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# Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China

By  
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The People's Republic of China ("PRC") has spent the last twenty years rebuilding its legal system and creating a modern administrative law regime as part of its efforts to adapt to the needs of a market economy and a political system that is moving away from its totalitarian past toward a new form of polity. To what extent has the process been a response to or shaped by the forces of globalization, including China's increasing integration into the global economy? Is China's administrative law system converging on the best practices of administrative systems elsewhere, or will the path-dependent nature of reforms push China in a new direction? China is a single party socialist state saddled with a transition economy, an immature legal system, and a historical legacy of more than two millennia in which the subordinate role of law as a means of achieving social order stunted the growth of a culture of legality. Can institutions, rules and practices that play a central role in modern western liberal democracies with mature market economies be transplanted to China? Will they take root and flourish in China's very different soil?

It is now common practice to begin every discussion of globalization by observing that its meaning is contested. Having noted that the term is used in multiple, often contradictory ways, the author then proceeds to offer his or her own interpretation. Not wanting to risk upsetting settled expectations, I shall define "globalization" for present purposes as the processes of convergence in

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the economic, political, cultural and legal realms in countries around the world as evidenced in institutions, rules, norms and practices. Globalization is both a cause of convergence and a measure of the degree to which convergence has occurred. The emphasis on the processes of globalization captures both the active and resultant dimensions by bridging cause and effect, while drawing attention to the dynamic, multifaceted and interactive nature of globalization. Specifically, I assess globalization's role in facilitating convergence in the goals of administrative law in China, institutions (including mechanisms for controlling administration discretion), rules and outcomes.

Part I sets the stage by locating the impact of globalization on China's administrative law reforms within the general context of globalization in the economic, political and legal realms. The forces of globalization have shaped developments in all areas in China, although the degree of impact differs in various areas. The effects are most noticeable in the economic realm, where China has embarked on reforms that have increased the role of markets and resulted in China's economy becoming increasingly integrated in global and regional economies.<sup>1</sup> In contrast, political reforms have been slower, as China has resisted the trend toward democracy and challenged the universality of human rights. Legal reforms fall in the middle. China appears to be marching toward a socialist version of rule of law with Chinese (some would argue Asian)<sup>2</sup> characteristics. However, the road ahead remains a long and winding one with many bumps and most likely the occasional detour.<sup>3</sup>

Globalization can be measured in many ways. Indeed, whether one finds convergence, and hence signs of globalization, or divergence, depends to a large extent on the particular indicators that one chooses, the time frame and the degree of abstraction or focus. Markets, democracy, human rights and rule of law are broad standards, and each is capable of significant variation in theory and practice. For instance, economic growth in many Asian countries, including China, has been attributed to a form of managed capitalism in which the state actively intervenes in the market; government officials blur the line between public and private spheres by establishing clientelist or corporatist relationships with private businesses; and universal laws are complemented, and sometimes supplanted, by administrative guidance, vertical and horizontal relationships,

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1. See generally BARRY NAUGHTON, *GROWING OUT OF THE PLAN* (1995).

2. See Kanishka Jayasuriya, *Corporatism and Judicial Independence within Statist Legal Institutions in East Asia*, in *LAW, CAPITALISM AND POWER IN ASIA* 173, 177-81 (Kanishka Jayasuriya ed., 1999) (contrasting "East Asian statist" rule of law with western liberal rule of law; whereas the latter is defined in terms of liberal markets, an autonomous civil society reflecting pluralistic social arrangements and legal institutions with the role of resolving conflicts between various interests in civil society, the former consists of a managed form of capitalism, a regulated civil society characterized by an organic conception of the state, and legal institutions that serve to implement the policy objectives and interests of the state).

3. See generally Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 *CULTURAL DYNAMICS* 351 (1999). For more skeptical views, see STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* xvi (1999) (professing cautious pessimism about the future of legality in China); William Alford, *A Second Great Wall? China's Post Cultural Revolution Project of Law Construction*, 11 *CULTURAL DYNAMICS* 193 (1999).

and informal mechanisms for resolving disputes.<sup>4</sup> Similarly, China's nascent socialist rule of law diverges in important ways from more familiar liberal democratic versions of rule of law, in part because it is embedded in a historical, cultural and ideological context in which the role of the state and the relationship between the state and individuals differs significantly from their counterparts in the West.<sup>5</sup> Assessing the impact of globalization requires, then, that the broad standards of markets, democracy, human rights and rule of law be refined and supplemented by other measures. Nonetheless, these standards provide a starting point for measuring globalization.

In contrast, globalization of culture is much more nebulous and difficult to capture. While counting the number of McDonald's and Madonna CDs is suggestive of the spread of pop culture, it does not tell us much about the impact of globalization on more fundamental modes of being and values that are more constitutive of a community, people or nation. Nevertheless, culture is pervasive, and shapes the way the forces of globalization operate and their ability to affect change in each of the other areas of economic, political and legal reform. Rather than attempt a general assessment of globalization on Chinese culture, I focus on the particular ways in which Chinese traditions and cultures affect administrative law reform.

Although China has not been immune from the forces of globalization, reforms in China have been, and will continue to be, driven primarily by domestic factors. China's leaders emerged from the ashes of the Cultural Revolution with a mission: to modernize the country, and most importantly, to stimulate economic growth. Deng Xiaoping and others realized the regime's legitimacy and survival depended on improving people's living standards.<sup>6</sup> Similarly, China's efforts in the last two decades to rebuild the legal system and create an administrative law regime are an attempt to deal with modernity. As such, the project is a continuation of an on-again, off-again struggle that began in the late Qing dynasty when China first sought to import legal institutions and codes from the West and Japan.<sup>7</sup> While legal reform today is partly a response to the forces of globalization, such as WTO requirements and the demands of foreign investors, the main driving forces behind post-Mao reforms have been a visceral and personal reaction to the arbitrariness of the Cultural Revolution by many senior Party leaders, which led to the call for a more law-based order;<sup>8</sup> the regime's

4. See John Gillespie, *Law and Development in "the Marketplace": An East Asian Perspective*, in *LAW, CAPITALISM AND POWER IN ASIA*, *supra* note 2, at 118, 123.

5. See *infra* Part I.C.

6. Deng Xiaoping returned to power on a platform that emphasized the "two hands policy" and the "four modernizations." The two hands policy meant that on the one hand, the economy must be developed while on the other hand, the legal system must be strengthened. The four modernizations referred to the need to modernize agriculture, industry, national defense, and science and technology. See Jianfu Chen, *Market Economy and the Internalisation of Civil and Commercial Law in the People's Republic of China*, in *LAW, CAPITALISM AND POWER IN EAST ASIA*, *supra* note 2, at 70. See generally DENG XIAOPING, *THE SELECTED WORKS OF DENG XIAOPING (1975-1982)* 102 (1984).

7. See TUAN-SHENG CH'EN, *THE GOVERNMENT AND POLITICS OF CHINA 1912-1949* (1950).

8. The initial support for rule of law came from Party leaders who had suffered personally under the arbitrary rule of Mao. Many were tortured and humiliated, or sent to the countryside for re-education along with their families. As a result, they were keenly aware of the dangers of unlim-

desire for legitimacy at home and abroad; the need to ensure economic growth and attract foreign investment; the central government's desire to rationalize governance, enhance administrative efficiency and rein in local governments; and an increasing demand from citizens that the legal system protect their rights, particularly their increasingly valuable property rights.

Just as globalization need not be the only reason for convergence, neither need globalization mean one-size-fits-all. Convergence is a matter of degree. Even when the general ends are the same, there may be many means to achieve them. Administrative law is one area in which there is tremendous variety among legal systems around world. Simply put, there is no single correct way to deal with common administrative problems.<sup>9</sup> Thus, while all states rely on generally applicable laws to one degree or another to limit abuses of discretion and provide predictability and certainty, they may differ on how much administrative discretion is desirable. East Asian development states tend to favor a larger, more flexible role for the executive in managing the economy than western liberal states.<sup>10</sup> Administrative officials in China also enjoy considerable discretion, in part because the rapidly changing economic environment requires flexibility. In light of the diversity among administrative law regimes, the lack of a single blueprint for success, and the presence of a distinctive set of institutional, cultural, economic and political constraints, the development of China's administrative law regime inevitably will be determined primarily by its own contingent, context-specific conditions;<sup>11</sup> legal reformers will choose from the various items on the administrative-law-reform menu the ones that most suit China's particular circumstances, perhaps including some homegrown options.

Although the menu of options with respect to goals, institutions, mechanisms for controlling administrative discretion and legal doctrines is expansive and potentially unlimited, modern states with well-developed legal systems and

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ited government. See RONALD KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* 11 (1994) (noting that the debate over rule of law was initiated by the Party rather than the masses or intellectuals).

9. Critics of China's administrative law regime often overlook the diversity among administrative law systems everywhere and the common challenges and failures of such systems. Many of the features that draw heaviest criticism are by no means unique to China and in some cases are common to most administrative law systems. Examples include the unitary structure of government, the courts' lack of authority to strike down abstract acts that are inconsistent with superior legislation, the limiting of judicial review to the legality rather than the appropriateness of administrative acts, the preclusion of certain administrative decisions from judicial review and the requirement in some cases that parties first exhaust their internal administrative remedies before seeking judicial review. To be sure, institutions, mechanisms for controlling administrative discretion, and legal rules that work well in one context often do not function well in China for reasons discussed below. See *infra* Parts II through IV.

10. See Gillespie, *supra* note 4.

11. See Edward Rubin, *Administrative Law and the Complexity of Culture*, in *LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA* 88, (Ann Seidman et al. eds., 1997) (observing that administrative law is particularly difficult to transfer from one system to another because it is highly political in character, it primarily governs the state's relationships to its own citizens, and it is heavily dependent on the nation's underlying culture for its effectiveness); cf. Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 139, 163-65 (1997) (noting ways that the development of administrative law in France and the U.K. were influenced by traditional modes of governance and existing institutions).

functioning administrative law regimes have tended to converge on a range of favored choices.<sup>12</sup> Not surprisingly, as administrative law reforms have progressed in China, there are signs of increasing convergence. Whereas in the past the purpose of administrative law was considered to be how to facilitate efficient government and ensure that government officials and citizens alike obey central policies, administrative law is now understood to entail balancing government efficiency with the need to protect individual rights and interests.<sup>13</sup> China has also established similar institutions and mechanisms for reining in the bureaucracy, including legislative oversight committees, supervision committees that are the functional equivalent of ombudsmen, internal administration reconsideration procedures and judicial review.<sup>14</sup> At the level of legal doctrine, China has passed a number of laws that not only resemble but are modeled on laws from other jurisdictions. Even in the area of outcomes there are signs of convergence, albeit rather limited convergence.<sup>15</sup>

Despite convergence with respect to goals, institutions, mechanisms for checking administrative discretion and legal doctrines, China's administrative law regime produces comparatively sub-optimal results due to a variety of context-specific factors, many of which have little to do with the administrative law system as such.<sup>16</sup> Part II discusses these factors, which structure the internal dynamics of administrative law reform by highlighting the major areas in need of reform while simultaneously limiting the universe of feasible solutions.

The most common explanation for China's administrative law troubles places the brunt of the blame on socialist ideology and the attitudes of China's ruling elite, particularly senior Party leaders. Analyses of China's failures to create an effective administrative law regime and to strengthen rule of law more generally therefore typically begin, and all too often end, by noting that China remains a single party socialist state.<sup>17</sup> Rule of law is a much contested concept, with important conceptual and practical differences between a liberal and a so-

12. See, e.g., Jayasuriya, *supra* note 2, at 174 (observing that even in East Asian countries with a statist ideology in which law is conceived of as a tool to pursue a substantive normative agenda determined by state leaders, the development of a market economy has led to greater rationalization within the state, a stronger and more independent judiciary, and a more symmetrical relationship between the judiciary and executive).

13. XIANDAI XINGZHENGFA DE PINGHENG LUN [THE BALANCE THEORY OF MODERN ADMINISTRATIVE LAW] 1-7 (Haocai Luo ed., 1997).

14. See *infra* Part III.

15. See Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997) (discussing outcomes of administrative law cases).

16. For critical accounts, see generally PETER CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1997); ZHONGGUO XINGZHENG FAZHI FAZHAN JINCHENG DIAOCHA BAOGAO [SURVEY REPORT ON THE DEVELOPMENT AND PROGRESS OF CHINA'S ADMINISTRATIVE RULE OF LAW], (Mingan Jiang ed., 1998) [hereinafter ADMINISTRATIVE RULE OF LAW] (reporting progress and problems of implementing administrative law reform in various regions of China).

17. See, e.g., LESLIE PALMER, STATE AND LAW IN EASTERN ASIA 141 (1996) ("[I]t is certainly not possible to speak of the rule of law, and not even of the rule by law. It is clear . . . that the country's rulers, namely the Communist Party, regard such rules as simply Western 'bourgeois' conventions which limit their freedom of action; arbitrary government, which recognizes no restraint, is usual.").

cialist rule of law.<sup>18</sup> But at its most basic, rule of law refers to a system in which law imposes meaningful limits on the state and individual members of the ruling elite, as captured in the (admittedly overly simplistic) notions of a government of laws, supremacy of the law and equality of all before the law. Because administrative law plays a key role in limiting the arbitrary acts of government, the centrality of administrative law (administration in accordance with law—*yifa xingzheng*) to rule of law is well accepted both in China and abroad.<sup>19</sup>

Yet some critics argue that single party socialism is simply incompatible with rule of law and a limited government because the leading role of the Party cannot be reconciled with the supremacy of the law and a system in which law limits Party power.<sup>20</sup> Setting aside the theoretical issue of the compatibility of single party socialism and rule of law, hard-nosed realists claim that as a practical matter there is no rule of law in China, at least to a considerable extent, because senior Party leaders and other interested parties just do not want it.<sup>21</sup>

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18. See *infra* Part I.C. Given the many possible conceptions of rule of law, I avoid reference to "the rule of law," which suggests that there is a single type of rule of law. Alternatively, one could refer to the *concept* of "the rule of law," for which there are different possible *conceptions*. The thin theory of rule of law, discussed *infra*, would define the core concept of rule of law, with the various thick theories constituting different conceptions. Yet from the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way. As thick and thin theories serve different purposes, I do not want to privilege thin theories over thick theories by declaring the thin version to be "the rule of law."

19. See, e.g., *Jiang Zemin's Congress Report*, available in FBIS-CHI-97-266, Sept. 23, 1997 (report delivered at the 15th National Party Congress); see also Cuixiao Liu & Jianrong Wang, *Xingzheng faxue yanjiu shuping* [Critical Commentary on Administrative Law Research], 20 FAXUE YANJIU [LEGAL RESEARCH] No. 1, at 102 (1998) (reporting that a 1996 conference on administrative law theory and practice emphasized administration in accordance with law as the heart of ruling the country according to law). Although the centrality of administrative law to rule of law is accepted as a matter of principle in China, practice does not always accord with principle.

20. PRC scholars have struggled over this issue. For several examples, see Geor Hintzen, *The Place of Law in the PRC's Culture*, 11 CULTURAL DYNAMICS 167 (1999) (discussing debates among PRC scholars); Jiafu Wang, *Guanyu yifa zhiguo jianshe shehuizhuyi fazhi guojia de lilun he shijian wenti* [On Governing the Country in Accordance with Law: Theoretical and Practical Issues in Establishing a Socialist Rule of Law State], in ZHONGGONG ZHONGYANG FAZHI JIANGZUO HUIBIAN [COLLECTION OF SYMPOSIA OF THE CENTRAL COMMUNIST PARTY ON RULE OF LAW] 116-32 (Ministry of Justice ed., 1998) (asserting that rule of law is compatible with the centralization of power but CCP must act within the limits of the law). Compare Buyun Li, *Fazhi gainian de kexuexing* [The Scientific Nature of the Concept of Rule of Law], in ZOUXIANG FAZHI [TOWARD RULE OF LAW] 110-27 (1998) (arguing in an essay first published in 1982 that rule of law is compatible with Four Cardinal Principles), with Buyun Li, *Xianzheng yu Zhongguo* [Constitutionalism and China], in ZOUXIANG FAZHI [TOWARD RULE OF LAW] 1, 18 (1998) (proposing that if Party policy conflicts with law then law should prevail), and Lishan Jiang, *Zhongguo fazhi gaige he fazhihua guocheng yanjiu* [Study of the Process of China's Legal System Reform and Rule of Law Development], ZHONGWAI FAXUE [CHINESE AND FOREIGN JURISPRUDENCE] No. 6, at 35, 38 (1997) (observing that the Party has debated how to reconcile the Party's leadership role and the supremacy of law for twenty years and continues to do so). See also Shuguang Li, *Zhengzhi tizhi gaige de fazhi quxiang* [Rule of Law Orientation of Political System Reform], in ZHENGZHI ZHONGGUO [POLITICAL CHINA], 73, 80 (Yuyu Dong & Binhai Shi eds., 1998) (noting irony in the government leading a rule of law movement whose ultimate objective is to restrain the government).

21. See, e.g., CORNE, *supra* note 16, at 43; Alford, *supra* note 3. Although both Corne and Alford note that there are many other obstacles to the realization of rule of law, they appear to claim that a hostile view toward rule of law among the leaders is sufficient to prevent its realization. Alternatively, their claim may be the weaker one that the intent of the leaders is an important factor in determining whether rule of law will be realized in China. Since I believe the views of leaders are

After all, rule of law implies some degree of separation between law and politics and limits on the Party and government authority.<sup>22</sup> While Party leaders are happy to use law as a tool to ensure more efficient implementation of CCP policies, the last thing they want are meaningful restraints on their own power.<sup>23</sup> To the extent that one can speak of rule of law in China at all, rather than merely rule by law, it is a statist version of rule of law in which law is just a better tool to rationalize state power and to control local governments and private actors alike.<sup>24</sup> Law continues to serve as a handmaiden to Party policy and to serve the interests of the state rather than to protect individual rights and interests. Hence the legal system as a whole and the administrative law regime in particular are designed, allegedly, to provide the CCP sufficient flexibility to guarantee that Party policy becomes law or that laws may be amended or interpreted to comply with Party policy.<sup>25</sup>

In contrast, I suggest that the single party socialism in which the Party plays a leading role is in theory compatible with rule of law—albeit not a liberal democratic version of rule of law—and with an administrative law system that requires government actors to act in accordance with the law. Party members and government officials are required to comply with the law, and their behavior is increasingly constrained by law, especially when compared to twenty years ago. Although the CCP still often fails to abide by the circumscribed role set forth in the state and Party constitutions, on a day-to-day level, direct interference by Party organs in administrative rulemaking or specific agency decisions is not common.<sup>26</sup> Rather, the Party's main relevance to administrative law lies in its ability to promote or obstruct further political and legal reforms that would

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relevant but not determinative, the difference between our beliefs may be as to the degree of importance of the leaders' views.

