislation, to administration through political mobilization.<sup>39</sup> To be more specific, any social movement was subjected to the political power of the CCP through decisions or policies passed by the CCP leaders on the top

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34 Franz Schurmann, *Ideology and Organization in Communist China* (University of California Press, 1st ed, 1966), p. 532.

35 See for example: Fei Xue, 'Study on the Influence of the Chinese Constitution on the Decision-Making of the Great Leap Forward in the Early Years of the PRC(论建国初期的宪法建设对大跃进决策的影响)' (Master Thesis, Central China Normal University, 2007), pp. 16-17.

36 Rida Chi, 'The Historical Developments of China's Judiciary System and Judiciary Reforms (中国司法制度的历史演变和司法改革)' (Doctoral Thesis, Northeast Normal University 2003), p. 19.

37 Hongbing Huang, 'Study on the Cause of the 'Great Leap Forward' (试论“大跃进”发动的原因)' (2010) 117(5) *Journal of Qiqihar Junior Teachers' College*, pp. 91-92.

38 As a matter of fact, Mao even had the power to veto the decisions made by the Political Bureau of the CCP. See for example, Wanling Wu, 'Study on the CCP's Mobilization Model of Popular Movements after the Founding of the PRC(新中国成立后中国共产党群众动员运作模式研究)' (Master Thesis, Fu Jian Normal University, 2010), p. 18.

39 Biao Teng, 'Judiciary Independence and its Development in Contemporary China, ("司法独立"话语在当代中国的变迁)'(2004) *Huazhong Law Review (法学纪元 I)*,p. 63.

level. On regional and sub-regional levels, heads of the CCP commissions were designated as the sole implementers of the policies and decisions from the top. Through this typical *vertical* system, all levels of legislative authorities, governments, judicial courts and union organizations became agencies of the CCP leadership. These changes to the general style of socio-economic regulation and administration finally culminated in the late 1950s when a huge popular movement aimed at quickly promoting China's industrial and agricultural production was initiated by the CCP top leaders, i.e., the so called *Great Leap Forward*.

Although the *Great Leap Forward*, as a social program, was not directly related to public pension regulation, its initiation, implementation and completion typically followed the principles of the party-state regime and the 'vertical management system' mentioned above. Consequently, the real performance of the new regulatory system can be observed by tracing the development of this movement. Furthermore, the *Great Leap Forward* also led to social consequences such as the rural-urban dual economy characterized by segmentation of the rural and urban sectors, which further restricted the expansion of the public pension scheme as the labour force stopped flowing from the rural countryside to the urban cities. In this sense, a brief discussion of the *Great Leap Forward* is necessary for illustrating the evolution of the social environment and the evolution of the general regulatory system surrounding the public pension system.

## *4.2 Limitations of the New Regulatory System as Reflected in the Great Leap Forward*

The Great Leap Forward was a nation-wide popular movement initiated by the CCP in 1958 to accelerate economic production in China.<sup>40</sup> According to the policy slogan of ‘constructing a socialist China vastly, quickly and economically with the greatest commitment and determination’, the concrete policy objective of this movement was to double or even quadruple produce of a few major industrial products like steel and iron within just a couple of years.<sup>41</sup> This movement typically worked under the party-state regime and the ‘vertical management system’; that is, decision by the top CCP leadership, initiation through political mobilization, and implementation by CCP *cadres* of the CCP commissions at various regional and sub-regional levels.<sup>42</sup> To fuel people’s enthusiasm for the campaign, mass media were mobilized to report and disseminate stories of successful examples.<sup>43</sup>

However, the result of this movement did not lead to the results desired by the political leaders. Apart from some undesirable economic outcomes, over-investment in industrial production led to a rapid rural-urban migration in the second half of the 1950s. While the industrial sector seemed to be expanding fast, it actually created a sudden and huge increase of demand for industrial workers accompanied by an equally sudden and big decrease of labour supply in the countryside from 1958. This, accompanied by some

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40 See, for example, Li Wu, 'A Comparative Study on the Evolution of Chinese Government's Role in Economic Development (中国政府经济职能演进历史及比较研究)' (2003) *Collection of Papers of the Third Annual Meeting of Chinese History Study*, pp. 154-163.

41 Li Wu, 'The Development of Enterprise-Government Relationship in 1950s (五十年代国营企业党政关系的演变)' (1996) (5) *Reform (改革)*, pp. 110-117.

42 See, eg, Wanling Wu, 'Study on the CCP's Mobilization Model of Popular Movements after the Founding of the PRC (新中国成立后中国共产党群众动员运作模式研究)' (Master Thesis, Fu Jian Normal University, 2010).

43 *Ibid.* pp. 34-36

serious malpractices of agricultural administration and production,<sup>44</sup> further threatened the stability of agricultural production at the end of 1950s.<sup>45</sup>

The leadership of the CCP, as head of the party-state regime and the ‘vertical management system’, failed to take these economic issues seriously, even though feedbacks from the lower echelons of the economic system had begun to indicate these potential threats, and some senior political *cadres* even began to raise their concerns over the *Great Leap Forward*. Nevertheless, the leaders of the CCP, particularly Mao, were reluctant to accept these negative responses. While this could be partly attributed to Mao’s lack of specialized knowledge of socio-economic regulation and administration, the growing personal cult and decline of democracy within the political party was the main cause of the failure to respond.<sup>46</sup> In fact, many of those senior *cadres* in the CCP who expressed their concerns were immediately removed from office and further subjected to critical reviews of their political integrity. This further hushed the voice of concerns among senior officials within the CCP, and suppressed negative feedbacks from the lower echelons of the ‘vertical management system’.

The net consequence of these developments by the end of the 1950s was that the CCP *cadres* at the lower echelons of the system were no longer willing to report the real consequences of the policy implementation.<sup>47</sup> Rather, only those outcomes consistent with the policy goals desired by the top CCP

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<sup>44</sup> For a detailed account of the malpractices, see, especially, Yuan Liu, ‘The Great Leap Forward in China and the Cause of the great famine: From the Perspective of Political Rights (中国“大跃进”饥荒成因再辩——政治权利的视角)’ (2010) 9(3) *China Economic Quarterly*, pp. 1177-1188.

<sup>45</sup> Soon after the initiation of the Great Leap Forward, the demand of labour drastically increased both in industrial cities and countryside. To complete the production quotas, many industrial firms expanded their staff size. In 1958, the number of industrial workers increased by 85% in China, an increase of over 20 million within one year. See: Bo Yin *et al.*, ‘Economic and Historical Analysis of the *Great Leap Forward* (对大跃进的几点经济历史分析)’ (2000) (2) *Economics Information (经济学情报)*, pp. 64-66.

<sup>46</sup> Hong Xin, ‘Study on Information Feedback and Mao’s Major Policy Decisions: A Case Study of the “Three Anti” and “Great Leap Forward” Campaigns (信息因素与建国后毛泽东的重大决策研究——以“三反”“大跃进”运动为例)’ (Master Thesis, Guan Xi Ethnic University, 2009).

<sup>47</sup> Qingfang Feng, ‘Study on the Causes of the Exaggeration of Farm Produce during the Big Leap Forward (“大跃进”时期农业浮夸成风的原因)’ (2010) (1) *Culture and History Vision*, pp. 11-12.

leadership were to be reported. When this special practice became commonplace by the end of the 1950s, it made it difficult for the social community to regain access to the policy makers. This further reduced the efficacy of the policies made by the CCP. Given these new developments in the general system of socio-economic regulation and administration, little response was made to address the potential problems and issues. Finally, the problems developed into a huge economic recession accompanied by a serious and nation-wide starvation in the beginning of the 1960s.<sup>48</sup>

However, given Mao's esteem and power within the party-state regime established during the *Socialist Transformation*, the highly politicized bureaucracy was unable to respond systemically to those institutional problems within the 'vertical management system'. Rather, the regulatory system responded by ascribing the serious consequences to the fast immigration of labour to the cities,<sup>49</sup> which further triggered the policy initiatives to segment the rural and urban sectors by introducing the so called 'house-hold registration' system.<sup>50</sup>

### ***4.3 Household Registration and the Suspension of Rural-to-Urban Migration***

The so called 'house-hold registration' system was first established during the *New Democratic Era* mainly as an important social program for

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48 According to the official source, the recession and famine led to a casualty of more than 20 million over three years from 1960 to 1962, while some argued the figure amounts to over 30 million. Anyhow, one thing is agreed that the seed of this disaster was sown in 1958 when the Great Leap Forward was initiated by CCP's top leader Mao Zedong. See for example: Ruojian Li, 'Study on Population Loss during the Great Leap Forward (大跃进后人口损失的若干问题)' (1998) 67(4) *Chinese Demographic Science*, pp. 40-44; Yuan Liu, 'The Great Leap Forward in China and the Cause of the Great Famine: From the Perspective of Political Rights (中国“大跃进”饥荒成因再辩——政治权利的视角)' (2010) 9(3) *China Economic Quarterly*, pp. 1177-1188.

49 It is important to note, in late 1959 some CCP high-ranking officials did attempt to influence the course of the mass-line movement by illustrating problems in the policy implementation as well as the potential harms of the mass-line movement during plenary sessions of CCP central Committee. However, these attempts ended up with a new wave of political showdown among high-ranking CCP leaders.

50 As a matter of fact, all those officials who had announced their concerns or expressed their dissents were either reprimanded or removed straight away from post.

statistical and residential planning purposes. However, in the late 1950s, and particularly after the emergence of the negative effects stemming from the *Great Leap Forward*, this system turned into an important social control program aimed at restricting rural-to-urban migration to reduce the aggregate consumption of food during the nation-wide starvation of the early 1960s.

The house-hold registration system dichotomized people's place of birth into two major categories—urban cities and rural areas, and further underpinned people's socio-economic rights like entitlements to food rationing, medical care, education, employment, social benefits and public pension to their place of birth—the locality of the registered house-hold.<sup>51</sup> People moving from rural areas to urban cities were required to be formally employed by SOEs in the city; otherwise, they would have difficulty of getting goods and services necessary for living, such as food, medical care and housing. Under the 'iron rice-bowl' system, as only the state had the power to decide who was to be employed or not, rural-to-urban migration was further incorporated into the labour administration system, i.e., a heavily regulated area, in the early 1960s when more stringent measures against migration were implemented in response to the severe economic recession and starvation following the *Great Leap Forward*.<sup>52</sup>

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51 See for example: Baogang Zhu, 'Study on China's Household Registration System (论我国户籍制度改革)' (Master Thesis, Central China Normal University, 2004); Donglian Xiao, 'A Historical Review China's Dual-Economy: Its Formation and Structure (中国二元社会结构形成的历史考察)' (2005) (1) *Historical Review of the CCP*, pp. 21-29; Hua Xue, 'Study on the Social Security Rights of Chinese Farmers (论我国农民社会保障权)' (Master Thesis, China University of Politics and Law, 2006).

52 The reason of having National People's Congress, the highest national legislative authority in nominal terms, to initiate the legislative move lied in the fact that according to the 1954 Constitution, people had the constitutional right of free migration. For more details, see: Donglian Xiao, 'A Historical Review China's Dual-Economy: Its Formation and Structure (中国二元社会结构形成的历史考察)' (2005) (1) *Historical Review of the CCP*, pp. 21-29.

With the stringent house-hold registration system in place, urban-rural migration came to rest from the 1960s.<sup>53</sup> While this directly led to the social segmentation between the urban cities and rural countryside, it also slowed down the expansion of the public pension schemes as rural labour was no longer to be absorbed into the industrial and commercial sectors of the urban cities.<sup>54</sup> This social institution, as we shall see later, finally became a major source of the social problems confronting public pension regulation in the beginning of the 21<sup>st</sup> century.

## 5. Conclusion

The *Socialist Transformation* (from 1953 to 1958) was an important period of significant social changes. It witnessed the nationalization of the private sector in the economy, and the establishment of the party-state regime in the society. Following these changes in the social environment, the regulatory system surrounding the public pension regulation also evolved into two distinctive models of administration—the ‘iron rice-bowl’ system and the ‘vertical management system’. While the former underpinned the new institutional arrangements concerning the relations between the state, business and labour; the latter further laid down the institutional framework of all socio-economic regulation and administration in the second half of the 1950s. Although these changes did not lead to any significant changes to the substantive rules of the public pension scheme established in the early 1950s, they fundamentally changed the *regulatory space* within which the *regulatory process* operated. While the impact of these changes on *regulatory responsiveness* and *system reflexivity* is yet to be examined in

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53 Guiwen Zhang, ‘A Historical Investigation of China's Dual Economy: Structural Changes and Characteristics (中国二元经济结构演变的历史考察与特征分析)’ (2001) (8) *Macroeconomics* (宏观经济研究), pp. 33-38.

54 See, eg, Yilong Lu, ‘Structure and Change: the Household Registration System in China after 1949 (1949年后的中国户籍制度:结构与变迁)’ (2002) 39(2) *Journal of Peking University(Humanities and Social Sciences)*, pp. 123-130.

light of the analytical framework defined in Chapter 2, some limitations of the new regulatory systems have been reflected by the description concerning the *Great Leap Forward*—a popular socio-economic movement—initiated and implemented under the general context of the ‘vertical management system’ and the party-state regime. In addition, the response of the state to the aftermath of the *Great Leap Forward*—the stringent segmentation between the rural and urban sectors—is also reviewed. While the implications of this response are yet to be explained later in the analysis part of the thesis(Chapter Eight); it suffices to say, at the time being, this segmentation supported by the ‘house-hold registration’ system largely stopped rural-to-urban migration in the PRC from the beginning of the 1960s onwards. This further slowed down the expansion of the public pension system (which only covered the workforce of the urban sector).

## **CHAPTER FIVE: EVOLUTION OF PUBLIC PENSION REGULATION IN THE EARLY STAGE OF CHINA'S ECONOMIC REFORM AND LIBERALIZATION, 1978-1989 (WITH A BRIEFING OF THE CULTURAL REVOLUTION, 1966-1976)**

### **1. Introduction**

As discussed in the previous chapter, from the mid-1950s onwards, the public pension system had been evolving under the centralized party-state regime and the 'vertical management system'. This chapter continues the discussion by first describing the evolution of the public pension system during the *Cultural Revolution* from 1966 to 1976, as this particular period not only witnessed the complete disruption of many socio-economic functions of the state, but also foreshadowed the significant socio-economic reforms in the late 1970s and 1980s.

The time period between 1978 and 1989, i.e., the early stage of China's *Economic Reform and Liberalization*, merits special attention for two important reasons. First, it witnessed a number of important strategic reforms and changes to the general model of state regulation and administration, which further triggered a number of new changes to the *spaces* and *process* of the public pension system followed by a new model of pension regulation. Second, it was characterized by far reaching institutional changes in the government, business and labour sectors, particularly in the second half of the 1980s, which further added to the dynamics of the regulatory system for further evolution. All these changes in the social environment and the developments in regulation will be reviewed in the third section of this chapter.

## 2. Disruption of China's Public Pension System during the Cultural Revolution, 1966-1976

### 2.1 *The Cause of the Cultural Revolution*

After the CCP took over all regulatory powers originally designated to the legislative, the judiciary, the government, the trade union and business in the public pension system, a division soon emerged within the CCP leadership regarding the general strategy of socio-economic administration, particularly, in the wake of the '*Great-leap Forward*' which resulted in a serious 3-year recession and starvation in the early 1960s.<sup>1</sup> The gist of this division was whether the political vision of Mao should be strictly followed, or whether adaptations should be made in response to the real consequences of the previous policies and guidelines.<sup>2</sup> Advocates of these two different models of socio-economic administration further developed into two groups within the CCP.

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<sup>1</sup> After the *Great Leap Forward*, the CCP leadership decided to hold a meeting of all representatives of CCP cadres from different regional governments and SOEs—the so called 'Seven-Thousand-Man Meeting' (*qi qian ren a hui*) in 1962. The most important issue of the meeting's agenda was to discuss the achievements and mistakes of the *Great Leap Forward*. However, given the serious socio-economic consequences brought about by the movement initiated by Mao, this meeting concluded that the *Great Leap Forward* was a *fiasco* mainly caused by wrong leadership and administration while other factors like the impact of natural disasters also contributed to the gravitation of problems. The net result of this meeting was Mao's secession from economic planning and administration. As a matter of fact, from 1962 to 1966, Mao was commonly said to be sitting in the back row of decision-making concerning economic issues. While this period witnessed a fast economic recovery of China, it also witnessed the increasing tension within the CCP top leaders, i.e., the tension between Mao and Liu. For the consequences of the 'Seven-Thousand-Man Meeting' and its impacts on the development course of China in 1960s, see: Zhu Xiao, 'The 'Seven-Thousand-Man Meeting'--a Watershed of Mao and Liu's Relation (七千人大会——毛泽东和刘少奇关系的分水岭)' (2009) (12) *Over the Party History* (党史纵横) pp. 12-15; Zhong Zhi, 'Mao Zedong and Liu Shaoqi in the 'Seven-Thousand-Man Meeting' ( "七千人大会" 上的毛泽东和刘少奇)' (2009) (2) *Historic Literature of Wuhan* (武汉文史资料) pp. 4-15.

<sup>2</sup> This was the fundamental cause of the division between Mao and Liu in early 1960s. While Mao was always stressing the importance of political purity, predominance of public ownership and elimination of any economic exploitation, Liu took a more pragmatic approach to socio-economic issues. In Liu's opinion, while the orthodoxy of socialism was then ideologically the highest political principle, its real impacts on the Chinese society had so far remained unclear. Therefore, continuous study and observation were essential to the adaptations of socio-economic policies. For this particular point of view of Liu, see: Xianmin Tan and Zheng Tang, 'A Hard Choice from the Mass Movement to the Law of Economy--The Course and Characteristics of Liu Shaoqi's Consideration on New China's Economic Construction (从群众运动到经济规律的艰难选择——刘少

The first group were known as the ‘*leftists*’ who believed that from the end of the 1950s onwards, the Chinese society was facing an ongoing challenge from some newly emerging capitalist elements, even though a dominant state-owned sector in the national economy had been established through Socialist *Transformation Movement*. However, unlike the capitalist elements in the early 1950s, the new Capitalism in the new socialist state was largely constituted by the CCP cadres and officials who were acting in a way perceived to be counter-productive to the socialist order.<sup>3</sup> In other words, these cadres and officials did not perform their functions and duties strictly in accordance with Mao’s political vision, which prioritized absolute public ownership and socio-economic equality for the purpose of eliminating any socio-economic exploitation.<sup>4</sup> In Mao’s opinion, the best way to cleanse the new *capitalist* elements in the society was mobilizing the people to join in political movements,<sup>5</sup> as vast civil participation in political movements could not only help achieve socio-economic goals but also prevent the integrity of the party-state regime from deterioration. This particular model of popular movements driven by political mobilization through *charismatic* influence of top political

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奇思考中国经济建设的历程与特点)' (2010) (2) *Journal of Social Science of Hunan Normal University* (湖南师范大学社会科学学报) pp. 75-79.

<sup>3</sup> For this political vision of Mao, see: Donglin Chen, 'Mao Zedong's Assertion of New 'Class Struggle' and the Cause and Characteristics of the Cultural Revolution (毛泽东的新“阶级斗争”论断与“文化大革命”的起因和特点)' (2000) (6) *Study of the History of the CCP* (中共党史研究) pp. 72-77.

<sup>4</sup> Mao’s vision about the economic development path had strong influence over the period between late 1950s and early 1960s. Although interrupted from 1962 to 1966, this vision was again put into practice during the Cultural Revolution. See, for example: Li Wu, 'A Comparative Study on the Evolution of Chinese Government's Role in Economic Development (中国政府经济职能演进历史及比较研究)' (2003) *Collection of Papers of the Third Annual Meeting of Chinese History Study* pp. 154-163.

<sup>5</sup> This view formed the theoretical basis of Maoist political movements aimed at maintaining the organizational integrity of the CCP. See, for example, Derui Li, 'Mao's Theory and Practices of Anti-Bureaucracy (毛泽东反对和克服官僚主义的理论与实践)' (2003) 23(4) *Academic Forum of Nan Du (Journal of the Humanities and Social Sciences)* (南都学坛人文社会科学学报) pp.97-98.

leaders formed the centre piece of Mao's paradigm of socio-economic administration and regulation.<sup>6</sup>

Unlike the *leftists*, the other group of politicians within the CCP followed Liu Shaoqi, then president of the PRC, who took a less *dogmatic* and more *pragmatic* approach to socio-economic administration. In contrast to Mao's *leftist* group, these *cadres* and officials were reluctant to fully accept Mao's view that the existing social conflicts largely stemmed from the resurgence of *capitalism* in the *socialist* state.<sup>7</sup> Although they agreed that the *socialist* order should be maintained at all costs, they didn't fully agree that absolute public ownership and egalitarianism was the only approach to administering the economy and society.<sup>8</sup> Instead, they believed that the real consequences of the policies aimed at achieving certain socio-economic goals within the general context of *socialism* were to be subjected to ongoing observation, and the socio-economic institutions established to facilitate *egalitarian* distribution of economic resources should also be examined and evaluated before carrying forward any further socio-economic reform.<sup>9</sup> In terms of socio-economic administration and regulation, they advocated formal and specialized mechanisms relying on legal and governmental institutions to address social

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<sup>6</sup> See, especially, Li Wu, 'Exploratory Efforts of Mao Zedong concerning the Relations between Central and Regional Governments in Economic Administration since 1949 (1949 年后毛泽东对中央与地方经济关系的探索)' (Paper presented at the 6th Annual Conference of the Chinese History Society, 2006).

<sup>7</sup> According to Liu, after the *Socialist Transformation*, the national economy had been completely subjected to the centralized planning. Therefore, capitalism was no longer a major source of social conflicts. Instead, vestiges of capitalism and their negative impacts on the socialist economy were to be treated as internal conflicts of the people, not a fundamental conflict to be treated a political fight against the foe. See: Xianmin Tan and Zheng Tang, 'A Hard Choice from the Mass Movement to the Law of Economy--The Course and Characteristics of Liu Shaoqi's Consideration on New China's Economic Construction (从群众运动到经济规律的艰难选择——刘少奇思考新中国经济建设的历程与特点)' (2010) (2) *Journal of Social Science of Hunan Normal University* (湖南师范大学社会科学学报) pp. 75-79, above n 2.

<sup>8</sup> See above nn. 1 and 2.

<sup>9</sup> See above nn. 2 and 6.

problems,<sup>10</sup> while in order to maintain the integrity of the CCP *cadres* and government bureaucrats, they stressed the importance of supervision and control mechanisms inbuilt within the CCP system rather than within Mao's political movements.<sup>11</sup>

While these two different groups co-existed within the CCP, political conflicts continued to develop from the early 1960s, and the visionary schism further increased the tension within the political system by the mid-1960s.<sup>12</sup> In this regard, even the strong economic recovery from 1963 could not stop the tension from building up. Instead, the recovery further raised Mao's concern over the development path of the PRC. To Mao, Liu's pragmatic approach to socio-economic administration required increasing specialization of the government system. While this might contribute to economic growth, it also increased the chances of corruption. To Mao, this was a big concern, as the specialization of the government system accompanied by growth of corruption indicated the irreversible deterioration of the political integrity of the *cadres*, which would

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<sup>10</sup> See, eg, Quanli Chang and Liling Zhang, 'Liu Shaoqi's Exploratory Efforts for Reforms on the Political Institutions after the Founding of the PRC (建国后刘少奇政治体制改革思想探析)' (2008) (2) *Vicissitudes (沧桑)* pp. 67-71; Lijun Zhang, 'Liu Shaoqi's Philosophy of Addressing Conflicts between the CCP Cadres and the People (刘少奇关于正确处理人民群众同领导者矛盾的思想)' (2009) (5) *Scientific Socialism (科学社会主义)* pp. 124-127.

<sup>11</sup> See the references in above n 9. In particular, although Liu agreed that political movement with vast popular involvement was an important instrument to maintain the integrity of the bureaucracy, he also stressed the particular role of the state authorities in organizing and guiding the movements. In this respect, Liu's version of political movements was less fierce and violent as compared with Mao's. See: Kejin Deng, 'A Study on Liu Shaoqi's Conceptualization of Mass-line Movements in early 1960s (60年代初刘少奇对群众路线的进一步总结)' (2004) 14(3) *Journal of Changchun University (长春大学学报)* pp. 59-61.

<sup>12</sup> This political tension referred, in particular, to the schism between the *leftists* and the *rightists*. To be more specific, this schism was a visionary and strategic division between Mao and Liu as well as their respective followers. Many research articles identified this schism as one of the major causes of the Cultural Revolution. See, for example: Chunming Jin, 'A Literature Review of the Studies on the Causes of the 'Cultural Revolution' ( "文革" 起因众说纷纭)' (1995) (3) *Corpus of Party History (党史文汇)* pp. 2-7; Xupeng She, 'An Overview of the Researches on the Causes of the 'Cultural Revolution' ( "文革" 起因研究综述)' (2005) (5) *History of the CCP in Canton (广东党史)* pp. 31-34.

eventually erode his political influence over the *socialist* party-state.<sup>13</sup> Finally, these concerns, together with the pre-existing tension, developed into some direct ideological rivalry within the CCP in early 1966, and in response to this new situation, Mao decided to initiate another political movement across the nation.<sup>14</sup> These internal conflicts accompanied by some external disturbances stemming from the deterioration of foreign relations with the Soviet Union, contributed to the final outbreak of the *Cultural Revolution* in mid-1966.<sup>15</sup>

## ***2.2 Policy Input for the Cultural Revolution and the Emergence of the Revolutionary Committees***

According to Mao, the main purpose of the *Cultural Revolution* was to maintain the integrity of *socialism* in China; and to achieve this goal, a special revolutionary policy—‘from big disorder to big order’ (*da luan da zhi*)—was to be followed.<sup>16</sup> To be more specific, the *disorder* referred to the political movement of *rebels* under the leadership of Mao to displace those *capitalist cadres* and officials, while the *big order* referred to the transformation of the *rebels* alongside the *Cultural Revolution* into a new generation of *cadres* and

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<sup>13</sup> See, for example: Yi'ou Chen, 'Study on Mao's Anti-Corruption Philosophy (毛泽东治理腐败思想论析)' (2009) (2(b)) *Legal System and Society (法制与社会)* pp. 186-187.

<sup>14</sup> This extreme view was best proved by a personal mail of Mao to his wife, in which Mao strongly asserted ‘they (i.e., the rightists) are attempting to overthrow me and our Party, ... so our mission is to defeat them both in the Party and in the state.’ In the mail, Mao also identified himself with the leader of the ‘leftist’ wing while expressing the determination to carry the war through until complete victory. One Chinese source of this letter is available from a website, see: [http://www.stnn.cc/global/wg/wg10/t20060511\\_210419.html](http://www.stnn.cc/global/wg/wg10/t20060511_210419.html) first retrieved at December 5th, 2009.

<sup>15</sup> The deterioration of the relations with the Soviet Union was also identified as an important cause of the ‘Cultural Revolution’. It was believed by Mao and his followers that the rise of the *rightists* could be ascribed to the strong support from the Soviet Union. See, for example: Xupeng She, 'An Overview of the Researches on the Causes of the 'Cultural Revolution' ( “文革” 起因研究综述 )' (2005) (5) *History of the CCP in Canton (广东党史)* pp. 31-34.

<sup>16</sup> Tianshui Zhang, 'Study on Mao Zedong's Ideological Development and Characteristics throughout the 'Cultural Revolution' (试析毛泽东在 “文化大革命” 中的思想轨迹和特点)' (1993) (1) *Research of Mao Zedong's Philosophy (毛泽东思想研究)* pp. 134-139.

officials serving as successors to Mao's *socialism* in China.<sup>17</sup> It was under this particular policy that a restructuring of the existing party-state regime began and the so called *Revolutionary Commission* came into being.<sup>18</sup>

A *Revolutionary Commission* was a special state authority introduced in the early stage of the *Cultural Revolution*. Compared with the pre-existing party-state regime, the *Revolutionary Commission* system sought to upgrade the concentration of power by expressly merging the CCP, the legislature and the government,<sup>19</sup> while replacing the majority of the old *cadres* and bureaucrats under the party-state regime with new *rebels* of the *Cultural Revolution* who had claimed their absolute allegiance to Mao.<sup>20</sup> These mainly included people who had used violence to take over the state and the government bureaucracy at the beginning of the *Cultural Revolution*. While some old *cadres* and bureaucrats survived the political struggles and continued to serve certain roles in the *Revolutionary Commission* System, the leadership of the new system was largely to be constituted by the *rebels*. This replacement campaign corresponded with the political vision of Mao—the so called 'big disorder' of

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<sup>17</sup> For a detailed account of the *Revolutionary Commission* and its development during the Cultural Revolution in China, see: Zhiming Zhang, 'Study on Revolutionary Commissions During the 'Cultural Revolution' ( "文化大革命" 时期革命委员会研究 )' (Doctoral Thesis, Academy of the CCP (中央党校), 1995) pp. 159-164.

<sup>18</sup> In the narrow sense, a Revolutionary Commission was a new state organ which began to replace the legislature and government in 1966. In the broad sense, Revolutionary Commission was a uniform institution that followed Mao's ideal model of government, i.e., a 'grand democracy', under which government leaders were directly elected by the people, continuously monitored by the people, and also subjected to direct dismissal or replacement by the people. To have people's interest well represented, the Revolutionary Commissions at all levels were also required to involve three different groups of commissioners—old CCP cadres (who had survived the political purge), military servicemen, and the Revolutionists (i.e., rebels who took the lead in overthrowing the old regime).

<sup>19</sup> It is important to note that by early 1967, the Revolutionary Commission as a form of state authority had been rolled out in 29 provinces, municipalities and autonomous regions, while the other two autonomous regions, i.e., Xinjiang and Tibet, soon witnessed the establishment of the commissions in 1968. In this sense, except for Taiwan, Hongkong and Macao, the whole mainland under the rule of the CCP was then administrated by Revolutionary Commissions. See: Haiting Guan, 'The Start and End of the 'Revolution Commissions' ( "革命委员会" 始末 )' (1991) 527(6) *Journal of Chinese Communist Party History Studies* (党史研究) pp. 47-52.

<sup>20</sup> *Ibid.*

the revolution. However, when the *Revolutionary Committee* system was finally established in the last two years of the 1960s, the *disorder* did not lead to the ‘big order’ envisaged by Mao. Rather, many socio-economic functions of the state, including the regulation and administration of the public pension system, were disrupted.<sup>21</sup>

### ***2.3 The Impact of the Cultural Revolution on the Regulation of Public Pension***

From the late 1950s through to the outbreak of the *Cultural Revolution* in 1966, the public pension system was largely administered by the trade union movement (i.e., the ACFTU) whose functions included both routine operations (such as fund collection and benefit distribution) and fund management (such as fund pooling, i.e., administering nation-wide transfer payments). Although the labour department was originally assigned with the supervisory and enforcement roles, it withdrew from the regulation in the mid-1950s following a systemic downsizing of the government. After the completion of the *Socialist Transformation Movement*, the regulatory role of the Labour Ministry was not restored.<sup>22</sup> Rather, it only served some advisory function in the regulation,<sup>23</sup> for example, policy research and elaboration in relation to the existing rules, as well as some review and evaluation functions such as replying to enquiries from

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<sup>21</sup> For the curtailment and downsizing of the state and government authorities, see: Haiting Guan, 'Study on the Organizational Down-sizings During the 'Cultural Revolution' (论“文化大革命”中的精简机构)' (1994) 116(2) *Study of the CCP's History and Teaching Methodology* (党史研究与教学) pp. 23-30. For the massive destruction of the state and government authorities relating to labour insurance and retirement pension, see: Bingwen Zheng, Qingbo Gao and Huan Yu, 'A Review of 60 Years: Interactions between the Theories and Practices of Social Insurance (60年回顾: 社保理论与社保制度的互动)' (2009) (10) *China Social Security* (中国社会保障) pp. 114-117.

<sup>22</sup> See: Bingde Liu, 'An Account of Labour Insurance's Piloting in Chongqing (重庆试点记事)' (2009) (10) *China Labour Security* pp. 18-19.

<sup>23</sup> Ibid.

regional or sub-regional trade unions. However, after the initiation of the *Cultural Revolution*, this regulatory system was completely destroyed.

As mentioned above, the *Cultural Revolution* was a political movement to replace the existing *cadres* and officials of party-state regime.<sup>24</sup> In this particular context, socio-economic administration including the public pension regulatory system invariably became the target of the *Revolution*. In fact, the leadership of the ACFTU and the Ministry of Labour were replaced immediately after 1966, and their regulatory roles were also suspended.

The general pooling fund which had been used to coordinate benefit distribution across the whole country was frozen. The PAYG pension scheme established in early 1950s was completely dismantled. After replacing the leaders of the ACFTU, the trade union was reduced to a political affiliate of the *Revolutionary Committee*, and its major function was reduced to engaging workers for political struggles aimed at displacing the old government bureaucracy. Meanwhile, the advisory function of Ministry of Labour was also repealed.<sup>25</sup> In 1968, it was further incorporated into another government department responsible for economic planning—the National Commission of State Planning.

With the ACFTU and the Ministry of Labour being removed from their regulatory functions, public pension scheme was further transferred to

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<sup>24</sup> See Zhiming Zhang, above n. 17.

<sup>25</sup> From early 1960s the Ministry of Labour started a systematic program aimed at modifying the *Labour Insurance Provision* (1953). This program was an effort to reform the existing social insurance schemes including the pension schemes for industrial workers in the SOEs. Many social insurance laws and regulations of different countries, both developing and developed, were translated and compared while a final draft of the new regulatory provisions was also prepared for examination and approval by the State Council in 1964. However, the draft, together with the translated documents, was repudiated by the *revolutionists*, soon after the beginning of the Cultural Revolution. See: Chunrun Tian, 'The Evolution of the Pension Insurance System (养老保险制度流变)' (2009) (10) *China Social Security* (中国社会保障) pp. 25-28.

individual SOEs, pursuant to a government initiatives in 1969—In that year the Ministry of Finance issued a directive *Suggestions for Reforming the Accounting Rules in SOEs*. According to these guidelines, each SOE was responsible for the pension entitlement of its own workforce.<sup>26</sup> As a result, the PAYG pension scheme ceased as a social program administered by the state. Rather, it became an enterprise-based scheme to be delivered by each individual SOE at its own cost.

Although this kind of disruption in state regulation was apparent in the arena of public pension, it was not an exceptional case. Rather, it was a prevalent phenomenon among various socio-economic programs during the *Cultural Revolution*. After dismantling the old party-state regime, the new *Revolutionary Commission* system ceased to recognize the validity of many rules and laws concerning socio-economic regulation. Because the top leader of the *Cultural Revolution* (i.e., Chairman Mao) held the view that passing formal laws and regulations were not only time-consuming but also inflexible.<sup>27</sup> They limited the discretion of the *cadres* to exercise their power to steer the socio-economic developments under the new *socialist* context. In this regard, ‘rule by man’ through policies, commands and decisions made by the CCP *cadres* was a more effective means of social ordering.<sup>28</sup> As a result, a special model of socio-economic administration, which completely repudiated formal laws and written rules, was further developed in the early stage of the *Revolution*. A colloquialism that may best reflect this particular administrative style is ‘black

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<sup>26</sup> See Bingde Liu, above n. 22.

<sup>27</sup> See, eg, Zhongda Li, ‘A Historical Review of Mao Zedong’s Legal Thought and Practices (历史地全面地评价毛泽东的法律思想及其法制实践)’ (2004) (2) *Journal of Socialist Theory Guide* (理论导刊), pp. 31-33.

<sup>28</sup> For this particular Maoist view of social control and ordering, see, especially, Shuze Ren, ‘Study of Mao Zedong’s Legal Thought and Practices (毛泽东法制思想及实践探析)’ (2003) (2) *Theory and Reform* (理论与改革), pp. 124-126.

prints (written laws and statutes) are inferior to red tapes; red tapes are inferior to written commands on the white margins (of the red tapes); while all of the above are no match for verbal instructions (of the people in charge).<sup>29</sup> That further explains why the regulatory rules underlying the entire regulatory system of public pension established in early 1950s and reformed in late 1950s were so easily repudiated during the early stage of the *Revolution*.

Given the paralysis of the regulatory system, the ability of the state to respond to new socio-economic problems and issues was also impaired. In the first half of the 1970s, hundreds of thousands industrial workers reached the retirement age. However, many of them remained in their offices, and this continued well into the second half of the 1970s when the number of over-retirement-age employees reached 2 million.<sup>30</sup> In other words, instead of getting pension benefits, many *retired* workers got their salaries paid as if there were no retirement at all. The impact of this phenomenon was two-fold. On one hand, the rising proportion of old-age workers and the ill-functioning retirement system lowered the productivity the SOEs in the second half of the 1970s; while, on the other hand, failure to get the old-aged workers retired further reduced the number of vacancies available for the young generation—mostly the baby-boomers of the 1950s—waiting to be employed, thus causing growing social concerns of unemployment. However, just before these problems developed into any socio-economic crisis, the *Cultural Revolution* dramatically came to an end in 1976. The death of Mao in late 1976 and the accession of Deng to the top

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<sup>29</sup> See, eg, Jianji Wang, 'Ideological Change to Support "Rule by Law" (推进依法治国进程必须更新观念)' (1998) (12) *People's Congress Studying* (人大研究), pp. 26-27.

<sup>30</sup> For this particular fact, see, Haibo Zhang, 'China's Public Pension System: Model Selection and Improvement (中国公共养老金制度的模式选择与完善)' (Doctoral Dissertation, Nankai University, 2009), p. 55.

leadership of the CCP in 1978 finally ushered China into a new state of economic reform and liberalization.

### **3. Continuation of Public Pension Regulation in the *Economic Reform* and *Liberalization* after the *Cultural Revolution***

#### **3.1 *Some General Changes Brought Forth by the Economic Reform and Liberalization Program***

The new *Economic Reform* and *Liberalization* was initiated in 1978 as a result of the 3<sup>rd</sup> plenary session of the 11<sup>th</sup> Central Committee of the CCP. During this session, the decision to implement a number of important socio-economic reform programs was announced by the top leadership of the CCP. Although the fundamental purpose of the *Reform* was to prioritize economic development over the political movements of the *Cultural Revolution*; the *Reform* took a set of distinctive strategies to socio-economic administration diverging from those adopted in previous times.

First, the *Reform* introduced the idea of ‘socialist rule by law’, in lieu of the ‘rule of man’, as one of the cardinal principles of all socio-economic reforms.<sup>31</sup> According to Deng, the ‘socialist rule by law’ summarized in four phrases—‘availability of legal rules’ (*you fa ke yi*); ‘reliance on legal rules’ (*you fa bi yi*); ‘rigidity of rule implementation’ (*zhi fa bi yan*); and ‘certainty of enforcing compliance’ (*wei fa bi jiu*)—was the key policy to address the social problems left behind by the *Cultural Revolution*, such as the blind personal cult of Mao,

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<sup>31</sup> *Collection of Selected Works of Deng Xiaoping* (2) (邓小平文选2) (The People's Press (人民出版社), Beijing, 1983) p. 189.

the abuse of power, and the turbulence of the society.<sup>32</sup> While it primarily aimed at restoring many of the socio-economic regulation and administration programs disrupted by the *Cultural Revolution*, it also marked the revival of the legislative authorities and the court system as legitimate participants in the system generally.<sup>33</sup>

Second, the *Reform* also introduced a pragmatic approach—the so called ‘getting across the river by feeling the stones (lying beneath the surface)’—to experiment with new programs aimed at reforming the economy and the society.<sup>34</sup> It was envisaged that the Central Government was unable to conduct and lead the reforms alone. Rather, involvement of the governments and state authorities at lower levels was the essential complement to the *Reform* and *Liberalization*. Within this new context, the regional and sub-regional governments were a huge force not only capable of implementing the policies and commands from the Central Government, but also able to explore new mechanisms and tactics in light of their own local conditions.<sup>35</sup>

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<sup>32</sup> According to Deng Xiaoping, Mao has committed a number of mistakes after the completion of the Socialist Transformation Movement in the second half of the 1950s while the root cause of all these was Mao’s obsession with the purity of socialism in China regardless of the real consequences and outcomes of applying orthodox socialism, i.e., egalitarianism in economic production, absolute public ownership in managing business and labour and emphasis on ‘class struggle’ in political movements. One commentary from Deng may best summarize his criticism on this particular stance cherished by Mao—‘Over several decades we have suffered so much despite the completion of the Socialist Transformation simply because we stuck to the orthodoxy that class struggle is the supreme rule while ignoring the priority of developing production.’ See: *Collection of Selected Works of Deng Xiaoping (3)* (邓小平文选3) (The People’s Press (人民出版社), Beijing, 1993) p. 141.

<sup>33</sup> *Ibid.* p. 147.

<sup>34</sup> *Ibid.*

<sup>35</sup> Deng made a few comments on the relationship between the Central State/Government and regional, sub-regional governments under the general context of *Economic Reform* and *Liberalization*: ‘[L]egal provisions can start with crude and general rules that are subject to further refinements at later stages. Some regional or local regulations can be promulgated first as experiments, and be studied later before being passed as national laws or regulations. In a word, something is better than nothing; being quick is better than being slow.’ See: *Collection of Selected Works of Deng Xiaoping (3)* (邓小平文选3) (The People’s Press (人民出版社), Beijing, 1993) p. 332.

Third, as a result of these strategic changes mentioned above, the political leadership further introduced some new initiatives to change the ‘vertical management system’ governing the relations of the governments, enterprises and labour.<sup>36</sup> In particular, the *Reform* process de-centralized the system by empowering the governments at lower levels to carry out their own experimental reform programs whose results and outcomes were to be further observed and assessed by the Central Government for the purpose of policy learning.<sup>37</sup> In other words, governments at the lower levels were not only given more *horizontal* administrative powers to manage their own functional departments and agencies to carry out socio-economic reforms,<sup>38</sup> but also were allowed to play an advisory role in administrative and regulatory designs.<sup>39</sup>

As a result of these strategic changes brought forth by the general policy of *Reform* and *Liberalization*, the *regulatory space* (i.e., the constitution of the regulatory system) and *process* (the course of action in the regulation) of the public pension system also underwent a number of important changes from the late 1970s onwards.

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<sup>36</sup> Under the rule of Mao, regional governments had very little power to influence the formulation of administrative ordinances from the central government. Their role was largely limited to the implementation of the central plans, and their share of the fiscal revenues was very low as the vast majority of the revenues sourced from profits of the SOEs were directly handed over to the central government through the functional ministries that were directly managing the corresponding industrial or commercial sectors. See, especially, Fan Zhou, 'Intergovernment Relations in China after 1978: A Legal Perspective (改革开放后的中国府际关系: 一种法律的途径)' (PhD Thesis, Fu Dan University, 2003) pp. 84-85.

<sup>37</sup> Zhou, Fan, 'Intergovernment Relations in China after 1978: A Legal Perspective (改革开放后的中国府际关系: 一种法律的途径)' (PhD Thesis, Fu Dan University, 2003) p. 88.

<sup>38</sup> Ibid.

<sup>39</sup> See, eg, Qingkui Xie, 'Inter-Governmental Relations in China(中国政府的府际关系研究)' (2000) 37 (1) *Journal of Peking University*, pp. 26-34.

## ***3.2 New Changes to the Regulation of Public Pension***

### *3.2.1 Changes in the Regulatory Spaces of Policy Formulation, and Review and Evaluation in the late 1978*

As mentioned above, in the late 1970s, the SOEs were facing serious failure of the retirement system, i.e., over one million of industrial workers reaching the retirement age remained in their positions. This situation triggered the response of the Central Government in 1978—*Provisional Rules Concerning Retirement*—drafted by the State Council and endorsed by the National People’s Congress (the newly restored national legislature). Although the 1978 *Provisional Rules* did not make any significant change to the substantive terms and conditions of the public pension scheme stipulated in the revised *Labour Insurance Provisions* of 1953, and maintained the practice of enterprise-based provision of pension benefits, they introduced new mechanisms to reform the constitution of the regulatory system (i.e., the *regulatory spaces*), thus triggering a number of changes in the regulation from 1978 onwards.

First and foremost were the changes in the *spaces* of policy formulation, and review and evaluation. Unlike previous regulation and administration, the 1978 *Provisional Rules* recognized the role of the regional governments in helping formulate general policies concerning reforms in the public pension system. In particular, in the *Preamble* of the *Provisional Rules*, the State Council made special reference to the term ‘provisional’ and called on all the regional governments to join in the regulatory system for further reforms:

We hereunder issue the *Provisional Rules* to you in order to guide your experimental programs whereby lessons and

experience are to be drawn for future reform programs to be rolled out on a larger scale across the nation.<sup>40</sup>

As indicated by the above stipulation, the regional governments were no longer mere implementers of the commands and rules of the Central Government as they had been under the old, centralized ‘vertical management system’. Rather, they were allowed to advance new policy proposals concerning the reforms of the public pension system on the basis of the outcomes stemming from the implementation of the *Provisional Rules*.

Despite this change, however, it is equally important to note that in the late 1970s, the entire government system was still being controlled by the CCP. It was the CCP Commissions of the regional and sub-regional governments that were the real leaders administering socio-economic reforms.

### 3.2.2 Changes to the Regulatory Space of Correction in the early 1980s

Feedbacks concerning the real performance of the 1978 *Provisional Rules* began to accumulate in the early 1980s, while most of the reports concerning the 1978 *Rules* were made in the name of regional or sub-regional governments. Apart from some minor problems, such as failure to differentiate retirement ages across different occupations,<sup>41</sup> and loopholes in some of the practices aimed at encouraging people to retire,<sup>42</sup> the main problems mostly stemmed from the incongruence of the *Rules* when laid alongside some contemporary

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<sup>40</sup> *Provisional Rules Concerning Retirement* (People’s Republic of China), State Council, No 104, 2 June 1978, Preamble.

<sup>41</sup> See: The State Council's Bill for Delegation to the State Council to Make Amendments and Supplements to the *Provisional Rules concerning Retirement* (国务院关于提请审议授权国务院对职工退休退职办法进行部分修改和补充的议案) 1983.

<sup>42</sup> Guangshao Yue, 'Problems Arising from 'Replacement by Sons and Daughters' (谈谈职工子女顶替问题)' (1980) (5) *Labour and Work* (劳动工作) pp. 9-11.

socio-economic reforms, such as the reforms on corporate tax, and government revenues. The gist of the problems was that the ‘enterprise-based’ provision system for the retirement pension had been increasingly unable to spread the risk of ageing across the SOEs,<sup>43</sup> which further obstructed the realization of the policy aims of the above reforms.

In 1983, as more and more regional governments began to see these limitations in the existing pension system, it was widely agreed that the ‘enterprise-based’ pension system was no longer fit for the new socio-economic environment, and the original policy intention of the Central Government to roll out the retirement pension scheme under the 1978 *Provisional Rules* needed correction.<sup>44</sup> In response to these feedbacks and proposals aimed at adjusting the regulating rules,<sup>45</sup> the State Council of the Central Government submitted, in late 1983, a bill to the Standing Committee of the National People’s Congress to suspend the implementation of the 1978 *Provisional Rules*; while asking for the delegation from the national legislature for carrying out further reforms on the public pension system. For the first time, a regulatory response of correction was

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<sup>43</sup> In 1978 the number of retired pensioners from SOEs was 3.41 million. But the figure increased up to 11 million strong in 1982 while in 1988 the same figure was over 21 million. Another indicator of this serious problem is the ratio of the existing workforce to retired pensioners. In 1978, this ratio was 30.3 to 1; in 1982 it was 12.8 to 1; while in 1985 the ratio further gravitated down to 7.5 to 1. See: Gongcheng Zheng, *On China's Social Security System* (《中国社会保障论》) (The People's Press of Hu Bei Province (湖北人民出版社), Wu Han, Hu Bei Province, 1995) p. 123.

<sup>44</sup> It was because of the incongruence of the pension system with the on-going socio-economic reforms that the State Council of the Central Government organized a special meeting—National Social Welfare Workshop—in 1983 to further sort out a plan of reforming the social insurance and public pension. See: Zi Pang, ‘Conclusive Speech by Comrade Pang Zi (Member of the Party Commission of the Ministry of Labour and Personnel) in the National Seminar on Social Insurance and Social Welfare (劳动人事部党组成员庞自同志在全国保险福利工作会议上的总结发言)’ (1984) (S2) *China Labour* (《中国劳动》), pp. 25-32.

<sup>45</sup> These suggestions and feedback were largely sourced from regional or subregional governments as they were the administrators of the enterprises that were the actual providers of retirement pension. A number of problems and issues were listed in the State Council's Bill for *Delegation to the State Council to Make Amendments and Supplements to the Provisional Rules concerning Retirement*. See: above n 41.

triggered in the domain of public pension through the joint efforts of the regional governments.

Soon after receiving the bill, the National People's Congress endorsed the State Council's plan.<sup>46</sup> This response to the feedbacks from lower levels of government not only corresponded with the CCP's top leadership's pragmatic approach to socio-economic reform, but also marked the beginning of a new model of rule-making because the State Council immediately delegated the power to the regional governments to pass their own rules of pension regulation.

This time, the regional governments collectively moved for establishing a public pension scheme similar to the PAYG system of the 1950s. Nevertheless, it was also agreed that this new system was not to be managed by the ACFTU (i.e., the trade unions) as it had been in the 1950s and the early 1960s. Rather, the labour departments of the regional governments were to take the lead in making and implementing the regulating rules.

### *3.2.3 Changes to the Regulatory Space of Rule-Making*

Soon after the State Council's decision to suspend the *Provisional Rules* in late 1983, a national workshop concerning social insurance was held by the Ministry of Labour and Personnel (i.e., the successor of the Labour Ministry before the *Cultural Revolution*). During the seminar, a number of regulatory issues concerning how to reform the public pension regulation were discussed.<sup>47</sup> In particular, it was agreed that the old PAYG scheme with a social pooling system

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<sup>46</sup> The Standing Committee of the National People's Congress granted on September 2<sup>nd</sup>, 1983. See: Decision of the Standing Committee of the National People's Congress to Grant Delegation to the State Council for Amendments and Supplements to the *Provisional Rules concerning Retirement* (全国人民代表大会常务委员会关于授权国务院对职工退休退职办法进行部分修改和补充的决定) 1983.

<sup>47</sup> For a detail account of the discussions during this workshop, Pang, 'Conclusive Speech' above n 44.

could not only help reduce the financial risks of workforce ageing in the SOEs, but also improve the congruence of the public pension system with other ongoing economic reforms, such as those related to corporate tax, wage and personnel management. Following these agreements, the Ministry of Labour and Personnel further endorsed the financial principle of the new PAYG scheme—‘fixing contribution rates in light of actual expenses while allowing for small amounts of surpluses’—proposed by representatives of some regional governments. Following these agreements reached in the workshop, a wave of rule-making by the regional governments aimed at reform the ‘enterprise-based’ pension system began.

In contrast to the formal legislative process in the early 1950s, the rule-making procedure in the 1980s typically inherited the legacy of the CCP’s policy-making model under the highly centralized party-state regime. To be more specific, the rule-making function was mainly discharged by the functional departments of the regional governments—the regional labour authorities—in a relatively enclosed environment through internal meetings, discussions and negotiations, while public participation was minimal. The requirement of publicity was minimal as the finalized rules were only supposed to be forwarded to the State Council and the regional People’s Congress, and no issue of legality was to be reviewed by the judiciary. The regulatory rules were then to be promulgated in the form of government red tapes that were addressed to relevant government departments which would forward them to other interested actors of the regulation. In this case, the relevant government departments were county/district-level labour departments while the interested actors were the SOEs within the jurisdiction of the specific regional government. Although this

model of rule-making was not open to the general public, and was under very loose control of the Central Government and the regional legislature, it was part of the so called the *socialist* ‘rule by law’ envisaged by the CCP top leaders because it formed the basis of policy and regulatory experiments for further socio-economic reforms.

It was in this particular context that rules regulating the new PAYG schemes were drafted by various regional governments between 1984 and 1986. In spite of some differences, they typically followed the general PAYG principle—‘fixing contribution rates in light of actual expenses while allowing for small amounts of surpluses’—endorsed by the Ministry of Labour and Personnel in 1983. Contribution rates varied from slightly over 10 *per cent* to over 25 percent of the payroll while the benefit levels stipulated in the State Council’s 1978 *Provisional Rules Concerning Retirement* were maintained. In addition, like the *Labour Insurance Provisions* (1953), SOEs were to make the contributions. While the majority of the contributions were paid to the social pools, a certain amount, typically one twentieth of the fund, would go to the governments as operational costs. Last but not least, all the regulating rules were dubbed ‘provisional rules’ as they were subject to further changes and revisions at the discretion of the rule-makers, i.e., the labour departments of the regional governments.

With these provisional rules in place, the regional governments became, on one hand, the rule-makers of the retirement pension schemes, and the providers of public services in relation to fund collection and distribution, on the other. In other words, the governments took over a substantial part of the functions and duties of the SOEs in relation to public pension. While these new arrangements

served to relieve the SOEs of the risk associated with workforce ageing, it also necessitated the creation of new government establishments to deliver the public services. This further led to some important changes to the *regulatory space* of implementation.

#### *3.2.4 Changes to the Regulatory Space of Implementation*

The necessity of establishing new government departments and agencies for the new social pooling system was first voiced in 1983. In the national workshop held by the Ministry of Labour and Personnel, it was recognized that all regional labour authorities should immediately: 1) entrench insurance and welfare departments in regional labour and personnel bureaux, and 2) build up sub-regional agencies to collect contributions, on one hand, and distribute benefits, on the other.<sup>48</sup>

Along with the rule-making at the regional level from 1984 to 1986, the *regulatory space* of implementation also began to evolve at the sub-regional level. Departments of social insurance were set up within regional and sub-regional labour bureaux to administer social insurance services, while service agencies were further commissioned by sub-regional labour departments to process routine operations of fund collection and distribution with the SOEs. Nevertheless, all the social pools of the PAYG pension schemes were established at the sub-regional level. In other words, transfer payments could only be processed across different SOEs within the same sub-regional jurisdiction (i.e., an urban district or in a rural county).<sup>49</sup>

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<sup>48</sup> See: Pang, 'Conclusive Speech', above n 44.

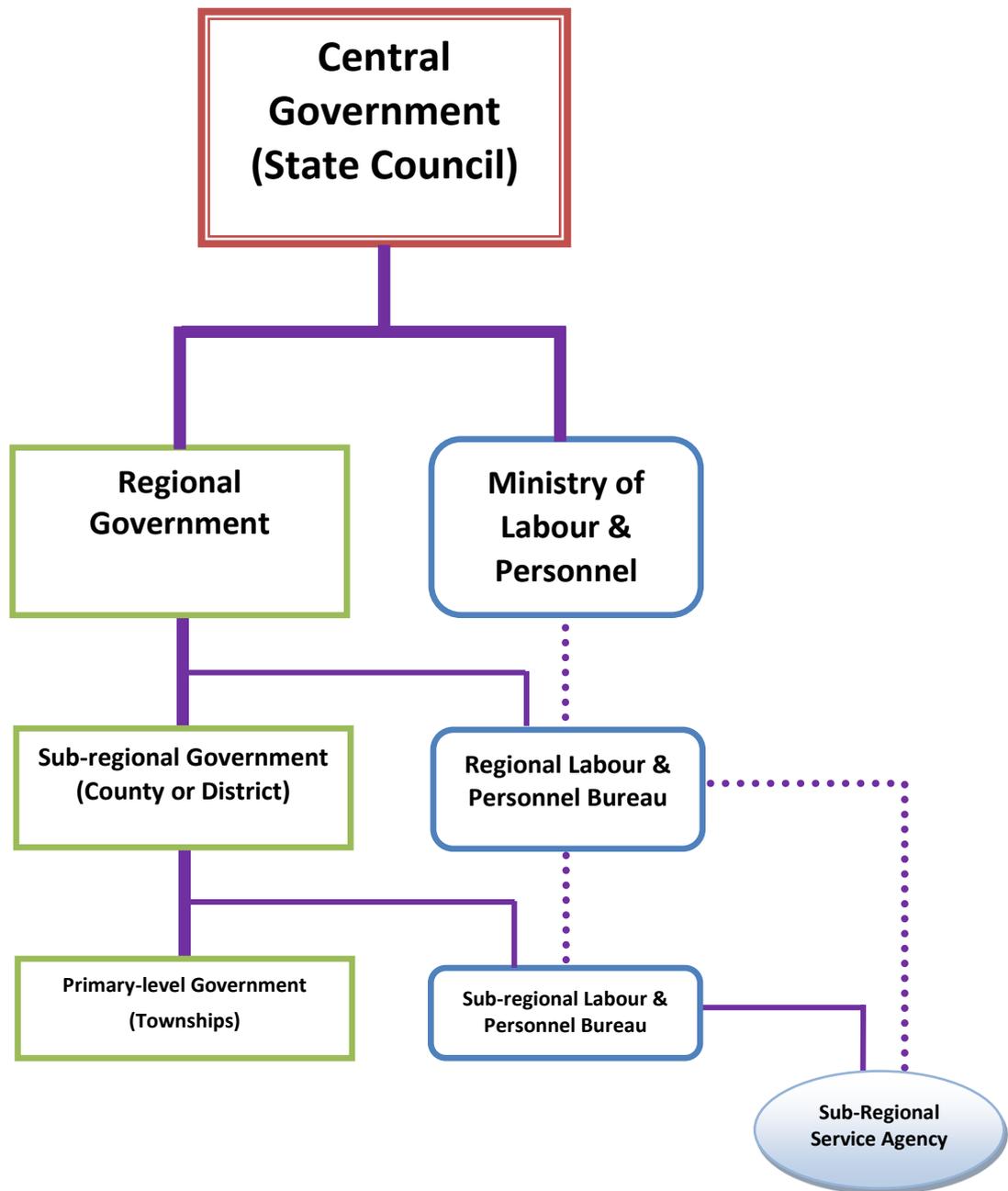
<sup>49</sup> The reason for this institutional change stemmed from two factors. First, the complete destruction of the trade unions and ACFTU during the Cultural Revolution had largely paralysed the functional ability of the trade

In spite of this, the administrative framework of the new PAYG system no longer followed the ‘vertical management system’. Rather, it was reshaped into a mixture of *horizontal* administration and *vertical* administration. To be more specific, while the new PAYG social pooling system was primarily administered by regional and sub-regional labour bureaux, the service agencies were largely commissioned by the sub-regional authorities which had the *horizontal* power to decide personnel and financial issues of the service agencies although the regional labour department had the *vertical* power to influence functional issues both of the sub-regional labour authorities and of the sub-regional service agencies. This particular administrative framework is illustrated by the diagram below.

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unions to manage pension and pooling, and this ability did not recover much even after the Cultural Revolution. Second, since the beginning of the Opening-up and Reform in late 1970s, the vertical functionality-based administrative structure was largely reshaped under the policy of ‘decentralizing power and transferring the profits’. On one hand, this power restructure was a political response to change the stagnation under the highly centralized planning system; while, on the other, this institutional reform also reflected the necessity of engaging regional and local governments in the Reform to carry out pilots and experiments within their jurisdictions. This political stance further repudiated the original model of social pooling which had been carried out through the vertical functionality-based administration by ACFTU.

**Chart 5.1: Administrative Framework of the *Regulatory Space of Implementation*<sup>50</sup>**



<sup>50</sup> This diagram is formulated by the author according to the descriptions in relation to the administrative structure of the social pooling system in 1980s.

The lines in the diagram suggest relations of subordination. In particular, bold solid lines indicate full administrative power, including personnel, financial and functional administration. Solid median lines indicate *horizontal* power of personnel and financial administration while dashed median lines indicate *vertical* power of functional administration. The regional government *horizontally* controlled the regional labour bureau and the same *horizontal* relation of subordination also applied to the sub-regional government and its sub-regional labour bureau.

Apart from *horizontal* administration, the *vertical* relations of administration and subordination existed between the labour authorities at different territorial levels—the Ministry of Labour and Personnel, the regional labour bureau and the sub-regional labour bureau—and between the regional labour bureau and the sub-regional service agency.

### ***3.3 New Socio-economic Changes to the Environment of Public Pension Regulation in the Second Half of the 1980s***

#### ***3.3.1 Socio-economic Problems Facing the Public Pension System in the mid-1980s***

As mentioned above, the establishment of the social pooling system in mid-1980s mainly aimed at reforming the ‘enterprise-based’ pension system by transferring the responsibility of pension provision to social insurance service agencies commissioned by the sub-regional governments. As a result, all the fund pools were built up at sub-regional level, i.e., within rural counties or urban districts.

While this new system helped many SOEs reduce the financial risks associated with the serious ageing of their workforce, the demographic trend of ageing continued to be a threat to the sustainability of the new PAYG system.<sup>51</sup> As a matter of fact, in the face of this demographic trend, the newly established PAYG system characterized by low level of sub-regional pooling was found to be too weak to spread the risk over a broader territorial basis, while managerial efforts of the SOEs to improve the age-structure of the workforce were further obstructed by the ‘iron rice-bowl’ system which had been providing the entire workforce with very generous welfare benefits accompanied by very secure employment terms endorsed by the centralized economic planning system. In fact, personnel management practices in relation to recruitment, remuneration, dismissal and job transfer were then heavily regulated by the state, and individual SOEs had very little power to manage their own workforce.

These two problems respectively stemming from demographic development of workforce ageing and institutional legacy of the planned economy finally triggered another important reform aimed at the corporate system in the late 1980s.

