The Ideals and Reality of a Legal Transplant – The Veil-Piercing Doctrine in China[*]

Shuangge Wen[*]

In response to a significant change in China's 2005 company law reform – the statutory inauguration of the piercing the veil doctrine, this paper critically examines the implementation of this common-law-originated doctrine in China's unique socio-economic environment. It was discovered that so far the practice of veil-piercing has largely derogated from its intended legislative goals. Factors beyond the realm of law, including the structure of the national economy, related policies, and mainstream jurisprudential thoughts, constrain the uniform applicability of this doctrine. Meanwhile, the congruence of this legal transplant has also been pragmatically compromised by various institutional factors. In view of the policy imperatives of encouraging investment and the continuing preponderance of the state-owned economy, this paper foresees an even more restricted role of the veil-piercing doctrine in China's future commercial practice.

Contents

[*] This is a pre-copyedited, author-produced version of an article accepted for publication in Stanford Journal of International Law. The definitive published version (2014) 50 Stanford Journal of International Law 319-358 is available online on Heinonline.

[*] Lecturer in Law, Swansea Law School, Swansea University; Member of the Institute of International Shipping and Trade Law (IISTL), Professor in Law (part-time), Jilin University;. Opinions expressed herein are personal.

I. INTRODUCTION

There are few corporate law principles more intricate, and less settled, than that of when it is permissible to pierce the veil.[1] However, the fact that there is room for debate about the precise meaning of this metaphor has not affected the overall consensus about its core function in qualifying limited liability.[2] Echoing the powerful rhetoric of aligning Chinese corporate law more closely with that of other developed economies,[3] this doctrine of common law origin has recently been enshrined in China in form of a brief provision – Article 20(3) of the 2005 company law.[4] This statutory change came about as one result of a long-lasting debate about corporate law reform, and it was welcomed with a chorus of praise from Chinese academics and legal practitioners as a "*revolutionary development*".[5] Indeed, compared to the rigid 1993 company law regime, which focussed on state-owned enterprise rather than entrepreneurial business,[6] adding this doctrine into the 2005 company law framework and altering the conventionally rigid capital rules informs China's current policy imperatives of encouraging more diversified forms of investment and business development, building up a regulatory environment with more clarity and consistency in order to safeguard market players' interests, and steering the country towards a more liberal market regime.[7]

Laudable legislative goals notwithstanding, until the present time many Chinese scholars have taken as a given, rather than as an assumption, the applicability of the piercing doctrine in China.[8] The alleged civil

---

[1] Notwithstanding its widespread applications in various jurisdictions, there remain some disputes on the conception and scope of veil-piercing. For instance, it is submitted that ambiguity and lack of principles have plagued the veil-piercing concept in common law jurisdictions for hundreds of years. *See* BC Reed, *Clearing Away the Mist: Suggestions for Developing a Principled Veil Piercing Doctrine in China*, 39 VAND. J. TRANSNAT'L L. 1643 (2006). Similarly, Farrar criticised the doctrine and related law as being "*in a state of flux*". JH Farrar, *Fraud, Fairness and Piercing the Corporate Veil,* 16 CAN. BUS. L. J. 474, 479 (1989–1990). For discussions on the magnitude of the veil-piercing doctrine, *see* Thomas K Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines,* 34 B.C. INT'L & COMP. L. Rev. 329, 332 (2011); KW Wedderburn, *A Corporation's Ombudsman?* 23 MOD. L. REV. 663, 666 (1960); Murray A Pickering, *The Company as a Separate Legal Entity,* 31 MOD. L. REV. 481 (1968).

[2] As Lord Neuberger of Abbotsbury PSC commented in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, at [80], "*I have reached the conclusion that it would be wrong to discard a doctrine which, while it has been criticised by judges and academics, has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available.*" *See also* Robert Charles Clark, *The Duties of The Corporate Debtor to Its Creditors,* 90 HARV. L. REV. 505, 547 (1977).

[3] Mark Wu, *Piercing China's Corporate Veil: Open Questions from the New Company Law,* 117 YALE L. J. 329, 330 (2007).

[4] "*公司股东滥用公司法人独立地位和股东有限责任，逃避债务，严重损害公司债权人利益的，应当对公司债务承担连带责任。*" "*Where the shareholder of a company abuses the independent status of the company as a legal person or the limited liability of shareholders, evades debts and thus seriously damages the interests of the creditors of the company, he shall assume joint and several liability for the debts of the company.*"中华人民共和国公司法第二十条第三款. [Company Law of the People's Republic of China] (promulgated on Dec. 29, 1993 and effective Jul. 1, 1994, amended in 1999, 2004, and 2005) [Company Law 2005], art. 20(3), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50878

[5] Nairui Liu, *Guanyu Jiekai Gongsi Miansha de Zairenshi: Cong Xifang Fenzheng dao Woguo Dinglun (关于揭开公司面纱的再认识：从西方纷争到我国定论) [Revisiting Corporate Veil Piercing: Western Obscurity and Its Clarification in China],* 12 J. BUS. ECON. 69 (2008).

[6] Robert C Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People's Republic of China*, 20 YALE J. INT'L L. 273, 275 (1995).

[7] Junhai Liu, *Jiekai Gongsi Miansha Yingyong yu Sifa Shijian de Ruogan Wenti Yanjiu (揭开公司面纱制度应用于司法实践的若干问题研究) [An Analysis of the Controversial Issues Regarding the Application of Piercing Corporate Veil in Judicial Practice*] 305 J. L. APPLI. 16, 16(2011). *See also infra* note 79 and relevant texts.

[8] *See e.g.,* XUDONG ZHAO *ET AL.,* XINGONGSIFA ZHIDU SHEJI (新公司法制度设计) [THE SYSTEMIC DESIGN OF NEW COMPANY LAW] 374 (2005), *"(During the debate of reforming Company Law), only a very small number of scholars, for instance, Sibao Shen, have raised the concern that this veil-piercing doctrine is a common law principle… and therefore may not be suitable in our country.*" *Also* Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?* 60 AM. J. COMP. L. 743, 745 (2012), "*China's statutory veil-piercing law*

law affiliation[9] and the fledging state of the legal system[10] have both led to a principal emphasis on lawmaking in China, with the corollary that less attention has been focused on enforcing laws.[11] As succinctly noted by Potter, "*the effectiveness of (a piece of law in China) … is asserted (or assumed) on the basis of the enactment of legislation rather than being based on empirical reality*."[12] As such, while much ink has been spilled to unravel the intricacies of piercing from an ideological perspective, relatively few writers have examined whether its practical implementation has achieved the intended effects, or how well this transplanted doctrine has blossomed in the unique and distinctive soil of China.

While one might not go as far as some realists, who attack scholarly attention to legal conception and ideology as being "*arbitrarily … practical politics*",[13] it is nevertheless sensible to appreciate that the life of the law lies in implementation.[14] The effectiveness of particular statutes and regulations is almost invariably shaped and compromised by the institutional environments in which they operate.[15] While it is heavily influenced by Western legal norms,[16] China's legal system, embedded in a complex economic, political and ideological system that is unique and distinct from its Western counterparts, has long confounded Western scholars, particularly in the way that its laws and regulations are implemented.[17] Drawing on the text of relevant laws concerning veil-piercing, and the modest body of case judgements which have emerged to date, this article seeks to correct the current scholarly imbalance. With an analysis of the pressing issues pertaining to veil-piercing practices in China, it highlights a disparity between the desired legislative goals and the actual implementation, and, in a chain of causation, pinpoints institutional factors specific to the Chinese socio-economic setting that bear on current judicial practice. Part II sets the stage by briefly reviewing the connotation of the metaphor in the corporate law context. Part III then

---

is essentially borrowed from common law jurisdictions." *See also* Colin Hawes & Thomas Chiu, *Flogging a Dead Horse? Why Western-Style Corporate Governance Reform will Fail in China and What should be Done Instead*, 20 AUST. J. OF CORP. L. 25, 26 (2006) arguing that so far incorporating wide-ranging Western corporate law and governance principles has not yet produced the expected results in the management of China's business enterprises. This is mainly because of "*some basic flaws in the assumptions of those advocating 'Western-style' corporate governance reform in China*". Clarke criticised the approach of measuring the Chinese legal system by means of "*the Western rule of law ideal*" in the sense that it fails to reflect China's distinctiveness. *See* Donald C Clarke, *Alternative Approaches to Chinese Law: Beyond the "Rule of Law" Paradigm,* 2 WASEDA PROC. COMP. L. 49 (1998-1999). Likewise, Zhu challenged the "*prevailing wisdom*" of building up and evaluating the Chinese legal system using Western analytical and methodological approaches, suggesting that "[*v*]*isions …drawn from distinctly Western experience are not particularly meaningful for modern China, and evaluations and judgements based on these experiences or from their underlying ideology…have limited academic value and practical use for China.*" *See* Suli Zhu, *The Party and the Courts in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 52-53 (Randall Peerenboom ed., 2010).

[9] "*In the system of the civil law and of codified law, legislation occupies the most highly respected place as a source of law. … Inquiry usually begins with the codes and other legislation, then it seeks out the commentators and the treatises, and only in third place do cases come in for consideration and evaluation*." Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 426 & 430 (1967).

[10] Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 38 (2006–2007).

[11] *See e.g.* Donald C Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China* 10 UCLA PAC. BASIN L. J. 1, 3 (1991–2): *"So far, most scholarly analysis has been concerned with the contents of reform policies. Yet the means available to the government to effect these policies have been less well studied.*"

[12] PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALISATION AND LOCAL LEGAL CULTURE, 81 (2001), quoted in Lubman, *supra* note 10, at 38.

[13] *Palsgraf v Long Island Railroad* 248 N.Y. 339 at 352, 162 N.E. 99, at 103 (1928) Judge William Andrews.

[14] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT, 299 (6th ed., 2012).

[15] Clarke, *supra* note 11, at 3.

[16] "*At the level of legal doctrine, China has passed a number of laws that not only resemble but are modelled on laws from other jurisdictions*." *See* Randall Peerenboom, *Globalisation, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China,* 19 BERKELEY J. INT'L L. 161, 165 (2001).

[17] Peter Howard Corne, *Creation and Application of Law in the PRC,* 50 AM. J. COMP. L. 369, 369 (2002). As such, China "*is often used as a counterexample to convergence theories*." Peerenboom, *id.*, at 174.

takes up the major legislative imperatives underpinning the new piercing provision in China's 2005 company law. In contrast with these laudable legislative agendas, Part IV points out a number of thorny issues that have surfaced in application, the most prominent of which is the doubtful applicability of veil-piercing in the state-owned enterprise sector. Other problems in application include a compromise of legal consistency verified by a wide array of conflicting judgements; and a worrisome trend for unwarranted applications – regardless of the legislative emphasis on the limited use of piercing, this doctrine has been overly stretched in many instances.

In searching for the potential roots of these practical deficiencies, many have pointed to the highly factual nature of veil-piercing cases and the defective drafting of the statutory provision in the 2005 Company Law, arguing that while the level of generality of this principle allows for flexibility in real life applications, it also risks vagueness and inconsistency in implementation, as evidenced in the practice.[18] While legislative vagueness might be a convenient scapegoat, one should not overlook the influence of legal institutions that impinge on practice, as well as the macro socio-economic environment in which the law operates. After all, legal regulation is not a mere jurisprudence of concepts and logic orders; there is a need for a more contextual, less ideological approach to assessing the effectiveness of transplanted legal principles.[19] As will be discussed in Part IV, the overriding socio-economic feature of China's economy, i.e. the dominant role of the State in the national economy, has consolidated the instrumental view of law among mainstream Chinese jurists,[20] which has led to an uneven application of piercing between the state-owned and private economic sectors. Despite the Chinese government's vows to implement a consistent and uniform application of law, practice has shown that the piercing doctrine has been least effective in cases where it is probably needed the most, namely state-owned enterprises (hereinafter SOEs) and large listed enterprises.

As for its applications in private corporate sectors, there are a number of legal institutional deficiencies specific to the Chinese national context, including the lack of supplementary interpretations, excessive judicial discretion, and loopholes in connected areas of law, all of which contribute to the doctrine's suboptimal results in practice. Isolated denunciations of the lack of a clearly-worded provision fail to capture the contextualised legal reality as well as the holistic nature of legal institutions. In view of the policy imperatives of encouraging investment and the continuing preponderance of the state-owned economy, this paper foresees an even more restricted role for the veil-piercing doctrine in China's future commercial practice.

II. THE CONNOTATION OF THIS METAPHOR

[18] *See e.g.* Wu, *supra* note 3, at 330.
[19] Randall Peerenboom, *Introduction* in *in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 12 (Randall Peerenboom ed., 2010).
[20] An instrumental view of law means the use of legal rules by a government to achieve particular substantive ends. Eric W. Orts, *The Rule of Law in China,* 34 VAND. J. TRANSNAT'L L. 43, 82 (2001).

An attribute fundamental to the modern corporate form is its separate legal status,[21] though intriguingly this feature has been considered more extensively in relation to its exceptions.[22] The veil conferred by incorporation denotes that acts done in the name of and on behalf of a company are treated in law as the acts of the company, not of the individuals who are involved.[23] In simple terms, a distinction is maintained "*between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand.*"[24]

Notwithstanding nearly universal support for this corporate entity concept and its corollary, limited liability,[25] it is generally agreed that concessions to businessmen should not be without limitations.[26] Originating in the United States,[27] the metaphor of veil-piercing has thus far been employed to define exceptions to the well-received separate entity principle.[28] At its most basic, penetrating the corporate veil prevents shareholders from being insulated from personal responsibility for liabilities incurred by the firm.[29] However, since it is device for disregarding the individual personality of a corporation, consequences other than rendering shareholders liable for corporate debts can follow veil-piercing.[30] An example is *Gilford Motor Co Ltd v Horne,*[31] in which shredding the veil of the corporation was done primarily to honour a non-solicitation clause in an employment contract. Likewise, in *FG (Films) Ltd, Re*,[32] an unsuccessful argument for the separate status of a UK company from a US one was intended to

---

[21] PAUL L. DAVIES & SARAH WORTHINGTON, PRINCIPLES OF MODERN COMPANY LAW, 35 (9th ed., 2012).
[22] Pickering, *supra* note 1, at 482.
[23] *Jennings v Crown Prosecution Service* [2008] UKHL 29, at [16]. English examples are used here simply because there are a number of cases that nicely illustrate the kind of cases where one needs to lift the veil.
[24] *EBM Co Ltd v Dominion Bank*, [1937] 3 All ER 555, at 564-5, *per* Lord Russell of Killowen.
[25] "*The questionable but judicially accepted reasoning which regards limited liability as a result flowing out of the legal entity theory follows a simple route: The corporation is a separate entity; hence the obligations incurred in the operation of the business are those of the corporation itself, and the shareholders are not personally liable on these obligations*." Bernard F. Cataldo, *Limited Liability with One-Man Companies and Subsidiary,* 18 LAW & CONTEMP. PROBS. 473, 473 (1953). For discussions on the rationales underpinning limited liability, *see infra* notes 46–48 and relevant texts.
[26] Richard S Kohn, *Alternative Methods of Piercing the Corporate Veil in Contract and Tort Cases,* 48 B. U. L. REV. 123, 125 (1968).
[27] Pickering, *supra* note 1, at 482.
[28] In *Atlas Maritime Co SA v Avalon Maritime Ltd (No. 1)* [1994] 4 All ER 769, Staughton LJ attempted to distinguish between "*lifting the veil*" and "*piercing the veil*": *"[T]o pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.*" In *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, at [60] & [61], Lord Neuberger had a similar classification of cases underpinned by two distinct principles, "*namely those concerned with concealment and those concerned with evasion…Cases concerned with concealment do not involve piercing the corporate veil at all*". China does not seem to support such a detailed classification. Judging from the mainstream interpretations to Art. 20(3), the main purpose of "*disregarding the corporate veil*" in Chinese law is to impose debt liabilities on shareholders. *See infra* notes 39 & 216. In this regard, Chinese law is more in line with the comments of Baroness Hale of Richmond JSC (with whom Lord Wilson JSC agreed) in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, at [92]: "*I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion…But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if existed at all).*"
[29] "*As the case may be, when a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders*." *See* STEPHEN B PRESSER, PIERCING THE CORPORATE VEIL, 1-6 (1998). On this count, piercing the corporate veil is interpreted as "*expanding the ideals of equitable subordination and of fraudulent conveyance law*." *See* Clark, *supra* note 2, at 506.
[30] Davies & Worthington, *supra* note 21, at 215; Cheng, *supra* note 1, at 345. The corporate entity form may also be disregarded to impose liabilities on directors, with no impact on the limited liability of shareholders. E.g., *Harold Holdsworth & Co v Caddies* [1955] 1 WLR 352 (HL). There also exist statutory provisions which disregard the separate legal status of the corporation and impose liability on company directors, e.g., s. 214 of the Insolvency Act 1986 (hereinafter IA) in the UK. However, it is submitted that these are not true piercing actions in the sense that "*the corporate entity is discarded and liability attached to the members of the company*". *See* BRENDA HANNIGAN, COMPANY LAW, 57 (2nd ed., 2009).
[31] [1933] Ch. 935.
[32] [1953] 1 WLR 483.