22. The line between politics and law is not always a clear one. Nevertheless, as Alice Erh-Soon Tay notes, "[t]he difference between law and decree, between government proclamation and administrative power on the one hand and the genuine rule of law on the other, is perfectly well understood in all those countries where the rule of law is seriously threatened or has been abolished." Alice Erh-Soon Tay, *Communist Visions, Communist Realities, and the Role of Law*, 17 J.L. & Soc. 156 (1990).

23. China's legal system is often characterized as rule by law rather than rule of law because of the instrumental nature of law. See Richard Baum, *Modernization and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality*, 19 STUDIES IN COMPARATIVE COMMUNISM 69 (1986); Pitman B. Potter, FOREIGN BUSINESS LAW IN CHINA 5-7 (1995); Xingzhong Yu, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29 (1989); cf. LUBMAN, *supra* note 3, at 130-35 (highlighting instrumental aspects of PRC law and the primacy of policy); Edward Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19 (Pitman Potter ed., 1994) (describing tension between instrumental and autonomous aspects of law in China). Of course, law is used instrumentally in every legal system. Thus, a distinction must be made between pernicious instrumentalism and acceptable instrumentalism. 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 imposes meaningful limits on state actors merit the label rule of law.

24. See Chen, *supra* note 6, at 72. See generally Jayasuriya, *supra* note 2.

25. See, e.g., CORNE, *supra* note 16, at 283. Though skeptical, Corne says that it "is not altogether out of the question" that the Party could come to act in accordance with law and that law could become more autonomous over time. *Id.* at 286; see also Jayasuriya, *supra* note 2, at 193-97.

26. See *infra* Part II.A.



strengthen the legal system, but could also lead to the demise of the Party or to a drastic reduction in its power.<sup>27</sup>

Although certain reforms might place the Party at risk, there are nonetheless a number of ways the administrative law system could be improved that would advance the central Party leadership's self-professed goals to rationalize governance, increase government efficiency, rein in local officials and root out corruption without threatening its survival. There is, therefore, considerable room for further reform, as evidenced by an endless series of initiatives to strengthen the legal system as a whole and the administrative law regime in particular.

Moreover, while recognizing that there is probably some truth in the assertion that Party leaders are ambivalent about rule of law, I caution against overstating the extent of Party ambivalence or its practical significance.<sup>28</sup> The Party is not drawing on a blank state; its choices are constrained by the pressing need to sustain economic growth and to attract foreign investment, by international pressure, by growing discontent over corruption and by rising domestic demand for rule of law. Hence the future of rule of law in China turns on more than the ideological preferences of senior leaders. Accordingly, I place less emphasis on socialist ideology and the intent of the leaders and more emphasis on the context and the particular problems that China is confronting in establishing a law-based order. The CCP is only one of the obstacles to realizing a law-based administrative regime. Even if China's leaders were wholeheartedly committed to establishing an administrative law regime in which the law imposed meaningful constraints on state actors, it could only be imperfectly realized at this point, as indicated by the mediocre results of the many attempts to rein in government officials thus far.

China's administrative law system is beset by a number of problems. As a result of more than a decade of feverish legislating, the legal framework is mostly in place. Although some gaps in the framework and loopholes in the existing laws remain, tinkering with doctrine or passing more laws and regulations alone will have little impact. The biggest obstacles to a law-based administrative system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; the absence of a robust civil society populated by interests groups; a low level of legal consciousness; the persistent influence of paternalistic traditions and a cul-

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27. Of course the CCP is not monolithic. There are different factions within the CCP, and individual Party members hold different opinions on issues. Additionally, just as there are tensions between the central government and local governments, there are tensions and differences in the incentive structures and agendas between central Party organs and local Party organizations. Moreover, in recent years, many CCP members, like others in the general society, have become disillusioned with socialist ideology. Many of the younger members who recently joined the CCP have done so not for ideological reasons but rather for the perceived economic benefits and career opportunities. Nevertheless, the Party is still a force within the Chinese polity, with the power to influence, and in some cases determine, the outcome on certain key issues. CCP members may also be expected to support the Party line more readily than others, particularly on key issues where the leadership has taken a clear stand, even if only out of concern for opportunities to advance within the CCP.

28. See *infra* Part I.C.

ture of deference to government authority; rampant corruption; and the fallout from the unfinished transition from a centrally planned economy to a market economy, which has exacerbated central-local tensions and resulted in fragmentation of authority. In Part III, I discuss briefly the weaknesses in the various mechanisms for reining in government officials, including legislative supervision, administrative supervision, Party discipline, administrative reconsideration and judicial review. Each of these mechanisms is hampered by the institutional and systemic problems discussed in Part II and reflects the limits of the current legal and political environment.

Part IV explores ways that various contingent factors shape and limit the possibilities of administrative law reform by considering five examples. The first example is the struggle of the Licensing Law drafters to provide local authorities with sufficient flexibility to respond to local circumstances and unforeseen events and yet prevent abuse of discretion. The drafters were caught between a rock and a hard place. The weakness of the existing mechanisms for controlling administrative discretion argued for a narrow sphere of local discretion. On the other hand, placing local governments on too tight of a leash would produce inferior results when discretion was legitimately needed to respond to the vast regional variations of contemporary China.

The second example is the widespread problem of legislative inconsistency. A remarkable number of lower level rules and regulations are unconstitutional or are at odds with superior legislation. Although there have been several proposals to deal with legislative inconsistency, none of the proposed solutions is likely to work. Ultimately, deeper institutional reforms—including judicial reforms to increase the independence and authority of the courts and to give the courts the power to annul administrative regulations—are likely to be required. Even assuming that the Party is willing to tolerate a stronger judiciary, any such reform will upset the current balance of power among state organs, and therefore is likely to be opposed by the procuracy and the State Council. Accordingly, a more incremental approach, tailored to satisfy the present political realities, may be required, whereby the courts are first given the authority to strike down only lower level rules and regulations. Over time, as the stature of the judiciary grows within the Chinese polity and the competence of judges increases, the courts would be given authority to review increasingly higher level legislation.

The third example concerns the impact of China's ongoing economic reforms on administrative law. To illustrate, I focus on the lingering influence of government monopolies and the lack of separation between government and enterprises by examining recent developments in clientelist and corporatist relationships between government entities and enterprises and the attempt by the Ministry of Agriculture ("MOA") to force one foreign company to establish a joint venture with the MOA's subsidiary rather than the foreign company's preferred PRC partner.

The fourth example concerns China's accession to the WTO. Supporters have argued that China's entrance into the WTO will not only offer western businesses significant economic benefits, but will stimulate further legal reforms

and promote rule of law. Although this will probably prove true in the long run, in the immediate future foreign businesses will most likely continue to be frustrated by non-tariff barriers, including a burdensome approval process. The lack of effective ways to challenge administrative decisions will become increasingly contentious and could place China and the WTO on a collision course if foreign investors turn in large numbers to the WTO for the justice they believe they were denied in PRC courts.<sup>29</sup>

The fifth and final example involves China's ability to benefit from recent trends in administrative law. The modern era has been the era of the regulatory state. Administrative agencies have increasingly shouldered the responsibilities of lawmaking, interpretation, implementation and adjudication. Traditionally, administrative law scholars have been concerned with limiting administrative discretion to prevent abuse and ensure rule of law, and with rendering officials accountable in order to overcome the so-called democracy deficit resulting from the tremendous power ceded non-elected administrative officials.<sup>30</sup> In the last several decades, disenchantment with the modern regulatory state has led to a re-conception of the role of the state and new postmodern approaches to regulating. During the New Deal, agencies in the U.S. were viewed as neutral technocrats who served the public by deciding technical issues based on special expertise.<sup>31</sup> Over time, people lost faith in agencies as neutral truth seekers.<sup>32</sup> Critical legal scholars challenged the neutrality and expertise of administrative agencies, arguing that politics pervaded agency decision-making.<sup>33</sup> Philosophers challenged the value-neutrality of science.<sup>34</sup> Meanwhile, public choice proponents demonstrated that agencies at times put their own institutional interests ahead of the public interest and were susceptible to influence by special interests.<sup>35</sup> The response was a demand for greater transparency and public participation. More recently, disenchantment with top-down command and control approaches to regulation and the legitimacy and utility of judicial review has led to deregulation,<sup>36</sup> increased reliance on private actors to perform some of the tasks traditionally undertaken by administrative agencies,<sup>37</sup> more involvement of interest groups in negotiated rulemaking processes, and experimentation with new ways of regulating and controlling agencies that are more decentralized and

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29. See generally Richard H. Steinberg, *Institutional Implications of WTO Accession for China*, Institute of Global Conflict and Cooperation Policy Paper #41 (1998).

30. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969).

31. See generally JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

32. See FREEDMAN, *supra* note 30, at 162.

33. See generally THE POLITICS OF LAW (David Kairys ed., 3d ed. 1998).

34. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970).

35. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

36. See CHRISTOPHER EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 11 (1990).

37. See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

flexible and involve greater participation at the local level by members of the general public and private interest groups.<sup>38</sup>

China may be able to take advantage of some of the recent innovations in administrative law. But it will not be able to leapfrog over the modernist stage of legal system development directly to the postmodern stage in the way it has bypassed VCRs and gone directly to VCDs and now DVDs. Although a new age may be dawning in the United States and in other modern democratic states with developed legal systems, China is only now establishing the basic building blocks of a modern legal system. The postmodern approaches to administrative law assume a functioning judiciary as a backstop, even if they downplay the role of judicial review in favor of greater public participation and other ways of avoiding and resolving disputes.<sup>39</sup> Similarly, China lacks the market economy and liberal democratic political system assumed by advocates of deregulation and more bottom-up democratic experimentalism.<sup>40</sup> Deregulation and reliance on the market generally are not appropriate strategies in light of pervasive market failures, including market distortions due to administrative monopolies. Nor does China have the robust civil society and organized public interest groups from which bottom-up solutions are likely to emerge. More importantly, greater reliance on local initiatives runs counter to the Party's emphasis on maintaining tight central control over the political sphere. Although China has recently experimented with political reforms at the grass-roots level, the continuing harsh crackdown on political dissidents and Falungong members demonstrates unambiguously that the Party-state intends to keep a tight rein on any nascent civil society.<sup>41</sup>

Part V sums up the evidence for globalization and convergence, and offers some reflections on future reforms and the limits of the law in bringing about a limited government in which the arbitrary acts of government officials are held in check. External mechanisms for reining in wayward bureaucrats can only go so far. The most difficult task will be to create a culture of legality in which government officials and citizens alike show respect for the law through their voluntary compliance.

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38. See Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

39. These approaches are postmodern in that they are a reaction to the modern regulatory state. In addition, they challenge the kind of top-down, one-size-fits-all reasoning that typified modernism's quest for metanarratives and grand solutions to problems based on a belief in a single rational order. They are also postmodern in that they build on and take as their starting point the main pillars of modernity: a market economy, liberal democracy, a robust civil society, and rule of law.

40. Obviously I do not mean to attribute to proponents of deregulation or democratic experimentalism in the United States the view that these approaches would necessarily be suitable to China. Rather, the point is that even if China's reformers wanted to adopt such approaches, the feasibility and effectiveness of such approaches is limited by the present context. Cf. Michael Dowdle, *Heretical Laments: China and the Fallacies of 'Rule of Law'*, 11 CULTURAL DYNAMICS 287, 302-07 (1999) (raising similar critiques of top-down regulatory approaches in China and exploring possibilities of more bottom-up alternatives).

41. See U.S. State Dep't, 1999 Country Reports on Human Rights Practices – China (released Feb. 25, 2000), 4-10, available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/china.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html).

## I.

GLOBALIZATION IN CONTEXT: ECONOMIC, POLITICAL AND  
LEGAL REFORMS IN THE PRCA. *The Economy: A Case for Convergence?*

Globalization of the economy has received the most popular and scholarly attention, with the debates centering around three issues: first, the extent to which globalization is in fact occurring; second, whether countries are converging on particular economic institutions as opposed to distinct varieties of capitalism; and finally, whether globalization is a good thing. Undeniably, in the past thirty years many countries have experienced rapid growth in foreign trade, foreign direct investment and inflows and outflows of foreign capital.<sup>42</sup> The penetration of domestic markets by multinational corporations and the increased cross-border flow of technology, information, capital and management skills have altered the domestic production patterns in a number of states. By acceding to various treaties and joining international organizations such as the WTO, states have created a supranational legal order that threatens to impinge on state sovereignty. In the more radical view of some commentators, we are witnessing the end of the nation-state as an economic unit and the birth of a borderless world.<sup>43</sup>

The degree of globalization of the economy and its impact on state sovereignty are, however, easily overstated.<sup>44</sup> The world economy arguably was more integrated prior to WWII at the height of the gold standard.<sup>45</sup> Moreover, foreign trade still accounts for only a small part of the GDP of most countries, with the vast majority of domestic production being for local consumption.<sup>46</sup> Foreign Direct Investment ("FDI") is highly concentrated among developed countries and a small number of developing countries, and in any event accounts for only a fraction of the GDP in even these select countries.<sup>47</sup> Nor is capital as mobile as often portrayed, as evidenced by a high correlation between domestic savings rates and investment rates even in OECD countries and the differences in the prices of borrowed funds in different national markets.<sup>48</sup> Further, most multinational corporations ("MNCs") are still closely tied to a particular nation in terms of the location of most of their business, assets, employees and key

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42. See generally Robert Wade, *Globalization and Its Limits: Reports of the Death of the National Economy are Greatly Exaggerated*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 60, 62-64 (Suzanne Berger & Ronald Dore eds., 1996).

43. See CHARLES KINDELBARGER, AMERICAN BUSINESS ABROAD 207-08 (1969). See generally KENICHI OHMAE, BORDERLESS WORLD (1990); SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996).

44. See generally PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION (1996) (arguing against the myth of globalization); Robert Wade, *supra* note 42.

45. See Dani Rodrik, *Sense and Nonsense in the Globalization Debate*, 107 FOREIGN POL'Y 19, 22 (1997); HIRST & THOMPSON, *supra* note 44, at 49.

46. See Robert Wade, *supra* note 42, at 66-67 (noting that increased levels of trade are concentrated among northern countries but that even then 90% of production is for domestic consumption).

47. See *id.* at 70; HIRST & THOMPSON, *supra* note 44, at 2.

48. See Robert Wade, *supra* note 42, at 74; see also Rodrik, *supra* note 45, at 22.

decision-making.<sup>49</sup> And just as the death of the national economy has been exaggerated, so has the demise of sovereign states been overstated. Although developments in international law, including the rise of the human rights movement, have led to a change in the way states conceive sovereignty, the sovereign nation-state is hardly on the brink of withering away.<sup>50</sup>

Even assuming higher levels of economic integration, it is doubtful that all nations are converging on market economies with common institutions, policies and modes of production. The convergence theory maintains that imitation, the diffusion of best practices, and the mobility of trade and capital will lead to similar institutions and practices. Variations among countries are due to contingent circumstances—differences in political systems, natural and human resources, initial levels of development and so on—but over time such distinctions fade unless obstructed by the government or powerful interest groups.<sup>51</sup>

Those who argue that there are distinct varieties of capitalism challenge the view that states are converging on similar forms of economy.<sup>52</sup> Neoinstitutionalists, for their part, claim that economic policy and performance are affected by the organization of the political economy,<sup>53</sup> but they are divided on the issue of convergence. Some believe that the embeddedness of institutions leads to divergent social systems (or modes) of production, while others see convergence as the more likely end result.<sup>54</sup> The empirical evidence is mixed. To a considerable extent, convergence or divergence is in the eye of the beholder, and depends on which countries and indices one examines. Clearly, however, there is more convergence among developed states than less developed states.<sup>55</sup>

49. See Robert Wade, *supra* note 42, at 79.

50. See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183, 184 (1997) (arguing that states are not disappearing but *disaggregating* into functionally distinct parts and that the subunits are then cooperating voluntarily with their counterparts in other countries to form a transgovernmental order); see also Gregory Fox, *Strengthening the State*, 7 IND. J. GLOBAL STUD. 35 (1999) (suggesting that the success of the international law regime is dependent on strengthening the state, particularly in developing countries, as stronger states are a necessary prerequisite to effective governance); Martin Shapiro, *The Globalization of Law*, 1 GLOBAL LEGAL STUD. J. 37 (1993) (claiming that globalization in the sense of a supranational system of law with a global coercive enforcement mechanism is not likely anytime soon).

51. For a statement, but not necessarily an endorsement, of this view, see NATIONAL DIVERSITY AND GLOBAL CAPITALISM 1 (Suzanne Berger & Ronald Dore eds., 1996).

52. For an assessment of the variety of capitalism literature, see Peter Hall, *The Political Economy of Europe in an Era of Independence*, in CONTINUITY AND CHANGE IN CONTEMPORARY CAPITALISM 135, 143-45 (Herbert Kitschelt et al. eds., 1999); see also S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* (1990) (arguing that there is a distinct type of "Chinese capitalism"); Yash Ghai, *The Rule of Law and Capitalism: Reflections on the Basic Law*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 343 (Raymond Wacks ed., 1993).

53. See Hall, *supra* note 52, at 139. On the importance of institutions to economic development, see generally DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

54. See, e.g., J. Rogers Hollingsworth & Robert Boyer, *Coordination of Economic Actors and Social Systems of Production*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 1, 3, 5 (J. Rogers Hollingsworth & Robert Boyer eds., 1999) (noting that the authors contributing to the volume differ as to whether social systems of production will continue to have a strong national flavor or tend toward convergence).

55. See Robert Boyer, *The Convergence Hypothesis Revisited: Globalization But Still the Century of Nations*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM, *supra* note 51, at 29, 57.

In the last twenty years, China has moved steadily toward a more market-oriented economy. It has opened its borders to foreign direct investment, overhauled its antiquated foreign trade system in the process of becoming a major trading power, restructured the banking and financial system, engaged in SOE reform, established stock markets and will soon become further integrated into the international economic order through its accession to the WTO. In 1993, China became the second most favored destination for foreign capital after the United States.<sup>56</sup> Trade has grown dramatically and China is now the ninth largest trading nation in the world.<sup>57</sup> Although the transition to a market economy is far from complete, the point of no return has passed. To the extent that the *sine qua non* of globalization is marketization and increased participation in an international economic order, China's economy shows unmistakable signs of globalization.