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<sup>51</sup> This view was largely shared out among Chinese public authorities regulating the provision of pension services. See, for example, Zhongdi Pan, 'Discussion of Social Pooling for Retirement Pension (论退休金的统筹)' (1986) (2) *Zhe Jiang Economy* (浙江经济) pp. 13-16. Also see: Yinhua Yang, 'The Analysis of the Institutional Changes in China's Retirement System (中国退休制度演变的制度分析)' (Masters Thesis, Su Zhou University, 2008), pp. 34-35. For instance, in Shanghai, i.e., the biggest industrial city, the dependency ration between the retired pensioners and working employees was already 27% by the end of 1985, while the total amount of outstanding pension benefits averaged 25 per cent of the total payroll of the SOEs. See: Huazhang Feng, 'Social Pooling of Retirement Pensions for SOEs in Shanghai (上海市全民所有制企业实行退休统筹的情况)' (1987) (6) *China Labour* (中国劳动) pp. 12-15. The same problem was prevalent in other major cities such as Beijing, Tianjin and Guangzhou, etc. See: Zhongdi Pan, 'Social Pooling of Retirement Pension Funds and Old-Age Insurance (试论退休费统筹与养老保险问题)' (1988) (5) *Zhe Jiang Economy* (浙江经济) pp. 6-8.

### 3.3.2 Corporate Reform and the Decline of the 'Iron Rice-Bowl' in the Second Half of the 1980s

Under the highly centralized planning system, the vast majority of the enterprises were SOEs *vertically* administered by the functional ministries of the Central Government. Within this particular context, SOEs were little more than the economic agents of the central ministries which also served as important planners of the national economy according to their respective terms of references. Within this institutional environment, the enterprises were required to carry out direct ordinances from the ministries while, at the same time, sticking to the 'iron rice-bowl' system, i.e., centralized state administration of labour.

In the 1980s, the deficiency of the 'iron rice-bowl' system became more and more significant because it reduced the incentives of the staff in SOEs to improve their economic performance.<sup>52</sup> This led to further decline of productivity in the state-owned sector.<sup>53</sup> In response to this, the Central Government made a decision in 1984 to introduce corporate reform in the SOEs—i.e., the State Council's *Provisional Rules of Enlarging Autonomous Power of the State-Owned Enterprises*.

According to these above rules, the corporate reform was an essential component to a bigger reform of the economic system endorsed by the Central Committee of the CCP through the *Decision of the Central Committee of the*

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<sup>52</sup> 'Revisit the Separation of the Governments and the Enterprises (政企分开在研究)' (1990) (4) *China Commodities and Trade* (中国物贸) pp. 25-28.

<sup>53</sup> Gongzhao Tang and Daming Zhang, 'Treating the Economic Relations between the State and the Enterprises Properly (正确处理国家与企业的经济关系)' (1990) (6) *Reformation of Economic System* (经济体制改革) pp. 17-29.

*CCP concerning Reforms of the Economic System*. According to the *Rules* and the *Decision*, the aim of this new economic reform was to create and experiment with market mechanisms within the broader economic environment of state planning<sup>54</sup>—i.e., a dualism in the economic system. For this purpose, two important policy issues were further raised—disengagement of the governments from corporate administration, and empowerment of the SOEs to manage their own staff.<sup>55</sup>

The policy objective of disengaging the governments from corporate administration largely stemmed from the recognition that to enhance the economic efficiency of the enterprises through market mechanisms the governments were to shift their role from direct administration of the SOEs, to that of regulating the market consisting of all forms of enterprises including but without limitation to the SOEs. Moreover, to fill the gap left by the secession of government administration, the SOEs were given the power to implement their own personnel management practices in light of their own business plans and needs. For this purpose, the State Council passed *the Provisional Rules Concerning the Implementation of Labour Contract Mechanisms in SOEs* in the mid-1980s. It was stipulated in the above rules that labour contracts were not only to be applied to new recruits but also existing staff that had been previously employed under the ‘iron rice-bowl’ system. In other words, the

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<sup>54</sup> See: *The Decision of the Central Committee of the CCP concerning reforms of the Economic System* (1984). Important to note, in this political decision, the market mechanism was broadly referred to as ‘commodity economy’ which was then widely recognized as the primary stage of the market economy.

<sup>55</sup> The theoretical basis for this practice was the severability of the ownership of the enterprise and the rights attached to the premises of the enterprise. In early 1980s, a substantial body of literature was dedicated to the discussion of how the economic performance of the SOEs could be enhanced by further delineating the administrative power of the government and the automatic power of the SOE. See, eg, ‘Revisit the Separation of the Governments and the Enterprises (政企分开在研究)’ (1990) (4) *China Commodities and Trade* (《中国物贸》) pp. 25-28; and Shaohui Huang, ‘A Study of the Institutional Reform in the Government System (政府机构改革管见)’ (1988) (6) *Probe* (《探索》) pp. 41-43.

SOEs were empowered to design their own personnel policies concerning issues, such as recruitment, remuneration, dismissal and welfare.

Although the institutionalization of labour contracts was perceived to be a gradual process inbuilt in the corporate reform, it marked the secession of the state from direct administration of labour and personnel management, and therefore, the decline and phasing out of the ‘iron rice-bowl’ system.

### *3.3.3 Social Changes Stemming from the Corporate Reform: Functional Differentiations of Government, Business and Labour*

The primary purpose of the corporate reform was to lift the efficiency and productivity of the SOEs and the economy. However, the impact of the reform was not limited to the economy. Rather, it also led to some fundamental social changes, such as the functional differentiation of the government, business and labour.

As noted above, under the ‘iron rice-bowl’ system, government, business and labour were closely linked, as the state was not only the sole employer of all labour, but also the owner and controller of all SOEs. However, from the mid-1980s, China’s economic system began to undergo a transition towards a mixture of state planning and market economy. In this transition, the means of the government influence in the economy also changed, from direct ordinances and commands to financial and fiscal measures supplemented by legal rules to regulate the behaviour of all market participants. Furthermore, as labour contracts were gradually introduced in many SOEs from the mid-1980s, the government’s role as employer also began to decline.

Along with the functional transition and differentiation of the government, the SOEs, i.e., then the mainstay of the business sector, also underwent some important functional differentiation. As the government gradually loosened its administrative control, efficiency and competitiveness gradually became the most important pursuit of the SOEs, and along with the development of the market mechanisms in the mixed economy, compliance with direct ordinances and commands from the government also began to give way to compliance with regulatory rules and laws which were more broadly addressed to all market participants instead of a specific enterprise.

Also changing was the role of the workforce, particularly after the introduction of the labour contracts in 1984. Although many jobs were still assigned by the state, which remained a powerful employer in the mid-1980s,<sup>56</sup> enterprises were granted more power to address their own personnel management issues. While this increased the flexibility of employment, it also reduced job security. As some key aspects of human capital, such as skill, expertise and educational background gradually became important criteria in selecting job candidates, professionalization and specialization of the workforce also gained increasing momentum from the late 1980s onward.

These changes of functional differentiation stemming from the corporate reform in the mid-1980s further reshaped the socio-economic environment surrounding the public pension system. In fact, as the reform and the differentiation

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<sup>56</sup> Under the centralized planning system, workplace rights and obligations were heavily administrated by the state authorities. In particular, the labour authorities made uniform rules to regulate personnel issues such as salary, remuneration, welfare, health and safety, leaves, recruitment and dismissal, etc. The job of the personnel department of the enterprise was to strictly implement these state rules instead of formulating their own personnel measures to regulate the workforce because under the old 'iron rice-bowl' system the real employer was the state not the enterprise.

continued in the late 1980s, a number of new problems and issues began to emerge in public pension regulation.

#### *3.3.4 New Problems and Issues confronting the Public Pension System by the End of the 1980s*

As discussed above, the functional differentiations had largely reshaped the socio-economic environment of public pension regulation in China. By the end of the 1980s, as the socio-economic reform continued, divergence of interest between the government, business and labour also had emerged. To the government, optimization of market efficiency became a very important goal of regulation although their own economic and political interests involved in the regulation were also to be taken care of. The business and labour were then mostly concerned with their own economic interests, such as market competitiveness, business performance, and personal reward or well-being. While this divergence of interest was a natural product of the functional differentiation that was anticipated and desired by the designer of the *Economic Reform and Liberalization*, it also increased the chances of conflicts between these differentiated actors in the regulation of the public pension scheme.

First and foremost was the conflict of interest between the SOEs and the government. After the initiation of the corporate reform, the autonomy of the SOEs had been largely entrenched. While this added more incentives to the SOEs for raising economic productivity and efficiency, it also added more incentives for the enterprises to avoid the contributory obligation under the public pension schemes, given the fact that the public pension scheme only applied to the SOEs then, and the contributions accounted for about 20 *per cent*

of workers' payroll on average in the late 1980s. As a result, in the last few years of the 1980s, SOEs increasingly perceived the contributions as heavy financial burdens that would eventually reduce their market competitiveness as numerous non-state owned enterprises and firms began to join in the domestic market in the second half of the 1980s.

Second, as the incentives of the SOEs to avoid contributory obligations increased, chances of conflict between business and labour also rose. In fact, industrial disputes concerning social benefits (including public pension benefits) re-emerged in the mid-1980s and continued to grow in the late 1980s.<sup>57</sup> The gist of this new problem lay in the fact that along with the corporate reform, the state ceased to be the real employer of labour. To address this new social problem, enforcement mechanisms were needed to reduce the tension between business and labour.

Third, as the participants of the pooling system primarily consisted of the SOEs, the coverage of the public pension scheme remained limited as the emerging non-state-owned sector was not yet involved in the system. In the late 1980s, this also became a source of conflict between government, business and labour. To the government, expanding the existing PAYG scheme to workers employed by the non-state-owned enterprises would eventually help spread the risk of ageing in the public pension system, because the workforce in the non-state owned firms was much younger compared with their counterparts in the SOEs.

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<sup>57</sup> Originally, chances of such disputes were minimal. Under the 'iron rice-bowl' system, non-compliance was not a big problem, because it was the state that was actually managing all the benefits issues. In other words, the SOE was just an agent working on behalf of the state and government. If any problem concerning public pension arose, it was not to be treated as a dispute between the SOE and the worker. Rather, it was taken as an issue to be addressed through internal resolution mechanisms relying on enquiries by the SOE and replies by the labour authorities of the state.

However, to the non-state-owned sector, incentives to join in the system were low, because inclusion meant contributory obligations, and, therefore, more employment cost and less business profit. Furthermore, to the labour force in the non-state-owned sector, incentives to join were also low, because inclusion would lead to some reduction in their dispensable income as part of the payroll would then be deducted as pension contributions.

Last but not least, the problem of ageing among the labour force in the SOEs continued in the late 1980s. To maintain the financial sustainability of the public pension system, increments to the contribution rates were essential. However, the growing increments of contributory obligation would invariably threaten the financial sustainability of many SOEs. This, together with the growing market competition in the late 1980s, raised major concerns among the managers of the SOEs who began to voice their demand for reforms aimed at introducing employee's obligation of contribution.

While these conflicts created new problems and challenges to the existing public pension system, as new responses from the regulatory system were needed to address them, they added new evolutionary dynamics to the regulation in the 1990s.

#### **4. Conclusion**

The chapter began with an account of the disruption of the public pension system during the *Cultural Revolution*. The purpose of this was to explore the institutional factors that contributed to the disruption and non-evolution of the system, and to provide the evolution in the following decade with a clear historical context. As shown by the description of the *Cultural Revolution*, the

*regulatory space* of the public pension system was reduced to the minimum as all state authorities withdrew from the regulation, and no other regulatory response was made to the emerging problems of ageing, non-retirement, declining productivity, and increasing pressure of unemployment of the young people. Although the underlying *regulatory responsiveness* and *reflexivity* are yet to be explored in the analysis part of the thesis, it suffices to say, at the moment, that the special changes to the *regulatory space* and *process* during the *Cultural Revolution* were contributing factors to the paralysis of the response mechanisms of the public pension system.

The initiation of the *Economic Reform and Liberalization* at the end of the 1970s triggered a succession of reforms. Although the primary purpose was to revitalize the economy, the political leadership of the CCP adopted some new strategies to unfold the socio-economic reforms. These included a pragmatic approach of policy learning and evaluation through some restructuring of the government power system—turning the ‘vertical management system’ to a mixture of ‘vertical and horizontal’ administration. These further encouraged governments at regional and sub-regional levels to join in socio-economic regulation and administration, thus transforming the *regulatory spaces* and *process*—policy formulation, rule-making, implementation, review and evaluation, and correction—of the public pension system. While these new dynamics in the regulation are yet to be analysed in the later part of the thesis, it is clear that with these changes in place, the regulatory system began to think, learn and respond not only to the problems arising from retirement and ageing but also to those stemming from the incongruence of the existing public pension system with some other ongoing reforms surrounding the business and

government institutions, such as the reforms of corporate tax and government revenue. It was with these new changes in place, the 'enterprise-based' provision model was revamped, and the PAYG scheme based on sub-regional social pooling was established.

However, notwithstanding these new changes and responses produced by the reformed system, the social environment of the 1980s was characterized by rapid change. In particular, from the mid-1980s and onwards, China's economic system embarked on a transition towards a mixed economy of planning and market, which further triggered the functional differentiation of the government, business and labour, accompanied by the decline of the 'iron rice-bowl' system. In the late 1980s, this economic transition accompanied by some important reform programs, such as the corporate reform referred to led to further divergences of interest between the three principal actors within the regulation of public pension, giving rise to fresh problems and issues to be responded to in the succeeding decade.

## **CHAPTER SIX: EVOLUTION OF CHINA'S PUBLIC PENSION REGULATION, 1990-1999**

### **1. Introduction**

By the end of the 1980s, the public pension system in China was evolving within the context of a broad economic reform program aimed at instituting market mechanisms into the planned economy. The salient features of this particular reform program included, among other things, the decentralization of administrative power from the Central Government to the regional governments, the role transition of the regional governments from the direct administrators of business and labour to market regulators, and the empowerment of business firms to manage their own staff.

In terms of implementing the public pension scheme, the enterprise-based provision system was transformed to a semi-externalized delivery system consisting of sub-regional governments running their own PAYG schemes within their own jurisdictions. While this reform had somewhat helped to relieve the SOEs of the financial risks associated with workforce ageing, it fell short, on one hand, of solving the systemic problem of ageing, and remained, on the other, incongruent with the on-going economic reforms targeting the corporate system. Furthermore, along with the formation and development of the market as well as the differentiation of government, business and labour, various conflicts of interest became an important source of social problems and issues to be addressed through regulation.

Based on these new developments, this chapter reviews the evolution of the Chinese public pension system in the 1990s. It first notes the problems and challenges facing the government regulators, and discusses the policy formulation process of the regulation. It then describes the evolution of rule-making, its implementation, review and evaluation, and the accountability and

correction of the system. These new developments in *regulatory process* and *space* will be summarized in the conclusion.

## 2. Policy Formulation of Public Pension Regulation in the Early 1990s

### 2.1 Interaction of the Central and Regional Governments

As discussed in the previous chapter, the establishment of PAYG system based on sub-regional pooling could not entirely solve the systemic problem of workforce ageing.<sup>1</sup> Actually, by the end of the 1980s, the growth of retirees had begun to outstrip the fundraising capacity of the pension system, and the issue of financial sustainability re-emerged as an important problem confronting the regulators.<sup>2</sup> Furthermore, the demand for higher pension benefits by the pensioners in response to the ever-rising price indices further increased the financial pressure of the pension system. Although an easy solution to the problem was raising the contribution rate, this was strongly resisted by the SOEs, which insisted that the existing level of contribution had been threatening their business performance and financial viability.<sup>3</sup> These competing voices and demands from different actors in the regulatory system triggered a further round

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<sup>1</sup> It was suggested in late 1980s that old-ageing as a world-wide problem was taking a heavy toll in Chinese urban cities like Shanghai and Beijing. It was projected that unlike the ageing process in many developed countries, the ageing in China was characterized by a very fast speed. Therefore, the pension system would be consistently pressed by this negative demographic trend in the decades to come. See, for example, Guohua Hu and Yuanfa Guo, 'The Impact of the Seniors Tide (银色浪潮的冲击)' (1988) (42) *Outlook (瞭望)* pp. 12-13.

<sup>2</sup> See, for example, Wenbing Li, 'Collection and Distribution of Retirement Pension (谈谈退休养老金的计提与支付问题)' (1987) (3) *Friends of Accounting (会计之友)* p. 21; Li'AI Sun, 'Some Thoughts on Reforms Concerning China's Old-age Pension Insurance (关于我国老年社会保险制度改革的设想)' (1989) (6) *Management World (管理世界)* pp. 186-191; Chunlan Niu and Yali Liu, 'Achievements, Drawbacks and Strategies--In Honour of the 40th Anniversary of China's *Labour Insurance Provisions* (成绩、弊端、对策——纪念《中华人民共和国劳动保险条例》实施 40 周年)' (1992) 114(2) *Journal of Liaoning University (Philosophy Social Sciences Edition) 辽宁大学学报 (哲学社会科学版)* pp. 72-75.

<sup>3</sup> See, eg, Song Yang, 'The Necessity of Reforming the Current Old-age Pension System and the Feasibility of Social Pooling (论改革养老制度的必要性和实行社会统筹的可行性)' (1990) (6) *Social Sciences of Qiqi Ha'er (齐齐哈尔社会科学)*, pp. 8-10.

of government policy formulation aimed at introducing new fundraising mechanisms to solve the problem of fund shortage.<sup>4</sup>

As it had been in the 1980s, the *regulatory space* of policy formulation in the early 1990s largely followed the same pattern of interaction. That is to say, policy proposals were to be advanced by regional governments based on the implementation of the regulation, while decisions on whether or not to accept the proposals were to be made by the Central Government based on its review and evaluation of the proposals. Within this particular framework, a number of reform initiatives were further absorbed into the Central Government's policy agenda—*The Decision of the State Council on Reforming the Pension Schemes for Business Workers* in 1991 (the 1991 *Decision* of the State Council).

## ***2.2 Policy Responses Embedded in the 1991 Decision of the State Council***

The 1991 *Decision* of the State Council was a systemic policy set aimed at reforming the existing public pension system. In particular, it identified four important reform programs—introducing an employee's contribution obligation, extending the coverage of the public pension scheme, strengthening the linkage between pension benefits and consumer price levels, and upgrading the sub-regional social pools to regional pools—in response to the new challenges and problems fed back by regional governments. In addition, a new model of fund management was also mentioned in the 1991 *Decision* to further complement the new pension reforms.

### ***2.2.1 Employee's Contributory Obligation***

The contributory obligation of the employee was stipulated in articles 1, 2 and 3 of the *Decision*. Article 1 delegated the power of rule-making to the regional

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<sup>4</sup> This view was systematically discussed by a few journal articles. See, for example, Zhichuan Chen, 'Discussion of Raising Employees' Capability of Self-reliance for Old-age Pension (关于提高职工自我养老能力的思考)' (1992) (4) *Inquiry into Economic Issues* (经济问题探索) pp. 23-25.

governments, and article 2 made it clear that the new pension schemes were to reflect the principle of joint funding by the state, the employer and the employee. Article 3 set forth a maximum contribution rate of 3 *per cent* in the first year of implementation, while allowing for future upward adjustments by regional governments. Further, it was also stipulated that the PAYG scheme might allow for certain amounts of fund surpluses that were to be retained by the regional governments.

### *2.2.2 Extension of the Public Pension Scheme*

Article 11 set out the new coverage of the reformed pension scheme. It was stipulated that while the current PAYG scheme only applied to the SOEs, domestic workers employed by foreign-owned or privately-owned enterprises as well as self-employed workers in urban cities were also to be included in the schemes. Furthermore, it was also stipulated that the power of rule-making concerning how to extend the coverage was delegated to the regional governments.

### *2.2.3 Linkage of Pension Benefits to the Consumer Price Levels*

Article 6 acknowledged the necessity of reforming the old pension benefit level that had been defined on pre-retirement wage levels. According to the new rules, new mechanisms to link pension benefits to price index were to be introduced. However, the 1991 *Decision* did not provide any specific guidelines regarding how the linkage was to be established. Rather, it stipulated that the state would closely track the price index and wage growth to determine whether or not adjustments were to be made. Furthermore, it was also made clear that the term ‘the state’ referred to the labour authorities of the regional governments.

#### *2.2.4 Upgrading the Social Pools*

Article 7 of the 1991 *Decision* required the regional governments to upgrade the PAYG social pool from sub-regional level to regional level. It was stressed that after the upgrade, government authorities were gradually to unify the different contribution rates applied to different business firms and employees, while the power of rule-making regarding this issue was likewise delegated to the regional governments.

#### *2.2.5 Fund Management and Budgeting*

Apart from those issues relating to the substantive terms and conditions of the public pension scheme, the 1991 *Decision* also contained some articles in relation to new practices of fund management and budgeting. In particular, article 5 required regional and sub-regional governments to establish their own Old-age Pension Commissions (OPCs), staffed by a joint workforce from the labour department, the fiscal department, the state planning department and the audit department as well as non-government organizations like banks and trade unions. However, it remained silent on how these functional roles were to be served.

In addition to fund management, budgetary practices were also mentioned in article 10 of the *Decision*. It was stipulated that service agencies dealing with the pension funds should ‘establish a number of internal management practices according to the relevant state policies, while keeping the records of the revenues and expenditure as well as the operational costs’. It was also stressed in the same article that the budgetary records were to be reported to the labour departments which were further subjected to the supervision of the OPC. Nevertheless, article 10 remained silent on what specific rules the social insurance agencies were to rely on for making the accounting records and how

the government departments administering the service agencies were to be supervised by the OPC.

### ***2.3 Implication of the 1991 Decision by the State Council***

The 1991 *Decision* of the State Council was a general policy response of the Central Government to the demands of pension reforms. It sought to introduce a number of important new mechanisms and institutions into the public pension system. While it is important to the evolution of the public pension regulation, it only outlined a number of general principles and baseline requirements. In most cases, it delegated the power of rule-making to the regional governments. Nevertheless, this formed the foundation of a new wave of regulatory activities to be performed by regional governments in the early 1990s.

### **3. Evolution in the *Regulatory Space* of Rule-making by Regional Governments: Illustration in the Case of Shanghai**

Following the State Council's *Decision* of 1991, many regional governments immediately began formulating their own rules. However, this round of rule-making differed from the one followed in the 1980s because the regional governments could no longer directly order the SOEs to follow their ordinances as it had been able to be under the 'iron rice-bowl' system. In fact, along with the transition from state-planning to the mixed economy with market mechanisms, the state had gradually withdrawn from direct administration of the SOEs and labour. While this marked the functional differentiation in the society, it also changed the general socio-economic environment of the public pension regulation. As the interest of the state, business and labour continued to diverge, potential conflicts arising from the reforms became major concerns of the government authorities.<sup>5</sup> Consequently, regional governments began with

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<sup>5</sup> See, eg, Junmei Zhou, 'A Few Thoughts about How to Continue the Public Pension Reform (深化社会养老保险制度改革的若干思考)' (1992) 119(9) *Shanghai Enterprises* (上海企业), pp. 26-28; and Bo Yan, 'China's

careful surveys and negotiations with the SOEs and labour in the early 1990s, and this cautious stance towards rule-making could best be illustrated by the case in Shanghai, i.e., a metropolitan city that was then experiencing the most serious problem of workforce ageing in China.

### ***3.1 Preparation for the Regional Rule-making in the Metropolitan Shanghai***

By the time the regional rule-making started in the early 1990s, Shanghai had already become a city with a seriously aging workforce.<sup>6</sup> As a result of this, the contributory rate of the PAYG scheme was raised to 25.5 *per cent* payroll in 1990.<sup>7</sup> This particular situation prompted the government's move for the pension reform, which began with the formation of a special taskforce in 1991, involving various functional departments and social organizations, such as the municipal reform office, the fiscal bureau, the labour bureau, the labour and wage commission, the state planning commission, and the ACFTU (Shanghai office).<sup>8</sup> The taskforce was then nominated and commissioned by the regional government as the Old-age Pension Reform Promotion Office (i.e., the OPRPO) to start studies and surveys in late 1991.<sup>9</sup> In early 1992, the OPRPO finished the first draft the rules based on the outcomes of the preliminary studies and surveys. This draft was then issued to a number of SOEs for review and evaluation, while meetings were also held to collect feedbacks from business and labour. Then, the draft was revised, with some general principles

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Old-age Pension Insurance for Enterprise Workers: An Exploratory Examination of its Reform and Improvement (我国企业职工养老保险制度改革与完善的途径探讨) (1993) (2) *Journal of Xiang Tan University (Social Sciences)*, pp. 47-51.

<sup>6</sup> In 1991, the population aged over 60 accounted for 14.7 *per cent* of the total while the dependency ratio between the retired pensioners and the existing employees rated 1 : 3. See especially, Weixian Qin, 'Old-age Pension Insurance: New Experiments with Reforms in Social Security (养老保险: 社会保障制度改革新试验)' (1995) (4) *Century (世纪)*, pp. 62-64.

<sup>7</sup> *Ibid.*

<sup>8</sup> See, especially, Zhi Zheng, 'Shanghai--Herald of Old-age Pension Reform (上海先行一步: 养老保险)' (1993) (6) *Society (社会)*, pp. 18-21.

<sup>9</sup> *Ibid.*

concerning the contributory obligation, the contributory base, and benefit standards being outlined.<sup>10</sup>

According to this draft, the contribution rate was to be maintained at *25.5 per cent* of pay roll to be jointly funded by the employer (*22.5 per cent*) and the employee (*3 per cent*), while the proportion of the employee was to be further increased to *5 per cent* or more in the years to come.<sup>11</sup> The contributory base was to be expanded to include all forms of remuneration such as bonuses, allowances and subsidies, in addition to salaries and wages that constituted the contributory base under the old scheme. In addition, an upper limit (i.e., *150 per cent* of average wage) and a lower limit (*60 per cent* of average wage) were also proposed to further limit the range of the contributory base.<sup>12</sup>

Apart from these basic terms of the pension scheme, the draft also introduced the idea of ‘individual pension account’ (i.e., the IPA) to facilitate the distribution of pension benefits. Instead of a pure PAYG system, contributions were to be accredited to the IPA of every contributing worker whose balance in the IPA would further determine his or her pension benefits after retirement.<sup>13</sup> In other words, the contributions were further split into two parts, i.e., the social pool which followed the PAYG rule of transfer payments, and the IPA which was to be treated as personal equity of the beneficiary (i.e., the owner of the IPA). This new pension model proposed by the draft rules is illustrated by the following chart.

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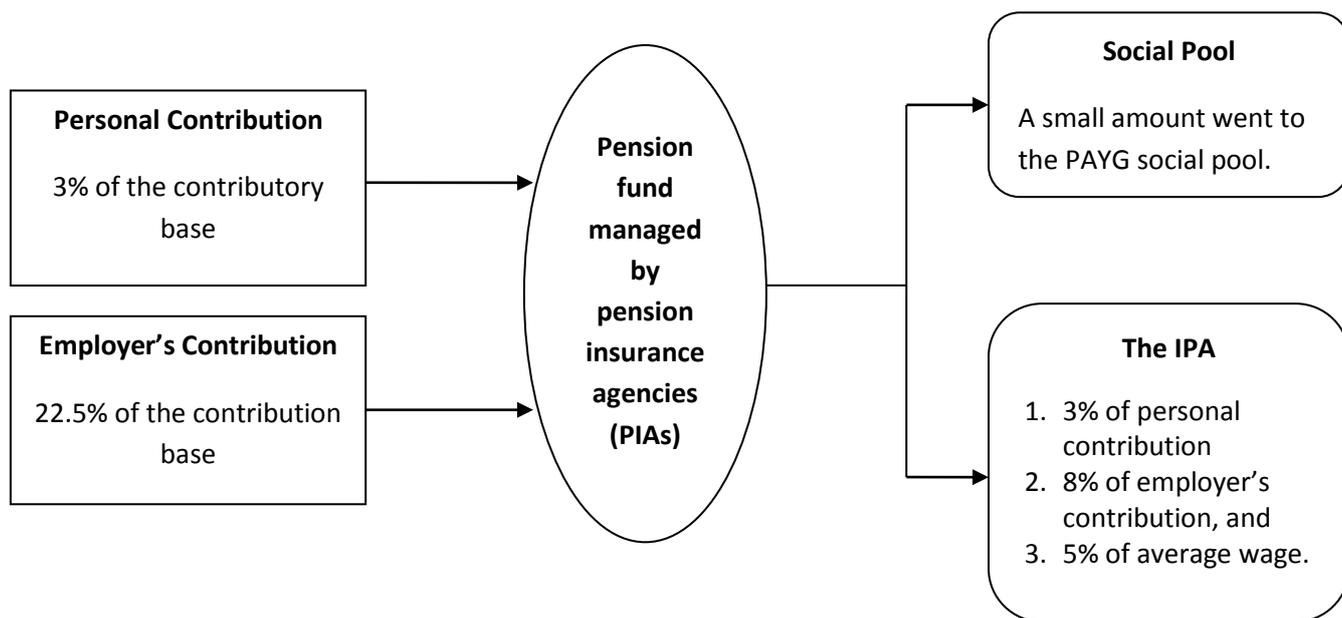
<sup>10</sup> The following discussion concerning the reformed old-age pension scheme in Shanghai is based on the draft rules of 1993. See: 上海市城镇职工养老保险制度改革实施方案[General Plan for Reforming the Old-age Pension Scheme for Urban Enterprise Workers in Shanghai] (People’s Republic of China) Shanghai Municipal Government, 23 February 1993.

<sup>11</sup> 上海市城镇职工养老保险制度改革实施方案[General Plan for Reforming the Old-age Pension Scheme for Urban Enterprise Workers in Shanghai] (People’s Republic of China) Shanghai Municipal Government, 23 February 1993, art 2.2.

<sup>12</sup> Ibid.

<sup>13</sup> 上海市城镇职工养老保险制度改革实施方案[General Plan for Reforming the Old-age Pension Scheme for Urban Enterprise Workers in Shanghai] (People’s Republic of China) Shanghai Municipal Government, 23 February 1993, art 3.

**Chart 6.1: New Model of the Public Pension Scheme<sup>14</sup>**



As shown by the above diagram, pension contributions were to be jointly funded by the employee and the employer, while the pension insurance agencies (i.e., service agencies of public pension) were to manage the contributions, and split them into two different parts, i.e., the social pool and the IPAs. While the funds in the social pool were to be used directly as transfer payments to the existing pensioners, contributions to the IPA were to be treated as personal equity of the account owner. In addition, according to the draft rules in Shanghai, the IPA contained a larger amount of contributions than the social pool as it was made up of the 3 *per cent* of personal contributions, 8 *per cent* of the employer's contributions and another 5 *per cent* of average wage. This typical split of the pension account was then colloquially called the 'big IPA and small social pool'.

<sup>14</sup> This chart is constructed by the author according to the provisional rules of public pension regulation in Shanghai as of 1993.

### *3.2 Consultations, Concerns and Conflicts during the Rule-making*

The preparation for the regional legislation was largely completed in 1991. However, to further ensure the viability of the pension reform, the OPRPO decided to involve more stakeholders in the consultation and rule-making process, and these initiatives began in early 1992. However, in contrast to the relatively smooth preliminary studies and surveys, the consultations with representatives from a broader base of workers from SOEs led to many concerns and contests.<sup>15</sup>

Many of the reform initiatives like the introduction of personal contribution, and the expansion of the contribution base, were commonly opposed by representatives of the workforce, while some of the reform initiatives, such as the upper limit of the contribution base, were also questioned by some representatives on the grounds of equity, as being over protective of high-income wage-earners.<sup>16</sup> Furthermore, many representatives expressed strong concerns over the new reform as many laid-off workers with very low pays were then supposed to contribute for their own old-age pension scheme. In addition, many representatives also expressed their dissatisfaction of the draft rules as regular adjustment mechanism for pension benefits were not mentioned in the rules.<sup>17</sup>

In response to these concerns and contests, the OPRPO started revisions of the draft rules. Although it was agreed among the taskforce of the OPRPO that to relieve workers of the new burden stemming from personal contribution, some subsidies were to be paid to individual contributors, while some adjustments of pension benefits were to be made in response to the high inflation, officers from different government functions had very different views regarding how to get

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<sup>15</sup> Zheng, 'Shanghai--Herald of Old-age Pension Reform (上海先行一步: 养老保险)', above n 8.

<sup>16</sup> See: Qin, 'Old-age Pension Insurance: New Experiments with Reforms in Social Security (养老保险: 社会保障制度改革新试验)', above n 6.

<sup>17</sup> Ibid.

the problems solved. Again, conflicts of interest became an important source of contests within the OPRPO.<sup>18</sup>

The impact of these concerns and contests was two-fold. They slowed down the progress of rule-making; and fuelled people's speculations over the new reforms. When the draft rules were revised in late 1992, concerns over the reform had spread to the entire workforce of the SOE, and resentment of the reform had become prevalent among the general public.<sup>19</sup> This further influenced the stance of the regional legislature. Instead of directly endorsing the rules, the general assembly of the regional people's congress tried to postpone the promulgation of the rules by saying:

[W]e are not provided with sufficient details of the consultations while some background information is still missing. It is imperative that more figures and details of the rule-making be submitted to us before we can endorse the draft.<sup>20</sup>

This was an exceptional response of the regional People's Congress as refusal to pass a bill from the government was quite an unprecedented case. After the refusal was announced, the draft was circulated to over 400 local enterprises. When over 400,000 workers further joined in the discussion and evaluation, resentment became even stronger.<sup>21</sup>

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<sup>18</sup> For example, the labour and wage commission proposed that the 3 per cent personal contribution could initially be set off by government subsidy and be gradually transferred to the workers, while the ACFTU officers further proposed a regular bi-annual adjustment mechanism for pension adjustments. But these views were strongly opposed by officers from the fiscal bureau and labour bureau. They maintained that such subsidies and adjustments were not possible given the current budgetary condition of the local governments. See: Qin, 'Old-age Pension Insurance: New Experiments with Reforms in Social Security (养老保险: 社会保障制度改革新试验)', above n 6, p. 27.

<sup>19</sup> For details about the great repercussion stemming from the pension reform in Shanghai, see, especially, Qin, weixian, 'The First Cry of the Rooster Year--Stories of the Old-Age Pension Reform in Shanghai (鸡年第一啼——上海养老保险改革方案出台前后)' (1993) (3) *Exploration and Free Views (探索与争鸣)* 25-30.

<sup>20</sup> See above n 18.

<sup>21</sup> Ibid.

Given the strong opposition from the labour force of the SOEs, the regional government was forced to step back. It decided not to promulgate the rules in 1993. Rather, experiments were to be carried out within a small group of SOEs in order to further test the modification of the terms and conditions of the public pension scheme.

However, notwithstanding these incidents, the Central Government's stance towards the pension reform was not reversed, and on a broader scope, the economic reform aimed at developing the market economy in China remained unchanged. By late 1992 the CCP leadership had begun to indicate the object of accelerating China's economic reform.

### ***3.3 The 14<sup>th</sup> Congress of the CCP in 1993 and its Impact on the Regional Pension Reforms***

The idea of accelerating China's economic reform and liberalization was first expressed by Deng Xiao-ping in a number of speeches during his visit to south China in 1992.<sup>22</sup> Following these speeches, the Central Government and regional governments began to mobilize social communities to study the *essence* of Deng's speeches in 1992, while university-based academics also began to step up research concerning how to translate Deng's vision into more

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<sup>22</sup> In 1989 and 1990, China experienced a number of political and economic retrenchments. Many economic reform initiatives introduced in late 1980s were suspended as a result of the after-math of the big political turbulence and social unrest at the end of the 1980s, while the ensuing uncertainty among the political leaders over the socio-economic development path of China further slowed down the economic growth as social and political stability were then identified as the top priority across the whole country. However, despite the economic slump in 1991, the after-math of the social unrest gradually came into rest late that year, while the economy also began to pick up in early 1992. This improving socio-economic environment accompanied by the completion of some major adjustments in the political system gradually eased the political tension in China, and paved the way for the continuation of the economic reforms. In early 1992, in particular, Deng Xiaoping released a number of speeches during his visit to south China, which carried strong indication of his support and commitment to China's socio-economic reform. This further paved the way for China's economic transition in the 1990s. For a snapshot of Deng's speeches in 1992, see: YouTube, 'Deng's Speech During His Visit to South China', <http://www.youtube.com/watch?v=t2o9BhW8MWA>, first accessed at 12 December 2010.

tangible and concrete plans.<sup>23</sup> The outcomes of this social learning and research were systemically examined and discussed<sup>24</sup> before and during the 14<sup>th</sup> Congress of the CCP in 1993, whereby a concrete plan for China's economic reform was endorsed.

The impact of the 14<sup>th</sup> Congress of the CCP on China's development path was far-reaching. The concluding report of this Congress, i.e., *the Decision of the Central Committee of the CCP on Issues concerning How to Establish a Socialist Market Economy* (the *Decision of the Central Committee*), systematically defined the policy paradigm for China's socio-economic development, and, in particular, initiated the transition of China's economy towards the so called 'socialist market economy' model, featuring market mechanisms, on one hand, and strong government control, on the other.

According to the *Decision of the Central Committee* (1993), one of the first principles of the new economic reforms was 'prioritizing efficiency while considering equity' so as to further step up the corporate reform in the SOEs.<sup>25</sup> According to this particular policy guideline, the essence of 'prioritizing efficiency' lay in further steps to raise the productivity of the workforce, while 'considering equity' referred to the necessity of providing a reliable safety-net to reduce the social risks stemming from the economic reform.<sup>26</sup> Following this

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<sup>23</sup> See, eg, Yurong Cao, 'Deepen the Reform: The Essence of Developing Socialism--Some Thoughts over Deng Xiaoping's Important Speeches in South China (深化改革:发展社会主义的本质——学习邓小平同志南巡重要讲话的体会)' (1992) (5) *Reform of Economic System (经济体制改革)*, pp. 51-55.

<sup>24</sup> In the early 1990s, there was much contestation about China's socio-economic development models. But Deng's Speeches had substantial influence on the state leaders, government officials, and the social community. Public discussions and learning workshops were numerous in 1992 and 1993 while opinions and research on how to translate Deng's vision into reality were voluminous. See, especially, 改革不能像小脚女人:邓小平南巡讲话发表 20 周年 (Reform is not to Proceed like a Woman with Bound Feet: The 20th Anniversary of Deng Xiaoping's South-China Speeches) ifeng.com <<http://news.ifeng.com/history/zhongguoxiandaishi/special/nanxun20nian/>> first at 28 August 2012.

<sup>25</sup> See, eg, Xishun Zhao, 'Putting Efficiency First while Giving some Consideration to Equity--An Analysis of Deng Xiaoping's Perception of China's Social Security System and Social Development (效率优先兼顾公平——邓小平社会保障和社会发展思想论析)' (1994) (4) *Study of Mao Zedong's Thoughts (毛泽东思想研究)*, pp. 27-30.

<sup>26</sup> Ibid.

principle, the *Decision of the Central Committee* (1993) further set forth a number of concrete guidelines concerning how the safety-net was to be constructed by the regional governments.

It identified social insurance as the most important component of the safety-net, and highlighted the importance of the public pension scheme for business workers as one of the two pillars of the social insurance system.<sup>27</sup> Based on the importance of public pension scheme, the 1993 *Decision* reinstated the general principles stipulated in the *Decision of the State Council on Reforming the Pension Schemes for Business Workers* (1991),<sup>28</sup> and prompted the regional governments to speed up their own regulatory initiatives in relation to the public pension reforms.<sup>29</sup> These statements made by the top political leadership of the state further provided the regional governments with strong support to carry forward the pension reforms despite the strong resistance and contests from the social community.

### ***3.4 The Promulgation of the Provisions of Old-age Pension for Urban Workers of Shanghai (1994)***

The 1993 *Decision of the Central Committee* was a formal political statement concerning how, and in what direction China's economy was to be developed. It clearly defined the importance and function of old-age pension to the broad economic reform. The tone of the *Decision* indicating urgent reforms in the social insurance system and the old-age pension schemes, endorsed the leading role of the regional governments in rule-making concerning the pension reform. Following the requirement of the CCP's *Decision* (1993), many regional governments in China promulgated their own pension reform programs in 1994.

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<sup>27</sup> See, eg, Feng Liu, 'Establishing a Social Security System that is Compatible with the Socialist Market Economy (建立与社会主义市场经济体制相适应的社会保障制度)' (1993) (5) *Teaching and Research* (教学与研究), pp. 23-26.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

These included the governments of Shenyang, Shandong, Jiangsu, Fujian and Liaoning, just to name a few. It was under this particular context that the stalemate of pension reform in Shanghai was resolved. The political support embodied in the CCP Central Committee's *Decision* (1993) superseded the stance of the regional People's Congress. After a one-year experimental implementation within a small number of SOEs and non-for-profit organizations, the draft rules were formally promulgated in the form of government ordinance, i.e., the *Provisions of Old-age Pension for Urban Workers of Shanghai* (1994).

#### *3.4.1 Substantive Terms of the New 1994 Provisions in Shanghai*

The 1994 *Provisions* largely followed the principles set forth in the draft rules. It re-instated the necessity of spreading the contributory obligations among the employer and the employee while the state's obligation of offering fiscal support was also implied. The contribution rate was initially fixed at 25.5 *per cent* as per the draft rules while the rate of personal contribution was 3 *per cent*—the same as the rate in the draft. Furthermore, government subsidies for personal contribution disappeared in the new rules. In addition, the benefit standards stipulated in the draft rules were also confirmed. In other words, the vast majority of the substantive terms and conditions concerning the public pension scheme were confirmed.

#### *3.4.2 Alignment of Public Pension Schemes in Shanghai*

With the strong political support for the reform, the regional government of Shanghai further stepped up its efforts to align the public pension scheme while expanding its coverage to firms other than the SOEs, and this took place in early 1995 when the Municipal Government of Shanghai passed three different sets of rules concerning the old-age pension schemes for urban privately-owned enterprises, urban self-employed workers, and domestic workers employed in

foreign-funded enterprises. In spite of some slight differences in terms of the contributory obligation and contribution rates, all these rules were based on the 1994 *Provisions* for the SOEs. In other words, the coverage of the public pension scheme was then rolled out to all urban enterprises in Shanghai, regardless of their types of ownership.

Nevertheless, unlike the rule-making procedure of the 1994 *Provisions* for the SOEs, no consultation or negotiation took place between the government and the stakeholders, and no draft rules were submitted to the general assembly of the regional People's Congress for further examination.<sup>30</sup> Rather, the regional government of Shanghai passed these rules on its own accord, and this particular style of rule-making was further entrenched in the second half of the 1990s.

### ***3.5 Features of the Rule-making Process as Illustrated by the Case of Shanghai***

As noted above, although the process of rule-making starting from 1991 following the State Council's *Decision on Reforming the Pension Schemes for Business Workers* met much resistance from labour, the political decision of the CCP top leadership to initiate the economic transition served as a strong endorsement of the pension reforms in Shanghai and elsewhere. Furthermore, as the policy paradigm of a 'socialist market economy' demonstrated the leading role of the government in economic reform, the regional governments were further encouraged to change their style of regulation, from the consultative and open model of rule-making in the early 1990s. As we shall see in the next section, this led to the concentration of power in regional governments to lead

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<sup>30</sup> The draft rules circumvented the general assembly of the People's Congress of Shanghai, and were submitted to the standing committee of the congress which was then controlled by the regional CCP commission and leading officials of the regional government. See: Qin, 'The First Cry of the Rooster Year', above n 19. No historical evidence of civil participation and discussion is found insofar as the data source of this thesis—i.e., the CNKI database—has to offer.

and control the regulation by influencing not only the substantive terms of the pension scheme but also the institutional settings of implementation and enforcement mechanisms.

#### **4. Evolution in the *Regulatory Space* of Implementation: Illustration by the Case of Shanghai**

As discussed in the previous chapter, service agencies for the public pension scheme were established in the first half of 1980s to support the sub-regional PAYG scheme. Under this scheme, sub-regional governments commissioned their own service agencies to collect the funds and distribute the benefits according to the rules passed by the regional governments. As the pension programs largely followed the PAYG model, the governments' involvement in fund management was primarily confined to routine operations of fund collection and transfer payments.

However, along with pension reforms since the early 1990s, this simple implementation mechanism underwent some significant changes. To be more specific, the decline of the 'iron rice-bowl' in the enterprises and the initiation of the market economy irrevocably triggered the role differentiation among the governments, business and labour. In particular, with the governments' disengagement from the direct administering of the SOEs, incentives of the business firms to gain economic advantages by reducing employment costs was high. This further contributed to high-rising non-compliance by business firms in the 1990s.<sup>31</sup> This not only increased the difficulty of fund collection, but also threatened the financial sustainability of the pension system. To ensure

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<sup>31</sup> See, eg, Liangchu Yang, 'General Thoughts over Reforms in Social Pension System for Urban Workers (城镇企业职工社会保险制度改革的总体思路)' (1998) (11) *Review of Economic Research* (经济研究参考), pp. 2-19. It was pointed in the article that from the early 1990s, a growing number of enterprises had become less willing to fulfil their contributory obligations. Although the underlying reasons were complicated, the symptom of non-compliance was significant.

compliance, it seemed necessary that a new function of enforcement was to be incorporated to the mandate of the service agencies.

Apart from the new developments concerning the function of the service agencies, the government function to implement the public pension scheme also changed as a result of introducing personal contribution and individual pension accounts (IPAs). As illustrated by the rules in Shanghai, the pension scheme was then reformed into a mixture of PAYG and funding through personal contributions. This further meant that a certain proportion of the pension benefits would then be sourced from the balance of the accumulated funds in the IPA, while further amounts would be paid through the social pooling system following the PAYG model of transfer payments from current contributors to existing pensioners. While this new reform complied with the general principles stipulated in the State Council's *Decision on Reforming the Pension Schemes for Business Workers (1991)* and the over-arching political guidelines embodied in the CCP's 1993 *Decision* concerning the economic transition from state planning to the socialist market economy, it also required the government to undertake the new functions and responsibilities of managing the pension funds.<sup>32</sup> In other words, apart from routine operations like fund collection and distribution under the PAYG system, the government authorities were also required to administer pension investment, as contributions in the IPAs would need good investment strategies and portfolios to hedge against the risk of inflation and depreciation.<sup>33</sup>

These two new issues within the implementation system of public pension regulation, i.e., enforcement of compliance and fund management, largely

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<sup>32</sup> See, eg, Fang Chen and Wuyi Sun, 'Ensure a increase in the Value of Old-age Pension Insurance Fund (确保养老保险基金的保值增值)' (1997) (10) *The Planning and Market (计划与市场)*, pp. 29-30.

<sup>33</sup> This policy idea was seriously considered by a number of officials and professional experts in Shanghai. See, eg, Zi Wang, 'Reflections on Pension Fund Entering Capital Market in China (中国养老保险基金进入资本市场的思考)' (1998) (10) *Shanghai Finance (上海金融)*, pp. 25-26.

became the targets of the regulatory responses of the government authorities in the second half of the 1990s.

#### ***4.1 Compliance Enforcement for Public Pension Regulation in Shanghai since 1994***

##### *4.1.1 Mandate of the Service Agencies' Enforcement Function in the Mid-1990s*

As mentioned above, along with the development of the market economy, the incentives of business firms to avoid the contributory obligations increased, while the incidence of non-compliance which had been very low under the planned economy, gradually turned into a major regulatory challenge to the public system.<sup>34</sup> In response to this new problem which was then threatening the financial sustainability of the public pension programs,<sup>35</sup> the *Provisions of Old-age Pension for Urban Workers of Shanghai* (1994), incorporated a new enforcement function to the mandate of the service agencies. It was stipulated:

The service agencies can check the compliance of business firms either on regular or irregular basis, and order the non-compliant business firm to make up their underpayments,

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<sup>34</sup> It was reported that in 1993, the amount of evasion for public pension in China totalled 335 million *yuan* while in 1994 the amount became 901 million and 156 million in 1995. See, for example, Sen Yu, 'Some Thoughts over the Basic Strategy to Improve the Reforms of Workers' Old-age Pension Insurance in China (试论完善我国职工养老保险制度改革的基本思路)' (1998) 75(3) *Journal of Inner Mongolia Teachers' College for the Nationalities* (内蒙古民族师院学报) pp. 50-52. The same problem of evasion was also serious in Shanghai from 1993 to 1995. For this particular view see: Weixian Qin, 'Old-age Pension Insurance: New Experiments with Reforms in Social Security (养老保险: 社会保障制度改革新试验)' (1995) (4) *Century* (世纪) pp. 62-64.

<sup>35</sup> Along with the high-rising incidence of evasion was the declining rate of compliance. It was reported that the rate decreased from over 95% in 1992 to about 90% in 1994. See: Jia Gu and Tao Wang, 'Management of Old-age Pension Insurance Fund: Problems and Reflections (养老保险基金运作中存在的问题与思考)' (1997) (3) *Journal of Qiqihar University(Philosophy & Social Science Edition)* pp. 31-33. This invariably compromised the financial viability of the public pension programs across the regions in China, and raised the concerns of the Central Government. See, for example, 'Re-alignment of the Responsibilities and Rights is the Key to the Solution of the Old-age Security Problems (理顺责任利益关系是养老保障走出困境的关键)' (1997) (38) *Review of Economic Research* (经济参考) pp. 35-38. In this research article, the taskforce commissioned by the State Council's Development Research Centre pointed out that the compliance rate was generally on the decline all across China, while in some extreme cases the rate was as low as 50-60%. This had gravely threatened the balance of the revenues and the outlays.

arrears or omissions within a specific time. If the order of payments is dishonoured, the agency can authorize the designated bank of the business firm to deduct the due amount from the bank account of the default firm, while imposing penalties ranging from one to two times of the default amount.

Apart from this, Article 49 of the 1994 *Provisions* further authorized the service agencies to charge demurrages over non-compliance, while Article 50 also set forth sanctions on fraudulence.<sup>36</sup>

#### *4.1.2 Development of the Enforcement Authorities in the late 1990s*

In spite of the mandate established by the 1994 *Provisions*, the incidence of non-compliance in Shanghai continued to rise in the second half of the 1990s. Although this problem might be partly attributed to the worsening economic performance of the SOEs,<sup>37</sup> the weak enforcement capacity of the service agencies stemming from lack of expertise, lack of staff and insufficient legal authority, were deemed to be the major causes of the problem.

In response, the regional government and legislature introduced further initiatives to improve the enforcement function in 1998. These included an organizational reform within the regional and sub-regional governments, and a new legislation by the regional People's Congress to entrench the legal authority of the enforcement functionaries.

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<sup>36</sup> Rules concerning dispute settlement will be discussed in detail in the next section as this may largely involve the administrative law system dealing with the legal relations between the government authorities or agencies and the private parties like business firms and employees, i.e., an accountability system established by administrative law regulating the working of the public pension system.

<sup>37</sup> The economic performance of the SOEs and COEs was poor at the end of 1980s and the beginning of the 1990s. According to the figures released by the regional statistics bureau, in 1994 34.8% of the local SOEs were suffering economic losses while at the end of 1995 the margin of losing SOEs remained the same. Meanwhile, in the COEs the margin of losing concerns was no better than that of the SOEs in the mid-1990s. The best indicators of the poor economic performance were the high debt ratio (averaging 78.9%), large amounts of personnel redundancy and low potential of future development. For a detailed account of this difficult time for SOEs and COEs, see, for example, ' More concerns about SOEs in Big Shanghai--A General Survey of Economic Performance among Large-and-medium-sized SOEs and COEs in Shanghai (大上海国有企业令人牵挂——上海市国有大中型企业扭亏增盈的总体调查) ' (1996) (4) *Think Tank of Science & Technology* pp. 10-22.

This organizational reform largely consisted of merging the Municipal Labour Bureau and the Municipal Social Insurance Bureau into a new and more powerful government department, i.e., the Shanghai Municipal Labour and Social Security Bureau (i.e., MLSSB). As a result of this merger, the new MLSSB was then empowered to administer all social insurance schemes, and the service agencies for public pension, together with other agencies managing the other social insurance schemes, were all incorporated into an integrated Social Insurance Agency system (the SIA system). Furthermore, the labour inspection teams (LITs), previously serving as labour law enforcement authorities, were also mandated as enforcement authorities by the regional people's congress in 1998.

Apart from the organizational reform, the regional people's congress also embarked on a new legislation to further entrench the enforcement function of pension regulation—*Rules on Strengthening Enforcement of Fund Collection for Old-age Pension Insurance of Urban Workers* (the 1998 Rules).<sup>38</sup> The 1998 Rules were largely designed to increase the legal authority of the enforcement functionaries by endorsing the enforcement measures stipulated in the 1994 Provisions, such as the monetary penalty and demurrage. In addition, the 1998 Rules also provided for a framework for solving administrative disputes concerning the enforcement measures.<sup>39</sup>

With the organizational merger in the regional government and the new legislation by the regional People's Congress in place, the problems in the enforcement function of public pension were largely addressed. Although the real effects of these reform initiatives were yet to be examined, it is arguable that in the late 1990s the regional government and legislature did make joint efforts to consolidate the enforcement function of the public pension system.

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<sup>38</sup> See: Rong Gu and Jing Cong, 'Integrating Legislative Decision-making and Reform Decision-making (立法决策与改革决策相结合)' (1998) (11) *Shanghai People's Congress Monthly* (上海人大月刊) pp. 24-25.

<sup>39</sup> The legal institutions for resolving administrative disputes will be discussed in detail in the next section.

## ***4.2 Fund Management for the Reformed Public Pension Scheme***

### *4.2.1 The Transition of Public Pension Schemes from the PAYG Model to the Mixed Model*

Fund management mostly followed the PAYG procedures in the 1980s while routine operations like contribution collection and benefit distribution were the major issues to be taken care of by the service agencies and the sub-regional governments. However, from 1994 onwards, a number of reforms were initiated across China. Both employee contribution and the individual pension account (i.e., the IPA) were introduced.<sup>40</sup> While all these reforms incorporated a uniform 3 per cent personal contribution in the first year, the size of the IPAs varied. In particular, two pension models emerged, i.e., the Shanghai model featuring a small PAYG (social pool) accompanied by a big IPA, and the other model featuring a big PAYG social pool accompanied by a small IPA.<sup>41</sup>

However, notwithstanding the difference, both models included a substantial IPA which had big influence over the amount of benefits to be received by the pensioners. As the term of the pension account normally spans over decades until the demise of the account owner, managing the funds in the IPA against

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<sup>40</sup> The policy idea of introducing the IPA into the public pension scheme first appeared in the late 1980s among a small group of academia in China. At that time, the main purpose of introducing and discussing this policy idea was largely confined to balancing the contributory obligations between the enterprise and the employee. Although the potential benefit of helping alleviate the negative impact of old-ageing was briefly mentioned, the funding model of public pension schemes associated with individual pension accounts (IPAs) had not been taken seriously until early 1990s when the limitations of the PAYG system were growingly recognized under the context of gravitating ageing in the SOEs accompanied by the fast economic transition. In mid-1993, a group of economists and government officials took a number of visits to Europe, Singapore and Chile for the purpose of studying and comparing the public pension schemes of these countries. In spite of the differences of these schemes, the common practice of personal contributions and IPAs turned out so impressive to the economists and officials that they drafted a proposal to the Central Committee of the CCP concerning the feasibility of incorporating these practices to the existing public pension schemes. It was reported that these practices largely reflected the benchmarks in the market economies, and if China was to change its economic system it was essential that personal contribution and the IPA be incorporated as important initiatives into the pension reforms. In late 1993, this proposal was not only accepted by the CCP leadership but also incorporated into the *Decision of the Central Committee (1993) concerning the China's transition towards the 'Socialist Market Economy'*. This further prompted the introduction of the IPA into the public pension scheme in the mid-1990s.

<sup>41</sup> See: Yang, 'General Thoughts over Reforms in Social Pension System for Urban Workers (城镇企业职工社会保险制度改革的总体思路)' above n 31, pp. 7-8.

inflation was essential to both of the models. Even before these two models were put into practice across China, both the Central Government and the regional governments had already anticipated the importance and the challenging nature of fund management in relation to the pension account. However, in the first half of the 1990s, following the political *Decision* of 1993, the Central Government was keen to see the experiments at the regional level because the outcome was essential for decision-making. It would reveal whether the new pension reform was facilitative to the economic transition at large, on one hand, and help sort out which model was better off in socio-economic terms, on the other.

It was in this particular context that the Central Government issued the *Circular on Stepping up Pension Reforms for Business Workers* in 1995 (the 1995 *Circular*), whereby both models were listed as options to be chosen by the various regional governments. It was highlighted in the 1995 *Circular* that the pension funds must be well managed to preserve their real value, while a number of institutions were to be established to administer, manage and monitor the funds respectively. In particular, it was required that a social insurance supervision commission was to be established involving representatives from a variety of government functions, business firms, trade unions and organizations of retired pensioners. The major function of the supervisory commission was to monitor the regulatory process of social insurance, including, but without limitation to, policy formulation, implementation, enforcement and fund management of public pension.

In the last article of the 1995 *Circular*, the Central Government called on all regional governments and the relevant functional departments to join in the new experiments and reforms so as to promote learning among the governments.

#### *4.2.2 The Institutional Framework Designed for Fund Management in Shanghai*

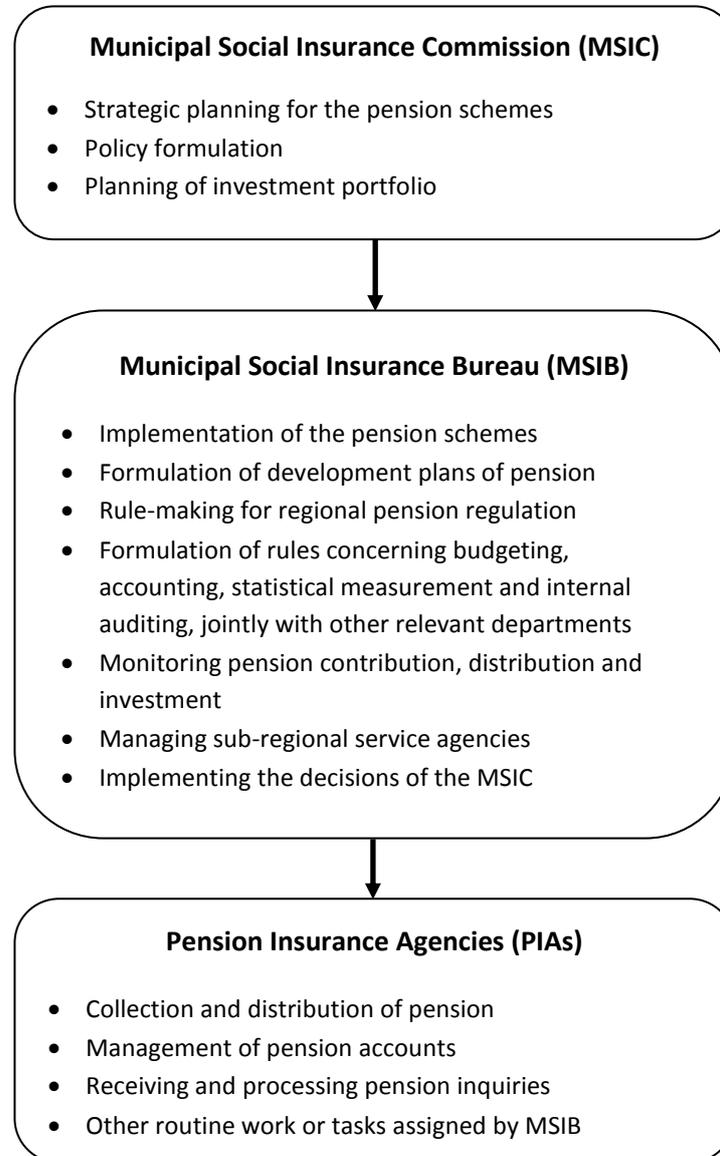
In Shanghai, the 1994 *Provisions* promulgated by the regional government provided that a three-tier administrative structure composed of the Municipal Social Insurance Commission (i.e., the MSIC), Municipal Social Insurance Bureau (i.e., The MSIB), and Pension Insurance Agencies (i.e., the PIAs), was to be established to carry out pension reform.<sup>42</sup>

In particular, the MSIC was designated as the general organiser of investment related issues. This body was designed to play the leading role within the entire regulatory system. The MSIB, on the other hand, was required to serve the executive role in terms of fund management, i.e., implementing investment plans formulated by the MSIC, while the PIAs that were mainly responsible for collecting and distributing the funds were not assigned any role for fund investment. The following diagram further illustrates this particular structure of fund management.

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<sup>42</sup> In particular, both the Municipal Social Insurance Commission (MSIC) and the Municipal Social Insurance Bureau (MSIB) were new government departments established in 1994; while the Pension Insurance Agencies were the social insurance service agencies originally affiliated to the Labour and Personnel Bureau in the 1980s. After the reform in 1994, the service agencies then became the agencies of the MSIB, and were re-named.

**Chart 6.2: Administrative Structure within the Municipal Government of Shanghai concerning Old-age Pension for Urban Workers in 1994<sup>43</sup>**



<sup>43</sup> This diagram is formulated according to the *Provisions of Old-age Pension for Urban Workers of Shanghai* (1994), in particular, section two of the *Provisions* which stipulated the institutional framework for the administering and management of the pension schemes in Shanghai.

As shown by the chart, the MSIC was assigned with a strategic role presiding over the MSIB and the PIAs. According to the 1994 *Provisions*, the MSIC was the top decision maker of public pension regulation, and it was to be jointly staffed by officials from government departments and experts from the regional office of the trade union (i.e., the ACFTU).<sup>44</sup> The SMIB, i.e., the government department, had the power to regulate all issues concerning the pension system including the budgeting, accounting and auditing of the pension scheme.<sup>45</sup> Nevertheless, it was to be held accountable to the SMIC. The IPAs were mere operational agencies that were to be managed by the SMIB.<sup>46</sup>

In addition to the above three, the 1994 *Provisions* also provided for a supervisory body to monitor the pension funds, although rules concerning the organization of the supervisory body were to be determined by future regulation.<sup>47</sup> In spite of this, the importance of the supervisory body was further stressed by the Central Government's 1995 *Circular*.