qualify a film produced by the UK company as British, so as to gain certain subsidy advantages. In some cases the veil-piercing doctrine even work in a reversible manner to impose liability on a corporation for the obligations of its shareholder(s). A landmark judgment in the US 10th Circuit Court of Appeals, *G.M. Leasing Corp. v United States*, [33] illustrates such thinking at work, where the court permitted U.S. government's reverse piercing claim after finding that the individual who failed to pay taxes was an equity owner of G.M. Leasing Co.[34] In some cases, the piercing the veil doctrine can even reversely work to the detriment of creditors. A recent UK Supreme Court judgment *Stone & Rolls v Moore Stephens*[35] probably best exemplifies this point: being the exclusive owner and controller of a company, it is only logical to attribute a shareholders' fraudulent intention to the company; and the company (or more accurately, the creditors standing in its insolvent shoes) could not rely on its own illegal fraud when bringing a claim against the others.[36] Given the varied scenarios under which the rule is triggered, in practice courts have developed various labels that may be attached to veil-piercing applications. As stated, "*some veils pierce when the corporation is the controlling shareholder's 'alter ego', others when the firm is the controlling shareholder's 'corporate dummy', and still others when it is his 'instrumentality'.*"[37]

In contrast to the broad dimension of the piercing doctrine in common law jurisdictions, the principle is narrowly formulated in China, functioning simply as *ex post* creditor protection against shareholders. The institution of disregarding corporate personality – a Chinese expression which approximates veil-piercing[38] – is now set out in Art. 20(3) of Company Law 2005 as follows:

> *Where the shareholder of a company abuses the independent status of the company as a legal person or the limited liability of shareholders, evades debts and thus seriously damages the interests of the creditors of the company, he shall assume joint and several liability for the debts of the company.*

From the litigation standpoint, triggering this provision means that creditors' claims are no longer confined to the company's assets, but can penetrate to reach the personal assets of shareholders.[39] In this

---

[33] 514. F.2d 935 (10th Cir. 1975).

[34] Today, reverse piercing is regularly applied in U.S. tax cases as "*the IRS (Internal Revenue Service) routinely uses the remedy to attach assets of a corporation to satisfy debts owed by individual shareholders*." *See* Nicholas Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice* 16 N.Y. Bus. L. J. 25, 27 (2012).

[35] [2009] 1 AC 1391.

[36] *"I consider that 'Piercing the corporate veil' … is simply a label…to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate reaffirmed by the House of Lords in Salomon v A Salomon & Co Ltd [1897] AC 22… If there is a small residual category in which the metaphor operates independently no clear example has yet been identified, but Stone & Rolls Ltd v Moore Stephens [2009] AC 1391, mentioned in Baroness Hale JSC's judgement, is arguably an example*." Lord Walker of Gestingthorpe in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, at [106].

[37] STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS, 151 (2002).

[38] Chao Xi, *Piercing the Corporate Veil in China: How did We Get There?* 5 J. BUS. L. 413, 424 (2011).

[39] For this reason, some literature has given this type of case the label of shareholder liability cases. *See e.g.* KAREN VANDERKERCKHOVE, PIERCING THE CORPORATE VEIL: A TRANSNATIONAL APPROACH 13 (2007). This narrow formulation is not least owing to the fact that China does not recognise unlimited companies, i.e. limited liability is a fundamental attribute of all companies incorporated under the Company Law in China. According to Articles 2 & 3 of the Company Law of the People's Republic of China, two types of companies are permissible in China, namely limited liability companies (LLCs) or joint stock limited companies. Shareholders' limited liability is prescribed as follows: "*As for a limited liability company, the shareholders shall be responsible for the company to the extent of the capital contributions they have paid. As for a joint stock limited company, the shareholders shall be responsible for the company to the extent of the shares they have subscribed to*." "*The Chinese LLC is similar to the private company or close corporation in Anglo-American jurisdictions while the (joint stock limited company) corresponds to the public company or publicly held corporation." See* Huang, *supra* note 8, at 752.

regard, China has largely followed the US path where the bulk of the veil-piercing cases concern shareholder liability alone.[40] Further to this general legal proposition, a specific piercing rule is also provided for one-man companies in Art. 64 of the new company law scheme.[41] Thus far, in all the veil-piercing cases concerning one-man companies in China, the corporate veils have been set aside by the courts.[42]

III. LEGISLATIVE AGENDAS UNDERPINNING VEIL-PIERCING IN CHINA

A discussion of the application of veil-piercing should take as its starting point the objects it seeks to achieve, which connect primarily to the perennial conflict of interest between the members and the creditors of a corporation.[43] This section, consisting of two parts, devotes itself to this matter.

A. Balancing Shareholders' and Creditors' Interests

For many, the overwhelming entrenchment of limited liability in modern company law generates a visible discrepancy in the risks and rewards for two primary corporate constituencies – shareholders and creditors. Shareholders can cap their liability when insolvency threatens, but their chance of gain is unlimited.[44] However, the other category of suppliers of capital to a limited liability corporation are left with residual risk and become comparably disadvantaged.[45] The pragmatic continuance of such an disparity of interest has so far been justified on multiple grounds; to name but a few: creditors bear a

[40] Cheng, *supra* note 1, at 344.

[41] Given that Art. 20(3) comprises a part of Chapter 1 – General Provisions, while Art. 64 is in Chapter II which delineates special rules concerning the establishment and organisational structure of a Limited Liability Company, Art. 64 will take priority over Art. 20 in the one-man company context, in accordance with the principle that "*if a special provision differs from a general provision (in the case of national law, administrative regulations, local decrees, autonomous decrees and special decrees, and administrative or local rules enacted by the same body), a special provision shall prevail*". *See* Art. 83 of the Legislation Law of the People's Republic of China, passed on 15 March 2000, promulgated from 1 July 2000. This principle can be traced back to the doctrine *Lex specialis derogate legi generali*. Gu Jianya, *An Analysis of the Difficulties concerning the Doctrine of "Special Provisions Override General Provisions* (2007) 12 Academic Forum 124 (in Chinese).

[42] Hui Huang, *An Empirical Study on the Veil-Piercing System in China,* 34 CHINESE J. L. 3 (2012). For the purpose of this article, our discussion will focus only on practices connected to the general legal proposition of veil-piercing – Art. 20(3) of the 2005 Company Law.

[43] LAIJI HUANG *ET AL*. (EDS), WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU (完善公司人格否认制度研究) [RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY], 274 (2012).

[44] PL DAVIES, S WORTHINGTON & E MICHELER, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW, 194 (8th ed., 2009).

[45] In this regard, we are not that sympathetic to banks with qualifying security interests. It is suppliers of goods and services, and those with claims against the corporation arising out of goods and services supplied by it, who often get the raw deal. *Cf.* the "*asset partitioning*" argument, which suggests that limited liability works not only for the benefit of shareholders, but also that of creditors. Under the limited liability regime, it is presented that creditors of a company are isolated from creditors of shareholders or of other companies in a group, and as a consequence the relevant monitoring requirements and costs are effectively limited. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organisational Law,* YALE L. J. 110 (2000); John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, (ESRC Cent. for Bus. Research, Cambridge Working Paper No. 299, 2005).

substantial portion of the risk of business failure as a desirable way of maximising the firm value;[46] limited liability is indispensable in setting up and operating a mature security market;[47] and it is easier for creditors to catch sight of good investments when the personal wealth of shareholders no longer affects the financial health of the corporation.[48] On the other hand, a number of moral hazards could be generated by an unwarranted expansion of limited liability, most prominently an incentive in corporations and those running them to engage in risky activities and transferring the costs to creditors.[49] Piercing the corporate veil thus operates as an exception to the paramount limited liability regime, bestowing redress on the ostensibly weaker party – creditors – and serving a normative ideal of justice in the general economic landscape.

In China the privileges of incorporation and limited liability have been obtainable since the inception of the modern Chinese company law in 1993, enabling investors to embark on risky ventures without personal liability.[50] However, the *ex-post* creditor remedy of veil-piercing did not find a place in this framework.[51] Instead, a line of rigorous rules governing the raising and maintenance of capital – a traditional creditor protection mechanism "*as old as limited liability itself*"[52] – characterised the 1993 regime. Demanding minimum capital thresholds of between RMB 100,000 and RMB 500,000 were enshrined in Art. 23,[53] which had to be fully paid up by shareholders prior to company registration.[54] Given that the average wage of a formal employee in China in 1995 was only 5,500 RMB per annum,[55] these capital thresholds prescribed in the 1993 company law were considered almost insurmountable at that time, particularly for small businesses and individual investors. In addition to rigid minimum capital requirements, a number of strict capital maintenance rules continued to govern corporate operations,

[46] *E.g.* Posner maintains that creditors are suitable risk bearers because they are less risk averse than shareholders, or they have superior information. Richard Posner, *The Rights of Creditors of Affiliated Corporations,* 43 U. CHI. L. REV. 499 (1976). Easterbrook and Fischel contest this argument and suggest that creditors are more risk averse than shareholders. The benefit of limited liability lies primarily in that it decreases the cost of searching for good investments, for both stockholdes and creditors. *Cf.* FH Easterbrook & DR Fischel, *Limited Liability and the Corporation,* 52 U. CHI. L. REV. 89 (1985).

[47] It is submitted that limited liability facilitates the trading of the company's shares because the personal wealth and conditions of different shareholders no longer attach diverse values to companies' shares. Paul Halpern, Michael Trebilcock & Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L. J. 117, 130-1 (1980); Easterbrook & Fischel, *supra* note 47, at 92.

[48] Easterbrook & Fischel, *ibid.*, at 92.

[49] Easterbrook & Fischel, *ibid.*, at 104; Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct,* 90 YALE L. J. 1, 65–76 (1980).

[50] O. Kahn-Freund, *Some Reflections on Company Law Reform,* 7 Mod. L. Rev. 54 (1944).

[51] Although the legal representative of a corporation was not personally liable for corporate debts under the 1993 company law, the legal representative might be fined or subject to administrative sanctions if the corporation engages in business beyond its authorised scope, conceals facts from registration and tax authorities, or hides property to evade repayment of debts. Art. 49 of Company Law of the People's Republic of China (promulgated on Dec. 29, 1993 and effective Jul. 1, 1994, [hereinafter Company Law 1993]; s*ee also* Art & Gu*, supra* note 6, at 294.

[52] Davies *et al.*, *supra* note 44, at 258.

[53] The minimum capital required of a company varied in keeping with its nature of business. It was RMB 500,000 for a company engaged primarily in manufacturing or in wholesale, RMB 300,000 for a company engaged primarily in retail, and RMB 100,000 for a company engaged primarily in research and development, consultancy or service provision. Art. 23 of Company Law 1993, *supra* note 51.

[54] Art. 25 of Company Law 1993, *supra* note 51.

[55] National Bureau of Statistics of China, China Statistical Database – Average Wage of Formal Employees by Sector (end of 1995), *available at* http://www.stats.gov.cn/english/statisticaldata/yearlydata/YB1996e/D4-26e.htm.

notably, a 50% limit on outside investments that could be made by a corporation.[56] The creditor protection function of these capital rules was supposedly manifest in two aspects: they were to create genuine rather than "*empty-shell*" investment vehicles by preventing frivolous incorporation;[57] and they were to furnish a sufficient material basis – the so-called "*equity cushion*"[58] – for a company's operation so that the risk of insolvency, if not eliminated, could at least be reduced for the benefit of creditors.

Given that the Chinese legal system was primarily modelled on the legal regimes of Germany and the former Soviet Republics, both of which attached great importance to legal capital,[59] this initial inclination of the Chinese legislators to construct an integral legal capital system is unsurprising. However, the efficacy of such a legal capital regime is quite another issue. In practice, the high level of minimum capital prescribed in Art. 23 of the 1993 Company Law very noticeably depressed investor enthusiasm and discouraged the growth of new companies.[60] After all, it was arbitrary to presume that all businessmen with initial capital lower than the minimum requirement were incapable as entrepreneurs, or that they intended to misuse the corporate form. To circumvent these rigid capital rules, some regions issued their own interpretations or regulations governing corporate capital, which had the practical effect of making the 1993 company law almost fall out of use in these regions and led to significant inconsistencies in implementation.[61]

Furthermore, this "*equity cushion*" for creditors will only function if available corporate capital can sufficiently offset the risks undertaken by the company.[62] After all, creditors are more concerned about the ability of the company to pay its short-term and long-term debts, rather than the existence of a large amount of company capital reserve.[63] Imposing a minimum capital threshold with reference to a level of assets frozen arbitrarily at the inception of the corporation,[64] will hardly serve this purpose, given that subsequent events may easily render the level of initial corporate capital irrelevant.[65] In any event, the concept of legal capital has been shown to be "*more important in theory than in practice in attaining the objectives*

---

[56] To maintain the level of company capital so as to protect the interests of company creditors, Art. 12 of the 1993 Company Law stipulated that the aggregate amount of investment which a company may invest in other limited liability companies or joint stock limited companies shall not exceed 50% of the net assets of the company. As revealed in practice, this constraint has severely depressed the development of legitimate corporate activities. *See* Ping Jiang, Xudong Zhao & Su Chen, *Zhongguo Gongsifa de Xiugai ji Jiazhi (中国《公司法》的修改及价值) [The Amendment and the Value of the Company Law of PRC]* (2005), *available at* http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=31305.

[57] Gordon Y.M. Chan, *Why Does China not Abolish the Minimum Capital Requirement for Limited Liability Companies,* Comp. Law. 306, 307 (2006); ZHAO ET AL., *SUPRA* NOTE 8, at 237–239.

[58] DAVIES ET AL., *SUPRA* NOTE 44, at 263.

[59] "*The former Soviet Union Republics' reforms in the late 19th and early 20th century were modelled primarily on German law*." Owen, The Corporation under Russian Law 1800–1917 (Cambridge, CUP); *International Encyclopedia of Comparative Law, National Reports,* (Tübignen, JCB Mohr 1972), at 1.

[60] Liu, *supra* note 7, at 16.