At the same time, China is often used as a counterexample to convergence theories and, in particular, to contest the notion that there is a single path to economic growth. While many economists touted the advantages of the big bang approach for socialist regimes seeking to modernize their economies, China pursued a more incremental approach.<sup>58</sup> Similarly, advocates of rule of law and western economists alike have argued that sustainable economic development requires rule of law and, more specifically, clear and enforceable property rights.<sup>59</sup> But China seems to have had tremendous economic growth without either, leaving economists and legal scholars to puzzle over the success of the economy despite market and legal imperfections.<sup>60</sup> China's phenomenal growth rate has been attributed to cultural factors,<sup>61</sup> a distinct form of "Chinese capital-

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56. See *Foreign Investment in China Exceeds 200 Billion US Dollars*, XINHUA NEWS AGENCY, Nov. 28, 1997.

57. Total external trade exceeded \$470 billion in 2000. See Hong Kong Trade Development Council, available at <http://www.tdctrade.com/main/china.html>.

58. See NAUGHTON, *supra* note 1.

59. See generally KATHARINA PISTOR & PHILIP WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (1999); NORTH, *supra* note 53.

60. See Donald C. Clarke, *Regulation and its Discontents: Understanding Economic Law in China*, 28 STAN. J. INT'L L. 283 (1992); Gary H. Jefferson & Thomas G. Rawski, *How Industrial Reform Worked in China: The Role of Innovation, Competition and Property Rights*, in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 1994, 129 (1995); Louis Putterman, *The Role of Ownership and Property Rights in China's Economic Transition*, CHINA Q. 1047 (1995); see also David Li, *A Theory of Ambiguous Property Rights in Transition Economies: The Case of the Chinese Non-State Sector*, 23 J. COMP. ECON. 1, 13-16 (1996).

61. See, e.g., Martin Weitzman & Xu Chenggang, *Chinese Township and Village Enterprises as Vaguely Defined Cooperatives*, 18 J. COMP. ECON. 121 (1994).

ism,"<sup>62</sup> a *guanxi*<sup>63</sup>-based rule of relationships,<sup>64</sup> clientelism<sup>65</sup> and corporatism.<sup>66</sup>

The belief in a single path to economic growth has been undermined not only by the success of China and other East Asian states, but by the repeated failures of economists and international funding agencies over the last fifty years to predict and promote economic development.<sup>67</sup> Nonetheless, the jury is still out as to whether China represents a unique form of capitalism and can continue to sustain high rates of growth without deeper institutional changes and without rule of law. Economists have noted that China's official growth rates are overstated and that China's growth has resulted in large part from productivity improvements mainly from reallocation of labor from low to high productivity sectors, in particular from agriculture to manufacturing and services.<sup>68</sup> However, long-term growth requires an increase in productivity within individual sectors. According to World Bank studies, only one-fourth of China's growth resulted from improvements in each sector.<sup>69</sup> Thus, China's years of easy growth may be coming to an end. Indeed, growth slowed in recent years, and

62. Chinese capitalism is characterized by a preference for family businesses, a tendency to resolve disputes through informal mechanisms rather than the courts, a common sinic cultural heritage, adherence to Confucian values and an emphasis on relationships. See, e.g., REDDING, *supra* note 52; Ghai, *supra* note 52, at 356.

63. *Guanxi* refers to one's personal, social and business connections and networks of relationships.

64. Carol Jones is most explicit in suggesting that rule of law may not be required for economic development and that "informal alternatives to legal regulation may be more efficient than competitive markets based on law." Carol Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 Soc. & LEG. STUD. 195, 212-13 (1994). In her view, the Four Dragons of Singapore, Taiwan, South Korea and Hong Kong have been dominated by a "rule of relationships" rather than rule of law and yet have enjoyed remarkable economic growth, leading her to conclude that "formal rational law may not be quite as crucial to capitalism as Weber imagined." *Id.* at 213.

65. To the extent that clientelism refers to reliance on personal and social relationship networks (*guanxi*), it is an alternative way of describing the rule of relationships. See generally DAVID WANK, *COMMODYFING COMMUNISM* (1999).

66. Corporatism has been put to three main, quite different uses in China. Some have used it as it has been used elsewhere—as a way of looking at state-society relations and as a measure of civil society. See Jonathan Unger & Anita Chan, *China, Corporatism, and the East Asian Model*, 33 AUSTL. J. CHINESE AFF. 29 (1995). Others have used it as a way of understanding East Asian statist models of economic development. See MARGARET PEARSON, *CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM* (1997). Still others have used it to explain local forms of government-business relations. Jean Oi, for instance, uses corporatism to capture the way in which local governments have treated the local economy as a single corporate entity. JEAN C. OI, *RURAL CHINA TAKES OFF: INSTITUTIONAL FOUNDATIONS OF ECONOMIC REFORM* 11 (1999); see also Andrew G. Walder, *The County Government as an Industrial Corporation*, in *ZOUPING IN TRANSITION* 62 (1998).

67. The World Bank recently unveiled a Comprehensive Development Framework declaring that everything matters: economic policies; political and legal institutions, including rule of law, property rights regimes and security market regulatory mechanisms; human resources; physical resources; geography; and culture. THE WORLD BANK, *ENTERING THE 21ST CENTURY*, WORLD DEV. REP. 21 (1999). The Bank is also careful to point out that this holistic approach is difficult to operationalize and is meant as a pragmatic guideline rather than a detailed blueprint. *Id.* The Bank adds that the "mixed record of development programs in the past suggests the need for both caution in application and realism about expected results." *Id.*

68. NICHOLAS R. LARDY, *CHINA'S UNFINISHED ECONOMIC REVOLUTION* 10 (1998).

69. See *id.*



foreign investment declined, only to recover recently as countries began to vamp up in anticipation of new opportunities created by China's accession to the WTO.<sup>70</sup> As it becomes more difficult to sustain growth and attract foreign investment, the lack of rule of law and enforceable property rights may in turn become an even bigger constraint on continued growth.<sup>71</sup>

Assuming that national economies are becoming more integrated, whether such globalization is a positive development or an ominous threat to national identities and local ways of life is contested in China and abroad. Debates continue over whether globalization will promote faster economic growth, whether it will foster or undermine macroeconomic stability (as seemed to be the case in the 1997 Asian financial crisis), and whether it will create new jobs or increase income inequality and unemployment among low-skilled workers.<sup>72</sup> Economic reformers in China have had to contend with a vociferous, if minority, conservative faction. The conservatives have vehemently opposed reforms on the grounds that China's open-door policies will lead to spiritual pollution in the form of decadent western bourgeois ideas while increased foreign capital will result in an over-heated economy, higher rates of inflation and social unrest as in the 1989 Tiananmen demonstrations.<sup>73</sup> The Asian financial crisis caused even some reformers to wonder whether reliance on FDI and foreign capital would undermine national security and leave China vulnerable to foreign interests. Plans for making capital accounts freely convertible were subsequently put on hold. Many domestic critics of China's accession to the WTO worry that domestic companies and financial institutions will be crushed by foreign competitors and that a sharp rise in agricultural imports will lead to massive rural unemployment, while state-owned enterprises simultaneously shed urban employees in an effort to become more competitive. The result could be heightened social tensions and perhaps chaos as disgruntled urban workers and displaced farmers from the countryside take to the streets to demand jobs. Should the two groups unite, the government might struggle to maintain order.

Whatever the long-term implications for economic growth and social stability, China's decision to embark on economic reforms and become more integrated into the world economy has significant implications for legal reform generally and administrative reforms in particular. The transition to a market economy required a new form of government and style of regulation. Government officials used to the patterns and practices of a centrally planned economy

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70. After exceeding 10% for a number of years, growth slowed to just over 7% in 1999. See Hong Kong Trade Development Council, *supra* note 57. Contracted investment has fallen dramatically from the high in 1993 of over \$110 billion to just over \$41 billion in 1999, a decrease of 21% from the year before. Actual investment also fell 11% in 1999 to \$40 billion. The number of new foreign ventures has decreased from a high of 83,000 in 1993 to just 17,000 in 1999. Ministry of Foreign Trade and Economic Cooperation, PRC, available at <http://www.moftec.gov.cn> (last visited March 22, 2001).

71. See Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the People's Republic of China*, 49 AMER. J. COMP. L. (2001).

72. See, e.g., Jeffrey Sachs, *International Economics: Unlocking the Mysteries of Globalization*, 108 FOREIGN POLICY 97, 99 (1998).

73. See Yong Wang, *China's Domestic WTO Debate*, 27 CHINA BUS. REV. 54 (Jan-Feb. 2000).

have had to change their ways. The process has not always been a smooth one. Getting entrenched bureaucrats to abide by the law—when in the past they were the law—has not been easy.

Given China's transition state, arguments about the use of administrative regulation to overcome market failures are given a new twist. In many cases, there is either no market or only an imperfectly functioning one. Many industries are still state monopolies or are dominated by state-owned entities. In such a system, the administration will have a greater role as regulator.<sup>74</sup> Inadequate information resulting from market imperfections also suggests a larger role for the administration than in a well-functioning market.<sup>75</sup> Similarly, agencies are needed to deal with a variety of externalities that are not found in more market-oriented economies, such as the problems caused by the dual-pricing system. For the moment then, as in other East Asian development states during their period of rapid economic growth and restructuring, a strong government and administration with considerable discretion is necessary to respond to the needs of reform.<sup>76</sup>

At the same time, the administration is itself often a cause of market failure. In the absence of a well-functioning legal system and mature markets, companies have found it advantageous to establish close relationships with the government officials that control access to valuable inputs such as technology, capital and raw materials and who can assist in resolving disputes with third parties.<sup>77</sup> Thus, the unfinished transition to a market economy has fostered the growth of clientelism and corporatism. As a result, local government officials frequently interfere in the operation of businesses and in the process of judicial review of administrative decisions in an effort to protect local companies in which they have a direct or indirect interest.<sup>78</sup>

Economic reforms have also created new incentives for officials and exposed them to new pressures. The combination of more economic activity and weak control mechanisms provides agency officials ample opportunities for cor-

74. See generally STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); see also Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 388-94 (1995) (arguing that transition economies need stringent anti-competition laws to create functioning markets and to break up state and administrative monopolies).

75. See Song, *supra* note 74, at 394.

76. The economic success of the Asian Dragons is often attributed to their strong governments. Economic development and transition states require tough and timely decisions. Authoritarian governments are able to make these choices. See Barry Sautman, *The Sirens of the Strongman: Neo-Authoritarianism in Recent Chinese Political Theory*, 129 CHINA Q. 72 (1992); see also Wim Timmermans, *Constitutional Developments in the Ukraine*, in *CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE* 37, 39 (Rein Mulleson et al. eds., 1996) (noting that Western European ex-dictatorial states all opted for a parliamentary system where parliament was strong and the president had a largely ceremonial or weak role, whereas Central Asian republics favored a strong presidency, believing that political and economic reforms are more easily achieved with a strong executive). But see José María Maravall, *The Myth of the Authoritarian Advantage*, 5 J. DEMOCRACY 17 (1994).

77. See, e.g., Li, *supra* note 60; Oi, *supra* note 66.

78. *Id.*

ruption and rent-seeking.<sup>79</sup> This is particularly problematic because agencies now face additional financial pressure. Cut off from state subsidies, agencies fund salaries and bonuses of employees in part from revenues collected by the agency, which provides a strong incentive to agencies to impose random and arbitrary fees.

In light of the costs of corporatism and clientelism, and the sharp rise in administrative corruption and rent-seeking, the role of administrative agencies is currently being re-defined. In keeping with the policy of separation of government and business, agencies are to become regulators rather than market players. Corporatist and clientelist ties between government agencies and businesses are being severed and the nature of the relationship between government and private businesses is becoming more limited, voluntary and symmetrical.<sup>80</sup> In the future, companies that prefer to forgo government assistance in exchange for greater autonomy will find it easier to go their own way without incurring the wrath of government officials or being subject to discrimination and harassment. Over time, the withdrawal of the administration from business will result in fewer conflicts of interests. Administrative agencies will be regulators but not competitors; and, as the market develops, the role of administrative agencies may diminish, as there will be less need for regulation. The number of approvals required to do business will decrease and become more a matter of formal, rather than substantive, review by administrative agencies.<sup>81</sup> To be sure, even in the long run, the PRC government may be more interventionist than governments such as Hong Kong's, which takes a more laissez faire approach, and administrative officials may enjoy a higher degree of discretion and rely to a greater extent on administrative guidance and informal ties to businesses than in other systems. But such differences, while significant, are a matter of degree and consistent with a more fundamental convergence that is likely to occur as the role of administrative agencies in the PRC comes increasingly to approximate that of agencies in countries with mature economies and developed legal systems.

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79. See, e.g., Liufang Fang, *Gongsi shenpi zhidu yu xingzheng longduan* [The Company Approval System and Administrative Monopolies], in *ZHONGGUO FAXUE*, [CHINA LEGAL STUDIES] 60 (1992); Song, *supra* note 74; PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 95, 109 (Jean C. Oi & Andrew G. Walder eds., 1999); cf. Robert Seidman, *Drafting for the Rule of Law: Maintaining Legality in Developing Countries*, 12 *YALE J. INT'L L.* 84, 89 (1987) (observing that during a transition period, laws will necessarily be more vague and give more discretion to decision-makers because legislators do not know the answers to novel problems and will need to leave room for experimentation; however, this leads to "goal-substitution," in the form of corruption and abuse of discretion).

80. See *infra* Part IV.D.

81. This is already beginning to happen. For instance, most technology contracts need only be registered. See Douglas Markel & Randy Peerenboom, *The Technology Transfer Tango*, 24 *CHINA BUS. REV.* 25, 25-29 (1997); see also *PRC to Change Business Licenses for Foreign-Funded Enterprises*, available in FBIS-CHI-2000-1229, Dec. 27, 2000 (announcing changes to streamline the process of obtaining business licenses).

At present, however, administrative agencies continue to resist reforms aimed at decreasing their control over enterprises and the economy.<sup>82</sup> As a result, the separation between government and enterprises is far from complete. Administrative agencies still are often both regulators and interested parties with affiliated entities that compete with other enterprises regulated by the agency;<sup>83</sup> and, they continue to exploit their ample opportunities for rent-seeking.

### B. Political Reforms: Continued Divergence

If free markets are the baseline for measuring globalization in the economic area, democracy and human rights are the pole stars for mapping globalization in the political sphere. Judged by those standards, globalization has had less impact on the political order of China than it has had on economic reforms. Although advocates of the big bang approach may take issue with the slow pace and incremental nature of China's economic transition, economic reforms have been rapid and far-reaching in comparison to the glacial pace and cramped nature of political reforms. Nevertheless, proponents of political convergence, perhaps indulging in wishful thinking, still see China as heading toward liberal democracy.

Proponents of political convergence come in different stripes. One type is the evolutionary liberal who believes that economic reforms will lead to political reform and a transition to liberal democracy.<sup>84</sup> As the economy develops, a middle class (or civil society) emerges, demanding that its property rights be protected, thus reinforcing legal reforms and the transition to rule of law and democracy. Moreover, once their materialistic needs are met, citizens will demand more say over political issues. As part of the ongoing legal reforms, the ruling regime will already have receded from day-to-day governance and devolved power to other state organs, including the legislature and the courts. Eventually, unable or unwilling to resist the tide of reform, the ruling regime will bow to the demands of the citizenry and carry out political reforms, including genuine multiparty democracy. The citizenry, for its part, will opt for a liberal regime that favors liberal values, including extensive individual autonomy and strong civil and political rights.

82. See, e.g., Randy Peerenboom & Zhou Lin, *Mixed Messages in the Agricultural Industry: China's Plant Protection Regulations Undermined by Agriculture Ministry Power Grab*, 11 CHINA L. & PRAC. 22, 25 (Dec. 1997); see also *infra* Part IV.D.

83. See Bin Shen, *Price Fixing Condemned for Hampering Reform*, CHINA DAILY, Nov. 9, 1998, at 1 (noting that ministries have encouraged industries to form price cartels for at least eight commodities); see also Weimin Chang, *Criticism Assails Industry Cartels*, CHINA DAILY, Nov. 9, 1998, at 1 (criticizing administrative monopolies that set price floors); Honghua Shao, *MOFTEC Researcher on Competition Policy*, available in FBIS-CHI-98-913, Nov. 9, 1998 (attacking administrative monopolies where government and its affiliated organizations abuse their administrative power to restrict competition).

84. For a recent statement of this view based on a statistical analysis of the relation between democracy and marketization in seven East Asian countries along with qualitative comparative studies of Korea, Taiwan, Indonesia and China, see SAMANTHA RAVICH, *MARKETIZATION AND DEMOCRACY: EAST ASIAN EXPERIENCES* (2000).

The ranks of evolutionary liberals who openly endorse such a rigid, mechanistic view of development are smaller than in the past, due in part to the mixed results of the law and development movement in the 1960s and 1970s and the failure of the third wave of democracy to produce sustainable liberal democracies.<sup>85</sup> In the 1960s, legal scholars in western developed countries, working in conjunction with scholars from other disciplines, practicing lawyers and international agencies, sought to export rule of law, capitalism and liberal democracy to developing countries.<sup>86</sup> The movement was predicated on an evolutionary convergence theory: legal reform would lead to economic reform and ultimately political reform.<sup>87</sup> At the end of the rainbow lay capitalist liberal rights-based democracies. Within academia, the movement quickly bogged down in the face of a variety of internal self-doubts and the empirical failure of some states to develop as expected. The evolutionary thesis that legal reform would inevitably lead to economic and political reform was not always borne out in practice. Some states failed to develop economically, or even if they did, some remained authoritarian. In fact, in the absence of political pluralism and opportunities for participation in government, a stronger legal system at times strengthened the hand of authoritarian regimes.<sup>88</sup> Even when states did become democratic, they did not necessarily become liberal democracies.

Like the evolutionary liberal, the end-of-history liberal sees democracy and human rights (and rule of law) in teleological terms, as the final resting place for all modern political systems.<sup>89</sup> However, the end-of-history liberal's claim is more of a normative claim about what should be than a how-to primer setting out the necessary steps to the promised land. Chastened by the failure of countries to achieve sustained economic growth and modernization, but buoyed by

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85. See Larry Diamond, *Is the Third Wave Over?*, 7 J. DEMOCRACY 20 (1996). According to Samuel Huntington, the first wave of democratization was from 1828 to 1926; the second wave was from 1943 to 1964; and the third wave was after 1964, particularly during the 1980s. See SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

86. For overviews of the law and development movement, see Elliot Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Estrangement"*, 25 AM. J. COMP. L. 492 (1977); Thomas Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?* 1972 WIS. L. REV. 767 (1972); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, YALE L. J. 82 (1972); David Trubek, *Scholars in Self-Estrangement*, 1974 WIS. L. REV. (1974).

87. The basic premises of the original law and development ("OLD") movement were derived from modernization theory: "development was an inevitable, evolutionary process of increasing societal differentiation that would ultimately produce economic, political, and social institutions similar to those in the West." Brian Z. Tamahana, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 471 (1995).