#### *4.2.3 The Evolution of the Institutional Framework of Fund Management in Shanghai in the Late 1990s*

In spite of the requirements of the Central Government's 1995 *Circular*, the real practices in Shanghai, as in other parts of China, largely diverged from the institutional design.

In *organizational* terms, the regional government did not actually follow the three-tier structure stipulated in the 1994 *Provisions*. The MSIC of Shanghai disappeared in 1995, and all its functions were taken over by the MSIB, i.e., the government department regulating the public pension scheme. While the PIAs continued to serve their operational roles, the supervisory body involving

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<sup>44</sup> 上海市城镇职工养老保险办法[Provisions of Old-age Pension for Urban Workers of Shanghai] (People's Republic of China) Shanghai Municipal Government, Order No 63, 1 June 1994, art 6.

<sup>45</sup> Ibid, art 7.

<sup>46</sup> Ibid, art 8.

<sup>47</sup> Ibid, art 45.

‘representatives from a variety of government functions, business firms, trade unions and organizations of retired pensioners’<sup>48</sup> was much discussed, but never formed.<sup>49</sup> Rather, it was finally reduced to a functional division of the MLSSB, the new government department administering public pension after the organizational reform in 1998 noted before.<sup>50</sup>

In *functional* terms, the institutional structure designed by the 1994 *Provisions* and the 1995 *Circular* were not carried out. No rules concerning the supervisory body was further formulated or passed in the 1990s by the regional government. Rather, along with the structural adjustment and organizational reforms within the regional and sub-regional governments in 1998, the regional MSIB was further incorporated into the SMLSSB, i.e., the function of MSIB was further absorbed by the labour department of the governments. While this helped entrench the enforcement function of the regulation, the power to manage the pension funds was further concentrated to the newly established SMLSSB, which could plan, implement and supervise investments involving pension

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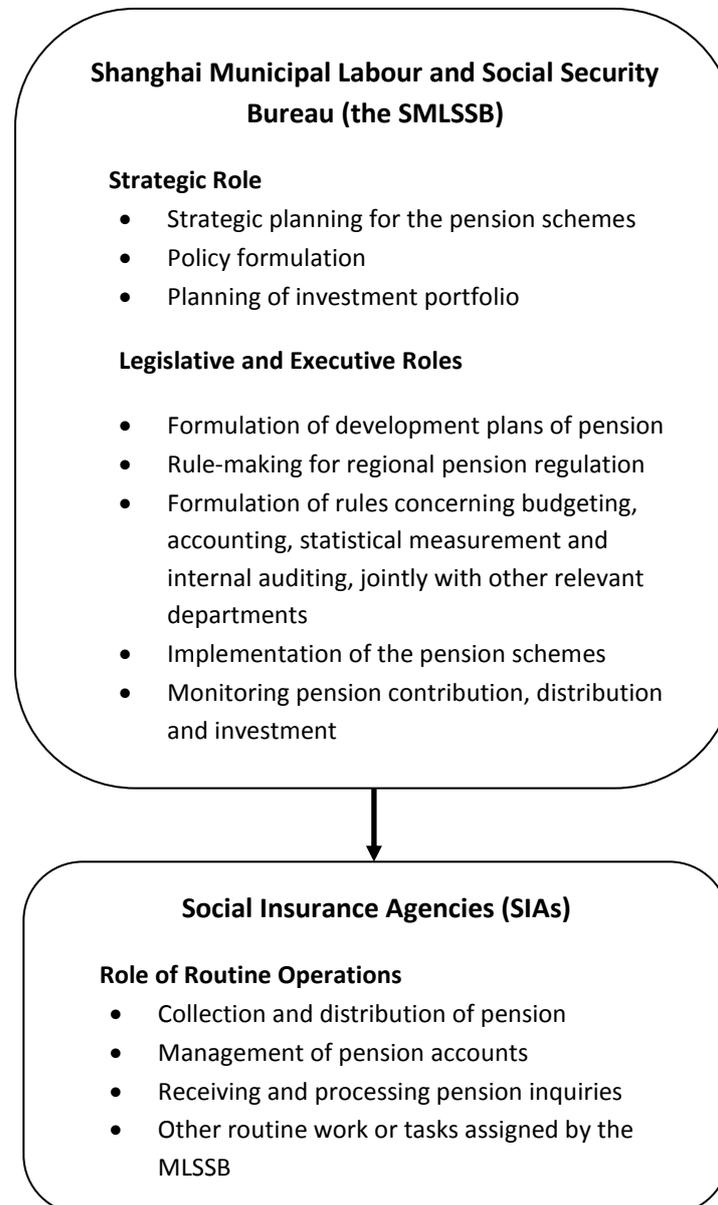
<sup>48</sup> This was an important requirement stipulated in the 1995 *Circular* from the Central Government. See section 4.2.1 of this chapter, pp. 180-181.

<sup>49</sup> For example, in 1996 an international seminar on the global trends and developments of social insurance system was held in Shanghai. Participants of this international seminar included high-ranking officials in the municipal government as well as world class scholars and professionals both within and without China. During the seminar, the issue of fund management and supervision was widely discussed and studied. It was highlighted that an independent organization specialized in monitoring the public pension fund was imperative in the sense that it could help maintain the integrity of the regulatory system and help improve the performance of the investment portfolios. For this particular point, see: Jiangqiang Li, 'The Necessity of Reforming the Current Systems for Social Security and Social Insurance--An Overview of the International Seminar on global Trends and Developments in the Social Security and Social Insurance Systems (社会保障与社会保险体制的改革势在必行——社会保障与保险体制改革的世界趋势国际研讨会综述)' (1996) (8) *Shanghai Insurance (上海保险)* pp. 16-17.

<sup>50</sup> This particular arrangement continued until late 2006 when a major scandal of fund misuse was disclosed. The repercussion of this scandal was huge because many senior officials ranging from the top leader of Shanghai municipal government to the director general of the SMLSSB were arrested. It was until then that the regional government of Shanghai passed the so call *Provisions of Fiscal and Financial Management for Social Insurance Funds in Shanghai*. However, in spite of the promulgation of the *Provisions*, it was widely recognized that this government rule-making mainly served as an ex-post response to an old, serious problem that had been embedded in the public pension system for over a decade. For a detailed account of this incident, either see the discussion in the next chapter. Or for a briefing of the case, see: Xiaowen Li, 'Study on the Supervisory Strategies Concerning Social Security Funds in China--A Case Study of the Real Practices in Shanghai (对我国社会保障基金监管的策略研究——以上海市社保基金监管改革为例)' (Master's Thesis, Tong Ji University, 2008), pp. 31-33.

funds. This particular institutional structure concerning fund management of public pension in the late 1990s is illustrated in the following diagram.

**Chart 6.3: The Institutional Structure of Fund Management in Shanghai by the end of the 1990s**<sup>51</sup>



<sup>51</sup> This chart is formulated by the author of the thesis based on the previous diagram and the organizational changes taking place in 1995.

As shown by the institutional framework of the fund management system in both organizational and functional terms, the SMLSSB of the regional government became the sole planner, manager and supervisor of the public pension funds although the routine operations like contribution collection and benefit distribution were then undertaken by the SIAs. In other words, in the late 1990s, particularly since 1998, the functional department of the regional government responsible for administering social insurance schemes became the dominant actor in the *regulatory space* of fund management, while its power to plan and implement investment was not supervised by any other government authority or any external organization in society.

Even more important is the fact that Shanghai was not an exceptional case in this respect. Rather, what happened in Shanghai mirrored the general practices across the whole country in the second half of the 1990s.<sup>52</sup> The net result was that by the end of the 1990s, the fund management system of public pension had become a highly closed *space* at both regional and sub-regional levels, while transparency of the real management practices was low. Given these new developments in the second half of the 1990s, it is arguable that the institutional requirements set forth in the Central Government's 1995 *Circular* were not complied with.

#### ***4.3 Summary of the Evolution in the Regulatory Space of Implementation***

Compliance enforcement and fund management are the two important components of the *regulatory space* of implementation for public pension. The former is primarily concerned with the mechanism of checks, inspections and penalties addressed to business firms, while the latter is more concerned with fund operations, including collection, investment and payment. Both of them

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<sup>52</sup> See, eg, Xiuqing Sun, 'A Few Thoughts about the Current Administrative Framework of the Social Security System (对当前社会保障管理体制的思考)' (1997) 13(3) *Huanghuai Journal* (黄淮学刊) pp. 31-31; and Bingwen Zheng 'Origin and Hazard of the Fragmented Social Security System in China (中国社会保险“碎片化制度”危害与“碎片化冲动”探源)' (2009) (1) *Social Security Studies* (社会保障研究) pp. 209-224.

are interrelated and essential to the public pension system in the sense that enforcement serves to secure the sustainability of contributions; while fund management, particularly the subsidiary function of investment, largely serves to preserve the value of the funds in the face of financial and economic risks. In the 1990s, both of them were heavily reformed by the government authorities, particularly the governments at the regional level, which not only defined the functional terms of the two *spaces* but also shaped the institutional framework governing their operations.

Nevertheless, the evolutionary courses within these two *regulatory spaces* were leading to some different ends as shown by the case of Shanghai. To be more specific, the organization reform aimed at entrenching the enforcement function at the regional level was not at odds with the policy of the Central Government. Rather, it responded to the changes in the society, such as the high-rising incidence of non-compliance stemming from the functional differentiation of the government, business and labour in the 1990s. However, the evolution in the *space* of fund management, as illustrated by the case of Shanghai, was not so much in line with the policy of the Central Government. Nor was it in compliance with the institutional framework stipulated in the regional rules passed in 1994. In other words, the management framework originally designed to feature division of power in planning, implementing and supervising, was not realized. Instead, by the end of the 1990s, the regional governments and their labour and social security institutions became the dominant actors within this particular *space* where supervision and transparency were weak.

## **5. Evolution in the *Regulatory Space* of Review and Evaluation**

### ***5.1 Regulatory Problems Identified by the Review and Evaluation Mechanism***

As noted in the last chapter, from the 1980s onwards, the *regulatory space* pertaining to review and evaluation consisted of two principal actors, i.e., the

Central Government and the regional governments, serving different functions within the *space*.<sup>53</sup> To be more specific, the regional governments as the main implementers of the regulation learned by doing. They fed back problems and possible solutions through their own experience with the regulation. The Central Government, however, learned by observing and evaluating. It reviewed the feedbacks and proposals advanced by the regional governments, and played a facilitative role in generating new regulatory policies in response to the new problems and issues fed back by the regional governments.

This particular mechanism of review and evaluation continued to operate in the 1990s. Particularly, after the new reforms on the constitution of the public pension scheme in the mid-1990s, three major problems were immediately identified, i.e., the ‘implicit debts’ caused by the introduction of the IPAs, the rising incidence of malpractices in fund management, and the persistently segmented social pooling system.

Although all these above problems had been common in China by the late 1990s, it is important to note that not all of them were then so significant in Shanghai. Therefore, to better illustrate these regulatory problems and issues, materials other than those of Shanghai are drawn upon.

### *5.1.1 The Implicit Pension Debt (IPD) Stemming from the IPA*

The ‘Implicit pension debt’ (IPD), as a special term in pension regulation, refers to the transition costs incurred as a result of public pension reform from the traditional model of PAYG to the funded model.<sup>54</sup> It largely stems from the introduction of the IPA into the pension scheme which links benefits in the future to the balance accumulated in the IPA at the date of retirement. However, during the transition from PAYG to funding, the near-retirement-age generation

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<sup>53</sup> For a detail account of these points, see sections 3.2.1 and 3.2.2 of Chapter Five on pages 139-141.

<sup>54</sup> For a more clear definition of the IPD, see, for example, Hans-werner Sinn, 'Why a Funded Pension System is Useful and Why it is Not Useful' (2000) (7) *International Tax and Public Finance* pp. 398-410.

normally has very little fund in their IPAs because the vast majority of their contributions have already been paid as transfer payments to the previous generation under the old PAYG system. Nevertheless, the near-retirement-generation is still entitled to pension benefits even if their IPAs have been very low in funds.<sup>55</sup> As a result, to support the transition of the pension scheme, the government would have to make up the financial gap. The amount of money needed to make up the deficits in the IPAs of the near-retirement-age generation is the implicit pension debt (i.e., the IPD).

In Shanghai and elsewhere, the issue of IPD was recognized from the very beginning in the mid-1990s. To reduce the transition cost (i.e., the IPD) while reforming the existing PAYG system, a mixed model involving PAYG transfer payment through social pooling and funding through the IPA, was introduced.<sup>56</sup> Nevertheless, the key issue of how to split the pension account into an IPA and a social pool remained unsolved. In this regard, the Central Government followed the typical pragmatic approach of policy learning widely used from early 1980s, i.e., ‘crossing the river by feeling the stones beneath.’ It assigned two different models, one with a big IPA and small social pool, and the other with a big social pool and a small IPA, to the regional governments for

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<sup>55</sup> As the theoretical background of the IPD lies beyond the scope of this thesis, the author is not to extend the discussion over the operation of the funded model. For a more detailed account of the IPD and the transition from the PAYG model to the funded model, see, for example, Robert Holzmann, 'Pension Reform, Financial Market Development, and Economic Growth: Preliminary Evidence from Chile' (1997) 44(2) *IMF Staff Papers* pp. 149-178.

<sup>56</sup> This strategy was first spotted by some Chinese policy researchers in early 1990s, and was finally endorsed by the political decision-makers in 1993. In mid-1993, a group of economists and government officials took a number of visits to Europe, Singapore and Chile for the purpose of studying and comparing the public pension schemes of these countries. In spite of the differences of these schemes, the common practice of personal contributions and IPAs turned out so impressive to the economists and officials that they drafted a proposal to the Central Committee of the CCP concerning the feasibility of incorporating these practices to the existing public pension schemes. It was reported that these practices largely reflected the benchmarks in the market economies, and if China was to change its economic system it was essential that personal contribution and the IPA be incorporated as important initiatives into the pension reforms. In late 1993, this proposal was not only accepted by the CCP leadership but also incorporated into the *Decision of the Central Committee* (1993) concerning the China's transition towards the 'Socialist Market Economy'.

experimental implementation. The model adopted in Shanghai was the first model, i.e., big IPA and small social pool.<sup>57</sup>

However, no matter which of the two models was chosen, once the reform began the implicit debt soon came into the foreground.<sup>58</sup> The key issue which was then debated was who were to pay for the IPD and how much was to be paid. The stance of the Central Government at the beginning of the reform was clear. It was stipulated in the 1995 *Circular* that public pension benefits for the ‘old generation’ were to be paid out from contributions going to the social pool from the existing contributors, i.e., the contributing employers and employees. However, in real implementation, this principle could not solve the problem of the IPD as the funds in the social pool could not really cover the transfer payments to the ‘old generation’. The following charts show how this problem occurred.

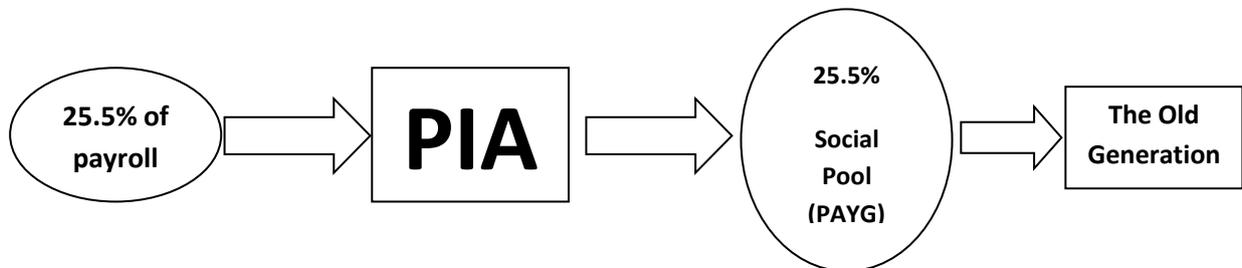
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<sup>57</sup> This particular point has been discussed in the last section concerning the rule-making process for the pension reform. While the comparison of the two different mixed models is also presented in the discussion of this section concerning the transition in Shanghai from the PAYG to the funded model.

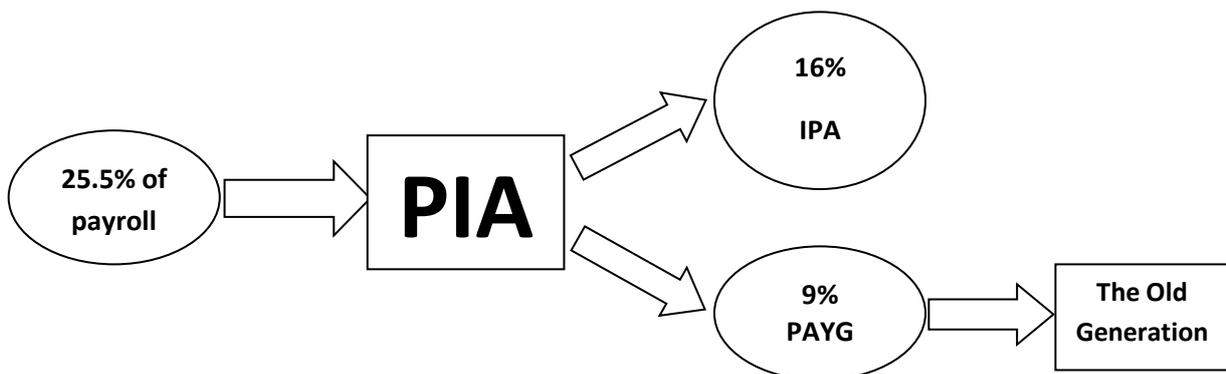
<sup>58</sup> For a more detailed discussion concerning the surfacing of the IPD in China since the 1990s, see, for example, Huahua Sun, 'Study over the 'Notional Account' of Individual Pension Account in China (养老保险个人账户“空账”研究)' (Master's Thesis, Shaan Xi Normal University (陕西师范大学), 2010) pp. 21-22.

**Chart 6.4: The Problem of Shanghai’s IPD after the Pension reform in the Mid-1990s**

**1. Before the Reform in 1994**



**2. After the Reform in 1994**



As illustrated by the two diagrams respectively showing the processing of contributions for paying off the IPD. In particular, in the first diagram, the 25.5 per cent of pension contributions were initially paid to the PIA (i.e., the Pension Insurance Agency). Under the old PAYG scheme before the reform, all the contributions went into the social pool, i.e., all the contributions were directly transferred to the contemporary pensioners of the ‘old generation’.

However, after the reform, while the total amount of contribution remained the same, i.e., 25.5 per cent of payroll, only 9 per cent went to the social pool. Nevertheless, according to the 1995 *Circular* from the Central Government, that

9 per cent was to pay off the pension benefits for the same old generation. Obviously, the other 16 per cent went to the IPAs of the owners of the pension accounts. Given the fact that in late 1990s the dependency ratio in Shanghai did not improve over the period before the reform in 1994, the 9 per cent in the social pool alone could not make the two ends meet. The difference shown in the two diagrams, i.e., the 16 per cent of payroll contribution, was approximately equivalent to the total amount of IPD for the regional government.<sup>59</sup> In this sense, if the financial principle stipulated in the 1995 *Circular* had been complied, the IPD would not have been paid off.

To solve this problem, it needed some external source of funds to make up the difference stemming from the IPD. It was suggested by the academics that the governments had the fiscal obligation to make up the difference because the 1995 *Circular* stipulated that ‘when the public pension funds go into deficits, the government is to provide fiscal support.’<sup>60</sup> However, following the reforms from the mid-1990s to the end of the 1990s, the issue concerning how to pay off the IPD through fiscal means remained a much contested issue. First, to address this issue it needed a clear public finance system that could determine the obligations both of the Central Government and of the regional governments in sharing the burden of fiscal expenditure.<sup>61</sup> Second, while sharing the burden, it also involved a potential conflict of interest between the Central Government and the regional governments with regard to who was to pay and how much was

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<sup>59</sup> Although in 1995, the exact amount of the IPD had not yet been clearly tallied. But an approximation was made by the domestic academia. It said that if Shanghai’s mixed model were to be rolled out across China, the IPD would reach 200 billion *yuan*. This approximation was based on the 16% difference of payroll in 1995. See: Zhenping Li, 'Problems Confronting China's Social Security and Possible Fiscal Strategies (我国社会保障存在问题及财政对策)' (1998) (5) *Practice of Finance and Economics* pp. 63-65.

<sup>60</sup> For this particular view, see, for example, Qing Yang, 'Study on the Fund Sources and Contributory Obligations of the Current Social Pension Insurance (现行社会养老保险的基金来源模式及缴费负担研究)' (1998) 16(1) *Journal of Foshan University (Social Science)* 佛山科学技术学院学报 (社会科学版) pp. 17-23.

<sup>61</sup> See, for example, Yuming Lin, 'Study on the progress of consolidating the individual pension accounts of China's pension insurance (中国养老保险个人账户“实账化”进程研究)' (1997) 191(10) *The Study of Finance (财经研究)* pp. 25-29.

to be paid.<sup>62</sup> Although university scholars at that time suggested that both levels of governments had the responsibility of paying off the IPD,<sup>63</sup> the existing tax sharing system in China was then undergoing a number of important reforms concerning the split of tax revenues and tax outlays between the Central Government and regional governments. The uncertainty of the reforms within the tax sharing system, and the uncertainty of the tax expenditure structure for the social insurance schemes including public pension scheme, in particular, further complicated the matter at issue.<sup>64</sup>

### *5.1.2 Malpractices in Managing the Public Pension Funds*

The second regulatory problem stemmed from the special fund management mechanism in the second half of the 1990s. As noted above, fund management was largely dominated by regional and sub-regional governments across China, while supervision and transparency in the management system were weak.<sup>65</sup>

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<sup>62</sup> The nature of the conflict was quite complicated as both the Central Government and the regional governments had substantial reasons to ask for payments from each other. To be more specific, the Central Government claim was largely grounded on the fact that under the taxation system of the 1990s, the regional governments had a substantial share of the tax revenues. This reduced the financial ability of the Central Government to pay off the debts. The regional governments at time argued that the Central Government was obligated to pay a hefty amount for the IPD because much of the IPD stemmed from the absence of contributions by 'the old generation' who had contributed much to the state under the planned economy where almost all profits of the enterprises were directly paid to the Central Government. Since it was the Central Government who had benefited from the old economic system where all proceeds from the 'old generation' went to the Central Government, the Central Government had the responsibility to pay a large part of the debt. For a more detailed discussion of the debates between the Central Government and the regional governments, see: Gongcheng Zheng, 'Discussions of Social Security--Theories and Practices of China's Social Security (2) (众说纷纭话保障——中国社会保障理论与实践[下])' (1996) (6) *Frontier (前线)* pp. 32-34.

<sup>63</sup> See, for example, Yun Huang, 'Discussion of Social Security and Fiscal Issues (试论社会保障与财政)' (1998) 72(5) *Academic Forum (学术界)* pp. 73-75.

<sup>64</sup> It was proposed that to pay off the IPD, the governments could create a new tax, i.e., social insurance tax. However, the unclearly defined power structure of taxation between the governments made it impossible for implementing this new tax. The main difficulty was the already heavy contributory obligation of public pension which averaged 23.5% of payroll in 1996 while in some regions like Shanghai the contribution rate had surpassed 25%. It was argued that given the uncertainty of the tax system and the high rate of contribution, the problem stemming from the IPD could hardly be solved at the moment. For this particular point, see: Qing Zhu, 'Discussion of Three Fiscal Issues Concerning China's Social Insurance Reforms (浅议我国社会保险改革中的三大财政问题)' (1998) (3) *Finance & Trade (财贸经济)* pp. 57-60.

<sup>65</sup> There were a number of academic journal articles reflecting this serious regulatory problem. See, eg, Qiaogen Feng and Jun Feng, 'A Few Thoughts about How to Deal with the Accounting of Pension Contributions of Enterprise Workers (对企业职工退休金及其会计处理问题的思考)' (1997) (2) *The Theory and Practice of Finance and Economics (财经理论与实践)* pp. 39-41; and Renchang Diao, 'Can Social Insurances be Made

Furthermore, due to the ongoing reforms in the public finance system throughout the second half of the 1990s, 'surpluses of pension' became a grey area falling outside the purview of the institutions of the Central State, such as the State Council, and that of the other state authorities, such as regional people's congresses.<sup>66</sup> This special situation further facilitated regional and sub-regional governments in treating the pension surpluses as an important source of revenue that was not open to the public and the Central State.

As noted above, from the 1980s, public pension schemes were largely administered by various governments at regional or sub-regional levels. Under this system, the labour and social security departments of the regional governments were the nominal managers of the funds while in fact, the regional or sub-regional governments in charge of the labour and social insurance authorities had the decisive power over the funds, because the regional or sub-regional governments were the *horizontal* superior to the labour and social insurance departments. Although the functional Ministry of Labour and Social Security could exercise its *vertical* power over the regional departments, this influence was just a soft control. The *horizontal* superior could decide issues of more immediate importance to the subordinate functionaries, such as personnel promotion or demotion, and financial supports.

In sum, the highly closed fund management system, the unclear status of the pension funds, and the 'vertical and horizontal management' system, together reinforced the economic incentives of the regional and sub-regional governments' to misuse the pension funds.

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Clean?--An Analysis of Malpractices in Social Insurance and Possible Solutions to Them (社会保险领域能成一方净土吗? --析不正之风在社会保险中的表现及抵制对策)' (1994) (3) *China Social Insurance* (中国社会保险) pp. 4-6.

<sup>66</sup> For this particular point, see, especially, Shuhai Cong, 'An Exploratory Study of Budgetary Measures concerning Social Security (社会保障预算管理的探讨)' (1999) (11) *Contemporary Finance & Economics* (当代财经) pp. 25-28; and Ling Zhu, 'Informal Fiscal Revenues of Central and Regional Governments (中央与地方政府的非正式财政收入行为)' (1997) (3) *Seeking Truth* (求是) pp. 41-46.

### 5.1.3 Segmentation of the Social Pooling System

Compared with the previous two problems that were largely related to the new reform during the mid-1990s, the third problem was largely related to the social pooling system of the pension scheme dating back to the early 1980s.

As noted in the last chapter, at the early stage of the public pension reform in the early 1980s, the social pooling system was largely segmented. In other words, the pension entitlement of a certain worker or employee was not transferable to another jurisdiction even though the workplace and the contributor of the employee's pension scheme had been relocated to another jurisdiction. The consequence of this institutional arrangement was that while the employer of the worker was obliged to contribute, the new pension account was not to be articulated with the old one, and the years of contribution were not to be aggregated or articulated because the contributions were made in two different sub-regional jurisdictions.

This could have both micro-level impacts on the individual pensioner's entitlement, and macro-level impacts on pension system's capacity of spreading the risk of ageing as well as. Furthermore, it was also found that this problem had had significant impacts on labour mobility in China.<sup>67</sup> In response to this serious problem, some regions, such as Beijing municipality, Tianjin municipality, Shanghai municipality, Jiang Xi Province and Fu Jian Province, managed to integrate the sub-regional social pools in the early 1990s,<sup>68</sup> and the successful experience in these regions led to the Central Government's subsequent policy requirement of upgrading the social pooling system in the

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<sup>67</sup> For this point, see for example: Zhongdi Pan, 'Discussion of the Fundraising Methods for Pension Insurance (关于养老保险基金筹集方式问题的探讨)' (1987) (3) *China Labour Science* (中国劳动科学) pp. 34-37.

<sup>68</sup> See: Fangzhou Li, 'The Gaming of Interests and Orientation of Policies in the Evolution of China's Social Security System (中国社会保障体制变迁过程中的利益结构与政策取向)' (PhD Thesis, North West China University, 2006) pp. 28-29.

remainder of the country.<sup>69</sup> However, this requirement of the Central Government did not lead to any substantial move towards the policy goal throughout the 1990s.<sup>70</sup> Although explanations from the sub-regional governments were largely related to the differences in the schemes such as different contribution rates, benefit levels as well as some technical issues such as non-compatibility of the IT systems used across the sub-regions, the underlying reasons for the standstill, as revealed by scholars, was the potential conflict of interest between the regional and subregional governments within the general administrative framework of ‘vertical and horizontal management’.

As it has been repeatedly mentioned, the administrative structure in China typically followed a combination of a horizontal administering system based on territorial jurisdiction and a vertical administering system based on functional guidance. The relationship between the regional and sub-regional governments followed the same administrative rules as the administrative structure governing the central and regional governments. The sub-regional social insurance agencies (SIAs) were fully commissioned by the sub-regional departments of labour and social security which were further *horizontally* administered by the

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<sup>69</sup> This policy requirement was first stipulated in the 1991 *Decision of the State Council on Reforming the Pension Schemes for Business Workers*— ‘in regions where regional social pools have not yet been established, the governments need to create proactive conditions for integrating the sub-regional social pools into the regional pools.’ In addition, the State Council further defined what the ‘regional social pool’ was— ‘after establishing a regional pool, the contribution rate of public pension schemes is to be unified across the whole region, while the funds are to be integrated and transferred under the PAYG system across the whole region.’

<sup>70</sup> By the mid-1990s, only eight more regions had proclaimed to have completed the upgrade, while in real terms, few of the eight regions actually conformed to the standard regional pool as of those in the first four pioneer regions. In late 1990s, further efforts to upgrade the social pool completely came to a standstill as no more regional pool was proclaimed to have been established. As a result of this systemic stagnation, by the end of the 1990s only about five regions had succeeded in establishing their regional pools while in the rest 26 regional jurisdictions, the PAYG social pooling system had remained highly fragmented as thousands of district and county pools stayed without being incorporated into the regional pools, while some regional pool, like the case in Fu Jian Province, even retrogressed back into various sub-regional pools. See, eg, Dongfang Li, ‘Unification of Social Security Pension at the Provincial Level and Sustainability Research (养老金省级统筹与社会保障持续能力研究)’ (Mater's Thesis, North-West University, 2006) p. 20. For a more detailed description concerning the different models of regional social pooling, see: Jun Wang, ‘Exposition of the Regional Social Pooling Models for Public Pension Schemes in 16 Provinces and Municipalities (关于 16 个审计统筹单位审计养老金调剂颁发的分析说明)’ (1998) (9) *China Labour* (《中国劳动》) pp. 39-41.

sub-regional governments. For the regional departments seeking to upgrade the sub-regional social pools, although they could order the sub-regional departments to join in the regional pool, the decision of whether or not join in the regional pool was subject to the strong influence from the sub-regional governments which had the *horizontal* power over the sub-regional departments.

However, the sub-regional governments had very little economic incentive to give up their control over the funds, especially after the pension reform in the mid-1990s, because control over the pension funds and social pools could bring at least two important sources of benefit. First, the pension fund was the direct source of income to the fund managers (i.e., the sub-regional SIAs) because a certain proportion of the fund was allocated as ‘management fees’ for paying the staff in charge of the fund.<sup>71</sup> If the sub-regional pools were incorporated into the regional pool, the sub-regional SIAs and departments would lose the ‘management fees’ to the regional governments. Second, the control over the pension funds could also serve to strengthen the financial position of the sub-regional government as the pension funds were then an important source of revenue (not open to the public) not only for public purposes such as local infrastructure construction,<sup>72</sup> but also for some potential private benefits and gains. Given these two reasons, it naturally followed that the governments and the SIAs at the sub-regional level were reluctant to comply with the calls of their superiors, i.e., the regional governments. This further explained the persistent segmentation of the social pooling system in the 1990s.

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<sup>71</sup> See, eg, Chunze Jiang and Nanxiang Li, 'After Upgrading the Social Pooling System to the Provincial Level in China: Analysis of the Problems and Policy Proposals (中国养老保险省级统筹以后的矛盾分析与对策研究)' (No. C1999001, China Center for Economic Research, 1999) p 11.

<sup>72</sup> This potential benefit has actually led some malpractices in fund management. For this particular point, see: Fangzhou Li, 'The Gaming of Interests and Orientation of Policies in the Evolution of China's Social Security System (中国社会保障体制变迁过程中的利益结构与政策取向)' (PhD Thesis, North West China University, 2006) pp. 29-30.

## ***5.2 Implications of these Regulatory Problems for the Evolution of the Regulatory Space of Review and Evaluation***

As the above discussion shows, the three regulatory problems largely differed from those problems and issues incurred in the 1980s and early 1990s, when the major difficulties were primarily associated with non-government institutions, such as the ‘enterprise-based’ pension system and the ‘iron rice-bowl’ embedded in the business and labour institutions. Rather, these new problems embedded in the implementation of the pension reform largely stemmed from the institution within the government system, i.e., the relational ties among different levels of governments.

To be more specific, the first problem, i.e., failure to address the IPD, stemmed from the deficiency of the public finance system, and, in particular, the unclear delineation of the responsibilities of governments at different levels to share out the pension debts. The second problem, i.e., the malpractices of fund management, largely stemmed from the special institutional framework of fund management which was reinforced by the special status of the pension funds (i.e., being extra-budgetary revenues not open to external review) and the ‘vertical and horizontal management’ system embedded in government administration. The third problem, i.e., persistent segmentation of the social pooling system, largely stemmed from the conflict of economic interest between the regional and sub-regional governments, while underlying the problem was the same limitation of the government administration characterized by strong *horizontal* power over against weak *vertical* power. Most importantly, while all these problems and their potential detriments to the interest of the social community—pension entitlement of the participants—were known soon after the reform in the mid-1990s, no systemic solutions were furnished by the regional governments. While this might suggest the difficulty of solution in the first place, it also showed the reluctant stance of the governments, particularly

the regional and sub-regional governments, toward further change in the institutional framework of the regulation as this would invariably affect their economic interests embedded in the existing system.

## **6. Evolution in the *Regulatory Space* of Accountability and Correction**

### ***6.1 Regulatory Responses from the Central Government***

In response to the three regulatory problems, the Central Government issued a number of policies and rules in the last few years of the 1990s. These regulatory actions were largely pursued through its administrative system, i.e., the so called ‘vertical and horizontal management’ system.

#### ***6.1.1 Response to the Problem of the IPD***

Efforts of the Central Government to address the issue of the IPD started in 1996 when a number of experts were engaged by the State Council to conduct actuarial estimates of the size of the IPDs.<sup>73</sup> After the estimation, a special taskforce was formed to formulate regulatory policies to solve the problem. In 1997, a policy portfolio was produced by the taskforce, which included three major options: downsizing the IPA, enlarging the coverage of the public pension scheme, and selling off some part of the state-owned assets.<sup>74</sup>

In light of the three policy options, the State Council issued in 1997 the *Decision to Unify the Basic Pension Insurance Schemes for Business Workers* (the 1997 *Decision*). The purpose of the 1997 *Decision* was two-fold. It sought

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<sup>73</sup> See, especially, Wang, Yan, et al., ‘China's IPD, Transition Costs, Reform Approaches and their Impacts-- Analysis based on Computable General Equilibrium (中国养老隐性债务、专轨成本、改革方式及其影响--可计算一般均衡分析)’ (2001) (5) *Economic Research Journal* (经济研究) 3-12.

<sup>74</sup> See, especially, Ge, Yanfeng and Zhang, Junkuo, ‘Clarifying the Rights, Responsibilities and Interests is the Key to the Solution of China's Old-Age Pension Dilemma (理顺责任利益关系是养老保障走出困境的关键)’ (1997) (38) *Review of Economic Research* (经济研究参考) 35-38; Zhang, Qichun, ‘Study on China's Fundraising Channels for Social Security within the Context of Socialist Market Economy (试论社会主义市场经济条件下我国社会保障基金的筹集渠道)’ (1998) 37(3) *Journal of Central China Normal University* (华中师范大学学报) 78-83.

to downsize the IPA within the public pension schemes, and increase the proportion of the funds available to the social pools, thus reducing the total size of the IPD.<sup>75</sup>

Apart from the 1997 *Decision*, the policy proposal concerning expansion of coverage was further translated into rules aimed at entrenching the enforcement capacity of the regional and sub-regional authorities. In early 1999, the State Council further issued the *Provisional Rules on Collection of Social Insurance Contributions* (the 1999 *Provisional Rules*). In article 3 of the 1999 *Provisional Rules*, it was stipulated that the new public pension scheme set forth in the 1997 *Decision* of the State Council was to be further rolled out to all forms of enterprises, including the SOEs, COEs, FFEs, POEs. In addition, the 1999 *Provisional Rules* further established the enforcement role of the labour inspection authorities and the social insurance agencies in checking and addressing compliance issues. Furthermore, also in early 1999, the Ministry of Labour and Social Security passed two sets of rules, i.e., the *Provisional Rules Concerning Application and Contribution for Social Insurance* and the *Provisional Rules Concerning Supervision of Social Insurance Contributions*, to further substantiate the administrative procedures and penalties for non-compliance. The real purpose of the regulatory measures was two-fold. On one hand, they aimed at entrenching the enforcement capacity of the social insurance authorities, while on the other hand, they also intended to extend the

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<sup>75</sup> According to the new, uniform model, the overall contributory obligation of the employer was capped by 20 *per cent* of payroll while the minimum contributory obligation of the employee was fixed at 4 *per cent* of payroll. Meanwhile, it was also stipulated that while the employee's contribution was to increase up to 8 *per cent* in the future, the total amount to be tallied to the IPA was 11 *per cent* of payroll. Compared with Shanghai's pension scheme established in 1994 where the IPA normally accounted for over 16 *per cent* of payroll, the new uniform model largely reduced the size of the IPA while maintaining the same level of the overall contributory obligation. The net result was that more contributions would go to the social pool. The underlying reason for this new practice was two-fold. On one hand, increasing the size of the social pool could help entrench the funds under the PAYG so that the pressure of paying off the pension benefits for the current pensioners could be reduced. On the other hand, cutting down the size of the IPA could also help reduce the total amount of the IPD in the future as the IPD primarily stemmed from the IPAs of the 'old generation' (i.e., the near-retirement age generation) and the 'middle generation' (i.e., the generation whose employment spans over the pre-reform and the post-reform eras). As a result, reducing the IPAs would cut down the total size of the IPD.

enforcement measures to all business firms. The underlying consideration of these rules was that entrenching the enforcement measures would help reduce the pressure of current pension outlays while collecting more contributions from those non-state-owned enterprises could also spread out the IPD among a larger body of participants.

Last but not least, preliminary efforts to carry out the policy proposals concerning selling off state assets were also initiated at the end of the 1990s. The key to this was that the financial market, in particular, the stock market was to be treated as an important channel of fundraising. It was pointed out in the proposal that the majority of the IPD stemmed from the ‘old generation’ and the ‘middle generation’ who had contributed to the development of the state-owned sector under the planned economy.<sup>76</sup> As a result, much of the IPD had actually been included in the current stock of the state-owned assets. Therefore, paying off the IPD by selling off the stock became a viable solution. However, in spite of the attractiveness of this policy proposal, the real implementation of the policy actually took place in the early 2000s as it involved the co-ordination and preparation of several functions with the Central Government, including the authorities administering the state-owned assets and the financial market.<sup>77</sup>

### *6.1.2 Response to Malpractices in Fund Management*

In response to the malpractices in fund management, the Central Government passed two sets of regulatory rules, one was stipulated in the 1997 *Decision* which addressed the routine fund operation procedures, and the other in the

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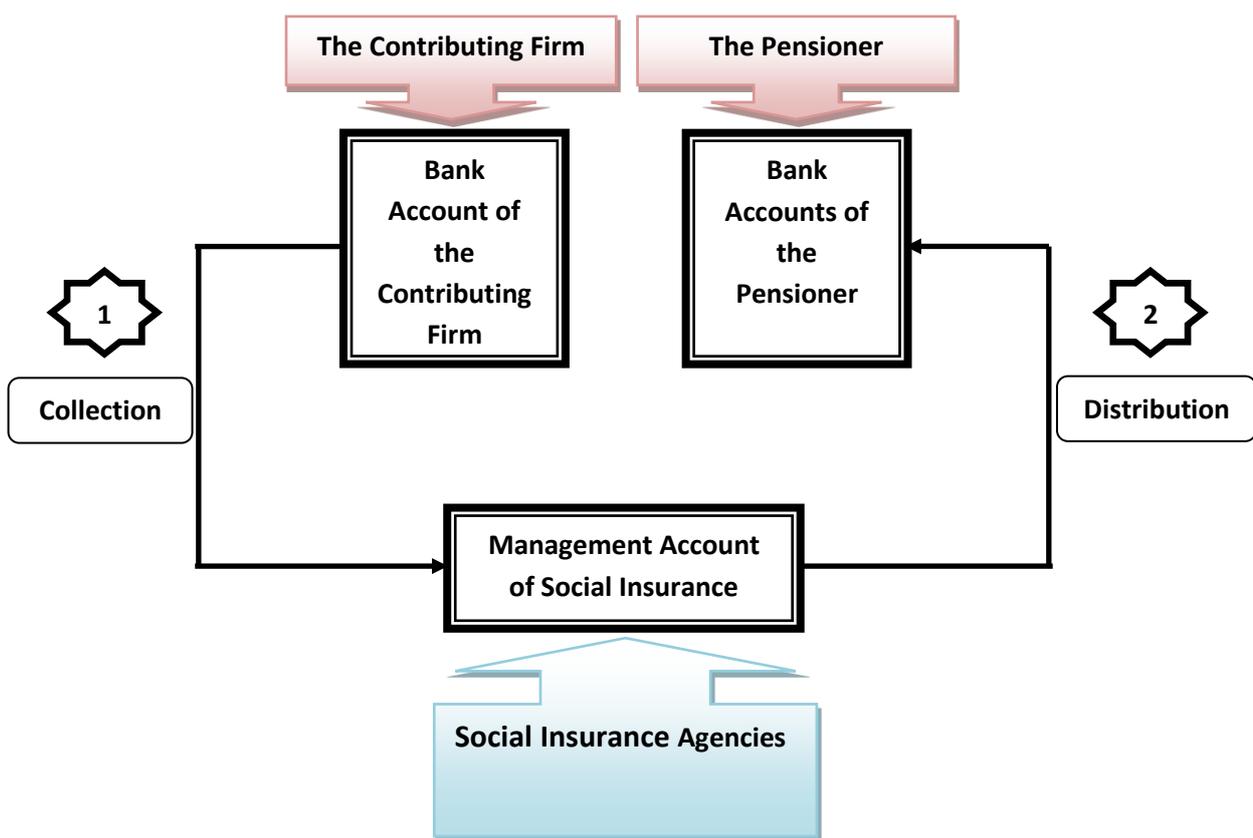
<sup>76</sup> See, especially, Shizheng Guo, ‘Feasibility Study of Transferring Part of “State Owned Assets” to Public Pension Funds (关于转移部分“国有资产”充入养老保险基金的可行性和方策研究)’ (1999) (2) *Study of Finance and Economics* (财经研究) pp. 17-21.

<sup>77</sup> However, this policy aimed at paying off the IPD was not successful. When the real intention of this policy was revealed to investors of the stock market in late 2000, the stock index plummeted. After a brief rally in early 2001, the stock market immediately turned bearish at the end of July 2001, i.e., soon after this policy was put into real practice in June. To protect the investors from greater losses, the implementation of this policy was stopped in late 2001. However, the impact of this policy was so huge that the bearish market continued over 4 years in the first half of the 2000s.

*Circular Concerning the Accounting Rules for Social Insurance Funds* in 1999 which further addressed the accounting issues relating to the surplus funds of the public pension scheme.

The major change to the routine fund operation procedures brought forth by the 1997 *Decision* was separating the revenue account and the expenditure account managed by the SIAs. As discussed in the last chapter, the routine operations of fund collection and benefit distribution were processed through one management account under the control of the SIA. The following chart illustrates the routine procedures involved in the old operation model.

**Chart 6.5: Routine Fund Operation Model before 1997**

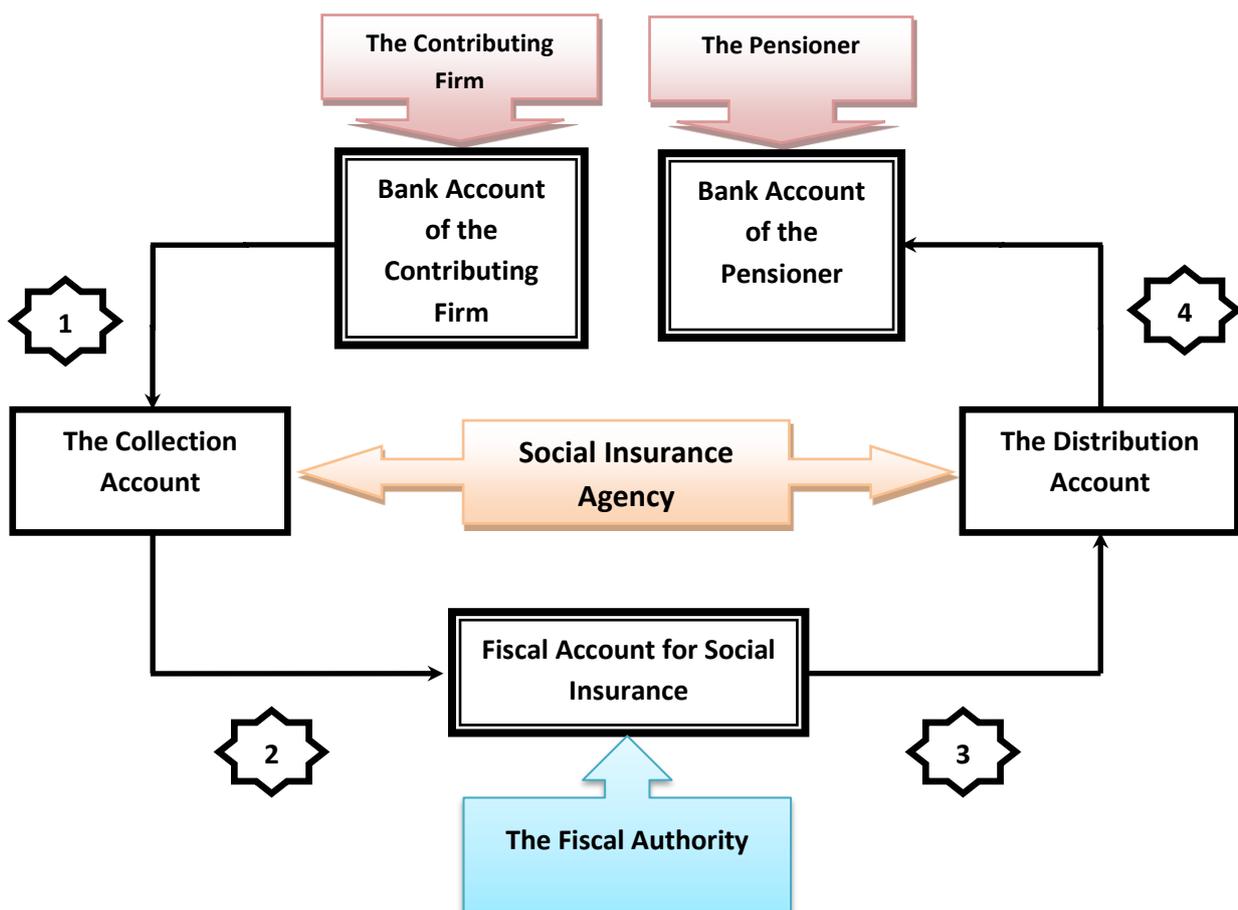


As shown by the above chart, under the old system, contributions from business firms were first transferred from the bank account of the contributing firm to the

account managed by the SIA. Through the same account, pension payments went to the pensioner's bank account. During the whole process, the revenue and the expenditure were processed through the same account administered by the SIA.

After the reform in 1997, the routine operation procedures were required to adopt a new model characterized by separate lines of collection and distribution. This was to be made possible by separating the revenue account from the expenditure account, while adding a transition account to be administered by the fiscal authority. The new model is illustrated in the following chart.

**Chart 6.6: Routine fund operation model after 1997**



As shown by the above chart, in the new model of routine fund operation, the fiscal authority was to manage the fiscal account which was set in between the collection account (i.e., the revenue account) and the distribution account (i.e., the expenditure account). Although the SIA still managed the collection and distribution accounts, these two accounts were then separated by the fiscal account administered by the fiscal authority. Consequently, the pension funds were no longer solely controlled by the SIAs commissioned by the labour and social security authority. Rather, the new model involved in a new government authority to check and monitor the SIAs. Under this new context, the SIAs were then held accountable to two different government authorities, i.e., the fiscal department and the labour and social security department.

Apart from the above model endorsed by the State Council in 1997, the Central Government further issued a set of new rules to address the accounting issues concerning the surplus pension funds, i.e., the *Circular concerning the Accounting Rules for Social Insurance Funds* (the 1999 Accounting Rules). Unlike the 1997 Decision, the 1999 Accounting Rules were jointly issued by the Fiscal Ministry and the Ministry of Labour and Social Security (MLSS). Nevertheless, the primary purpose of these rules were to further substantiate the general principles set forth in the 1997 Decision concerning the routine fund operation model, while addressing some other important issues such as the definition of surplus funds and the subject matters of investment portfolios. It was stipulated in article 26 of the 1999 Accounting Rules that ‘surplus funds include surpluses under the PAYG social pool and the surpluses under the IPA’, while for investment issues, article 36 further provided that ‘the fund surpluses can only be used either to purchase state bonds, or be saved as term deposits’. It was also provided in article 36 of the Accounting Rules that ‘the labour and social security authority could advise the fiscal authority’ in charge of the fiscal account concerning how to investment the surplus funds, while the decision to

invest was to be made based on ‘the agreement between the fiscal authority and the labour and social security authority through consultation’.

### *6.1.3 Response to the Segmentation of the Social Pooling System*

Compared with the regulatory responses to the previous two problems, the Central Government did not provide any substantial or procedural rules to address the segmentation of the social pools. Rather, the State Council issued a circular to the regional governments in 1998, i.e., the *Circular Concerning Implementing Regional Social Pooling of Basic Pension Schemes for Business Workers and Transferring the Social Pools of Industry-Based Pension Schemes to the Regional Authorities* (i.e., the 1998 *Circular*). The main purpose of the 1998 *Circular* was to address the fragmented social pooling system at the sub-regional level. However, like the *Circular* of the State Council in 1991, the Central Government did not provide specific guidelines concerning how to achieve this particular objective. Rather, it merely clarified the definition of the ‘regional social pooling’ in the 1st article, i.e., ‘a fund pooling system with uniform regional rates of contribution, uniform regional model of management, uniform regional procedures of transfer, administered in a purely vertical management structure for all social insurance agencies within the region’ while providing a deadline for completing the task, i.e., by the year of 2000. Beyond that, the majority of the 1998 *Circular* focused on the second issue, i.e., transferring the social pools of industry-based pension schemes to the regional authorities.<sup>78</sup>

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<sup>78</sup> This issue was briefly discussed in the last sub-section concerning the fragmented social pools. The industry-based pension schemes were largely run by those giants in the SOEs in industries like hydro-power generation and transmission, crude-oil refining, telecommunications, and banking, etc. These pension schemes first

## *6.2 Regulatory Outcomes of the Central Government's Responses at the End of the 1990s*

In the last few years of the 1990s, the Central Government passed a number of rules to address the problems stemming from pension fund management. A brief review of the rules, however, reveals that while most of the regulatory responses aimed at the regional governments, the majority of the rules were not aimed at changing the institutional framework governing the fund management system. The only exception were the rules establishing the new model for routine fund operation procedures that sought to separate the fund collection account from the fund distribution account.

### *6.2.1 Outcome of the Regulatory Responses to the IPD*

For the first problem of IPD, the Central Government's response was to downsize the IPA by stipulating a uniform scheme other than the two in the 1995 *Circular* while extending the coverage of the public pension scheme accompanied by rules to strengthen the enforcement capacity of the regional authorities. These first two rules were largely immediately carried out by the regional governments.

However, given the rapidity of putting these regulations into effect, the key issue embedded in the IPD—how to share out the deficits between the Central

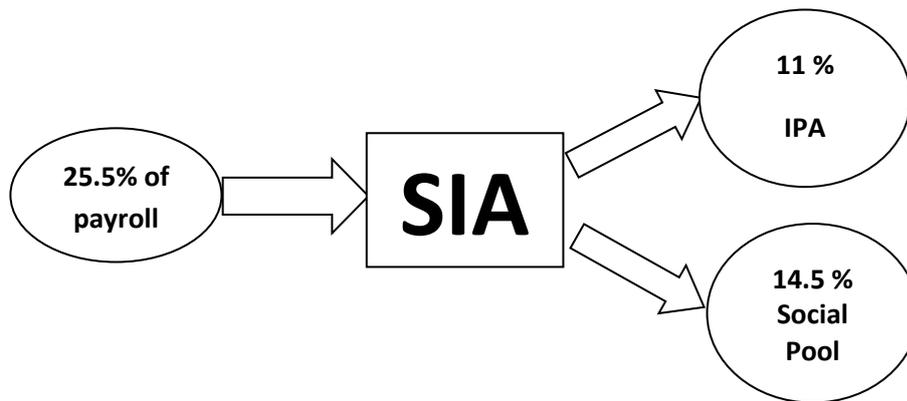
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appeared in the late 1980s and were expanded to a few more industries in the early 1990s while the main reason for organizing these schemes on industrial base was that the highly fragmented social pooling system in the 1980s and 1990s would largely compromise the pension entitlement of the employees because cross-regional or cross-subregional mobility of labour was essential given the special nature of the jobs in these industries. However, this stance and practice was vehemently attacked by the regional and sub-regional governments on the grounds that with these SOE giants being excluded from the regional and sub-regional pools, the sustainability of the public pension schemes was seriously threatened. The stalemate between those SOE giants and the regional governments finally developed into a final showdown in the late 1990s. While the functional ministries of the Central Government were inclined to accept the stance of the SOE giants, the strong resistance and outcries from the regional governments finally prevailed. As a result, in 1998 the State Council decided to step back, hence the 1998 *Circular*. For a detailed account of this gaming between the regional governments and the ministries of the Central Government concerning social pooling, see: Dongfang Li, 'Unification of Social Security Pension at the Provincial Level and Sustainability Research (养老金省级统筹与社会保障持续能力研究)' (Masters' Thesis, North-West University, 2006) pp. 21-23.

and regional governments—remained unaddressed. In other words, in spite of the entrenchment of the enforcement function and the reduction of the IPA, the deficits of the IPAs remained. The following charts take the case of Shanghai as an example to further illustrate the problem.

### **Chart 6.7: Why Contributions were Unable to Top up the IPD in Shanghai**

#### **1. After Reducing the IPA in 1997**

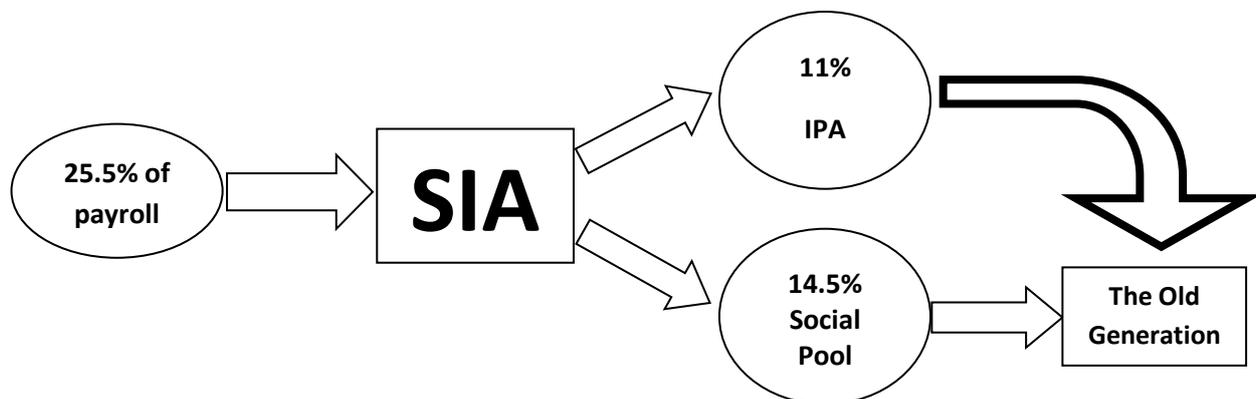


As shown in the above chart, since 1997, the size of the IPA was further reduced to 11 *per cent* of the payroll, while the social pool was increased to 14.5 *per cent* of payroll over against 9 *per cent* in the mid-1990s. Although this increased the availability of funds for transfer payments to the current pensioners (the so called ‘old generation’), it still fell short of making the two ends meet as the overall contribution rate—25.5 *per cent* of payroll—was very close to the real amount needed to pay off the ‘old generation’ in Shanghai by the end of the 1990s.

To keep the pension scheme going despite the shortage of funds, the regional government in Shanghai and elsewhere, took a special approach to solve the problem, i.e., using the funds in the IPAs of the ‘mid-generation’ and of the ‘new generation’ to pay off the ‘old generation.’ The net result of this practice was that the majority of the funds, which should have been tallied to the IPAs,

were actually used as transfer payments to the existing pensioners. Therefore, many of the pension accounts were not actually funded. Instead, the majority of them were just ‘notional accounts’, and the balances in these accounts were nothing but book values. That was why many scholars and government officials colloquially described these IPAs as ‘empty accounts,’<sup>79</sup> while others further argued that although the new scheme appeared to be a mixture of a social pool and an IPA, it still followed the PAYG rules, i.e., the majority of the funds were spent as transfer payments to the current pensioners.<sup>80</sup> The following chart describes what happened to the pension account.

## 2. What Happened to the IPAs in the Second Half of the 1990s



As shown by the above chart, to make the two ends meet, the regional government of Shanghai decided to use the funds that ought to have remained in the IPAs to pay off the ‘old generation’. The bold arrow in the above diagram illustrates this particular practice, thus explaining why the IPAs were largely

<sup>79</sup> See, for example, Yuming Lin, 'Study on the progress of consolidating the individual pension accounts of China's pension insurance (中国养老保险个人账户“实账化”进程研究)' (1997) 191(10) *The Study of Finance* (财经研究) pp. 25-29.

<sup>80</sup> For this particular point, see, for example: Juan Du, 'Implications of Privatizing Old-age Pension Insurance for China's Pension System (养老保险私有化改革对我国养老金制度的启示)' (2005) 25(2) *Journal of Tianjin University of Commerce* (天津商学院学报) pp. 51-55; Fangzhou Li, 'The Gaming of Interests and Orientation of Policies in the Evolution of China's Social Security System (中国社会保障体制变迁过程中的利益结构与政策取向)' (PhD Thesis, North West China University, 2006) pp. 37-38.

‘empty’ in spite of the pension reform since the mid-1990s. This practice was commonplace across China.

Although the legitimacy of this practice was examined by universities scholars in the early stage of the reform,<sup>81</sup> the research was largely limited to a small group of scholars, knowledge of these technical issues remained limited among the public at large.<sup>82</sup> Instead of the IPD, participants in the pension schemes could only judge their pension entitlements as per the written rules instead of the actual operations of the SIAs. Although the funds were not being used in compliance with the rules, the negative effects were then obscure, because, on one hand, the public had so far been unaware of the real practices; on the other hand, with this practice in place, the government obligation to pay off the IPD was temporarily avoided.<sup>83</sup> As a result, the Central Government took a tolerant stance towards the regional government activities in this respect.

### *6.2.2 Outcome of the Regulatory Measures in Response to Malpractices of Fund Management*

For the second problem, which involved regulatory measures to separate the collection account from the distribution account and restrictive measures on investment portfolios involving surplus pension funds, the outcome was poor. In terms of the first measure, the response of the regional governments was slow.

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<sup>81</sup> See, for example: Jiange Li, 'A Few Problems in the Reform of China's Social Security System (我国社会保障制度改革的几个问题)' (2002) (2) *Comparative Economic and Social Systems (经济社会体制比较)* pp. 46-52; Jinxia Liu, 'Old-age Pension Insurance: A Long March Ahead (养老保险: 任重道远)' (1998) (18) *Economic Tribune (经济论坛)* pp. 10-11.

<sup>82</sup> The issue of IPD and the empty pension accounts did not gain much public attention during the second half of the 1990s. It was until the early and mid-2000s that this issue was brought to the public attention. The 'consolidating the notional accounts' program was largely introduced in the mid-2000s across China until then the awareness of the general public of what was happening to their IPAs had remained weak. For this particular situation, see: Lisen Han, 'To Get Funded is the Key to Old-age Security--Empty Pension Accounts Awaiting Consolidation (养老要保险 关键在积累——个人账户的“空账”亟待“实化”)' (2001) (1) *Labour Theories and Practices (劳动理论与实践)* pp. 10-11.

<sup>83</sup> As suggested above, the Central Government was unwilling or at least hesitant to pay off the IPD in the 1990s. The debate between the Central Government and the regional governments continued well into the 2000s. Meanwhile, this particular practice of 'notional account' also continued well into the mid-2000s.

Only a few provinces immediately passed regional by-rules to carry out the regulatory policy,<sup>84</sup> whereas others began to comply in the early 2000s.<sup>85</sup> Some did not comply until the second half of the 2000s. Shanghai belonged to the last group. It was not until late 2006, when a huge scandal of fund management was revealed, that the regional by-law of instituting this particular measure of separating the collection and distribution accounts for public pension schemes was finally passed and put into practice in Shanghai province.<sup>86</sup>

The second measure seeking to regulate investment portfolios was equally unsuccessful. Although fund surpluses amounted to over 60 billion *yuan* in 1998 and over 70 billion by the end of 1999,<sup>87</sup> only a small proportion of the surpluses were actually invested in the state bonds or term deposits *as per* the regulatory rules of the Central Government.<sup>88</sup> In this sense, the situation of compliance was really problematic. However, given this poor level of compliance, it is important to note that the rules restricting the investment

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<sup>84</sup> Some of the regional governments like those of the Zhe Jiang Province and Si Chuan Province and Han Nan Province were the actual heralds of the regulatory program aimed at separating the income and expenditure accounts of social insurance funds. They actually experimented with this particular practice even before 1999. Some regional governments like those of Chong Qing Municipality, He Bei Province, Shaan Xi Province, Hu Bei Province and Beijing Municipality passed their regional by-laws immediately after receiving the regulatory policy from the State Council. However, about half of the regional governments such as those of Shanghai Municipality, Gui Zhou Province, Jiang Su Province, Canton Province, Guang Xi Province, Jiang Xi Province, etc., did not comply with this regulatory policy until the mid and late 2000s.