[61] For instance, despite the 10 million RMB minimum capital prescription for setting up a joint stock company enshrined in Art. 78 of the Company Law 1993, the Shanghai municipality issued its own regulations requiring only 5 million RMB to set up a joint stock company in its own region. *See* Provisional Regulations of Shanghai Municipality on Joint Stock Companies. This Regulation remained in force until 23 September 1997, three years after the promulgation of the 1993 Company Law (effective from 1 July 1994).

[62] DAVIES ET AL., *SUPRA* NOTE 44, at 263.

[63] The High Level Group of Company Law Experts, *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe*, 79 (2002).

[64] Harvey Gelb, *Piercing the Corporate Veil – The Undercapitalisation Factor,* 59 CHI.-KENT L. REV. 1, 18 (1982–3).

[65] *Ibid.,* at 4.

that are assigned to it".[66] For regions that had complied with the 1993 capital thresholds, such stringent requirements have had little pragmatic effect in eliminating fraud and speculative activities carried out in corporate form. As has been proven in practice, rather than eliminating fraudulent "*shell*" companies and offering effective protection to creditors as intended, the period since the promulgation of the 1993 company law has seen an upsurge in chronic problems and cases in which investors evaded initial capital contribution requirements by various methods, such as not providing the stipulated amount of cash or other assets, or surreptitiously withdrawing contributed capital shortly after incorporation.[67]

In the face of a preponderance of evidence challenging the stringent legal capital rules,[68] Chinese lawmakers have increasingly been under pressure to reform company law.[69] Indeed, given accelerating economic development and globalisation, and an increased need for foreign investment,[70] China's company law reform has been set as a legislative priority in the new millennium.[71] The primary agenda of this legislative amendment emphasises "*encouraging & stimulating investment*", in line with pressure to maintain the rapidity of industrial and economic development.[72] Professor Ping Jiang, a leading member of the High-Level Expert Group for Company Law Reform, neatly stated the rationale dictating this agenda: "*We need to have businesses first before we can start talking about governing them. If we merely concentrate on disciplining the businesses, without providing sufficient support or stimulus, the nation's economic and business development will be severely jeopardised.*"[73] To this end, the balance between shareholders and creditors was tilted in the latter's favour in the 2005 company law framework, on the grounds that too much indulgence to creditors could generate hazards in terms of risk-averse decision-making and business inhibition.[74] Two amendments of company law followed this overhaul of priorities: first, provisions facilitating the creation of more forms of business, including one-man companies[75] together with greatly reduced minimum capital thresholds;[76] and secondly, provisions conferring a greater degree of autonomy on shareholders over corporate operations[77] than had existed before.[78] On a broad spectrum, this implies a greater reliance

---

[66] S*upra* note 63, at 78–9.
[67] ZHAO ET AL., *SUPRA* NOTE 8, at 244.
[68] Jiang et al., *supra* note 56.
[69] Nicholas C. Howson, *China's Company Law: One Step Forward, Two Steps Back – A Modest Complaint,* 11 Colum. J. Asian L. 127, 136 (1997); Art & Gu, *supra* note 6, at 276.
[70] Jonathan M Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process,* 51 AM. J. COMP. L. 839, 840 (2003).
[71] Ping Jiang, *Guanyu Gongsifa Xiugai de Jige Wenti (关于公司法修改的几个问题) [Several Issues concerning the Reform of Company Law of PRC]* (2006) Civil and Commercial Law Network, *available at* http://www.civillaw.com.cn/article/default.asp?id=24230.
[72] Howson, *supra* note 69, at 136.
[73] Jiang et al., *supra* note 56.
[74] It is submitted that unlike shareholders, who are residual claimants and have an allied interest with the solvent company, creditors normally secure their interests in the company via contracts and thus have an incentive to prevent managers from taking entrepreneurial risks, which may cost the company in terms of its ability to attract new investment and stay competitive in the modern business world. *See* FH Easterbrook & DR Fischel, *Voting in Corporate Law,* 26 J. L. Econ. 39 (1983); *also* A. Sandaram & A. Inkpen, *The Corporate Objective Revisited,* 15 ORG. SCIENCE 350, 354 (2004).
[75] The 2005 Company Law devoted an entire chapter to this matter. *See* Company Law 2005*, supra* note 4, Chapter 3.
[76] Prior to the 2005 reform, the minimum registering capital requirement for registering a company was 100,000 RMB. This threshold has now been reduced to 30,000 RMB. *See* Company Law 2005*, supra* note 4, art. 26.
[77] More autonomy is mainly conferred by way of improving the position of Articles of Association in determining key corporate issues, e.g. the distribution of dividends (Art. 35 of the Company Law of the PRC 2005), the amount of corporate investment or guarantee (Art. 16 of the Company Law 2005), and shareholders' voting rights (Art. 43 of the Company Law 2005). It has been proved that the revised minimum thresholds have greatly stimulated investment activities. Since the promulgation of the new Company Law, the number of registered companies has largely increased. *See* Yanfeng Chen, *Shanghai Shishi Xingongsifa de Tansuo*

on the rhetoric of the Anglo-American market-based system in today's China corporate law regime, instead of the conventional German ideals.[79]

With the policy shift in shareholders' favour comes an inevitable call for balancing the protection offered to creditors, the corollary of the privilege of limited liability.[80] Because of the frequency of misconduct among controlling shareholders against small creditors in listed companies after the promulgation of the 1993 Company Law,[81] the lawmakers cast significant doubt on the conventional *ex ante* minimum capital shield for creditors, and eventually moved towards *ex post* protection, enshrining the notion of piercing the veil of incorporation as a functional substitute. However, because of its potential to discourage investment,[82] the lawmakers emphasised on various occasions that the veil-piercing doctrine should be applied "*with great caution*".[83] From an economic standpoint, an extended application of veil-piercing would conflict with the efficient centralised decision-making apparatus, considered to be "*the hallmark of modern corporations*".[84] Growing risks of personal liability might also reduce shareholders' capacity to diversify their investment and thus increase the costs of capital for the public firm.[85] From a legal aspect, an undue exploitation of this doctrine not only runs the risk of eroding established corporate law foundation – the separate personality of the corporation and limited liability – but also has negative impacts on other aspects of law, such as taxation, environmental disputes, and security laws.[86] As reiterated by the Law Commission of China, while it is attractive to adopt the veil-piercing doctrine in order to "*protect creditors' interests and preserve normal economic order*", the application should in no way undermine the fundamental

---

(上海实施新公司法的探索) [An Exploration of the Implementation of the New Company Law in Shanghai], *in* Wanshan Gongsi Renge Fouren Zhidu Yanjiu, (完善公司人格否认制度研究), [Research into the Principle of Disregard of Corporate Personality], 184 (Laiji Huang *et al.* eds., 2012), at 184.

[78] Under the 1993 company law, shareholders were already conferred a number of rights resembling those of shareholders under American law, such as the rights to inspect financial records, elect and dismiss directors, set their salaries, and vote on fundamental changes such as mergers, dissolution and liquidation. Art & Gu, *supra* note 6, at 296.

[79] For instance, in the UK, a representative country of the Anglo-American regime, there is no minimum share capital requirement for setting up a private limited company. In stark contrast, a minimum share capital of €25,000 is required to register a private company in Germany. *See* HANNIGAN, *SUPRA* NOTE 30, at 18. In comparative studies, the Anglo-American model is often alternatively labelled the market-oriented, shareholder-centred or liberal model. The Continental model is variously known as the bank-oriented, stakeholder-centred or coordinated model. R. Aguilera, D. Rupp, C. Williams & J. Ganapathi, *Putting the S Back in Corporate Social Responsibility: A Multi-level Theory of Social Changes in Organisations,* 32 ACAD. MNG'T REV. 836 (2007); C. Williams & J. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct* (2005) 38 Cornell International Law Journal 493.

[80] After all, as presented by Kahn-Freund, it is one of the principal purposes of all corporate legislation to enforce the raising and maintaining of the capital as a guarantee fund for the company's creditors. Kahn-Freund, *supra* note 50, at 60.

[81] *保中小投资者 新《公司法》将"揭开公司面纱"The New Company Law Will Pierce the Corporate Veil to Protect Medium and Small Investors*, PEOPLE'S DAILY, Feb. 16, 2005, *available at* http://www.people.com.cn/GB/jingji/1037/3180565.html; *see also* Randall Peerenboom, *supra* note 19, at 8.

[82] David M. Albert, *Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine,* 23 U. PA. J. INT'L ECON. L. 873, 874-5 (2002).

[83] Jie Yuan, *Woguo Gongsi Renge Fouren Zhidu de Chuangshe (我国公司人格否认制度的创设) [The Establishment of the Principle of Disregarding Corporate Personality in China], in* WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU, (完善公司人格否认制度研究), RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY, 8 (Laiji Huang *et al.* eds., 2012).

[84] Stephen M Bainbridge, *Abolishing Veil Piercing,* 26 J. CORP. L. 479, 490 (2001).

[85] A strong possibility of unlimited personal liability will discourage investors to diversify their portfolios, and will consequently lead to higher costs of capital. *See* Larry E Ribstein, *Limited Liability and Theories of the Corporation* 50 MD. L. REV. 80, 101-2 (1991).

[86] ALAN DIGNAM & JOHN LOWRY, COMPANY LAW, 36 (6th ed., 2010); Huang, *supra* note 8, at 758; *see also* Gallagher & Ziegler, *Lifting the Corporate Veil in the Pursuit of Justice*, J.B.L. 292 (1990).

principle that the shareholder's liability is limited to its stated contribution to the company.[87] Underlying the narrow statutory formulation of veil-piercing is the robust unwillingness of legislators to permit limited liability to be impeded. Nevertheless, as will be explored in the sections below, judicial practice has so far largely thwarted this commendable legislative aim.

B. Accessibility and the Uniform Application of Law

Another reason to introduce veil-piercing was an accessibility agenda – to eliminate practical overlaps and duplications and provide more legal clarity for members, creditors and other related parties. Although they had no statutory authority prior to 2006, it is not as if the courts had been unable to look behind the curtain of corporate personality when they were minded to do so.[88] As admitted by the Supreme People's Court (hereinafter the SPC), "*The existing company law framework in our country has been unable to provide an effective solution to the problem [of rampant abuses of limited liability] … [There was] a sense of helplessness when [the courts] applied the existing laws, regulations, and judicial interpretations to relevant [veil-piercing] cases*."[89] In the policy debate on the enactment of the 2005 company law, placing the veil-piercing doctrine on a statutory footing was well-received on the grounds that it would render company law more accessible, better understood, and more consistently applied.[90] Accessibility generally is associated with legal transparency and ease of use, and a positive correlation can be tacitly assumed between the accessibility of the law and enhanced compliance with it.[91] The statutory provision as to veil-piercing was envisaged as a necessary condition in providing greater clarity to investors and creditors as to when, if ever, piercing would occur.[92] In terms of judicial application, it was hoped that a clearly-prescribed statutory basis would eliminate the practical diversities across local courts and ensure greater uniformity in application.[93]

An improved regulatory environment has become even more indispensible after China's accession to the WTO. As part of her conscious efforts for all-round participation, China promised in the Accession Protocol to apply and administer in "*a uniform, impartial and reasonable manner all its laws … pertaining to or*

---

[87] Kangtai Cao，*Guanyu Zhonghua Renmin Gongheguo Gongsifa Xiuding Cao'an de Shuoming (关于中华人民共和国公司法修订草案的说明) [An Explanation to the Amended Draft of Company Law of PRC],* 2005 年 2 月 25 日在第十届全国人民代表大会常务委员会第十四次会议上的讲话 A speech delivered at the Fourteenth Session of the Tenth National People's Congress on 25 February 2005, *available at* http://www.npc.gov.cn/wxzl/gongbao/2005-10/27/content_5343120.htm; *see also* Bingrong Liu, *Chengwenfa xia Gongsi Renge Fouren de Sifa Shiyong (成文法下公司人格否认的司法适用) [The Judicial Application of the Statutory Piercing the Veil Doctrine]*, *in* WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU, 完善公司人格否认制度研究， RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY, 251 (Laiji Huang *et al.* eds., 2012).

[88] Long before it was formally embodied in Company Law, veil-piercing had already been pragmatically exerted in a wide array of rules and judgements in a fragmented state. Veil-piercing used to be executed by Chinese courts on various legal grounds, including tort, agency, and the honesty and credibility principle. *See* Liu, *supra* note 7, at 16; Liu, *id.*, at 244.

[89] QIONG ZHANG (ED.) XIN GONGSIFA XIUDING YANJIU BAOGAO III 新公司法修订研究报告[RESEARCH REPORTS ON THE NEW AMENDMENTS TO THE COMPANY LAW III], 18 (2005); translated and quoted in Chao Xi, *Who Writes Corporate Law Rules? The Making of the 'Piercing the Corporate Veil Rule' as a Case Study, in* THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES, 170 (Guanghua Yu eds., 2011).

[90] Wu, *supra* note 3, at 333.

[91] Deirdre Ahern, *Directors' Duties, Dry Ink and the Accessibility Agenda,* L. Q. REV. 114, 114 (2012).

[92] Wu, *supra* note 3, at 332.

[93] *Ibid.,* at 333.

affecting trade".[94] Without a doubt this includes the designation and implementation of the provisions as to company law, vital legislation governing the primary form of business entities through which direct foreign investment in China is generally operated. [95] Given that veil-piercing connects closely with the rights, obligations and value of foreign capital in Chinese companies,[96] a clear articulation and consistent utilization of this principle is obviously an important linchpin for an integral and advanced company law regime. Looking at company law in major developed economies, the international dimension of the veil-piercing doctrine also led the lawmakers to conclude that a modern Chinese company law would look odd without one. [97] Drawing on laws from American and other Western developed economies, the inauguration of the piercing doctrine is thus regarded as a forward step towards conforming to international business standards, at least at the theoretical level.[98]

IV. CONTRAST BETWEEN RHETORIC AND REALITY

A. Applicability of the Veil-Piercing Doctrine in the State-Owned Economic Sector

Just as one would not expect legal reforms to occur in isolation from the socio-economic environment in which they operate, when a common law principle such as veil-piercing is transplanted into the Chinese legal system, inevitably its application will be affected by domestic conditions in the receiving jurisdiction. This section explores the impact of Chinese conditions on veil-piercing practice. It will be suggested that the dominance of the State has affected the even-handed legal application of veil-piercing in China. Despite the pledge of uniform application, the piercing doctrine actually works least in cases where it is probably needed the most – in relation to SOEs and large listed companies.

a. The Supremacy of the State-Owned Economy in China

Inspired and driven by Marxism,[99] which sees society as merely superstructural, reflecting underlying economic conditions and the interests of the ruling class,[100] in its early days the Chinese government

---

[94] Art 2.A.2 of Protocol on the Accession of the People's Republic of China, 11 November 2001, *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf.
[95] According to Art. 218 of Company Law 2005*, supra* note 4, the limited liability companies and joint stock limited companies invested by foreign investors shall on a general basis be governed by this Law.
[96] Howson, *supra* note 69, at 134–5.
[97] ZHANG (ED.) *SUPRA* NOTE 89, at 18.
[98] One of China's post-WTO policy imperatives is to seek conformity with long-accepted foreign norms. Pitman B Potter, *Globalisation and Economic Regulation in China: Selective Adaption of Globalised Norms and Practices,* 2 WASH. U. GLOBAL STUD. L. REV. 119, 120 (2003).
[99] "*[Marxism] is unique in that no other body of social thought became the doctrine of an important political movement and ultimately the orthodoxy of ruling parties in much of the world (initially in the Soviet Union and then the People's Republic of China).*" MDA FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, 1129 (8th edn., 2008).
[100] BIX, *SUPRA* NOTE 14, at 299.

regarded the public ownership of the means of production, represented and exerted by the State, as the one and only way of achieving Communism and eliminating unfair or oppressive aspects of society.[101] Logically, therefore, a dominant feature of China's economy since 1949 has been the dominance of enterprise owned by the State as the representative of "*the whole people*".[102] A centrally-planned model was adopted to secure the dominance of the State in the economy; decision-making power rested with the government, with business targets across all industries being planned and issued to enterprises in the form of hierarchical administrative orders.[103]

Underpinned by a subsequent ideological development that diverse business forms developed in capitalist countries could benefit a socialist system as well,[104] China's remarkable economic turnaround towards a market-based paradigm was initiated in the late 1970s.[105] This policy shift was marked by the acceptance of foreign investment,[106] the restructuring of banking and financial systems, and, most prominently, the corporatisation of many state-owned enterprises, which used to form the central pillar of the planned economy.[107] Categories of investment vehicles have also significantly expanded, after private enterprise was officially acknowledged as an important component of the national economy.[108]

Nevertheless, although the state-owned economy is now rivalled by increasingly diverse non-state sectors,[109] its primacy is far from withering away.[110] State-owned enterprises (SOEs) continue to hold a position of dominance in China's national economy, controlling natural resources, utilities, infrastructure and many other key industries.[111] As has been shown empirically, the State tightly controls China's listed

---

[101] "*At one time, the Chinese government prohibited the establishment of corporations or private ownership of stock because it deemed such concepts inconsistent with, or even heretical to, China's political and economic system.*" Art & Gu, *supra* note 6, at 282.