88. Today, some PRC scholars claim that China's recent efforts to promote rule of law will stimulate economic development, which in turn will strengthen the government fiscally and bolster its legitimacy. A stronger government may be better positioned to resist meaningful political reforms. See Li Su, *Ershi shiji Zhongguo de xiandaihua he fazhi* [20th Century China's Modernization and Rule of Law], 20 FAXUE YANJIU [LEGAL RESEARCH] 3, 9 (1998). On the other hand, an arguably more likely result is that rule of law will be a force for further reforms and come to impose restraints on the rulers, as in Taiwan.

89. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY* (1992).

the downfall of the Soviet Union, the third wave of democratization<sup>90</sup> and the turn to market-based economies, the end-of-history liberal is sure as to direction but unclear as to means. While rejecting the claim that a mechanical series of legal and/or economic reforms will inevitably lead to liberal democracy, the end-of-history liberal nonetheless sees liberal democracy complete with civil and political liberties as the only viable alternative in the post-socialist era.<sup>91</sup>

In assessing the likelihood of political convergence in China, it is helpful to distinguish between majoritarian democracy, as a form of government in which the people exercise their right of self-determination and decide political issues through the majoritarian decision-making process and elections; rights-based democracy as a particular form of democracy that emphasizes individual rights as a check on the majoritarian decision-making process;<sup>92</sup> and liberal rights-based democracy, which is a particular type of democracy that emphasizes individual rights and autonomy to a greater extent than communitarianism. Rights-based democrats worry that the majoritarian decision-making process may subject individuals and minorities to the tyranny of the majority. To protect the rights and interests of individuals and minorities, rights-based democrats place limits on the majoritarian voting process by removing certain issues from the legislative arena.<sup>93</sup>

China could become democratic without becoming a liberal rights-based democracy. Although the third wave of democratization has brought majoritarian democracy to many nations, it has not necessarily made them more liberal, particularly with respect to civil and political rights.<sup>94</sup> Thus, even if China becomes more democratic, there is no guarantee that Chinese citizens will endorse a liberal view of human rights that gives priority to civil and political rights over economic rights and collective interests, or that they will interpret civil and political rights in the same way as liberals, or that they will strike a

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90. See generally HUNTINGTON, *supra* note 85.

91. Some pragmatic liberals, including Richard Rorty, share the end-of-history liberal's belief in the superiority of liberal democracy and liberal values, but are more cautious about declaring them to be the end of history. Realizing that many other political theories claiming to transcend space and time turned out to be nothing more than the contingent narrative of a particular people at a particular time, Rorty readily acknowledges the contingency of liberal democracy and what he calls our culture of rights and bourgeois freedoms. Nevertheless, he remains unabashedly ethnocentric, championing on pragmatic grounds liberal democracy and liberal values as the best alternative available for all countries at this time. See, e.g., RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989). For a critique of Rorty's ironic liberalism as a basis for Chinese democracy and human rights, see Randall Peerenboom, *The Limits of Irony: Rorty and the China Challenge*, 50 *PHIL. E. & W.* 56 (2000).

92. I prefer rights-based democracy to the more common *liberal democracy* because the latter is ambiguous; it may refer to any form of rights-based democracy where rights place limits on the majority or to a particular liberal version of rights-based democracy that emphasizes individual rights and autonomy.

93. See, e.g., James Madison, Speech before the House of Representatives, June 8, 1789, reprinted in JAMES MADISON, *THE PAPERS OF JAMES MADISON* 196, 204 (1984).

94. See Diamond, *supra* note 85. Diamond refers to majoritarian democracy as "electoral democracy" and rights-based democracy as "liberal democracy."

similar balance between concern for the individual and concern for the interests of society and the nation.<sup>95</sup>

A few optimistic liberals, mainly foreigners and PRC nationals living in exile, think that China is moving toward genuine multiparty democracy and a liberal view of individual rights.<sup>96</sup> There is little evidence that this is the case, however, at least in the short term, with respect to democracy and, even in the long term, with respect to a liberal view of human rights.<sup>97</sup> Experiments with democracy have been limited to genuinely contested elections at only the grass roots level—in villages and, more recently, for positions on urban neighbor committees. Moreover, there are numerous obstacles to the realization of democracy in China, including a radically different conception of democracy on the part of China's leaders, which grounds the ruling regime's legitimacy in its ability to serve the well-being of the people rather than on the consent of the people.<sup>98</sup> In addition, some have argued that China lacks the cultural requisites for democracy or at least that democracy is less likely to emerge in China than elsewhere, given the culture and traditional beliefs.<sup>99</sup> Although such cultural arguments are easily overstated and less persuasive in light of Taiwan's success at democratizing,<sup>100</sup> it is possible that democracy will be slower in coming as a result of traditional beliefs pervasive in the PRC. In any event, even if traditional beliefs were overcome and Party leaders were prepared to sanction genuine democracy at all levels, democracy would not be possible at this point because China currently lacks the necessary institutions and civil society to make it work.<sup>101</sup>

95. I have argued elsewhere that China will most likely become democratic in the future—though not the near future—but that it will not likely become a liberal rights-based democracy. See Peerenboom, *The Limits of Irony*, *supra* note 91.

96. See Barret McCormick & David Kelly, *The Limits of Anti-Liberalism*, 53 J. ASIAN STUD. 804 (1994). Although McCormick and Kelly assert that liberalism is becoming more popular in China, they are forced to dismiss the statements of Chinese citizens that are critical of liberalism and favor more authoritarian forms of government as the product of coercion and the lack of free speech. However, it should not come as a surprise that Chinese citizens reject liberalism given that many other Asians do so as well. See, e.g., Francis Fukuyama, *Confucianism and Democracy*, 6 J. DEMOCRACY 20, 29-30 (1995). A survey of academics, think tank experts, officials, businesspeople, journalists and religious and cultural leaders found significant differences between Asians and Americans. The former chose an orderly society, harmony and accountability of public values, in descending order, as the three most important societal values. In contrast, the Americans chose freedom of expression, personal freedom and the rights of the individual. See Susan Sim, *Human Rights: Bridging the Gulf*, THE STRAITS TIMES (Singapore), Oct. 21, 1995.

97. See Larry Diamond and Raymond H. Myers, *Introduction: Elections and Democracy in Greater China*, CHINA Q. 162 (2000) (discussing obstacles to democracy in China); see also Peerenboom, *The Limits of Irony*, *supra* note 91 (discussing reasons why liberalism is unlikely to take hold in China).

98. See ANDREW NATHAN, CHINESE DEMOCRACY (1985).

99. See LUCIAN PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSION OF AUTHORITY 184 (1985).

100. See generally BAOGANG HE, THE DEMOCRATIZATION OF CHINA (1996).

101. See Gordon White, *Democratization and Economic Reform in China*, 31 AUSTR. J. CHINESE AFF. 73 (1994) (cautioning against wishful thinking for rapid democratization and arguing that during the period of economic transition China may benefit from a strong government). Interestingly, Ravich's model, based on the relationship between marketization and democracy, predicts that further marketization and economic reforms are required before Chinese citizens will enjoy even the

As for the likely emergence of liberalism, although China has signed numerous international human rights treaties, including the International Covenant on Civil and Political Rights, the government continues to promote an Asian Values variant of human rights that challenges the universality of rights and exposes fundamental differences in the way rights are conceived and the purposes they are meant to serve.<sup>102</sup> To be sure, there is good reason to be skeptical about Beijing's recourse to the self-serving rhetoric of Asian Values to justify limitations on exercise of civil and political liberties that could lead to the downfall of the ruling regime. Yet one should not be too quick to dismiss Beijing's attempt to play the cultural card as a cynical strategy seized upon by an authoritarian regime to deny Chinese citizens their rights. Although there is undoubtedly more than a kernel of truth to the accusation, there are also legitimate differences in values at stake and legitimate differences of opinions over key issues.<sup>103</sup> Human rights are a fundamentally contested concept, notwithstanding their seemingly universal normative endorsement. There are significant differences with respect to how rights are to be conceived and justified,<sup>104</sup> how different rights are to be prioritized and reconciled in case of conflict among different rights, and how rights are to be interpreted and implemented. That the PRC government uses culture as an excuse to deny citizens their rights speaks to the motives of the government, but tells us little about the substantive merits of its position.

No Asian government would appeal to Asian Values unless they resonated with the attitudes of their constituency. The government's invocation of culture may be politically motivated and yet still accurately reflect the views of the majority of the people. There are, of course, many voices in the PRC. Chinese human rights activists tend to be more liberal and democratic than their governments.<sup>105</sup> But the views of human rights activists do not necessarily represent the views of the majority. Significantly, there does not seem to be much demand for democracy or even for more expansive civil and political rights in China at present. Study after study shows most people are more concerned about stability and economic growth than democracy and civil and political lib-

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limited political freedoms of Indonesian citizens. She argues that marketization leads to the development and maturation of a civil society and a process of democratic learning on the part of citizens. See RAVICH, *supra* note 84, at 58.

102. See Randall Peerenboom, *Human Rights and Asian Values: The Limits of Universalism*, in 7 CHINA REVIEW INTERNATIONAL 296, 296 (2000) (reviewing JOANNE R. BAUER & DANIEL A. BELL, *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (1999)).

103. See DANIEL BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); Joseph Chan, *Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate*, in HUMAN RIGHTS AND ASIAN VALUES (Ole Bruun & Michael Jacobsen eds., 2000); Sim, *supra* note 96.

104. For the argument that rights in China are conceived not in deontological terms as antimajoritarian trumps of collective interests and the social good but rather as one among many interests to be balanced against other interests, see Randall Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359 (1995).

105. See the Asia-Pacific Non-Governmental Organizations' response to the Bangkok Declaration, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION (James Tang ed., 1995).



erties.<sup>106</sup> Of course, the need for stability does not give the government free license. Even in times of crisis, governments must meet certain minimal standards with respect to due process and fair trials. China's reliance on arbitrary detentions and torture cannot be excused by invoking Asian Values.<sup>107</sup> But beyond such minimal, albeit vital, requirements, there is considerable room for variation.

That China is not likely to become a liberal rights-based democracy any time soon has important consequences for administrative law. The lack of genuine elections above the village level diminishes whatever pressure government officials feel to keep the administration in line. There is no sense of urgency that Jiang Zemin and the ruling party will be voted out of office if the government performs poorly. Moreover, the absence of a strong civil society means that the direction and pace of administrative reforms have been determined largely, though by no means exclusively, by state leaders.<sup>108</sup> Needless to say, the interests and concerns of state leaders and the public will not always be identical.

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106. See, e.g., Yali Peng, *Democracy and Chinese Political Discourses*, 24 *MODERN CHINA* 408-44 (1998); see also Minxin Pei, *Racing Against Time: Institutional Decay and Renewal in China*, in *CHINA BRIEFING* 11-49 (William A. Joseph ed., 1997). Pei cites polls showing that two-thirds of the people thought that the economic situation was improving while half thought their own living standards were improving and that the majority of respondents (54%) placed a higher priority on economic development than democracy. Over two-thirds of those polled supported the government's policy of promoting economic growth and social stability, and 63% agreed that "it would be a disaster for China to experience a similar change as that in the former Soviet Union." *Id.* at 18. Even 40% of non-CCP member respondents said they voluntarily supported the same political position as the CCP. See *id.*; see also Xia Li Lollar, *CHINA'S TRANSITION TOWARD A MARKET ECONOMY, CIVIL SOCIETY AND DEMOCRACY* 74 (1997) (citing results of poll in which 60% of respondents assigned highest priority to maintaining order, while another 30% chose controlling inflation, whereas only 8% chose giving people more say in political decisions and free elections, and only 2% chose protecting free speech); Wan Ming, *Chinese Opinion on Human Rights*, 42 *Orbis* 361 (1998) (citing survey data showing growing support for the Party, and concluding that a development consensus that emphasizes stability has emerged). Another study showed Chinese to be the least tolerant of diverse viewpoints among all of the countries surveyed. It also found little support for a free press and the publishing of alternative views. See Andrew Nathan & Shi Tianjian, *Cultural Requisites for Democracy in China: Findings from a Survey*, 122 *DAEDALUS* 95 (1993).

Granted, polling results must be used with caution. Often, the design of the question influences the outcome, as may be the case when people are simply asked to choose between economic growth and democracy. Moreover, respondents may feel inhibited, and provide what they feel are safe answers or the answers desired by the pollers. On the other hand, as BELL, *supra* note 103, at 179 n.16, notes, some surveys are designed to minimize the feeling of inhibition on the part of the respondent by asking them to comment on what they believe to be the values or views of others in society, while other studies rely on an analysis of a culture's heroic figures. Further, as Wan Ming observes, PRC nationals living abroad often make similar arguments about democracy and economic growth and exhibit similar values. Nor are such views limited to mainland PRC citizens. See Wan Ming, *supra*. When asked to choose between democracy and economic prosperity and political stability, 71% of Hong Kong residents chose the latter, and only 20% chose democracy. In addition, almost 90% preferred a stable and peaceful handover to insisting on increasing the pace of democracy. *Id.*; see also BELL, *supra* note 103, at 119.

107. See, e.g., U.N. HUMAN RIGHTS COMMISSION, *IMPUNITY FOR TORTURERS CONTINUES DESPITE CHANGES IN THE LAW: REPORT ON IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN THE PEOPLE'S REPUBLIC OF CHINA* (2000), available at <http://www.hrichina.org/reports/cat2000.html>.

108. Cf. J. PIERCE, *BUREAUCRACY IN THE MODERN STATE: AN INTRODUCTION TO COMPARATIVE PUBLIC ADMINISTRATION* (1995); Myung-Jae Moon & Patricia Ingraham, *Shaping Administrative Reform and Governance: An Examination of the Political Nexus Triads in Three Asian Countries*, 11

Tight restrictions on civil society undermine the effectiveness of postmodern approaches to regulations which rely on greater interest group participation in the rulemaking and monitoring processes.<sup>109</sup> As a result, problems of government and administrative corruption are likely to be more prevalent in China than elsewhere, particularly given the lack of transparency, public supervision and right of access to information. There is a greater danger that elite government and administrative officials will take advantage of their authority to pass and interpret laws and regulations for their own ends, especially since public participation in the rulemaking and decision-making processes is limited. The absence of democratic traditions may explain in part why China has been slow to pass a procedural law that would provide effective channels for public participation in these processes.

Similarly, reliance on the media and the public to supervise administrative agencies is less promising in a socialist state where the government controls the press and imposes limits on freedom of speech. Although there are *60 Minutes*-like muckraking television shows such as *Jiaodian Diaocha* (Focus) and newspapers that publicize criticism of agency actions, venues for speech are still limited and controlled. The kind of reports of dissidents being packed off to re-education through labor that one regularly sees in Hong Kong papers are not seen in PRC papers. Nor is there a freedom of information law.<sup>110</sup>

That China is not a liberal rights-based democracy goes to the very purpose of administrative law. The view that the purpose of administrative law is to facilitate efficient administration has given way to the belief that administrative law must strike a balance between protecting the rights of individuals and promoting government efficiency.<sup>111</sup> The tension between the two goals is evident in every system. But how China balances the two goals will differ from other systems both in respect to outcomes and justifications. The amount of procedural protections afforded individuals may also differ as a result. There may be a tendency to limit judicial review or to expect greater deference toward administrative decisions on the part of courts. Therefore, some of the grounds for quashing specific acts may be interpreted more narrowly. Courts may be less likely to interpret the notion of abuse of authority to include a concept of fundamental rights or proportionality, as in other countries.<sup>112</sup> Moreover, because the ruling regime in China, like the ruling regimes in other Asian countries, rejects

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GOVERNANCE 77 (1998) (depicting administrative reforms in terms of a political nexus triad consisting of policy-makers, bureaucracy and civil society).

109. See *infra* Part IV.

110. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 17-18 (calling for legal right of public access to information to enable public supervision of administrative agencies). Of course, even many democratic states do not have freedom of information laws.

111. See THE BALANCE THEORY OF MODERN ADMINISTRATIVE LAW, *supra* note 13.

112. Compare P. P. CRAIG, ADMINISTRATIVE LAW 17-18 (3d ed. 1994) (claiming that the standard of ultra vires is being reinterpreted along lines consistent with respect for fundamental rights in the U.K.), with Pei, *supra* note 15, at 856 tbl.12 (noting that abuse of authority was invoked in only 16 of 219 cases where courts quashed illegal acts of agencies compared to 60 times for exceeding legal authority, 48 times for insufficient principal evidence, 40 times for incorrect application of law and 32 times for violation of legal procedures).

the liberal notion of a neutral state, courts may be more inclined to decide cases in light of a substantive normative agenda for society, as determined by the ruling elite—whether that agenda be economic development, some vaguely defined version of socialism, or a communitarian emphasis on harmony and stability that privileges the interests of the community over the interests of individuals.<sup>113</sup>

To be sure, there may be other reasons, besides the rejection of liberalism, contributing to these divergent practices and outcomes. There are, for example, institutional reasons why courts are deferential to agencies and thus are unlikely to rely on a broad interpretation of abuse of authority to rein in administrative officials.<sup>114</sup> Nevertheless, even in the long term there will likely be divergence in the operations of seemingly similar institutions, in the application of seemingly similar rules and therefore in the outcome in particular cases due to enduring differences in profound beliefs about the nature of the individual, the purpose of government, and individual rights.<sup>115</sup>

### C. Legal Reforms: Convergence and Divergence

The hallmark of a modern legal system is rule of law. The essence of rule of law is the ability of law to impose meaningful limits on the state and individual members of the ruling elite. Historically, however, law in China has been conceived of instrumentally as a tool to ensure that the will of the rulers or the policies of the CCP are carried out.<sup>116</sup> The function of law has not been to impose meaningful constraints on the ruling elite or to protect individual rights and freedoms against arbitrary infringement by the government.<sup>117</sup> While administrative laws have been part of China's legal system since the Han dynasty in 200 B.C., the purpose of such laws was to ensure that government officials faithfully implemented the ruler's decrees.<sup>118</sup> The emphasis was on government efficiency rather than on protecting individuals against an over-reaching government.

By the Qing dynasty, the inadequacies of the imperial dynastic system gave rise to calls for radical political and legal reforms. China's humiliating loss at the hands of Great Britain and Japan demonstrated that the central kingdom was no longer the most advanced nation in the world and shook the confidence of rulers and citizens as to the assumed superiority of Chinese civilization. Some

113. Jayasuriya, *supra* note 2, at 19 (arguing that judicial independence in East Asia is influenced by a statist ideology that rejects the liberal notion of a neutral state in favor of a paternalist state that grounds its legitimacy in its superior ability to fathom what constitutes "the good" for society; therefore, courts are more likely to serve as instruments for the implementation of the policy objectives of the state and ruling elite).