<sup>85</sup> Even among the few which actually complied, problems and loopholes were many. For this particular point, see, for example: Jumei Wu, 'The Management *Status Quo* of the Special Fiscal Account for Social Insurance Funds (社保基金专户管理的现状)' (1999) (12) *Auditing in Hubei* (湖北审计) p. 41.

<sup>86</sup> This scandal and its implications for the regulatory system of public pension in China will be closely studied in the next chapter. For the time being, it suffices to say, the author tries to use this scandal as an indicator of the outcome concerning those regulatory measures of the Central Government.

<sup>87</sup> As revealed by the discussion in the previous sub-sections, the surpluses of pension funds largely stemmed from the fact that the payment of the IPD was shelved since the beginning of the pension reform in the mid-1990s. As a result, a certain proportion of the fund was left over in the form of surpluses. For more figures of the surplus funds from the public pension schemes, see: Qingguo Li, 'Study on the Improvements of China's Legislation on the Management of Pension Funds (论我国养老保险基金投资立法的完善)' (Master's Thesis, Capital University of Economics and Business, 2004) p. 23.

<sup>88</sup> Before 1999, the rate of investment in the form of state bonds and term deposits was about 20-30%. However, after the promulgation of the 1999 *Accounting Rules*, the rate did not pick up. Rather, it stayed flat. Indication of this fact can be seen in several Chinese journal articles. As a matter of fact, to change the poor compliance situation, the Central Government established a national social insurance fund to manage investment issues in 2000. For example: Hongluo Wu, 'Factors Restricting the Operation and Management of Pension Funds in China (我国养老基金投资运营的制约因素)' (2006)(3) *Contemporary Economic Studies* (当代经济研究) pp. 65-68.

portfolios were much criticized. The main reason underlying the criticism was the fact that investment returns of the state bonds and term deposits were persistently low in the mid-1990s and thereafter. Consequently, compliance with the rules would not actually have solved the fundamental problem of depreciation.<sup>89</sup> Rather, it would only have shown the stance of the regional governments towards the policy of the Central Government.

Given the procrastination of the regional governments in carrying out the rules separating the collection account and the distribution account, as well as the poor compliance with the rules concerning investment restriction, it is arguable that the intended effect of regulating non-compliance of the regional government in fund management was largely a failure.

### *6.2.3 Outcome of the Regulation to Address the Segmented Social Pooling System*

In spite of the regulation from the Central Government, the segmentation of the social pools continued. The intention of the 1998 *Circular* of the State Council was to integrate the much fragmented social pooling system. However, such action among regional governments was marginal. The underlying reason remained the same as it had been for the 1991 *Decision* of the State Council. In the early 1990s, there were altogether 2,200 strong sub-regional and regional pools in China.<sup>90</sup> This number not only remained the same at the end of the 1990s but also continued well into the late 2000s. In this sense, the deadline, i.e.,

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<sup>89</sup> This is a very contestable issue in public pension regulation. While restrictive measures of the Central Government aimed at addressing malpractices of the fund administrators at the regional and sub-regional levels, the substantive terms of the measures which largely confined the subject matters of investment to state bonds and term deposits, both of which had been persistently characterized by very low rates of return, were much criticized by many scholars. This contestable nature of the regulatory rules along with the special institutional framework surrounding the fund management system finally contributed to more incidents of non-compliance in the 2000s. The conflict between the rules restricting the subject matters of investment and the stance of the regional and sub-regional governments concerning how to invest the funds will be discussed in great detail in the next chapter.

<sup>90</sup> See, especially, Bingwen Zheng, 'Origin and Hazard of the Fragmented Social Security System in China (中国社会保险“碎片化制度”危害与“碎片化冲动”探源)' (2009) (1) *Social Security Studies* (社会保障研究) pp. 209-224.

year 2000, which was stipulated in the first article of the 1998 *Circular* of the State Council, was not at all complied with by the regional and sub-regional governments. Nor did the number of integrated regional pools increase in the years following 1991.

The regulatory outcomes and the regulatory measures are summarized in the following table.

**Table 6.8: Regulatory Responses of the Central Government and the Outcomes**

Problems	Regulatory Measures	Outcomes	Comments
Huge IPD	<ul style="list-style-type: none"> <li>• Down-size the IPA</li> <li>• Extend coverage</li> <li>• Sell off state-owned assets</li> </ul>	Complied	Temporarily alleviating the problem which remained serious as most IPAs were <i>empty</i> in the late 1990s.
		Complied	
		Not completed in the 1990s	
Malpractices	<ul style="list-style-type: none"> <li>• Separating the accounts</li> <li>• Investment restriction</li> </ul>	Poorly complied	Not solved at all.
		Poorly complied	
Segmented social pools	<ul style="list-style-type: none"> <li>• 1998 <i>Circular</i> by the State Council</li> </ul>	Not complied at all	Not solved at all.

### ***6.3 Implications of these Outcomes for the Regulatory Space of Accountability and Correction Embedded in the Government System***

The reform of the fund management system for public pension was initiated as a result of the transition of the public pension schemes from the original PAYG model to the new mixed model combining a social pool of PAYG with an IPA. While the substantive changes to the pension schemes were largely endorsed by

the 1993 *Decision of the Central Committee of the CCP on Issues Concerning How to Establish a Socialist Market Economy*, the institutional changes to the fund management system were, as shown in the case of Shanghai, mostly introduced as a result of regional legislation by the regional governments in the mid-1990s. Since the establishment of this new pension system, institutional reforms continued in Shanghai as they did elsewhere in China. However, most of the reforms aimed at changing the institutional structure of the fund management system were carried out solely by regional governments, and surveillance by the Central Government and involvement of the community generally were slight marginal. As a result, fund management finally evolved into a self-reliant, high-enclosed and segmented system. This led to three regulatory problems in the late 1990s and a number of regulatory responses from the Central Government.

However, in spite of the quantity of the rules and policies in response to the three problems, the vast majority of the regulatory measures focused either on changing the substantive terms of the pension scheme, such as downsizing the IPA, or on regulating the behaviour of the regional and sub-regional governments, such as restricting the subject matters of pension investment, while only a few regulatory policies primarily aimed at addressing the underlying institutional problems. Even for the few rules which sought to address institutions, such as separating the revenue account and the expenditure account and integrating the sub-regional social pools, compliance by the regional and sub-regional governments proved to be weak at best. Consequently, the outcomes of the regulatory responses from the Central Government in the last few years of the 1990s provide no convincing evidence of effective regulation. Instead, these outcomes, and the regulatory activities lying behind these outcomes, revealed further important changes in the accountability and correction mechanisms within the government system.

First and foremost was the change in the relational ties between the Central and regional governments which had been characterized by a dynamic *regulatory process* consisting of policy formulation, rule-making, implementation, review, evaluation and correction in the 1980s. However, as reflected by the implementation of the pension reform since the mid-1990s, regional governments were no longer committed to the role of implementing the regulatory policies co-defined by the Central Government and themselves in the early 1990s. Rather, economic interests and benefits embedded in the reform initiatives became an important factor influencing their responsiveness. This was not only reflected in the efforts of the regional governments to construct the special fund management system which was highly enclosed and segmented, but also reflected by the reluctance of the regional and sub-regional governments to give up their vested interests and comply with the regulations from the Central Government.

Second, as shown by the regulatory activities since the mid-1990s, the administrative system characterized by strong *horizontal* administration and weak *vertical* guidance, was not able to hold the regional and sub-regional governments accountable for their non-compliance and problems.<sup>91</sup> Nor was the Central Government able to correct the deviation in the regulatory activities

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<sup>91</sup> As a matter of fact, since the decentralization of administrative and legislative powers in the early 1980s, the Central Government had largely lost its direct control over the regional governments as the vertical function-based administrative model had largely been shifted to a horizontal territory-based model in which the Central Government had very limited power over the personnel, organizational and financial issues within the regional and sub-regional governments. As suggested by the discussion in this section, in the domain of public pension regulation, each region was then financially independent, and the Central Government had very few financial means to regulate the performance of the regional governments, while in terms of personnel and organizational issues, the power also largely lay in the decision-makers of the regional governments. The only exception was disciplinary surveillance through administrative measures against people accused of official misconducts, loss of integrity or corruption. Apart from that, the Central Government could only exercise influence over the departments of the regional governments through policy guidance. However, this sort of guidance was largely derived from the special learning relationship between the Central and regional Governments in the 1980s, and was mainly used for feedback processing in response to emerging problems stemming from implementation of reform initiatives, including but without limitation to regulatory programs. In other words, while policy guidance had some influence over the performance of the government departments at the regional level, it could not to be enforced against the non-complying government actor or actors.

performed by the regional and sub-regional governments. This further suggests the deterioration of the co-operative ties among the governments that had been driving the systemic learning and evolution of the public pension regulation since the late 1970s. In particular, the *regulatory space* of implementation was no longer serving the function of identifying problems for further improvements in the regulatory system. Rather, it was blended with economic considerations and motivations, while purposive avoidance of complying with the guidance from superior government authorities actually became an important means to realize the potential economic benefit embedded in the pension reform. The emergence of the regulatory problems and their persistence in the wake of the Central Government's responses further demonstrated this particular stance of the regional and sub-regional governments.

Third, as shown by the discussions concerning the nature of the regulatory problems, the cause of the problems lay in the institutional framework surrounding fund management. In fact, given this particular management model, neither the IPA nor the social pool was secure. The former was exposed to the risk stemming from malpractices of government authorities, while the latter was not able to be transferred across different sub-regional jurisdictions, not to mention across all regions in the country. The net result of these problems was that the entitlement of the participants (beneficiaries of the public pension scheme) was compromised.

#### ***6.4 Accountability and Correction Mechanisms outside the Government System***

As noted above, the functioning of the accountability and correction mechanisms in the late 1990s indicates the fact that regional governments were no longer committed to implementing regulatory policies from the Central Government. Nor were they willing to report the real problems in the regulation

as they had in the 1980s. Given this new situation, the Central Government had to check and identify the problems on its own accord while ordering the regional and sub-regional governments to address these problems through the administrative system characterized by strong *horizontal* control and weak *vertical* guidance. Despite this, the outcomes of the regulatory responses were not effective.

Given these new changes in the government system, it is important to note that the above description does not cover the complete *space* of accountability and correction. In particular, no description of the accountability and correction mechanisms provided by the legal system has been made. To complete the description, this sub-section continues to examine relevant mechanisms provided by the legal system. In particular, the accountability and correction mechanisms provided by administrative law—a sub-system of law for regulating government authorities—will be examined in detail.

Administrative law is a body of law which primarily deals with the legal relations stemming from or relating to public administration. In particular, it involves a range of legal mechanisms through which the social community can challenge the public authorities for their executive actions.<sup>92</sup>

In China, this particular legal sub-system had been much under-developed under the rule of Mao,<sup>93</sup> and it had not been seriously introduced into China's legal system until the mid-1980s when the CCP top leadership decided to reform the socio-economic and state institutions under the big policy paradigm

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<sup>92</sup> For this particular point, see: John Ohnesorge, 'Chinese Administrative Law in the Northeast Asian Mirror' (2006) 16(103) *Transnational Law & Contemporary Problems* p. 143.

<sup>93</sup> As has been discussed in Chapter 4, the legal system was largely enfeebled in the late 1950s and 1960s, while during the Cultural Revolution (1966-1976) the legal system was completely reduced to a subsidiary part of the public security function. It largely seceded from social governance and regulation. Furthermore, along with the secession of law, was the suspension of state legislation. The Nation People's Congress stopped working since the late 1950s. This situation was not reversed until late 1970s when the Opening-up and Reform began. For another source that can strongly prove this, see: John Ohnesorge, 'Chinese Administrative Law in the Northeast Asian Mirror' (2006) 16(103) *Transnational Law & Contemporary Problems*, pp. 136-137.

of ‘*Socialist Rule by Law*’.<sup>94</sup> In the second half of the 1980s, administrative law was finally incorporated into the general framework of social governance,<sup>95</sup> while four legal mechanisms—administrative litigation, administrative review, petition by letters and visits, and congress inquiry—were further legalized in the late 1980s and 1990s to regulate public administration.

#### 6.4.1 *Administrative Litigation*

Administrative litigation was first introduced by a set of enforceable legal rules in the late 1980s to establish the legal standing of any private party against public authorities for civil liabilities, while in 1989 the National People’s Congress (i.e., the NPC) further passed the *Administrative Litigation Law* (i.e., the 1989 ALL) to formalize the procedures of legal actions involving government authorities, thus subjecting a number of administrative activities to judicial review.<sup>96</sup> The primary aim of this law was to help private actors to redress wrongful acts of the public authorities, pursue monetary compensation, or even hold the responsible personnel accountable for wrongful acts. The impact of the law was at least two-fold. It led to some changes to the administrative environment in China, where the authoritative stance of the government functionaries was seldom challenged, and helped to firm up a certain kind of supervisory mechanism available to the social community to check and balance the administrative function of the state.

#### 6.4.2 *Administrative Review*

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<sup>94</sup> For this particular point, see, eg, Li Zhang, 'Three Development Stages of China's Administrative Law (中国行政法发展三阶段)' (2009) (6) *Unity (团结)* pp. 38-41; Huaide Ma, '30 Years of Rule of Law in Public Administration (行政法治 30 年)' (2009) (3) *Journal of CUPL (中国政法大学学报)* pp. 138-145.

<sup>95</sup> These comments were made in October 1987 by the then Secretary General of the CCP. The main topic underpinned by these comments was political reforms and administrative reforms. These were quoted by a few journal articles. See, for example: Daying Wu and Lin Li, 'Reforming the Political System and Improving the Administrative Law System (政治体制改革与完善行政法制)' (1988) (3) *Political Science and Law (政治与法律)* pp. 5-9; Huaide Ma, '30 Years of Rule of Law in Public Administration (行政法治 30 年)' (2009) (3) *Journal of CUPL (中国政法大学学报)* pp. 138-145.

<sup>96</sup> John Ohnesorge, 'Chinese Administrative Law in the Northeast Asian Mirror' (2006) 16(103) *Transnational Law & Contemporary Problems* p. 141.

In tandem with the promulgation of the 1989 ALL, the Central Government also stepped up its regulatory efforts to further standardize the review system of government administration. In particular, the State Council passed the *Administrative Review Provisions* (ARP) in 1990. Unlike the 1989 ALL which sought to provide private actors with a new mechanism for solving disputes arising from public administration, the 1990 ARP aimed at reforming the internal adjudication mechanism within the government system for checking and addressing possible wrongs stemming from public administration. In the 1980s, the administrative review mechanisms varied within different government functionaries as most of the review mechanisms were established by various rules and regulations passed by the Central Government, while the varied procedures prescribed in these rules and regulations further reduced the efficiency of the review mechanisms. The 1990 ARP unified the procedures of administrative review, and expressly allowed private parties to submit the outcome of the administrative process to judicial review. In 1999, the 1990 ARP was further replaced by the NPC's *Administrative Review Law* (1999 ARL).

#### *6.4.3 Petition by Letters and Visits*

This grievance petition system, colloquially known as the 'petition by letters and visits' (i.e., the PLV), was a mechanism of direct appeal to government authorities. In the early 1950s, the mechanism was furnished by the Central Government to serve two important functions: 1) communication of public opinions and grievances; and 2) addressing difficult problems unable to be solved by low-level government functionaries or legal courts.

In the mid-1990s, the PLV mechanism was further formalized by the Central Government which passed the *Provisions on Petitions by Letters and Visits* in 1995 (i.e., the 1995 PPLV), allowing more citizens 'to present their complaints to specially designated government offices, bypassing the bureaucracy that

allegedly harmed them, as well as the courts and judicial review.’<sup>97</sup> In particular, the 1995 PPLV allowed private parties to lodge four types of petitions concerning or relating to: 1) criticisms, advice or requirements addressing to government functionaries or their staff; 2) charges or disclosures of illegal acts or malfeasances by government staff; 3) allegations of torts; 4) other issues (presumably including difficulties arising out of changes in laws and policies). In addition, timelines were also provided for case processing and appeal,<sup>98</sup> while legal liabilities were also stipulated for omission, dereliction, procrastination, and malfeasance of the government authorities handling the petition.

#### 6.4.4 Congress Inquiry and Correction

Unlike the previous three mechanisms which were legalized through legislations by the NPC or the State Council, the fourth mechanism is endorsed by China’s Constitution. It is normally referred to as a ‘congress inquiry’ to be initiated by the people’s congresses (i.e., the state legislatures), concerning possible wrongs and problems attributable to the administrative or other public authorities.<sup>99</sup> This mechanism was first stipulated in the *Constitution* of 1954 as an important instrument to supervise the administrative function of the government.<sup>100</sup> However, under the rule of Mao who particularly disdained the

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<sup>97</sup> John Ohnesorge, 'Chinese Administrative Law in the Northeast Asian Mirror' (2006) 16(103) *Transnational Law & Contemporary Problems* p. 144.

<sup>98</sup> Article 30 of the 1995 PVL provided that ‘the government department receiving the case is to process the case within 30 days, and inform the claimant of the result.’ Article 31 of the 1995 PLV further provided that ‘if a case is transferred from some other government department, the processing time can be extended to 90 days.’

<sup>99</sup> It is important to note that the ‘inquiry’ under issue is not, in most cases, just a question regarding a certain matter to be explained by the respondent. Rather, it is a process of questioning initiated by the representatives of the congress, which may further give rise to accountability issues. In this sense, it differs from the ‘parliamentary inquiry’ in Victoria where ‘a parliamentary inquiry is a question directed to the presiding officer of a deliberative assembly to obtain information on a matter of parliamentary law or the rules of the organization bearing on the business at hand.’ The Chinese ‘congress inquiry’ is largely to challenge instead of to obtain information.

<sup>100</sup> Article 36 of the 1954 Constitution provides that ‘representatives of the National People’s Congress can raise inquiries to the State Council or its ministries and commissions, while answering the inquiry or inquiries is imperative.’

use of law for social governance, congress inquiry was marginalized. It was not until 1982 when the Constitution was revised for the third time that the ‘congress inquiry’ was again incorporated into the supervisory function of all people’s congresses,<sup>101</sup> while later legislations such as the *Organizational Law of People’s Congresses* set down the procedures for initiating the inquiries.

It was prescribed by the laws that the inquiries could only be initiated during the annual general assembly of the congress or during the meetings of the standing committee of the congress; while quantitative requirements regarding the number of congress representatives intending to initiate the inquiry were also stipulated.<sup>102</sup> The targets of the congress inquiry were broad, including virtually all government functionaries and state organs like the law courts,<sup>103</sup> while the subject matters of the inquiries included constitutional issues, allegations of non-compliance with law or regulations, omission or dereliction in carrying out the decisions passed by the congress, or issues of great public concerns. Once a congress inquiry was raised, the government department or state organ being questioned was obliged to respond, while the congress could choose to accept or reject the response. In the latter case, another response was required. Normally, the congress inquires would lead to consequences such as congress decisions (concerning the issues at stake) which had the same legal force of laws

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<sup>101</sup> Article 73 of the 1982 Constitution provided that ‘during the general assembly of the National People’s Congress, or during the meetings of the Standing Committee of the Congress, the Congress can send special inquiries to the State Council or its ministries and commissions according to the law; while answering these inquiries is imperative.’

<sup>102</sup> In the 1990s, the quantitative requirements regarding the number of representatives intending to initiate the inquiry vary at different levels of the congresses. To be more specific, at the national level, a minimum of 30 representatives was required; while at the regional level, the number was 10. Besides, the standing committees of the congresses could also initiate inquiries while the quantitative requirements normally varied from 3 to 10, i.e., 3 to 10 members of the standing committee. For a detailed discussion concerning the quantitative requirements see, for example: Ying Sun, ‘Study on the Initiation of Congress Inquiries (论人大质询的启动要件)’ (2010) (6) *People’s Congress Studying (人大研究)* pp. 6-13.

<sup>103</sup> The people’s procuratorates are the state authorities that serve a supervisory role over the judiciary courts while normally speaking this particular role is served in criminal proceedings. For the purpose of this thesis, the function of the procuratorates is not much discussed as the main theme of the thesis is social regulation and pension which has very little connection with the function of the procuratorates or the criminal law in China.

depending on the hierarchy of the congress, and accountability measures such as dismissal of the responsible personnel with recourse of legal liabilities.

### ***6.5 Limitation of the Accountability and Correction Mechanisms outside the Government System***

In the above sub-section, four accountability and correction mechanisms, i.e., administrative litigation, administrative review, grievance petition and congress inquiries, available to the social community, are discussed. As shown by their evolution during the 1990s, three of them were endorsed by the state legislature, i.e., the NPC (for the 1989 ALL and 1999 ARL), and the State Council (for the 1995 PVL), while the congress inquiries were endorsed by the Constitution (1982) and some additional state laws legislated by the NPC. Given the apparent legal force of the laws, it is equally important to note the fact that there were both statutory and institutional restrictions on the operation of these mechanisms. To further examine these restrictions, we first focus on the statutory aspects of the restrictions provided by the laws, while the underlying institutional aspects will be examined later.

#### ***6.5.1 Statutory Restrictions: Dichotomization of Abstract and Concrete Administrative Acts***

‘Abstract administrative acts’ and ‘concrete administrative acts’ were concepts used in China’s administrative law to decide actionability of issues stemming from public administration. To be more specific, a *concrete* administrative act referred to a specific administrative act performed by some administrative authority or authorities, i.e., government functionaries and agencies as well as their staff, to discharge its or their administrative functions and duties over against some non-public party or parties which were definite and certain.<sup>104</sup> An

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<sup>104</sup> See, eg, Baoying Guan, ‘The Conception of Legal Classification of Administrative Act (行政行为法律分类构想)’ (2009) (4) *Oriental Law* (东方法学) pp. 60-70.

*abstract* administrative act, in contrast, refers to an act which was addressed to a non-specific group of private parties.<sup>105</sup>

However, in spite of the significance of this dichotomization, the 1989 ALL did not provide any detailed criteria or tests to distinguish between *concrete* and *abstract* administrative acts. Rather, it only set forth a number of administrative acts which were legally deemed as *concrete* and *actionable*. These included, as provided by article 11 of the 1989 ALL, actions involving: administrative sanctions, administrative enforcement measures (either against person or property), administrative measures alleged to be infringing on the managerial powers of a business, administrative decisions concerning issuance of a permit or license, failures of the administrative authorities to take measures to protect personal safety or property in response to applications made by the private parties, omission of distributing social benefits stemming from industrial injuries or deaths, omissions of discharging statutory obligations and tortious administrative acts. In addition, the 1989 ALL also explicitly excluded some obvious *abstract* administrative acts from judiciary review. These included, as provided by article 12, decisions and ordinances prescribed by administrative rules or provisions with broad binding forces.

Apart from the 1989 ALL, the 1990 ARP also stipulated the same restrictions on reviewability. Similar to the 1989 ALL, Article 9 of the 1990 ARP set forth exactly the same concrete administrative acts that were to be reviewed while expressly excluding all abstract administrative acts that were likewise treated as non-actionable matters under the 1989 ALL.<sup>106</sup>

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<sup>105</sup> See, eg, Shirong Fang and Gang Li, 'A Study on the Classification of Administrative Act (行政行为的分类研究)' (1989) (4) *Studies in Law and Business (法商研究)* pp.8-14.

<sup>106</sup> See, eg, Shuyi Zhang, 'Again Discussing Problems of Dividing Abstract Administrative Act and Concrete Administrative Act (再谈抽象行政行为与具体行政行为的划分)' (1994) 57(1) *Chinese Legal Science (中国法学)* pp. 112-114.

Therefore, as revealed by the above discussion, both the 1989 ALL and the 1990 ARP limited the scope of disputes to be settled through administrative litigation and administrative review, and excluded the *abstract* administrative acts from the purview of adjudication.

#### *6.5.2 Impact of the Dichotomization of the Administrative Acts*

The impact of the dichotomization of administrative acts and the restrictions on actionability and reviewability was at least two-fold. First, the restrictions narrowed down the scope of the disputes to be initiated by the social community. The social actors could only challenge a few listed issues stemming from *concrete* administrative acts while the majority of other administrative acts such as the rule-making process, the rules, and administrative decisions concerning the institution of the regulatory system were primarily excluded by the statutory restrictions. The net result was that the targets of the legal challenges were further narrowed down to those enforcement and operational functionaries because these authorities were mainly responsible for carrying out administrative sanctions and enforcement measures which might further involve omissions or tortious acts, thus triggering administrative disputes to be adjudicated either through administrative litigation or review.

In terms of public pension regulation, the enforcement and operational functionaries in the late 1990s were the LITs and the SIAs. The former were mainly responsible for taking enforcement measures against non-compliance while the latter was designated with the role of undertaking routine operations such as fund collection and benefit distribution. While these two functionaries were most likely to become the targets of administrative litigations and reviews, however, other authorities such as those responsible for rule-making, institutional designing, and fund management were not. Both the regulating rules and the rule-making process were not concrete administrative acts listed in

the 1989 ALL and 1990 ARP. Nor were institutional issues concerning the fund management system or the fragmented pooling system actionable or reviewable because they either stemmed from internal decisions of the administrative authorities or the provisions of the regulatory rules, both of which were expressly excluded by the ALL and ARP as *abstract* administrative acts. The only exception was malpractice of fund management provided the malfeasance was spotted by some social actor and was proved to be stemming from the misconduct of government staff, rather than internal decisions of the government functionaries.

The implication of these above facts was two-fold. First, with these statutory restrictions on actionability and reviewability in place, the three major regulatory problems of the public pension schemes—the inability to address the IPD, the institutional deficiency of the fund management system and the segmentation of the social pooling system—were not to be addressed by administrative litigation or review, as they largely stemmed from *abstract* administrative acts of the government authorities. Second, as no such statutory restrictions were imposed on the other two mechanisms (i.e., petition by letters and visits (PLV) and the congress inquiry), they became the only two available channels to the social community for addressing disputes or problems stemming from the three problems in public pension regulation. In the meantime, as both *concrete* and *abstract* administrative acts could be examined under these two mechanisms, challenges raised by the social actors could presumably target at a broader scope of regulating authorities including those median-level authorities responsible for rule-making and institutional designing, i.e., the regional governments and their labour and social security bureaux.

However, given the availability of these two mechanisms, it is also important to note that their operation had a number of institutional restrictions, and this fact

can be shown by further examinations into the power structure of the state and of the government underpinning these two mechanisms.

### *6.5.3 The Institutional Framework of the PLV*

As revealed in the above discussion, the PLV is an accountability and correction mechanism available to the social community. It is inbuilt in the government system to enable interactions and communications between government authorities and the society at large, in addition to the function of accountability and correction.<sup>107</sup>

In operational terms, the function of the PLV had been largely served by the special reception offices affiliated either to different government functionaries at different levels, or to the central, regional or sub-regional governments following the typical vertical and horizontal administrative structure of the government system. However, given this special position, these reception offices had no power to give substantive solutions to the petitions. Rather, they only served a co-ordinating role in processing the cases, such as communicating the claims or complaints of the petitions to the corresponding government authorities for further treatment. Although there were statutory requirements regarding the timeframe of case handling, there was no legal requirement concerning the normative or substantive aspects of the outcomes.<sup>108</sup> In other words, the real capacity of the PLV, as an important channel of processing petitions, claims or complaints relating to administrative acts of the government, was quite limited in the sense that the reception offices had no adjudicative

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<sup>107</sup> See, for example, Tuantuan Yang, 'An Exploratory Study of the Reforms in China's Petition by Letters and Visits System (我国信访制度改革路径探析)' (Thesis for Master's Degree, China University of Political Science and Law, 2009) p. 10.

<sup>108</sup> For this particular point, see especially, Xi Wang, 'Study on the Historical Evolution, Present Situation and Reform of the Petition System in China (论我国信访制度的历史沿革、现状及其改革)' (Thesis for Master's Degree, Nan Chang University, 2008) pp. 29-30.

functions while the procedural requirements provided by the 1995 PPLV did not guarantee conclusive outcomes for the petition.<sup>109</sup>

These institutional settings were universal across all lines of public administration, including the system of pension regulation. To be more specific, in the regulatory system of public pension, the reception offices were largely affiliated to the Ministry of Labour and Social Security, regional and sub-regional bureaux of labour and social security, while the central, regional and sub-regional governments also had their own special reception offices. As it was a statutory requirement that all petitions were to be handled primarily within the government system, the reception office could only send the petition to the labour and social security authorities that were presumably responsible for the administrative acts being challenged or inquired about by the petitioner. In other words, it was no more than a review of the administrative act by the government department that had actually carried out the administrative act. This process even differed from the administrative review procedure in the sense that in an administrative review the adjudicator of the case was the government authority immediately superior to the government functionary being challenged.

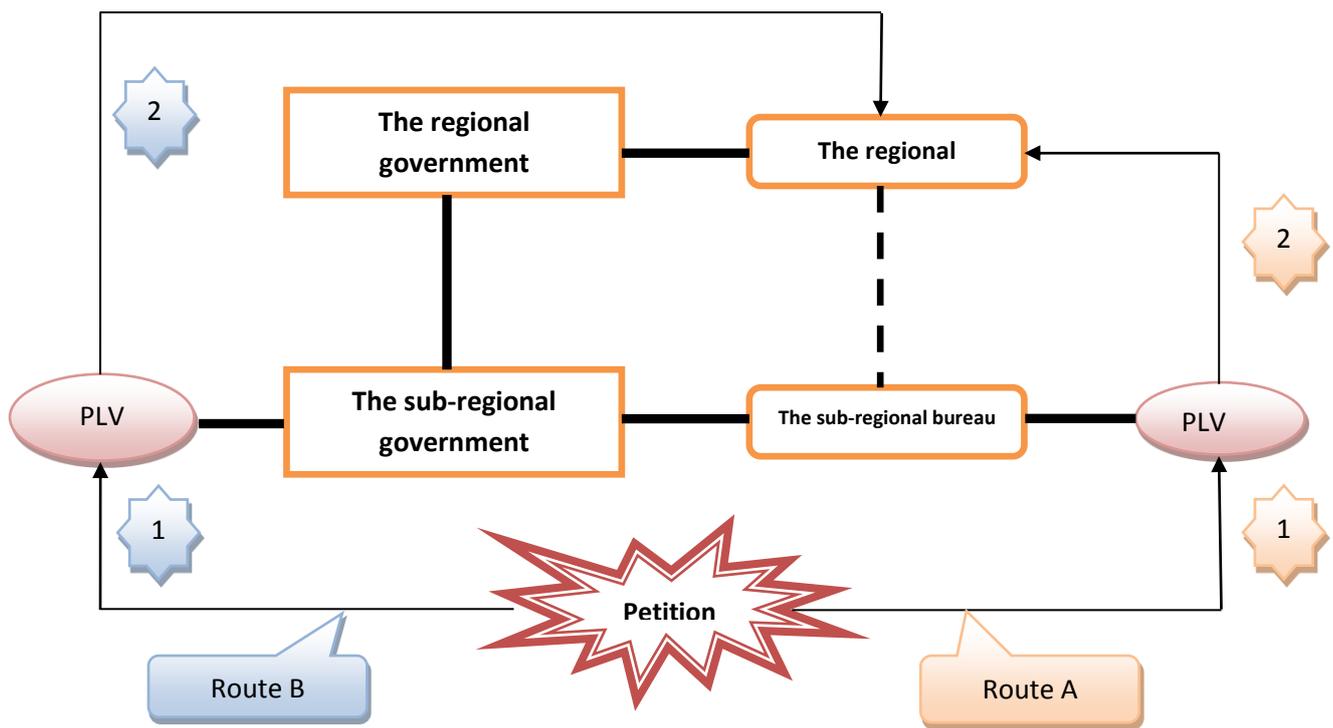
Having said that, suppose that in order to challenge the fragmented social pooling system that had resulted in some impairment of his or her entitlement to public pension, a petitioner lodged a petition to the reception office affiliate to the sub-regional labour and social security bureau. The reception office would find that the rules governing the social pooling system stemmed from an abstract administrative act of the regional government and, in particular, the regional labour and social security bureau. In that case, the petition would be most probably transferred to the regional bureau which was then supposed to respond to the petitioner although the response might not lead to some substantive solution to the problems and difficulties reflected by the petition.

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<sup>109</sup> Ibid.

The same procedure would repeat if the petition concerned with difficulties stemming from the other two regulatory problems of the IPD and the fund management practices. The following flowchart helps illustrate the procedure of the PLV.

**Flowchart 6.9: Procedure of the PLV concerning Public Pension**



As illustrated by the flowchart, the petitioner could choose to lodge the petition either to the reception office affiliated to the sub-regional bureau (following Route A) or to the reception office under the sub-regional government (following Route B). However, no matter which of the two offices was chosen, the petition would be transferred to the regional labour and social security bureau as the subject matter of the petition was relating to the abstract administrative act made by the regional bureau. As shown by the flowchart, in either case the regional bureau was to address the petition challenging or questioning its own administrative acts. In other words, it was no more than adjudicating its own administrative decisions or rules.

However, given the nature of the regulatory problems as well as the difficulty of addressing these problems as revealed by the discussion in the previous section, it is arguable that such petitions could hardly lead to any effective regulatory response. First, there was no statutory requirement concerning the outcome of adjudication, thus no government accountability for failure to provide any substantive solution. Second, there was no appeal system for the PLV, thus no accountability for malfeasances in dealing with the petition. Third, there was very little risk associated with failure to respond effectively as the social actors could hardly remove the government officers that were allegedly responsible for the wrong which stemmed from some abstract administrative act. What the petitioner could do if he or she found the response unsatisfactory was to repeat the petition process, or lodge the petition up to reception office under the Central Government. However, as shown by the discussion in the previous section, even the pressure from the Central Government for addressing these problems did not lead to any substantial improvements by the end of the 1990s. Therefore, the chances of correcting the wrongs stemming from these regulatory problems were really thin. Actually, this particular phenomenon of self-adjudication accompanied by ineffective outcomes in the PLV was a commonplace in the 1990s as it is now. Although the overall performance, legality and effectiveness of the PLV still remains a much contested issue, it is commonly agreed that the capacity of the PLV to address wrongs or problems stemming from abstract administrative acts of the government has been weak, while the special institution of the PLV has been an important factor contributing to the weakness.

The only exception was when some abstract administrative act led to certain significant social problems which further triggered serious group petitions by letters or visits. In that case, the government authorities would probably choose to respond efficiently. The best example was the massive petitions by coal mine

workers in the late 1990s protesting the non-compliance of their business firms that had seriously violated their contributory obligations.<sup>110</sup> In this case, the government authorities responded by rapidly integrating and aligning their enforcement institutions to ensure better compliance of the business firms. Nevertheless, this was just an exceptional case where group petitions were successful. However, the likelihood of success was also accompanied by legal risks because group petitions or massive petitions and protests were generally outlawed by the 1995 PPLV.<sup>111</sup> The petitioners had to be mindful of their behaviour, otherwise administrative sanctions or even criminal charges would follow.

In sum, based on the special institutional settings of the PLV and their impacts on the real performance of this accountability mechanism, it can be argued that unless there were serious group petitions directing at a certain abstract administrative act, sporadic petitions by letters and visits were unlikely to bring about any substantial regulatory changes or corrections. In terms of the three regulatory problems of public pension, the social actors could hardly rely on the PLV to correct the potential wrongs and detriments stemming from these problems.

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<sup>110</sup> For instance, in the late 1990s, some coal mining companies suffered very serious financial stringencies, which further led to failure of pension contributions and payments. This was followed by massive petitions and protests by the retired workers. For a detailed account of these events, see: 'Not to be Delayed--Vice Premier Wu's Observation Concerning the Wage and Pension Arrears by Coal Mining Companies (刻不容缓——吴邦国副总理谈解决煤炭企业拖欠的养老金和职工工资问题)' (1999) (12) *Coal Enterprise Management* *Coal Enterprise Management (煤炭企业管理)* pp. 5-6. In response to these event, the Ministry of Labour and Social Security also responded by issuing a circular to all regional labour and social security bureaus for the purpose of appeasing the upheaval in 1999. See: 关于进一步做好两个确保工作切实维护社会稳定有关问题的紧急通知[Urgent Notice Concerning How to Maintain the 'Double Security' in Order to Safeguard Social Stability](People's Republic of China) Ministry of Labour and Social Security, Circular No 11, 28 April 1999.

<sup>111</sup> It was required that petitioners who had similar or related issues of concern could not visit the same PLV authority in a group of more than five people. See: 信访条例[Provisions of Petition by Letter or Visit](People's Republic of China) State Council, Order No 185, 28 October 1995, art 12.

#### *6.5.4 Institution of the People's Congress and its Influence on the Mechanism of Congress Inquiry*

The National People's Congress (NPC) was established along with the first Constitution of the PRC in 1954. According to the Constitution, the NPC was the supreme legislative authority to pass laws and amendments of the Constitution while overseeing the performance and functioning of all the other state and government authorities. Nevertheless, under the rule of Mao, this supremacy largely remained 'the law of the book.'<sup>112</sup> In the late 1950s and thereafter, the CCP took over all the state powers and consolidated its control over all public authorities including the people's congresses at the central, regional and sub-regional levels. The legislative function of the NPC came to a standstill and this situation continued well into the late 1960s when the Cultural Revolution began and the Revolutionary Commissions largely replaced all the people's congresses.

It was not until the end of the 1970s that the people's congress system was restored under the general policy paradigm of 'socialist rule by law.' The legislative and supervisory functions of the people's congresses were re-instituted by the *Organizational Law of the People's Governments and Congresses* (i.e., the 1979 *Organizational Law*) while the new Constitution of 1982 further re-enforced these two important functions of the people's congress system. According to the 1979 *Organizational Law*, the leaders of the governments and judiciary courts at all levels are to be elected, appointed or repealed by the corresponding people's congresses. In the meantime, it is also stipulated both in the 1979 *Organizational Law* and the 1982 Constitution that

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<sup>112</sup> See, eg, Lin Fu, 'Constitutional Stipulations concerning Congress Inquiries: Loopholes and Suggestions for Improvements (宪法对质询制度规定的疏漏及其完善)' (2001) (2) *Law Science* (法学) pp. 13-14; and Yuqing Han, 'The People's Congress Inquiry System in the Context of Constitutionalism (宪政视野下的人大质询制度)' (2007) 199(8) *Academic Forum* (学术论坛) pp. 34-47.

the people's congresses have the supervisory power over the governments and judiciary courts of the same hierarchy.<sup>113</sup>

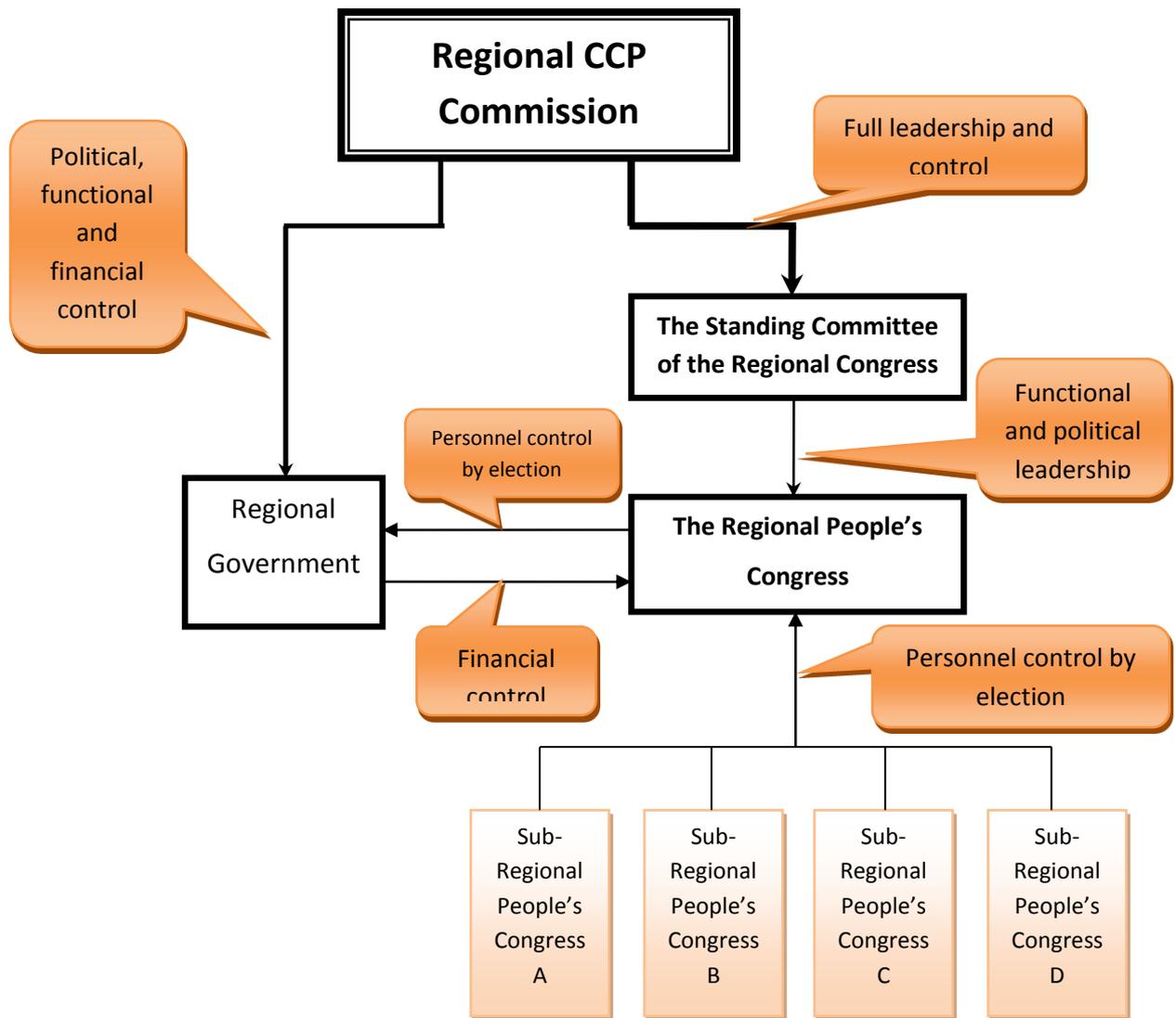
However, in spite of this important position of the people's congress within the state, it is important to note that even under the regime of 'socialist rule by law', the strong influence of the party-state regime remained intact. In other words, the strong control of the CCP Committees at all jurisdictional levels remained the same as they had been in the late 1950s and early 1960s. To be more specific, although the leaders of the governments were presumably to be elected by the people's congress, key leaders of the CCP Committees were still appointed by the CCP. Under the party-state regime, the leading cadres of the CCP Committees were superior to the government leaders of the same jurisdictional hierarchy.<sup>114</sup> Furthermore, these cadres of the CCP Committees also maintained important seats within the leading offices of the people's congresses, i.e., the standing committees. In other words, the CCP Committees at all jurisdictional levels were the real leaders both of the governments and of the people's congresses, and this institutional framework continued in the 1990s. This particular power structure can be better illustrated by the following chart. But for the sake of clarity, this chart only focuses on the relationship between the CCP Committee, the government, the people's congress and the standing committee of the people's congress at one jurisdictional stratum, i.e., the regional level.

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<sup>113</sup> See especially, Songbo Jiang, 'Improve Inquiry System and Promote the Application of Inquiry Power (完善质询制度 推进质询权运用常态化)' (2011) (7) *Jianghuai's Governance by Law (江淮法治)* pp. 53-54.

<sup>114</sup> For a more detailed account of this particular institutional arrangement, see: Miao Du, 'When the Congress will cease to be embarrassed by Inquiries? (人大监督政府如何才能不尴尬?)' (1998) (4) *Public Administration & Law (行政与法)* pp. 43-44.

**Chart 6.10: The Institutional Structure concerning the Regional People’s Congress**



As shown in the above diagram, the regional CCP commission was the real leader both of the regional government and of the standing committee of the people’s congress. Some important cadres of the CCP committee normally presided over the standing committee to exercise full leadership and control while in terms of the relationship with the government, the control was strong in the sense that the CCP committee maintained political, functional and financial controls over the government. The standing committee normally maintained political and functional leadership over the people’s congress. To be more

specific, the standing committee could influence the legislative and supervisory functions of the people's congress. The congress had personnel control over the government as the leaders of the government were elected by the congress. But the government also had the power of deciding the budgets of the congress, hence the financial control over the congress. In addition, the people's representatives of the congress were elected by the sub-regional people's congresses which had the power to influence personnel issues of the superior congress.

Given these relational ties between these various state authorities under the party-state regime, the nature of the supervisory function of the congress over the government as well as the accountability mechanism enshrined in the congress inquiry can be better examined and explained. It is clear in the diagram that although the people's congress was presumably the supreme state authority having legislative power, while maintaining supervision over the all other state and government functionaries, in real terms it was the regional CCP committee which served the leading role of the state. The only exception lay in the fact that the CCP committee had no influence over the election of the people's representatives in the congress. Nevertheless, both the government and the people's congress were to be influenced by the CCP committee's policies and decisions. Furthermore, even in terms of the relational ties with the government, the supremacy of the congress was also questionable in the sense that the government had financial control over the congress.

Given their common leadership, i.e., the CCP committee, as well as their mutual influence on each other, it is arguable that the congress inquiry mechanism, in the strict sense, was not an accountability mechanism endorsed by supervision by some superior state authority over the government. Rather, under the particular party-state regime, it was a supervision and accountability mechanism between two parallel public authorities. However, in real terms, even this parity

was not stable in the sense that during the 1980s and 1990s, many regional governors were staffed by leaders of the regional CCP committees. In that case, an inquiry from the congress was no more than a challenge by the people's representatives over against the standing committee of the congress as well as the CCP committee. In this circumstance, a congress inquiry would become a political issue while the effectiveness of the inquiry would also be subjected to the stance of the CCP committee. Unless the support of the CCP committee was procured, the government would not sincerely respond to the inquiry or correct the challenged administrative act as the congress had no influence over the CCP cadres of the CCP committee that were also the leaders of the government. In this sense, the real practice and performance of congress inquiry actually differed from what it appeared to be on the law of the book, because, in the final analysis, the stance of the CCP committee was the key to the success of the inquiry. This further explained why the people's congress had been reluctant to initiate congress inquiries against the government ever since the re-institution of this particular accountability mechanism which was specially endorsed by the Constitution as a political instrument to address possible wrongs of the government in public administration.

Ever since the early 1980s to the end of the 1990s, the frequency of congress inquiry at regional and sub-regional levels had been persistently low while at the state level it did not even occur. In the realm of pension regulation, the impact of the congress inquiry on pension regulation was also marginal in the sense it did not occur until 1999 in one region of China.<sup>115</sup> Although this single case of inquiry in pension regulation was directed at one of the three regulatory problems, i.e., malpractices of using pension funds by the labour and social security department of the regional government, the challenge did not hit

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<sup>115</sup> This single case took place in Sichuan Province in 1999 when the regional People's Congress challenged the local labour and social security authority. See especially, Biyao Tian, 'A Review of Design and Practice of the People's Congress Inquiry System (对人大质询制度设计和实践的审视)' (2005) 167(11) *People's Congress Studying* (人大研究) pp. 11-14.

squarely on the institutional deficiency of the fund management system or any abstract administrative act leading to the deficiency. Rather, it only challenged and addressed certain wrongs stemming from the decision of the responsible government department to construct its own office building by using the pension funds, i.e., a non-administrative act in the sense of public administration or social regulation.

Therefore, based on the particular institutional settings which underpinned the congress inquiry as well as the real impact, performance and practice of this mechanism, it is arguable that its real effect on addressing or correcting the problems stemming from the government authorities administering the public pension schemes was quite marginal. In other words, the social community could hardly rely on this accountability mechanism to correct possible wrongs stemming from the three regulatory problems identified in the previous section.

### ***6.6 Summary of the Evolution in the Accountability and Correction Space***

The discussion in this section has primarily focused on the function and evolution of the accountability and corrections of public pension regulation in the 1990s. In particular, it describes the accountability and correction mechanisms within and without the government system, which followed different evolutionary courses.

As noted above, the mechanisms within the government system largely followed the special administrative system characterized by strong *horizontal* control and weak *vertical* guidance. While three important regulatory problems were identified by the Central Government in the late 1990s, the regulatory responses of the State Council and the Ministry of Labour and Social Security failed to effectively address them by the end of the 1990s. Instead, it was found that the cooperative ties between the governments were undergoing continuous deterioration which further undermined the ability of the regulatory system to

correct the deviations from and non-compliance with the regulatory policies co-defined by the Central Government and the regional governments in the first half of the 1990s.

In contrast, the evolution of the accountability and correction mechanisms outside the government system was significant throughout the 1990s. From the late 1980s onwards, a number of laws and regulations were passed by the NPC and the State Council to further formalize mechanisms that could be used by the social community to challenge the wrongs and mistakes of the government authorities in public administration. These mechanisms included: administrative litigation, administrative review, the PLV, and the congress inquiry. However, given the apparent availability, it is also found that there were statutory restrictions on the use of the first two mechanisms because in the 1990s, actions of public administration were largely dichotomized into ‘concrete administrative acts’ and ‘abstract administrative acts.’ Given the fact that the nature of the regulatory problems of public pension was largely associated either with the institutional deficiency of the regulatory system or deficiency in the regulating rules, the first two mechanisms could not be used. While the remaining two mechanisms, i.e., the PLV and congress inquiry, were free from the statutory restrictions, their functioning was also limited by the institutional framework. To be more specific, the PLV was characterized by self-adjudication and weak accountability for ineffective or non-conclusive outcomes of the self-adjudication. The congress inquiry, which was presumably invested in the hands of the supreme state authorities (i.e., the people’s congresses), was found to be largely handicapped by the party-state regime. In other words, the people’s congress could not, and did not really challenge the *abstract* administrative acts of the governments which led to the regulatory problems in the public pension system.

Given these findings concerning the accountability mechanisms and their possible impacts on corrective responses of the government, it is arguable that in the 1990s, neither the government system nor the administrative law system provided the social actors with viable means to challenge or address the possible wrongs stemming from the three regulatory problems of public pension. In other words, the social actors could hardly rely on the accountability mechanisms to protect their pension entitlement.

## **7. Conclusion**

The last decade of the 20th century witnessed fast socio-economic transition and differentiation in China. These changes and the conflicts of the differentiated actors within the regulatory system of public pension led to a major reform in the mid-1990s.

Based on the *regulatory spaces* developed in the 1980s, the public authorities administering the pension schemes formulated the reform policies, and passed the rules. Then the new pension schemes were implemented by various regional and sub-regional governments in the second half of the 1990s. The new public pension scheme introduced some important changes to the substantive terms of the original PAYG scheme. It included employee contributory obligation, and established the IPA to reduce the financial burden of the employers, while extending the coverage of public pension to all business firms and employees to further spread the systemic risk of ageing.

In the late 1990s, the reformed pension schemes were widely implemented across the whole country. Nevertheless, three important problems and issues—the IPD, malpractices of fund management, and the segmentation of the social pooling system—emerged in the regulation. In response to these problems and issues, the Central Government passed a number of policy guideline and rules. However, during this process, the interests of the governments began to diverge,

and conflicts also emerged, which further affected the functioning of the *regulatory space* of review and evaluation, and the effectiveness of the accountability and correction mechanisms within the government system. Meanwhile, although the accountability and correction mechanisms outside the government system were evolving under the administrative law system, they were unable to reach or solve these three regulatory problems because these mechanisms were not able to challenge the institutional deficiency lying behind these regulatory issues. Although the *regulatory responsiveness* and *system reflexivity* underlying these new changes and developments are yet to be interpreted in the part of data analysis, it suffice to say, for the time being, that this existing regulatory system was unable to address or solve the problems in spite of the many regulatory activities in the last few years of the 1990s. This further contributed to stagnation in the regulatory system, which potentially reduced the dynamics of the system for further evolution and improvement.

## **CHAPTER SEVEN: EVOLUTION OF CHINA'S PUBLIC PENSION REGULATION, 2000-2009**

### **1. Introduction**

In the second half of the 1990s, a number of reforms to the pension schemes were made in response to the economic transition towards the so called 'socialist market economy'. Although these reforms did not solve all of the regulatory problems inherent in the regulatory system, the mixed model of the public pension scheme, integrating an IPA and a social pool, was largely institutionalized across China in all types of domestic firms.

This chapter continues the discussion of pension evolution accompanied by the new social changes in the first decade of the 21<sup>st</sup> century. In particular, to further illustrate the dynamics in the *regulatory spaces* and *process*, the emergence of a new group in the Chinese labour force (i.e., migrant workers), and their experience with the public pension regulation, will be reviewed in detail. Finally, the new legislation of the *Social Insurance Law* will be further discussed to show the latest developments in the regulatory system in response to the new challenges by the end of the 2000s.

### **2. New Socio-economic Changes and the Policy Formulation for Pension Reforms**

#### ***2.1 New Changes in the Socio-economic Environment in the Early 2000s***

On the threshold of the 21<sup>st</sup> century, the socio-economic environment in China continued to evolve under the general paradigm of the 'socialist market economy', coinciding with the wave of economic globalization, rapidly developing foreign direct investments (FDIs), and growth of the Chinese

domestic manufacturing sector.<sup>1</sup> These dynamics, together with China's accession to the WTO in 2001, not only led China out of the economic slump stemming from the South-East Asia Financial Crisis in the late 1990s, but also ushered in a new phase of economic growth. The new phase included rapid industrialization and urbanization of the country,<sup>2</sup> particularly in those eastern coastal regions which were not only major attractions of FDIs but main hubs of manufacturing as well.<sup>3</sup> The net consequence of these new socio-economic developments was two-fold. On one hand, it further invigorated the economic growth of the urban areas. On the other, it sped up the migration of rural labour into Chinese cities.<sup>4</sup>

## ***2.2 Nature of the Regulatory Issues Stemming from the Migrant Workers***

### ***2.2.1 Backgrounds of the Migrant Workers under the Public Pension Regulation***

In the early 1990s, the vast majority of the industrial urban sector was filled by the urban working population. Although a few million rural migrants had moved into the cities, very few of them were employed by business firms at that time.<sup>5</sup> Rather, they were categorized as a special group colloquially known as the 'blind herd' (i.e., *mang liu*) which literally means the aimless wanderers without formal jobs.<sup>6</sup>

However, this situation changed drastically from the late 1990s onwards. The volume of rural labour was increasing as a proportion of the urbanised labour

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<sup>1</sup> See especially: Xuwei Hu, 'Economic Globalization and China's Urbanization (经济全球化与中国城市化)' (2007) 107(4) *City Planning Journal* (城市规划学刊) pp. 53-55.

<sup>2</sup> See especially: Jinping Song *et al.*, 'The Impact and Enlightenment of Globalization on Urban Development (全球化对城市发展的影响与启示)' (2008) (4) *Urban Problems* (城市问题) pp. 30-34.

<sup>3</sup> See especially: Jiali Hu and Fengyi Liang, 'Transforming Migrant Workers to City Residents: the New Engine of China's Economy in the Coming Three Decades (农民工市民化:我国经济后 30 年增长的新引擎)' (2009) (6) *Management and Administration* (经营与管理) pp.9-10.

<sup>4</sup> *Ibid.*

<sup>5</sup> See, eg, Jun Peng, 'Can the Doors of the Cities be Open to Migrant Workers--An Interview with Professor Cai Fang of Demographic Research Institute of China Academy of Social Sciences(城门能否向农民敞开——访社科院人口所副所长蔡昉博士)' (1996) (9) *Quality Promotion in China* (中国质量万里行) pp. 46-47.

<sup>6</sup> See, eg, Chengrong Duan, 'Some Issues on Present Floating Population in China(关于当前我国人口流动的几个问题)' (1999) (4) *Science and Technology Review* (科技导报) pp. 61-64.

force,<sup>7</sup> and unlike their predecessors in the 1980s and early 1990s, this new group of rural labour was largely employed by new business firms, largely those joint ventures with overseas investments or private firms formed by domestic entrepreneurs since the mid-1990s.<sup>8</sup> As a result of their participation in the market economy, rural labour was no longer deemed to be a ‘blind herd’ because the majority had been formally absorbed into the industrial and commercial sectors of the economy, while most of them were no longer depending on farming as their major source of income although their homes remained in the rural regions. A new title was created in the early 2000s to describe this particular new group of workers—migrant rural workers.<sup>9</sup>

According to the pension scheme established in the second half of the 1990s, all types of business firms were required to fulfil their contributory obligations under the public pension schemes administered by the government.<sup>10</sup> Likewise, employees also had to pay certain amount of contribution for their own public pension schemes whether or not they were migrant workers. Furthermore, as the migrant worker and his or her employer fulfilled the contributory obligation under the public pension scheme, the worker was to become a beneficiary of the pension plan. In other words, he or she should be able to claim public pension benefits after the retirement age if the contributory obligations were duly fulfilled.

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<sup>7</sup> As a matter of fact, with the rise of many new townships in the suburbs of the big cities, the size of the traditional urban labour was surpassed by that of the emerging sectors in 2003. See, eg, Shan Shi, ‘A Miracle of the Chinese Farmers--Rural Labour Surpassing Urban Workforce in the Urban Cities (我国农民的又一伟大创举——在城市打工的农民工数量超过了传统产业工人)’ (2003) (2) *People (百姓)* p. 17.

<sup>8</sup> See, eg, Jianxiang Shi, ‘Social Insurance for Migrant Workers: An Important Issue to be Taken Care of (农民工保险:一个亟待重视的问题)’ (2004) (21) *Zhejiang Economy (浙江经济)* pp. 46-47; and Cuiying Yang and Jinfeng Guo, ‘The Social Endowment Insurance System for Rural Migrant Workers :Dilemma and Theoretical Analysis (农民工养老保险制度运作的困境及其理论诠释)’ (2006) 36(3) *Journal of Zhejiang University( Humanities and Social Sciences)(浙江大学学报(人文社会科学版))* pp. 108-116.

<sup>9</sup> For a more detail explanation of this title, see, eg, Yong Wang, ‘The Historic Development of ‘Migrant Workers’ (‘农民工’称谓的历史演变及其启示)’ (2007) (11) *Social Sciences Nanjing (南京社会科学)* pp. 98-93.

<sup>10</sup> For this particular point, see: section 3.4.2 of Chapter Six of this thesis, pp. 172-173.

However, although these rules appeared quite reasonable under the existing public pension system, they were just written regulations on the book. In fact, migrant workers' participation in and entitlement to public pension were ridden with many difficulties in the early 2000s. The vast majority of the migrant workers were not covered by any pension scheme because there were barriers stemming from the general social institutions, on one hand, and limitations owing to their special economic conditions, on the other.

### *2.2.2 Barriers Stemming from the Household Registration System*

Household registration (i.e., *hu kou*) as a form of social regulation was primarily introduced in the early 1950s.<sup>11</sup> However, it was further entrenched in the late 1950s in the context of vast socio-economic stringencies followed by some serious natural disasters and famines of the early 1960s.<sup>12</sup> Although the purpose of reinforcing the household registration system was multifarious, the central aims of this social regulation were to limit the migration of the rural population into the city, to reinforce the dual-economy system, and to subsidize the development of the industrial urban sector at the expense of the rural agricultural sector.<sup>13</sup> The net result of implementing this entrenched version of regulation was that by the late 1990s, there were large disparities of income and social benefits between the rural and the urban residents.<sup>14</sup>

In terms of income, urban residents typically received higher pay from employment in the urban sector, and they also enjoyed cheap farm produce from the rural sector because of the subsidies and regulation of the state aimed

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<sup>11</sup> Yilong Lu, 'China's Household Registration System after 1949: Structure and Evolution (1949 年后的中国户籍制度: 结构与变迁)' (2002) (2) *Journal of Peking University (Humanities and Social Sciences)* pp.123-130.

<sup>12</sup> For this particular point, see: section 4.3 of Chapter Four of this thesis, pp. 120-122.

<sup>13</sup> See especially, Donglian Xiao, 'A Historical Review China's Dual-Economy: Its Formation and Structure (中国二元社会结构形成的历史考察)' (2005) (1) *Historical Review of the CCP* pp. 21-29.

<sup>14</sup> See especially: Cuiying Yang, 'On the Difference and Coordination of the Social Security System in the Urban and Rural Areas of China (中国社会保障制度的城乡差异及统筹改革思路)' (2004) 34(3) *Journal of Zhejiang University(Humanities and Social Sciences)* (浙江大学学报(人文社会科学版)) pp. 12-20.

at containing the prices of farm products.<sup>15</sup> As a result, the relative income of rural residents whose household registration remained in rural areas got worse over the decades. The most significant indicator of this disparity is the urban-rural income ratio which climbed up from less than 2:1 in the early 1980s to about 2.5:1 by the early 2000s.<sup>16</sup> However, if the entitlement to social benefits is to be taken into account, the disparity would increase to over 3:1.<sup>17</sup>

Although social benefits include a variety of benefits under the public service provision system including safety net, education, housing benefits, childcare and social insurance schemes, etc., old-age security was one of the most significant differences between rural and the urban residents. As indicated in earlier discussion concerning the evolution of the pension system since the early 1950s, all the public pension schemes were designed for the urban workforce, while the rural population had been largely excluded from such protections. Moreover, as the household registration system was reinforced to restrict rural-urban migration of labour, the chance of the rural population's enjoyment of such rights was marginal. Over the decades, old-age security in the rural regions was largely provided through a few baseline solidarity schemes providing some basic old-age care services instead of any substantial monetary support as it was under the public pension schemes.<sup>18</sup> As a result, the awareness of the migrant workers concerning the public pension schemes was low. Despite their inclusion in the urban economy through formal employment, their overall

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<sup>15</sup> See: Jikun Tao, 'Social Security System and the Rural-Urban Income Gap (社会保障制度与城乡收入差距)' (2008) 183(12) *Economic Research Journal (经济学研究)* pp. 54-55.