[102] Art & Gu, *id.*, at 276. This ideological development in the late 1970s advocates the goal of "*socialism with Chinese characteristics*", i.e., combining the basic principles of Marxism with China national specifics. *See* *马克思主义中国化的两次历史性飞跃 Marxism with Chinese Characteristics – The Two Great Leaps*, *available at* http://theory.people.com.cn/n/2012/1018/c350436-19312396.html

[103] GUANGHUA YU, COMPARATIVE CORPORATE GOVERNANCE IN CHINA: POLITICAL, ECONOMY AND LEGAL INFRASTRUCTURE 24 (2007); S Wen, *The Achilles Heel that Hobbles the Asian Giant: The Legal and Cultural Impediments to Antibribery,* 50AM. BUS. L. J. 483, 512-4 (2013).

[104] Art & Gu, *supra* note 6, at 279.

[105] Chaobin Wang*, Cong Jihuajingji dao Shehuizhuyi Shichangjiji de Weida Biange (从计划经济到社会主义市场经济的伟大变革) [A Great Transformation from the State-Planned Economy to Socialist Market Economy]* 11 XINXIANG REV. (2008), *available at* http://cpc.people.com.cn/GB/68742/127229/127250/8344596.html. At the Plenary Session of the Communist Party Central Committee in 1984, the central committee has indicated that ownership and management of state-owned enterprises may be appropriately separated. This was codified in 1988, in the form of the Law on Industrial Enterprises Owned by the Whole People. *See* Art & Gu, *supra* note 6, at 278–9.

[106] The availability of Class B shares (for foreigners) and Class H shares (for shares traded on the Hong Kong stock exchange), beginning at the end of 1992, is indicative of China's openness to foreign investment. *See* Andrew Xuefeng Qian, *Riding Two Horses: Corporatizing Enterprises and the Emerging Securities Regulatory Regime in China,* 12 UCLA PAC. BASIN L. J. 62, 67 (2003).

[107] Peerenboom, *supra* note 16, at 172–3.

[108] Constitution of the People's Republic of China, amended on March 14, 2004, Art. 11.

[109] Lubman, *supra* note 10, at 6.

[110] Peerenboom, *supra* note 16, at 173. Such liberal reforms of SOEs reached their peak with China's WTO entry in 2001, but slowed after 2006 and then went into reverse, particularly after the financial crisis created serious doubt about the efficiency of free markets. *See State-Owned Enterprises: The State Advances*, THE ECONOMIST, Oct. 6, 2012, *available at* http://www.economist.com/node/21564274.

[111] Jonathan R. Woetzel, *Reassessing China's State-Owned Enterprises,* MCKINSEY QUARTERLY (July 2008) *available at* http://www.mckinseyquarterly.com/Reassessing_Chinas_state-owned_enterprises_2149. China's state-owned enterprises also play an important role in the international arena, too. According to the US congressional commission, state-owned companies accounted for 90% of the value of Chinese investments in the US industrial machinery, aerospace, automobile and logistics industries between 2007 and the third quarter of 2011. Bob Davis, *China's Investments Prompt Call for New Rules*, THE WALL STREET JOURNAL, Jan. 6, 2013.

firms through both concentrated ownership and influence on the boards; the ultimate controlling shareholders for more than 80% of Chinese firms are central or local governments.[112] Government agencies and government-affiliated entities together account for approximately 70% of the shares of listed Chinese corporations, and government representatives generally dominate the boards of these corporations.[113] Up to 2008, the State was the biggest shareholder in 85% of the listed companies in China.[114] Although the number of shareholders of listed companies has increased over the past three years, indicating a trend towards dispersed shareholding,[115] the State still has a predominant position. In 2012, within the top one hundred listed companies the largest state-owned shareholding amounted to 84%, while the highest percentage of private shareholding was only 13%.[116]

b. State-owned Economy in Law

Reflecting "*a regulatory ethic that posits the state as the primary agent for economic and social development*",[117] law in China is mainly construed as a means to achieve the strategic goals set by the State,[118] and the debate about whether China is now at the thin end of a "*rule of law*"[119] or subscribing to a "*rule by law*"[120] does not detract from this widespread "*ideology-ridden*" instrumental vision of law.[121] Some contend that this instrumental view imitates legal positivism, with legal rights defined as "*grants from the State that may be*

---

[112] Qiao Liu, *Corporate Governance in China: Current Practices, Economic Effects, and Institutional Determinants,* 52 CESIFO ECON. STUD. 415, 429 (2006).
[113] *Id.,* at 446.
[114] Ciyun Zhu, *Yige Xuyao Jiji bing Jinshen Shiyong de Sifa Guize, (一个需要积极并谨慎适用的司法规则) [A Doctrine that Needs to be Proactively yet Cautiously Applied]*, *in* WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU (完善公司人格否认制度研究) [RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY], 204 (Laiji Huang *et al.* eds., 2012).
[115] Protiviti Risk & Business Consulting, *Corporate Governance Assessment Summary Report on the Top 100 Chinese Listed Companies for 2012* (Chinese Academy of Social Sciences, 2012), *available at* http://www.protiviti.co.uk/China-en/Documents/CN-en-2012-Corporate-Governance-Survey-Report.pdf, at 10. It was suggested by Chen that the policy imperative in the setting of Chinese stock markets was to shift the burden of loss made by SOEs from the state to the market. Zhiwu Chen, *Capital Market and Legal Development: the China Case,* 14 CHINA ECON. REV. 451, 456 (2003).
[116] Protiviti Risk & Business Consulting, *ibid.,* at 10.
[117] Pitman B Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control*, 141 CHINA Q. 155, 156 (1995).
[118] This is in line with socialist legal theory, which conceives law as a tool of the ruling class. *See* John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery,* 20 U. PA. J. INT'L ECON. L. 735, 782–3 (1999).
[119] A thin theory of the rule of law circumvents debating the impact of political theories and emphasises only "*the formal or instrumental aspects*" of law. Thick versions of the rule of law, on the other hand, reiterate elements of political morality, and intertwine aspects of law and political regimes. *See* Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China,* 23 MICH. J. INT'L L. 471, 471–473 (2002). Judging by these thick versions, many regard China as lacking an established Western pattern of rule of law, which connects primarily to the Western conception of liberal democracy, underpinned by the multi-Party mechanism. For blame placed on China's political ideology and the consequent failure to realise the rule of law in China, *see* Donald Clarke, *The Bo Xilai Trial and China's 'Rule of Law': Same Old, Same Old*, THE ATLANTIC, Aug 21, 2013, *available at* http://www.theatlantic.com/china/archive/2013/08/the-bo-xilai-trial-and-chinas-rule-of-law-same-old-same-old/278868/; Chun Peng, *Is the Rule of Law Coming to China?* THE DIPLOMAT, Sept. 10, 2013, *available at* http://thediplomat.com/2013/09/10/is-the-rule-of-law-coming-to-china/.
[120] "*Legal systems in which the law is only a tool of the State are best described as rule by law, whereas legal systems in which the law (at least in theory) imposes meaningful limits on State actors may merit the label rule of law.*" Peerenboom, *id.*, at 521, footnote 137. Peerenboom saw "*China's legal system as in transition toward rule of law but still falling short of the minimal standard of achievement required to be considered rule of law.*" *Id.,* at 525. In any event, the distinction between the rule of law and rule by law is not central to our discussion in this paper, as it is more of a conceptual division rather than a pragmatic one. In practice, there is no legal system that merely imposes limits on the State without encouraging the power of the State. It is also hard to draw the line of "*meaningful limits*", as advocated by thick versions of rule of law theory.
[121] Jianfu, Chen, *The Revision of the Constitution in the PRC, A Great Leap Forward or a Symbolic Gesture?* 53 CHINA PERSPECTIVES 1, 4 (2004).

revoked and limited by the State as it sees fit".[122] That said, the historical evolutions of different legal systems have established that any rule of law and governance is embedded in and compatible with a particular institutional and value complex,[123] stemming from economic forces[124] and including coercive political power[125] and normative pressures beyond legal forces.[126] Likewise, the instrumental view of law in China also derives from its socio-economic contextual complex. Its profound historical heritage of Confucianism demanded collectivism and hierarchical obedience,[127] and regarded the laws as a set of commands for assisting government bureaucrats as they governed the country.[128] Since 1949, the dominant Marxist jurisprudence also consolidated the view of law as a means to State economic and political ends. Though Marxists argue that the State and laws will eventually "*wither away*" with the realization of a communist society, Chinese scholars believe that the nation is still at an "*initial stage of socialism*", and laws and legal institutions are still necessary to achieve social solidarity and promote policy imperatives.[129] Understandably, the supremacy of the state-owned economy is legitimised and reiterated in legal terms. As prescribed in the Constitution, the basis of the socialist economic system of the PRC is state-owned economy, representing "*socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people*".[130] As to private economic sectors, which foreign investment and other private property rights fall within, they are "*an important (but not leading) component*" of China's economy, and remain under the State's supervision and control.[131] In terms of business operations, the superiority of state ownership directly connects to a dynamic by which governance is pursued by a sovereign political authority.[132] Recent legislative developments further consolidate the superiority of state property rights, signifying the government's efforts to preserve domestic values while

[122] Peerenboom, *supra* note 119, at 483.
[123] Peerenboom, *supra* note 19, at 4.
[124] M. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANISATIONAL FORMS (2000).
[125] E.g. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 69, 93–109 (Jeffrey N. Gordon & Mark J. Roe eds 2004).
[126] Ruth V Aguilera & Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants* 28 ACAD. MGMT REV. 447, 449 (2003); NW Biggart, *Explaining Asian Economic Organization: Toward a Weberian Institutional Perspective,* 20 THEORY & SOC'Y 199 (1991).
[127] The concept of Guanxi, originally derived from the Chinese language, is now widely used to describe the special relationships and interconnections among people in Chinese society. Howard Davies, Thomas K.P. Leung, Sherriff T.K. Luk & Yiu-hing Wong, *The Benefits of "Guanxi": The Value of Relationships in Developing the Chinese Market*, 24 INDUS. MAR. MGMT. 207 (1995).
[128] Lubman, *supra* note 10, at 4.
[129] *社会主义初级阶段主要矛盾, The Main Conflicts in the Initial Stage of Socialism*, available at http://dangshi.people.com.cn/GB/165617/173273/10357187.html. *Also* Orts, *supra* note 20, at 106, "*The Chinese government seems to be moving strongly toward adopting rule by law in the instrumental, positivist sense of creating consistent and uniform "rules of the game" needed for a modern market economy.*"
[130] Constitution of the People's Republic of China, amended on March 14, 2004, Art. 6.
[131] Constitution of the People's Republic of China, amended on March 14, 2004, Art. 11.
[132] Potter, *supra* note 98, at 125. Such an overriding position of the state-owned economy and state control over private sectors remains immune to challenge, as "n*o laws or administrative or local regulations may contravene the Constitution*." Constitution of the People's Republic of China, amended on March 14, 2004, Art. 5.

transplanting global norms.[133] For instance, although recent developments of property law bear the strong imprint of the Western tradition, they in no way threaten the supremacy of the state-owned economy.[134]

c. Incompatibility between the State-Owned Economy and Veil-Piercing – The Ideological Aspect

For the purpose of this article, we need not try to seek answers about the desirability of state dominance in China.[135] What does need to be acknowledged, however, is that this fundamental socio-economic attribute clearly affects the application of veil-piercing in China, which fits awkwardly into an economic context overwhelmingly dominated by the State.[136] SOEs in China were originally conceived as vehicles of a centrally-controlled State plan, with no independent legal personality to pierce.[137] Liability wasn't an issue because it would normally be a case of one state enterprise against another, best resolved by central control. While a number of SOEs were later corporatised into "*companies limited by shares*" and were thereby afforded independent status, the State as shareholder still occupies a controlling position in the reformed entity.[138] A direct consequence of veil-piercing in these enterprises would be to hold the controlling shareholder, i.e. the State, directly liable. The plausibility of doing this remains highly controversial since it could be construed as a potential threat to the dominance of State ownership over private capital, which goes against the long-established Chinese socialist economy ideology as enshrined in the Constitution.[139] As for state monopolies, recast as "*wholly state-owned limited liability companies*",[140] there remains a vast number of these in the Chinese economy.[141] In legal terms they are a form of business unit "*under ownership by the whole people*",[142] with every Chinese citizen being the owner of each

---

[133] For instance, in the General Principles of Civil Law (1986), while some global norms including party equality, party autonomy and the protection of citizens' lawful rights and interests are included, it is emphasised that these were "*to meet the needs of the developing socialist modernization*". *See* General Principles of the Civil Law of the People's Republic of China, Adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 and promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, Art. 1.

[134] "*In the primary stage of socialism, the State upholds the basic economic system under which public ownership is dominant and the economic sectors of diverse forms of ownership develop side by side.*" Property Law of the People's Republic of China, No. 62, effective from October 1, 2007, Art. 3. *See also* Potter, *supra* note 98, at 127.

[135] As a matter of fact, China's SOEs have maintained their economic dominance as Chinese industry advances and are considered to be a major driver of China's fast-growing national economy. *See* Michael Schuman, *Are China's Big State Companies a Big Problem for the Global Economy?* TIME, Feb 15, 2012, *available at* http://business.time.com/2012/02/15/are-chinas-big-state-companies-a-big-problem-for-the-global-economy/.

[136] Nicholas Calcina Howson, *Judicial Independence and the Company Law in the Shanghai Courts, in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, 138 (Randall Peerenboom ed., 2010). As argued by Huang, though SOEs can be either in the camp of shareholder or that of creditors, the interests of shareholder SOEs prevail when these two rival interest groups are in conflict. Huang, *supra* note 8, at 768.

[137] Howson, *supra* note 69, at 130.

[138] Howson, *supra* note 69, at 132.

[139] *Supra* notes 130–131.

[140] Art. 65 of the Company Law 2005, *supra* note 4, "*The term 'wholly state-owned company' … refers to a limited liability company incorporated wholly through investment by the state…"*

[141] The revised 2005 Company Law devoted an entire section to wholly state-owned companies. *See* Section Four of the Company Law 2005, *supra* note 4.