114. *See infra* Part III.D.

115. *See* DAVID HALL & ROGER T. AMES, *DEMOCRACY OF THE DEAD* 175-89 (1998) (suggesting that a post-socialist China is more likely to resemble a Deweyan version of Confucian communitarianism than a liberal rights-based democracy).

116. *See* LUBMAN, *supra* note 3.

117. *See* WILLIAM JONES, *THE GREAT QING CODE* 9-11 (1994).

118. *Id.*

reformers looked to the West for inspiration.<sup>119</sup> China drafted its first constitution in the early 1900s, adopted legal codes modeled on codes primarily from Germany and Japan and sought to modernize the judiciary by restructuring the courts (including the establishment of administrative courts) and increasing the professionalism of judges and the newly established private bar.<sup>120</sup> But such reforms could not gain a foothold during the turbulent Republican period, so the first wave of globalization had little lasting impact.

During the Mao era, the legal system was characterized by wild swings in which the emphasis was placed alternatively on ideology (being red) and professionalism (being an expert).<sup>121</sup> But at all times law continued to be viewed as a tool to carry out the ruler's dictates, now in the form of Party policies. The government was administered largely based on policies and in accordance with the instruction and orders of political leaders.<sup>122</sup>

Shortly after Mao's death in 1976, the CCP Central Committee began to promote economic reform and the establishment of the legal system, resulting in renewed interest in law generally and administrative law in particular.<sup>123</sup> By the late 1970s, widespread disenchantment with the arbitrary rule of the Mao era led to calls to replace rule of man (*renzhi*) with rule of law (*fazhi*). In the mid-1990s, Jiang Zemin and the CCP endorsed the establishment of a socialist rule of law state (*shehui zhuyi fazhiguo*) in which the Party and government must act in accordance with law. In 1999, the Constitution was amended to incorporate expressly the principle of rule of law.<sup>124</sup>

Whether China is indeed moving toward some credible version of rule of law is hotly contested. In my view it is, although that depends on what is meant

119. See Paul Cohen, *Ch'ing China: Confrontation with the West, 1850-1900*, in *MODERN EAST ASIA* 29 (James Drowley ed., 1970). China's experiments with legal reform undoubtedly were spurred on by its confrontation with the West and the promise of western powers to relinquish their extraterritorial rights and submit their nationals to Chinese courts if China carried out reforms. Nevertheless, even though reforms were related to the impact of the West, they were not solely a response to it. *Id.* at 31.

120. CH' IEN, *supra* note 7, at 52-53 and 247-61.

121. See, e.g., Victor H. Li, *The Evolution and Development of the Chinese Legal System*, in *CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY* 241 (John Linbeck ed., 1971).

122. See Perry Keller, *Sources of Order in Chinese Law*, 42 *AM. J. COMP. L.* 711, 719-24 (1994).

123. See *Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, 52 *PEKING REV.* 6 (1978); see also LIN FENG, *ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA* 8-9 (1996).

124. See *Jiang Zemin's Congress Report*, *supra* note 19; see also *Session Votes Amendments*, *CHINA DAILY*, Mar. 16, 1999, at 1.

by rule of law.<sup>125</sup> Generally, rule of law theories can be divided into two types: thin and thick.<sup>126</sup>

A thin theory of rule of law emphasizes the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic, capitalist or socialist, liberal or theocratic society.<sup>127</sup> These features typically include the following: there must be procedural rules for lawmaking such that only laws made by an entity with the authority to make laws in accordance with such rules are valid; the system must be transparent and laws made public and readily accessible; laws must be pro-

125. While rule of law has been the subject of continuous debate in China since 1978, over time the terms and focus of the debate have changed and official policy has evolved. In the early years after the Cultural Revolution, the focus was on the difference between *renzhi*—rule of man and *fazhi*—rule of (or by) law—and the need to rebuild the legal system. See Buyun Li, *Shixing yifa zhiguo jianshe shehuizhuyi fazhi guojia* [Establish a Socialist Rule of Law State by Implementing Ruling the Country in Accordance with Law], in *ZHONGGONG ZHONGYANG FAZHI JIANGZUO HUIBIAN* [COLLECTED ESSAYS FROM CENTRAL PARTY RULE OF LAW SYMPOSIA] 133-35 (Ministry of Justice ed., 1998).

In the mid-90s, the new *tifa* (officially endorsed policy formulation), to “rule the country in accordance with law, establish a socialist rule of law state” (*yifa zhiguo, jianshe shehuizhuyi fazhiguo*), was adopted. The new slogan reinvigorated the rule of law debate, leading to numerous conferences and countless books and articles. See generally Albert Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, 17 UCLA Pac. Bas. L. J. 125 (1999).

Some legal scholars and political scientists distinguished rule of law from the related notions of construction of the legal system and ruling the country in accordance with law. See Junning Liu, *Cong fazhiguo dao fazhi* [From *Rechtsstaat* to Rule of Law], in *ZHENGZHI ZHONGGUO* [POLITICAL CHINA] 233; Yuyu Dong, *Tongguo zhengzhi tizhi gaige de fazhi zhi lu* [The Rule of Law Road to Political System Reform], in *POLITICAL CHINA* 56. At the same time, scholars were debating whether *fazhi* should be understood as rule of law or rule by law, with many advocating the former. See Shuguang Li, *supra* note 20, at 73-82. Junning Liu pointed out the similarity between the concept of a “socialist rule of law country” and *rechtsstaat*, contrasting both with the notion of rule of law per se. See Liu, *supra*. Whereas a rule of law country or *rechtsstaat* could be a morally bankrupt state properly governed in accordance with positive law, rule of law required more. Some PRC scholars have taken the additional element to be normative—one needs not only laws, but “good” laws. See Jiafu Wang, *supra* note 20, at 117; Xiaoxia Sun, *Fazhi guojia ji qi zhengzhi gouzao*, [Rule of Law State and Its Political Structure], 20 *FAXUE YANJIU* 16-26 (1998). Some claim the additional requirements are democracy and human rights. See, e.g., Buyun Li, *The Scientific Nature of the Concept of Rule of Law*, *supra* note 20; Qi Zhang, *Fazhi de lixiang yu xianshi* [The Ideal and Reality of Rule of Law], in *ZHONGWAI FAXUE* [CHINESE AND FOREIGN LEGAL STUDIES] No. 2, at 128 (1998).

Among the latter, most seem to hold that democracy and human rights are compatible with a socialist rule of law (or rule of law with Chinese characteristics). See Buyun Li & Zhiming Zhang, *Kua shiji de mubiao: yifa zhiguo, jianshe shehuizhuyi fazhi guojia*, [An Objective for the Next Millennium: Ruling the Country According to Law, Establishing a Socialist Rule of Law State], in *ZHONGGUO FAXUE* Nos. 6, 18, 24 (1997); Hainian Liu, *Beilun shihuizhuyi fazhi yuanzi* [General Discussion of Socialist Rule of Law Principles], in *ZHONGGUO FAXUE* [PRC Legal Studies], No. 5, at 13-14 (1998); Jiafu Wang, *supra* note 20, at 121. Indeed, some suggest the ultimate realization of a genuine rule of law is achievable only in a socialist state. See, e.g., *id.* at 120-21.

Others, while less explicit (understandably, given the boundaries of permissible speech in China), appear to conceive of rule of law and human rights in liberal democratic terms, implicitly, if not explicitly calling into question the compatibility of rule of law and socialism. See, e.g., Junning Liu, *supra*.

126. See Peerenboom, *Ruling the Country in Accordance with Law*, *supra* note 3, at 315-16.

127. See, e.g., Robert Summers, *A Formal Theory of Rule of Law*, 6 *RATIO JURIS* 127, 129-30 (1993); cf. Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 211 (1979).

spective, relatively clear, consistent, and stable; laws must be enforced fairly and impartially, with only a narrow gap between the laws on the books and laws as implemented in practice; and, laws must be reasonably acceptable to a majority of the populace or the people affected (or at least the key groups affected) by the laws.<sup>128</sup>

A variety of institutions are also required. The promulgation of laws assumes the existence of a legislature and the government machinery necessary to make the laws publicly available; it also assumes rules for making laws. Congruence of laws on the books and actual practice assumes institutions for implementing and enforcing laws. The fair application of laws implies normative and practical limits on the decision-makers who interpret and apply the laws and principles of due process such as access to impartial tribunals, a chance to present evidence and rules of evidence.

In contrast to thin theories, thick theories incorporate into rule of law elements of political morality, such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.) or conceptions of human rights (liberal, communitarian, etc.). Thick theories of rule of law can be further subdivided according to the particular substantive elements that are favored.

Thus, one could distinguish between a Liberal Democratic, a Statist Socialist, a Neo-authoritarian and a Communitarian rule of law.<sup>129</sup> Liberal Democrats would incorporate free-market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural and collective or group rights.

The Statist Socialist rule of law favored by Jiang Zemin incorporates a socialist form of economy, which is an increasingly market-based economy, but one in which public ownership still plays a larger role than in other such economies; a non-democratic political system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights and subsistence as the basic right as opposed to civil and political rights.<sup>130</sup>

Another version of a non-liberal thick theory of rule of law might be called the Asian communitarian version built on market capitalism, perhaps with a

128. For similar but not identical lists of characteristics of a thin rule of law, see LON FULLER, *THE MORALITY OF LAW* 33-38 (1976); Summers, *supra* note 127; see also GEOFFREY DE Q. WALKER, *THE RULE OF LAW* 23-41 (1988).

129. I develop elsewhere in greater detail the contrast between Statist Socialist, Neo-authoritarian, Communitarian and Liberal Democratic models of rule of law as they apply to China by analyzing each variant's position with respect to the economy, democracy, human rights, legal institutions, rules, practices and outcomes. One could, of course, create an ever-expanding taxonomy by making finer specifications of any of the variables—economy, government, interpretation of rights—or by introducing new ones. See Randall Peerenboom, *Competing Conceptions of Rule of Law in the PRC* (unpublished manuscript on file with author).

130. See Jiang Zemin's *Congress Report*, *supra* note 19.

somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian interpretation of rights that gives relatively greater weight to the interests of the majority and collective rights over individual civil and political rights.<sup>131</sup>

Still another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all.<sup>132</sup> For instance, Pan Wei, a prominent Beijing University political scientist, has advocated a "consultative rule of law" that eschews democracy in favor of single party rule, albeit with a redefined role for the Party, and more extensive, yet still limited, freedoms of speech, press, assembly and association.<sup>133</sup>

Although China may not be moving toward a Liberal Democratic version of rule of law, it appears to be on its way toward implementing a socialist variant that meets the requirements of a thin rule of law. That is, China currently appears to be in transition from an instrumental rule-by-law legal system in which law is a tool to be used as the Party-state sees fit to a rule of law system where law does impose meaningful restraints on the Party, state and individual members of the ruling elite.

By all accounts, China has made tremendous progress in the last two decades in rebuilding its legal system.<sup>134</sup> Decimated by the Cultural Revolution and decades of neglect and abuse, the legal system had to be rebuilt virtually from scratch. Given the heavy reliance on policy during the Mao period, China lacked even the most basic laws, such as a comprehensive criminal code, civil law or contract law. The response has been a legislative onslaught the pace and breadth of which has been nothing short of stunning. By 1998, the National People's Congress ("NPC") and its Standing Committee ("NPCSC") had passed more than 337 regulations and local people's congresses and governments have issued more than 6000 regulations.<sup>135</sup>

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131. The tremendous variation among East States makes it difficult to argue for a single East Asian model. For instance, although a development state that takes an active and interventionist role in the economy is one of the pillars of what some have referred to as East Asian statist rule of law, Hong Kong's *laissez faire* policies have been the antithesis to interventionism. See, e.g., Jayasuriya, *supra* note 2.

132. In some cases, the state may give the appearance of allowing genuine multiparty elections at all levels but in fact control the outcome by, for example, limiting the ability of opposition parties to campaign.

133. Wei Pan, *Democracy or Rule of Law—China's Political Future* (unpublished manuscript presented at the Conference on China's Political Options, May 19-20, 2000, Vail, Colorado).

134. For overviews of legal reform in the last twenty years, see generally LUBMAN, *supra* note 3; *Legal System Building Reviewed*, available in FBIS-CHI-98-359, Dec. 25, 1998; Alford, *supra* note 3; Cai Dingjian, *Development of The Chinese Legal System Since 1979 and Its Current Crisis and Transformation*, 11 *CULTURAL DYNAMICS* 135 (1999).

135. See Li Peng *Urges Establishing Scientific Legislative System*, available in FBIS-CHI-98-293, Oct. 20, 1998.

Considerable efforts and resources have also been spent on institution building. The Ministry of Justice, dismantled in 1959, was reestablished in 1979. Law schools have re-opened and a wide variety of legal journals are now being published. In an effort to rebuild its legal institutions and promote greater professionalization in the various arms of the judicial system, China passed the Lawyers Law, Judges Law, Procuracy Law, Police Law and Prisons Law.<sup>136</sup> The legal profession in particular has made remarkable strides over the last twenty years. While in 1980, there were just 200 law offices and a mere 2,000 lawyers, today China boasts more than 8,300 law firms, twice as many as in 1993, and over 110,000 lawyers.<sup>137</sup> In addition, the National People's Congress has been strengthened and has begun to shed its rubber stamp image.<sup>138</sup>

Much time and effort have also been spent on legal education and consciousness-raising. China is now in its third five-year plan to publicize laws. Recently, live trials have been broadcast on television. There is a radio program to inform people about their rights.<sup>139</sup> Judging from the increase in litigation, the promotional work is achieving some success. While litigation was virtually non-existent in 1979, the total number of cases of first instance reached 5.26 million by 1996.<sup>140</sup>

Perhaps most important, China has taken a number of steps to strengthen the administrative law regime. Administrative law reform began slowly in the late 1970s. The emphasis in the early Deng years was on the use of law as an instrument of economic development.<sup>141</sup> Economic reforms called for an expansive role for government rather than a limited one. Accordingly, relatively little attention was paid to administrative law and in particular to the use of administrative law as a means of restraining government actors, though some laws did provide for administrative suits against the government.<sup>142</sup>

The 1982 Constitution was a step forward in that it contained provisions regarding administrative procedures, compensation and the right to sue.<sup>143</sup> As the Constitution is not directly justiciable, between 1982 and 1988 more than 130 implementing laws and regulations provided for administrative litigation in

136. See RONALD BROWN, UNDERSTANDING CHINESE COURTS AND THE LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 99 (1997).

137. See RANDALL PEERENBOOM, LAWYERS COMMITTEE ON HUMAN RIGHTS, LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS (1998).

138. See Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1, 1 (1987). See generally MURRAY SCOT TANNER, THE POLITICS OF LAWMaking IN POST-MAO CHINA (1999).

139. See *Radio Series on Human Rights*, available in FBIS-CHI-98-348, Dec. 14, 1998.

140. See 1997 *Zuigao renmin fayuan gongzuo baogao* [1997 Supreme People's Court Work Report], RENMIN RIBAO [People's Daily], Mar. 21, 1997.

141. See FENG, *supra* note 123, at 8.

142. See Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989).

143. See XIANFA [P.R.C. CONSTITUTION], art. 41 (1982), in *Xin bian Zhonghua Renmin Gongheguo changyong falu fagui quanshu* [hereinafter *Changyong falu fagui quanshu*] [A New Compendium of Frequently Used Laws and Regulations] 1, 8 (*Guo wu yuan fazhi bangongshi* [State Council Legislative Affairs Bureau] ed., 2000).



specific instances.<sup>144</sup> By the end of 1988, the Supreme People's Court had established an administrative law division and more than 1400 local courts had created administrative panels to hear administrative cases.<sup>145</sup> In 1987, drafting of an Administrative Litigation Law ("ALL") commenced.<sup>146</sup>

Although the slogan of administration in accordance with the law (*yifa xingzheng*) dates back to the late 1970s, there was not much law for government officials to rely on in the early years. However, by 1987, after nearly a decade of legal reform and intense legislative activity, the CCP Central Committee was ready to endorse administration according to law. The idea that law should restrain the administration and protect individuals against government arbitrariness started to gain acceptance.<sup>147</sup> The ALL was passed in 1989 and went into effect October 1, 1990, providing a general basis for citizens to sue government officials.<sup>148</sup>

The pace of administrative law legislation picked up in the 1990s. In 1990, the Administrative Supervision Regulations and the Administrative Reconsideration Regulations were passed.<sup>149</sup> The 1993 State Civil Servant Provisional Regulations changed the way government officials were selected and promoted, requiring that they pass exams and yearly appraisals, and introduced a rotation system.<sup>150</sup> In 1994, the State Compensation Law was passed,<sup>151</sup> followed by the Administrative Penalties Law in 1996.<sup>152</sup> Currently, an Administrative Procedures Law, Administrative Licensing Law, and a law on compulsory administrative enforcement are all in the works.

Despite the considerable progress in rebuilding the legal system, China presently falls far short of compliance with even the more minimal standards of a thin theory, particularly in the administrative law area.<sup>153</sup> The reach of the law remains limited; higher level Party and government officials are still above the law in many ways.<sup>154</sup> Moreover, some senior leaders are no doubt to some extent ambivalent about legal reforms: they may want the benefits that flow

144. See FENG, *supra* note 123, at 116.

145. See *id.* at 116.

146. Personal communication with one of the drafters in October 2000.

147. See FENG, *supra* note 123, at 9; see also THE BALANCE THEORY OF MODERN ADMINISTRATIVE LAW, *supra* note 13.

148. XINGZHENG SUGONG FA [P.R.C. ADMINISTRATIVE LITIGATION LAW] (1989) [hereinafter ALL], 2137 *Changyong falu fagui quanshu* (2000).

149. Both regulations have since been amended and upgraded to laws. See XINGZHENG JIANCHA FA [P.R.C. ADMINISTRATIVE SUPERVISION LAW] (1997), 724 *Changyong falu fagui quanshu* (2000) [hereinafter ASL]; P.R.C. XINGZHENG FUYI FA [ADMINISTRATIVE RECONSIDERATION LAW] (1999) [hereinafter ARL] 651.

150. See GUOJIA GONGWUYUAN ZANXING TIAOLIE [STATE CIVIL SERVANT PROVISIONAL REGULATIONS] (1993), 711 *Changyong falu fagui quanshu* (2000).

151. See GUOJIA PEICHANG FA [P.R.C. STATE COMPENSATION LAW] (1994), 199 *Changyong falu fagui quanshu* (2000).

152. See XINGZHENG CHUFA FA [ADMINISTRATIVE PENALTIES LAW] (1996), 640 *Changyong Falu Fagui quanshu* (2000).

153. See generally CORNE, *supra* note 16; LUBMAN, *supra* note 3; Alford, *supra* note 3; Peer-enboom, *Ruling the Country in Accordance with Law*, *supra* note 3.