<sup>16</sup> See: Ming Lu and Zhao Chen, 'Urbanization, Urban-Biased Policies, and Urban-Rural Inequality in China, 1987-2001' (2006) 39 *Chinese Economy* pp.42-63.

<sup>17</sup> See: Tao, 'Social Security System and the Rural-Urban Income Gap', above n 15.

<sup>18</sup> Although in the early 1990s a few experimental old-age insurance schemes were implemented, yet the difficulty of funding soon emerged and led in their abortion in the late 1990s. Furthermore, even in substantive terms and conditions, these experimental schemes were found to be different from the public pension schemes in the sense that the benefit level was too low to provide economic security for the rural elderly. In fact, it was argued that these schemes were more similar to those baseline security programs that were available to those people whose income was marked below the poverty line. See especially, Weidong Dai, 'A Review of China's Rural Old-age Pension Schemes (中国农村社会养老保险制度研究述评)' (2007) (1) *China Rural Survey (中国农村观察)* pp. 71-79.

conceptualization of the old-age security remained unchanged.<sup>19</sup> In other words, they were inclined to rely on economic support from family members, particularly male off-spring for old-age security, rather than social benefits sourced from public pension schemes provided by the state. Furthermore, this particular outlook did not change even after the wide introduction the ‘one-child policy’ in the late 1970s,<sup>20</sup> which largely reduced the family size and hence the potential availability of economic support from family members.

### 2.2.3 Barrier Stemming from Economic Conditions of Employment

Apart from the barriers stemming from the social institutions developed and reinforced under the centralized planned economy since the late 1950s, the participation of migrant workers in the public pension schemes was also impeded by a number of difficulties stemming from the real economic conditions relating to the characteristics of their employment.

As mentioned in the early parts of this chapter, the wave of urbanization in China since the late 1990s was largely driven by the FDIs and the burgeoning private firms in the manufacturing sector. Although this wave had led to an economic boom both in the city and the countryside alike, it had different implications for migrant workers than it had for the urban labour force. Because the skill profile of migrant workers was typically low,<sup>21</sup> they were largely

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<sup>19</sup> For this particular conceptual orientation of the Chinese migrant workers, see: Cuiying Yang and Jinfeng Guo, ‘The Social Endowment Insurance System for Rural Migrant Workers: Dilemma and Theoretical Analysis (农民工养老保险制度运作的困境及其理论诠释)’ (2006) 36(3) *Journal of Zhejiang University (Humanities and Social Sciences)*(*浙江大学学报(人文社会科学版)*) pp. 108-116.

<sup>20</sup> The conceptual change of old-age security among the Chinese migrant workers has been very slow, and this a fact established by empirical evidence. See, eg, Jianping Yao, ‘Migrant Workers’ Participation in the Public Pension System--Survey and Empirical Analysis Based on Data Collected from Beijing, Shenzhen, Suzhou and Chengdu (农民工的社会养老保险参与问题——基于北京、深圳、苏州和成都四城市调查数据分析)’ (2008) (5) *Journal of Tianshui College of Administration (天水行政学院学报)* pp. 36-41.

<sup>21</sup> See: Shubing Jin, ‘Study on the Low Participation Rate of Migrant Workers in the Public Pension System in China: Causes and Possible Solutions (我国农民工养老保险参保率低的原因及对策探析)’ (2007) (12) *Finance and Economy (金融与经济)* pp. 40-43.

excluded from those high-end, high-profit industries or trades.<sup>22</sup> Migrant workers were mostly absorbed by labour-intensive sectors such as construction and low-end manufacturing where private firms were taking the lead.<sup>23</sup> These sectors were typically characterized by high levels of competition, based on labour and other costs.<sup>24</sup> Avoidance by employers in this sector of the public pension contributions naturally became one of the important business tactics used by the firms to ensure their business competitiveness.<sup>25</sup>

In addition to the stance of the employers, the migrant workers themselves also lacked incentive to comply with the contributory obligations due to their low income.<sup>26</sup> On one hand, although participation and inclusion in the public pension system could potentially safeguard their economic security in the long run, particularly after retirement age, in the short run compliance would invariably require personal contributions that could further reduce their disposable income which was already low when compared with those of their urban counterparts.<sup>27</sup> On the other hand, the employer's contribution would also increase the cost of employment, thus reducing the demand for labour and the availability of jobs to the migrant workers.<sup>28</sup>

The lack of incentive to comply, both on part of the employers and of the migrant workers alike, largely shaped the overall market environment underlying the regulatory issues in the public pension scheme. Although the

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<sup>22</sup> See especially: Yao, 'Migrant Workers' Participation in the Public Pension System--Survey and Empirical Analysis Based on Data Collected from Beijing, Shenzhen, Suzhou and Chengdu (农民工的社会养老保险参与问题——基于北京、深圳、苏州和成都四城市调查数据分析)', above n 20.

<sup>23</sup> See especially: Wenshu Gao, 'Factors Influencing Migrant Workers' Employment and Income Profile: Case Studies of Beijing, Shijiazhuang, Shenyang, Wuxi and Dongguan(进城农民工就业状况及收入影响因素分析——以北京、石家庄、沈阳、无锡和东莞为例)' (2006) (1) *Chinese Rural Economy*(*中国农村经济*) pp. 28-80.

<sup>24</sup> *Ibid*, p. 31.

<sup>25</sup> See especially: Jianzhong Zhang, 'Research on Avoiding Contribution in Old-age Pension Insurance in China (我国养老保险逃费问题研究)' (Thesis for Master's Degree, Wuhan University, 2005) pp. 13-14.

<sup>26</sup> See: Yang *et al.*, 'The Social Endowment Insurance System for Rural Migrant Workers :Dilemma and Theoretical Analysis (农民工养老保险制度运作的困境及其理论诠释)', above n 19, pp. 108-110.

<sup>27</sup> See especially: Xuhui Liu, 'An Exploratory Study about how to Improve the Pension Insurance for Migrant Workers (对完善农民工社会养老保险制度的探究)' (2007) (2) *Rural Economy* (*农村经济*) pp. 22-23.

<sup>28</sup> *Ibid*.

number of migrant workers increased drastically year-on-year in the late 1990s, public pension coverage among this group of workers was marginal.<sup>29</sup>

#### *2.2.4 The Stance of the Regional and Sub-regional Governments towards Inclusion of the Migrant Workers*

Although the migrant workers and their employers had difficulties in joining in the public pension system, the stance of the government regulators, particularly those regional or sub-regional governments supplying and managing the local public pension schemes, differed significantly from that of the two private actors. Apart from obvious reasons like the contributory obligations required by the regulatory rules, the equity issues of ‘equal pay for equal work’ and the responsibility of enforcing the basic legal rights under the Chinese *Labour Law* in 1995, economic considerations relating to the local public finance were also important factors influencing the government stance towards this issue.

First, as discussed in the previous two chapters, since the early 1980s, population ageing had become a growing problem in most urban cities, especially big metropolitan cities like Beijing, Shanghai, and Tianjin.<sup>30</sup> The immediate consequence of this demographic trend was the rapidly increasing outlays in pension payments for the increasing numbers of pensioners retiring from enterprises under the control of the state, i.e., the SOEs. Although the reform programs in the 1990s helped introduce mechanisms of personal contributions, thus reducing the financial burden of the employers, the demographic problem of ageing and the pressure on the pension outlays remained. Even after the transition from the PAYG to the mixed model, the majority of the IPAs were just nominal accounts that were not really funded by the personal contributions.<sup>31</sup> Rather, the majority of the personal contributions

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<sup>29</sup> See especially: Qiang Li and Zhuang Tang, ‘The Rural-urban Workers in Cities and the Irregular Employment in Cities (城市农民工与城市中的非正规就)’ (2002) (6) *Sociological Research* (社会学研究) pp.13-25.

<sup>30</sup> See: Section 3.1 of Chapter Six of this thesis, p.147.

<sup>31</sup> For this particular fact, see: Section 6.2.1 of Chapter Six of this thesis, pp. 206-209.

were directly transferred to pay off the existing pensioners. In other words, the size of the IPDs remained huge, and the need for new sources of pension funds was strong in the urban cities.

Second, given the huge IPDs accompanied by the worsening demographic trend of ageing, on one hand, and the growing demand of the urban cities for pension funds, on the other, the reforms in the public finance system did not lead to any substantial guidelines regarding the responsibilities of the Central Government, the regional and sub-regional governments in sharing the IPD.<sup>32</sup> As revealed by the discussions in the previous chapter, the general policy solution developed by the governments was to extend the coverage of the reformed public pension schemes designed for the SOEs to all types of business firms and their employees, in other words, to spread out the IPDs stemming from the SOEs to all business firms and employees.<sup>33</sup>

As a result of these developments, migrant workers employed by the business firms in the urban cities came to be required by the regulators as eligible participants to the public pension schemes. They and their employers were to fulfil their contributory obligations in spite of the fact that the demand of the migrant workers for inclusion in the public pension system was weak. In other words, the policy issue was not whether or not the migrant workers were to be included, but how the extension and inclusion were to be realized.

### ***2.3 Policy Guidelines of the Central Government and the Regulatory Responses of the Regional Governments***

As shown by the discussion in the previous sub-sections, in the early 2000s, the policy stance of including migrant workers into the public pension system was

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<sup>32</sup> There was any agreement among the government concerning how to pay off the IPD. Rather, contributions to the Individual Pension Accounts (i.e., IPAs) were used to cover the pension deficits. For these events, see Section 6.2.1 of Chapter Six of this thesis, pp. 205-208.

<sup>33</sup> For this particular fact, see: Section 6.1.1 of Chapter Six of this thesis, pp. 199-201.

not developed principally through the demand of migrant workers and their employers. Rather, it was largely demanded by the regional and sub-regional governments that were responsible for running and managing the territory-based public pension schemes. Following the policies of reform in the 1990s, both the Central and regional governments were inclined to extend the coverage of the pension system in response to the huge IPD, i.e., the cost of transition, stemming from the pension reforms, although the validity and legality of spreading the IPD to the private sector remained quite controversial at that time.<sup>34</sup> Nevertheless, in spite of the commitment to the extension, the leading regulator of the system, i.e., (the Central Government) did not produce a clearly defined model for inclusion. Rather, it just set forth a few general rules regarding the migrant workers.

These were first stipulated in the 1999 *Provisional Rules concerning Application and Contribution for Social Insurance* issued by the Ministry of Labour and Social Security (i.e., the MLSS), which prescribed that ‘all enterprises in the urban cities and their employed workers are to participate in the urban pension schemes, including migrant workers employed on labour contracts.’<sup>35</sup> However, to further address the issue of inclusion, the MLSS issued in late 2001 a *Circular about Improving the Basic Old-age Pension Insurance Schemes for Employees in the Urban Cities* (the 2001 *Circular*) which set out a few policy guidelines regarding how the social insurance agencies (i.e., the SIAs) were to design and manage the public pension schemes for the migrant workers. Section 4 of the 2001 *Circular* provided as follows:

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<sup>34</sup> For this particular point of view, see, eg, Junxia Liu, ‘Study on the Fundraising Model for Social Insurances in China (论中国养老保险统筹基金筹资方式的选择)’ (2003) (5) *Economic Review* (经济评论) pp.56-59; and Liguang Zhang and Changrong Qiu, ‘Evasion of Old-age Pension Contributions in China: Causes and Policy Solutions (我国养老保险逃费行为的成因及对策研究)’ (2003) (9) *Finance & Trade Economics* pp.37-40. It was also argued that from the perspective of many private firms, the high contribution rate was a major cause of evasion.

<sup>35</sup> 劳动和社会保障部社会保险等及管理暂行办法[Provisional Rules concerning Application and Contribution for Social Insurance] (People’s Republic of China) Ministry of Labour and Social Security, Order No 1, 19 March 1999, art 5.

When the participant of the pension scheme (who is a migrant worker employed on labour contract) has his or her labour contract terminated or dissolved, the competent SIA can either preserve the individual pension account (i.e., the IPA) of the participant and help to articulate/aggregate the participant's balance and contributory records if that person gets re-employed later; or ... opt to refund the balance in the IPA to the account owner upon termination or dissolution of the labour contract while terminating the rights and obligations under the pension scheme. In the latter case, the person has to participate in the pension scheme upon re-employment.

Apart from the general rules concerning the role of the SIAs, the 2001 *Circular* also stipulated the criteria of pension entitlement in Section 4:

Migrant workers who have participated in the pension scheme and whose aggregate contribution time have reached or surpassed 15 years are entitled to public pension benefits at retirement age, i.e., 60 for male participants and 55 for female participants. If at the aforesaid retirement age, the participant's aggregate time of contribution is less than 15 years, the balance in his or her IPA is to be refunded.

As shown by these provisions the regulating policy from the Central Government was broad enough in the sense that they only prescribed how to handle the IPAs of the migrant workers while remaining largely silent on the issue of the contributions going to the social pools. When briefly addressing the issue of aggregation which was important to the migrant workers given their high degree of mobility across the whole country, the 2001 *Circular* did not provide any guidelines concerning any special mechanism for migrant workers

to have their contributory records articulated. Nor did it set forth any standards regarding the base, rate and benefit level of the public pension schemes. Rather, it was the regional and sub-regional governments that were to further define the regulating rules. In other words, the response of the Central Government to the emerging problem of migrant workers followed the same strategy developed in the early 1980s, with the regional governments being the rule-makers and implementers that were to feed back the real effects of the regulating rules or policies for the purpose of improving the responsiveness of the regulatory system.

### **3. Rule-making by the Regional Governments**

#### ***3.1 Socio-legal Backgrounds of the Rule-making***

As shown by the discussions in the previous chapter concerning the rule-making process in the 1980s and 1990s, the regional governments and their labour and social security departments were the dominant actors within this *regulatory space*.<sup>36</sup> In the mid-1990s and following, when the CCP leadership decided to start China's economic transition by following the over-arching policy paradigm of 'socialist market economy with Chinese characteristics', (i.e., a special socio-economic development model with the government playing the leading role in building up and regulating the market), the rule-making process of public pension further underwent some changes that reinforced the dominance of the regional governments, and in turn, strengthened the isolation of the rule-making procedures.<sup>37</sup> In other words, apart from the government actors, the social actors within the market, particularly business firms and labour in the non-state-owned sector, had little influence over the formulation of the rules because their involvement this process was minimal at best.<sup>38</sup>

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<sup>36</sup> See: Section 3.5 of Chapter Six of this thesis, pp. 173-174.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

In spite of the fact that the National People's Congress (i.e., the NPC) passed in 2000 the *Legislative Law* to regulate the rule-making function of public administration by the governments, this particular style of rule-making did not change. For one thing, the 2000 *Legislative Law* mainly focused on the legislative capacities of the public authorities, the hierarchy of the legal authorities of the laws and regulatory rules, and the general principles of addressing the possible conflicts of the laws and rules,<sup>39</sup> instead of the procedural issues involved in the rule-making process such as public participation and hearings.<sup>40</sup> For another, although the 2000 *Legislative Law* did provide some general principles concerning rule-making in public administration, (for example, article 59 of the law stipulated that 'during the process of administrative legislation, the concerned agencies, organizations and citizenry are to be consulted,' while the consultation may be made in a number of ways such as 'meetings, workshops and hearings,') it did not provide under what circumstances the consultations were to be conducted and how. Nor did it provide for legal consequences to the regulatory rules if failure to conduct the consultations occurred, or for legal liabilities of the public authority that failed to comply with such procedural requirements.<sup>41</sup> Further, the *Legislative Law* did not provide for how the opinions of the consulted private stakeholders, (i.e., the concerned social organizations and citizens), were to be considered and processed by the public authorities. In the absence of these provisions, the public authorities undertaking the rule-making function had vast discretionary power to decide the procedural issues, i.e., whether or not to hold public

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<sup>39</sup> The 2000 *Legislative Law* of the PRC was composed of 6 sections and 94 articles while 37 articles (from Article 56 to Article 92) were closely related to the hierarchy of laws and rules as well as principles of resolving potential conflicts of them. See: 中华人民共和国立法法[The Legislative Law of the People's Republic of China] The National People's Congress of the People's Republic of China, 15 March 2000.

<sup>40</sup> For this particular view point, see especially: Shuxia Zheng, 'Deficiency of the Legislative Law of China (论我国立法法的缺陷)' (2007) (11) *Legal System and Society (法制与社会)* pp.116-117.

<sup>41</sup> For these particular points, see especially, Fan Yang, 'Exploratory Study on Procedures of Administrative Legislation in China--From the Theoretical Perspective of Negotiative Democracy (刑侦立法程序新探——以协商民主理论为视角)' (Master's Degree Thesis, East China Normal University, 2009), pp. 56-60.

hearings and how to deal with the opinions pressed by the social stakeholders (also the potential regulatees).<sup>42</sup> In other words, despite their presence in the *Legislative Law*, the general principles concerning procedures of rule-making for public administration were not enforceable in the case of non-compliance.

It was against this particular backdrop that the rule-making process was initiated in major cities. Despite the common trait of the enclosed rule-making procedures led by the regional governments, the substantive rules and terms of the pension schemes varied across the regions.

### ***3.2 Different Pension Schemes Aimed at Including Migrant Workers***

The regional governments and their labour and social security departments were the main rule-makers of the pension schemes to include migrant workers. They could formulate their own regional rules while the baseline requirement was that the general principles set forward in 2001 *Circular* of the Central Government were to be complied with. In spite of the variety, three different approaches emerged in the early 2000s in response to the inclusion policy of the state, i.e., inclusion through the existing public pension schemes for the urban workforce with local residency, inclusion by specially-designed models for migrant workers, and inclusion by the comprehensive insurance model of Shanghai.<sup>43</sup>

#### ***3.2.1 Inclusion by the Existing Urban Public Pension Schemes***

After the issuance of the 2001 *Circular*, some regions continued to uphold the existing public pension schemes as the uniform model across their jurisdiction

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<sup>42</sup> Ibid, p.57.

<sup>43</sup> For more details of this special classification of the inclusion schemes, see especially: Yafei Wang, 'Study on Social Insurance Legislation for Migrant Workers in China (农民工社会保险立法研究)' (Thesis for Master's Degree, Shanxi University, 2009) pp. 10-13; and Weibing Zhang, 'Study on Old-age Social Insurance Policies for Migrant Workers Employed in Urban Cities--The Policy Approach of 'Integrating Social Pooling and Individual Pension Account' from the New Perspective of Unifying the Urban and Rural Sectors (城市农民工养老保险政策研究——城乡一体化事业下的新型“统账结合”政策思路)' (Thesis for Doctoral Degree, Nankai University, 2009) pp. 5-7.

regardless of the participant's residency. In other words, migrant workers were to be treated the same as the urban workforce with local residency (i.e., locally registered house-hold). These regions include a few provinces like Guangdong, and a handful of big cities like Shenzhen and Zhengzhou.<sup>44</sup> According to the regulatory rules of these regions, the contributory obligations were to be shared out among the employer and the employee. The contribution base typically ranged from 60 to 300 *per cent* as of the region's average wage level while the contribution rate normally varied across the whole country from slightly over 10 *per cent* to about 30 *per cent*.<sup>45</sup> Contributions were then tallied to the two different parts of the public pension account of the participant, i.e., the individual pension account (the IPA) and the social pool.<sup>46</sup> Some eligibility criteria such as retirement age and aggregate years of contribution were made uniform across all participants regardless of their status of residency. Normally, these two criteria are the same across the whole country. To be more specific, the retirement age now is 55 for women and 60 for men, while the minimum time of aggregate contribution is 15 years.<sup>47</sup> It is important to note that the term 'aggregate years of contribution' strictly refers to the total sum of the time when contributions are made to the same regional or, in some cases, the same sub-regional social insurance agency (i.e., SIA) from which the participant is to receive the public pension benefits. In other words, time of contributions made

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<sup>44</sup> See, eg, Zhigang Li, 'Exploratory Study on How to Improve the Old-age Social Insurance for Migrant Workers (健全农民工社会养老保险制度的思考)' (Thesis for Master's Degree, Hebei University, 2008) p.7.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> These eligibility criteria were used to determine whether or not a urban employee was entitled to pension benefits after his or her statutory retirement age. See, eg, 上海市城镇职工养老保险办法[Provisions of Old-age Pension for Urban Workers of Shanghai] (People's Republic of China) Municipal Government of Shanghai, Order No 63, 27 April 1994, art 20; and 深圳经济特区企业员工社会养老保险条例(修正) [Regulations of Old-age Social Insurance for Enterprise Employees in Shenzhen Special Economic Zone(revised)] (People's Republic of China) Standing Committee of the People's Congress of Shenzhen Special Economic Zone, Order No 10, 22 December 2000, art 23.

to another SIA of a different jurisdiction, normally a different region, is not to be aggregated.<sup>48</sup>

Apart from these common requirements that are uniform to all participants, there are some special requirements to migrant workers such as the requirement of ‘5 years of continuous contribution’ to the regional or sub-regional SIA. In other words, a participant without local residency is not entitled to public pension benefits if the 5-year requirement is not satisfied even though other eligibility conditions are met.<sup>49</sup> In that case, the participant was only entitled to refund of the balance in the IPA, or chose to quit the pension scheme.

### *3.2.2 Inclusion by Specially Designed Schemes with Lower Contribution Bases and Rates*

The second approach of inclusion differed from the first in that some regional governments designed special schemes for migrant workers, i.e., workers and employees without local residency. This particular group of schemes normally had lower contribution bases and rates.<sup>50</sup> However, the eligibility criteria for entitlement remained largely the same across the migrant workers and local employees. To be more specific, in addition to the retirement age requirement, a migrant worker without local residency also needs to pass the 15-year minimum aggregate years of contribution (to the regional SIAs) test to gain full entitlement to the public pension benefits provided by the regional government.

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<sup>48</sup> This particular issue is discussed in the previous chapter as an important regulatory problem of public pension regulation. The gist of the problem, as revealed by the discussion, lies in the fact that the Chinese public pension system has been largely fragmented in the sense that over 2000 regional and sub-regional governments are running their own schemes while all of these territory-based schemes have no arrangements of inter-regional articulation. See: Section 6.2.3 of Chapter Six of this thesis, pp. 211-212.

<sup>49</sup> See, eg, 《深圳经济特区企业员工社会养老保险条例》若干实施规定[Some Implementation Rules concerning the Old-age Social Insurance Regulations for Enterprise Employees in the Special Economic Zone of Shenzhen] (People’s Republic of China) Municipal Government of Shenzhen Special Economic Zone, Order No 120, 21 August 2002, art 13.

<sup>50</sup> Under these particular schemes, contribution base was normally reduced to the local minimum wage, instead of 60%-300% of average wage (as for participants with local urban residency), while the contribution rate was also lower. For example, in Xiamen City, the contributory rate was just 16%. See: 厦门市外来员工社会保险暂行办法[Provisional Rules on Social Insurance for Migrant Workers] (People’s Republic of China) Municipal Government of Xiamen City, Order No 42, 17 May 2007, art 5.

Otherwise, they could only ask for refund of the balance in their IPA either at the time of retirement or when quitting the scheme.

### *3.2.3 Inclusion by the Comprehensive Insurance scheme in Shanghai*

The Comprehensive Insurance model was specially designed by the municipal government of Shanghai in 2002.<sup>51</sup> It was a unique social insurance scheme in the sense that its pension scheme largely differed from the first two models which were more or less based on the pension schemes for the urban workforce. Instead, the pension scheme under the Comprehensive Insurance model (i.e., the Comprehensive Model), not only reduced the contribution base and the rate, but also used commercialized insurance plan for the pension scheme. Under this model, contributions from employers were used to buy life-insurance policies from some commercial insurance companies.<sup>52</sup> The policy was bought on an annual basis, (i.e., purchased for 12 consecutive months of contributions), and was transferred to the participant as a certificate of ‘old-age subsidy’ that was to mature on the participant’s retirement age.<sup>53</sup> As the Comprehensive Model was a compulsory scheme involving commercial insurance companies in managing the funds and paying the benefits, it did not have an IPA or social pool.

### *3.3 Common Characteristics of the Schemes and their Potential Detriments on Migrant Participants*

All these inclusion schemes were established through the rule-making processes of the regional government and their labour and social security departments, and were compulsory schemes that could not be contracted out of by the employer

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<sup>51</sup> On 22 July 2002 the Municipal Government of Shanghai passed the *Provisional Rules of Comprehensive Insurance for Incoming Workers*. As a result of the name of the regulatory rules, the pension scheme is colloquially known the Comprehensive Model. See: 上海市外来从业人员综合保险暂行办法[Provisional Rules of Comprehensive Insurance for Incoming Migrant Workers](People’s Republic of China) Municipal Government of Shanghai, Order No 123, 22 July 2002.

<sup>52</sup> See: 上海市外来从业人员综合保险暂行办法[Provisional Rules of Comprehensive Insurance for Incoming Migrant Workers](People’s Republic of China) Municipal Government of Shanghai, Order No 123, 22 July 2002, art 16.

<sup>53</sup> Ibid.

and the employee. Nevertheless, in spite of the express intent of inclusion, accompanied by the proclaimed efforts to safeguard the labour rights of migrant workers, all these rules tended to focus on the contribution side of the issue while neglecting the real provision of benefits, in particular, the difficulty of articulation and aggregation which were the key to the final eligibility of pension entitlement.<sup>54</sup>

The first model of the three adopted the existing urban pension scheme to include the migrant workers, and required the migrant workers to meet the same eligibility conditions and criteria for pension benefits. Given the high mobility of the workers and the fragmented pension system, very few migrant workers participating in the schemes could finally satisfy the 15-year aggregate contribution requirement as the vast majority of the migrant workers typically stayed in one city or region for just 4 to 6 years while in some industries like building and construction the time span could be as short as 2 to 3 years.<sup>55</sup> In other words, the '15-year' requirement had become the most significant barrier to the vast majority of rural migrant workers. Furthermore, if a participant failed to comply with the '15-year' requirement, he or she could only claim back the funds in the IPA, while the majority of the contributions were to be directly used by the SIA to pay off current pensioners within the jurisdiction. In other words, as the vast majority of migrant workers could not satisfy the '15-year' requirement, their contributions were actually subsidizing the local pensioners.

Similar to the first model, the second model, with its lower contribution base and rate, also had the same problem, i.e., it did not provide a viable arrangement to overcome the systemic difficulty of inter-regional articulation and aggregation of contribution history. Rather, it adhered to the '15-year'

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<sup>54</sup> For this particular point of view, see especially: Li, 'Exploratory Study on How to Improve the Old-age Social Insurance for Migrant Workers (健全农民工社会养老保险制度的思考)' above n 44, p. 12.

<sup>55</sup> *Ibid.*, p. 11.

requirement, thus excluding the vast majority of migrant workers from public pension entitlement.

In this regard, the third model, i.e., the Comprehensive Insurance Scheme, was an exception. This model fully adopted commercial insurance, and the contributions were savings to be managed by the commissioned insurance companies. Furthermore, it had the advantage of the second model as both the contribution rate and base were low.<sup>56</sup> In addition, all the contributions were to be made by the employer.<sup>57</sup> As a result, the third model had avoided the difficult problem of inter-regional articulation and aggregation for the pension accounts. In spite of these advantages, however, it was required under the third model that 12 months of continuous contributions be made before an annual insurance policy from the commercial bank would be issued.<sup>58</sup> In other words, even a single month of non-contribution within one calendar year would result in the cancellation of the pending insurance policy. In that case, the contributions would automatically become funds of the social pooling that were to be used by the regional SIA for payments to the local pensioners.

As shown by the above discussion, it is clear that all the three inclusive models had significant restrictions on a migrant workers' entitlement to a pension. In particular, as contributions to the social pool were not to be aggregated across the different regions, the vast majority of the contributions to the social pools were not to ensure or improve the migrant workers' pension entitlement in the future. Although they were included in the pension system, their right to social security and old-age pension were not to match that of the participants who had local urban residency. In fact, only those migrant workers who succeeded in

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<sup>56</sup> The contribution base under the Comprehensive Model was just 60% of the local average wage, while the contribution rate was 12.5% for old-age insurance. See: 上海市外来从业人员综合保险暂行办法[Provisional Rules of Comprehensive Insurance for Incoming Migrant Workers](People's Republic of China) Municipal Government of Shanghai, Order No 123, 22 July 2002, art 9.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, art 16.

securing urban residency in the locality of his or her workplace could ensure the availability of pension benefits after retirement. But the proportion of these migrant workers was really marginal.<sup>59</sup> The following table compares the likelihood of pension entitlement between the local urban workforce and the migrant workers.

**Table 7.1: Likelihood of Pension Entitlement for the Local Urban Workforce and the Migrant Workforce<sup>60</sup>**

	<i>Local urban participants</i>	<i>Migrant participants</i>
<i>Inter-regional shifts of workplace</i>	Very unlikely	Very likely
<i>Inter-regional aggregation of pension accounts</i>	Impossible	Impossible
<i>The 15-year requirement</i>	Very likely	Very unlikely
<i>Pension entitlement</i>	Very likely	Very unlikely

As is evident from the above table, the important reason for local urban participants' entitlement lies in the fact that the majority of the urban participants were unlikely to shift their workplaces across regions. In that case, even though inter-regional aggregation of the pension account is impossible, they were unlikely to be affected by the institutional deficiency of fragmentation. Furthermore, as they were already well settled in the urban city where they worked, the '15-year requirement' was unlikely to exclude them from entitlement at the statutory retirement age. However, if the local urban

<sup>59</sup> See, eg, Li, 'Exploratory Study on How to Improve the Old-age Social Insurance for Migrant Workers (健全农民工社会养老保险制度的思考)' above n 44, p. 11; and Wang, 'Study on Social Insurance Legislation for Migrant Workers in China (农民工社会保险立法研究)', above n 43, p. 7.

<sup>60</sup> This table was constructed by the author based on the discussion of Section 3.4 of this chapter.

resident decided to spend the majority of his or her working life across several regions of the country, then he or she would meet the same problem confronting the migrant workers of rural residency. In this sense, it is arguable that the real gist of the problem was whether or not the participant migrated across the different regions rather than whether or not the participant was an urban resident.<sup>61</sup>

### ***3.4 The Stance of the Regional Governments towards the Regulation***

In spite of the potential harm inherent in the rules underlying these three models, the regional governments, as the rule-makers and regulators of the pension schemes, were nevertheless ready to implement them. Even before the rules were put in place, it was commonly recognized among university academics that the implementation of the rules would favour the regional governments, particularly the governments of big cities,<sup>62</sup> where population ageing had been significant and the IPD stemming from the pension reform had been large.<sup>63</sup> It was argued that in the name of inclusion the city governments could increase the source of revenues from the migrant participants to pay off pension outlays while being largely immune from the liability of providing pension benefits to the migrant participants in the future.<sup>64</sup> In other words, it is clear that the regional governments of the urban cities had the incentives to implement the rules on the threshold of the 21<sup>st</sup> century although the real consequences of implementing these rules remained unclear.

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<sup>61</sup> This particular point of view will be further addressed in Section 6.1 of this chapter, which mainly focuses on a special case of migrant worker who was denied old-age pension for 7 years since his formal retirement.

<sup>62</sup> For his particular view point, see, eg, Tao Zhou, 'A Comparative Study of Old-age Social Insurance Policies for Migrant Workers in China(农民工社会养老保险政策的比较)' (2003) 141(6) *Population & Economics* (人口与经济) pp. 75-80; and Xiaogang Fan, 'Study on Social Security Issues concerning Migrant Workers in China (论城市农民工的社会保障问题)' (2003) (11) *Problem of Agricultural Economy* (农业经济问题) pp. 14-18.

<sup>63</sup> For this particular fact, see: Section 6.2.1 of Chapter Six of this thesis, pp. 205-208.

<sup>64</sup> See especially: Zhou, 'A Comparative Study of Old-age Social Insurance Policies for Migrant Workers in China(农民工社会养老保险政策的比较)' above n 62, p. 78.

#### **4. Evolution of the *Regulatory Space* of Implementation and Enforcement as Illustrated by the Case of Shanghai**

In the late 1990s, the government functions of social security and labour administration were merged into one department at all levels of the government system. In the municipality of Shanghai, the Bureau of Social Insurance merged with the Bureau of Labour into the Shanghai Municipal Labour and Social Security Bureau (SMLSSB). However, the enforcement agencies, i.e., the social insurance agencies (SIAs) and the Labour Inspection Teams (LITs), which had been affiliated to the two bureaux before the merger, were not combined. Instead, the LITs and the SIAs remained two distinct lines of authority under the SMLSSB, with the SIAs taking the lead in the function by the end of the 1990s.

##### ***4.1 Evolution of the Enforcement Function in the 2000s***

The SIAs enforcement function was first established in the 1980s, and was further renewed in the mid-1990s. In particular, the rules of the mid-1990s authorized the SIAs to dispense demurrage or/and fines to punish non-compliance, while reporting of non-compliance cases, particularly those with serious wrongs and consequences. These were incorporated as penal measures against non-compliant firms.<sup>65</sup> In the late 1990s, the LITs further joined in the enforcement function, and in the year 2000 the municipal government further passed the *Provisions of Labour Inspection in Shanghai* to strengthen their enforcement function.<sup>66</sup> Based on these regulations, these two agencies were

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<sup>65</sup> For a detailed account of these enforcement measures, see Section 4.1.2 of Chapter Six of this thesis, pp. 177-178.

<sup>66</sup> According to article 2 of the 2000 Provisions, labour inspection was defined as ‘monitoring and surveillance by the labour and social security authorities on all forms of firms and proprietary businesses, i.e., business employers, for compliance issues relating to laws, regulations and rules within the ambit of social security and labour administration.’ Article 6 of the Provisions further identified ‘compliance with social insurance obligations’ as one of the LIT’s terms of reference, while Article 7 authorized the LITs to conduct regular inspections to check compliance, investigate in suspicious cases revealed by complaints or reports, and penalize non-compliant firms.

further integrated into a more sophisticated enforcement model under the auspice of the SMLSSB in the following years.

The new model of compliance enforcement was designed in order to strengthen the capacity of the regional social insurance system which includes the administration of the public pension schemes for all eligible participants. This further led to the birth of two new agencies, i.e., the Telephone Inquiry Centre (i.e., the TIC)<sup>67</sup> and the IT Centre (i.e., the ITC)<sup>68</sup> as well as the development of a new labour inspection mechanism colloquially called the ‘grid-based management’ system.<sup>69</sup>

The ITC was mainly built up to deliver social insurance information to the public, while connecting all functional departments and agencies under the SMLSSB.<sup>70</sup> This enabled all the departments within the SMLSSB to conduct regular data sharing and matching through their respective information sub-systems.<sup>71</sup> The TIC was built up to facilitate policy enquiries from the social community, while receiving and processing complaints and reports were soon incorporated into the TIC’s function.<sup>72</sup> Being connected to ITC, the information received by the TIC can be immediately delivered to the IT systems of the SIAs

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<sup>67</sup> The program to build up the IT Centre (ITC) for the SMLSSB was first initiated in 1999, and was deemed as a systematic program to deliver information of public services of social insurance to the general public in Shanghai. By the year 2002, the IT service hub had been largely established. See: Ran Chen, ‘Landline’ Hub Offering ‘Boundless’ Services--The Telephone Inquiry Centre of Shanghai Municipal Labour and Social Security Bureau (‘有线’平台 “无限”服务——记上海市劳动保障局电话咨询中心)’ (2007) (3) *China Labor and Social Security* (《中国劳动和社会保障》) pp.22-23.

<sup>68</sup> See especially: Wen Pei, ‘Wanda IT Going Hand in Hand with Digital City--Great Opportunity for Wanda IT in Digitalization of Urban Cities (万达信息与城市信息化俱进——城市信息化为万达信息带来发展良机 万达信息将为城市现代化作出新的贡献)’ (2002) (9) *Shanghai Business Firms* (《上海企业》) pp.4-6.

<sup>69</sup> See, eg, ‘Entrench Supervision through Scientific Technology and Address New Forms of Labour Rights Infringement (立足科学监管 破解维权新难题)’ (2006) (7) *China labour and Social Security* (《中国劳动保障》) pp. 50-52.

<sup>70</sup> See especially: Jianping Sun, ‘Innovative Practices of E-government in Shanghai--Social Security Card for Residents (上海电子政务的创新实践——社保卡让市民享受随身的政府服务)’ (2004) (6) *Shanghai Economic Forum* (《上海综合经济》) pp.4-8.

<sup>71</sup> Ibid, p.5.

<sup>72</sup> Chen, ‘Landline’ Hub Offering ‘Boundless’ Services--The Telephone Inquiry Centre of Shanghai Municipal Labour and Social Security Bureau (‘有线’平台 “无限”服务——记上海市劳动保障局电话咨询中心)’, above n 67, p.23.

and the LITs, thus enabling the latter two to take immediate actions against potential cases of non-compliance.

Furthermore, a new enforcement mechanism, i.e., ‘grid-based management’ system, was developed by the LIT to obtain more accurate information of business firms, such as number of employees, the size of the payroll, and the composition of the workers (migrant or local).<sup>73</sup> Within this particular enforcement mechanism, the word ‘grid’ refers to a few residential communities that formed a primary-level jurisdiction grass-roots labour inspection team. In the early 2000s, the LIT formed up to over 200 teams in the residential communities across the municipality, extending the original enforcement network to a ‘grid-based’ network involving 200 teams.<sup>74</sup> Within these inspection teams was a taskforce of over 2500 inspectors that were responsible for, apart from the conventional function of inspections and checks, collecting relevant information and data of the business firms and logging them into the IT system, thus enabling data updating in other functional departments and agencies.<sup>75</sup> With the ITC, TIC and the ‘grid-based’ system in place, the new enforcement mechanisms became an integrated system in the mid-2000s, illustrated in the following Chart.

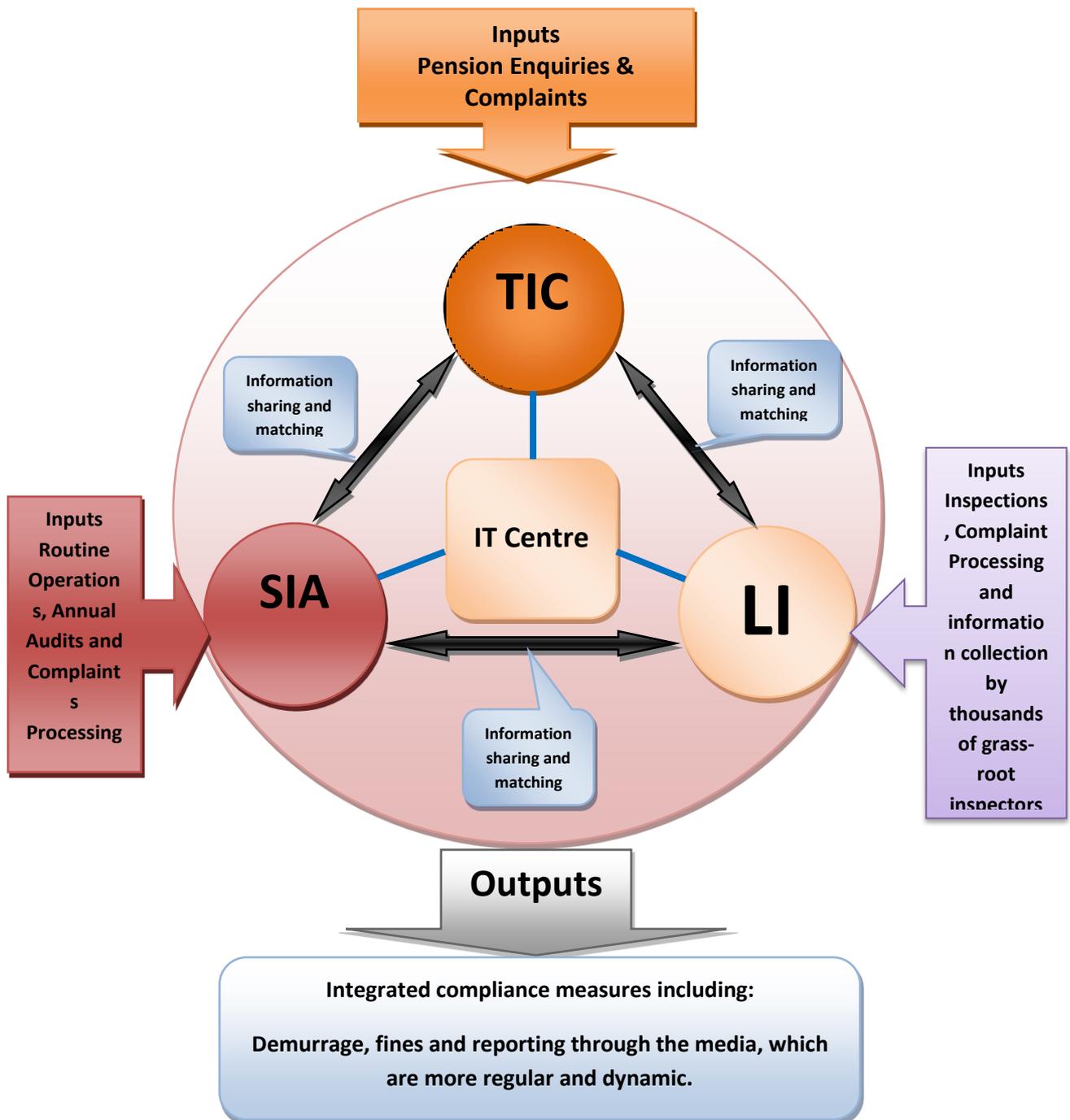
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<sup>73</sup> *'Grid-based' Management System of Labour Inspection: Claw Back 454 Million Worth of Wage Arrears and Outstanding Social Insurance Contribution (劳动监察网格化 一年追回“欠薪欠保”4.54 亿)* 01JOBBCN (第一招聘) first accessed at 10 December 2010: <http://www.01job.cn/cgi/news22734.html>.

<sup>74</sup> See especially: Xin Nie, 'Study on China's Labour Inspection System(我国劳动保障监察体制研究)' (Thesis for Master's Degree, Ocean University of China, 2009) pp. 46-48.

<sup>75</sup> *Ibid*, p.47.

**Chart 7.2: The Integrated Enforcement Model Developed in the Mid-2000s**



As indicated, the new enforcement model had three nodes of input, i.e., the TIC, the SIA and the LIT, each of which could receive information concerning pension through their own routine operations, as indicated by the three arrowed boxes outside the big circle. Inside the circle, the three functionaries were connected by the ITC through the intranet, which further enabled them to exchange, update and match the data with each other on regular basis, thus increasing the capacity of the entire enforcement system to spot potential cases of non-compliance. In particular, with the ‘grid-based’ management system, the LITs could take their own initiatives to obtain relevant data of all business firms, thus facilitating the SIAs to carry out more focused audits on suspicious firms, while allowing for more integrated enforcement measures against non-compliance in all social insurance undertakings, including but without limitation to, the pension scheme for migrant workers.

#### ***4.2 The Real Outcome of the Inclusion Schemes Accompanied by the Entrenched Enforcement Measures in Shanghai and Elsewhere***

The development of the enforcement system in Shanghai in the early 2000s was the epitome of the evolutionary course of many big cities. Although the intensity of the entrenchment varied across the regions, the development towards a network-based, integrated model of compliance enforcement was a common trend.<sup>76</sup> Although the primary aim of the entrenchment was to expand the coverage of the public pension schemes, the highly isolated mode of rule-making and the strong government-led enforcement system, had not led to the desired regulatory outcome. Rather, it contributed to some unintended consequences for the migrant workers.

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<sup>76</sup> See, eg, Wen Xiong, ‘Social Security Always On-line--IT Construction in Jinan Labour and Social Security Bureau (社保体系不断线——记济南市劳动社会保障局信息化建设)’ (2005) (12) *Computer Weekly* (《每周电脑报》) pp.25-26; and Xiangbing Ma, ‘Glide on the Wind of ‘Digital Fujian’ to Promote the IT Infrastructure of the Provincial Labour and Social Security Bureau (借助“数字福建”建设东风 促进我省劳动和社会保障网络信息系统建设)’ (2002) (1) *Labour and Social Security of Fujian Province* (《福建劳动和社会保障》) p.7.

To be more specific, the Comprehensive Insurance model in Shanghai was first rolled out in late 2002. In 2003 and early 2004, only about 25 *per cent* of the migrant workers joined in the scheme.<sup>77</sup> Although after a number of enforcement campaigns since late 2004, the participation rate increased to 40 *per cent* by the end of 2004, it came to a standstill in the following years.<sup>78</sup> In the City of Chengdu where the same model of Comprehensive Insurance model was adopted in 2003, the situation was mostly the same. In big cities like Shenzhen where the public pension scheme for urban employees (i.e., the first model of inclusion) was applied to the migrant workers, the participation rate was about 23 *per cent* in 2000. In the following two years, however, as a result of the entrenchment in the enforcement system aimed at inclusion, the participation rates rose to 36 *per cent* and 53 *per cent*.<sup>79</sup> But, along with these enforcement campaigns aimed at the migrant workers were waves of withdrawals from 2001. In 2003 and the years following, the number of withdrawals began to surpass that of new entrants.<sup>80</sup> In the city of Dongguan which adopted the same model of inclusion in Shenzhen, the number of withdrawals reached 400,000 in 2005 when the total labour force in the city was about one million.<sup>81</sup> In the province of Zhejiang where the second model of ‘reduced base and rate’ was adopted, the number of withdrawals remained high every year while the overall participation rate continued to be as low as 15 *per cent*.<sup>82</sup> By the mid-2000s, there were about 150 million migrant workers mostly

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<sup>77</sup> See: Li, 'Exploratory Study on How to Improve the Old-age Social Insurance for Migrant Workers (健全农民工社会养老保险制度的思考)' above n 44, p.9.

<sup>78</sup> See especially: Wu Hu, 'A Comparative Study of the Comprehensive Insurance Schemes in Shanghai and in Chengdu (上海与成都综合社会保险比较)' (2005) (3) *Economic Management (经济管理)* pp.79-83.

<sup>79</sup> Qizhao Ye, 'The Social Insurance Schemes for Rural Migrant Workers in Shen Zhen: Practices and Reflections (深圳市农民工社会保险的实践与探索)' (2004) (10) *Reform and Strategy (改革与战略)* pp. 41-44.

<sup>80</sup> Ibid.

<sup>81</sup> See especially: 'The Severe Consequences of Massive Migrant Workers Quitting the Social Insurance Schemes (农民工大量退保后果严重)' (2006) (4) *China Insurance (中国保险)* p. 7.

<sup>82</sup> See especially: Xiaohuan Wu, et al., 'Old-age Insurance for Migrant Workers: Policy Evaluation and Institutional Innovation (农民工社会养老保险: 政策评估与制度创新)' (2005) 29(4) *Population Research (人口研究)* pp.28-35.

of rural residency in China. But less than 20 million were covered by any of these inclusion schemes.<sup>83</sup>

As revealed by scholarly research, the majority of the migrant workers had sound reasons either for not joining in, or for quitting, the regional inclusion programs although old-age security remained a big concern to most of them. There are two main reasons for this. First, the migrant workers were typically low income owners, and the contributory obligation on them was a hefty financial burden even though many of the regional programs had reduced the base and the rate of the contribution.<sup>84</sup> Second, even though some migrant workers were willing to participate in the schemes to better secure their old-age pension entitlement, the realization that under most of the schemes the 15-year minimum time of contribution would finally bar them from pension entitlement largely dampened their enthusiasm for participation in the scheme.

### ***4.3 Development of the Fund Management Model and the 2006 Pension Scandal in Shanghai***

#### *4.3.1 Backgrounds of the Scandal*

As noted in the previous chapter, the fund management model was largely developed in the second half of the 1990s, and was characterized by segmentation and low transparency without supervision either from the social community or the Central Government. Even the ordinances and policy guidelines from the Central Government had been unable to change the model.<sup>85</sup>

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<sup>83</sup> See especially: Wang, 'Study on Social Insurance Legislation for Migrant Workers in China (农民工社会保险立法研究)', above n 43, p. 5.

<sup>84</sup> See, for example: Ruiyan Yu, 'Study over the Extension of Public Pension Schemes in China: Taking the City of Qing Dao as a Case in Focus (我国社会养老保险扩面问题研究)' (Master Degree's Thesis, Shan Dong Normal University, 2009) p. 20.

<sup>85</sup> In the later 1990s, a number of malpractices were disclosed as a result of internal audits conducted by the taskforces of the Central Government. In spite of the immediate effects of removing those responsible from office while accusing them of criminal offences, however, the very institutional arrangements underlying these internal risks of malpractices were not addressed. See: Section 6.2.2 of Chapter Six of this thesis, pp. 208-210.

Under this model, contributions were collected by the SIAs that were affiliated either to a certain regional or sub-regional labour and social security bureau. The surpluses of the pension funds—residuals after paying off the contemporary pensioners—were then administered by the labour and social security bureau, while behind the bureau was the regional or sub-regional government that had the power to influence or make the fund investment decisions.<sup>86</sup> The investment operations were not open to the market; nor were the regional or sub-regional governments obliged to disclose the investment portfolios and returns as these surpluses were largely treated as some special revenue outside the purview of public finance audits. These particular practices which insulated the managing authorities from external supervision and disclosure obligation largely reinforced the institutional deficiencies that harboured the pension scandal in Shanghai.

Apart from the institutional settings, some practical difficulties stemming from the conflict of interest between the Central and regional government also contributed to the occurrence of the scandal. As discussed in the previous chapter concerning the IPD stemming from the reform in the 1990s, the governments of the large urban cities where population ageing was significant, had long been under the pressure of increasing pension outlays. To keep the schemes going, the regional governments of some major cities like Beijing, Shanghai and Tianjin had raised the contribution rates to more than 30 *per cent* of the payroll. Although the high rates could help secure benefit payments to existing pensioners, the individual pension accounts (i.e., the IPAs) of the contemporary contributors remained under-funded.<sup>87</sup> Given the fact that the use

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<sup>86</sup> This particular point was discussed and explained in much detail in the previous chapter. See: Section 4.2.3 of Chapter Six of this thesis, pp. 183-186.

<sup>87</sup> Another policy option that could be used to reduce the pressure of the pension outlays was to postpone the retirement age of the workforce as it could prolong the time of contribution and shorten the time span of payment to the pensioner. However, it was widely recognized by the governments that this option would invariably have some negative impact on the employment of the young generation given the new entrants to the urban labour market continued to outnumber the newly created jobs over the 1990s and 2000s.

of IPA funds to pay off pensioners had been a common practice since the mid-1990s, the high rates of contribution could not effectively reduce the size of the IPD because the debts owing to the unfunded IPAs continued to grow. To address the financial risk, the government could either reduce the size of the IPA, or invest the existing funds of the IPAs (i.e., defined as ‘surplus funds’) in assets or enterprises with higher returns. However, although the stance of the Central Government towards reducing the size of the IPA was positive,<sup>88</sup> its stance towards liberalizing pension investment was not.<sup>89</sup> The fund surpluses managed by the regional or sub-regional authorities could only be used to purchase state bonds or be saved in term deposits. Yet these two investment options typically offered low returns, (i.e., about 2 *per cent*),<sup>90</sup> while under the general context of high inflation which averaged at least 3 *per cent* from the mid-1990s to the mid-2000s, the surplus funds were facing serious risk of devaluation.<sup>91</sup> This would further increase the size of the IPD and the difficulty of pension payments.<sup>92</sup>

Furthermore, by the mid-2000s, governments’ responsibility of sharing the IPDs had not been defined, while the poor performance of the stock market in the first half of the 2000s also frustrated the plan of selling off state-owned assets to pay

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<sup>88</sup> The affirmative stance of the Central Government towards IPA reduction has been discussed in the last chapter, see: Section 6.1.1 of Chapter Six of this thesis, pp. 199-201.

<sup>89</sup> From the mid-1990s, the State Council, the Ministry of Labour and Social Security and the Fiscal Ministry had issued a number of rules and provisions to regulate the investment activities of the regional and sub-regional government authorities. For a detailed discussion of these regulatory activities, see: Section 6.1.2 of Chapter Six of this thesis, p. 204.

<sup>90</sup> Bingwen Zheng, 'Institutional Analysis on the Cases against the Regulations of Social Security Funds and Reform of the System (社保基金违规的制度分析与改革思路)' (2007) (4) *Chinese Journal of Population Science* (中国人口科学) pp. 2-15.

<sup>91</sup> The risk of devaluation stemming from the restrictive policies of the Central Government is discussed in detail by Xinqi Wang, 'Study of the Management System of China's Basic Pension Schemes (中国社会基本养老保险管理问题研究)' (Master Degree's Thesis, Zheng Zhou University, 2006) pp. 13-16. Also see: Guoqing Li, 'Study on the Improvements of China's Legislation on the Management of Pension Funds (论我国养老保险基金投资立法的完善)' (Master's Thesis, Capital University of Economics and Business, 2004) p. 23.

<sup>92</sup> For this particular viewpoint, see, for example: Jian Zhong, 'Study of the Old-age Pension Fund in China--From the Perspective of Sustainable Development (基于可持续发展的中国养老保险资金研究)' (PhD Thesis, Southwestern University of Finance and Economics, 2007) p. 101. Also See: Dan Li, 'Study of the Mechanisms to Pay off China's Implicit Pension Debts (中国养老金隐性债务偿付机制研究)' (Doctoral Degree Thesis, Fu Dan University, 2009) p. 58.

off the IPD.<sup>93</sup> The uncertainty of the government responsibility, together with the insufficiency of funds of the Central Government stemming from the frustration of the sale-of-assets plan, confronted the regional or sub-regional governments with a dilemma, i.e., if the policy-guidelines of the Central Government concerning investment restrictions were to be complied with, the growing IPD would probably threaten the sustainability of public finance; while if the investment portfolio was extended to other more lucrative assets or enterprises, the legal and political risks of non-compliance would arise although the IPD might be reduced. In the face of the two options, the SMLSSB, i.e., the government department managing the pension funds in Shanghai, chose not to comply, hence the notorious pension scandal in 2006.

#### *4.3.2 The Pension Scandal of the SMLSSB in 2006 and its Social Consequences to the Public Pension Regulation*

The SMLSSB Pension Scandal in 2006 began with the detention of the director-general of the SMLSSB in July 2006. However, when all investigations were completed two years later, the funds involved in the scandal were found to be 32.9 billion, among which, 11.8 billion were basic social insurance funds including the ‘surpluses’ of the public pension schemes.<sup>94</sup> Over 85 per cent of the funds were found to have been invested in real estates, stocks, shares, or trust loans, i.e., assets and equities other than those stipulated in the state policies.<sup>95</sup> Meanwhile, over 3 billion worth of gains and profits were concealed, and another 363 million were offered or taken as bribes in the dealings.<sup>96</sup> A number of senior officials and cadres of the metropolitan city were found

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<sup>93</sup> For the failure of this policy initiative and the bearish performance of China’s stock market in the first half of the 2000s, see especially: Lei Yan and Qiubai Zhu, ‘Analysis of Selling State-owned Assets in the Stock Market from the Perspective of Institutional Economics (国有股减持的制度经济问题探析)’ (2003) (8) *Research on Financial and Economic Issues* (财经问题研究) pp.40-43.

<sup>94</sup> Daosheng Shao, ‘Concurrent Corruption of Money and Power: The Social Insurance Scandal of Shanghai (从上海“社保基金案”看权力资本腐败)’ (2006) (23) *Study Monthly* (学习月刊) p.33.

<sup>95</sup> Ruijin Zhou, ‘A Warning of Shanghai Social Insurance Scandal (上海社保基金案的初步警示)’ (2006) (11) *Chinese World* (华人世界) pp.96-97.

<sup>96</sup> *Ibid*, p. 97.

responsible for the scandal, including the secretary-general of the CCP Commission of Shanghai (i.e., the No.1 political and administrative leader in Shanghai).<sup>97</sup>

Apart from the non-compliance concerning the investment portfolio, the practices of routine operations in Shanghai were also found to be at odds with the Central Government's regulating policies. In 1997, the State Council issued the *Decision to Unify the Basic Pension Insurance Schemes for Business Workers* (i.e., the 1997 *Decision* of the State Council) to check possible malpractices of fund management. According to this *Decision*, regional authorities in charge of the social insurance funds were to follow the financial principle of 'separating the lines of fund collection and distribution'. Under this particular model of routine fund operation, the fiscal authority was supposed to establish a special account for social insurance funds including public pension funds, and monitor both the revenues and outlays processed by the SIAs.<sup>98</sup> However, it was found that this policy guideline from the Central Government had never been carried out. Instead, the municipal Fiscal Bureau's role was confined to checking the accounting reports from the SIAs and forwarding the reports to the municipal government. In other words, the supervisory role had never been duly performed prior to 2006.<sup>99</sup>

The business contributors and the pension scheme participants were largely unaware of the scandal until 2006, when it was suddenly found that although the

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<sup>97</sup> Dong Geng, 'An Overview of the Criminals and Convictions Involved in Shanghai Social Insurance Scandal (上海社保案涉案人员罪行一览)' (2008) (6) *Friend (党员干部之友)* p. 54.

<sup>98</sup> This particular model of routine fund operation is discussed in detail in the previous chapter. See: Section 6.1.2 of Chapter Six of this thesis, pp. 201-204.

<sup>99</sup> The absence of supervision over the routine operations enabled the SMLSSB to fully control the funds. Under the influence of the top leaders of the city government, the funds were further invested, while the details of the portfolios were 'top secrets' that were not to be disclosed to the public. In fact, even within the SMLSSB, only a few officials and staff members knew how the pension funds had been invested before 2005 when some general information of the investment portfolios was revealed during an internal meeting of the SMLSSB. However, even the disclosure during the meeting did not reveal the final balances of the investment portfolios. Nor were the attendants of the meeting allowed to reveal the information to any third party. See especially: Yun Chen, 'Shanghai Social Insurance Scandal: Possibility or Certainty (上海社保案: 偶然还是必然)' (2006) (10) *China Social Security (中国社会保障)* pp.6-7.

municipal government had frequently expressed its concern over the pension funds, the vast majority of fund surpluses had actually been used by the leadership of the local government to their own interest. Although it was later confirmed that since the early 2000s, the public pension funds for the urban participants in Shanghai had been generally in the red,<sup>100</sup> this fact alone was not enough to appease public concern over the integrity of the public pension system. The general public was losing confidence in the entire system as it came to realize that the vast majority of the funds had been manipulated by a small fraction of political leaders, government officials and corporate CEOs who had no regard for the fiduciary duty to public pension contributors.<sup>101</sup>

#### ***4.4 Summary of the Evolution in the Regulatory Space of Implementation***

This section reviews the evolution of the implementation system of pension regulation in the first half of the 2000s, in particular, the development of the two sub-spaces—compliance enforcement and fund management. Like the evolutionary pattern in the late 1990s, these two sub-systems followed different paths during the period under the discussion.

The compliance enforcement sub-space, as illustrated by the case of Shanghai, was undergoing continuous entrenchment throughout the early 2000s. To be more specific, it started with two different agencies, (i.e., the SIA and the LIT), separately fulfilling the enforcement function, and developed, in the early 2000s, into an integrated enforcement model consisting of several agencies with more differentiated functions being coordinated by a powerful computer network based in the SMLSSB. Furthermore, the LIT also developed a new model of labour inspection—the grid-based management system, which enabled the LITs

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<sup>100</sup> Ibid, 7.

<sup>101</sup> See, eg, Fang Hou, 'Public Concern over the Supervisory Mechanisms of Social Insurance (社保基金案凸现监督之忧)' (2006) (21) *Prosecutorial Review* (《检察风云》) pp.26-27; and Xiangwei Gu, 'Corruption, Disclosure, Rule of Law--Some Reflection on the Strange Event of 'Uninformed Corruption' in Shanghai Social Insurance Scandal (腐败、举报、法治——对上海社保案“有腐败，无举报”怪现象直接读与反思)' (2009) (8) *Frontier* (《前沿》) pp.73-76.

to dynamically track business firms and their employees within all residential communities across Shanghai. The new model of enforcement accompanied by the new model of inspection somehow contributed to the rise of the participation rate of the migrant workers in the regional inclusion program, (i.e., the Comprehensive Insurance), at least within the short term; although across the whole country, the effect of the entrenchment on the public pension schemes aimed at inclusion was limited.

In contrast to the system's enforcement, the fund management sub-space largely remained unchanged. As shown by the 2006 Scandal, both the routine operation procedures and the fund investment activities continued to follow the old pattern developed in the late 1990s, which was highly-enclosed and non-market-based. A small fraction of senior political leaders and government officials were found to have masterminded and benefitted from many secretive dealings involving public pension funds, which clearly contravened the regulating policies and rules of the State Council. While the institutional deficiencies within the fund management sub-system suddenly became the focal point of the public concerns over the integrity of the public pension system, the seeds of these problems, as can be revealed by the discussions in the last chapter, had long been sown before 2006.