[142] SHIZHONG DONG ET AL., TRADE AND INVESTMENT OPPORTUNITIES IN CHINA – THE CURRENT COMMERCIAL AND LEGAL FRAMEWORK, 25 (1995); *see also* Art. 3 & 4 of the Law of the People's Republic of China on the State-owned Assets of

SOE.[143] The efficacy of veil-piercing in a wholly state-owned company is even more questionable, as theoretically the claimant may overlap with the respondent – a Chinese citizen creditor with unsatisfied claims is in law also a shareholder of the SOE concerned, with an equal share of ownership interests to be claimed against.

As well as ideological incompatibility, enforcing veil-piercing in a SOE context can be pragmatically thorny. Though a policy of "*separating government functions from those of enterprises*" has been established as a core guideline for the new round of Chinese reforms[144] and primarily targets state-owned enterprises,[145] current practice still fully embraces an impenetrable legacy of administrative control when it comes to the supervision and management of state-owned assets. According to Article 11 of the Law on the State-Owned Assets of Enterprise,[146] ownership rights attached to state-owned assets are executed by the State Councils and local governments, who shall delegate their rights to State-owned Asset Supervision and Management Commissions to supervise and manage state-owned assets. Leaving aside the closed governance circuit of these Commissions, which perform both as inspectors and as managers of state-owned assets, they need to report to the local governments on a regular basis about their work in supervising and managing the State-owned assets,[147] and governmental approval must be sought by the Commissions prior to decisions about important matters, including the separation, merger, insolvency or dissolution of state-owned enterprises.[148] Furthermore, underpinned by the policy imperative of preventing the loss of state-owned assets,[149] strict assessment rules apply to all state-owned assets in China, particularly when they need to be transferred or used to discharge a debt.[150] Thus, if the veil of a state-owned enterprise on the brink of insolvency is pierced by the court, leaving aside the lengthy assessment process, the judgement would not be enforceable unless the approval of both the local government and the Commission can be obtained. Relying on authorisation power and control over the Commissions, governments can, if they so desire, steer companies and piercing suits in a favourable direction. From the litigation standpoint, there is little sense for a claimant in even trying to pierce the corporate veil, as he is unlikely to extract money from the State, unless it chooses to pay.

Enterprises (adopted at the 5th session of the Standing Committee of the 11th National People's Congress of the People's Republic of China on October 28, 2008, promulgated and effective on May 1, 2009).

[143] The State Council and local governments exercise the ownership rights of State-owned assets as surrogates of the people. *See* Chuan Roger Peng, *Limited Liability in China: A Partial Reading of China's Company Law of 1994*, 10 COLUM. J. ASIAN L. 263, 264 (1996); SHIZHONG DONG ET AL., *id.,* 25.

[144] THE STATE COUNCIL, CHINA'S CONDITIONS AND POLICIES – WHITE PAPER [中国的能源状况与政策], Dec. 2007; the Chinese version is available at http://www.gov.cn/zwgk/2007-12/26/content_844159.htm.

[145] *See* Art. 7 of Interim Measures for the Management of the Transfer of the State-owned Property Right of Enterprises, issued by State-owned Asset Supervision and Administration Commission of the State Council, and Ministry of Finance on Dec 31, 2003, effective on Feb 01, 2004, [hereinafter Interim Measures].

[146] Law of the People's Republic of China on the State-Owned Assets of Enterprise 中华人民共和国企业国有资产管理法, promulgated by the NPC on 28 October, 2008, effective from 1 May, 2009, art. 11; *See also* Interim Measures, *id.,* Articles 4.

[147] Interim Measures, *id.* art. 15.

[148] Interim Measures*, id.* art. 21.

[149] Art. 1 of the Interim Measures for the Administration of Assessment of State-Owned Assets of Enterprises, 企业国有资产评估管理暂行办法, issued by State-owned Asset Supervision and Administration Commission of the State Council on August 25, 2005, effective on September 1, 2005.

[150] Art. 47 of the Law of the People's Republic of China on the State-Owned Assets of Enterprise; Art. 6 of the Interim Measures for the Administration of Assessment of State-Owned Assets of Enterprises, *ibid.*

Incompatibility between the State-Owned Economy and Veil-Piercing – The Practical Aspect

With many issues affecting the reconciliation between veil-piercing and state-owned businesses, it appears "*unrealistic*" to think that lawmakers and judiciaries could carry the full burden of resolving these complexities,[151] especially when they, like any other institutional actors, tend to respond strategically to the political and economic elite.[152] The awkwardness of the veil-piercing doctrine in the state-owned enterprise context has already been demonstrated in the company lawmaking process, implicating the dependency approach to legal development in China.[153] A wide cross-section of the elite among the Party and government officials produced input during the consultation process.[154] In particular, the lawmakers were closely attuned to the views of state-owned enterprise institutions and government agencies, who expressed strong apprehensions about a full-scale imposition of established foreign norms.[155] One major concern raised was that the prevalence of veil-piercing is out of sync with the predominance of state ownership in business activities.[156] Not least owing to the idea that piercing would open up a floodgate for piercing claims against SOEs, subsequently inflicting huge losses in terms of state-owned assets,[157] the lawmakers steered clear of the clearly-prescribed draft version[158] and instead shaped Article 20(3) in its current vague form. From a jurisprudential perspective, this evidences the strong hold of the instrumental character of the law in China. Legal reforms do not occur within a political vacuum, and for reforms to be successful, they must take into account relevant interests and existing conditions, and make compromises whereas necessary.[159]

Consistent with the socialist tendency to view law in instrumental terms, while the courts enjoy functional independence,[160] they also uphold the substantive agendas set by the Party and allegedly prioritise the harmony of Chinese society over the interests of individuals.[161] When they are construing and applying

---

[151] IFES/USAID, *Guidance for Promoting Judicial Independence and Impartiality* (2002), at 6, available at http://transition.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf. In practice, disputes concerning state-owned assets and SOEs are mainly addressed via administrative means. *See infra* note 166.

[152] Peerenboom, *supra* note 19, at 3; *also* Zhu, *supra* note 8, at 53, suggesting that the Party's intervention has prevented to some extent "*judicial corruption and judicial arrogance, two common by-products of the judiciary's ongoing transformation*…"

[153] For a general discussion of the implications of the dependency approach in East Asia, *see* Frederic C. Deyo, *Introduction, in* THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM, 11–22 (Frederic C. Deyo ed., 1987).

[154] Corne, *supra* note 17, at 379.

[155] Chao Xi, *Who Writes Corporate Law Rules? The Making of the 'Piercing the Corporate Veil Rule' as a Case Study, in* THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES, 168 (Guanghua Yu ed., 2011).

[156] *Id.,* at 168; Further information is available on the SASAC's website: http://www.sasac.gov.cn/n2963340/n2963393/2965120.html.

[157] Xi, *supra* note 155.

[158] The initial draft contained a clear and specific standard of piercing. For further details *see* Huang, *supra* note 8, at 772–3.

[159] Peerenboom, *supra* note 19, at 6.

[160] Judicial independence is established as a fundamental principle underpinning all Chinese laws, as specified in Article 126 of the Constitutional Law of PRC: *The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organisations or individuals*.

[161] In the 2013 SPC Work Report, it was emphasised that the operation of the SPC should follow the strong leadership of the CPC, and uphold the grand theme of "*serving the major objectives and administering justice for the people*" (为大局服务，为人民司法). *See* Shengjun Wang, *Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告) [The Work Report of the SPC]*, presented at the third plenary meeting of the first session of the 12th National People's Congress at the Great Hall of the People in Beijing,

legislative instruments, courts inevitably revert to whether the application serves the growing potency of China's economic development and societal harmony,[162] contending that this helps to thwart rule fetishism[163] and realise the "*spirit*" rather than the "*letter*" of the law.[164] In practice, in courts' practice there is great deference to State policy and administrative decisions, manifest in their reluctance to review administratively-related disputes.[165] Most disputes concerning SOEs are still addressed between government departments in a wholly political forum, regardless of the increasing rhetoric of enhancing market actor autonomy against the State.[166]

Setting aside the conundrum of the particular instances when law should give way to State policy imperatives, the congruity of veil-piercing as a legal transplant has been compromised by this instrumental view. Evidence shows that courts in China have been carefully circumventing the use of veil-piercing for state-owned assets: not only SOEs but also large listed companies have so far been insulated from veil-piercing claims in China.[167] A detailed study of more than a thousand corporate law cases in Shanghai courts between 1992 and 2008 revealed that the courts have refused to accept jurisdiction over certain disputes due to the influence of the economic and political powers involved in the case.[168] Among the corporate cases that courts are reluctant to hear, many involved parties are state-owned enterprises or wholly state-owned companies.[169] Evidence also suggests that the courts have been "*specifically directed not to accept*" public company cases, or steered these cases into political and administrative channels for settlement – between 1992 and 2008, topics relevant to public companies accounted for less than 1 per cent of the available case opinions.[170] This is not least owing to the overriding proportion of State ownership in public companies in China, and the close ties between corporate insiders and the ruling political elite.[171]

While the courts' reluctance to apply the veil-piercing doctrine to state-owned enterprises and listed companies might be construed as serving the national economic and political policy imperatives, it runs counter to the legislative goals of piercing. As discussed above, the incorporation of this doctrine into the new company law regime was in large part occasioned by the misconduct of controlling shareholders

---

March 10, 2013. The Chinese version is *available at* http://paper.people.com.cn/rmrb/html/2013-03/22/nw.D110000renmrb_20130322_2-02.htm.

[162] Lubman, *supra* note 10, at 5. A typical example is the courts' reluctance to accept and allow corporate dissolution-liquidation pleadings in contravention of the law, as the fall of corporate enterprises is generally considered as shedding negative impacts "*in different degrees on market order and stability*", including increasing unemployment and rising social costs. Howson, *supra* note 136, at 143.

[163] Rule fetishism is used to "*describe an excessive attachment to the letter of the law in contradiction with logic, convenience, and justice.*" *See* Julieta Lemaitre, *Legal Fetishism: Law, Violence, and Social Movements in Columbia* (2008) 77 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 331, at 332.

[164] Corne, *supra* note 17, at 412.

[165] Zhu, *supra* note 8, at 60; Peerenboom, *supra* note 119, at 509.

[166] Howson, *supra* note 136, at 138–9.

[167] Since the promulgation of the new Company Law, all successful veil-piercing cases have occurred in small limited liability companies in China. Hui, *supra* note 42, at 3.

[168] Howson, *supra* note 136, at 137-8; Xin He, *The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts, in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, 180 (Randall Peerenboom ed., 2010).

[169] Howson, *supra* note 136, at 138.

[170] Howson, *supra* note 136, at 144–146.

[171] *Supra* note 112–116.

against small creditors in listed companies.[172] The inapplicability of piercing against state-owned businesses to a certain extent compromises the uniformity of application promised by the Chinese government in the WTO protocol and also inhibits foreign investors' enthusiasm for doing business in China. As noted by OECD, among the issues surrounding the current regulatory framework in China, a prominent difficulty for foreign businesses is the lack of transparency regarding strategic assets (i.e. large SOEs) in terms of policy and management.[173] During the company law drafting process foreign scholars suggested that the application of Article 20(3) should exclude foreign businesses, so that foreign investors would not be forced to bear all the piercing liabilities in a company with state-owned assets.[174] Though the suggestion was eventually turned down, the SPC has promised follow-up judicial interpretation to clarify this matter.[175] The interpretation has yet to be produced, and the probability of selective application remains at the time of writing. Given the incompatibility between this generalised corporate law principle and state-owned businesses, although China's lawmakers were wholeheartedly committed to establishing a veil-piercing regime to impose effective constraints on limited liability, the piercing doctrine will likely continue to be selectively applied and be the least effective in cases where it is probably needed the most – i.e. in the context of SOEs and large listed companies.

B. Veil-Piercing Practices in Private Company Contexts

As well as its limited application in the state-owned sector, dictated by the unique Chinese socio-economic setting, the application of veil-piercing in other business sectors (mainly private companies[176]) also informs a cumulative number of clashes between "*law*" and *"truth and substance*",[177] manifest in both the over-application of the principle in certain contexts and various inconsistencies in implementation.

As presented by Peerenboom, "*congruence of laws on the books and actual practice supposes institutions for implementing and enforcing laws*."[178] While a full discussion of the role of legal institutions in shaping practices might cause us to digress, several institutional deficiencies that are exploited in veil-piercing practice do warrant further attention. As will be seen in the sections below, a number of legal institutional deficiencies, including a lack of authoritative guidance, conflicting views on judiciary discretion, and loopholes in

[172] *保中小投资者 新《公司法》将"揭开公司面纱"The New Company Law Will Pierce the Corporate Veil to Protect Medium and Small Investors*. PEOPLE'S DAILY, Feb. 16, 2005, *available at* http://www.people.com.cn/GB/jingji/1037/3180565.html; *see also* Peerenboom, *supra* note 19, at 8.
[173] OECD Directorate for Financial and Enterprise Affairs Investment Committee, *Preliminary Findings and Issues for Guidance by the Committee, in China's Mergers and Acquisitions Policies,* (2005 Project, Oct. 14, 2005), at 23–27.
[174] Ping *et al., supra* note 56.
[175] *Id.*
[176] In China, piercing claims almost invariably happened in private companies. Huang, *supra* note 42, at 3.
[177] Kahn-Freund, *supra* note 50, at 57.
[178] Here we adopt the broad conception of institutions, including considerations of ideology, social norms, organisational structures and cultures, rules, purposes and outcomes, and moral agendas, to name but a few. *See* Peerenboom, *supra* note 119, at 480 & 505.

related areas of law, have all contributed towards exacerbating pragmatic incongruities, quite apart from the complexity arising from the intensely factual nature of piercing cases.

a. Over-application of the Principle

At its minimum, congruence between laws on the books and actual practice requires laws to be applied in a way that "*does not completely defeat people's expectations*".[179] However, in contradiction to legislators' reiteration that veil-piercing is an exception rather than a norm and that it should be applied with extreme caution,[180] an inclination towards over-usage is shown in practice.[181] The overall rate of piercing in China has so far been significantly higher than in overseas countries, and it is rising on a yearly basis.[182] In many instances the doctrine has been overstretched or incorrectly invoked, a typical instance being shareholders' capital contribution. As initially asserted by a 1994 SPC guidance[183] and now enshrined in the 2005 Company Law, the shareholders of a company are accountable for the company's debt under two undercapitalisation circumstances: (1) if the shareholders' actual capital injection in the company has met the minimum capital requirement in law but failed to pay in full the amount of the company's registered capital, shareholders should be liable for the unsettled claims of the company up to the difference between registered capital and paid-up capital;[184] (2) if shareholders fail to inject capital into the company, or the company's paid-up capital fails to meet the minimum legal capital threshold, shareholders should bear all liabilities thereby incurred, primarily debt obligations.[185]

Judging from an ideological perspective, while both circumstances specified above lead to shareholders' liability, it would be inappropriate to categorise either of them into the narrowly-prescribed scope of Article 20(3) of the 2005 Company Law. In the first instance, a shareholder failing to make scheduled capital contributions is mainly in breach of contract towards the detriment of shareholders who have made their capital contributions on schedule and in full amount, rather than jeopardizing creditors'

---

[179] Peerenboom, *ibid.*, at 480.