154. See *infra* Part II.A.

from a modern legal system and yet not want law to impose meaningful limits on their behavior.

Ultimately, the key to the future realization of rule of law in China is power.<sup>155</sup> How is power to be controlled and allocated in a single party socialist state? To the extent that law is to limit the Party-state, how does the legal system obtain sufficient authority to control a Party that has been above the law? In a democracy, the final check on government power is the ability of people to throw the government out and elect a new one. In the absence of multiparty democracy, an authoritarian government must either voluntarily relinquish some of its power or else have it taken away by force. Naturally, Party leaders will resist giving up power so readily. They may therefore be disinclined to support reforms that would strengthen rule of law but would also allow institutions to become so powerful that they could then provide the basis for challenging Party rule. The result may be that, at least on those issues that threaten the survivability of the Party, the needs of the Party continue to trump rule of law concerns for some time. To be sure, there are numerous ways in which the legal system can be improved and strengthened that do not rise to the level of a threat to the Party. But some reforms, such as those aimed at promoting a more independent judiciary or robust civil society, could put the Party at risk.

Nevertheless, there is some reason to believe that the issue of power can be resolved in favor of rule of law and that law will come to impose meaningful restraints on Party and government leaders. First, although the views of senior leaders have been vital to legal reforms in China and will continue to influence the future development of the legal system, whether opposition on the part of certain leaders will be sufficient to block further reforms is doubtful. It is likely that different leaders hold different views, that many of them have not thought through their positions in a systematic way, and that their views are therefore likely to be inconsistent in some respects, and, at least for some of them, soft and subject to change.<sup>156</sup> There also appear to be generational differences, with younger people, particularly those trained in law or exposed to the West, tending to see law as more autonomous and less instrumental.<sup>157</sup> Differences among Party elite both in the substance of their views and the firmness with which they

155. See Pufan Zhang, *Wanshan shehui fazhi de diandi sikao* [Some Accumulated Reflections on the Perfection of a Socialist Legal System], in *ZHONGGUO FAZHI SHIXIAN FANGLUE* (BITANHUI) [STRATEGY FOR THE REALIZATION OF RULE OF LAW (WRITTEN EXCHANGE OF IDEAS)], *FALU KEXUE* No. 3 [Scientific Legal Studies] 3, 6 (1996) [hereinafter *RULE OF LAW STRATEGY*] (arguing that the main problem for rule of law in China today is the relation between power and law: how to control power, allocate it and make power obey law); Yuhong Hu, *Quanli kongzhi: fazhi de zongzhi yu guisu* [Controlling Power: The Goal and End of Rule of Law], in *RULE OF LAW STRATEGY*, at 18.

156. Compare Li Peng, *RMRB Article by Li Peng on Promoting Rule by Law*, FBIS-CHI-2001-0111, Jan. 11, 2001, with Li Peng on *Implementation of Criminal Procedure Law*, FBIS-CHI-2000-1120, Nov. 20, 2000, and Li Peng *Speaks on PRC Judicial Reform*, FBIS-CHI-2000-1026, October 26, 2000.

157. See Hintzen, *supra* note 20; see also Li Cheng, *Jiang Zemin's Successors: The Rise of the Fourth Generation of Leaders in the PRC*, 161 *CHINA Q.* 1, 3 (2000) (noting that there are more lawyers among the next generation of PRC leaders than the present generation and that the next generation of leaders are more diverse in terms of their formative experiences, political solidarity, ideological conviction, career paths and occupational backgrounds).

hold such views make it difficult to predict how their views will be translated into action. Reform factions within the Party itself may push for deeper legal and political reforms, perhaps even someday genuine democracy. As Jiang Jingguo's deathbed support for greater democracy in Taiwan, and the experience of Korea and the Soviet Union show, authoritarian leaders are capable of relinquishing power given the right circumstances. Jiang Zemin and Party leaders' endorsement of rule of law and its subsequent incorporation into the Constitution suggest that the Party is willing to accept limitations on its power.

Although Party leaders may be wary about rule of law, they appreciate its advantages. In his speech at the 15th Party Congress, Jiang Zemin portrayed rule of law as central to economic development, national stability and Party legitimacy.<sup>158</sup> Jiang has paid homage to the virtues of rule of law as a way of reining in increasingly unruly local governments.<sup>159</sup> Economic reforms have resulted in fewer subsidies and more autonomy for local governments. Facing reduced central government support, local government officials have been forced to fend for themselves. In their pursuit of economic growth, local officials have thumbed their noses at Beijing, regularly circumventing or just plain ignoring central laws and policies. Since lower level officials are more likely than Party leaders to feel the bite of rule of law on a daily basis, perhaps their resistance is to be expected. But the interest of local officials in avoiding the law does not further the policy interests of CCP leaders and the central government. Jiang Zemin and other central leaders advocate rule of law in no small measure because they believe it will strengthen the hand of the central authorities in controlling wayward local officials and help rationalize governance. Not surprisingly, much of the initiative for legal reforms has come from the center.<sup>160</sup>

But for the Party to achieve its goals of stability, implementation of central policies, economic development and legitimacy, further legal reforms, including a stronger administrative law regime and a more independent judiciary, are necessary. Currently, widespread discontent over judicial corruption, bias and incompetence is deterring investors, undermining the legitimacy and effectiveness of the legal system and ultimately hurting the Party. The CCP's only interest in the outcome of most commercial or administrative cases is that the general populace perceive the result as fair. By far the most prevalent source of external

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158. See *Jiang Zemin's Congress Report*, *supra* note 19; see also David S. Goodman, *Democracy, Interest and Virtue: The Search for Legitimacy in the People's Republic of China*, in FOUNDATIONS AND LIMITS OF STATE POWER IN CHINA 291, 305-06 (Stuart Schram ed., 1987); Pitman Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325 (1994).

159. *Jiang Zemin's Congress Report*, *supra* note 19.

160. See, e.g., Lishan Jiang, *Zhongguo fazhi daolu chutan (xia)* [Preliminary Examination of China's Rule of Law Road (part two)], ZHONGWAI FAXUE NO. 4 [Chinese and Foreign Legal Studies] 21, 18-29 (1998) (portraying the emergence and development of rule of law in China as largely a top-down, government orchestrated movement); Su, *supra* note 88. On the other hand, the top-down nature of reform is often overstated. Increasingly, much of the impetus for concrete reforms has come from legal scholars, government officials and those working on the front lines. See Peer-enboom, *Competing Conceptions of Rule of Law in the PRC*, *supra* note 129, and *infra* note 173 and accompanying text.

interference in the judicial process is not the CCP but local government officials. Only rarely does the CCP interfere in the handling of specific cases. When it does interfere, at least in commercial cases, the CCP often does so to ensure that the result accords with law.<sup>161</sup> On the other hand, because of the institutional arrangements whereby the local people's congresses appoint and remove judges and local governments fund the courts, government officials are able to pressure judges to find in favor of the administrative agency in administrative litigation cases or local companies in commercial disputes.

From the Party's perspective, a stronger legal system with a more independent judiciary has both advantages and disadvantages. While the Party for years has acknowledged that local protectionism is undermining the independence of the judiciary, it has refused to address the institutional causes of the problem, presumably because it fears that an authoritative and independent judiciary able to decide commercial and administrative cases on their merits would also be able to decide politically sensitive cases on their merits. Thus, the dilemma facing the Party is how to strengthen the judiciary without allowing it to become too strong. In deciding whether to support further reforms the Party must determine whether the benefits outweigh the costs. However, that calculus is influenced by factors beyond the Party's control.

The need to sustain economic growth will continue to put pressure on China's leaders to carry out reforms, even if this results in further erosion of the Party's power. China's leaders realized early on that a market economy required a legal system capable of providing the necessary certainty and predictability demanded by investors. The slogan that a market economy is a rule of law economy has been repeatedly invoked in mantra-like fashion.<sup>162</sup> Economic reforms have resulted, however, in a devolution of authority to lower level governments and to some degree shifted the base of power from the Party and state to society. Although the extent to which reforms have weakened the Party and diminished central control is much debated, clearly the Party and central authorities are much less dominant than in the past.<sup>163</sup> As reforms continue, the balance of power will continue to shift.

161. According to a survey of 280 judges published in 1993, almost 70% of the judges claimed that as a rule they were subject to outside interference, citing the following sources: CCP, 8%; government organs, 26%; social networks, 29%; other, 4%. See FAZHI DE LIXIANG YU XIANSHI [THE IDEAL AND REALITY OF RULE OF LAW] 33 (Xiangrui Gong ed., 1993) [hereinafter IDEAL AND REALITY]. Another survey of 100 intermediate and basic level court judges in Chongqing were asked: When you handle compulsory enforcement, what kind of interference do you regularly experience? 45% responded no interference; 12%, CCP interference; 32%, government department interference; 15%, interference from the people's congress; 12%, interference from within the court; 11%, outside interference from non-parties and 6% other interference. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 63. In a survey of arbitral award enforcement in China, I found that while interference from local government officials was common, CCP interference was rare and usually only occurred when there was a personal connection between a Party member and the respondent against which enforcement was being sought. See Peerenboom, *Seek Truth from Facts*, *supra* note 71.

162. See Zongling Shen, *Yifa zhiguo yu jingji* [Ruling the Country According to Law and the Economy], 3 ZHONGWAI FAXUE 1 (1998).

163. See Richard Baum & Alexei Shevchenko, *The "State of the State" in Post-reform China*, in THE PARADOX OF CHINA'S POST-MAO REFORMS 333 (1999).

Moreover, rule of law is a function of institution building and the creation of a culture of legality. Progress has been made and continues to be made on both fronts. Legal reformers and members of the judiciary will continue to push for more independent and authoritative courts, if for no other reason than path-dependent institutional self-interest.<sup>164</sup> Political and legal reforms tend to take on a life of their own, with institutions bursting out of the cages meant to confine them.<sup>165</sup> In Taiwan, for example, the Council of Grand Justices assumed a much greater role in curbing administrative discretion and limiting government as legal and political reforms progressed, thereby contributing to further reforms.<sup>166</sup> In Indonesia, the Suharto government's desire to obtain legitimacy abroad and to deal with corruption and patrimonial practices that were adversely affecting business confidence led to the establishment of administrative courts. But then the courts turned on Suharto, pursuing key allies on corruption charges and defiantly striking down the government's decision to ban a popular weekly news magazine. In response to a groundswell of public support, the judiciary became increasingly aggressive in challenging the government, to the point where now Suharto himself is being brought up on charges of corruption.<sup>167</sup>

Further, although much of the impetus for legal reforms in China has come from the center, the demand for rule of law has increasingly come from citizens, domestic businesses, academics, members of the judiciary, legal reformers in state organs such as the NPC, and even local governments.<sup>168</sup> As economic reforms progressed, private citizens and domestic businesses accumulated more property and business interests to protect, and they were increasingly willing to take to the courts to protect them.<sup>169</sup> Local governments have also begun to appreciate the advantages of a law-based order. Notwithstanding Guangdong province's reputation for flexibility and propensity to circumvent the rules, Guangdong officials were among the first to jump on the rule of law bandwagon because they felt that a flexible approach left them vulnerable to a predatory

164. See Minxin Pei, *Creeping Democratization in China*, 6 J. DEMOCRACY 65 (1995).

165. For the metaphor of China's legal reforms as a bird in a cage, see LUBMAN, *supra* note 3.

166. See Sean Cooney, *A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform*, in LAW, CAPITALISM AND POWER IN ASIA, *supra* note 2, at 253 (1999); see also K. Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, 41 AM. J. COMP. L. 1 (1993) (noting more aggressive approach of Korean courts as reforms continued).

167. See David Bourchier, *Magic Memos, Collusion and Judges with Attitude*, in LAW, CAPITALISM AND POWER IN ASIA, *supra* note 2, at 233.

168. See PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (unpublished manuscript on file with author); see also Michael Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Aid in China*, 24 FORDHAM INT'L L.J. 56 (2000); Dowdle, *The NPC as Catalyst for New Norms of Public Political Participation in China*, forthcoming in CHANGING VIEWS OF CITIZENSHIP IN CHINA (Merle Goldman & Elizabeth Perry eds., 2001).

169. See, e.g., Junning Liu, *Chanquan baohu yu youxian zhengfu* [Protection of Property and Limited Government], in ZHENGZHI ZHONGGUO [POLITICAL CHINA] 40 (arguing that while rule of law and limited government are necessary to protect people's property interests that have grown as a result of economic reforms, there still is not a large enough middle class demanding protection of their political rights to support political reforms and democracy).

central government and that implementing rule of law would help them maintain their competitive edge over other provinces.<sup>170</sup>

In short, the development of the legal system hinges on more than the ideas of the top leadership. Legal reforms will continue to be driven to a considerable extent by objective forces, including the needs of a market economy; the demands of foreign investors and domestic businesses; international pressure as evidenced in the amendment of the Criminal Law and Criminal Procedure Law and accession to various human rights treaties;<sup>171</sup> GATT requirements once China becomes a member of the WTO;<sup>172</sup> and the ruling regime's desire for legitimacy, both at home and abroad.

China's legal system, therefore, will most likely continue to converge toward a system that meets the standards of a thin rule of law, but the pace and the path of reforms will be determined primarily by domestic factors. Despite general agreement about the standards of a thin theory, how these standards are interpreted will vary to some extent depending on the context. While thin and thick versions of rule of law are analytically distinct, in the real world there are no free-standing thin rule of law legal systems that exist independently of a particular political, economic, social and cultural context. Put differently, any legal system that meets the standards of a thin rule of law is inevitably embedded in a particular institutional, cultural and values complex, whether that be Liberal Democratic, Statist Socialist, Neo-authoritarian, Communitarian, some combination of them or some other alternative.

Thus, one way of conceiving of the relationship between a thin rule of law, particular thick conceptions of rule of law, and the broader context is in terms of concentric circles. The smallest circle consists of the core elements of a thin rule of law, which is embedded within a thick rule of law conception or framework. The thick conception is in turn part of a broader social and political philosophy that addresses a range of issues beyond those relating to the legal system and rule of law. This broader social and political philosophy would be one aspect of a more comprehensive general philosophy or worldview that might include metaphysics, aesthetics, religious beliefs and so on.

Whereas liberal versions of rule of law are embedded in the liberal democratic frameworks, traditions, and norms of the particular, usually western, countries in which they exist, China's conceptions of rule of law are embedded in a non-liberal framework with Chinese characteristics. Even the Communitarian

170. See Linda Chelan Li, *The "Rule of Law" Policy in Guangdong: Continuity or Departure? Meaning, Significance and Processes*, 161 CHINA Q. 199, 208-14 (2000).

171. See, e.g., JONATHAN HECHT, LAWYERS COMMITTEE ON HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996) (describing influence of international pressure and international legal norms in the criminal procedure law amendment process).

172. See, e.g., Margaret Hilf & Christoph Feddersen, *GATting China into the WTO - A European Perspective in China*, in THE WORLD TRADE SYSTEM 87, 115 (Frederick Abbott ed., 1998) ("The transformation of the legal and judicial system in the economic area, as required by the WTO framework, will influence and change the entire Chinese legal system. Only the change from the 'rule of socialism' to the 'rule of law' can provide a successful membership in the WTO."). For a more cautious account of the impact of China's accession, see *infra* Part IV.C.

conception, despite its endorsement of democracy, rejects many of the fundamental tenets of liberalism, including the liberal preference for a neutral state and emphasis on individual autonomy, in favor of a paternalist state that sets the normative agenda for society and balances the need for individual freedom against the needs of society as a whole. Accordingly, notwithstanding convergence with respect to the general purposes of rule of law, some variation in institutions and rules between China and liberal democratic countries is to be expected.<sup>173</sup> Of course, even within liberal democracies, states rely on a variety of distinct institutional arrangements to realize common ends. Nowhere is this more true than in administrative law.

#### D. Institutional and Doctrinal Convergence and Divergence

The wide variation among countries' constitutional structures, institutional arrangements, legal doctrines, regulatory methods and mechanisms for controlling administrative discretion makes it difficult to generalize about the effects of globalization on administrative law. There is ample evidence of both convergence and divergence. One illustrative issue is the separation of powers. In the United States, separation of powers refers to a system in which the legislature, executive and judiciary are constitutionally independent and equal branches. In contrast, like some European countries, China is a unitary state in which the legislature is supreme. Thus, the legislature, the National People's Congress ("NPC"), is officially the organ of highest state power.<sup>174</sup> The State Council, the head of the administrative branch, and the Supreme People's Court, are responsible to the NPC, though they are granted a certain degree of independence under the PRC Constitution.<sup>175</sup> Accordingly, while there is separation of functions in China, there is no separation of powers in the sense of three constitutionally independent and equal branches. However, in practice no country—not even the United States—strictly adheres to the simplistic separation of powers in which the legislature passes laws, the executive implements them, and the courts

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173. Proponents of the various conceptions see rule of law serving certain similar purposes: enhancing predictability and certainty, which promotes economic growth and allows individuals to plan their affairs; preventing government arbitrariness; increasing government efficiency and rationality; providing a mechanism for dispute resolution; protecting individual rights; and bolstering regime legitimacy. They differ, however, with respect to the priorities of the various purposes, their degree of support or enthusiasm for any given purpose and the details of how the goals are interpreted. Broadly stated, Liberal Democrats emphasize the role of rule of law in limiting the state and protecting the individual against government arbitrariness, whereas Communitarians favor a more balanced role for rule of law as means of both limiting and strengthening the state. In contrast, Neo-authoritarians place somewhat greater emphasis on the state-strengthening aspect, which is assigned an even higher priority by Statist Socialists. See Peerenboom, *Competing Conceptions of Rule of Law*, *supra* note 129.