Despite the different course of evolution in the two sub-spaces, however, the consequences of their development had one thing in common, i.e., neither of them actually pushed the entire regulation system towards the fulfilment of the policy goals set in the beginning of the 21<sup>st</sup> century—inclusion of migrant workers and the reduction of the IPD. In fact, both of the two sub-systems led to some of serious social problems. To be more specific, the entrenchment of the enforcement mechanism had led to serious exploitation of the migrant workers in the sense that migrant workers were pushed into the pension schemes which were unlikely to grant them the pension benefits at the retirement age. As a

result of this, while the regional government stepped up enforcement measures in the early 2000s, the number quitting the scheme escalated immediately, which further pushed down the overall participation rate across the whole country to less than 15 *per cent*. Even worse was the fund management sub-system, which developed into a further major crisis for pension regulation. The 2006 Scandal completely revealed the institutional deficiencies in routine fund operations and investment activities, which further raised strong public concerns over the integrity of the regulatory system

## **5. Implications of the 2006 Pension Scandal for the *Regulatory Spaces of Review and Evaluation, and Accountability and Correction***

The disclosure of the 2006 Scandal revealed to the general public the secretive dealings and operations involving the public pension funds. While the social community was shocked, the academic community and the media switched the focus from the accused to the institutional framework surrounding the fund management activities of the SMLSSB.<sup>102</sup> In the meantime, the State Council of the Central Government, as the leading regulator and policy maker within the public pension system, also took the opportunity to increase the enforcement of its decisions and rules concerning fund management, including the policy of ‘separating the lines of revenue and expenditure’ concerning the routine operations and rules relating to the restrictions on investment portfolios.<sup>103</sup> Furthermore, internal audits were initiated across the nation to address the non-compliance issues. As it was later revealed by reports of the Ministry of Labour and Social Security, non-compliance was a serious problem in a number of

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<sup>102</sup> See especially: Bingwen Zheng, ‘The Institutional Cause of China’s Social Insurance Scandal and Possible Solutions (中国生产社保案的制度原因及解决办法)’ (2007) (5-6) *International Economic Review* (《国际经济评论》) pp.1-11.

<sup>103</sup> *All Provinces and Regions Should Safeguard the Social Insurance Funds--Waves of Audits after Shanghai Social Insurance Scandal* (各省社保基金须确保安全 上海社保案后都被审计) Beijing Youth Post [http://www.china.com.cn/policy/txt/2006-11/17/content\\_7373273.htm](http://www.china.com.cn/policy/txt/2006-11/17/content_7373273.htm) first accessed on 9 December 2010.

regions and sub-regions, although the severity of non-compliance revealed by the audits was no match with that of the Scandal in Shanghai.<sup>104</sup>

The outbreak of the 2006 Scandal, and the similar incidents of non-compliance found later in the whole country, further established the fact that the traditional review and evaluation mechanisms exercised by the government regulators were no longer working in the direction of systematic learning and improvement. Rather, the cooperative tie between the different government actors continued to deteriorate. First and foremost, the rule-makers and the implementers of the regulatory system were no longer following the regulatory policies of the Central Government while the divergence of interest between the two government actors further developed into continued manoeuvring in the early 2000s. Second, as reflected by the 2006 Scandal and its aftermath, by the mid-2000s, the social community had no access to the information concerning the investment portfolio of their pension funds, not to mention any means to check the regional authorities. This further facilitated the non-compliance of the regional government authorities. Third, as the fiscal authorities were not effectively monitoring the social insurance funds, the public finance system was unable to disclose the government budgets used for social insurance schemes, in particular, for the public pension schemes.<sup>105</sup> This further insulated the government authorities managing the funds from supervision from other state organs such as the people's congress of the region.

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<sup>104</sup> *Ministry of Labour and Social Security: 7.1 Billion Social Insurance Funds Found to be in Risk, 98.5% being Rescued* (劳动和社会保障部: 71 亿违规社保资金纠正 98.5%) WWW.NEWS.CN (新华网) [http://news.xinhuanet.com/politics/2007-11/30/content\\_7171806.htm](http://news.xinhuanet.com/politics/2007-11/30/content_7171806.htm) first accessed at 9 December 2010.

<sup>105</sup> In the first half of the 2000s, budgets of social insurance were largely not included in the public finance system. In many regions of China, particularly where the model of 'separate lines of revenue and expenditure' was not adopted for public pension schemes, social insurance budgets were not managed by the fiscal authorities of the governments, nor were they subject to the supervision of any other public authorities such as the people's congress. Rather, they were just listed as part of the expenditure of public finance in the government report that was to be examined by the people's congress. For a detailed discussion of this issue, see: Section 5.1.2 of Chapter Six of this thesis, pp. 193-194.

Given these new developments in the institution of review and evaluation, it is arguable that the regional authorities in charge of the public pension funds were unlikely to feedback the problems in managing the funds because that was no more than revealing their own dealings and non-compliance either to the Central Government or to the social community. In this sense, the 2006 Scandal in Shanghai further proved the dysfunction of the accountability and correction mechanism inbuilt in the government system characterized by strong *horizontal* administration and weak *vertical* guidance. Instead of relying on the feedbacks and proposals from the regional governments, the Central Government needed to act on its own initiative to find out the real performance of pension system while making efforts to improve the performance of the public pension system. However, the effectiveness of the regulatory responses from the Central Government still relied on the attitudinal stance of the regional and sub-regional governments that were supposed to implement the policy guidelines and ordinances.

## **6. Evolution of the Accountability and Correction Mechanisms outside the Government System**

The discussion of the previous three sections has revealed that by the mid-2000s, the public pension system was facing numerous problems, including the new regulatory problems stemming from the new development and changes in the socio-economic environment—the inclusion of migrant worker and its aftermath, and those old problems which appeared in the late 1990s, i.e., the problem of the IPD, the institutional deficiencies of the fund management system, and the fragmentation of the social pooling system. As has been suggested by the previous discussion, the initiation of the inclusion programs and the unsatisfactory outcomes were closely related to the old regulatory problems. For instance, one of the important policy considerations for inclusion actually stemmed from the large and continually increasing IPD in the big cities;

while one of the important reasons for the extensive withdrawals that frustrated the regulatory goal of inclusion was also attributable to the segmentation of the social pooling system that was unable to aggregate or articulate cross-regional pension contributions.

Given these regulatory problems and issues, this section further discusses the working of the accountability and correction mechanisms outside the government system which, as shown by the relevant discussion in the previous chapter, include more state actors serving different roles to regulate the government actors in public administration. In particular, there are four important mechanisms, i.e., administrative litigation, administration review, petition by letters and visits, and congress inquiry, which can be used by the social community to address the possible detriments to their pension entitlement as a result of the regulatory problems. In particular, the issue of the migrant worker's pension entitlement will be treated as the main subject of the inquiry, and a real case will be used to show the performance and the impact of this system on the public pension regulation as a whole. Although the person involved in the case was not a 'migrant worker' in the strictest sense as he was an urban resident,<sup>106</sup> he had the same problem of pension entitlement characteristically found among the migrant workforce with rural residency.

### ***6.1 The Performance of the Accountability and Correction Mechanisms as Illustrated by the Case of Mr. Jiang***

#### ***6.1.1 Basic Facts of Mr. Jiang's Case<sup>107</sup>***

Naiqun Jiang (Mr. Jiang) was a registered urban resident of Nanjing, the capital city of Jiangsu Province. He was first employed in a local SOE in 1962 and

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<sup>106</sup> For a detailed account and definition of 'migrant workers', see Section 2.2.1 of this chapter, pp. 239-240.

<sup>107</sup> These basic facts were largely derived from a CNKI journal article. See: Xuefeng He, 'Conflicting Policies Hurt the Innocent--37 Years of Employment Leading to No Pension (政策打架 殃及无辜——工作 37 年的蒋乃群退休后居然领不到养老金)' (2005) (6) *Fellow (工友)* pp.22-25.

worked there for 27 years and remained a participant of the public pension scheme in Nanjing until 1992 when left for the city of Shenzhen where he was employed by a private firm from 1995. After his enrolment, his employer helped Mr. Jiang join in the public pension system in the city of Shenzhen. However, during his stay in Shenzhen, Mr. Jiang did not become a registered resident of the city where he worked till the 2002 and reached the statutory retirement age of 60.

However, after his retirement, Jiang was unable to get his public pension benefits from the SIA in the city of Shenzhen, and was told that he was not entitled to the regional pension benefits because the applicable rules in Shenzhen, i.e., *the Provisions of Public Pension Insurance for Business Employees in Shenzhen Special Economic Zone*, required all migrant workers (i.e., people without local registered residency) to qualify for the 15-year minimum contribution test. In other words, all migrant workers needed to have at least 15 years of aggregate contributions within the jurisdiction of the city before they could be entitled to the pension benefits provided by the city government. However, as Mr. Jiang had only 7 years of contributory history in Shenzhen he could not pass the test even though his total years of formal employment and contribution added up to 37 years, i.e., 30 years in Nanjing and 7 years in Shenzhen.

To claim back his pension entitlement starting from 2002, Mr. Jiang began petitions and legal actions that lasted for 7 years.

### 6.1.2 *Petitions, Administrative Reviews and Administrative Litigations in Nanjing, Shenzhen and Beijing*<sup>108</sup>

After the request for pension entitlement was rejected by the SIA of Shenzhen, Jiang went back to Nanjing, his home city, and lodged a request for pension entitlement as he had 30 years of employment history with one of the local SOEs. However, the SIA in Nanjing also rejected Jiang's request on the grounds that his pension contribution records were not available in Nanjing, and according to the general principle of pension payment, only the SIA which retained the pension records of Mr. Jiang, i.e., the SIA in Shenzhen, was responsible for the payments. Soon after receiving the reply from the Nanjing Bureau of Labour and Social Security, Mr. Jiang started searching the relevant regulations concerning his particular situations, and found a circular issued by the Ministry of Labour and Social Security in 2002 in response to an enquiry from the Labour and Social Security Bureau in Shanghai, i.e., *Reply to the Enquiry concerning Pension Benefit Payment for Participants whose Registered Household Residency is Different from their Places of Pension Contribution* (the MLSS Reply). The MLSS Reply stated that:

The contributions made in the place just before retirement are to be aggregated with those previous contributions made in other regions so long as the contributions are valid according to the state regulations, and no matter where the participant's registered household residency is, the pension payments are to be made by the competent authorities of the place where the participant's contributory obligations have been duly fulfilled

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<sup>108</sup> The following account of Mr. Jiang legal actions, petitions and negotiations was largely translated and adapted from a journal article from CNKI: Sufang Xie, 'Social Insurance Law: Opening Up a New Era for China's Social Security System (社保法:开启中国社会保障制度的新篇章)' (2010) (21) *People's Congress of China* (中国人大) pp.32-34. Apart from this, some new articles were also checked to verify the details. See especially: *People to Pay the Price for the Policy Deficiency? (政策缺陷, 个人买单?)* www.people.com.cn (人民网) <http://www.people.com.cn/GB/guandian/1033/2622504.html> first access at 9 December 2010.

prior to his or her retirement. Upon the statutory retirement age, formalities required for the participant's pension entitlement are to be processed by the labour and social security authorities of the place where the participant's fulfilled his or her contributory obligations just before the retirement while the pension payments are also to be made by the authorities of the same place.

In light of the MLSS *Reply*, it was clear that Shenzhen was Mr. Jiang's last place of contribution prior to his retirement. In that case, it was the SIA in Shenzhen that was obliged to pay him the pension benefits. Mr. Jiang also learned, in the meantime, that according to the 1997 State Council's *Decision*, his 30-year employment history in the SOE was recognized as valid employment history before the reform in the 1990s, and that these 30 years were actually deemed as the 'equivalent contribution time' that was valid for aggregation. Knowing these state policies and rules, Mr. Jiang went back to Shenzhen, and lodged a petition to the regional Bureau of Labour and Social Security for administrative review of Shenzhen SIA's refusal of payment.

However, the Bureau of Shenzhen adjudicated in favour of the Shenzhen SIA on the ground that the 2002 MLSS *Reply* was just an internal government document addressed to the Labour and Social Security Bureau of Shanghai. According to the 2000 *Law of Legislation*, the legal force of the *Reply* was no match to the regulatory rules of Shenzhen. In other words, Mr. Jiang's case was thus not governed by the stipulations in the MLSS *Reply*, and the refusal by the Shenzhen SIA was justified.

After receiving the outcome of the administrative review, Mr. Jiang went back to Nanjing in 2004, and lodged a request for an ex-post lump-sum contribution to realize his pension entitlement in Nanjing. Although ex-post lump-sum

contributions were a local practice in Nanjing that might help people who had failed the 15-year minimum contribution test to save their pension entitlement, the Nanjing Bureau of Labour and Social Security decided to reject Jiang's request.

Mr. Jiang then initiated an administrative litigation with the Nanjing Bureau on the grounds that the Bureau had failed to perform its duty to facilitate the realization of his pension entitlement. The court of the first instance forthwith rejected Jiang's request on the grounds that there had been no convincing evidence that Jiang's employers had properly fulfilled the contributory obligations. Mr. Jiang appealed soon after, but the same result followed.

After these failures in Nanjing and Shenzhen, Mr. Jiang finally went to Beijing, and sued the Ministry of Labour and Social Security in 2007 on the ground of administrative omission, i.e., the failure of the Ministry to perform its duty of providing him with public pension. However, the court in Beijing did not rule in his favour, and the procedure of administrative litigation had been exhausted. Mr. Jiang then started continuous petitions by letters and visits (i.e., the PLV) in Beijing to numerous government departments and state authorities including the National People Congress.

Finally, in late 2008, the newly formed Ministry of Human Resources and Social Security reached Mr. Jiang and started negotiations with him to settle the case. As a result of the negotiations, the Nanjing Bureau of Human Resources and Social Security agreed to pay Mr. Jiang 1500 *yuan* worth of monthly pension from the beginning of 2009, although this amount was not based on the regulating rules either in Nanjing or Shenzhen at the time of settlement moreover no compensation for the loss of pension in the previous 7 years was concluded.

## *6.2 Implications of Jiang's Case for the Accountability and Correction Mechanisms outside the Government System*

Mr. Jiang's case is an important example of how institutional deficiency within the regulatory system, (i.e., the fragmented public pension system managed by thousands of regional or sub-regional governments that are unable to aggregate or articulate pension contributions made in other regions or jurisdictions) might threaten the rights of migrant workers to a pension entitlement. It shows that if the inclusion programs were to continue, the vast majority of migrant workers would be excluded from securing rights to pension benefits at the statutory retirement age.

Furthermore, as illustrated by the 7-year long round of petitions, reviews and legal actions on the part of Mr. Jiang, migrant workers could expect many difficulties in using the mechanisms, (i.e., legal actions and petitions by the general public to challenge, address and remedy possible wrongs of the government authorities stemming from public administration), to solve the problems of the rules that affected their rights and entitlement. In fact, as revealed by the discussion in the previous chapter, the segmentation of the public pension schemes reflected the deep involvement of economic interests of the regional governments that had the power to pass the rules to protect their vested interests.<sup>109</sup> In particular, as the administrative acts of the governments to make rules were treated as 'abstract administrative acts' that were not to be reviewed by the judiciary, the regulations were also not open to being disputed in an administrative litigation. To protect their own rights and entitlements, the migrant workers could only sue the regulating authorities on the grounds of omission of duty, which was 'a concrete administrative act'. However, as the omission, (i.e., refusal to make pension payments to a specific person), was made on the basis of the rules, the judicial review process was unable to reverse

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<sup>109</sup> See: Section 5.2 of Chapter Six of this thesis, pp. 198-199.

the inaction of the public authorities. As a result, the mechanism of administrative litigation was largely unable to exercise any significant influence on the regulating authorities to change or improve the existing implementation system. Nor was the mechanism of administrative review able to address this problem, either, because, in that case, the adjudication was to be conducted by the regional governments themselves.

Having exhausted the administrative litigation and administrative review, Mr. Jiang resorted to the only two remaining mechanisms available to the private actors, i.e., the PLV and the Congress enquiry. Although it has been shown by the discussions of the previous chapter that these two mechanisms had played quite a limited role in changing and reforming the public pension regulatory system in the 1990s,<sup>110</sup> in Jiang's case it seemed that it was the PLV that finally worked to solve his problem. However, this was little more than appearance. In fact, when Mr. Jiang was busy with his PLVs in 2007 and 2008, the National People's Congress (the NPC) had already initiated the legislation of the *Social Insurance Law* to address the regulatory problems of the public pension schemes, while underlying the action of the NPC were numerous petitions and complaints of a nature similar to that of Jiang. In this sense, it can be argued that the final solution of Jiang's pension problem was possibly attributable to his own efforts and commitment in addition to the new developments in the social environment, particularly, the legislation initiated by the NPC in response to the numerous petitions and complaints similar in kind of Jiang's case.

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<sup>110</sup> See: Section 6.5 of Chapter Six of this thesis, pp. 235-237.

## 7. Legislation of the *Social Insurance Law* by the NPC and the Changes Brought by the Legislation to Public Pension Regulation

### 7.1 *Background of the Social Insurance Law and its Legislation*

Although the process of drafting the *Social Insurance Law* (i.e., the SIL) was formally initiated in the late 2000s, the idea of the legislation was first introduced in the NPC in 1994. However, this initiative by the NPC met such strong opposition from the government actors, particularly those of the regional and sub-regional governments, that it was suspended soon afterwards.<sup>111</sup> Then, the State Council followed the same path in pension regulation as was developed in the 1980s, i.e., empowering the regional governments to make and implement their own rules in order to lay down the foundation of the regulatory system as of the late 2000s.

However, by the mid-2000s, many regulatory problems of the public pension system had become public knowledge. The huge IPD, the malpractices of fund management, and the segmentation of the social pooling system, were revealed to the public by the mass media, and in particular through the internet, while some new problems like those concerning the migrant workers were also made known by the mid-2000s.<sup>112</sup> The concerns over the potential harm stemming from the problems, and the complaints of those that were actually being affected by the problems also led to some changes in the NPC's stance towards the legislation of the SIL. In 2003, 254 NPC members jointly signed a bill aimed at re-initiating the legislation, while in 2004, over 500 NPC members joined in the

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<sup>111</sup> Shangyuan Zheng and Chunhai Hu, 'The Development Path of China's Social Insurance Legislation: Study on the Legislative Practices of China's Social Insurance Law (中国社会保险立法进路之分析——中国社会保险立法体例再分析)' (2010) (3) *Modern Law Science* (现代法学) pp. 65-74.

<sup>112</sup> All these problems and issues were largely recognized by the social community, academia and government officials. A number of journal articles began to systemically criticise the deficiency of the public pension system. See, eg, Zhihua Xu, 'Reflections on How to Improve the Current Old-age Insurance System in China(完善我国养老保险立法的再思考)' (2005) (5) *Human Rights* (人权) pp. 40-43; and Hantong Yao, 'The Necessity of Upgrading the Legislative Level for the Old-age Insurance(养老保险立法要提高位阶)' (2005) (5) *China Labour* (中国劳动) pp. 30-31.

initiative.<sup>113</sup> In the face of the pressure both from the social community and from the NPC, the MLSS started drafting the SIL in 2003. In 2006, when the pension Scandal in Shanghai was disclosed, the drafting process was further accelerated. In late 2006, the MLSS taskforce finished off the initial draft within a relatively enclosed environment, i.e., in the ambit of the State Council and the Central Government.<sup>114</sup> One year later, the first formal draft of the SIL was submitted to the NPC for examination.

However, by the time the first draft was submitted, a number of changes had taken place in the legislative system, and these changes, as we shall see in the following discussion, largely reshaped the institutions of pension regulation and the substantive terms of the pension schemes.

## ***7.2 Changes in the State legislative system in the Second Half of the 2000s***

In the 1980s and 1990s alike, the NPC as the state legislative authority had been largely excluded from the realm of pension regulation. Rather, it had delegated legislative power to the State Council, the head of the Central Government, to formulate and implement regulatory rules through the government system. In the 1990s, in particular, when the economic transition was initiated, the ‘socialist market economy’ further required the leading role of the governments in transforming the socio-economic environment.<sup>115</sup> As a result, formal legislation largely gave way to government administration, while the legislative procedures also assumed the style of rule-making within the government system. In other words, the legislative activities tended to proceed within a relatively isolated environment with very limited public participation or presentation. Furthermore, in the wake of the legislation the real consequences of the law and the feedback

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<sup>113</sup> Shangyuan Zheng and Chunhai Hu, ‘The Development Path of China’s Social Insurance Legislation: Study on the Legislative Practices of China’s Social Insurance Law (中国社会保险立法进路之分析——中国社会保险立法体例再分析)’ above n 110, p. 66.

<sup>114</sup> Ibid.

<sup>115</sup> This was explained in the previous chapter. See: Section 3.3 of Chapter Six of this thesis, pp. 169-171.

from the social community were not automatically processed by the legislative authority. Instead, it was the government that was mainly responsible for making adjustments by passing by-laws to address the problems. Therefore, in the 1980s and the early 1990s, the government had strong control over the social community.

However, in the early 2000s, over a decade since the initiation of the economic transition, both the society and the market underwent some significant changes. To be more specific, as the market economy developed, the differentiation of the government, business and labour accelerated. The government was disengaged from the administration of the SOEs,<sup>116</sup> while the number of firms without state-ownership such as private firms, shareholding firms, joint ventures, and foreign firms multiplied from the late 1990s onwards. Along with the changes in the business sector, the structure of the labour force also underwent important changes. In the 1980s and early 1990s, the vast majority of the labour force was made up of the working population in the urban cities. But, from the early 2000s, the labour force from the rural regions began to overtake their urban counterparts. In fact, it was estimated that by the mid-2000s, the number of workers of rural origin had reached over 200 million while 60 *per cent* of them were migrant workers of rural origin.<sup>117</sup> In addition, another 40 million rural workers became urban residents as a result of the fast urban expansion since the late 1990s.<sup>118</sup> While these social changes substantially increased the size of the market, they also reduced the share of the economy controlled by the government, thus decreasing the ability of the government directly to represent the diverse interests of the social stakeholders in socio-economic regulation. Even within the government system, the same differentiation also took place as

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<sup>116</sup> This process of social differentiation was discussed in detail in Section 3.3.3 of Chapter Five of this thesis, pp. 151-153.

<sup>117</sup> See: Shi, 'A Miracle of the Chinese Farmers--Rural Labour Surpassing Urban Workforce in the Urban Cities (我国农民的又一伟大创举——在城市打工的农民工数量超过了传统产业工人)' above n 7.

<sup>118</sup> See: Wang, 'The Historic Development of 'Migrant Workers' ('农民工"称谓的历史演变及其启示)' above n 9.

was shown by the divergence of interests among the Central, regional and sub-regional governments.

However, despite the vast differentiation taking place in the business sector, labour force, and the governments, the leading role of the government in regulating the market was reinforced, while the highly isolated style of administration, regulation and rule-making was also maintained. As shown by the evolution of the pension regulation system, the regional and sub-regional governments had important interests in the regulation, and to protect these interests they had used the regulating rules to their own advantage even though the contributors' pension entitlement had suffered consequently.

Given this particular situation in public administration and regulation, the government actors themselves became the targets of regulation, and this particular kind of regulation was first introduced in the 1990s in the form administrative laws passed by the NPC. By the mid-and-late 2000s, although the impact of the laws passed by the NPC in the 1990s to regulate government administration and regulation had been limited in the domain of public pension, the necessity of checking the administrative and regulative power of the government through formal legislation had been widely recognized.<sup>119</sup> In this regard, the NPC responded by taking two parallel courses of action, i.e., stepping up intervention in socio-economic regulation and opening up its own legislative activities to the general public to engage more social actors in the consultations and negotiations.

This new model of state legislation was first introduced in 2005 for the legislation of the *Law of Property Rights*, and was further carried onto the *Law*

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<sup>119</sup> Important to note is that this view point was gradually formed along with the awareness that the Chinese society has been undergoing some fundamental changes towards pluralisation and differentiation. See especially: Chaohua Han, 'Pluralization of Interest and Transition of Social Governance (利益多元化与社会治理结构转型)' (2007) (1) *Studies on the Socialism with Chinese Characteristics (中国特色社会主义研究)* pp. 49-53; and Zhong Gao, 'Right of Say under the Rule of Law: A Pluralized Society and Maintenance of Social Equity 法治框架下“权利话语”的多元化与社会公平之维系'(2006)(12) *Seeker(求索)* pp. 142-144.

of *Labour Contracts* in 2006 and the *Law of Employment Promotion* in 2007.<sup>120</sup> During these legislative processes, the academic sector, the social stakeholders and the government authorities were widely engaged in consultations and debates while the drafts of the laws were also disclosed to the general public to invite public discussions and feedback.<sup>121</sup> In 2008 when the second draft of the SIL was being conceived in the NPC, the practice of open legislation became a rule.<sup>122</sup> The legislative process of the social insurance and public pension scheme were made open to the general public as they had been in 1951 when the *Provisions of Labour Insurances* were being conceived.

### ***7.3 The Procedures and Institutions of the NPC's Legislation as Illustrated by the Drafting of the SIL***

The NPC's legislation of the SIL is an important event in the evolution of the regulatory system of China's public pension. Compared with the legislative initiatives undertaken by the governments, such as the policy formulation and rule-making processes described in this and previous chapters, this formal legislation by the NPC had a number of major differences from those performed by the government authorities. Apart from the duration of time, (i.e., already over 2 years by the end of 2009), the presentation of interest and the openness of the procedures are significantly different. The only exception was the first draft which was largely undertaken by the MLSS while the consultations and negotiations were largely confined to the government departments at the central level.

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<sup>120</sup> See especially: Zhiming Xu and Yue Li, 'Civil Participation and Presentation of Interest in Legislation of Social Laws: A Case Study of the Social Insurance Law( 社会立法过程的公民参与和利益表达——以《社会保险法》草案公开征求意见为例)'(2010) (1) *Journal of Henan University(河南大学学报)* pp. 12-16; and Zhengqiu Tan and Jian Li, 'The Social Law Category And The System Research——Take social law legislation as angle of view(社会法范畴和体系探究——以社会法立法为视角)' (2008) (2) *Contemporary Law Review(当代法学)* pp. 17-22.

<sup>121</sup> Xu *et al.*, 'Civil Participation and Presentation of Interest in Legislation of Social Laws: A Case Study of the Social Insurance Law ( 社会立法过程的公民参与和利益表达——以《社会保险法》草案公开征求意见为例)', above n 119, p. 15.

<sup>122</sup> *Ibid.*

The second draft, however, was taken over by the NPC's legal commission. Before revising the draft, feedbacks and consultations with various regional governments, ministries of the Central Government, members of the NPC, representatives of business and labour, and academia had been widely taken, while a number of social surveys were also carried out in quite a few regions across China.<sup>123</sup> The findings and problems revealed by the surveys were then repeatedly discussed in the NPC, while officials from the State Council, the newly founded Ministry of Human Resources and Social Security (i.e., MHRSS), and representatives of the ACFTU also attended the discussions.<sup>124</sup> Furthermore, following the completion of the second draft, a public discussion of the draft was carried out throughout the country for over two and a half months in late 2008 and early 2009. During this period, over 70,000 responses were received from academia, legal practitioners, business and labour.<sup>125</sup>

In 2009, based on the feedback from the social community as well as another three social surveys in Chongqing Municipality, Zhejiang Province and Henan Province, the legal commission of the NPC began to revise the second draft.<sup>126</sup> Upon completion, the revised draft was forwarded not only to all the relevant government authorities including regional governments and the ministries of the Central Government, but also a range of social organizations like universities and research institutes.<sup>127</sup> Feedback from these government authorities and social organizations were further processed by the legal commission of the NPC

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<sup>123</sup> Ibid, p. 13.

<sup>124</sup> See: Yili Yi, Baoming Wei *et al.*, 'Participation of the Trade Unions in the Construction of the Social Security System in China(社会保障体系建设的工会参与)'(2011)(6) *Chinese Workers(中国工人)* pp.16-21.

<sup>125</sup> Xu *et al.*, 'Civil Participation and Presentation of Interest in Legislation of Social Laws: A Case Study of the Social Insurance Law (社会立法过程的公民参与和利益表达——以《社会保险法》草案公开征求意见为例)', above n 119, pp.15-16.

<sup>126</sup> Bolin Zhang, 'Report by the Legal Commission of the National People's Congress Concerning the Revision of the *Social Insurance Law* (draft)—On the 12<sup>th</sup> Session of the 11<sup>th</sup> Standing Committee of the National People's Congress 全国人民代表大会法律委员会关于《中华人民共和国社会保险法(草案)》修改情况的汇报——2009年12月22日在第十一届全国人民代表大会常务委员会第十二次会议上'(2010)(7) *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*(中华人民共和国全国人民代表大会常务委员会公报) p. 634.

<sup>127</sup> Ibid.

which continued to modify the draft while conducting a number of consultations and negotiations with a variety of institutional stakeholders of the social insurance system such as the State Council, the MHRSS, the Ministry of Finance, China Enterprise Confederation, All-China Federation of Industry & Commerce, and the National Council for Social Security Fund.<sup>128</sup> The opinions and feedback from the consultations were further discussed in the meetings held by the legal commission of the NPC in late 2009, which were also attended by officials from the State Council's legal office and the MHRSS.

As shown in the drafting of the SIL, along with the revision of the drafts, the involvement of the stakeholders increased along the legislation while the openness of the drafting process was also entrenched along the way through the public discussions, consultations and negotiations with the variety of institutional stakeholders both within and without the government system. Although the third draft completed by the end of the 2009 is not the final draft, yet the changes to rules concerning the pension regulation were significant. In particular, many of the changes were directly aimed at the regulatory problems stemming from the government regulators, i.e., the IPD, the management of funds, the supervision of the funds, and the fragmentation of the social pooling system that threatens the entitlement of the migrant workers.

#### ***7.4 Changes Brought by the Drafts of the SIL in Response to the Major Problems in Public Pension Regulation***

##### ***7.4.1 Changes Introduced by the First Draft***

The first draft was made by the MLSS with limited consultations within the government system and a few surveys conducted by the MLSS. Nevertheless, it highlighted a few important issues within the regulatory system, which included the social pooling system, the management of the funds and the supervision of

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<sup>128</sup> Ibid.

them. It stressed the importance of realizing social pooling at the regional level although it delegated the State Council to provide more specific rules regarding the timeframe and technical issues.<sup>129</sup>

In terms of the management of funds, it reinstated the necessity of implementing the financial principle of ‘separate lines of revenues and expenditures’ for routine operations of collection and payment, and the essential disclosure of pension balances by the SIAs to the public on regular bases. For issues concerning investment, it delegated the introduction of regulations to the State Council. Meanwhile, in terms of the supervision over the fund management, the first draft tried to introduce a new institutional actor into the regulatory system, i.e., the Supervisory Committee of Social Insurance (hereafter, the SCSI) in addition to the existing supervision mechanism largely undertaken by the fiscal authorities and government auditors.<sup>130</sup> It was proposed in the draft that SCSIs might be established in all jurisdictions where independent social pools existed, to perform the supervisory function. The SCSI was to be composed of non-government actors from participating firms, individual participants, union members and independent professionals.<sup>131</sup> Nonetheless, the SCSI was not made a compulsory institution in the first draft.

#### *7.4.2 Changes Brought by the Second Draft*

The second draft in late 2008 was primarily completed done by the legal commission of the NPC and was largely based on the consultations and negotiations with a wider range of government and non-government

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<sup>129</sup> Shangyuan Zheng and Chunhai Hu, ‘The Development Path of China’s Social Insurance Legislation: Study on the Legislative Practices of China’s Social Insurance Law (中国社会保险立法进路之分析——中国社会保险立法体例再分析)’ above n 110, 66.

<sup>130</sup> Ibid.

<sup>131</sup> Bolin Zhang, ‘Report by the Legal Commission of the National People’s Congress Concerning the Revision of the *Social Insurance Law* (draft)—On the 6<sup>th</sup> Session of the 11<sup>th</sup> Standing Committee of the National People’s Congress 全国人民代表大会法律委员会关于《中华人民共和国社会保险法(草案)》修改情况的汇报——2008年12月22日在第十一届全国人民代表大会常务委员会第六次会议上’(2010)(7) *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China*(中华人民共和国全国人民代表大会常务委员会公报) p. 633.

stakeholders.<sup>132</sup> It substantiated the provisions on the regulatory issues of social pooling and supervision, while clarifying the financial responsibility of the IPD stemming from the SOEs.

To be more specific, the segmentation of the social pooling system was deemed as a significant threat to the pension entitlement of migrant workers.<sup>133</sup> It was recognized by the taskforce responsible for the second draft that the policy goal of regional pooling was insufficient to address the new problem facing the migrant workers.<sup>134</sup> Therefore, it further required the governments to realize regional pooling by the end of 2009, and to build up a nation-wide pooling system in a specific timeframe. In addition, it also set forth a few general principles of inter-regional articulation and aggregation of pension contributions to solve the problems confronting migrant workers. It was proposed that the final amount of pension benefits was to be aggregated in light of the amounts of contributions made in different regions, while payment of the pension benefits was to be made by the regional government where the pensioner was residing at the time of retirement.<sup>135</sup>

In terms of fund management, the taskforce followed the advice from the ACFTU and the State Council's legal office, and made the SCSI a compulsory institution in all jurisdictions with independent social pools to entrench the supervisory institution. For this purpose, Article 52 of the raft law was revised as follows:

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<sup>132</sup> Shangyuan Zheng and Chunhai Hu, 'The Development Path of China's Social Insurance Legislation: Study on the Legislative Practices of China's Social Insurance Law (中国社会保险立法进路之分析——中国社会保险立法体例再分析)' above n 110, p.67.

<sup>133</sup> Zhang, 'Report by the Legal Commission of the National People's Congress Concerning the Revision of the *Social Insurance Law* (draft)—On the 6<sup>th</sup> Session of the 11<sup>th</sup> Standing Committee of the National People's Congress 全国人民代表大会法律委员会关于《中华人民共和国社会保险法(草案)》修改情况的汇报——2008年12月22日在第十一届全国人民代表大会常务委员会第六次会议上' above n 130, pp. 632-633.

<sup>134</sup> *Ibid*, p. 634.

<sup>135</sup> *Ibid*.

The governments ought to establish SCSIs staffed by representatives of business firms, individuals, union members, legal experts, actuarial professionals, etc., which are to inspect and process the information concerning the revenue and expenditure of the social insurance funds as well as details of the investment portfolios, losses and gains.... The SIAs are to report to the SCSI accounting details of the funds. The SCSI can also engage accountants to perform special or annual audits over the funds while the reports of the audits are to be disclosed to the general public.<sup>136</sup>

In addition to supervision, the second draft also stated that paying off the IPD stemming from the pension reform in the 1990s was a government responsibility.<sup>137</sup>

#### *7.4.3 Changes Introduced by the Third Draft*

The third draft was complete in late 2009, and was based on a substantial amount of feedback from public discussions and even broader consultations with various social organizations and within the academia.<sup>138</sup> In particular, it also incorporated the outcomes of a 2-year research program jointly conducted by universities and the governments led by the legal commission of the NPC.<sup>139</sup>

Changes introduced by the third draft include, among other things, a mechanism of enforced information disclosure to individual participants and business contributors, the supervisory role of the people's congress over the fund management at both central and regional levels, the extension of the information

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid, p. 633.

<sup>138</sup> Zhang, 'Report by the Legal Commission of the National People's Congress Concerning the Revision of the *Social Insurance Law* (draft)—On the 12<sup>th</sup> Session of the 11<sup>th</sup> Standing Committee of the National People's Congress 全国人民代表大会法律委员会关于《中华人民共和国社会保险法(草案)》修改情况的汇报——2009年12月22日在第十一届全国人民代表大会常务委员第十二次会议上', above n 125, p. 634.

<sup>139</sup> Ibid.

disclosure mechanism to the National Council of Social Security Fund, and the introduction of two new public pension schemes to cover all rural residents and urban residents who have been previous excluded from the public pension system.<sup>140</sup>

### ***7.5 Summary of the Changes Brought Forth by the SIL Drafts to Public Pension Regulation***

Compared with the situations before the legislation, the new rules and provisions introduced by the SIL drafts, particularly by the 2nd and 3rd drafts, were significant changes in response to the major regulatory problems of the public pension system.

First and foremost was the clear stipulation in the 2nd draft that pension contributions both to the social pool and to the IPA were to be articulated and aggregated across the different regions. This, accompanied by the announcements from the State Council concerning the timeframe for realizing social pooling, (i.e., achieving regional pooling by the end of 2009 and national pooling by the end of 2012), might be expected to have some substantial impact on the solution of the pension problems confronting migrant workers because by the end of 2009 their pension accounts would be transferable at regional level (i.e., within each province, municipality or autonomous region) in China, while by the end of 2012, pension accounts would be free to move across the whole country. As the 3rd draft of the SIL was being discussed in late 2009, the State Council passed the *Provisional Rules concerning the Articulation and Aggregation of Basic Pension Accounts for Urban Enterprise Workers* to further secure the public pension entitlement of the migrant workers. In this sense, even before the SIL was formally passed by the NPC, the regulation problem of pension articulation and aggregation had already been effectively addressed by

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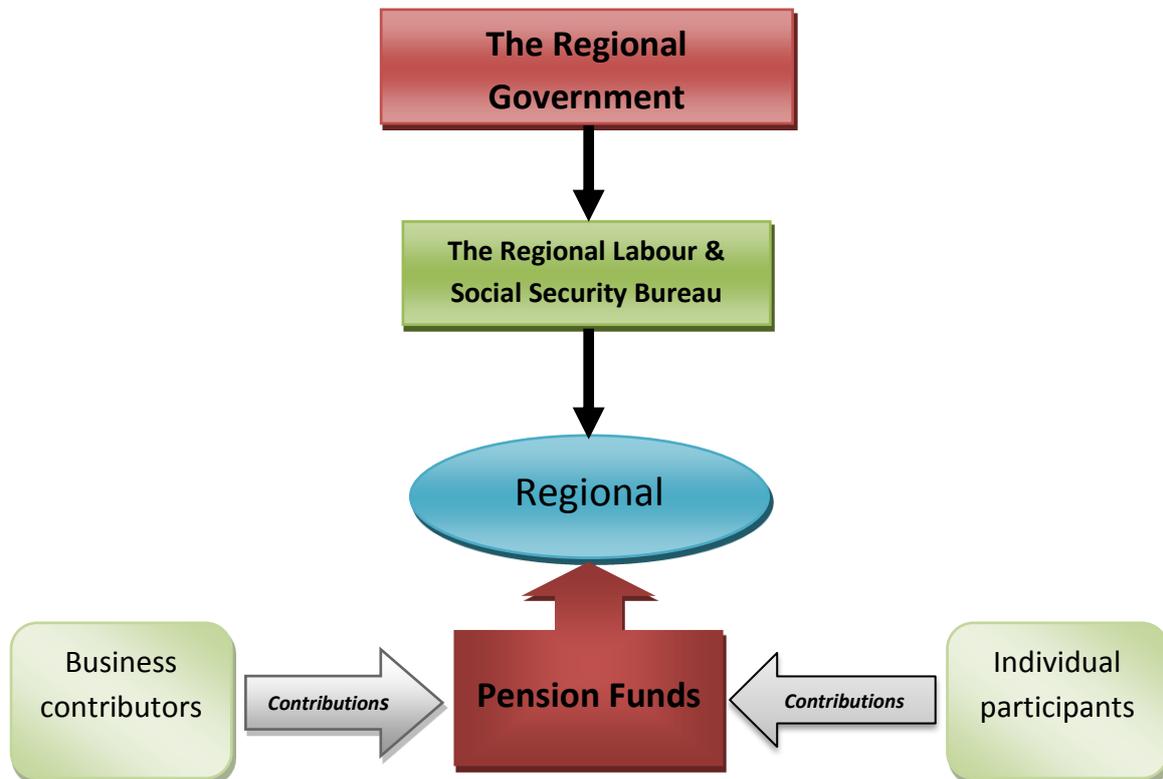
<sup>140</sup> Ibid, p. 635.

the Central Government. This adjustment to solve the problem was quite surprising because the 1st draft of the SIL which was largely completed by the then MLSS, had not mentioned the goal of building up the ‘national pooling system’. Rather, it merely mentioned the building up a number of ‘regional pooling systems’ within the whole country while as a goal with no specific timelines attached.

Second, the new provisions in the 2nd and 3rd drafts fundamentally reshaped the structure of the fund management system for public pension and other social insurance schemes alike. The first draft sought only to entrench the practice of ‘separating the lines revenues and expenditures’, i.e., an inter-departmental check and balance system to ensure the safety of the funds. Although some external supervisory institution, i.e., the SCSI, was mentioned by the 1st draft, it was not a compulsory institution. However, the 2nd draft obliged all regional governments to establish their own SCSIs which were to be non-government institutions made up of representatives from business, labour and professional organizations, and further held all SIAs accountable to the SCSIs which must disclose all reports and audits over the funds on regular basis to the general public. In addition to the SCSI, the 3rd draft further introduced the supervisory role of the people’s congresses over the governments. In other words, the governments were further to be held accountable to the people’s congresses which had the power to carry out examinations and audits over the accounting details of the funds. Furthermore, the 3rd draft also introduced the obligation of the SIAs to disclose pension information upon request to business contributors and individual participants. This, together with the other measures, was designed to entrench the right to information of the private actors, i.e., business firms and employees. Compared with the old model of fund management and supervision, this new model endorsed by the new drafts involved far more actors, and was

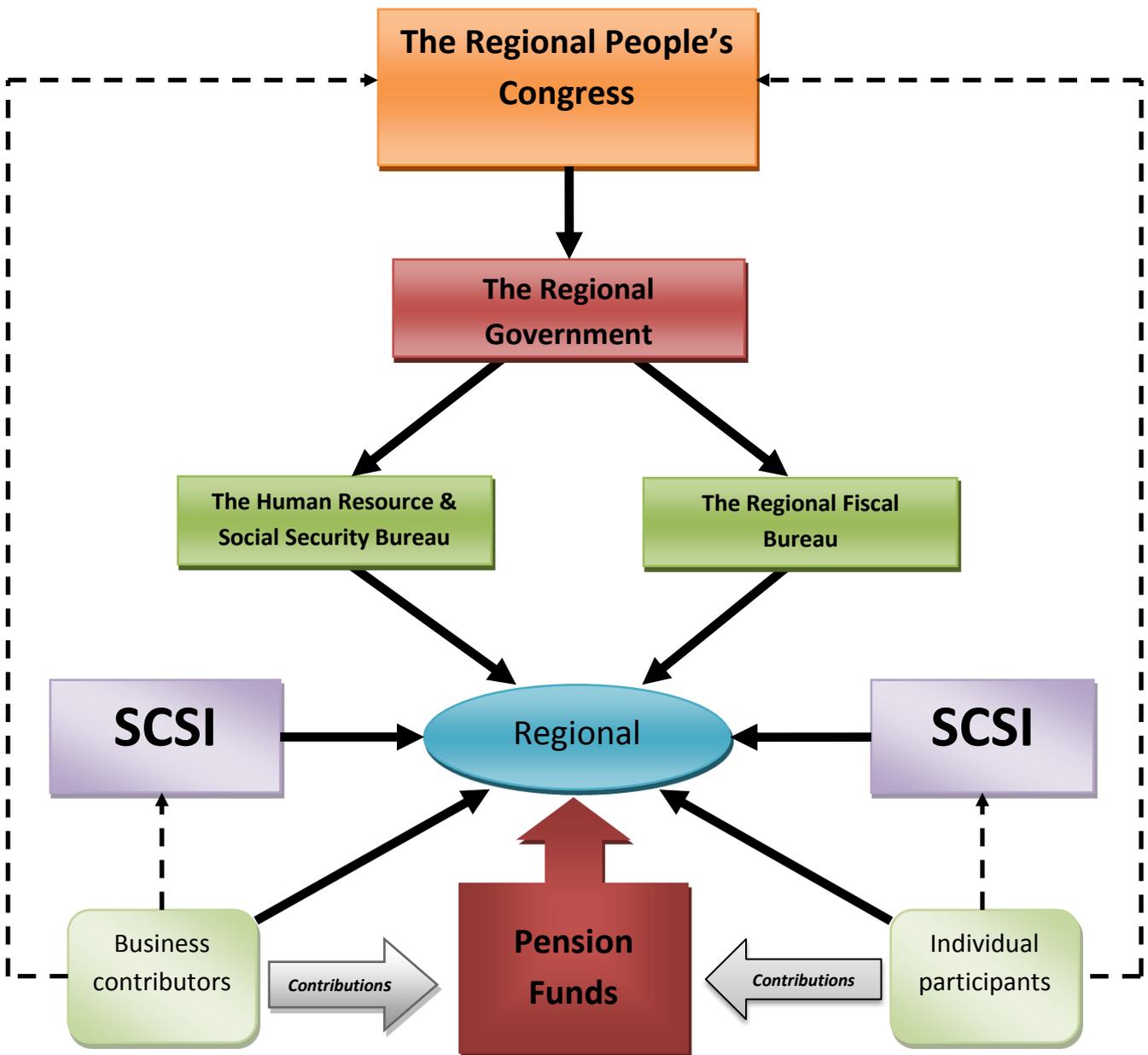
presumably to be more transparent and secure. These two different models are illustrated in the following diagram.

**Flow Chart 7.3: The old fund management system**



As shown by the above diagram, the SIAs were only held accountable to the labour and social security authorities that were directly administered by the regional or sub-regional government. There was no supervision from other state authorities or social actors. This institution was to be revamped under the new SIL as shown in the following diagram.

**Flow Chart 7.4: The New Model to be Introduced by the SIL**



The bold solid lines indicate direct supervision or control while the dashed lines suggest indirect control through election or representation. The arrows point to the actors that are subjected to the control or supervision. As shown in the diagram, the new model will introduce two independent lines of supervision, one from the People's Congress and the other from the SCSI, while entrenching

the right of the private actors' to information. Furthermore, the fiscal department of the government was also required to monitor the operation of the funds following the principle of 'separate lines of revenues and expenditures'. In other words, under the new model, the SIAs were no longer just accountable to the government. Rather, they were further subjected to the surveillance of other social organizations and state authorities.

Third, the SIL intends to establish two more public pension schemes in addition to the current schemes to further cover people who have been excluded from the public pension system. Unlike the existing schemes, these two new schemes are not to be extensively based on employment and contributions. Rather, they are principally funded by government budgets. Although the benefit level of these two schemes is substantially lower than the existing ones, participants can still choose to contribute while the majority of the contributions are to be accredited to their individual pension accounts. The main purpose of the schemes is to include the self-employed, those employed in the informal sectors, and those senior citizens without pension coverage. The inception of these two new schemes also aims at providing a safety-net for those people who may fail to qualify the 15-year minimum contribution requirement when reaching the retirement age. Under the SIL, these people can choose either of the two schemes depending on their final residential place at retirement.

Finally, the 2nd draft also sets out the general principle concerning the financial responsibility to pay off the IPD stemming from the pension reforms in the 1990s. It is stipulated that it is the government that is to incur the IPD. Although this principle appears to be very broad, yet it implies that the prevalent practice of using the funds in the IPAs to pay off the pensioners is no longer to be followed. Instead, both the Central and the regional governments will make efforts to get the 'empty pension accounts' duly funded, although the SIL remains silent on how and when the funding process is to be completed.

## ***7.6 Implications of the SIL Legislation by the NPC***

The SIL is a national legislation completely open to the social community in the domain of social insurance. The number of the legislative consultations, negotiations and debates, as well as the number of social surveys and workshops undertaken during the revision of the drafts are very substantial. So is the time taken for the legislation, which is substantially longer than it was for the 1951 *Provisions of Labour Insurance*. This huge amount of legislative work for a single law in the domain of socio-economic regulation is exceptional. On one hand, it shows the severity and complexity of the problems underlying the pension regulation, while, on the other, it also shows the broadness of interest presentation and the intensity of conflicts during the consultations and debates. The substantial revisions introduced by the 2nd and 3rd drafts are ample evidence of how these conflicts of interests are resolved and addressed through the numerous consultations and negotiations accompanied by the equally many workshops and surveys. Although the 3rd draft of the SIL is not the final draft, it is clear that a number of important principles and plans have been worked out to address the regulatory problems stemming from or associated with the government regulators. Meanwhile, as shown by the discussions in the previous few sub-sections these principles and plans are largely directed at the institutional problems of the regulation, such as the supervision of the fund management system, the articulation and aggregation of the pension contributions under the fragmented social pooling system, and the financial responsibility for sharing out the IPD stemming from the pension reform in the 1990s.

However, in spite of these apparent signs of improvements and the commitment of the legislative to improving the regulatory system through more open legislation, it is important to note that the real validity of these legal solutions

are still subject to proof through implementation. Nevertheless, a few important points are quite noteworthy.

First and foremost are the institutional settings of the SCSI. Although the supervisory organization has been made compulsory, its organization and terms of reference remain unclear. In particular, the SIL has not provided for the relations of the SCSIs to the government authorities and the social actors, i.e., business contributors and participating employees. Is it to be affiliated to any government department of the regional government or to be largely elected by the social community? In either case, how is the supervisory function of the SCSI to be funded and administered? Besides, although the SIL drafts stipulated the obligation of the regional governments to establish the SCSI, there is no mentioning of any legal liability in the case of non-compliance. On one hand, similar supervisory commissions were mentioned and stipulated in regulations as early as in the mid-1990s in Shanghai, for instance.<sup>141</sup> However, this particular institution in the written regulation has never been translated into a real practice. Whether the SIL will turn it into reality is still to be seen.

Second, although the SIL drafts have subjected the government authorities and the SIAs to the obligation of disclosure, the accounting rules and standards concerning information disclosure have not yet been formulated. In other words, no clear uniform rules have been made as regards what and how the accounting details of the pension revenues, expenditures and balances are to be reported either to the SCSI or to the regional people's congress. The public pension funds as well as the funds of the other social insurance scheme have long been excluded from the formal public finance system. Rather, they have been treated as extra-budgetary funds that are not subjected to the surveillance of the

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<sup>141</sup> Similar supervisory organization was actually proposed in the early 1990s, and was stipulated in the regional rules of Shanghai. But this organization was never formed. For a more detailed account of the institutional settings of fund management and supervision, see: Section 4.2.3 of Chapter Six of this thesis, pp. 183-186.

People's Congress and of the public. Given the absence of the rules regarding disclosure and the existing deficiency in the public finance system, the government obligation of disclosure and the right of the general public to information are likely to be compromised. So will the supervisory power of the People's Congress and of the SCSI.

Third, the SIL drafts have not given consideration to the investment issues of the public pension funds. Although the current stringent restrictions on investment portfolios involving pension funds may provide enough security to the funds, at least in the short term, yet given the high-rising inflation and low return of the bank deposits and state bonds—the only two subject matters allowed for investment, the financial risks of devaluation are growing. Without the availability of better investment portfolios, the final outcome is likely to be the reduction of pension benefits. Given the fact that the proportion of the contributions to the IPA normally averages over 30 *per cent* of the total contributions, the devaluation of the funds in the IPAs will have some significant impacts on the pension entitlement in the future. Due to the low returns of the current investment portfolio the replacement rates of the public pension schemes have already declined from 75 *per cent* in the mid-1990s to less than 55 *per cent* by the mid-2000s.<sup>142</sup> Nevertheless, even if the restrictions on investment portfolios are to be lifted, the conditions of the financial market in China are substantial concerns for pension regulators. In fact, the deficiency and poor regulatory environment of the financial market have long been two of the most important reasons for the current restrictions.<sup>143</sup> In this sense, it is arguable that the investment issue is dependent not only on the legislation of the social insurance system but also on the environment and conditions of the

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<sup>142</sup> Fuling Zhu, 'Pension Replacement Rate Research (养老金替代率研究)' (2004)(3) *Journal of Beijing Institute of Planning Labour Administration*(北京市计划劳动管理干部学院学报) pp. 17-21.

<sup>143</sup> See, eg, Tao Jiang and Yanqiu Zheng, 'Separation of Basic Pension Funds and Non-basic Funds in Market Operations 基本养老金应实行本金与基金分流运营' (2008)(10) *Accounting Monthly (Theory)*(财会月刊理论) pp. 46-47.

bordering regulatory systems like that of the financial market in China which may have similar regulatory problems over the years.

Last but not least, although the legislation of the SIL was a hallmark of intervention by the state legislature in the arena of socio-economic regulation, its impacts are largely confined to the implementation, policy formulation, and legislation of the regulatory system. However, as we have shown in this chapter and the last chapter alike, the review and evaluation mechanisms, as well as the accountability and correction mechanisms inbuilt in the government system were deteriorating as shown by the persistent failure to give effect to the regulatory policy of the central government on the part of government at lower level. Meanwhile, the accountability and correction mechanisms available to the social actors were still incapable of addressing or rectifying the wrongs stemming from the ‘abstract administrative acts’ of the government regulators, which is best illustrated by the case of Mr. Jiang. Although these issues belong to a broader scope of socio-economic governance which is beyond the ambit of the SIL, their impacts on the *responsiveness* of the regulation requires further discussions in the context of the system’s *reflexivity*, which will be presented in Chapter Eight.

## **8. Conclusion**

This chapter has reviewed the evolution of China’s public pension regulation in the 2000s. In particular, the special regulatory programs aimed at including migrant workers into the public pension system were described in detail to illustrate the evolution in the *regulatory spaces*—constitution of the regulatory system and the interactive ties of the actors.

As noted in the early parts of this chapter, the major policy aim of the inclusion schemes was to spread the systemic risk of ageing to a broader base of business firms and labour force, and to reduce the financial pressure of pension outlays

stemming from the implicit pension debts (i.e., the IPD) after the pension reform in the mid-1990s. In this regards, the strong economic boom accompanied by the rise of migrant workers in the big cities represented a good opportunity to realize these policy goals. However, the government authorities did not fully consider the special characteristics of migrant workers. This, together with the highly segmented social pooling system, contributed to the unsatisfactory outcomes of the regulation, while the pension scandal in Shanghai further pushed the public pension system to a critical stage of reform.

In the last few years of the 2000s, the state legislature initiated the legislation for the *Social Insurance Law* in response to the social claims of reforms. While the impact of the changes brought forth by the new legislation are yet to be analysed in the following part of the thesis, it is clear that this legislation differed significantly from those previous initiatives in the 1980s and 1990s. In particular, it restored the practice of open legislation and rule-making in the early 1950s, and engaged various social and government stakeholders in negotiations and consultations, while squarely addressing the persistent regulatory problems unresolved by the government regulators. Although the real implementation and performance of the new *Social Insurance Law* are yet to be examined in the future, and some of the potential problems and deficiencies in the regulation may lie beyond the ambit of this law, the impact of this law and the legislative process leading to its finalization, clearly changes the *responsiveness* and *reflexivity* of the regulatory system, because some significant changes have been introduced to the *regulatory spaces* of the public pension system. These changes, together with their impacts on the evolution of the regulatory system, are to be further analysed against the general trend of social changes in the following chapter.

**PART C**

**DATA ANALYSIS**

**AND**

**CONCLUSION**



## **CHAPTER EIGHT: EVOLUTION OF PUBLIC PENSION REGULATION EXPLAINED IN TERMS OF *SYSTEM REFLEXIVITY*, *REGULATORY RESPONSIVENESS* AND SOCIAL EVOLUTION**

### **1. Introduction**

The previous five chapters have described the evolutionary course of China's public pension regulation in the context of a changing social environment. The nature of the social changes was examined to illustrate the specific demands, problems and issues awaiting responses from the public pension regulatory model. As mentioned in Chapter Two (i.e., the literature review and research design), these 'responses' are interpreted through two important concepts—*system reflexivity* and *regulatory responsiveness*, while each of them has its own descriptive approach and normative postulations.

According to the research design, *regulatory reflexivity* is to be indicated in the institutions and interactions of the actors within the regulatory system—the so called regulatory space; while its normative postulations mainly include: being facilitative to communications and negotiations of the actors, being conducive to transparency of the regulatory activities, and being able to foster mechanisms of self-regulation. *Regulatory responsiveness*, on the other hand, is to be indicated in the dynamics of the regulatory process (i.e., the five key components of regulation identified in literature review, including: policy formulation, legislation and rule-making, implementation and enforcement, review and evaluation, and accountability and correction). The normative postulations embedded in *responsiveness* are—being open to the changing social environment, being facilitative to, and capable of addressing and resolving problems and issues stemming from social changes, and being able to maintain integrity in the regulatory system. These form the basis of the analytical tools applied in this thesis to each of the five historical periods for the

purpose of answering the research questions presented in section 3.2 of Chapter Two.

To unfold the analysis, this chapter includes three following sections. In the second section, the *regulatory spaces* and *regulatory processes* of the five historical periods will be further scrutinized with special attention to those historical details corresponding to the normative postulations and attributes of *reflexive law* and *responsive regulation*. Based on the analytical outcomes derived from this section, the two subsidiary questions—respectively concerning *system reflexivity* and *regulatory responsiveness*—raised in section 3.2 of Chapter Two will be answered. The third section aims at answering the main research question—in what ways has the public pension regulatory system in China evolved in response to a changing social environment. Apart from *system reflexivity* and *regulatory responsiveness*, this section will further analyse the interactions between the regulatory system of public pension and the changing society in China. In particular, it will use the general model of social evolution suggested by systems theory<sup>1</sup> to analyse the specific social contexts within which the regulatory systems were formed, and the impacts of the regulations on the evolutionary path of the Chinese society over the historical periods. Section 4 is a summary.

## **2. Changes and Adaptations in the *Regulatory Spaces* and *Processes* Informed by *System Reflexivity* and *Regulatory Responsiveness***

### ***2.1 The New Democratic Era (1949-1953)***

#### ***2.1.1 Changes in the Social Environment and Issues to be Addressed by Public Pension Regulation***

The *New Democratic Era* was a brief period after the founding of the PRC. The society was then characterized by a certain degree of differentiation in the

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<sup>1</sup> This particular model was presented as Flowchart 2.2 of Chapter Two of this thesis, p. 30. ...

economy with various business firms of both state and private ownership co-existing in the market, although the overall industrial base was weak, and the general level of technological specialization was also low. In response to this special socio-economic context, the ruling political party (i.e., the CCP), together with many other non-ruling parties, passed the *Common Program* (i.e., the interim Constitution of the PRC) in late 1949. According to the policy guidelines for the socio-economic development of the new state, the most important aim of government administration and regulation was to boost economic recovery in the short run; and to further industrialize China, in the long run. Furthermore, it was also envisaged that to realize these goals, a strong state-owned sector was essential. In light of these policy guidelines, the *Common Program* further delineated a specific policy concerning the regulation of business and labour—‘enabling both public and private sectors’ and ‘benefiting both business and labour’, while highlighting the necessity of building up labour insurance schemes, including the public pension system, to provide industrial and commercial workers with better social security benefits. These general policy guidelines in the *Common Program* not only lay down the strategic orientation of the social changes that were to take place during the *New Democratic Era*, but also defined the specific issues and aims for the regulation of the public pension system.

### *2.1.2 Reflexivity of the Regulatory Spaces*

Although the initial plan of the Central Government was to implement the public pension scheme (and other social insurance schemes) in a small fraction of large-sized, industrial firms (mostly state-owned enterprises then), the regulatory program was initiated with significant attributes of *reflexivity* as shown by the dynamics in the *regulatory space*.

First, the *space* of policy formulation was primarily formed by various political parties, including the CCP, and their negotiations largely took place within the framework of the CPPCC (i.e., Chinese People's Political Consultative Conference) according to the procedural rules stipulated in the Constitution, i.e., the *Common Program*. In most cases, important state policies were to be discussed and decided through the CPPCC with participation of various political parties in the society. In other words, the ruling party could not pass important socio-economic policies without consulting with other political powers in the CPPCC.

Second, the *space* of legislation and rule-making was primarily composed of the Ministry of Labour and the ACFTU. Although the leadership of both was made up of some senior *cadres* of the CCP and the organizational structures of the government, the ACFTU and the CCP were then quite similar (i.e., the *vertical* and *horizontal* lines of administration), the leading role of the *CCP cadres* was largely confined to political guidance and supervision, instead of functional direction. Furthermore, the legislative process was open to public scrutiny and participation, in spite of the fact that only a small fraction of labour and business was to be included in the initial phase of the regulation. In particular, the involvement of labour in the legislation was very significant as the trade unions under the administration of the ACFTU engaged the vast majority of the labour force in the public discussion of the draft rules. In this respect, business firms were less involved, although they could advise the rule-makers (i.e., the drafting committee) by sending letters to the Ministry of Labour. Apart from being open to all social stakeholders, the *space* of legislation was also open to all relevant government departments and state authorities, while representatives of the CPPCC also took part in co-ordinating the interests and concerns of the public authorities.

Third, the *space* of implementation and enforcement was largely constituted by the labour authorities and the trade unions. The delineation of functions stipulated in the *Provisions of Labour Insurance* (1951) was clear. Trade unions were mainly responsible for routine operations, such as collection of contributions (to be paid by business employers), book keeping, benefit distribution, and management of the national social pooling system following the financial rule of the PAYG system (i.e., the Pay-as-You-Go system). The labour authorities were mainly responsible for taking enforcement measures against non-compliance, and supervising the trade unions and firms, while furnishing labour dispute tribunals to resolve industrial disputes. Apart from these, the *space* of implementation and enforcement also introduced some special mechanisms aimed at entrenching the transparency of the system. For example, in light of the information disclosure requirements in the 1951 *Labour Insurance Provisions*, the ACFTU further issued internal rules to regulate accounting and disclosure activities to be performed by primary-level union organizations. According to these rules, trade unions running the public pension scheme were not only required to release the accounting details to business, labour and government on regular basis, but also obliged to hold monthly meetings to be attended by representatives of both labour and business for reporting purposes. In addition, internal auditing units were also established within all union organizations to ensure accounting accuracy and integrity. While the primary aim of these rules and institutional arrangements were to increase the integrity of the routine operations performed by union organizations, they also formed self-regulatory mechanisms in the trade union system.