[180] As stated by Min Liu, a judge sitting on the SPC, "*between the separate legal personality doctrine and the piercing doctrine, the former undoubtedly presides. What merits special attention in judicial practice is that we cannot easily refute the limited liability of shareholders in the name of creditor protection. Simply put, we cannot overuse the doctrine of piercing the veil.*" *See* Min Liu，*Faren Renge Fouren Zhidu zai Ge'an zhong de Shenzhong Shiyong (法人人格否认制度在个案中的慎重适用) [A Cautious Application of the Veil-Piercing Doctrine],* 1 GUIDANCE AND REFERENCE TO CIVIL AND COMMERCIAL JUDGEMENTS IN CHINA (2005) *available at* http://www.civillaw.com.cn/article/default.asp?id=29016.

[181] Liu, *supra* note 87, at 244; Huang, *supra* note 8, at 748.

[182] Huang, *supra* note 42.

[183] Guanyu Qiye Kaiban de Qita Qiye Bei Chexiao Huozhe Xieye hou Minshi Zeren Chengdan Wenti de Pifu (最高人民法院关于企业开办的企业被撤销或者歇业后民事责任承担问题的批复) [Reply issued by the SPC to the Higher People's Court of the Guangdong Province On the Assumption of Civil Liability after an Enterprise Established by Another Enterprise has been Closed or Gone Out of Business], Mar. 30, 1994, FAFU(1994) No.4 [hereinafter Reply 1994].

[184] S. 1(2) of Reply 1994; *also* Art. 28 & 31 of the 2005 Company Law

[185] S. 1(3) of Reply 1994; Art. 23 of Company Law.

interests, which would not prevail until the company is on the brink of insolvency.[186] Likewise, the second instance is not simply related to veil-piercing – according to Article 23 (2) of the 2005 Company Law, capital contributions of shareholders reaching the statutory minimum amount of capital is a necessary precondition of incorporation. If shareholders' capital contributions fail to meet the minimum legal threshold, the company will never be duly incorporated and thus would not have a separate legal status,[187] let alone any scope for disregarding such a legal existence. However, there have been a large number of judicial decisions mistakenly drawing on Article 20(3) and categorising cases of these two types into the "*piercing the corporate veil*" category. For instance, in *Huaxia Bank Shanghai Branch v Shareholders of Shanghai Huadong China Petrol Trade Co.*,[188] shareholders failed to make the amount of capital contributions specified in the Articles of Association, which resulted in the company's registered capital amounting to less than the minimum capital threshold. The court agreed that this company had never been conferred a separate legal status because the essential requirements of incorporation had never been met, but in reaching this conclusion it erroneously drew on Article 20(3) as the legal basis, which only concerns shareholders abusing the separate legal status of a duly incorporated company.

b. Loose Drafting and Inconsistencies in Application

When indicating the fragilities of piercing practice, many scholars take issue with the level of generality at which the piercing provision is pitched. As argued, piercing has always been an area characterised by issues of an intensely factual nature, and it is in need of detailed guidance in terms of application.[189] While the general proposition in Article 20(3) is a useful rule of thumb, it does not map out the legitimate province of the piercing doctrine. With important terms such as "*abuse*" undefined, neither does it obviate the need for relevant parties to seek additional guidance for application, or instruct the courts how to proceed with analysing a veil-piercing case.[190] After all, the more meticulous-drafted a law, the more robust its implementation – precision minimises wrongdoing in action.[191] The inherent vagueness of Art. 20(3) unquestionably leads to inconsistencies in practice, and further widens the gap between the designated goal of restrictive application and pragmatic extravagance.[192]

---

[186] Art. 28 of Company Law 2005, *supra* note 4. Likewise, in England, a large number of cases, dating from the nineteenth century when partly-paid shares were the norm, provided that the shareholders could be sued for the difference when the company goes into insolvency, but not on the ground of veil-piercing.

[187] LINQING WANG, GONGSI SUSONG CAIPAN BIAOZHUN YU GUIFAN (公司诉讼裁判标准与规范) [THE JUDGING CRITERIA AND REGULATION OF CORPORATE LITIGATION], 115 (2012).

[188] 华夏银行股份有限公司上海分行诉上海华东中油石油销售有限公司等股东滥用公司法人独立地位和股东有限责任赔偿纠纷案 (2008).

[189] Gelb, *supra* note 64, at 2; *see also United States v Standard Beauty Supply Stores, Inc.,* 561 F.2d 774, 777 (9th Cir. 1977), in which the court commented that *"[w]hether the corporate veil should be pierced depends upon the innumerable individual equities of each case".*

[190] Wu, *supra* note 3, at 333.

[191] Corne, *supra* note 17, at 376.

[192] Wu, *supra* note 3, at 330.

While the loose drafting of law might indeed be a convenient causal factor, it would be wrong to overstate its effect in bringing about the practical discrepancy, and a blank denunciation of the ambiguity of Article 20(3) fails to capture the complex reality. In point of fact, it is appropriate to portray loose drafting and principle-like pronouncements as a major characteristic of all basic laws and statutes in China.[193] This to some extent is due to the short development period of Chinese law, and the lack of experienced draftsmanship – after all, the present Chinese legal system is mainly a product of legal efforts undertaken since the 1980s, an astonishingly short period of time in comparison with the centuries over which similar Western legal institutions developed.[194] Omissions and general catch-call clauses are inevitable occurrences when lawmakers have to design a rule from scratch and have no precedent to build upon.

However, the major rationale dictating such broadly worded legislation is that Chinese lawmakers intend them to be exactly that. Based on an instrumental understanding, the "*old school*" Chinese jurists consider law to be superstructural and mere reflections of the economic base of society.[195] Given the sweeping scale and rapidity of economic reform in China, it is seen as imperative that legislation should begin in a principle-like fashion, as "*fluid and changeable as the economy and society which it is supposed to regulate*."[196] As the dynamics of the economy develop and the variations of enterprises change, a broadly-worded law may provide adequate scope for corresponding pragmatic experimental action,[197] enabling lawmakers to "*integrate theory with practice*".[198]

Nevertheless, inherent in such a principle-based legal system is an acknowledgement that minutiae must be covered by additional rules and interpretations outside the confines of relevant statutory statements.[199] When new situations emerge, the catch-all basic law will quickly be supplemented by additional rules and interpretations providing points crucial to the application, which can be promulgated and changed much more easily than the basic law itself.[200] Therefore, the ambiguity accompanying the flexibility brought about by the generic and abstract piercing provision can and should, at least in theory, be mitigated by deftly tailored interpretations.[201] This echoes the thoughts of Chinese company lawmakers, who expect that the statutory piercing provision will form a rough legislative architecture conveying the spirit of the law, with follow-up judicial interpretations providing accessible guidance for users.[202] Additional interpretations are expected to be provided by both the State Council or other administrative authorities

---

193 Corne, *supra* note 17, at 375; Lubman, *supra* note 10, at 11.
194 Lubman, *supra* note 10, at 7.
195 Lubman, *supra* note 10, at 36; Corne, *supra* note 17, at 374; BIX, *SUPRA* NOTE 14, at 277.
196 Corne, *supra* note 17, at 375.
197 *Ibid.*
198 "*Integrating Theory with Practice*" was one of the fundamental points in Mao Tse-tung's thought, and it remains the primary principle guiding CCP's practice today. *See* *坚持理论和实践相结合的作风 Continuing Integrating Theory with Practice,* available at http://dangshi.people.com.cn/GB/165617/173273/10415371.html.
199 Ahern, *supra* note 91, at 124.
200 Immanuel Gebhardt & Matthias Mueller, *China's New Government Procurement Law: A Major Step towards Establishing a Comprehensive System?* 7-8 CHINA LAW & PRACTICE, 23-4, (2002).
201 Corne, *supra* note 17, at 375; Ahern, *supra* note 91, at 124.
202 Cao， *supra* note 87.

in the form of regulations or administrative rules, and the SPC on matters "*concerning specific application of laws and decrees in judicial proceedings*".[203]

However sensible this may sound from a jurisprudential perspective, the institutions and interpretations that characterise the Chinese legal environment have not been as effective as envisaged in sweeping away the ambiguities. It follows from observations that boundaries of the multiple sources of law and the power allocations among institutions to make and interpret laws have been left undefined. According to the Legislation Law of the PRC, the National People's Congress (hereinafter the NPC) enacts "*basic laws*", the State Council (the head of the executive branch of the government) endorses "*administrative laws*", and provincial and sub-provincial governments can issue mandatory "*local regulations*" and "*local rules*".[204] However, the connotations and scope of these essential terms, including "*basic laws*", "*administrative laws*" and "*local regulations and rules*", remain unclassified, and the respective jurisdictions of these lawmaking bodies stay blurred.[205] Furthermore, because the NPC Standing Committee is allocated the role of interpreting basic laws under the Constitution, the function of judicial interpretations issued by the SPC is legally confined to clarifying issues concerning "*specific application of laws and decree in judicial proceedings*".[206] In reality, however, the Standing Committee has rarely undertaken the interpretation of laws or the Constitution, which gives considerable leeway to SPC judicial interpretations (or, as remarked by Corne, creates an impingement on the legislative power bestowed by the Legislation Law), either with or without law suits.[207] This adds to the complexity in lawmaking discussed above, since judicial interpretations issued by the SPC also have the force of law.[208] In practice, the respective jurisdictions and relationships between these lawmaking bodies are commonly arranged via informal negotiations, which results in a significant amount of political discretion in enforcing laws, as well as inconsistency in implementation.[209] Such inconsistency has been singled out as among the four biggest challenges for foreign businesses' activities in China.[210]As remarked by Potter, "*inconsistent regulatory performance is often the product of the conflicting goals of different bureaucracies, whose regulatory power is subject to few effective limits*."[211]

---

[203] Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [NPC Resolution on Strengthening the Legal Interpretations of Law], passed by the Standing Committee of the Fifth National People's Congress as an amendment to the 1955 Standing Committee Resolution on the Interpretation of the Law, issued on June 10, 1981, effective from June 10, 1981, Art. 2; Fayuan Zuzhi Fa (法院组织法) [Organic Law of the People's Courts of the People's Republic of China] (adopted at the Second Session of the Fifty National People's Congress on July 1, 1979, amended by the 24th meeting of the Standing Committee of the 10th National People's Congress on October 31, 2006) [hereinafter Organic Law], Art. 33； *see also* Wu, *supra* note 3, at 330–1.

[204] LEGISLATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, effective from June 1, 2000, Art. 7.

[205] Wen, *supra* note 103, at 514–5.

[206] Organic Law, *supra* note 203, Art. 33.

[207] Corne, *supra* note 17, at 409–10.

[208] 最高人民法院关于司法解释工作的规定 [Provisions Concerning the Work of Judicial Interpretation], issued by the Supreme People's Court on March 23, 2007, effective from April 1, 2007, Art. 5.

[209] THE NATIONAL PEOPLE'S CONGRESS, INTERPRETATION TO THE LEGISLATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, §2 Aug. 1, 2001, available at http://www.npc.gov.cn/npc/flsyywd/xianfa/2001-08/01/content_140407.htm; L Li, *The Division of Jurisdictional Discretion in China*, Zhengyi (2009), *available at* http://review.jcrb.com/zyw/n4/ca128229.htm.

[210] Peerenboom, *supra* note 19, at 17.

[211] Pitman B. Potter, *Law Reform and China's Emerging Market Economy*, *in* CHINA'S ECONOMIC FUTURE: CHALLENGES TO US POLICY, 221 (Joint Economic Committee, Congress of the United States ed., 1997).

Leaving aside the complications in lawmaking, the brevity of China's company law development also defies clarity in terms of the legal interpretation and application of veil-piercing. The nation has only had a systematic company law framework for two decades, and the piercing principle was only statutorily endorsed six years ago. The short period of performance prevents the availability of comprehensive and accessible implementation guidance based on accumulated experience. "*For each head of controversy that has been cut off, there will arise, hydra-like, one or more new ones. And it will only be decades later, after the codes has become overlain with a think encrustation of case law, that the old measure of legal certainty (or uncertainty) will be restored*."[212] Hahlo and Gower's comments on the deficiency of codification, although presented in a common law context, seem apposite in describing China's current position regarding the field of veil-piercing. Although concrete steps have been taken in the direction of building up the "*interpretive regimes*" necessary for the effective function of law in China, much remains to be done.[213] To date the SPC has issued three judicial interpretations targeting obscurities in the 2006 Company Law, none of which specifically deals with the topic of veil-piercing.[214] It is predictable that there will be an extended period of flux, at least before awaiting clarifications as essential aspects of the law come before qualified judiciaries.

The riddle of inconsistency in piercing practice brought about by the lack of authoritative interpretation is best exemplified by the evaluation of the concerned party's subjective mind, i.e. whether a shareholder's intent to evade obligations is a prerequisite to piercing the veil. This is a question that has exercised both judges and scholars over recent years.[215] China's new company law statute does not take a firm position in this regard, and since the advent of Article 20(3) no interpretation with the force of law has been attempted on this matter, leading to court judgements and academic commentaries at odds with each other. So far, the scholarly view seems to favour intent as an indispensable element in piercing, as well as two other essentials – shareholders' misconduct (in abusing the corporate form) and consequences (in terms of impairing the creditors).[216] The Vice-Director of the Legalisation Committee of the NPC has also emphasised on various occasions that the disregard of the corporate personality principle applies only when ***shareholders have the wilful intent and the behaviour of evading debts*** (author's emphasis

[212] H.R. Hahlo & L.C.B. Gower, *Here Lies the Common Law: Rest in Peace,* 30 MOD. L. REV. 241, 249 (1967).
[213] Orts, *supra* note 20, at 111.
[214] The first judicial interpretation was concerning how courts should handle actions that straddle January 1, 2006; the second was on shareholder petitions for company dissolution; and the third on the derivative action mechanism. *See* CXi, *supra* note 155, at 173; Liu, *supra* note 87, at 251. *Cf.* Peerenboom, *supra* note 16, at 168, arguing that China's legal framework is mostly in place, and passing more laws and regulations alone will have little impact.
[215] In the US, the subjective intent of the relevant party, i.e. good faith or the absence of fraudulent intent in the debtor, has a bearing on the extent of the creditors' recovery. *See* s. 8(d)(3) of Uniform Fraudulent Transfer Act, drafted by the National Conference of Commissioners on Uniform State Laws, promulgated in 1984, "…*a good faith transferee or oblige is entitled, to the extent of the value given the debtor for the transfer or obligation, to … a reduction in the amount of the liability on the judgement*."
[216] Huang, *supra* note 8, at 746; Zhu, *supra* note 114, at 194 & 199. Key elements proposed by Zhu include: (1) misconduct, i.e. the separate corporate form and/or limited liability has been abused by shareholders; (2) intent: the abusive behaviour was intended to evade the debt payment; and (3) consequence: the abuse caused serious damage to the creditors' interests. *Cf.* Liu, *supra* note 7. As suggested by Liu, in order to remove the corporate veil that shields shareholders from their liabilities, the relevant creditor must bear the burden of proof for the following three factors: (1) whether any of the shareholders of the company has evaded the payment of their debt, and such evasion constitutes an abuse of the independent status of juridical person or the shareholder's limited liabilities; (2) whether the interests of the relevant creditor have been *seriously* damaged; (3) and whether there exists a proximate causation between shareholders' manipulative behaviour and creditors' interest loss.

added), with consequences of severely damaging creditors' interests.[217] This statement clearly stipulates the necessity of an intent element in triggering the principle.