174. P.R.C. CONSTITUTION, *supra* note 143, arts. 2, 3, 57, in *Changyong falu fagui quanshu*, at 3-4, 9.

175. See *id.*, arts. 3, 85, 89, 92, 126, 128, in *Changyong falu fagui quanshu*, at 3, 14, 15, 16, 19, 20.

interpret and enforce them by adjudicating disputes. For better or worse, administrative agencies everywhere make, implement and adjudicate laws.<sup>176</sup>

States also rely on a variety of mechanisms in the administrative law area to keep the government in check. Such mechanisms include internal norms, public participation and transparency requirements, due process rules, administrative review, judicial review, ombudsmen, legislative oversight, and contractual and tort remedies. The particular mix will vary from country to country. Moreover, similar institutions may differ in their constitutional bases or powers. Ombudsmen may be created under and held responsible to the legislature or the executive.<sup>177</sup> In some countries, generalist courts have jurisdiction over suits challenging the government, as in the United States, whereas others establish special administrative courts or tribunals, as in France.<sup>178</sup> While courts in the United States have the authority to review the constitutionality of administrative regulations and specific acts, other states assign responsibility to specialist constitutional courts or review bodies.<sup>179</sup> Many states allow courts to strike down administrative laws that are inconsistent with superior legislation, but some, including China, do not.<sup>180</sup> The relative importance of the various control mechanisms may also vary from country to country. For instance, though it may be changing, judicial review has played a more important role in the United States than in Europe.<sup>181</sup>

At the level of doctrine, there is also considerable variation. While some states have procedural requirements for administrative rulemaking, many do not.<sup>182</sup> Judicial review doctrines also diverge, with some countries requiring parties to exhaust internal remedies first as a general rule while others such as China generally allow the parties to choose.<sup>183</sup> Standing rules, standards for review and limits on delegation all diverge. Moreover, there is often considerable change over time within one country. In the United States, for instance, standing rules, standards for review and delegation doctrines have varied over

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176. See, e.g., KENNETH WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 310 (1982) (“[A]dministrative agencies, much to the dismay of those who endorse a clear separation of powers in government, have legislative, judicial and administrative powers.”).

177. *Id.* at 342-46; see also CRAIG, *supra* note 112, at 127.

178. See L. NEVILLE-BROWN & JOHN BELL, *FRENCH ADMINISTRATIVE LAW* 7 (4th ed. 1993).

179. See Louis Favoreau, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS* 38 (Louis Henkin & Albert Rosenthal eds., 1990).

180. See *infra* notes 260-65 and accompanying text.

181. See Majone, *supra* note 11, at 155-57. However, there is considerable variation within Europe. See, e.g., SHAPIRO, *supra* note 50, at 59 (observing that German administrative courts appear to be more active reviewers than French).

182. Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 Harv. L. Rev. 1279, 1288 (1994) (noting that Germany’s Administrative Procedure Act only imposes procedural requirements with respect to specific acts of administrators, not abstract acts—i.e., general rulemaking).

183. Compare ALL, *supra* note 148, art. 37, in *Changyong falu fagui quanshu*, at 2140 (allowing parties to choose whether to first seek administrative reconsideration—unless specifically required by laws), with *Darby v. Cisneros*, 113 S.Ct. 2539, 2540 (1993) (holding that absent a statutory mandate, it is within the discretion of the courts whether to require that administrative remedies first be exhausted).



the years. In some cases, the process is cyclical, as in the experiments with formal and informal modes of regulating in the United States.<sup>184</sup>

Given such diversity of institutions and doctrines, globalization in administrative law can only be measured in broad terms. To assess a particular system requires that one look at the system as a whole and the outcomes it produces. The outcomes must then be evaluated in terms of the larger socio-political goals of the particular country and the values of its citizens. The balance between government efficiency and protection of individual rights varies from country to country. For a variety of context-specific reasons, people may differ in their levels of confidence and trust in their officials. As a result, they may place a different priority on holding officials accountable, and may prefer to keep officials on a tighter leash, even if that results in a slower and more costly administrative process.

Though institutions, doctrines and outcomes will vary from one country to the next, there are limits to the range of acceptable variation. China's administrative law regime is similar to that of certain civil law countries with respect to the powers and functions of the legislature, executive and courts. China has also established control mechanisms similar to these countries for reining in the bureaucracy, and even has some unique techniques such as Party disciplinary committees.<sup>185</sup> After years of legislating, the essential framework of a modern regulatory system is in place, yet the outcomes in China are vastly inferior to outcomes in other countries due largely to weak institutions and systemic problems.

## II.

### INSTITUTIONAL AND SYSTEMIC OBSTACLES TO ADMINISTRATIVE LAW REFORM

#### A. *The Relevance of the Party for Administrative Law Reform*

In every legal system, some authority—be it the Party, legislators, administrative officials, judges or the people—is ultimately responsible for creating, interpreting, and implementing rules.<sup>186</sup> In a very general sense, one difference between a socialist rule of law and a liberal democratic rule of law is that the Party reserves the right to make fundamental policy decisions in the former, whereas in the latter such decisions are left to the people. Thus, the official interpretation of the role of the Party, set forth in the state and Party constitutions and endorsed by Jiang Zemin, is that the Party is to set the general policy

184. See generally Todd Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000) (describing the swings from formal to informal modes of regulating as exemplified in the passage of the Administrative Procedure Act (APA); the subsequent reliance on adjudication rather than rulemaking; the ensuing explosion in informal rulemaking when the U.S. Supreme Court held that the APA did not require formal rulemaking; and the reaction to informal rulemaking in the 1970s that led to courts imposing additional procedural requirements on agencies; and then the more recent return to informal means of techniques such as negotiated rulemaking, reliance on interpretative rules and organized guidance).

185. See *infra* Part III.

186. See Shapiro, *supra* note 50, at 45.

direction for society.<sup>187</sup> Significantly, however, whereas under Mao, CCP policies substituted for or trumped laws,<sup>188</sup> CCP policy is now being transformed into laws and regulations by entities authorized to make law in accordance with the stipulated lawmaking procedures.<sup>189</sup> Rule of law requires that laws be passed by entities with the authority to make law in accordance with proper procedures, but it does not dictate from where the ideas must come. The source could be the Party, the legislature, citizens or private interest groups.

Nevertheless, for the Party's leading role in society to be compatible with rule of law, it would have to be clearly defined by law, and Party organs and individual Party members would have to be subject to law. Officially, Party organs and individual Party members are supposed to abide by the law, but in reality their behavior does not accord with these pronouncements.<sup>190</sup> The actual role of the Party is not clearly defined in the Constitution or laws.<sup>191</sup> The Party's importance is more a matter of political reality than law. The power of Deng Xiaoping in the last years before his death was entirely extra-constitutional; he held no official government position.<sup>192</sup> Nor is there any mention in the Constitution of the Party system of control that creates a parallel structure of Party organizations at each level of government.<sup>193</sup> Similarly, there is no formal legal basis for the nomenklatura system of appointments whereby the Party appoints or approves the appointments of key personnel, usually CCP members, to

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187. See C.C.P. CONST. preamble (1992) (stating that the Party must conduct its activities within the limit permitted by the Constitution and law). Party members must also conscientiously observe the law. See *id.* art. 3(4); see also P.R.C. CONST., *supra* note 143, art. 5, in *Changyong falu fagui quanshu*, at 4. Zhongjie Li, *Theories and Practice of the Building of Legal System Over the Past 20 Years*, FBIS-CHI-98-359, Dec. 25, 1998 (translation of Renmin Ribao article) presents a standard view:

As pointed out by Comrade Jiang Zemin, our Party's leadership is mainly political, ideological, and organizational, whereas the key form of political leadership is: To transform the Party's ideas into the state's will after going through a statutory procedure; and to bring into effect the Party's line, principle, and policy through activities organized by the Party and Party members' exemplary role set for the broad masses. The Party has to exercise leadership over the formulation of the Constitution and law, and also to act consciously within the bounds of the Constitution and law, work strictly according to law, and rule the country according to law.

*Id.*

188. See Michel Oksenberg, *Policy Making Under Mao, 1949-68: An Overview*, in *MANAGEMENT OF A REVOLUTIONARY SOCIETY* 79 (John Lindbeck ed., 1971). See generally KENNETH LIEBERTHAL & MICHEL OKSENBERG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES* (1988).

189. The greater reliance on laws, rather than CCP policy, is widely acknowledged to be one of the hallmarks of the post-Mao era. See, e.g., Thomas Jones & Susan Finder, *PRC Law: A Millenium Retrospective*, 14 *CHINA L. & PRAC.* 53, 54 (1999/2000).

190. See *THE TIANANMEN PAPERS* (Andrew Nathan et al. eds., 2000) (discussing how the decision to impose martial law and to use military force to clear the square was reached).

191. The difference between the formal structure of government set forth in the Constitution and the reality of political power in China is often noted. See, e.g., Jerome Cohen, *China's Changing Constitution*, 76 *CHINA Q.* 794 (1978); William C. Jones, *The Constitution of the People's Republic of China*, 63 *WASH. U. L.Q.* 707 (1985).

192. Deng did retain a Party position overseeing the military as head of the Central Military Commission.

193. See KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION TO REFORM* 157-218 (1995).

positions of power within all of the major institutions, including the people's congresses, governments, courts and administrative agencies.<sup>194</sup> Neither the Constitution nor any other law provides for such powers. On the contrary, the involvement of the CCP Committees in the appointment of judges, for instance, is at odds with the appointment process set forth in the Judges Law.<sup>195</sup>

Moreover, although in theory CCP policy must be transformed into laws and regulations by the entities with lawmaking authority to be legally binding, in practice there are still instances where CCP policy trumps the available laws and regulations.<sup>196</sup> In addition, Party members are often insulated from judicial sanctions because the Party generally handles members' violations of the law internally, according to CCP disciplinary rules.<sup>197</sup>

While one could imagine a constitution that spelled out the CCP's role, including its appointment powers and so forth, the current constitution does not. Alternatively, one could imagine the CCP acting only within the limits of its constitutionally prescribed role, but neither is that currently the case. Although ruling the country in accordance with law is the official policy, even CCP leaders admit that there are problems.<sup>198</sup> Party organs and members continue to interfere in day-to-day governance in ways that have no legal basis and go beyond the Party's leading role as general policy setter. The reality is that Party organs sometimes make decisions that should be made by legislators, government officials and courts.

Nevertheless, Party involvement in day-to-day governance is undeniably less prevalent than it was in the past. The Party has turned over much of the daily governance to the usual actors: the legislature, executive and courts. Although the Party still maintains various mechanisms for influencing the legislative process,<sup>199</sup> its role is considerably diminished. In 1991, the Party issued a

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194. See John Burns, *Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura*, 138 CHINA Q. 458 (1994).

195. According to the Judges Law, judges are to be appointed by the people's congresses. See FAGUAN FA [JUDGES LAW], art. 11 (1995) 94, 96, in *Changyong falu fagui quanshu* (2000).

196. See Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, 141 CHINA Q. 82 (1995).

197. Most CCP members who are disciplined internally or punished by the courts tend to be low-level officials. For instance, in 1998, courts handled 18,468 cases of economic crime and convicted 15,670 offenders. However, there were only three officials at the ministerial level, 54 officials at the prefecture or department level, and 434 at the county or division level. See 1999 ZUIGAO FAYUAN GONGZUO BAOGAO [1999 SUPREME COURT WORK REPORT], available in FBIS-CHI-1999-0323, March 20, 1999. The procuracy in 1998 investigated 40,162 persons for corruption, prosecuting 26,834 of them. Of those investigated, only three were provincial level officials, 103 were department or bureau level officials, and 1714 were county or division level officials. See 1999 SUPREME PEOPLE'S PROCURATORATE WORK REPORT, FBIS-CHI-1999-0323, March 20, 1999. In the rare case of punishment of high-level officials, Party leaders must first decide whether to turn the violator over to the courts or to handle the matter internally. If the courts handle the matter, the Party effectively determines the decision as to guilt and often as to punishment prior to trial.

198. See Jiang Zemin's *Congress Report*, *supra* note 19.

199. Party control over the legislature is exercised in a variety of ways, some more direct than others, some more effective than others. These means include pre-approval of the legislative agenda, pressure on legislative leaders to push bills forward and the review of draft laws. The Party also makes its views known through Party cells within the legislature and through other channels of communication. But, the most important means of CCP control is the nomenklatura system of ap-

document defining its leadership role with respect to lawmaking.<sup>200</sup> The document confirmed that the CCP's role should be limited to "leadership over the political line, direction and policies" and review and confirmation of draft laws.<sup>201</sup> Not all draft laws need be submitted to the CCP for approval.<sup>202</sup> Moreover, in practice the review process usually consists of general comments on most laws rather than detailed calls for revisions.<sup>203</sup>

Long regarded as a rubber stamp, the NPC has grown increasingly assertive. The Standing Committee recently voted down a draft amendment to the Highway Law and has demanded significant amendments to other laws.<sup>204</sup> The lawmaking process now involves considerable bargaining between various constituencies.<sup>205</sup> There is more opportunity for participation by different interest groups, particularly with respect to national laws.<sup>206</sup> Even local people's congresses are becoming more assertive.<sup>207</sup> In short, the outcome of the legislative process is increasingly determined by factors other than the dictates of the CCP.<sup>208</sup>

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pointments. See Murray Scot Tanner, *The Erosion of Communist Party Control Over Lawmaking in China*, 138 CHINA Q. 381, 397-401 (1994).

200. Tanner cites and discusses Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking Work. See *id.* at 397-401.

201. *Id.* at 400.

202. See *id.* at 396.

203. See Dowdle, *The Constitutional Development and Operations*, *supra* note 138.

204. See Xu Yang, *Road Bill Negation Written in History*, CHINA DAILY, April 30, 1999 (noting that this was the second time that the NPC voted down draft bills, the other draft bill voted down was the urban neighborhood committee law).

205. See LIEBERTHAL & OKSENBERG, *supra* note 188; Tanner, *Erosion of Communist Party Control*, *supra* note 199; Murray Scot Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Lawmaking*, 141 CHINA Q. 39, 53-55 (1995).

206. For instance, the draft Unified Contract Law was widely circulated, even to foreign law firms. See *Democratic Legislation to Produce Better Laws*, CHINA DAILY, Sept. 28, 1996, at 4.

207. See Roderick MacFarquhar, *Reports from the Field: Provincial People's Congresses*, 155 CHINA Q. 656, 665-66 (1998) (observing that provincial people's congresses are developing an institutional life of their own, albeit within limits); Pei, *Creeping Democratization in China*, *supra* note 164, at 75 (1995) (reporting that some provincial and municipal people's congresses elected their own candidate rather than the candidate favored by the Party).

208. In any event, the mere fact that a ruling party is effective at having its policies become laws is not inconsistent with rule of law. The role of the Party in sponsoring and reviewing laws and appointing key personnel is similar to the role of the ruling party in many parliamentary systems. In such systems, the ruling party controls the legislative process and is generally able to push through the legislation it desires. Moreover, the ruling party may also make key government and in some cases judicial appointments. See CRAIG, *supra* note 112, at 74 ("[T]he government can always ensure that its policies become law in much the way that it desires."); G. Craenen, *Legislators*, in THE INSTITUTIONS OF FEDERAL BELGIUM 71, 77 (G. Craenen ed., 1996) (describing a change in center of gravity away from the Parliament to the Executive such that the latter is able to "push its initiatives to the foreground and to obtain from Parliament what it considers necessary" and arguing that Parliament's main function is now less legislative and more to keep the government in check); Sir William Wade, *Administrative Justice in Great Britain*, in ADMINISTRATIVE LAW AND THE PROBLEM OF JUSTICE: ANGLO-AMERICAN AND NORDIC SYSTEMS 5-6 (Aldo Piras ed., 1991) (observing that there is no strict separation of powers in Britain and that acts of Parliament are drafted by the executive and "pushed through Parliament by the government's majority vote, sometimes with virtually no alteration and sometimes with only perfunctory discussion."). Obviously there are important differences between the CCP and ruling parties elsewhere; most notably, the CCP is not elected. The CCP also appoints a much larger number of people than the ruling party in most systems. But, while the non-

In the administrative area, CCP influence may have diminished and is mainly indirect.<sup>209</sup> The CCP continues to influence rulemaking through the nomenklatura system and by setting general policies. But as in the legislative realm, CCP influence on administrative rulemaking is breaking down and agencies are increasingly assertive in pursuing their own agendas.<sup>210</sup> Administrative entities pass thousands of regulations every year, many of them highly technical in nature. Even were it so inclined, the CCP lacks the capacity to play a more significant role in the rulemaking process. Similarly, administrative agencies make countless specific decisions every day. Direct interference by the CCP is necessarily limited. Indeed, the CCP only rarely interferes in administrative litigation cases.<sup>211</sup>

Given the greatly reduced role of the CCP in the administrative area, it would be a mistake to lay the brunt of the blame for China's administrative law problems on the CCP. Most of what ails the administrative system in China has little to do with the CCP. Rather, the Party's impact is felt mainly in two indirect ways. The first is symbolic. When Party organs or members act beyond the law, it sends a signal to the rest of society that laws need not be taken seriously.

Second, the reluctance of senior leaders to unleash political and legal reforms that could threaten the Party has resulted in tight limits on civil society, an attempt to co-opt emerging interest groups through the establishment of clientelist and corporatist relationships and efforts to regulate them through registration requirements. It has also led to limited transparency, with restricted public participation in the lawmaking and rulemaking processes and the refusal to enact a freedom of information law. Perhaps most important, senior leaders have refused thus far to carry out institutional reforms needed to create an independent judiciary.

The choice the Party faces, however, is not all or nothing. Further reforms are possible that would not only strengthen the legal system without directly threatening the Party, but would also further the Party's goals. One of the areas most in need of modification is the legislative system.

### *B. A Legislative System in Disarray*

A law-based order requires a way of verifying whether laws are valid and legally binding, i.e., that (1) they are made by an entity with authority to make laws; (2) the entity was acting within its scope of authority; (3) the entity followed proper procedures, if applicable; and (4) the regulations are consistent with superior legislation. China has passed a number of laws and regulations

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elected character of the CCP and the nomenklatura system are incompatible with democracy, they are not necessarily incompatible with a thin theory of rule of law.

209. See Moon & Ingraham, *supra* note 108, at 85 (noting that decentralization and a move toward a market economy, combined with civil service reforms, will ultimately decrease the importance of the CCP in the administrative area).

210. See, e.g., LIEBERTHAL & OKSENBERG, *supra* note 188, at 21-22 (commenting that the role of the Party was less than usually assumed at least in the case of energy policy, and that policy formation was a protracted, disjointed and incremental process of consensus building).

211. See IDEAL AND REALITY, *supra* note 161.

setting out the procedures for lawmaking, including the newly minted Law on Legislation.<sup>212</sup> Yet numerous problems remain.<sup>213</sup>

### 1. Dispersion of Lawmaking Authority and Inconsistency of Laws

One of the problems with China's legislative system is its sheer complexity.<sup>214</sup> A number of entities have been afforded the right to legislate, resulting in a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, and explanations, all claiming to be normatively binding and treated as such by the creating entity.<sup>215</sup> The NPC and local people's congresses, the State Council and its ministries and commissions, and local governments may all issue legislation.<sup>216</sup> In many areas, administrative agencies are mainly responsible for legislation with the total number of administrative regulations (including Rules and Normative Documents) greatly exceeding the number of NPC Laws.<sup>217</sup>

212. See LIFA FA [LAW ON LEGISLATION] (2000) 214, in *Changyong falu fagui quanshu* (2000).

213. For an assessment prior to the enactment of the Law on Legislation, see Buyun Li, *Guanyu qicao "Zhonghua Renmin Gongheguo lifafa (zhuanjia jianyi gao) de ruogan wenti"* [Several Problems in the Expert Opinion Draft of the PRC Law on Legislation], *ZHONGGUO FAXUE* [PRC LEGAL STUDIES] 11 (Jan. 1997). For a critique of the Law on Legislation, see Yahong Li, *The Law-making Law*, 30 *HONG KONG L. J.* 120 (2000).