Fourthly, the *space* of review and evaluation also exhibited some significant signs of *reflexivity*. During the experimental period of the 1951 *Labour Insurance Provisions*, trade unions were required by the ACFTU to collect

feedback from the stakeholders, i.e., business firms and employees. While the labour authorities were mainly responsible for processing and reporting the feedback from the trade unions, they also organized workshops to engage representatives from the business sector to collect their feedback and opinions. These further facilitated communications between the public authorities and the social stakeholders for the purpose of systemic learning and contemplation.

Finally, the *space* of accountability and correction, as shown by the developments in the *New Democratic Era*, was composed of various functionally independent actors, such as judicial courts, government supervisory authorities, and business associations, in addition to unions and labour authorities. In particular, their interactive relations led not only to administrative measures or legal action aimed at addressing disputes or remedying wrongs stemming from implementation or enforcement, but also to some legislative action aimed at changing the rules, although evidence of the impact of this on policy formulation was not evident in the historical data.

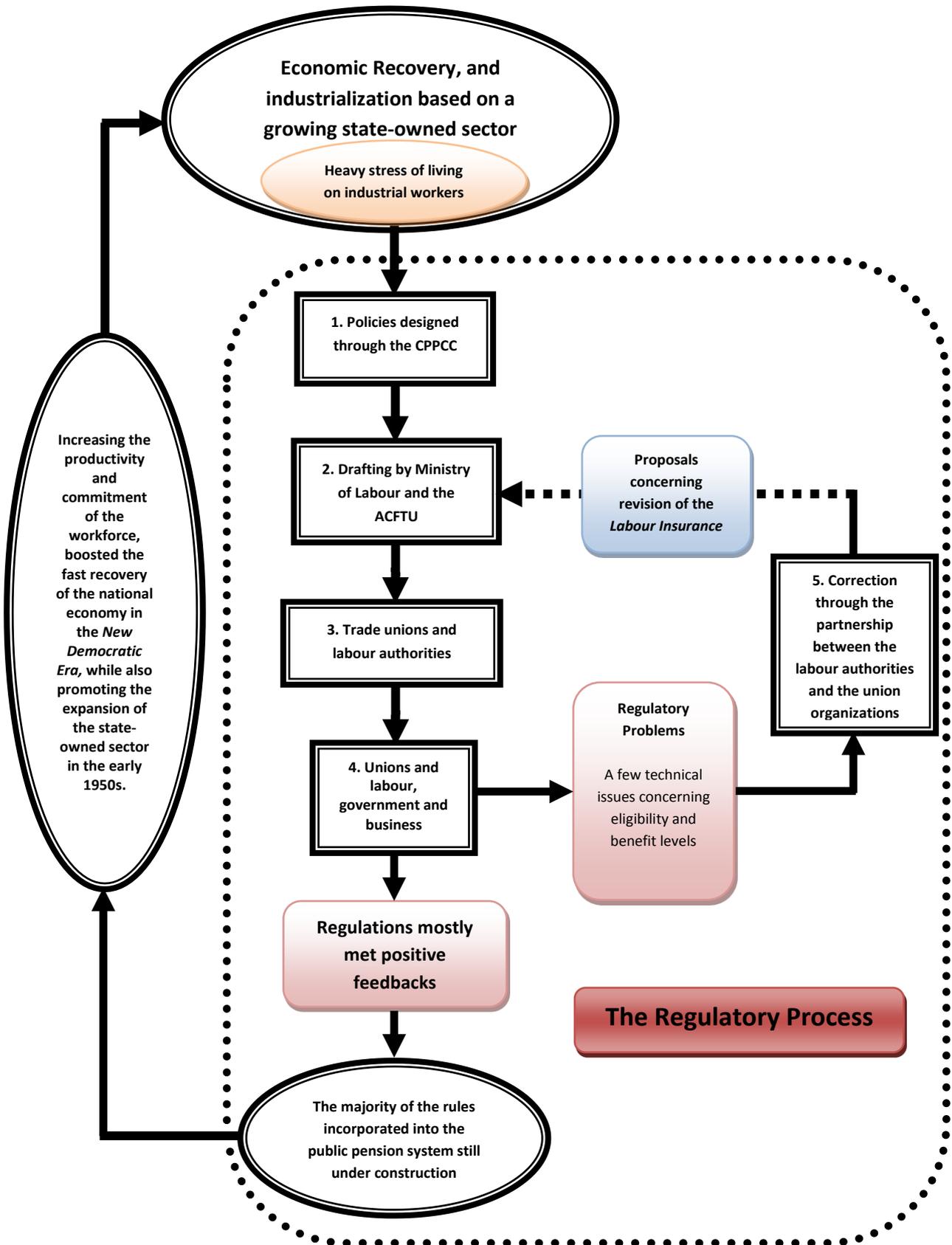
### *2.1.3 Responsiveness of the Regulatory Process*

Based on the constitution and attributes of the *regulatory spaces* discussed above, the *process* of the regulation can be further illustrated through the following flowchart which now provides details to the abstracted flowchart presented in Chapter Two.<sup>2</sup>

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<sup>2</sup> In Chapter Two, an abstract flowchart was presented based on the general literature of regulation and Selznick's model of responsive regulation. See: Flowchart 2.3 of Chapter Two of this thesis, p. 47.

**Flowchart 8.1: The Regulatory Process during the *New Democratic Era***



As indicated by the oblong circle on the top of the chart, the major socio-economic changes desired by the state at the beginning of the *New Democratic Era* included the recovery of the national economy through industrialization based on a strong state-owned sector. Under the general policy of ‘benefiting both labour and business’, the main issue to be addressed by the regulation of public pension at this stage was to ‘reduce the stress of living on industrial workers’ by providing them with better social insurance schemes (indicated by the smaller oblong circle on the top). These state policies, concerning the regulation of labour, business and public pension, were conceived and endorsed by the CPPCC with vast participation of various political parties in late 1949 (indicated by the box numbered ‘1’).

Following these policies, the legislation was undertaken by a drafting committee composed of officials from the Ministry of Labour and the ACFTU (indicated by the box numbered ‘2’). Following vigorous procedures of public participation and discussion, the 1951 *Labour Insurance Provisions* were passed, while a number of regulatory by-rules were also passed by the Ministry of Labour and the ACFTU.

The implementation and enforcement of the regulation were performed by the trade unions and labour authorities with clearly defined terms of references (indicated by the box numbered ‘3’), while the real effects were further processed through the review and evaluation mechanisms (box numbered ‘4’). Although the majority of the regulations met with positive feedback from the social actors, a few issues in the rules were further identified. In the *New Democratic Era*, changes to the rules were made through the correction mechanisms inbuilt in the partnership between the labour authorities and trade unions (indicated by the box numbered ‘5’). Based on these mechanisms, the revised *Labour Insurance Provisions* were passed by the Central Government in 1953.

During the three years (from 1951 to 1953) when the public pension scheme and other social insurance schemes were being implemented and revised, China's economy experienced a very strong and rapid recovery, which further corresponded with the general policy goal of socio-economic regulation of *New Democracy*. Although a variety of factors had contributed to this economic expansion, the positive impact stemming from public pension regulation was significant, because it substantially increased workers' productivity and commitment, particularly in the state-owned sector, as the majority of firms covered by the labour insurance schemes (including the public pension scheme) were state-owned enterprises. This not only boosted the expansion of the SOEs in the early 1950s, but also enabled the state-owned sector to overtake the private sector in terms of total industrial and commercial production in 1953. This further contributed to the realization of the socio-economic changes that had been envisaged by the *Common Program*.

As shown by the above discussion of the *regulatory process* of public pension in the *New Democratic Era*, the regulatory system was not only well connected with the social environment, but also largely achieved the goals set forth in the regulatory policies which reflected the demands of the labour force for socio-economic security, and the demands of the business firms for recovery and expansion. Furthermore, there was no evidence showing any deterioration of integrity in the regulatory system. These factors indicate that the public pension regulation in the *New Democratic Era* largely corresponded to the normative postulations of *regulatory responsiveness*.

## ***2.2 The Socialist Transformation Period (1953-1958)***

### *2.2.1 Changes in the Social Environment*

The most salient feature of the social changes during the *Socialist Transformation Movement* was the vast socio-economic integration by the CCP.

This integration first began in the economic system with the nationalization of all private business firms, and then proceeded to the executive, judicial and legislative systems of the whole state regime. While the express goal of these integration programs was to complement and facilitate the *socialist* economy of central planning, the real purpose, as revealed by the historical data, was to cement the CCP leadership's control over the entire state (i.e., establishing the party-state regime). As a result of these political integration programs, various social organizations, such as the trade unions under the ACFTU, and state authorities, such as the legislatures (the People's Congresses), judicial bodies, and government departments were organizationally merged into the CPP system by the mid-to-late 1950s. In the domain of the social regulation of business and labour, these new changes further led to two important administrative models—the 'vertical management system' and the 'iron rice bowl'—that had some significant impact on the *regulatory spaces* of the public pension system, although no significant change took place in the substantive terms of the public pension scheme.

### 2.2.2 Reflexivity in the Regulatory Spaces

The political integration of the society and of the state largely reduced the organizational independence of the actors within the public pension system, as all political, social, economic, legal, and government institutions were then subjected to the leadership of CCP commissions. This, as shown by the historical data,<sup>3</sup> further undermined the standing of the *reflexive* institutions in socio-economic regulation, as *reflexivity* presumes the differentiation of social sub-systems characterized by a considerable degree of functional and organizational autonomy. However, these important properties of functional and organizational autonomy which had been discernible in the regulatory system

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<sup>3</sup> See, especially, Section 2 of Chapter Four of this thesis, pp. 102-109.

under the *New Democratic Era* largely disappeared in the second half of the 1950s.

In terms of policy formulation, the CPPCC was replaced by the National People's Congress which was further subjected to the control of the CCP in the second half of the 1950s. The various political parties that had been involved in consultations and negotiations aimed at formulating important state and government policies in the *New Democratic Era* were marginalized. Although they could still advise the CCP and the government through the CPPCC, they no longer had the substantial power to influence the policies that were then only to be formulated by the leadership of the CCP.

In the *space* of legislation and rule-making, the former actors (i.e., the Ministry of Labour and the ACFTU) were subjected to the 'vertical management system' of the CCP. Instead of passing rules, they were required to follow the commands, directions and ordinances from the CCP leadership.

The *space* of implementation and enforcement underwent some significant downsizing during the *Socialist Transformation Movement*. The labour authorities seceded from the *space*, and the enforcement function disappeared. With the establishment of the 'iron rice-bowl' system in the second half of the 1950s, the state became the sole employer of the labour force. Accompanied by the 'vertical management system' governing the business institutions, government, labour and business became an integrated whole. As a result, non-compliance of public pension and industrial disputes between labour and business were conceptually eliminated. Both of them were treated as internal problems and issues to be addressed by the 'vertical management system' through the administrative mechanism of enquiries (from the SOEs) and replies (by labour authorities). While this was indicative of some significant system downsizing and functional reduction in the *space* of implementation and

enforcement, the same thing also took place in the *spaces* of review, evaluation and corrections.

Given these institutional changes in the regulatory spaces, it can be argued that while the foundation of *reflexivity* in the whole society was largely undermined by the political integration in the second half of the 1950s, the institutions of *reflexive regulation* embedded in the public pension system of the *New Democratic Era* also disappeared in the late 1950s.

### 2.2.3 Responsiveness of the Regulatory Process

Despite the significant changes to the *regulatory spaces* of the public pension system, the dynamics in the *regulatory process* were insignificant as activities aimed at revising the 1953 *Labour Insurance Provisions* came to a standstill. In fact, no amendment was made to the substantive terms of the public pension scheme for the remainder of the 1950s. Rather, the administrative mechanism of enquiries and replies became the major form of resolving regulatory problems and issues concerning the scheme.

Notwithstanding the few developments in the *regulatory process* of public pension, the rapid decline of *regulatory responsiveness* in the entire socio-economic administration system was quite discernible as shown by the nationwide popular movement—the *Great Leap Forward*—and its aftermath.

The foremost factor contributing to the declining *responsiveness* was the lack of expertise and specialized knowledge on the part of the CCP leaders to command and control various socio-economic undertakings. After the vast political integration in the mid-1950s, all socio-economic organizations and institutions were subjected to the highly centralized party-state regime following the ‘vertical management’ system. All of them were required to follow the commands and orders from the top CCP leaders. This change not only reduced the organizational independence of the social sub-systems, but also slowed

down the process of their functional specialization. In fact, from the second half of the 1950s, political integrity and ideological allegiance to Mao's philosophical thoughts were further prioritized over scholarly expertise and professional skills in various government and state institutions. This was deemed to be essential for the smooth implementation of the commands and orders from the political leaders.

Second, under the party-state regime and the 'vertical management system', although commands and orders from the political leaders were likely to be complied with or carried out, the real consequences of implementing these commands and orders, as shown by the prevalent practices of selective reporting on the part of lower echelons of the CCP *cadres* during the *Great Leap Forward Movement*, were not easily fed back to the policy-makers. This further disconnected the CCP leadership, the then dominant policy-makers and commanders, from the actual socio-economic context to which the policies and orders were applied. Consequently, the openness of the socio-economic administration to the social environment was also impaired.

Finally, as shown by the heated debates within the CCP concerning the problems stemming from the *Great Leap Forward* in the late 1950s, the democratic institutions within the CCP also deteriorated. Personal cult overran honest feedback and reporting by a few senior *cadres* of the CCP. Pre-determined principles and doctrines based on Mao's political and ideological visions were further reinforced and immunized from any doubt or challenge, thus compelling all the CCP members to refrain from questioning the validity of the socio-economic policies decided by Mao. This further reduced the ability of the senior policy makers to learn and respond to the real needs and demands of the social community, thus impairing the *responsive* institutions within the CCP to timely address the socio-economic problems stemming from the *Great Leap Forward* in the last few years of the 1950s.

These changes and developments towards weaker *responsiveness* of the CCP's policies, commands and orders, finally contributed to a serious 3-year economic recession and famine in the early 1960s, with tens of millions of people being starved to death from 1960 to 1962.<sup>4</sup> Although the impact of the recession and the starvation did not squarely land on public pension regulation, rural-to-urban migration was stopped by the CCP, which further slowed down the expansion both of the urban sector and of the public pension system.

Equally important to note is the fact that after the recession and famine in the early 1960s, Mao temporarily retreated from socio-economic administration from 1962 to 1966, and Liu (then President of the PRC) became the leading socio-economic policy maker in the CCP. Although Liu was more pragmatic in policy learning and designing, he did not have the political influence to change the institutional framework governing socio-economic administration that had been envisioned and endorsed by Mao in the 1950s, i.e., the centralized party-state regime, the 'vertical management system' and the 'iron rice-bowl' system. In other words, although Liu's pragmatic style of socio-economic administration somehow increased the *responsiveness* of the CCP and the party-state regime, the foundation of *reflexivity*, i.e., the differentiation of socio-economic, governmental and state functions with certain degree of organizational autonomy and functional specialization, which had been present in the *New Democratic Era*, was not restored. Even Liu's pragmatic style of socio-economic administration which included some *responsive* practices, such as policy learning, observation and evaluation, led to growing concerns of Mao,

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<sup>4</sup> There has been a voluminous body of literature showing the cause of the big famine and the mistakes made by the CCP leaders in the late 1950s. Most of the causes identified by this body of literature are closely related to the loss of *responsiveness* in the socio-economic institutions. See, especially, Ruojian Li, 'Study on Population Loss during the Great Leap Forward (大跃进后人口损失的若干问题)' (1998) 67(4) *Chinese Demographic Science* pp. 40-44; Bo Yin and Xinyi He, 'Economic and Historical Analysis of the Great Leap Forward (对大跃进的几点经济历史分析)' (2000) (2) *Economics Information (经济学情报)* pp. 64-66; Shusheng Yi, 'Social Control before and after the Great Leap Forward ("大跃进"前后的社会控制)' (2011) (4) *Yan Huang Chun Qiu (炎黄春秋)* pp. 8-12; and Liuling Wu, 'Public Opinions and Exchange of Opinions within the CCP during the Great Leap Forward(大跃进时期的舆论场与党内意见交流)' (2011) 20(2) *Journal of Mudanjiang University (牡丹江大学学报)* pp. 108-109.

as these practices gradually led to doubts among some senior *cadres* about the validity of Mao's socio-economic policy paradigm. However, these doubts within the CCP did not lead to any systemic socio-economic reform in the 1960s. Rather, they partly contributed to the increasing political tension in the CCP, which further developed into a revolution in 1966 whereby the entire public pension system, together with many government and state institutions, was dismantled.

### ***2.3 The Early Stage of China's Economic Reform and Liberalization (1978 to 1989)***

#### *2.3.1 Changes in the Social Environment and Issues to be Addressed by Public Pension Regulation*

The *Economic Reform and Liberalization* initiated in the last few years of the 1970s was based on political and ideological reversal of the *Cultural Revolution* from 1966 to 1976. This *Revolution* not only destroyed the party-state regime established in the 1950s and the few *responsive* elements introduced by Liu in the mid-1960s, but also dismantled the national PAYG social pooling system (i.e., nation-wide transfer payment system of public pension) managed by the ACFTU; while all state authorities also withdrew from the regulation and administration of public pension, including the trade unions. The public pension scheme was then reduced to an enterprise-based benefit scheme, with the SOEs being providers of public pension benefits to their own retired workforce. Although the substantive terms and conditions of the public pension scheme did not change, the operation of this special model of pension provision was very problematic. Under this particular system, millions of over-retirement-age employees continued employment. This not only led to some serious economic problems, such as the declining productivity of the workforce, but also created some serious social problems, such as unemployment of the young generation in

the late 1970s. In 1978, these issues and problems became the immediate targets of new reforms taking place in the domain of social insurance and public pension.

### *2.3.2 Reflexivity of the Regulatory Spaces*

The reform on the public pension regulation began with the State Council's *Provisional Rules Concerning Retirement* in 1978 (i.e., the 1978 *Provisional Rules* of the State Council). The main purpose of the regulatory rules was to bring retirement of old workers in the SOEs back into the pension scheme. However, this reform led to some further reforms on the public pension system as a result of some significant changes to the *regulatory spaces* of the public pension system.

One major change was the re-introduction of the pragmatic approach to state regulation and administration (i.e., learning by doing what was colloquially known as 'getting across the river by feeling the stones'), accompanied by the de-centralization of power from the Central Government to regional and sub-regional governments. The net result of these strategic changes was that the old party-state regime based on centralized 'vertical management' was replaced by a new administrative system relying on stronger *horizontal* administration and weak *vertical* guidance, although the CCP still retained its heavy control over the government system. In other words, although the political leadership still retained its control over all government functionaries, the CCP leadership controlling the Central Government ceased to be the sole policy maker and designer of socio-economic regulation and administration. As a result, the regional and sub-regional governments were no longer deemed to be mere implementers of political policies and commands. Rather, the lower echelons of governments and their functional departments were now allowed to participate in all the *regulatory spaces* of socio-economic administration, including the

regulation of public pension. This further restored some *reflexive* institutions in the regulatory system, as different levels of governments were then engaged in the common process of policy learning and evaluation aimed at gradually reforming the economic system as well as its various sub-systems. In particular, these *reflexive* institutions were embedded in the *spaces* of review and evaluation as well as accountability and correction. In other words, lower echelons of governments then acquired certain degrees of functional and organizational autonomy endorsed by the new model of state administration (i.e., the model based on stronger *horizontal* management and weak *vertical* guidance) to complement the regulatory role of the Central Government. They could join in the process of policy formulation and rule-making in addition to the traditional role of implementation.

Second, apart from the decentralization in the government system, the CCP leadership also decided to restore the legislative bodies and courts at all territorial levels, and introduced the concept of ‘socialist rule by law’ (i.e., *she hui zhu yi fa zhi*). The primary purpose of this particular idea was to reverse the general practice of administering socio-economic programs by commands and orders under the rule of Mao. This not only restored the authority of legal rules, but also increased the transparency of all socio-economic regulations as written rules, whether made by state legislatures or administrative authorities. These were required to be made known to all the interested parties in society, which was also manifest in the regulatory initiatives concerning public pension reform from 1978 and onwards.

With these fundamental changes, particularly those to the administrative system of the governments, the *regulatory process* began to recover its *responsiveness* in the 1980s.

### 2.3.3 Responsiveness of the Regulatory Process

The historical data<sup>5</sup> concerning this particular period demonstrated very strong dynamics in the regulatory system. It began with an important revision of the regulatory policy embedded in the 1978 *Provisional Rules* of the State Council concerning retirement in the early 1980s, continued with a wave of rule-making by various regional governments across the whole nation in the mid-1980s, and introduced a new implementation model of public pension in the second half of the 1980s. At the same time, it regained its openness and connection with the rapidly changing social environment characterized by the functional differentiation of government, labour and business in the bigger economic system by the end of the 1980s.

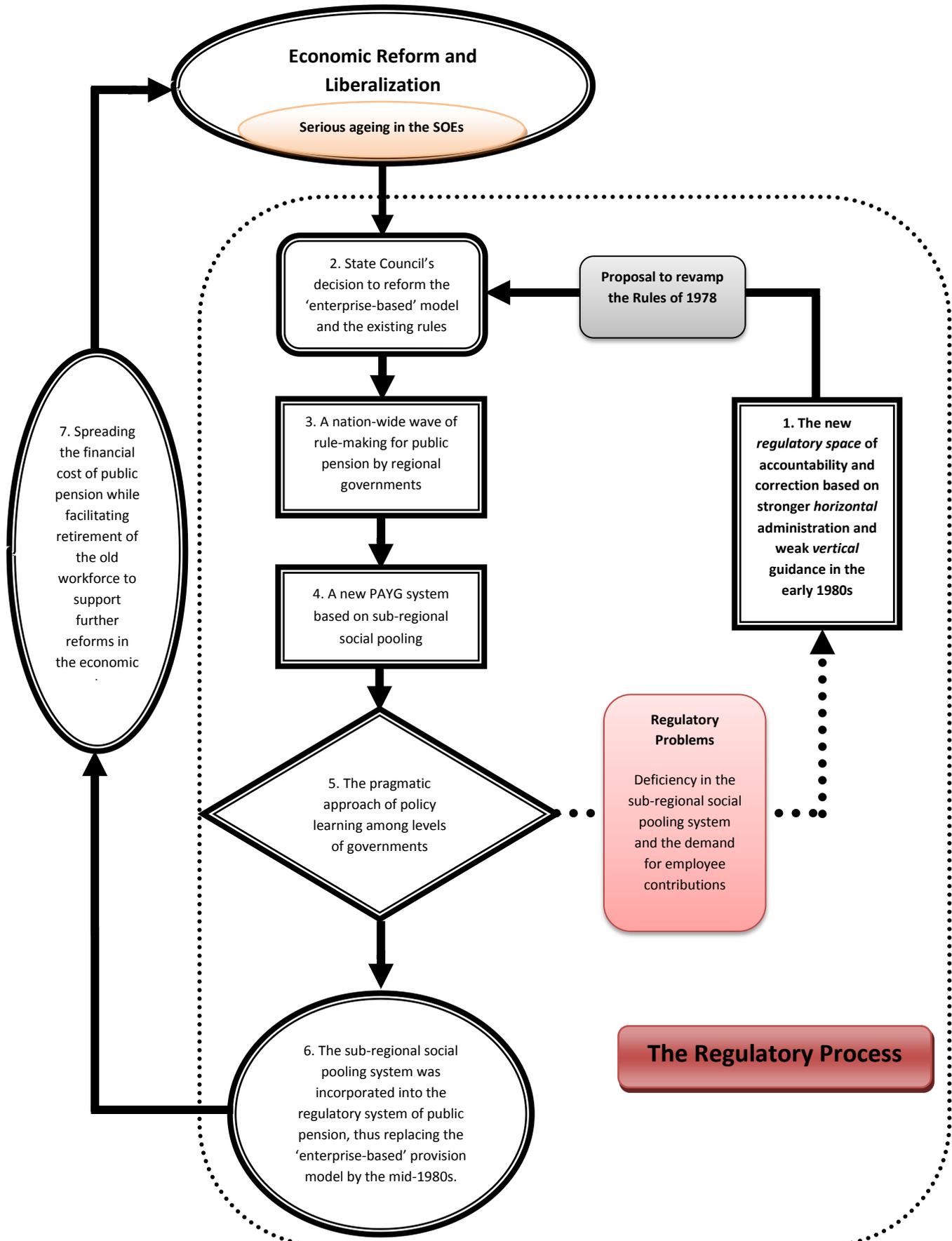
The most salient feature of the public pension regulation in the early stage of *Economic Reform and Liberalization* was that lower echelons of governments could advise reform initiatives in response to social change. In the early 1980s, this happened in public pension regulation. The key issue involved was that following a few years of implementing the 1978 *Provisional Rules* of the State Council, it was commonly felt among the regional and sub-regional governments that the ‘enterprise-based’ model of pension provision, together with the underlying policy aim of promoting retirement, was insufficient to systemically address the socio-economic changes taking place in the SOEs. In particular, while implementing the 1978 *Provisional Rules* of the State Council, it was found that many old enterprises established in 1950s or earlier were unable to independently finance their own pension schemes due to the serious ageing of the workforce. To spread the financial cost of pension provision while further facilitating the retirement of the old workforce in the SOEs, the regional governments proposed a new implementation system for PAYG transfer payments to be managed by sub-regional governments. This was a significant,

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<sup>5</sup> Here, the historical data specifically refers to Section 3 of Chapter Five of this thesis, pp. 162-172

institutional change aimed at the existing policy paradigm. Nevertheless, the Central Government immediately decided to support the proposal, while the National People's Congress also endorsed the Central Government's decision, thus initiating further regulatory responses of the governments throughout the 1980s as illustrated in the following flow-chart with all relevant details fit into the abstract flow-chart presented in the research design of Chapter Two.

**Flow-chart 8.2: The *Regulatory Process* of Public Pension in the 1980s**



As shown by the above flowchart, the proposal of reform (i.e., indicated by the rectangular box numbered ‘1’ in the upper right of the chart) was first produced in the new *regulatory space* of accountability and correction characterized by strong *horizontal* administration and weak *vertical* guidance (i.e., enclosed in the bold rectangular box on the middle right of the chart).

The Central Government decided to initiate the reform aimed at revising the 1978 rules (i.e., indicated by the rectangular box numbered ‘2’), and passed on the rule-making power to the regional governments, while the Ministry of Labour and Personnel also held a national workshop in late 1983 to further align the new regulatory policy of public pension—‘fixing contribution rates in light of actual expenses while allowing for small amounts of surpluses’ (due to space limit, this step is not presented in the above chart).

Following the regulatory policy established during the national workshop in late 1983, various regional governments began making their regional rules aimed at building up the PAYG pension schemes based on social pooling at sub-regional level in the mid-1980s (indicated by the rectangular box numbered ‘3’).

The new public pension scheme reformed by the regional governments (indicated by the rectangular box numbered ‘4’), largely retained the substantive terms and conditions of the 1953 *Labour Insurance Provisions*. The only difference in the substantive terms was the change to the contributory obligation to be borne by the SOEs, i.e., 10 *per cent* to over 20 *per cent* of payroll varying from place to place. In terms of administration, the new implementation model was largely managed by the labour departments of the sub-regional governments and operated by service agencies commissioned by the sub-regional governments. The trade unions largely withdrew from the routine operations concerning fund collection, benefit distribution and cross-regional transfer payments. In fact, the national social pooling system which had been

established under the ACFTU system since the early 1950s was not restored. That is to say, unlike what it had been in the 1950s and in the first half of the 1960s when public pension benefits could be distributed in any part of the PRC regardless the location of a worker's previous pension contributions, the new scheme limited the PAYG pooling system strictly to sub-regional jurisdictions, which meant if a worker had his or her pension contributions made in different places, the final payment of public pension benefits might be subjected to some special difficulties stemming from the segmented social pooling system, because transfer payments across the sub-regional jurisdictions were not possible under the new system. In addition, as all the contributions for public pension were made by the SOEs, while the old problem of workforce ageing was just temporarily relieved, the demand for introducing new fundraising practices, such as contributions by business employees was also voiced by SOEs at the end of the 1980s. These two problems became the main issues (indicated by the red box titled 'regulatory problems') identified through interactions in the *space* of review and evaluation (indicated by the rhombus numbered '5' in the chart), while the arrow with dashed lines in the flowchart further indicates future regulatory responses to be produced by the accountability and correction mechanisms within the regulatory system.

Despite these two regulatory problems, the new model, together with the sub-regional PAYG social pooling system, was incorporated into the regulatory system of public pension, thus replacing the old 'enterprise-based' provision model (indicated by the circle at the bottom of the chart numbered '6'). With this new model being established, the financial cost of funding retirement pensions was temporarily relieved as the risk of workforce ageing was spread to a broader scope of SOEs within the same sub-regional jurisdiction. This not only facilitated the retirement of the old workforce but also served to support some other ongoing reforms in the economy system (as indicated by the oblong

circle at the left side of the chart connecting to the social environment). This finally completed the regulatory *loop* of public pension in the 1980s, which largely responded to those issues and problems that had been confronting the regulation in the early 1980s.

However, notwithstanding this regulatory *loop* in the 1980s, problems continued to emerge by the end of the 1980s. Apart from those already identified by the review and evaluation mechanisms in the second half of the 1980s (indicated by the red rectangular box titled ‘regulatory problems’), some fundamental changes also took place in the social environment—the functional differential of the government, business and labour—stemming from the transition of the economic system from central planning to a mixed economy in the second half of the 1980s. As a result of this transition, some important reforms aimed at phasing out the ‘iron rice-bowl’ system were carried out. To be more specific, these reforms included corporate reform and the introduction of the labour contracts in the late 1980s. The impact of these economic reforms was two-fold. On one hand, they contributed to the rapid functional and organizational differentiation of the government, business and labour in the late 1980s, while on the other hand, they also led to a number of new issues and problems in the social environment as potential conflicts of interest among these three institutions began to surface along with their continuing differentiation at the end of the 1980s.

The new problems and issues existing both inside the *regulatory process* and emerging outside in society further became the objects to be treated by the evolving public pension regulatory system in the 1990s. However, notwithstanding these new issues, the *regulatory responsiveness* of the public pension system in the 1980s was obvious. It was connected to the social environment, and responded to those problems and difficulties left behind by the *Cultural Revolution*, while supporting other socio-economic reforms in the

domain of business and labour institutions, although the *responsiveness* was largely realized within the government system based on strong *horizontal* administration and weak *vertical* guidance. Nevertheless, no significant evidence of deterioration in the integrity of the regulating authorities was found during this period.

## ***2.4 The Period from 1990 to 1999***

### *2.4.1 Changes in the Social Environment and Issues to be Addressed by Public Pension Regulation*

As noted above, the economic transition initiated in the second half of the 1980s led to significant functional and organizational differentiation in the sub-systems of government, business and labour in the late 1980s. While this marked the start of the functional specialization in the three sub-systems, it also led to conflict of interest and new problems in the public pension system, such as the demand of the SOEs for introducing the employee's contributory obligation (the conflict of interest between the SOEs and their employees), the demand of the governments for extending the public pension scheme to enterprises of all ownership types (i.e., the conflict of interest between the governments and the non-state-owned firms), and the discontent of the pensioners with the benefits given the high rising inflation (i.e., the conflict of interest between the retired pensioners and the government authorities). These, together with the old problem of workforce ageing and deficiency in the social pooling system, formed a *complex* of issues and problems awaiting regulatory responses in the early 1990s.

### *2.4.2 Reflexivity of the Regulatory Spaces*

In the face of the growing complexity of the new problems and issues, the *regulatory spaces* of the public pension system continued to evolve under the general framework of stronger *horizontal* administration and weak *vertical*

guidance. Nevertheless, a certain degree of variation in terms of *reflexivity* was discernible.

The *space* of policy formulation, as shown by the historical data,<sup>6</sup> largely followed the same institution of the 1980s. The regional governments could make proposals concerning further reforms of public pension, while the Central Government could decide whether or not these proposals were to be endorsed based on its own discretion. In particular, as shown by the developments in the 1990s, apart from the governments of lower echelons, academic specialists also became important advisors to the Central Government in policy design. This, to some extent, increased the *reflexivity* of the *space*.

The *space* of rule-making, however, as illustrated by the case of Shanghai,<sup>7</sup> underwent two distinctive stages of evolution. In the first stage (i.e., from 1991 to 1993) the constitution of the rule-making *space* in Shanghai exhibited quite significant *reflexive* properties. These included, among other things, a drafting taskforce made up of members from various government departments and social organizations representing different interests, a number of surveys and studies carried out among sample SOEs to test the validity of the rules, and numerous meetings to engage all stakeholders in the negotiations and consultations for the purpose of contemplation. Nevertheless, the conflicts of interest among government, business (mainly SOEs) and labour force were strong, and the rule-making process met much resistance from the social community, while the regional legislature was also reluctant to endorse the rules aimed at introducing some significant reforms stipulated in the policy guidelines of the Central Government in 1991. In spite of this stalemate, however, the strong support from the leadership of the CCP concerning the overall transition towards the ‘socialist market economy’ in late 1993, contributed to the new development of

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<sup>6</sup> See: Section 2 of Chapter Six of this thesis, pp. 158-162.

<sup>7</sup> See: Section 3 of Chapter Six of this thesis, pp. 162-172.

regulation and rule-making in the domain of the public pension system. According to the general principle of the new socio-economic paradigm of ‘socialist market economy’, strong government control was necessary to boost various socio-economic reforms (including public pension) embedded in the transition. The impact of the political support for the regional governments from the CCP leadership was two-fold. It expedited the process of rule-making for public pension, and contributed to significant changes in the style of rule-making by the government authorities, as shown by the case in Shanghai. Instead of continuing the *reflexive* style of consultations, negotiations and communications during the process of rule-making, the regional government of Shanghai further entrenched its dominance in this *space*. In fact, from the mid-1990s to the end of the 1990s, rule-making concerning public pension regulation became a highly enclosed area of public administration, while the *reflexive* elements of the early 1990s also disappeared in the second half of the 1990s.

In the *space* of implementation and enforcement, *reflexivity* varied. In terms of implementation (i.e., routine operations and fund investment), there was little evolution in the institutional framework toward *reflexive* regulation. As shown by the historical data of Shanghai,<sup>8</sup> the regional government and its functional department dominated fund investment, although routine operations were largely carried out by the social insurance agencies. Nevertheless, the agencies were functionally and organizationally affiliated to the regional government. Within this particular *space*, supervision (either from the social community or from other state authorities) was weak, and transparency was low, while functional differentiation among the government authorities was also insignificant. In particular, from the mid-1990s onwards, the government department in charge of the public pension assumed a variety of roles

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<sup>8</sup> See: Section 4 of Chapter Six of this thesis, pp. 172-185.

concerning pension funds, including the strategic role of planning investment portfolios, the executive role of implementing investment plans, rule-making concerning fund management, and the supervisory role of monitoring the pension funds. This further undermined the foundation of *reflexivity* in the *space* of implementation.

Nevertheless, compared with the implementation *space*, the *space* of enforcement contained a few *reflexive* elements. On one hand, from the second half of the 1990s and onwards, this *space* underwent continuous functional entrenchment aimed at addressing the rising rate of non-compliance. Apart from the service agencies, labour inspection authorities also joined in the *space* in the late 1990s, as shown by the historical data of Shanghai. On the other hand, a number of accountability mechanisms aimed at regulating public administration (i.e., administrative litigation and administrative review) were entrenched in this *space* throughout the 1990s. Apart from the government agencies (i.e., service agencies of public pension and the labour inspection teams), the courts were further involved in the *space* to provide judicial review for cases challenging legality issues relating to administrative acts performed by the government agencies in the regulation of public pension. This increased the transparency and openness of the enforcement measures, because administrative litigations could be used to challenge not only procedural issues of enforcement actions but also the legal grounds underlying the enforcement measures.

The *space* of review and evaluation largely followed the old institutional framework developed in the 1980s. To be more specific, this framework was characterized by some *reflexive* institutions inbuilt in the government system. The regional and sub-regional governments learned by doing, while the Central Government learned by observing and assessing the outcomes. Based on inter-governmental interactions and communications, this pragmatic approach to socio-economic regulation was colloquially called ‘trial and error by the

regional governments' (*di fang shi cuo*), while accompanying this particular framework of review and evaluation was the weak governmental accountability system under the special model of 'strong *horizontal* administration and weak *vertical* guidance'. However, as shown by the historical data concerning the developments in Shanghai and elsewhere, this inter-governmental partnership of systemic learning, began to decline in the second half of the 1990s, i.e., after the reform of the public pension scheme in the mid-1990s. While the new reform introduced a new mechanism of funding through employee's contributions, it also led to some significant problems. While these problems are to be further discussed in the analysis of the *regulatory process*, suffice it to say that governments of lower echelons were no longer actively proposing regulatory solutions to the problems, nor were they as willing to reveal the facts concerning the developments of the problems, as they had been in the 1980s. Consequently, the Central Government could only rely on academic specialists (both domestic and overseas) to fulfil the review and evaluation functions, while relying on public finance audits to learn the severity of the problems embedded in the *space* of implementation. However, this did not lead to any substantial change to implementation because in the 1990s, pension funds and contributions were largely treated as 'shadow revenue' of the regional or sub-regional governments, and were not included in the ambit of public finance. In other words, neither the superior governments nor the other parallel state authorities had access to the information about public pension funds. Given these facts, it is arguable that the *reflexivity* of the review and evaluation function in the government system generally declined in the second half of the 1990s, although specialists from academia began to join in the *space*.

There was some evolution in the *regulatory space* of accountability and correction, as some mechanisms came into being outside the government system in the 1990s, such as administrative litigation and administrative review,

while some others, such as petition by letters and visits (i.e., the PLV) and congress inquiry, were further entrenched. Nevertheless, these external mechanisms, as shown by the historical data,<sup>9</sup> were largely unable to effectively address the regulatory problems taking place in the public pension system, which largely stemmed from the special constitution of the implementation *space*. In fact, there were both statutory limitations and institutional barriers to these accountability and correction mechanisms that were available to the social actors for challenging potential wrongs and mistakes in public administration.

Furthermore, within the government system, *reflexivity* of the old accountability and correction mechanism declined. The Central Government became the sole regulator of the regional and sub-regional governments. However, such inter-governmental regulation was also subjected to the general framework of ‘strong *horizontal* administration and weak *vertical* guidance’. In other words, the Ministry of the Central Government could exercise functional influence over the corresponding departments in lower echelons of governments through *vertical* guidance. However, as shown by the historical data, this particular way of regulation only amounted to a soft control over the government departments because the enforceability of the guidance was very weak. In fact, it was the regional or sub-regional governments that had much more substantial power over their labour and social security departments because they had the *horizontal* power (i.e., administrative power to decide personnel, financial and proprietary issues of the departments) to influence the behaviour of the government authorities actually implementing the pension schemes. While the dynamics of this *space* are yet to be analysed in the context of the entire *regulatory process* in the 1990s, suffice it to say, the *reflexivity* of the accountability and correction mechanisms inbuilt in the government system began to deteriorate in the second half of the 1990s, as is shown in the

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<sup>9</sup> See: Section 6.4 of Chapter Six of the thesis, pp. 215-220.

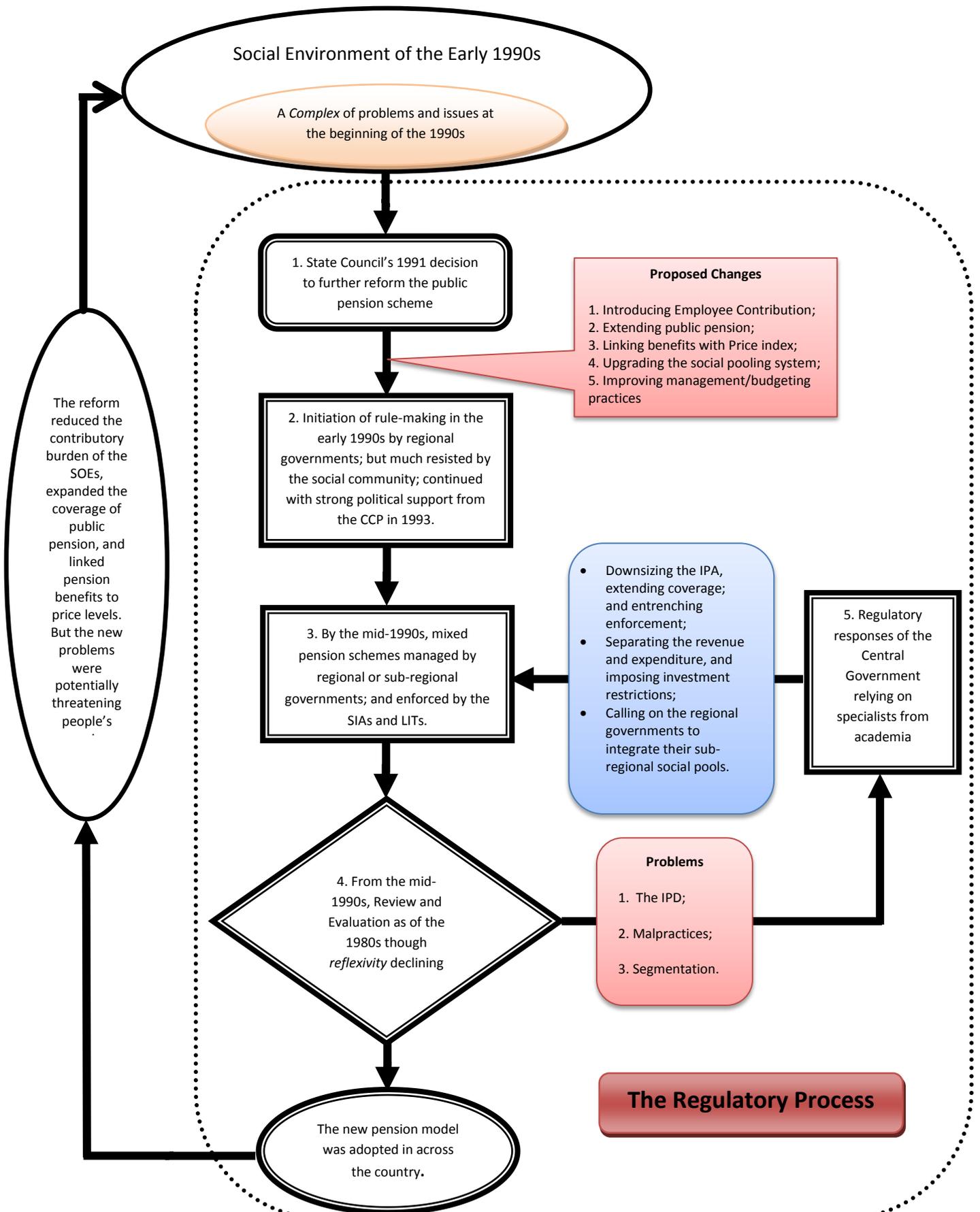
manoeuvring between the governments in the late 1990s (instead of systemic learning and improving throughout the 1980s).

Given these facts concerning the *regulatory space* in the 1990s, it is arguable that both the constitution of the actors and the interactive ties among them largely remained the same as of those in the 1980s. Although some new actors were introduced into some of the *regulatory spaces* of the public pension system (i.e., academic specialists in policy formulation, review and evaluation, and accountability and correction; and courts in reviewing disputed enforcement measures), the *reflexivity* of the regulation as indicated in the dynamics of the *regulatory spaces*, particularly the *reflexivity* of the government actors, declined especially in the second half of the 1990s.

#### *2.4.3 Responsiveness of the Regulatory Process*

As noted above, the objects to be addressed through public pension regulation were a *complex* of problems and issues in the beginning of the 1990s, which involved both new ones stemming from the changing social environment, and old ones not resolved by previous regulations. Using the flowchart of regulation developed in the research design of this thesis, the performance of the public pension system in the 1990s is illustrated below, with all relevant details being placed into the corresponding stages of the *regulatory process*.

**Flowchart 8.3: Dynamics of the Regulatory Process from in the 1990s**



As shown by the above flowchart, the public pension system was facing a *complex* of problems and issues noted in section 2.4.1 (indicated by the oblong circle with in the ‘social environment’ on the top). In response to these problems, the Central Government issued a general policy guideline in 1991, i.e., the *Decision of the State Council on Reforming the Pension Schemes for Business Workers* (indicated by box numbered ‘1’). Proposals (indicated by the red box) concerning public pension reforms included: introducing the employee’s contributions, extending public pension coverage (i.e., extending it to all types of business firms), linking pension benefits to the changing price levels, upgrading the social pooling system (from sub-regional level to regional level), and improving management and budgeting practices. These proposals also underlined the general policy goals of the public pension reforms in the 1990s.

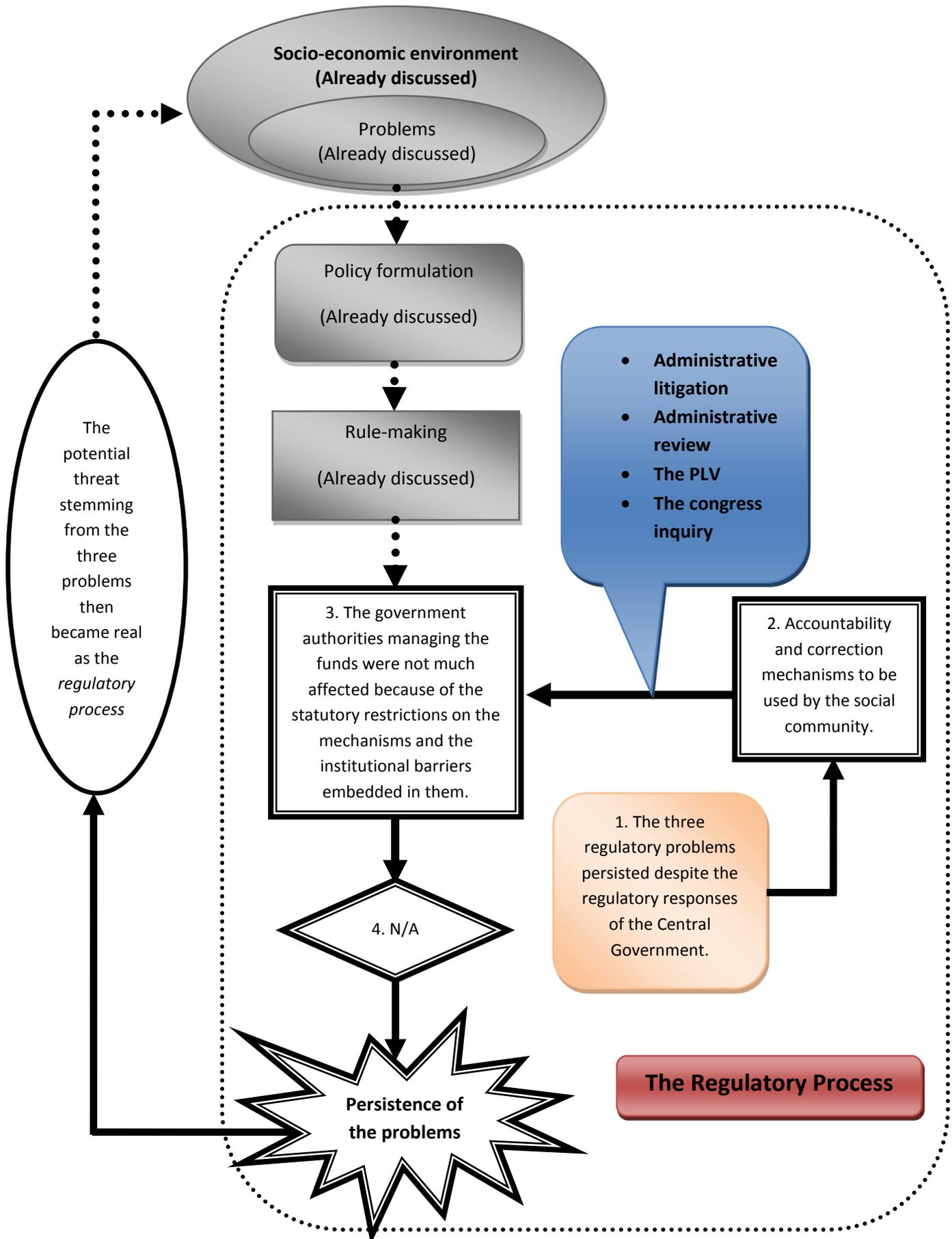
Following the policy guideline of the State Council, the regional governments began the rule-making process in 1991. However, as illustrated by the case in Shanghai, the pension reform met strong resistance from some social actors, particularly the resistance of the labour force (indicated by the box numbered ‘2’). Nevertheless, relying on the strong political support from the CCP concerning further economic reform in 1993, the rule-making process continued in the mid-1990s.

The new public pension scheme established in the mid-1990s (indicated by the box numbered ‘4’) was a mixture of PAYG (relying social pooling and transfer payments) and funding (based on employee’s contributions to the individual pension account, i.e., the IPA). Although this reform was envisioned by the State Council’s 1991 *Decision*, the review and evaluation *space* (indicated by the box numbered ‘4’) immediately identified three important problems and issues—the implicit pension debts (i.e., the IPD), malpractices of fund management and investment, and persistent segmentation of the social pooling

system (indicated by the red box at the lower right)—in the second half of the 1990s. These problems and issues further led to regulatory responses by the Central Government in the last few years of the 1990s (indicated by the box number ‘5’). These aimed at addressing the problems within the *space* of implementation, including: downsizing the IPA (hence reducing the IPD), stepping up the extension of the public pension scheme, entrenching enforcement measures, separating the revenue and expenditure accounts of public pension, restricting investment portfolios involving pension funds, and calling on all regional governments to further integrate the sub-regional social pools (all these responses are enclosed by the blue box set between the boxes numbered ‘3’ and ‘5’).

Despite these responses, however, these regulations did not lead to the desired outcomes, as shown by the historical data presented in Chapter Six. Rather, the regional and sub-regional governments began to manoeuvre in order to avoid compliance with these regulatory responses in the last few years of the 1990s. Furthermore, the accountability and correction mechanisms outside the government system were also unable to bring about changes to the institutions underlying these three regulatory problems. Therefore, the problems and issues persisted in the *regulatory process*, as illustrated by the flowchart below.

**Flowchart 8.4: Persistence of the Problems by the End of the 1990s**



As shown by the above flowchart, while the three regulatory problems persisted even though the Central Government sought to address them in the late 1990s (indicated by the box numbered ‘1’ above), the accountability and correction *space* (indicated by the box numbered ‘2’) containing a number of mechanisms available to the social actors (indicated by the blue box) were unable to bring about any substantial change in the *space* of implementation (indicated by the box numbered ‘3’). Furthermore, as no social actors or other state authorities were present in the *space* of review and evaluation (indicated by the box numbered ‘4’), no further regulatory response was triggered. This finally contributed to the persistence of the three regulatory problems, hence translating the potential threat stemming from the problems to reality (as indicated by the oblong circle on the left).

Given the performance of the *regulatory process* presented above, a few attributes of the regulation in the 1990s are quite observable. First and foremost, the rule-making process in the mid-1990s was characterized by a high degree of isolation from the social environment as the regional governments entirely dominated the whole process, and participation by social actors or other state authorities was insignificant. Second, after introducing employee’s contribution and the transition to a mixed model of pension scheme, the fund management system became an equally isolated *space*. This was accompanied by some loopholes in the public finance system in the 1990s, which further contributed to three major problems in the regulation. Underlying these problems, as shown by the historical data and the analysis concerning the *space* of fund management,<sup>10</sup> were the special institutional settings that repelled *system reflexivity*.<sup>11</sup> Third, the failure of the Central Government’s regulatory responses

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<sup>10</sup> See: Section 6.3 of Chapter Six of this thesis, pp. 211-215.

<sup>11</sup> The function of implementing the new pension scheme did not undergo any significant differentiation even though such differentiation had been required by the policy guidelines of the Central government and the regulatory rules passed before the mid-1990s. In fact, as shown by the historical data of Shanghai, the regional labour and social security bureau of Shanghai and the regional government actually assumed a variety of roles

to address these problems effectively and the underlying institutions spawning the problems, further indicates the deterioration of the cooperative ties between the governments insofar as systemic learning and evaluation is concerned. Further, the failure of the accountability and correction mechanisms outside the government system to trigger any further regulatory response impaired the ability of the regulatory system to realize some of the important policy goals of pension reform set forth in the beginning of the 1990s, such as upgrading the social pooling system, and improving practices of fund management and budgeting.<sup>12</sup> In addition, the realization of the second goal, i.e., expanding the coverage of public pension, was also questionable, because the persistence of the three problems, particularly the segmentation of the social pooling system and the malpractices of fund management were real threats that could cause immediate detriments to pension entitlements of all participants and beneficiaries.

Given these attributes, i.e., the isolation of rule-making and fund management, and the inability to realize the majority of the policy goals set in 1991, it is arguable that the evolution of the public pension regulation by the end of the 1990s exhibited some significant decline in *responsiveness* to the changing social environment, while the emergence of the malpractices in the second half of the 1990s and their persistence at the end of the 1990s, further support that argument because the integrity of the regulatory system (i.e., one of the three major normative indicators of *regulatory responsiveness*) was also found to be deteriorating.

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concerning the management of pension funds, including strategic planning of fund investment, implementation of investment plans, formulation of by-rules concerning fund management and investment portfolio as well as supervision of the pension funds.

<sup>12</sup> While these goals appeared to be stipulated by the State Council in its 1991 *Decision*, they were actually, as indicated by the analysis, cooperatively formulated by the Central and regional governments at the end of the 1980s.

## ***2.5 The Period from 2000 to 2009***

### *2.5.1 Changes in the Social Environment and Issues to be Addressed by Public Pension Regulation*

From the late 1990s, the differentiation of the government, labour and business began to deepen. It no longer just took place among these three institutions but within them also. The business sector further evolved into a variety of firms with different ownership structures, while the labour force also differentiated into two major groups—urban workers with stable residency in the big cities, and rural labour mostly on the move from one city to another (i.e., migrant workers). In the context of economic globalization, accompanied by growing foreign direct investment and the rise of private firms in the manufacturing sector, the growth of the second group (i.e., migrant workers) accelerated from the late 1990s onwards. As this rapidly growing group typically had a young age profile, their employment in the urban economy substantially increased the base of eligible participants to be included in the Chinese public pension system which had been primarily designed for the working population in the urban cities. This further created an opportunity for the public pension system to reduce the financial pressure of pension outlays stemming from ageing and the IPD (i.e., the implicit pension debt as a result of the reform in the mid-1990s). Consequently, to incorporate the migrant workers (mostly employed by private firms) into the varied public pension schemes became an important issue of regulation in the early 2000s.

In spite of this, however, it is equally important to note that migrant workers were a differentiated group of labour that had a number of specialities which were potentially at odds with the public pension system. As the jobs undertaken by migrant workers tended to be of lower income and higher cross-jurisdiction mobility, some of the basic requirements under the existing public pension

system, such as the employee's contributory obligation and aggregate years of local contribution, were practical barriers to their inclusion, because the former requirement would substantially decrease their disposable income and reduce their willingness to join in, while the latter would probably conflict with the mobile nature of their employment and bar them from entitlement at the age of retirement given the highly segmented social pooling system. Furthermore, as new participants, migrant workers would also face the common problems of the regulation, such as the IPD, and the institutional deficiencies of fund management practices. However, notwithstanding these practical barriers and problems, the government authorities administering the public pension schemes did not make any change or adaptation in the *regulatory spaces* to increase the *reflexivity* of the system. Rather, they adhered to the old model of regulation as it was in the 1980s and 1990s.

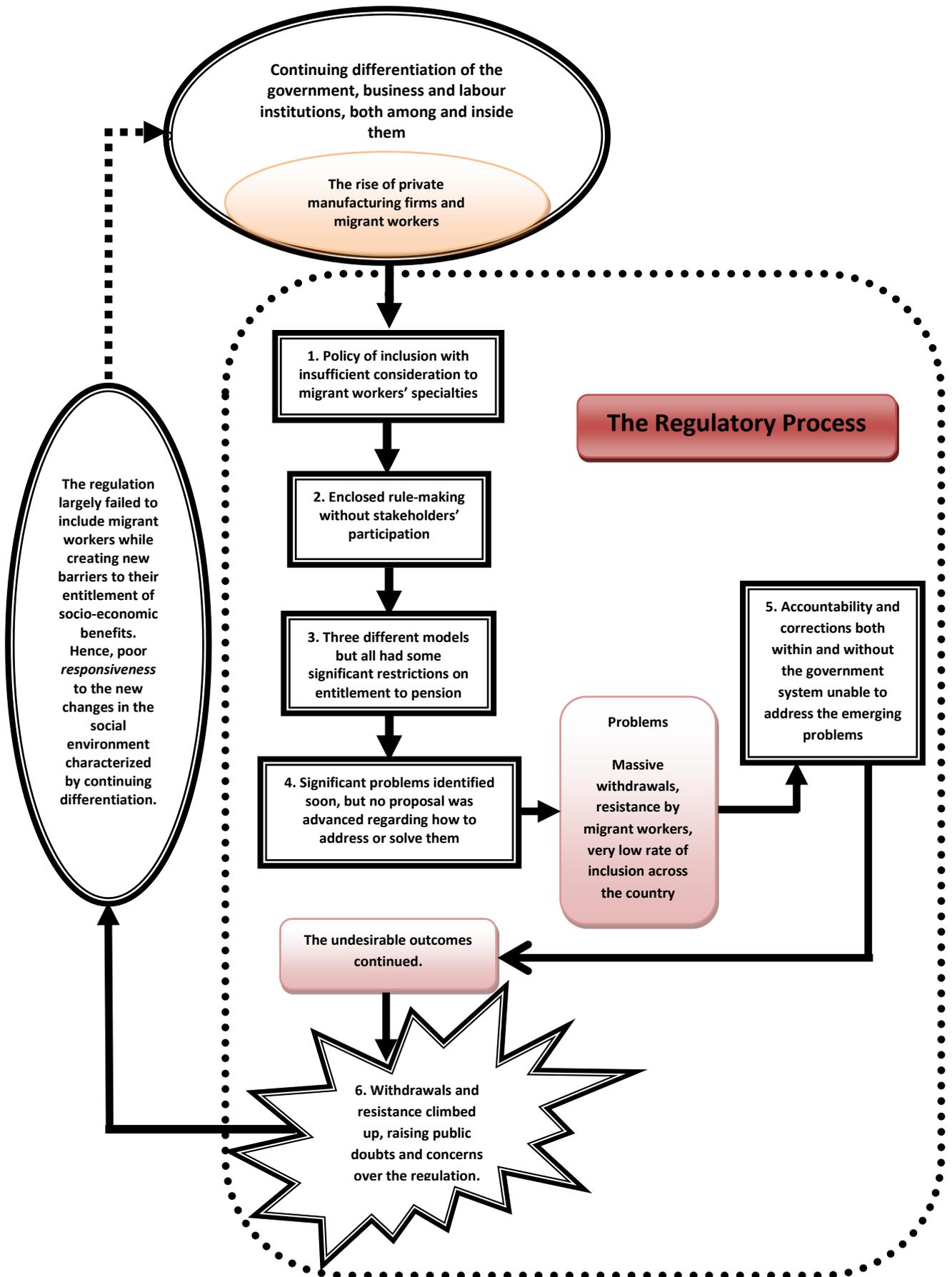
### 2.5.2 Reflexivity of the Regulatory Spaces

In the first half of the 2000s, the *regulatory spaces* of public pension did not undergo any significant change. The *regulatory spaces* of policy formulation, rule-making, implementation and enforcement, review and evaluation, and accountability and correction, mostly followed the same pattern of interactions among levels of governments. Nevertheless, as noted in the analysis concerning the 1990s, the cooperative ties between the governments aimed at systemic learning and improvement had been deteriorating, while conflicts of interest between the governments also emerged as important barriers to effective regulation. While this undermined the *reflexivity* of the regulatory system from the second half of the 1990s, no systemic effort was made in the first half of the 2000s to reverse this trend.

### 2.5.3 Responsiveness of the Regulatory Process

The performance of the *regulatory process* in first half of the 2000s did not exhibit any significant change in the extent of its *responsiveness*. It largely failed to realize the new policy goal of inclusion, and created some undesirable social consequences that affected the integrity of the public pension system. The *process* of regulation in this particular period is illustrated in the following flowchart based on the relevant historical details.

**Flowchart 8.5: The *Regulatory Process* of Public Pension from 2000 to 2005**



As shown in the above flowchart, the big oblong circle indicates the general trend of social changes, while the smaller circle inside contains the specific issues to be addressed by the public pension regulation. The policy concerning inclusion of migrant workers was first declared by the Ministry of Labour and Social Security in the *Provisional Rules Concerning Application and Contribution for Social Insurance* (1999). However, these rules did not provide clear guidelines on how to deal with the issue of aggregation and articulation of pension accounts for migrant workers, which was important for this particular group of workforce given their mobility of employment. Rather, it was simply required that migrant workers and their employers contribute to the public pension schemes in accordance with the varied rules across different regional and sub-regional jurisdictions. In 2001, a *Circular* of the Ministry of Labour and Social Security further equated migrant workers' eligibility conditions of pension entitlement with those of the urban workforce. In this sense, the policy inputs of the Central Government provided no specific guidelines in response to migrant workers' special circumstances of employment, and this result of the policy formulation is indicated by the rectangular box numbered '1'.

Following these policy inputs, various regional governments commenced rule-making in the early 2000s (indicated by the box numbered '3'). As noted above, the rule-making took place within an enclosed environment without participation of relevant stakeholders, i.e., migrant workers and their employers. Although three different schemes were established by the rules in the early 2000s, all of them had some stipulations that significantly threatened migrant workers' pension entitlement. In particular, while the highly segmented social pooling system did not allow for aggregation of the contributions made in various jurisdictions, most of the government regulators required migrant workers to satisfy the same eligibility conditions of the urban workforce (i.e., the required 15-year contribution within the jurisdiction) to secure their

entitlement to the public pension. The real effect of this requirement, as shown by the historical data,<sup>13</sup> was that the governments administering these inclusion schemes were largely exempted from the obligation of payment as only a small fraction of migrant workers could really satisfy this eligibility criterion. To put it from the perspective of the migrant workers and their employers, although they were required to contribute to the public pension system, entitlement to public pension at the age of retirement was highly unlikely.