Given the predominant position of the NPC as the highest level of legislative authority in making and approving law,[218] and the asserted pragmatic importance of interpretation that is attributed by governmental officials in China,[219] it is rational to assume that an interpretations given by the NPC's senior official will carry significant weight. Nevertheless, so far a number of decisions have only pierced on the basis of objectionable facts, without taking into account the mental element.[220] Paradoxically, in these piercing decisions courts confusingly but invariably refer to "*the principle of honesty and credibility*", which as a general civil law doctrine hinges on an assessment of the state of mind of the relevant party.[221] As presented by Liang, the incorporation of the conception of "*honesty and credibility*", one of the fundamental moral values underpinning Confucianism,[222] is essentially a "*legalisation of the fundamental moral belief*" in the civil law context.[223] Meanwhile, because the Chinese legal system initially derived from the German regime, this civil law principle to a large extent was a transformed integration of s. 242 of the German Civil Code, which prescribes that "*an obligator has a duty to perform according to the requirements of good faith, taking customary practice into consideration*."[224] Both these sources of the honesty and credibility doctrine dictate an examination of the state of mind of the parties concerned, over and above the general mechanical financial tests.[225] The courts' customary reference to this subjective-mind-based principle in piercing cases, although it falls short of examining the parties' mental states, thus creates an inherent ideological contradiction.

In common law jurisdictions, such legislative ambiguities and paradoxes would be resolved by the doctrine of *stare decisis*, i.e. judicial decisions being both the source and the proof of the law.[226] Attempting

---

[217] Yuan, *supra* note 83, at 8.

[218] The NPC has the power to make basic laws and amend the Constitution. Other laws and regulations may in no manner conflict with the constitution. In addition, the Standing Committee of the NPC has the exclusive authority to interpret the Constitution, with which no other law may conflict. For more details *see* the NPC website http://www.npc.gov.cn/englishnpc/about/2007-11/20/content_1373257.htm.

[219] Corne, *supra* note 17, at 406.

[220] Huang, *supra* note 8, at 759.

[221] For instance, although Liu advocates piercing on an objective basis, in his article, "*abusing the independent status of the corporate entity and limited liability regime*" has been interpreted as "*shareholders, in order to pursue undue profits, violate the principle of honesty and credibility and harm creditors*." *See* Liu, *supra* note 7, at 18.

[222] For more than two thousand years, the Chinese civil religion, the official cult, and the feudal society were dominated by the philosophy of Confucianism. LIONEL M. JENSEN, MANUFACTURING CONFUCIANISM: CHINESE TRADITIONS AND UNIVERSAL CIVILIZATION 4 (1997).

[223] Wanying Liang, *Lun Chengshi Xinyong Yuanze (论诚实信用原则) [A Discussion of the Principle of Honesty and Good Faith]*, *Civil and Commercial Law Web Journal* (2008), *available at* http://www.civillaw.com.cn/article/default.asp?id=39452.

[224] S 242 of Bürgerliches Gesetzbuch (or BGB), The Civil Code of Germany of 18 August 1896, last amended by statute of 4 December 2008, available at http://www.fd.ul.pt/LinkClick.aspx?fileticket=KrjHyaFOKmw%3D&tabid=505. For the impact of this provision on Chinese civil law, *see* Senyan Sun, *Gongxu Liangsu yu Chengxin Yuanze (公序良俗与诚信原则) [Public Customs and the Principle of Honesty and Credibility], in* MINFA ZONGZE ZHENGYI WENTI YANJIU (民法总则争议问题研究) [A RESEARCH INTO THE CONVOLUTED ISSUES OF THE CIVIL CODE OF PRC], 166 (Yuling Yang ed., 2004).

[225] Sun, *id.*, at 168; GUODONG XU，MINFA JIBEN YUANZE JIESHI: CHENGXIN YUANZE DE LISHI, SHIWU, FALI YANJIU (民法基本原则解释：诚信原则的历史，实务，法理研究) [AN INTERPRETATION OF THE BASIC PRINCIPLES OF CIVIL LAW: THE HISTORY, PRACTICE AND IDEOLOGY OF THE PRINCIPLE OF HONESTY AND CREDIBILITY], 36 (2012), suggesting that the principle of "*honesty and credibility*" accords with the Latin conception of *bona fides* and *good faith* in English law, both emphasising an element of subjective state of mind as well as the objective fact.

[226] Joseph Dainow, *supra* note 9, at 425.

to have the best of both worlds, in 2011 the Supreme People's Court initiated the publication of Guiding Cases (Zhidao Xing Anli 指导性案例). These comprise a selection of typical cases in various fields, in the hope of providing clear guidance to local courts when they are judging cases of the same kind.[227] Although these cases do not have the authority of making new laws, they are envisaged as a major move towards safeguarding the uniformity and coherence of judicial practice.[228]

While one should not be too quick to dismiss the SPC's commendable attempt, there is good reason to be sceptical about the effect of such recourse to Guiding Cases. Lacking the close reasoning and analysis in common law judgments, the style of Chinese courts judgments, following the civil law system route, is abstract and general, with previous cases not cited or analysed. A Chinese court judgement normally consists of a brief summary of the essential facts followed by a succinct statement of the rules of law,[229] and the courts have often limited themselves to expressing conclusions without detailed explanation or analysis on the rules.[230] While this ruling style springs from civil law judges' great respect for legislation,[231] it also limits the instructive value of judgements and suggests that Guiding Cases will not have comparable effects in clarifying and interpreting law in comparison with judgements in common law jurisdictions. The recent Guiding Case concerning veil-piercing – *Xugong Group Engineering Machinery Co., Ltd vs. Chengdu Chuanjiao Industry and Trading Co., Ltd and Other Respondents on a Dispute over a Purchase and Sale Contract*[232] – best evidences the limited effect of these Guiding Cases in clarifying the legal convolutions. The court pierced the veil of affiliated corporations on the basis of objective facts – the commingling of assets[233] – and the subjective element of shareholders' intention was not taken into account. However, in justifying the piercing decision, the court also confusingly referred to the principle of honesty and credibility, stating that the fact of commingling of assets "*infringed the theme of separate legal personality and breached the principle of honesty and credibility; the nature and the damaging effect of the behaviour (of commingling of assets) fall in the circumstances stipulated in Art. 20(3).*"[234] While the second half of the judgment infers assessing only the objective facts on the basis of "*the nature and the damaging impact of the relevant behaviour*", reference to the honesty and credibility principle in the first half implicates the necessity of an intent element, thus leaving existing complexities untouched.

---

[227] Zuigao Renmin Fayuan Fabu Di'erpi Zhidao xing Anli, (最高人民法院发布第二批指导性案例) [The Second Batch of Guiding Cases Were Issued by the SPC], Apr. 14, 2012, *available at* http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201204/t20120414_175938.htm.

[228] *Id.*

[229] Dainow, *supra* note 9, at 432.

[230] Lubman, *supra* note 10, at 30.

[231] Dainow, *supra* note 9, at 428.

[232] (2011）苏商终字第 0107. (2011) Su Shang Zhong No. 0107, 指导案例第 15 号，No. 15 of Guiding Cases, Published by the Supreme People's Court on 31 Jan. 2013, available at http://www.chinacourt.org/article/detail/2013/02/id/893723.shtml.

[233] "*三个公司之间表征人格的因素（人员、业务、财务等）高度混同，导致各自财产无法区分，已丧失独立人格，构成人格混同。*" *[The vast commingling of personnel, business and accounts of the three corporations involved has resulted in the inseparability of the corporate assets, thereby constituted the commingling of corporate personality and the dearth of independent personality.] See Xugong Group Engineering Machinery Co., Ltd vs. Chengdu Chuanjiao Industry and Trading Co., Ltd and Other Respondents on a Dispute Over a Purchase and Sale Contract,* (2011）苏商终字第 0107. (2011) Su Shang Zhong No. 0107, 指导案例第 15 号，No. 15 of Guiding Cases.

[234] "*上述行为违背了法人制度设立的宗旨，违背了诚实信用原则，其行为本质和危害结果与《公司法》第二十条第三款规定的情形相当*'. *Xugong Group Engineering Machinery Co., Ltd vs. Chengdu Chuanjiao Industry and Trading Co., Ltd and Other Respondents on a Dispute Over a Purchase and Sale Contract, supra* note 232.

c. The Scope of Judicial Discretion in Making Laws

A critical part of a civil law judge's approach, as discussed above, is a great respect for legislation as the main source of the law.[235] On the other hand, a judge in such a system may be in an awkward position if the written law is inadequate on a certain topic, as is the case for veil-piercing in China.[236] In order to fill gaps in the written law and to bring the principle to fruition, courts in China have thus far created a number of pragmatic tactics and made new law in many practical instances. This may be fortuitous or not, since as discussed above the reality of the loose legal drafting pragmatically endows them with broad discretion to do so.[237]

While the debate might remain open as to the flexibility and appropriateness of these court reactions, one must not overlook the inconsistency and arbitrariness which are their results in application, riding roughshod over the uniform principle of "*treating like cases alike*".[238] For instance, a pragmatic approach adopted by many regional courts has been to distribute internal notices and opinions to fill the statutory gaps and impact on future case decisions at the local level.[239] Though they are not available to the public and not as authoritative as Supreme People's Court interpretations, in reality these internal circulations tend to be more powerful in the handling of cases in regional courts.[240] However, although the levels of legal education and professional standards have improved drastically in China in the past two decades, there remains a discrepancy in the quality of the courts, varying widely from the relatively advanced large coastal cities to the less developed western inland regions.[241] The huge size of the nation and regional discrepancies further confound the vision of consistent and uniform implementation.[242] Indeed, by allowing too much room in lawmaking and interpretation, practices become prone to derogation, with results often far away from the original legislative intent. As critically remarked by Gelatt, "*practice, as a popular Chinese catch phrase puts it, remains in many cases the sole criterion of truth*."[243]

The issue of the burden of proof in piercing cases, which did not receive any mention in the current company law framework, exemplifies the practical riddles created by judges' creative practice. The only

---

[235] Dainow, *supra* note 9, at 424.
[236] *Id.,* at 433.
[237] Corne, *supra* note 17, at 376; Howson, *supra* note 136, at 137. *Cf.* Dainow, *supra* note 9, at 433, arguing that judges in civil law countries are expected to make law in circumstances when legislation is inadequate.
[238] "*Judicial discretion imports great flexibility, so much so that it engenders exactly what legal practice was supposed to alleviate – inconsistency*." Corne, *supra* note 17, at 393; *See also* Orts, *supra* note 20, at 112.
[239] Howson, *supra* note 136, at 151.
[240] *Ibid.,* at 151.
[241] Lubman, *supra* note 10, at 29.
[242] As discovered by Balme, while it is not deniable that local judges in China are better trained and more professional than they were in the past, only half the judges in the lower courts have law degrees and technical competence remains an issue. Stephanie Balme, *Local Courts in Western China: The Quest for Independence and Dignity*, *in* JUDICIAL INDEPENDENCE IN CHINA – LESSONS FOR GLOBAL RULE OF LAW PROMOTION, 154–179 (Randall Peerenboom ed., 2010); Peerenboom, *supra* note 16, at 168.
[243] Timothy A. Gelatt, *China's New Cooperative Joint Venture Law*, 15 SYRACUSE J. INT'L L. & COM. 187, 201 (1989).

legal rule remotely relevant to this matter is Article 64 of Civil Procedure Law, which provides that a party to an action is under a duty to provide evidence in support of his allegations.[244] This means that a creditor seeking to pierce the corporate veil bears the burden of proving that shareholders have abused the corporate form to evade debt. However, this general proposition is likely to result in pragmatic difficulties in a corporate context. According to Chinese law, all an outsider creditor is given is the information concerning the company's incorporation.[245] With no access to the financial details of either the company or its shareholders,[246] an outside creditor is in a rather weak position to gather the evidence required by Article 64 – it is simply not clear how far insiders abuse their controlling status by dealing to the detriment of outside creditors.[247] As this is often the case in practice, many judges apply a two-stage test in piercing cases instead of the generic rule of Article 64: the burden of proof at the first stage is on the claimant (the creditor) to satisfy the court that there is a good arguable case which *prima facie* falls into the piercing sphere. Once this is satisfied, the burden of proof will then be shifted to the defendant (i.e. the shareholders) to prove that the corporate form as a separate legal entity and the limited liability regime have not been abused. The burden will be mainly on the shareholders, which will to some extent balance the information asymmetry between shareholders and creditors.[248] For instance, in *Mr. Deng v. Mr. Jiang and Others*,[249] it was ruled by the court in the first instance and upheld by the court of final appeal that shareholders in the concerned company should bear the burden of proving that they have not abused their shareholders' rights, and in particular that their act did not cause the depreciation or loss of the company assets, thereby potentially prejudicing creditors' interests.

Setting aside the commendable intent, the legitimacy of these piercing decisions has been severely challenged on the basis of the restricted scope available for civil law judges to make new laws. For many, the main source of law in a civil law system is legislation, and a court may not use a previous judgement in the nature of a general rule.[250] In a common law jurisdiction judicial decisions are "*both the source and the proof of the law*", and judicial techniques of "*distinguishing*" and "*overruling*" earlier cases make room for rule adjustments in response to new conditions.[251] In stark contrast, when a civil law judge applies the law as

---

[244] Art. 64 of the Civil Procedure Law of the People's Republic of China, adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991, amended at the Twenty-Eighth Session of the Eleventh National People's Congress on August 31, 2012, effective from January 1, 2013.

[245] Art. 6 of Company Law 2005, *supra* note 4, "*The general public may consult the relevant matters on company registration at company registration authority, who shall provide consulting services*", *available at* http://english.wzj.saic.gov.cn/laws/061027085055-0.htm. On a different note, this provision is a typical example of "*loss in translation*", as the Chinese version of Company Law states the general public may "*check the relevant matters concerning company registration, and the authority should provide such information*" (查询登记事项), quite apart from the provision of "*consulting services*".

[246] Art. 34 & 166 of Company Law 2005, *supra* note 4; in general only shareholders have access to a company's financial report. This is with the exception of listed companies, whose financial report needs to be publicly announced. However, as discussed above, piercing claims have so far only been supported in private companies in China. *Supra* note 176.

[247] Clark, *supra* note 2, at 539. In practice, owing to the inaccessibility to the financial accounts of the company, many creditors were unable to discharge the burden of proving that shareholders have abused the limited liability regime and separate legal personality of the company. *See* Zhu, *supra* note 114, at 198-9.

[248] Yongjian Zhang & Jianfeng Jin, *The Theory and Practice of Disregarding the Corporate Personality in China*, *in* WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU, 完善公司人格否认制度研究 [RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY] 29-30 (Laiji Huang et al. eds., 2012, Democracy and Law Press); Wang, *supra* note 187, at 125.

[249] 邓某某与姜某某股东滥用股东权利赔偿纠纷上诉案，（2010）沪一中民四（商）终字第 2531 号.

[250] Dainow, *supra* note 9, at 424; Liu, *supra* note 87, at 238-9.

[251] Dainow, *supra* note 9, at 425.

set forth by the legislative body, her power of interpretation is often regarded as "*restricting to the text of the law, without the power or technique to complement or modify the law through her interpretation"*.[252] As commented by He, *"…[I]n a legal system such as China's… the courts do not have legislative power and are charged with faithfully applying laws and regulations rather than creating law.*"[253] Not least owing to such salient respect for legislation, a number of courts and judges in China have been persisting with the conventional approach, i.e. employing general civil law principles (including civil procedural law) as a legal basis to tackle special commercial issues when commercial law is silent on the matter.[254] Such divergent views about civil law judges' capacity to make laws have thus far generated conflicting judgements in the piercing field, causing inconsistencies and confusion.[255] In one typical instance, creditors proved that shareholders had unduly transferred corporate assets and altered the place of business before satisfying the debt claim, and the concerned shareholders did not defend themselves or respond to any of the creditors' claims, but the court nevertheless referred to Article 64 of Civil Procedural Law and refused to pierce on the grounds that the creditors didn't have adequate evidence proving that "*the shareholders have abused the corporate form by commingling their personal assets and accounts with those of the company concerned*".[256]

d. Related Areas of Law and Spillover Effects

The efficacy of a statutory provision often depends on whether a legal system as a whole can produce the desired results.[257] Even taking into account the robust rule-making efforts and the growing coverage of legislation in the past few decades, one has to acknowledge that because of its short period of development, the Chinese legal system is still in its early years.[258] Although progress has undoubtedly been

---

[252] Fernado Orrantia, *Conceptual Differences between the Civil Law System and the Common Law System,* 19 SW. U. L. REV. 1161, 1164 (1990); *cf.* Dainow, *supra* note 9, at 433, arguing that judges in a civil law system should make law when the written law is silent on a particular issue.

[253] He, *supra* note 168, at 186.

[254] Fei Li, *Introduction* in WANSHAN GONGSI RENGE FOUREN ZHIDU YANJIU, 完善公司人格否认制度研究，RESEARCH INTO THE PRINCIPLE OF DISREGARD OF CORPORATE PERSONALITY, 2 (Laiji Huang et al. eds., 2012). On the other hand, it is possible to take issue with this application as well. While the close interconnections between commercial law and civil law are not in doubt,[254] one cannot deny that after hundreds of years' development, significant differences exist between these two major branches of private law. As argued by Kozolchyk, while a decent and reasonable merchant is cooperative and trustworthy, he is far from being "*as brotherly or altruistic as is the good father of the family*" in the civil law context. It would be erroneous to assume that the general morality and good customs in the civil law context, e.g. the ones inspired by and applying to the character of "*the good father of the family*", are applicable in all corporate contexts where veil-piercing disputes take place, an example being the confusing usage of the "*honesty and credibility*" principle discussed above. *See* Boris Kozolchyk, *The Commercialisation of Civil Law and the Civilisation of Commercial Law* 40 LA. L. REV. 3, 3 & 5 (1979).

[255] Liu, *supra* note 87, at 245.

[256] *Jiang Liangfu v Hu Xidong and Other Shareholders* (2011), 江良富与胡锡东等股东滥用公司法人独立地位和股东有限责任赔偿纠纷上诉案, (2011）浙温商终字第 914. As presented in *supra* notes 245–247 and relevant texts, one cannot help but cast doubt on the credibility of this decision: in this situation, how can a member of the public such as a creditor form an intelligent view of the commercial basis of his company? It is fairly obvious that the employment of Art. 64 in piercing cases would be detrimental to the interests of creditors of close-held companies if shareholders, the only people with access to essential financial documents, simply refuse to respond to the claims, as in this case.

[257] Peerenboom, *supra* note 119, at 500.

[258] Lubman, *supra* note 10, at 76; Huang, *supra* note 8, at 762.

made on each dimension of law,[259] this progress has been uneven and some essential pieces are still missing from the legislative jigsaw puzzle, generating spillover effects particularly in terms of the implementation of veil-piercing.

A typical related area of law is corporate liquidation. To alleviate the potential shift of risk from shareholders to creditors at the critical point of liquidation, in many jurisdictions a system of laws is available to enable a creditor to rely on the reality of the issued corporate capital, and receive an equitable asset distribution should the company go into liquidation.[260] Such rules generally include a detailed delineation of liquidators' powers and duties,[261] as well as available remedies for creditors in case a liquidator making any default such as malpractice in filing, delivering or making any return, account or other document.[262] Furthermore, to prevent the liquidation process from being unduly affected by shareholders' desires, it is often required that a liquidator must be an independent professional, e.g. the requirement for a qualified insolvency practitioner in the UK, authorised either as a member of a recognised professional body or as an individual by the Secretary of State under the Insolvency Act 1986.[263] This secures the independence of the liquidator from both shareholders and the company concerned, so that the liquidation will proceed in a professional and impartial manner.

In stark contrast, many of these rules are scarce in China's company law context and uncertainty ineludibly abounds.[264] Regardless the conflict of interests between shareholders and creditors at the onset of liquidation, instead of employing independent liquidators who are professionally trained to carry out the task, the law merely asks shareholders of a limited liability company to form a liquidation group, while in a joint stock limited company (i.e. a public company) the composition of the liquidation group must be determined by the shareholders' assembly.[265] There is no law prescribing the number of people sitting on a liquidation group, or the distinction between the role of controlling shareholders and that of small individual shareholders in forming a liquidation group.[266] The degree of involvement and the duties of shareholders in liquidation thus far remain confounded, exemplified by the presence of cases centering upon the composition and operation of liquidation groups.[267] The liability regime concerning defective or non-liquidation cases also falls short of clear delineation. The veil-piercing doctrine, an "*equitable principle[s]*

[259] Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions, in* JUDICIAL INDEPENDENCE IN CHINA – LESSONS FOR GLOBAL RULE OF LAW PROMOTION, 69-95 (Randall Peerenboom ed., 2010).
[260] Kahn-Freund, *supra* note 50, at 60; A. KEAY & P. WALTON, INSOLVENCY LAW: CORPORATE AND PERSONAL, 22 (2nd ed., 2008).
[261] Ss 165–170 of IA 1986.
[262] E.g. s 170 of IA 1986.
[263] See s. 230 & 390–393 of IA 1986; the Insolvency Practitioners Regulations 2005, SI 2005/524. *See also* Hannigan, *supra* note 30, at 661.
[264] Lubman, *supra* note 10, at 76.
[265] Art. 184 of Company Law 2005, *supra* note 4.
[266] Wang, *supra* note 187, at 658.
[267] For instance, in *Food Store Limited Co. v Baiyu Bank*, 某食品商店有限责任公司与某股份有限公司白玉支行股东损害公司债权人利益责任纠纷案（2012）沪高民五（商）终字第 1 号, it was held that joint liability should only be imposed on those shareholders in a liquidation who had impeded the operation of corporate liquidation, in contrast with the decision in *Shanghai Cunliang Trade Limited Co. v Jiang Zhidong & Wang Weiming* 上海存亮贸易有限公司诉蒋志东，王卫明等, (No. 9 Guiding Case, Published on 18 September 2012). *See infra* note 275 and relevant texts.

and rhetoric",[268] has been frequently employed by Chinese courts to fill these statutory voids concerning shareholder performance in corporate liquidation.[269] By doing this, courts claim that they look at the "*spirit*" rather than the "*letter*" of the law, since shareholders not completing liquidation, while it is not explicitly prescribed in law, does at least touch on the spirit of veil-piercing.[270] For instance, in *Mr. Cheng and Other Shareholders of Bichengli Co. v Mr. Lu*,[271] although no evidence was presented to suggest that Mr. Cheng and other shareholders deliberately delayed or impeded the liquidation process, the court held shareholders liable for the company's debt on the grounds that "*shareholders are expected to fulfil the obligation of processing liquidation in a proactive manner, rather than being passive about it…*"[272] Likewise, in the case of *Xiong Shupeng v Xu Shimou and Others*,[273] the court has expressed a similar view on shareholders' obligations in liquidation, that when a company is facing termination the party responsible for liquidation should duly manage and dispose of the company's assets, debts, and other related matters. The corporate veil was also pierced on the ground that the shareholders had not duly completed liquidation.[274]

It is possible to take issue with the application of veil-piercing in such circumstances, especially the lack of regard to non-controlling shareholders in limited liability companies. Even if we ignore the conflict of interests between shareholders and creditors at the critical point of liquidation, these individual shareholders normally do not possess the controlling power or the essential professional expertise to initiate and complete a complicated company dissolution process, and a complete revocation of their limited liability by means of piercing seems too harsh a punishment. An example in this regard is the No. 9 Guiding Case *Shanghai Cunliang Trade Limited Co. v Jiang Zhidong & Wang Weiming*. The concerned company in this case did not complete liquidation and the corporate assets were lost, with the remaining unable to satisfy debt claims. Although the two minority shareholders, Mr. Jiang and Mr. Wang, presented evidence to the court proving that they had duly employed lawyers to proceed with the liquidation, and the fact of the company being wholly controlled by another shareholder, Mr. Fang, actually impeded their efforts, the court nevertheless held Jiang and Wang jointly liable for the corporate debt on an unlimited basis. "*As Company Law and relevant judicial interpretations do not specify the circumstances raised by Jiang and Wang, regardless their share ownership proportion or the degree of control in corporate operations, the shareholder status of Jiang and*

---

[268] Clark, *supra* note 2, at 506.
[269] Wang, *supra* note 187, at 654.
[270] *Jiang A v. Shareholders in Company C* probably best summarises the judicial attempt to fill the void, "*non-performance or improper performance of (the shareholders who are liable for liquidation) in finishing up liquidation, or their behaviour of maliciously allocating or dealing with corporate assets, will undeniably harm the rights and interests of interested parties, especially the interests of creditors. This is a clear defiance to the shareholder limited liability regime.*" 江 A 等与 C 公司股东损害公司债权人利益责任纠纷上诉案, (2012）沪一中民四（商）终字第 1969 号.
[271] 成某某与陆某某等股东损害公司债权人利益责任纠纷上诉案，（2012）一中民终字第 14962 号。
[272] Art. 18 of Provisions of the Supreme People's Court about Several Issues on the Application of the Company Law of the People's Republic of China II 最高人民法院关于适用中华人民公司法若干问题的规定二, *available at* http://www.bstarts.com/wp-content/uploads/2012/05/Provisions-of-the-Supreme-Peoples-Court-about-Several-Issues-on-the-Application-of-the-Company-Law-of-the-Peoples-Republic-of-China-II.pdf), was referred to by the court as the legal basis to pierce, regardless that it does not expressly cover the circumstance of shareholders not completing liquidation.
[273] 熊树鹏 等与徐世谋等股东损害公司债权人利益责任纠纷上诉案,（2012）益法民二终字 第 82 号。
[274] "*上诉人（股东）对…公司…的资产未尽到监管义务…在营业期限届满后根本未履行法定的清算义务…上诉人的不作为已经侵害了被上诉人享有的债权，应依法承担赔偿责任。*"

Wang obligates them to complete the liquidation."[275] Judging by the two common ideals thwarting veil-piercing – shareholders' nonhindrance of creditors' claims and affirmative support of creditors' interests[276] – Jiang and Wang could be seen as having complied with both, as shown by their proactive efforts of employing lawyers to tackle liquidation affairs. Compared to other remedy methods in liquidation cases, piercing and imposing liability to the full extent of shareholders' personal assets also tend to overcompensate the creditors for the harm caused by shareholders' performance or non-performance, especially when shareholders' personal assets exceed the size of the capital inadequacy during liquidation.[277] Not least owing to these concerns, radically contrasting decisions are common in this field. For instance, in *Mr. Huang v Guanxi Branch of China Agricultural Bank*,[278] the court, in contradiction with the judgements mentioned above, ruled that the bank as a shareholder of the concerned company was not jointly liable for the corporate debt, notwithstanding the fact that the liquidation had never completed. It is clear that legal reforms to advance the consistency of veil-piercing practice in China, even only in a private company context, would entail a wide range of changes that would affect not only the wording of company law, but also the systemic development of substantive and procedural law in related fields, increasing the availability of clearly-articulated authoritative interpretations as well as providing a precise delineation of the discretion of the judiciary in interpreting and making laws.

V. CONCLUDING REMARKS

There seems to be a general assumption underpinning the recent inauguration of the veil-piercing doctrine in China that this Western-style principle ought to be applicable and effective in this nation.[279] To date an extensive body of scholarship in China has commented on the ideological implications of this common law-originated doctrine, but the large literature has spawned relatively little in terms of contextual specifics, an imbalance which this article seeks to redress.

---

[275] No. 9 Guiding Case *Shanghai Cunliang Trade Limited Co. v Jiang Zhidong & Wang Weiming,* 上海存亮贸易有限公司诉蒋志东，王卫明等, published on 18 September, 2012.
[276] Clark, *supra* note 2, at 547.
[277] Various examples were given in Clark's seminal work *The Duties of the Corporate Debtor to Its Creditors* to explain this point, which are equally illuminating in pointing out Chinese law's harshness in the field. Imagine a hypothetical scene where a company (M) is owned by a shareholder (S). The company had bought goods on credit from a supplier who thus became an outside creditor (OC) with a claim of 150 RMB. The company had also entered into a bona fide borrowing transaction at market rates with S, who thus became a creditor with a 50 RMB claim. The company M went into liquidation and it later turned out that the company was only left with assets of 100 RMB. Suppose that S instgates some chargeable acts or omissions in the liquidation process. If M goes into insolvency and S's creditor claim was not objected to, the outside creditor would only receive 150/200 of the assets, i.e. 75 RMB. If equitable subordination was invoked as a remedy, the outside creditor would receive 100 RMB. However, if the corporate veil was pierced, then the creditor, under Chinese law, would be able to hold S jointly liable on an unlimited basis with the corporation, and recover 150 RMB. Clark, *supra* note 2, at 521-522, 547–549. *See also* Wang, *supra* note 187, at 654.
[278] 黄某某与中国农业银行广西壮族自治区分行债权人利益责任纠纷上诉案, (2012) 钦民二终字第 15 号。
[279] *Supra* note 8.

Stepping back from the policy rhetoric of interest-balancing and accessibility, this article has considered several pragmatic issues that have emerged in recent veil-piercing practice. In contradiction of the laudable legislative agenda of a uniform application of law, complications to do with economic and political legacies in the Chinese national context have had a strong restraining effect on the applicability of the veil-piercing doctrine. The entrenched stability of China's state-dominated economic regime, and mainstream jurisprudential thought that prioritises national social and economic policy over and above more specific mandates set forth in the Company Law,[280] disturbs the even-handed practical application of veil-piercing. Instead of the uniform and impartial implementation promised in China's WTO Accession Protocol, state-owned enterprises and large listed companies have been almost immune from piercing claims in practice, due in part to the close ties between these business sectors and the ruling economic and political powers.[281] The application of veil-piercing in non-state-owned economic sectors has also been affected by China's complicated socio-cultural context. Although there is no non-arbitrary or universal way of mapping out the precise degree to which legal practice is considered consistent or not,[282] one cannot overlook the fact that the veil-piercing application has so far fallen considerably short of the designated ideals of clarity and consistency, particularly in private company contexts.

While some might take issue with the ambiguous wording of the veil-piercing provision and argue that the answer lies in a new clearly-articulated provision, in the absence of a broad legal context that facilitates its operation it is hard to see how a word change alone can achieve the aim. As discovered in Part IV, a number of legal institutional factors, including the lack of authoritative guidance, contradictory views on judiciary discretion and loopholes in related areas of law, have all contributed towards the pragmatic inconsistencies. Indeed, as stated by Pistor, *"…[f]or an adequate assessment of the quality of the law, … without analysing the conditions for establishing (legal) rights gives a distorted picture*."[283]

The minimal applications of veil-piercing in SOEs and flawed usages in private company contexts are to a large extent rooted in the incompatibility of China's current domestic dynamics and this Western-originated legal norm, which will continue to restrict its pragmatic force. As noted, *"even when law is transplanted, the law does not necessarily precede the development of a country's enterprise or financial sector."*[284] Meanwhile, thinking coherently about limited liability, as with so much else in company law,[285] also requires us to treat veil-piercing cases as exceptions rather than the norm, and constrains its excessive use in non-state-owned sectors. As the legal system gradually builds up, it is foreseeable that the veil-piercing doctrine will become increasingly confined in the Chinese context.

[280] Howson, *supra* note 136, at 143.
[281] Howson, *supra* note 136, at 147.
[282] Peerenboom, *supra* note 119, at 513.
[283] Katharina Pistor, *Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies*, 1 EUR. BUS. ORG. L. REV. 59, 83 (2000).
[284] *Id.*, at 63.
[285] Bainbridge, *supra* note 84, at 485.