The realization of these facts by the social stakeholders almost immediately led to massive withdrawals and resistance by migrant workers so as to avoid the contributory obligations. While these problems were rapidly identified in the first half of the 2000s, no solution was produced within the *space* of review and evaluation (indicated by the box numbered ‘4’ in the flowchart) to address the problems or the underlying segmentation of the social pooling system.

Furthermore, as shown by the historical data,<sup>14</sup> the accountability and correction mechanisms, both within and without the government system (indicated by the box numbered ‘5’ in the chart), were unable to trigger any regulatory response. The undesirable outcomes stemming from the inclusion schemes continued in the regulatory system, while the net result was that by the mid-2000s withdrawals and resistance increased across the country, thus raising some public doubt and concern over the regulation of the entire public pension system (indicated by the box numbered ‘6’ in the chart). These outcomes—failure to include migrant workers and failure to respond to the specific needs and demands (indicated by the oblong circle on the left of the chart)—further fed back into the social environment where functional differentiation and conflicts of interest among various socio-economic sub-systems continued.

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<sup>13</sup> See: Section 3.4 of Chapter Seven of this thesis, pp.258-259.

<sup>14</sup> See: Sections 5 and 6 of Chapter Seven of this thesis, pp. 272-280.

These developments showed the declining *responsiveness* of the regulatory system in the face of new changes in the social environment. However, apart from this, the regulatory system also exhibited significant *inertia* in addressing important regulatory problems developed in the second half of the 1990s, i.e., the IPD and malpractices of fund management, in addition to segmentation of the social pools. In this regard, the 2006 pension scandal in Shanghai brought all these problems and deficiencies to public knowledge. The doubts and concerns that had been accumulating in the first half of the 2000s finally developed into widespread distrust and outrage. To use a term widely employed in the scholarship of sociology of law and sociological jurisprudence, a ‘crisis of legitimacy’ was confronting the Chinese public pension system in 2006. To reverse the evolutionary course of the regulation at this critical time, the central state and central government of China finally decided to initiate a systemic reform—heralded by the legislation of the *Social Insurance Law* (i.e., the SIL)—in response to this ‘crisis of legitimacy’ in the late 2000s. As shown by the historical data presented in Chapter Seven,<sup>15</sup> this legislation not only exhibited some significant changes to the *regulatory spaces*, but also demonstrated some systemic efforts of the national legislature to introduce *reflexive* institutions into the regulatory system, thus increasing the *responsiveness* of the regulation to the problems and issues stemming from the changing social environment.

#### *2.5.4 Legislation of the SIL: Changes to the Regulation as Informed by the Concepts of Reflexivity and Responsiveness*

The legislation of the SIL marked several important changes to the *space* and *process* of public pension regulation, while their implications can further be interpreted in terms of *reflexivity* and *responsiveness*.

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<sup>15</sup> See: Section 7.4 of Chapter Seven, pp. 288-299.

In terms of the *regulatory spaces*, the legislation reformed the constitution of policy formulation and rule-making, while proposing to introduce more social actors into the *space* of implementation. Unlike the original *space* of policy formulation which was largely dominated by the Central Government and regional governments, the initiative of changing the policies of the public pension regulation was brought forth by a growing size of members serving in the National People's Congress (i.e., the NPC) in the mid-2000s. Compared with the previous reform initiatives that had been largely driven by the demand of the government authorities, this initiative largely reflected the claims and needs of the social community, as the members of the NPC who advocated the initiative were elected by their own constituents in the society. This further indicates that social actors began to exercise influence over the policy formulation of pension regulation through their own Congress Members.

Apart from policy formulation, the legislation process was also characterized by some significant *reflexive* attributes. As shown by the historical data,<sup>16</sup> this legislation was formally initiated in late 2007, and was first led by a drafting committee in the Ministry of Labour and Social Security. However, when the 2<sup>nd</sup> and 3<sup>rd</sup> drafts were being conceived in the 2008 and 2009, the NPC's own legal commission took over the executive role of drafting, while engaging representatives of various state and non-state organizations in the discussions and debates over the legal rules. In particular, representatives and experts from business, labour and academia were widely consulted, while numerous social surveys and studies were also carried out across the whole nation to seek feedback concerning the draft rules. In addition, based on this feedback and the outcomes of the consultations on legislation, the NPC's legal commission stipulated a new model of fund management involving 'Supervisory Committees of Social Insurance' (i.e., SCSIs) composed of representatives from

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<sup>16</sup> See: Section 7.1 of Chapter Seven of this thesis, 281-283.

business firms, labour, legal and actuarial professionals and trade unions; while mechanisms of enforceable disclosure of information concerning social insurance funds were also stipulated, thus including revenues and expenditures of public pension in the ambit of public finance subject to regular budgetary audits. While these measures were to increase the transparency of the implementation *space* of pension regulation, they also formed the legal basis of self-regulation on the part of the relevant government authorities and agencies responsible for administering the pension funds.

Apart from these *reflexive* institutions, the legislation of the SIL (particularly the 2<sup>nd</sup> and 3<sup>rd</sup> drafts of the SIL) also squarely responded to all the persistent problems and issues emerged since the pension reform in the mid-1990s. For instance, the 2<sup>nd</sup> draft squarely addressed the problem of inclusion concerning migrant workers, and required all governments to upgrade the social pools to the regional level by the end of 2009, and to integrate all pools into a nation-wide system by the end of 2012. This would not only allow migrant workers to have their contributions aggregated but would also enable nation-wide transfer payments of pension benefits, thus completely removing the negative impact of segmentation. In addition, the 2<sup>nd</sup> draft of the SIL also set forth a general principle concerning the IPD. Although the policy was broad, it clearly defined the IPD as an important government obligation, which implied that the empty IPAs were to be gradually funded through budgetary measures. Furthermore, the 3<sup>rd</sup> draft also proposed two new public pension schemes to be funded through public finance. This would further expand the coverage of public pension to all residents, rural or urban, employed or never employed. Last but not least, it is important to note that while the drafts of the SIL evolved in response to these persistent problems, the entire drafting process was open to the general public. Participation by various social actors was facilitated not only

by numerous surveys, studies and consultations within the NPC but also through the many discussions and forums hosted online by the NPC legal commission.

### ***2.6 Summary of the Evolution of Public Pension Regulation Informed by System Reflexivity and Regulatory Responsiveness***

In the above five sub-sections, the evolution of the regulatory system of public pension has been examined and interpreted according to the analytical tools defined in section 3 of Chapter Two. In particular, the concepts of *system reflexivity* and *regulatory responsiveness* have been applied to the analysis to illustrate the characteristics of the regulation over the historical periods. Based on the historical details, particularly those pertaining to the normative postulations embedded in these two concepts, it is found that the regulatory system exhibited very significant changes over the historical periods, which are presented in the following table.

**Table 8.1: Major Findings concerning *System Reflexivity* and *Regulatory Responsiveness***

Historical Periods	Problems and Issues Facing Public Pension Regulation	System Reflexivity	Regulatory Responsiveness
<b>The New Democratic Era</b>	<ul style="list-style-type: none"> <li>➤ Weak industrial base;</li> <li>➤ Strong demand for economic recovery;</li> <li>➤ Low socio-economic security of industrial workers.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Policy formulation: multi-party negotiation and consultation through the CPPCC;</li> <li>➤ Rule-making: vast participation by social stakeholders, and high transparency of the draft rules;</li> <li>➤ Implementation: high transparency of implementation mechanisms, self-regulation secured by clear requirements of regular disclosure of information;</li> <li>➤ Review and evaluation: feedbacks of social stakeholders processed both by the trade unions and by the labour authorities;</li> <li>➤ Accountability and correction: various state and government functionaries with clearly defined rules and terms of references.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Policy formulation and rule-making open to the social environment;</li> <li>➤ Smoothly realizing the policy goals defined in the <i>Common Program</i>;</li> <li>➤ Facilitating economic recovery as well as the expansion of the state-owned sector in the economy;</li> <li>➤ No evidence showing any loss of integrity on the part of state or government regulators.</li> </ul>
<b>The Socialist Transformation Period</b>	<ul style="list-style-type: none"> <li>➤ Broadly defined policy goal of transition from a <i>New Democratic</i> society to a socialist society with a centralized planned economy;</li> <li>➤ No specific problem or issue confronting the public pension system.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Political integration of all social sub-systems, undermining the foundation of <i>reflexivity</i>;</li> <li>➤ Highly centralized economic planning system accompanied by vertical management system plus the ‘iron rice bowl’ system;</li> <li>➤ Significant downsizing of the regulatory system;</li> <li>➤ All <i>reflexive</i> institutions of the <i>New Democratic Era</i> completely disappeared.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Lack of expertise and specialization in the political leaders who took over the power of socio-economic administration;</li> <li>➤ Political leaders increasingly isolated from the social environment from the second half of the 1950s onwards;</li> <li>➤ Deterioration of democracy within the CCP in the second half of the 1950s;</li> <li>➤ Some significant socio-economic disasters (the 3-year economic recession and nation-wide famine) stemming from the <i>Great Leap Forward</i> movement of the late 1950s;</li> </ul>

			<ul style="list-style-type: none"> <li>➤ Entrenchment of house-hold registration, stopping rural-urban migration and impeding the expansion of the public pension system.</li> </ul>
<p><b>The Early Stage of Economic Reform and Liberalization</b></p>	<ul style="list-style-type: none"> <li>➤ An inefficient ‘enterprise-based’ pension provision system due to the <i>Cultural Revolution</i> from 1966 to 1976 when the entire public pension system was largely dismantled.</li> <li>➤ Millions of over-retirement-age employees in the SOEs stemming from the failure of the public pension system;</li> <li>➤ Declining labour productivity in the SOEs due to ageing and non-retirement;</li> <li>➤ Serious unemployment of the young people.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Repudiating Mao’s model of socio-economic administration;</li> <li>➤ Replacing the vertical management system by a new model based on strong <i>horizontal</i> administration and weak <i>vertical</i> guidance;</li> <li>➤ Empowering governments of lower echelons to join in all the <i>regulatory spaces</i> of pension regulation;</li> <li>➤ Increasing negotiations, discussions and consultations among levels of governments for the purpose of improving and reforming the public pension system.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Introducing a pragmatic model of social learning and reform—‘crossing the river by feeling the stones’—to reconnect the public authorities to the changing social environment;</li> <li>➤ The special <i>reflexive</i> institutions within the government system began to restore the <i>responsiveness</i> of the public pension system to the social environment;</li> <li>➤ Revamping the public pension system, and establishing the sub-regional social pooling system for the new PAYG schemes;</li> <li>➤ Resolving the problems and issue left behind by the <i>Cultural Revolution</i>;</li> <li>➤ Facilitating functional and organizational differentiation of government, business and labour in the late 1980s;</li> <li>➤ No significant evidence showing loss of integrity on the part of the public authorities regulating the pension schemes.</li> </ul>

<p><b>The 1990s</b></p>	<ul style="list-style-type: none"> <li>➤ A <i>complex</i> of problems and issues stemming from the organizational and functional differentiation of government, business and labour in the early 1990s;</li> <li>➤ Ageing of the workforce;</li> <li>➤ Economic transition towards the ‘socialist market economy’.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Largely following the <i>reflexive</i> institutions of the 1980s;</li> <li>➤ Attempting to involve all social stakeholders in the rule-making process in the early 1990s (as shown by the case of Shanghai), but failing to carry on this special <i>reflexive</i> model of rule-making due to very strong conflicts of interest between labour, business and various state or government departments representing the varied interests;</li> <li>➤ Strong political support from the CCP for regional governments’ reform initiatives in the domain of social insurance and public pension;</li> <li>➤ Entrenching the administrative power of the regional and sub-regional governments in public pension regulation from the second half of the 1990s onwards;</li> <li>➤ Conflicts of interest emerging between the Central Government and the governments of lower levels;</li> <li>➤ Cooperative ties of the governments in terms of systemic evaluation and improvement deteriorating;</li> <li>➤ The <i>reflexivity</i> of the administrative framework established in the 1980s declining.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Introducing employees’ contributory obligation in the mid-1990s;</li> <li>➤ Transforming the PAYG scheme;</li> <li>➤ Highly enclosed model of rule-making and implementation dominated by regional and sub-regional governments;</li> <li>➤ Being unable to solve three important problems stemming from the pension reform of the mid-1990s, thus threatening the pension entitlement of the social stakeholders;</li> <li>➤ Failing to realize a number of important policy goals set forth in the beginning of the 1990s;</li> <li>➤ Significant evidence of declining integrity on the part of the government regulators (particularly in fund management and investment).</li> </ul>
<p><b>The 2000s (before the legislation of the SIL in late 2007)</b></p>	<ul style="list-style-type: none"> <li>➤ Differentiation of the society and emergence of migrant workers to be included in the public pension system;</li> <li>➤ The three old problems of the 1990s;</li> <li>➤ Ageing in the urban cities;</li> </ul>	<ul style="list-style-type: none"> <li>➤ No significant change, retaining the old institutions and practices of the 1980s and 1990s;</li> <li>➤ Conflict of interests between the governments continuing;</li> <li>➤ Deterioration of the cooperative ties among the governments for systemic learning and evaluation continuing;</li> </ul>	<ul style="list-style-type: none"> <li>➤ Failure to effectively include migrant workers while causing some undesirable conflicts between government and labour;</li> <li>➤ Failure to address the old problems of the 1990s;</li> <li>➤ Significant loss of integrity shown by the 2006 pension scandal in Shanghai, thus leading to strong concerns and challenges</li> </ul>

		<ul style="list-style-type: none"> <li>➤ Regional and sub-regional governments dominating the entire regulation.</li> </ul>	from the social stakeholders in the second half of the 2000s.
<b>The Legislation of the SIL at the end of the 2000s</b>	<ul style="list-style-type: none"> <li>➤ All the problems and issues unresolved by the regulatory system since the beginning of the 2000s</li> </ul>	<ul style="list-style-type: none"> <li>➤ Significant changes to some of the <i>regulatory spaces</i>, such as policy formulation, rule-making (legislation), with sufficient negotiations, discussions and consultations, as well as much transparency of procedures and the contents of the draft rules;</li> <li>➤ Significant attempts to introduce <i>reflexive</i> institutions into the implementation <i>space</i> in order to increase its transparency by empowering the social stakeholders to the supervisory role;</li> <li>➤ Significant attempts to include public pension funds into the public finance system subject to regular audits and examinations by the people's congresses at various levels, thus increasing the transparency of pension regulation (also forming the legal basis of self-regulation).</li> </ul>	<ul style="list-style-type: none"> <li>➤ Opening the regulatory system to various social stakeholders;</li> <li>➤ Providing solutions to all the regulatory problems (failure to include migrant workers, the IPD, malpractices of fund management, and segmentation of the social pools);</li> <li>➤ Introducing new public pension scheme to cover all citizens within the country;</li> <li>➤ Real effects of these new changes to the regulatory system yet to be examined by future research.</li> </ul>

As shown in the above table, the *New Democratic Era* was a very brief period in the early years of the PRC. However, the regulation of public pension of this period exhibited considerable attributes of *system reflexivity* and *regulatory responsiveness*. The *regulatory spaces* were constituted by various state and non-state actors. Consultations, negotiations and discussions were significant during the policy formulation stage and the rule-making process; while in the *space* of implementation, mechanisms aimed at transparency and self-regulation were also discernible. With these *reflexive* attributes in place, the regulatory system also exhibited very significant *responsiveness* to the social environment. It realized all the policy goals pertaining to public pension regulation, and promoted the rapid economic recovery in the early 1950s. In addition, no evidence was found regarding loss of integrity on the part of the state and government actors.

The *Socialist Transformation Period* from 1953 to the end of the 1950s, however, exhibited very significant changes both to the general paradigm of socio-economic administration and public pension regulation. Although this period witness an important transition from a *New Democratic* society to a socialist society based on centralized planning, no specific problems and issues were actually confronting the regulation of public pension. Nevertheless, massive political integration of all socio-economic subsystems in the second half of the 1950s largely destroyed the functional and organizational autonomy of the state and non-state actors within the *regulatory spaces*, which further undermined the foundation of *system reflexivity*. In fact, it was found that in the second half of the 1950s, all the *reflexive* institutions of the *New Democratic Era* disappeared completely. Along with this significant decline of *reflexivity*, the *responsiveness* of the regulatory system to the social environment was also impaired. Although indicators of the decline are many, the most important one was the severe economic recession and famine in the late 1950s and early 1960s,

accompanied by entrenchment of the house registration system in the late 1950s, which further impeded the expansion of the public pension and rural-urban migration.

The early stage of China's economic reform and liberalization was initiated in the late 1970s. The public pension system was then facing many serious socio-economic problems left behind by the 10-year-long *Cultural Revolution*. Nevertheless, a number of strategic changes took place within the *regulatory spaces* of the public pension system in the early 1980s, particularly the new model of 'strong *horizontal* administration and weak *vertical* guidance'. These changes further led to some *reflexive* institutions in the regulation, mostly within the government system. Levels of governments were then closely engaged in all the five important *regulatory spaces* (i.e., policy formulation, rule-making, implementation and enforcement, review and evaluation, and correction), while negotiations, discussions and consultations among the governments were also significant during this period. Along with these *reflexive* institutions, the *responsiveness* of the regulatory system was also recovered. Pragmatic approach of socio-economic administration was instituted in lower echelons of government, thus connecting the regulatory system with the social environment. As shown by Flowchart 8.2 of the *regulatory process*, the problem of non-retirement left behind by the *Cultural Revolution* was addressed, while some other issues stemming from socio-economic reforms within other regulatory arenas were also treated. The new PAYG public pension scheme was established within all sub-regional jurisdictions in the late 1980s. In addition, no evidence of declining integrity or malpractice was found. In this sense, the increase of *regulatory responsiveness* during this period was significant.

In the early 1990s, the public pension system was facing a complex of problems and issues stemming from conflicts of interest as a result of differentiation of government, business and labour, while the problem of ageing continued.

Despite this, the regulatory system largely maintained the *regulatory spaces* of the 1980s. Although in the early 1990s, some regional governments, such as the government of Shanghai, tried to involve all state and non-state actors into the rule-making aimed at introducing personnel contribution, these efforts were finally aborted as a result of strong conflicts between business (i.e., the SOEs) and labour, which also caused the stances of the public authorities involved in the rule-making to diverge. Based on the strong political support from the leadership of the CCP in 1993 and the decision of the Central Government to initiate the transition towards ‘socialist market economy’, the regional governments, as shown by the case of Shanghai, changed their style of rule-making. This *regulatory space* became a highly enclosed arena with very little public participation. So was the *space* of implementation. In the second half of the 1990s when the cooperative ties between the governments began to deteriorate as a result of potential conflicts of interest in pension administration, the *reflexivity* of the regulatory system, particularly the *spaces* of review, evaluation and correction, significantly declined. Alongside this decline in *reflexivity*, the *responsiveness* of the regulatory system also deteriorated. In the late 1990s, three serious problems—the IPD, malpractices of fund management and segmentation of the social pools—emerged and stayed within the regulatory system despite numerous regulatory responses from the Central Government, thus potentially threatening participants’ pension entitlements. Loss of integrity on the part of the government regulators developed. But no effective accountability and correction mechanism was in place to check this development.

In the first eight years of the 2000s, neither the *regulatory spaces* nor the *regulatory process* exhibited any significant change. Rather, the government regulators continued to administer the public pension schemes by following the old models and practices of the 1990s. No positive change took place either in

terms of *system reflexivity* or in terms of *regulatory responsiveness*. The non-evolution of the regulatory system accompanied by the fast changing social environment further led to a number of undesirable social consequences—failure to include migrant workers and failure to address the old problems and issues of the 1990s. The net result of this was the final outbreak of the pension crisis in the late 2000s, when the pension scandal in Shanghai brought all the serious problems and the underlying institutional deficiencies to public knowledge. As a result, conflicts between the social stakeholders and the government regulators flared.

The legislation of the SIL in the late 2007 was a systemic response to the public pension crisis. Although at this critical stage, public confidence of the public pension system was low, and the problems to be addressed were serious, a number of *reflexive* institutions did appear in the legislation. The legislation aimed at reforming the public pension system was initiated by the NPC members, instead of the governments. Many of the general principles underlying the new rules concerning the public pension scheme were formulated by through discussions and negotiations within the NPC, while the whole legislation underwent numerous consultations and discussions involving all state and non-state stakeholders. In addition, a number of social surveys and studies were also carried out alongside the legislation. Public participation was also introduced both on-line to facilitate communications between the legislature and the social communities. The draft laws, which were revised twice between 2008 and 2009, were largely aimed at resolving all the problems and issues that had accumulated since the mid-1990s. In particular, they aimed at increasing the transparency of the implementation *space* by including fund management into public finance while empowering independent social organizations to play the supervisory role of the pension schemes. Despite this, however, it is also important to note that the legislation of the SIL was not

influential in all of the *regulatory spaces* of the public pension system. Some important components of the regulation, such as review and evaluation, and accountability and correction (particularly those mechanisms available to social actors for the purpose of addressing or remedying wrongs and mistakes stemming from government authorities), were not changed by the SIL. However, given the performance of these *spaces* in the 1990s and 2000s, their functioning was quite problematic. To increase the *responsiveness* of the entire regulatory system, further reforms aimed at increasing the *reflexivity* of these two *spaces* were needed.

### **3. Ways in which the Public Pension Regulation Responded to the Changing Social Environment in China**

As indicated in the research design (i.e., section 3.2 of Chapter Two), the answer to the main research question—In what ways has the public pension regulation in China evolved in response to a changing social environment?—requires some in-depth analysis aided by the general framework of social evolution suggested by systems theory, in addition to the information derived from the analysis of the historical data through the lens of *system reflexivity* and *regulatory responsiveness*. In other words, while incorporating the analytical results concerning the two subsidiary research questions into the in-depth analysis, special attention will be paid both to the specific social contexts within which the regulatory system evolved, and to the impacts of the regulatory outcomes from which the evolution of the society proceeded.

#### ***3.1 Interaction between the Regulatory System and the Social Environment during the New Democratic Era***

In the brief *New Democratic Era*, Chinese society was characterized by a considerable degree of functional and organizational differentiation of various sub-systems. This differentiation was universal across the polity, state,

government, business and labour sectors, although the general level of specialization in the socio-economic sub-systems was low. Within this particular social context, the political structure allowed a significant degree of policy contestation and negotiation, and showed a comparatively high degree of respect to the functional and organizational autonomy of various social sub-systems, such as trade unions, business firms, and the labour authorities. Under this particular approach to state regulation, the public pension system exhibited considerable *reflexivity* across all important *spaces* of the regulation to reduce the potential conflicts between the interested social sub-systems—business and labour—while passing and revising the relevant regulations and rules. With these *reflexive* institutions in place, the *regulatory process* also exhibited strong *responsiveness* to the social environment. It not only fulfilled all the regulatory goals set forth in the regulatory policies, but also contributed to the strong economic recovery in the early 1950s. In particular, it is important to note that during the whole process, the public authorities strictly confined the target of the regulation to those real social problems and potential conflicts of interest between labour and business.

In sum, the regulatory system in the *New Democratic Era* was not only characterized by significant *system reflexivity* and *regulatory responsiveness*,<sup>17</sup> but also was found to be congruent with the evolutionary pattern suggested by systems theory.

### ***3.2 Interaction between the Regulatory System and the Social Environment during and after the Socialist Transformation Period***

Both the social environment and the regulatory system underwent some significant changes during this particular period of time.

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<sup>17</sup> *System reflexivity* and *regulatory responsiveness* each have three important indicators. See: Section 2.5 of Chapter Two of this Chapter, p.39-40.

In particular, the CCP leadership abandoned the approach of state intervention developed under the *New Democratic Era*, replacing it with a highly politicized and centralized model of social governance. As a result of this, business firms, labour and union organizations (i.e., the ACFTU system) were integrated by the state into the ‘iron-rice bowl’ system, while all public authorities, including the legislature, government and judiciary, were also integrated into the political system of the CCP (i.e., the party-state regime accompanied by the so called ‘vertical management system’). This, as shown by the historical data and in the analysis of the previous section,<sup>18</sup> formed the basis of Mao’s special paradigm of socio-economic administration, which widely repudiated functional and organizational differentiation both of the state institutions and of the socio-economic institutions, thus wiping out the foundation of the *reflexive* institutions that had been developed in the *New Democratic Era*.

From an evolutionary perspective, this massive political integration also had some significant impact on the development course of China from the late 1950s onwards. In the short term, the integration appeared to have removed all the social problems and conflicts in the society, thus justifying large downsizings of the regulatory system. However, in the long and medium run, this integration wiped out the differentiated sub-systems that were essential to the evolutionary path of modern society.

Furthermore, as a result of losing the foundation of *system reflexivity* in various socio-economic regulations including public pension, the political leadership administering the society also lost the ability to respond to the new changes in the social environment and new developments in the natural world. In this regard, the severe 3-year economic recession and the sudden contraction of the Chinese population (owing to a nation-wide famine causing tens of millions of

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<sup>18</sup> See: Section 2.3 and Section 2.3 of Chapter Four, pp. 105-111. Also see: Section 2.2 of Chapter Eight, pp. 312-313.

deaths) in the early 1960, were strong evidence of the incongruence of Mao's administrative model. It not only destroyed the *responsiveness* of the regulatory system, but also broke up the evolutionary loop of modern society suggested by systems theory. In this sense, even the following response of entrenching the house-hold registration system and stopping rural-urban migration, was not *responsive*, either. It not only slowed down the expansion of the public pension system, but also reinforced the suspension of the evolutionary loop as rural residents were then largely denied access to the urban, industrialized sectors, thus being excluded from the process of functional specialization.

Based on these findings, it is arguable that the ways in which various socio-economic regulations (including the public pension system) responded to the social environment, not only repudiated *reflexive* and *responsive* institutions, but also interfered with the overall evolution of the society. In particular, they largely contributed to the regression of the differentiation and specialization within the society, thus blocking and slowing down the entire evolutionary course suggested by systems theory.<sup>19</sup>

### ***3.3 Interaction between the Regulatory System and the Social Environment in the Early Stage of China's Economic Reform and Liberalization, 1978-1989***

China's *Economic Reform and Liberalization* was initiated by the political leadership of the CCP in the late 1970s. Although the society was then characterized by very low levels of functional differentiation and specialization of a result of the 10-year-long *Cultural Revolution*, the new leadership of the CCP introduced some strategic changes to the old model of socio-economic administration under the rule of Mao. These changes, as shown by the analysis, not only reflected a fundamental shift in the approach to state intervention and

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<sup>19</sup> In this regard, the total disruption of public pension regulation also served as strong evidence for this point. During the *Cultural Revolution*, not only the regulatory system lost its *reflexivity* and *responsiveness* to the environment, the whole Chinese society deviated from the evolutionary course of a modern society. In particular, the processes of differentiation and specialization were completely stopped.

socio-economic regulation, but also had significant impacts on the ways in which the regulation responded to the social environment.

First, and foremost, the strategic changes led to the restoration of various state and government functions as well as the decentralization of administrative powers to lower levels of governments. As a result, the significant process of functional and organizational differentiation within the state and government was restarted. Second, these changes enabled levels of government bodies to engage in a pragmatic process of policy experimentation and learning—colloquially known as ‘getting across the river by feeling the stones’. This further replaced Mao’s ‘vertical management system’ where the vast majority of socio-economic policies and commands were made by the top political leadership of the state. The impact of this change in the early 1980s was two-fold. It not only fostered *reflexive* institutions in various socio-economic regulations, including the public pension system, but also restored the *responsiveness* of the public pension system. In fact, the public pension regulatory system was re-connected with the social environment, and began to respond not only to those problems inherent in retirement and pension provision, but also to those new issues and difficulties stemming from other socio-economic reforms concerning business and labour. Third, the differentiation of state institutions accompanied by the pragmatic approach of socio-economic intervention eventually contributed to the phasing out of the ‘iron rice bowl’ system, thus accelerating the functional and organizational differentiation of government, business and labour in the second half of the 1980s. Nevertheless, as this process of differentiation continued in the late 1980s, conflicts of interest among the sub-systems also emerged as an important source of problems and issues to be addressed by the public pension regulatory system. Despite this, the recovery of *reflexivity* and *responsiveness* in the regulatory system was significant, and the interaction between the regulatory system and the social

environment were largely consistent with the evolutionary course of society suggested by systems theory.

In sum, by the end of the 1980s, although conflicts of interest appeared, they came into being as a result of functional and organizational differentiation both of the state and of the socio-economic sectors. From a broader perspective of social development, this was a significant sign of evolution typical of a modern society as suggested by systems theory;<sup>20</sup> while from a narrower perspective of socio-economic regulation, this was also significant evidence of increased *reflexivity* and *responsiveness* in socio-economic regulation as shown by the public pension system.

### ***3.4 Interaction between the Regulatory System and the Social Environment from Mid-1990 to the Mid-and-late 2000s (before the Legislation of the SIL)***

No significant change had taken place in the public pension regulatory system from the end of the 1980s until the mid-1990s when the system began to transform from the PAYG model to the mixed model (i.e., composed of a PAYG social pool and an individual pension account). However, as shown by the analysis of the previous section, from the mid-1990s to the mid-and-late-2000s (before the legislation of the SIL in late 2007), although some significant changes took place in the substantive terms of the public pension schemes, changes to the constitution and interactive patterns of the regulatory system (i.e., *system reflexivity* of the Chinese public pension regulation) was marginal.

Nevertheless, this historical period, as indicated by the analysis of the previous section, witnessed a significant transition towards a ‘socialist market economy’ accompanied by a special model of state intervention with Chinese characteristics—i.e., strong government involvement in constructing and regulating the burgeoning market. With this particular approach to socio-

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<sup>20</sup> See: Section 2.2.2 of Chapter Two of this thesis, pp. 22-25.

economic administration and regulation, very significant differentiations within the socio-economic sector (i.e., differentiations both between and within business and labour) took place. But the differentiation within the state and the government authorities was very limited. The government regulators adhered to the old institutions and practices of the 1980s, and did not introduce any significant change to increase the *reflexivity* of the regulation. Rather, after the pension reform in the mid-1990s, the cooperative ties between the government regulators began to deteriorate, and the partnership of systemic learning and evaluation between the Central and regional governments faltered. As a result of the failure to increase the *system reflexivity* of the regulation and the deterioration of the cooperation between the governments, the *regulatory responsiveness* of the public pension system was significantly impaired.

In particular, two components of the regulatory system—review and evaluation, and accountability and correction—were found to be malfunctioning in the second half of the 1990s. On one hand, the regional and sub-regional governments were no longer willing to feed back to the Central Government information about the real problems stemming from implementing the regulation, or to provide solutions to address the regulatory problems. On the other hand, the Central government was no longer able to enforce its regulatory policies or rules through the accountability system inbuilt in the government system (i.e., the accountability system characterized by strong *horizontal* administration and weak *vertical* guidance) against non-compliance of lower echelons of government bodies. Further, the accountability and correction mechanisms available to social stakeholders (i.e., business contributors and individual participants) were also found to be ineffective in addressing or remedying the wrongs and mistakes stemming from the regulation. As a result, the three regulatory problems and issues (i.e., the IPD, the malpractices, and segmentation of the social pools) as well as the failure to include the emerging

migrant workers persisted in the public pension system. Although the decline of *responsiveness* reflected by the persistence of these four problems was evident, their implications for the interaction between the regulation and the society are quite different.

The persistence of the three major regulatory problems (i.e., the IPD, malpractices of fund management, and segmentation of the social pooling system) largely reflected the potential conflicts of interests among levels of governments and the inability of the accountability and correction mechanisms to address the problems arising from the regulatory system. They threatened the pension entitlement of all existing participants within the public pension system, while impeding further evolution of the regulatory system within the changing social environment. The failure to include migrant workers further reflected the inability of the entire system to effectively respond to new demands and needs stemming from changes in the social environment—the increasing differentiation of the social sub-systems. Rather than inclusion, the new regulatory programs concerning migrant workers actually created new barriers to their inclusion, thus impeding the process of their functional specialization in the formal, urban and industrialized sectors. In this sense, the failure to include migrant workers within the scheme further impeded the evolution of society in systems theory terms.

In sum, from the early 1990s to the mid-and-late 2000s, China underwent a transition toward ‘socialist market economy’, and the political power of the state decided to adopt a special approach to socio-economic regulation, under which the government’s role (particularly the role of the regional and sub-regional governments) was significantly entrenched in public pension regulation. However, despite a range of substantive changes to the public pension schemes, the *reflexivity* of the regulatory system did not undergo any significant change. Particularly, while the process of differentiation in business and labour

institutions accelerated, functional and organizational differentiation within the state and public institutions were found to be limited. As a result of this, the *responsiveness* of the regulatory system significantly declined, while conflicts between the social stakeholders and the state regulators surfaced to the foreground in the mid-and-late 2000s.

### ***3.5 Interaction between the Regulatory System and the Social Environment at the End of the 2000s: The Legislation of the Social Insurance Law (i.e., the SIL)***

The legislation of the SIL was initiated in the context of a crisis of the late 2000s when the regulatory system was critically challenged by the general public. Although the pension scandal in 2006 appeared to be the main cause of the crisis, the actual cause, as noted in the data,<sup>21</sup> lay in the institutional deficiency of the regulatory system, which was then embedded in a general public administration system characterized by very limited functional and organizational differentiation within the government and state authorities administering the pension schemes. In response to this, the NPC that initiated the legislation of the SIL tried to reshape the *regulatory spaces* of policy formulation and rule-making while introducing *reflexive* institutions into the *space* of implementation. Furthermore, the SIL also managed to provide a number of substantive solutions to all the persistent problems and issues developed since the pension reform in the mid-1990s, thus exhibiting strong intention of increasing the *regulatory responsiveness* of the public pension system.

Although the real performance of the regulatory system is yet to be seen, the impact of the SIL on the social environment and its further evolution is noteworthy. The formal legislature intervened, for the first time, in the

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<sup>21</sup> See: Section 5 of Chapter Seven, pp. 272-274.

regulation of public pension, and tried to introduce some organized social actors, such as the SISC (i.e., Social Insurance Supervisory Commission) into the regulation to monitor the government authorities. Meanwhile, the NPC also tried to further include all revenues and expenditures concerning public pension into the ambit of public finance subject to audits and examinations by the People Congresses at central, regional and sub-regional levels. Given the fact that public pension funds had largely been treated as ‘extra-budgetary revenues’ only monitored by the fiscal authorities of the governments in the 1990s and in the most part of the 2000s, this initiative exhibited some systemic efforts of the NPC to further regulate the governments in the domain of public administration. This, together with the initiative to introduce social actors into the regulatory system, further increased the potentiality of future differentiation within the state and government system.

Nevertheless, it is equally important to note that the SIL has been unable to exercise substantial influence on the development of two important components of the regulation—review and evaluation, and accountability and correction. In particular, the role of the NPC (and the people’s congresses at lower levels) in evaluating the implementation of the regulation, and revising the rules in the future, is not defined. In addition, the availability and viability of the accountability and correction mechanisms to be used by social actors for the purpose of addressing and remedying possible wrongs, mistakes and malpractices on the part of the government authorities, are still to be improved. This is particularly important not only because the performance of this part of the regulatory system was very poor as suggested by the historical data (particularly the case of Mr. Jiang),<sup>22</sup> but also because the SIL has delegated the power of making the by-laws to regional governments. In this sense, the regional governments will continue to play a substantial role in the regulation.

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<sup>22</sup> See: Section 6.1 of Chapter Seven, pp. 275-279.

To prevent the regulatory system from repeating the evolutionary path of the 1990s and 2000s, increasing the *reflexivity* of the regulatory system while promoting the differentiation and specialization within the state and government system is necessary. Nevertheless, what further actions would be taken and whether or not these actions would lead to new regulatory approaches aimed at realizing this process remain unclear. In fact, these questions lie beyond the ambit of the SIL and the scope of the historical data presented in this thesis.

#### **4. Summary**

This chapter has analysed the historical data presented in Part B of the thesis. In particular, the second section addressed the two subsidiary questions concerning the evolution of public pension regulation in China in terms of *system reflexivity* and *regulatory responsiveness*. The third section relied on the evolutionary model of modern society suggested by systems theory, and answered the main research question concerning the interaction of the regulatory system and the social environment in China over the historical periods. In particular, it is based on the information concerning *reflexive* and *responsive* attributes of the regulatory system as well as the underlying approaches of varied forms of state intervention presented in section 2 of this chapter, and focused on the specific social contexts within which the regulatory system was embedded as well as the specific impacts of the regulations on the evolution of the society, to illustrate the ‘ways in which public pension regulation evolved in response to the changing social environment in China’.

Based on the results presented in section 2 of this chapter, it was found that the evolution of the public pension system in China exhibited very significant variation in *system reflexivity* and *regulatory responsiveness*, while accompanying this were the different approaches of state intervention and regulation. It was also found that the social contexts varied considerably in

systems theory terms. In particular, since the late 1990s onwards, the socio-economic sub-systems (i.e., business and labour institutions in particular) in China have been undergoing rapid differentiation. While this has created a complex of problems and issues awaiting regulatory solutions, a decline of *reflexivity* and *responsiveness* persisted, and accompanying this decline was the slow and insignificant differentiation of the relevant state and government authorities from the mid-1990s to the mid-to-late 2000s. This not only contributed to the serious pension crisis in 2006, but also impeded the social evolution suggested by systems theory. In this regard, although the legislation of the SIL showed the intention of the state legislature and Central Government to improve the regulation, the real effects of the SIL and its subsequent impacts on the regulatory system are yet to be seen.

## CHAPTER NINE: CONCLUSION

### 1. Summary of the Study

The principal aim of this thesis has been to examine and explain the evolution of the primary research subject—the Chinese public pension regulation—alongside the secondary research subject—the changing social environment in China.

For this purpose, the concept of ‘regulation’ was first delineated according to the special nature of the research subjects. In light of the specific definition,<sup>1</sup> a literature review of social evolution and state regulation was undertaken. Systems theory and two ancillary regulatory perspectives—*responsive regulation* and *reflexive law*—were further recognized as theoretical guides for the research. An analytical framework combining two principal concepts—*system reflexivity* and *regulatory responsiveness*—was developed. In particular, it was pointed out that *system reflexivity* was to be illustrated by descriptive accounts of the changing institutions and interactions of the actors within the regulatory system (i.e., the so-called *regulatory space*), while normative attributes associated with this concept were to include: its being facilitative to communications and negotiations, its being conducive to transparency of the regulatory activities, and its being able to foster self-regulatory mechanisms. *Regulatory responsiveness* was to be illustrated by descriptive accounts of the dynamics in the *regulatory process* (i.e., the five key components of regulation identified in literature review, including: policy formulation, legislation and rule-making, implementation and enforcement, review and evaluation, and accountability and correction), and its normative attributes mainly included: its being open to the changing social environment, its being capable of treating and

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<sup>1</sup> This thesis treats regulation as purposive state intervention or control for certain public purposes in the form of law and government regulation. See: Section 2.1 of Chapter Two of the thesis, p. 17.

resolving problems and issues stemming from social changes, and its being able to maintain integrity in the regulatory system.

Based on the normative attributes and descriptive tools identified for these two concepts, one main research question and two subsidiary research questions were posed. It was posited that the subsidiary questions concerning the *reflexivity* and *responsiveness* of the evolving regulatory system would be answered first to provide information concerning the normative attributes of the regulation; and that this would be followed by an in-depth analysis aided by systems theory to answer the main question—in what ways the public pension regulation responded to the changing social environment in China? Five historical periods were subsequently selected as data which was further analysed in Chapter Eight.

## **2. An Overview of the Chinese Public Pension Schemes Examined by the Research**

As shown by the historical data presented in Part B of the thesis (i.e., Chapter Three to Chapter Seven), the Chinese public pension scheme has undergone several significant changes over the period from 1949 to 2009.

It began, in the early 1950s, with a PAYG scheme designed for a small fraction of industrial workers employed by large-sized state owned enterprises (i.e., SOEs) and privately-owned firms in urban cities. At that time, contributions were made by the employers, and the pension funds were managed by trade unions. Nation-wide transfer payments were made possible by the social pooling system administered by the ACFTU (i.e., All-China Federation of Trade Unions). In the second half of the 1950s, along with the *Socialist Transformation Movement*, all private firms were nationalized and became SOEs thereafter. Following this, the PAYG pension scheme was further rolled out to all business firms of the urban sector, and this continued well into the

second half of the 1960s, when the *Cultural Revolution* began. During this particular period of political turbulence from 1966 to 1976, the public pension scheme was reduced to an enterprise-based pension plan administered by individual SOEs. Trade unions under the ACFTU system ceased to administer the pension funds while the nation-wide pooling system was also dismantled.

Soon after the *Cultural Revolution*, China embarked on its Economic Reform and Liberalization in the late 1970s. Alongside many socio-economic reforms, the pension system was revamped in the early 1980s. The social pooling system was restored while regional and sub-regional governments (i.e., provincial and city governments) and their labour departments became the main regulators of their own PAGY schemes. As a result, the nation-wide social pooling system originally administered by the ACFTU in the 1950s and 1960s was replaced by a much segmented system constituted by thousands of separate social pools. Nevertheless, the substantive terms and conditions concerning pension contributions and benefits were largely maintained.

The mid-1990s witnessed another significant change to the public pension scheme. It was transformed from a pure PAYG model to a mixed model of PAYG and funding, while employee's contributory obligation was also introduced to reduce the financial cost of the employers. In spite of these changes, the social pooling system remained segmented, the individual pension accounts were not funded, and the vast majority of the rural migrant labour was not included into the public pension system. These continued well into the late 2000s, when further reforms triggered by the SIL were initiated.

While these above facts generally summarize the overall trajectory of the public pension scheme over the historical periods, it is important to note that all these changes took place within different social, political and economic contexts, while underlying these apparent changes to the pension scheme were varied

approaches to purposive intervention by the state accompanied by different forms of *regulatory spaces* and *processes* through which these changes were carried out. These dynamics further constituted the responses of the public pension regulatory system to the changing social environments in China, which were further examined and explained in terms of *system reflexivity* and *regulatory responsiveness* by the analytical part of the thesis.

### **3. Major Findings Concerning the Research Questions**

The analytical part of the thesis (i.e., Chapter Eight) aimed at answering the research questions posed to investigate the interactions between the regulatory system of public pension and the changing environment in China. In general, the results show that the evolution of the public pension system in China has exhibited very significant variation in *system reflexivity* and *regulatory responsiveness*, while the ways in which the regulatory system has responded to the changing social environment have also varied significantly over the five historical periods.

The social environment under the brief *New Democratic Era* from 1949 to 1953 was characterized by considerable differentiation in the society although the general level of specialization was low in the economy. The dominant political power (i.e., the CCP) decided to take an approach to socio-economic regulation which permitted a considerable degree of functional and organizational autonomy of various social institutions then endorsed by the Constitution (i.e., the *Common Program* of 1949). Under this approach to state intervention, the public pension regulatory system exhibited significant *reflexivity* as shown by the *regulatory space* of the five regulatory components, while all the *reflexive* attributes were found to be significant throughout the regulatory system.<sup>2</sup> So

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<sup>2</sup> A detailed account of the *reflexive* institutions of the *New Democratic Era* was presented in Table 8.1 of Chapter Eight of the thesis, p. 351.

were the attributes of *regulatory responsiveness* in the early 1950s.<sup>3</sup> Furthermore, there was no significant conflict between labour and business as a result of the regulation. Nor was there any significant conflict between the social stakeholders and the public authorities administering the public pension scheme. The general model of socio-economic regulation during the *New Democratic Era*, as reflected by the regulation of the public pension scheme, was conducive to the social evolution process in systems theory terms.

The *Socialist Transformation* period from mid-1950s to the late 1950s, however, witnessed a very significant shift in the general model of state intervention and socio-economic regulation. Political integration was rolled out to all the sub-systems. In particular, business and labour (i.e., the two important social stakeholders of the public pension regulation) were completely integrated in to the party-state regime and the ‘iron-rice bowl’ system. This, accompanied by the parallel political integration of all the relevant state and government authorities (such as the legislatures, judicial courts and labour authorities), further destroyed the functional and organizational autonomy of the actors in the regulatory system, thus undermining the foundation of *system reflexivity*. Along with the disappearance of all the *reflexive* institutions developed in the *New Democratic Era*, the *responsiveness* of the regulatory system was largely impaired in the second half of the 1950s. The impact of these changes on the overall social evolution was two-fold. They seemingly eliminated many social conflicts in the short run as all social sub-systems had been merged into an integrated whole under the leadership of the CCP, but they actually blocked the process of differentiation and specialization in the state, government and various socio-economic sectors. In this regard, the model of socio-economic administration developed in this period was found to be counter-productive to the social evolution in systems theory terms.

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<sup>3</sup> For a detailed account of the *responsiveness* attributes, see Table 8.1 of Chapter Eight of this thesis, p. 351.

The public pension regulation in the early stage of China's economic reform and liberalization from the late 1970s to the end of the 1980s was embedded in a highly-centralized society with very weak differentiation both in the state and government institutions (i.e., the legislatures, government authorities, and judicial courts) and in the socio-economic institutions (i.e., business and labour). Nevertheless, the commitment of the political leadership to reform was very strong. In particular, the political leaders took a pragmatic approach to socio-economic administration in general. This further facilitated the formation of *reflexive* institutions in the government system. In particular, the 'vertical management system' was replaced by a new model of government featuring weak *vertical* guidance and strong *horizontal* administration (i.e., through provincial and city governments broadly referred to as regional governments).<sup>4</sup> As a result, lower echelons of governments were closely engaged in various socio-economic reforms including public pension reforms. Significant evidence of increased negotiations, discussions and consultations among the government authorities was found, although details indicative of other *reflexive* attributes (i.e., transparency and self-regulatory mechanisms) were not in evidence in the historical data examined in this research.<sup>5</sup> Nevertheless, this showed the increase of *reflexivity* which gradually helped the regulatory system to recover its *responsiveness* to the social environment.<sup>6</sup> The net result of these changes in the regulation, exhibiting a strong momentum of increasing *reflexivity* and *responsiveness* within the government system, further facilitated the differentiation of government, labour and business in the late 1980s. In this sense, the contribution of the reformed public pension system to the social evolution was positive in systems theory terms.

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<sup>4</sup> A more detailed account of this special change to the model of government administration is presented in Section 2.3.2 of Chapter Eight of the thesis, pp. 320-321.

<sup>5</sup> An account of the *reflexive* institutions of this period was presented in Table 8.1 of Chapter Eight, p. 352.

<sup>6</sup> An account of the *responsive* attributes of this period was presented in Table 8.1 of Chapter Eight, p. 352.

The second half of the 1990s and the first eight years of the 2000s (i.e., from 2000 to 2007) were characterized by a special model of socio-economic administration and regulation that accompanied China's economic transition towards the so called 'socialist market economy'. During this period of time, the government's role in market constructing and regulating the market was continually entrenched. Despite this, the public pension regulatory system exhibited very limited change in *system reflexivity*.<sup>7</sup> Rather, in the second half of the 1990s (i.e., after the transition of the pension scheme from the PAYG model to the mixed model), the *reflexive* institutions within the governments, which had been largely developed in the 1980s, began to deteriorate. In particular, the cooperative ties among echelons of governments degraded while conflicts of interest also emerged. Further, the social actors of the regulation (i.e., business and labour) were also largely excluded from some key components of the regulatory system (i.e., policy formulation, rule-making, and implementation and enforcement). Along with this continuous decline of *reflexivity*, the *responsiveness* of the regulatory system also declined. An isolated model of rule-making was developed and reinforced, while a number of serious regulatory problems (i.e., the IPD, malpractices of fund management, and segmentation of social pools) emerged and persisted.<sup>8</sup> In other words, all the *responsive* attributes were largely lost over this period. This, together with the regulatory failure to include migrant workers into the public pension system in the first half of the 2000s, finally developed into a major crisis of the public pension system in 2006 when a serious pension scandal in Shanghai brought all the problems to public knowledge. Along with the significant decline of *reflexivity* and *responsiveness* in the regulatory system, however, the social environment in China experienced very rapid differentiation in economic sector (i.e., in labour and business institutions in particular), although functional and

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<sup>7</sup> For a detailed account of the *reflexive* attributes of the mid-1990s to the mid-to-late 2000s, see Table 8.1 of Chapter Eight, pp.352-353.

<sup>8</sup> For an account of the *responsive* attributes of these two periods, see Table 8.1 of Chapter Eight, p. 352-353.

organization differentiation within the state and government authorities pertaining to public pension regulation was very limited. In the mid-to-late 2000s, significant conflicts emerged between the social stakeholders and the government regulators. Given these facts, it is arguable that the public pension regulation was exerting quite negative impacts on the social evolution in systems theory terms.

The legislation of the SIL in the last few years of the 2000s was an important event, whereby a number of institutions typical of *reflexive* regulation were introduced. In particular, various social actors (i.e., labour, business and academia) and relevant public authorities (i.e., legislatures and government authorities except judicial courts) were vigorously engaged in the process of drafting the SIL. A number of concrete solutions to all the persisting problems and issues were provided.<sup>9</sup> Although some components of the regulatory system (such as review and evaluation, and accountability and correction) were not significantly influenced by the legislation, and the real *responsiveness* of the new regulatory system is yet to be seen, the process of the legislation did show some signs of further differentiation within the state and government authorities pertaining to public pension. While this, as suggested by systems theory, may be proactive to the social evolution in China, the real effect is yet to be examined. In particular, as indicated by the analysis, questions concerning what new regulatory actions will be undertaken by the Chinese state in the future and whether or not such *reflexive* practices of pension regulation aimed at increasing the *responsiveness* of the regulatory system may lead to some new model of socio-economic administration and regulation at large, remain unclear as these lie beyond the scope of this thesis.<sup>10</sup> The summary of the above research findings are further presented in the table below.

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<sup>9</sup> For a detailed account of the *reflexive* and *responsive* attributes of the public pension regulatory system during the legislation of the SIL, see Table 8.1 of Chapter Eight, p. 353.

<sup>10</sup> See especially, Section 3.5 of Chapter Eight of this thesis, p. 368.

**Table 9.1: Main Research Findings**

Historical Periods	The Specific Social Context	General Approaches to State Intervention and Regulation	System Reflexivity	Regulatory Responsiveness	Impacts on Social Evolution
<p><b>The New Democratic Era</b></p>	<ul style="list-style-type: none"> <li>• Considerable levels of functional and organizational differentiation in the state, government, economy and social community;</li> <li>• Relatively low levels of specialization in the economy.</li> </ul>	<ul style="list-style-type: none"> <li>• Tolerance of policy contestation and negotiation;</li> <li>• Paying considerable respect to the organizational and functional autonomy of the social sub-systems then endorsed by the Constitution.</li> </ul>	<ul style="list-style-type: none"> <li>• Significant</li> </ul>	<ul style="list-style-type: none"> <li>• Significant</li> </ul>	<ul style="list-style-type: none"> <li>• Reducing the conflicts between labour and business;</li> <li>• No significant evidence showing conflicts between social actors and public actors;</li> <li>• Showing respect to the differentiated social sub-systems, and being conducive to the loop of social evolution suggested by systems theory.</li> </ul>
<p><b>The Socialist Transformation Period</b></p>	<ul style="list-style-type: none"> <li>• Transition from <i>New Democracy</i> to Socialism</li> </ul>	<ul style="list-style-type: none"> <li>• Political integration of all social sub-systems;</li> <li>• Party-state regime;</li> <li>• Vertical management system; and</li> <li>• Iron rice-bowl</li> </ul>	<ul style="list-style-type: none"> <li>• Disappeared</li> </ul>	<ul style="list-style-type: none"> <li>• Very poor</li> </ul>	<ul style="list-style-type: none"> <li>• Apparently eliminating lots of social conflicts in the short run;</li> <li>• Actually blocking differentiation and specialization both within and without the state and government system;</li> <li>• Largely slowing down the course of social evolution suggested by systems theory.</li> </ul>

<p><b>The Early Stage of Economic Reform and Liberalization</b></p>	<ul style="list-style-type: none"> <li>• Highly centralized society with very weak differentiation both within and without the state and government system;</li> </ul>	<ul style="list-style-type: none"> <li>• Strong political support for change and reform; and</li> <li>• A pragmatic approach to socio-economic reform and regulation engaging lower echelons of government bodies.</li> </ul>	<ul style="list-style-type: none"> <li>• Recovering</li> </ul>	<ul style="list-style-type: none"> <li>• Increasing</li> </ul>	<ul style="list-style-type: none"> <li>• Re-initiating functional and organizational differentiation within the state and government system in the late 1970s;</li> <li>• Re-initiating functional and organizational differentiation within the socio-economic sectors (i.e., labour and business institutions);</li> <li>• Pulling China back to the evolutionary path suggested by systems theory.</li> </ul>
<p><b>The Second Half of the 1990s and the First Half of the 2000s</b></p>	<ul style="list-style-type: none"> <li>• Economic transition towards 'socialist market economy' with Chinese characteristics</li> </ul>	<ul style="list-style-type: none"> <li>• Entrenching the government's role in market construction and regulation.</li> </ul>	<ul style="list-style-type: none"> <li>• Declining</li> </ul>	<ul style="list-style-type: none"> <li>• Worsening</li> </ul>	<ul style="list-style-type: none"> <li>• Continuing differentiation in the socio-economic sectors from the second half of the 1990s;</li> <li>• Insignificant functional and organizational differentiation in the public authorities pertaining to public pension regulation;</li> <li>• Obvious conflicts between the public authorities (regulating the public pension schemes) and the social stakeholders (bearing the contributory obligations);</li> <li>• Beginning to exert negative impacts on the social evolution path suggested by systems theory.</li> </ul>

<p><b>The Late 2000s as Shown by the Legislation of the SIL</b></p>	<ul style="list-style-type: none"> <li>• Increasingly complex socio-economic sectors characterized by rapid differentiation;</li> <li>• Insignificant differentiation within the state and government system;</li> <li>• Significant conflicts between the government regulators and the social stakeholders.</li> </ul>	<ul style="list-style-type: none"> <li>• So far unclear</li> </ul>	<ul style="list-style-type: none"> <li>• Significant efforts aimed at improvement, but the real outcomes are yet to be seen</li> </ul>	<ul style="list-style-type: none"> <li>• Yet to be seen</li> </ul>	<ul style="list-style-type: none"> <li>• Showing some signs of re-initiating differentiation within the state and government system;</li> <li>• The real effect on further evolution of the society unclear so far.</li> </ul>
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## 4. Implications

This thesis addressed two important research subjects through a new analytical framework. Given the analytical outcomes presented above, several theoretical and empirical implications can be drawn.

### 4.1 *Theoretical Implications*

In theoretical terms, the thesis has applied an analytical framework integrating systems theory and two related but nuanced strands of regulatory theory—*responsive regulation* and *reflexive law*—to a specific regulatory arena (i.e., public pension regulation) within a special and dynamic social environment of China. It managed to conduct exploratory enquiries into the evolution of the public pension regulatory system and the Chinese society over five historical periods from 1949 to the end of the 2000s. In particular, the author developed a special tool—a flowchart of *regulatory process* with five important regulatory components being connected with the social environment—to depict and evaluate the *responsiveness* of a regulatory system in China.<sup>11</sup> Although this analytical tool, together with the existing concept of *regulatory space* (i.e., constitution of the regulatory system and interactions of the actors within the system), has so far only been used to examine the evolution of the Chinese public pension system, its validity for the research aim and subjects can be tentatively established by this thesis, while its applicability to other socio-economic regulations in China or elsewhere may also be expanded by future studies.

### 4.2 *Empirical Implications*

In empirical terms, the thesis has systemically described the ways in which the public pension regulatory system responded to the changing social environment in China. Although it has not heavily focused on the causal relations between

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<sup>11</sup> See Flowchart 2.3 of Chapter Two of this thesis, p. 48.

*system reflexivity, regulatory responsiveness*, the general social contexts (i.e., the general level of organizational and functional differentiation in state and non-state institutions), and the general approaches of state intervention, the analytical results building on the descriptive accounts of the historical data do shed some light on three interactive patterns between the regulatory system and the social environment.

First, so far as the analytical outcomes reflecting the co-evolution of the Chinese public pension regulatory system and the changing social environment are concerned, the political power of the state (i.e., the CCP leadership) has always played a dominant role in shaping the general approaches of state intervention. Although a comprehensive analysis of the political events which underlay the adoption of these varied approaches lies beyond the scope of this thesis, the impact of these general approaches on the variation in functional and organizational differentiation of the various social sub-systems has been significant.

Second, the *reflexivity* of the regulatory system has largely co-varied with the general level of social differentiation, and the pattern of the co-variation has exhibited some significant degree of positive correlation. In this regard, the *New Democratic Era* (when both differentiation and *reflexivity* were significant), the *Socialist Transformation Period* (when both differentiation and *reflexivity* disappeared), the second half of the 1990s (when differentiation within labour and business institutions was significant but the differentiation within the state and government institutions were not, while the *reflexivity* of the regulatory system continuously declined), and the first half of the 2000s (largely the same as the second half of the 1990s) demonstrate this particular pattern of correlation. The only exception appears to be the early stage of China's *Economic Liberalization and Reform* when the increase of *reflexivity* was initially embedded in a social context with very low level of differentiation in

the late 1970s. It is, however, important to note that the commitment of the political leadership to socio-economic reform was strong in the late 1970s, and the level of differentiation did speed up from the mid-1980s. In this sense, it is arguable that the historical period of 1980s also demonstrates the same pattern as the other periods except the last few years of the 2000s.<sup>12</sup> This positively-correlated pattern of co-variation may further suggest that the general level of social differentiation and the *reflexivity* of the regulatory system are inter-dependent, although underlying both are the varied approaches of state intervention endorsed by the political leaders of the CCP.

Third, so far as the research findings in relation to the evolution of the Chinese public pension system over the five historical periods are concerned, *responsiveness* of the regulatory system tended to co-vary with *reflexivity*, and the pattern of the co-variation has largely been positively-correlated. This, together with the empirical evidence which is suggestive of temporal precedence of changes in *reflexivity* to changes in *responsiveness* over the historical periods, further implies that level of *reflexivity* has had certain impacts on the performance of the regulatory system in terms of its *responsiveness* to the social environment. This finding corresponds with the theoretical postulation which has largely treated Teubner's *reflexive law* as 'regulation of the regulations'—procedures and rules setting up the institutional framework—that may influence the regulatory outcomes. In particular, as suggested by the analytical outcomes,<sup>13</sup> this positive correlation has been consistent throughout the historical periods with the varied approaches of state intervention. This further provides some practical guide regarding how to improve the public pension regulatory system in today's China where the *regulatory space* of some

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<sup>12</sup> The last few years of the 2000s (i.e., the period when the legislation of the SIL was going on) is excluded from the investigation because the evaluation of the *reflexivity* of this period was largely limited to the legislative process of the SIL. Although the legislature has made significant efforts to introduce *reflexive* practices and institutions into the regulatory system, the real implementation of these practices as well as the real outcomes of these institutional changes are yet to be seen.

<sup>13</sup> See Table 9.1 of this Chapter, pp. 379-381.

components of the regulatory system, such as implementation (fund management in particular), review and evaluation, and accountability and correction (particularly those mechanisms available for social actors to address potential wrongs and harms caused by public regulators), has so far persistently been characterized by very low levels of *reflexivity*. In fact, as suggested by the analysis,<sup>14</sup> due to a lack of *reflexive* institutions and practices in these components, the *regulatory process* of public pension has so far been unable to form a *regulatory loop* of the kind suggested by Selznick's model of *responsive regulation*.<sup>15</sup>

To enhance *reflexivity* of the public pension regulatory system and increase the *responsiveness* of the regulation, further differentiation in the state and government institutions—which are heavily influenced by the general approach to socio-economic intervention of the state—needs to be allowed for. This, as shown by the analytical outcomes,<sup>16</sup> is particularly relevant to today's Chinese society where a disparity between slow differentiation in state/government institutions and rapid differentiation in socio-economic institutions (the institutions of labour and business in particular) have been found to be causing a succession of regulatory problems in the public pension system from the late 1990s onwards. Although the existing approach of state intervention based on 'strong government involvement in market construction and regulation' has exhibited significant limitation in the new socio-economic context of highly differentiated business and labour, any move towards further differentiation in the state/government institutions, as suggested above, is highly dependent on the will of the political power in China (i.e., the CCP leadership). In this sense, it is arguable that notwithstanding the serious efforts aimed at introducing some *reflexive* institutions and practices in the regulation, as the legislation of the SIL

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<sup>14</sup> See especially, Section 2.4.2 of Chapter Eight, pp. 328-334.

<sup>15</sup> For this particular point, see especially, Flowchart 8.5 of Chapter Eight and the accompanying text, pp. 344-347.

<sup>16</sup> See especially, Section 3.4 of Chapter Eight, pp. 364-367.

has attempted to, the capacity of legislative authority to increase the real *reflexivity* of the regulatory system (and hence better *responsiveness*) may still be limited unless strong political support for further social differentiation is secured. In other words, although the legislation of the SIL has showed some indicative signs of re-opening the differentiation of state and government authorities, questions concerning whether or not, and if so how a more systemic reform within the state and government institutions is to be initiated remain unclear. As indicated above, these issues lie beyond the scope of the SIL and the scope of this thesis. To further examine such move or the real impact of such move on the evolutionary path of the public pension regulation and other socio-economic regulations in China, future studies based on more nuanced research methods and approaches are required.

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