214. See Perry Keller, *Legislation in the People's Republic of China*, 23 *U. BRIT. COLUM. L. REV.* 653 (1989).

215. See Peter Come, *China's Legal Structure*, in *A GUIDE TO THE LEGAL SYSTEM OF THE P.R.C.* 1 (1997) ("At first glance the PRC legal system appears almost unintelligible. It consists of multiple levels of laws, regulations, sub-legal documents and explanations, each with, up until now, ill-defined legal status and effect.").

216. For present purposes, the legislative hierarchy may be classified as follows:

- (1) Constitution;
- (2) Laws (*falu*) passed by the NPC and NPC SC;
- (3) Administrative Regulations (*xingzheng fagui*) passed by the State Council;
- (4) Local People's Congress Regulations (*difangxing fagui*) passed by the people's congresses and their standing committees of provinces, autonomous regions, cities directly under the central government and major cities and special economic zones;
- (5) Rules (*guizhang*), including Government Rules (*zhengfu guizhang*) passed by people's governments of provinces, autonomous regions, cities directly under the central government and major cities and Ministry Rules (*bumen guizhang*) passed by central level ministries, commissions, agencies or entities (such as the People's Bank of China) directly under the State Council; and
- (6) Normative Documents (*guifanxing wenjian*), including all legislation passed by people's congresses and governments other than those mentioned above.

See LAW ON LEGISLATION, *supra* note 212, arts. 78-86, in *Changyong falu fagui quanshu*, at 223-24. Legislation passed by the State Council, governments and administrative departments with the authority to issue legislation may be Rules or merely Normative Documents depending on the nature of the legislation, the procedures for making the legislation and whether the legislation was published or not. Accordingly, it is often difficult to determine whether legislation should be treated as a Rule or merely as a Normative Document.

I distinguish between laws, regulations, administrative regulations and rules in a generic sense and as technical terms of art referring to particular types of PRC legislation as defined in the Law on Legislation by capitalizing the latter.

217. China is by no means unique in this regard. In many countries, including the U.S., the number of administrative regulations passed every year exceeds the number of laws passed by the legislature.

Not only is power dispersed, but the lines of authority for lawmaking are unclear. In many instances it is difficult if not impossible to state with certainty whether an entity was acting within its authority. The Constitution, the Law on Legislation and organic laws give the State Council, administrative agencies, local people's congresses and local governments vaguely delineated inherent authority to legislate.<sup>218</sup> According to the traditional understanding of separation of powers, the legislative branch has exclusive authority to pass laws. The executive branch lacks the power to pass legislation unless the legislature delegates its lawmaking powers to the executive. In China, the State Council has the inherent authority to "adopt administrative measures, to enact administrative rules and regulations and to issue decisions and orders in accordance with the Constitution and the law."<sup>219</sup> Similarly, ministries and commissions subordinate to the State Council, local governments and people's congresses also enjoy the inherent authority to pass legislation.<sup>220</sup> Additional legislative authority may be delegated to any of these entities by the NPC. As in many countries, delegation is often broad.<sup>221</sup> For instance, in 1984 and 1985 the NPC authorized the State Council to enact regulations relating to economic reform and foreign investment.<sup>222</sup>

The lack of clear lines of lawmaking authority has resulted in quality and consistency problems. Many regulations are poorly drafted, ill-advised or unworkable in practice.<sup>223</sup> They also frequently conflict with superior legislation. According to a study in Hebei, Beijing, and Tianjin in the mid-1980s, about two-thirds of local regulations were inconsistent with the Constitution.<sup>224</sup>

To be sure, the high level of inconsistency is due to various factors beyond the dispersion of lawmaking authority. Superior legislation is often general and vague.<sup>225</sup> Accordingly, it is not always clear what the drafters intended. Diffi-

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218. Many PRC scholars argue that inherent authority may not be used to create new rights and obligations not recognized by superior law. In fact, lawmaking entities have regularly done so, in part because there has often been no superior law on point. Presumably the need to exceed the scope of inherent authority will diminish as more laws are passed. For instance, 1987 regulations in Shanghai permitted the government to issue regulations in the absence of relevant regulations by the local people's congresses. However, 1994 regulations eliminated this clause on the ground that it led to abuse by local government and inconsistency in regulations. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 3. Moreover, the Law on Legislation now expressly reserves certain areas for legislation by the NPC or NPCSC exclusively. LAW ON LEGISLATION, *supra* note 212, art. 8, in *Changyong falu fagui quanshu*, at 215.

219. P.R.C. CONST., *supra* note 143, art. 89, in *Changyong falu fagui quanshu*, at 15.

220. *See id.* arts. 90, 99-100, 107, in *Changyong falu fagui quanshu*, at 15, 16-18.

221. *See infra* note 459.

222. *See* RESOLUTION ON THE GOVERNMENT WORK REPORT (1984); *see also* DECISION CONCERNING THE DELEGATION OF AUTHORITY TO THE STATE COUNCIL TO ENACT TEMPORARY REGULATIONS REGARDING THE ECONOMIC REFORM AND OPENING TO FOREIGN COUNTRIES (1985) (issued by the NPC).

223. *See* CORNE, *supra* note 16, at 95; *see also* ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 28.

224. *See* CORNE, *supra* note 16, at 152.

225. The generality and vagueness of many PRC laws is itself attributable to various factors. Many of China's laws are modelled on the laws of civil law countries, which are typically more general and more broadly drafted than statutes in common law countries. *See, e.g.*, MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 56 (2d ed. 1994). Given wide regional variation

culty in applying and interpreting these vague laws leads lower level entities to pass regulations that are later determined to be inconsistent with superior legislation.<sup>226</sup> The problem is exacerbated by the failure of the NPC and State Council to issue interpretations of the laws and regulations.<sup>227</sup>

Power grabs among China's various bureaucracies frequently produce conflicts in laws.<sup>228</sup> The transition to a market economy has exacerbated inter-agency conflicts. Recent downsizing reduced the number of ministries from 40 to 29 and slashed the number of government officials by 50%, intensifying the desire among the survivors to make themselves seem needed.<sup>229</sup> The struggle for turf among administrative departments leads to a variety of departments claiming jurisdictional authority over the same area and issuing conflicting rules to protect their institutional interests.<sup>230</sup>

Administrative agencies are not the only ones who knowingly pass inconsistent legislation to promote their own interests. Local governments regularly do so as well. Economic reform has resulted in greater autonomy and fiscal responsibility for local governments.<sup>231</sup> As a consequence, local governments often pass regulations that conflict with national legislation in an effort to attract investors and promote the growth of the local economy. For instance, although for a number of years PRC laws only permitted the establishment of 22 retail

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and ongoing reforms, laws and regulations are broadly drafted to allow sufficient flexibility in implementation to meet local conditions. A traditional emphasis on particularized justice characteristic of the Confucian tradition, socialism's emphasis on uniting theory and practice, and the pragmatic orientation of current leaders also favor laws that are often statements of general principles that must then be interpreted and applied to the particular situation by local officials and administrators. See DAVID HALL & ROGER T. AMES, *THINKING THROUGH CONFUCIUS* (1987) (noting Confucian emphasis on particularism); Carlos Wing-hung Lo, *China's Legal Awakening*, in *LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA* 21-26 (1995) (discussing socialist emphasis on praxis and the emergence of pragmatism during the Deng era).

226. See Conita SC Leung, *Chinese Law-Making: A Case of Legislative Disorder*, CHINA L. NEWS, Feb. 27, 1998, at 1 (complain[ing] that "[l]awyers and even local officials are often confronted with difficulties in applying the laws and regulations that conflict with each other or are simply too vague to make any sense.").

227. Given the reluctance of the NPC to interpret its own laws, the Supreme People's Court (SPC) has stepped into the gap and issued a number of interpretations. However, the legal authority of the SPC to do so is unclear. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 188-90 (1994). Moreover, the SPC often goes beyond the original law in its interpretation, thus creating new law, in clear violation of its constitutional powers. See *infra* Part II.C.

228. See Keller, *Sources of Order*, *supra* note 122, at 733 (observing that "the expansion of legislative powers to so many central and regional state bodies has in effect brought the rivalries and disorder of Chinese bureaucracy directly into the legislative structure").

229. See Julie Reinganum & Thomas Pixley, *Bureaucratic Mergers and Acquisitions; Chinese Government's Restructuring Initiatives*, CHINA BUS. REV., May 15, 1998, at 36; *Chinese Premier's Government Work Promises Reduction of Ministries* (BBC Monitoring Asia Pacific, March 11, 1998).

230. See *Dispute Slows Passage of Securities Law*, CHINA SEC. BULL., Sept. 24, 1997 (describing how State Development and Planning Commission, People's Bank of China, Finance Ministry, State Commission for Restructuring the Economy and State Council all refused to withdraw from "the profitable securities industry"); see also William Alford & Shen Yuanyuan, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125 (1997) (arguing that environmental problems are attributable in part to conflicts among agencies).

231. See James Feinerman, *The Give and Take of Central Local Relations*, CHINA BUS. REV., Jan.-Feb. 1998, at 16, 21.



joint ventures, all of which needed central level approval, local authorities approved more than 340.<sup>232</sup> Similarly, local governments have routinely ignored repeated warnings from the central government that they do not have the authority to issue tax breaks to investors.<sup>233</sup>

Ideological struggles also contribute to legislative inconsistency. Two of the areas most rife with inconsistencies and conflicts between lower and higher level legislation are land<sup>234</sup> and labor,<sup>235</sup> in part because they are undergoing rapid reform as part of the transition from a centrally planned economy, but also due to their ideological importance. Mao rose to power on the promise of land reform. Allowing private ownership of land, even in the form of leaseholds, was a major step toward redefining socialism with Chinese characteristics. Similarly, laborers are supposedly the backbone of socialism. Giving employers the right to freely hire and fire employees and to pay them according to their performance, and thus breaking the iron rice bowl that guaranteed workers employment, housing and other benefits made China appear less like the workers' paradise and more like the much maligned capitalist enemy.

China's rush to the market has further exacerbated problems of legislative inconsistency. Not surprisingly, the pace of economic reforms has contributed to instability and lack of clarity in laws and administrative regulations as drafters grapple with new issues and rush to keep up with the rapidly changing environment.<sup>236</sup> In the absence of superior laws, lower level entities are forced to issue regulations in response to market demands. When superior legislation is eventually passed, they often do not go back and annul or amend the existing inconsistent legislation.<sup>237</sup> Conversely, sometimes a law is passed incorporating certain concepts or provisions that turn out to be inconsistent with the trend of reform or unworkable in practice. Rather than undertaking the time-consuming process of amending the superior legislation, central authorities implicitly or explicitly permit local governments or agencies to pass legislation (often in the form of experimental implementing rules) that meets the needs of reform but is at odds with the superior legislation.<sup>238</sup> If the implementing rules prove effective, the superior legislation will be amended in time.

232. See Steven Shi & Anne Stevenson-Yang, *Retail Roundabout*, CHINA BUS. REV., Jan.-Feb. 1998, at 43, 44.

233. See *State Will Strengthen Supervision of Taxation*, CHINA DAILY, Mar. 30, 1998, at 1 (noting that only the central government has the authority to issue tax legislation and grant tax reductions).

234. See Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 53 (1996) (citing ideological obstacles to marketization of land and resulting inconsistencies); Peter Corne & Andrew Godwin, *Allocated or Granted Land? New Rules Blur the Boundaries*, CHINA JOINT VENTURER, Feb. 1997, at 11, 19 (attributing inconsistencies in land regulations to socialist emphasis on maintenance of state ownership of property).

235. See generally CORNE, *supra* note 16.

236. Such problems are typical of transition states. See, e.g., Seidman, *supra* note 79, at 89.

237. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 220-21 (estimating that the passage of 1992 State-owned Industrial Enterprise Law resulted in the need to clean up 200,000 Rules and Normative Documents, including the repeal of 7600 and amendment of 100,000 more).

238. For example, the Regulation of Administration of Technology Contracts issued by the State Council on May 24, 1985 required approval for technology import contracts. When that proved cumbersome and a hindrance for PRC businesses seeking to import technology, MOFTEC

The drafters' lack of legal skills and experience is another source of inconsistency among the laws. The procedures for rulemaking generally do not provide for much, if any, input from citizens or interested parties. The lack of legal knowledge combined with the absence of input from interested parties contributes to the low quality and inconsistency of laws.<sup>239</sup>

Whatever the reasons, inconsistencies and conflicts in rules undermine the effectiveness of the legal system and investors' confidence in it.<sup>240</sup> Conflicting rules create uncertainty for the regulated, who are not sure which laws to follow. For instance, even if investors would prefer to take advantage of more flexible, lower level laws, they then live in fear that the central authorities will one day crack down on rogue local legislators and officials who have exceeded their authority.<sup>241</sup>

## 2. Lack of Effective Means of Resolving Conflicts of Law

The lack of a practical way to sort out conflicts of law is as damaging to a law-based order as the existence of conflicting rules. While in theory there are

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issued the Administration of Trade in Importation of Technology and Equipment Tentative Procedures, issued by MOFTEC on March 22, 1996, changing the requirement for certain technology import from approval to registration. See Markel & Peerenboom, *supra* note 81.

239. MOFTEC and the State Administration for Industry and Commerce issued regulations that require all parties to a joint venture to contribute equity at the same time unless special approval is obtained. See Supplementary Provisions to the Several Provisions regarding Capital Contributions by the Parties to Sino-foreign Equity Joint Venture, art. 2 (promulgated by MOFTEC and SAIC, Sept. 29, 1997). Where—as in most cases—the Chinese party to a joint venture will contribute land and buildings and thus have paid in its registered capital in full immediately upon establishment of the joint venture, the foreign investor is obligated to contribute its registered capital in full at the same time. This makes no commercial sense in that the foreign party will often contribute cash and equipment, which may not be needed by the joint venture for some time. Making such capital available before necessary is an extra cost that ultimately must be borne by the joint venture.

Even more remarkable, the regulation provides that an investor with a controlling share of the company may not exercise decision-making authority until it pays its capital in full. But if the majority partner cannot make decisions, who is to run the company? The minority shareholder? But why should a minority partner, with only, say, a 5% stake in the company, be given the right to run the company simply because the partner with a 95% share has yet to contribute perhaps as little as 1% of the outstanding registered capital? Moreover, how would it be legally possible for the minority party to run the company? If the majority shareholder cannot vote, would its presence at a board meeting count for quorum purposes? When contacted, MOFTEC officials had no idea how such issues were to be resolved. In practice, the regulations appear to have turned out to be a deadletter. Although not implemented, the regulation remains on the books and could potentially be hauled out in particular cases to the detriment of the majority investor.

240. In a 1992 survey, foreign investors ranked problems in the regulatory environment, including lack of uniformity and consistency in interpreting and implementing rules, as the number one obstacle. See Pitman Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control*, 141 CHINA Q. 155, 176 (1995). A 1997 survey of 1000 foreign business executives in Shanghai found their biggest complaint to be red tape, including government interference, complex procedures, inconsistent policies and poor communications. Suggestions for improvement included increasing policy transparency, reducing bureaucracy, maintaining stable and consistent government policies and strengthening the legal system. See Zheng Wu, *Shanghai Survey Finds More Red Tape to Cut*, CHINA DAILY, Nov. 9-15, 1997, at 5.

241. The central government recently forced many locally approved retail joint ventures to reorganize, with the Chinese party taking a majority interest; or in some cases to dissolve altogether. See *Overhaul of Foreign Investment in China's Retail Sector*, CHINA L. & PRAC., Dec. 1998/Jan. 1999, at 66.

ways to reconcile inconsistencies,<sup>242</sup> in practice there is often no effective means for doing so. The power of constitutional supervision resides in the NPC and its Standing Committee.<sup>243</sup> Because the CCP rejects separation of powers, there is no independent constitutional review body.<sup>244</sup> Thus the NPC polices itself. Not only has the NPC yet to strike down any of the laws of its Standing Committee as unconstitutional, the Standing Committee has rarely annulled any lower-level rules on grounds of unconstitutionality.<sup>245</sup>

The NPC Standing Committee ("NPCSC") is also responsible for reviewing the consistency of lower level legislation with NPC and NPCSC Laws.<sup>246</sup> However, only recently has the NPCSC established procedures and designated a body within the NPC to review the consistency of lower level legislation.<sup>247</sup> Whether the review mechanism stipulated in the Law on Legislation will be effective remains to be seen.<sup>248</sup>

As in the case of conflicts of laws, it is difficult if not impossible to resolve conflicts both between Administrative Regulations and among lower level legislation.<sup>249</sup> The State Council,<sup>250</sup> lower level people's congresses and governments have all been reluctant to intervene.<sup>251</sup> Furthermore, although in many

242. See LAW ON LEGISLATION, *supra* note 212, Chapter V, in *Changyong falu fagui quanshu*, at 223-26.

243. P.R.C. CONST., *supra* note 143, art. 62(2), (11); art. 89(1), (13), (14), in *Changyong falu fagui quanshu*, at 10-11, 15.

244. See Dingjian Cai, *Constitutional Supervision and Interpretation in the People's Republic of China*, 9 J. Chinese L. 219, 244 (1995).

245. See Buyun Li, *Several Problems*, *supra* note 213, at 19; cf. *China: 20 Years of Legal System Developments*, FBIS-CHI-990016, Jan. 16, 1999 (claiming that from 1993 to June 1997, there were 3,692 local regulations filed with the NPC, 2,045 of which were reviewed by NPC committees, which found that 93, or 4.5%, were inconsistent with the Constitution or current laws). In response to poor performance by the NPCSC, scholars have proposed a variety of possible reforms, including the creation of a constitutional review body, perhaps under the NPC or the NPCSC, the creation of a constitutional court or expanding the authority of existing courts to include constitutional review. All suggestions have met with resistance on a number of theoretical and practical grounds. See Cai, *Constitutional Supervision and Interpretation*, *supra* note 244.

246. P.R.C. CONST., *supra* note 143, art. 89(13)-(14), in *Changyong falu fagui quanshu*, at 15-16.

247. See LAW ON LEGISLATION, *supra* note 212, arts. 90-91, in *Changyong falu fagui quanshu*, at 225-26.

248. For a discussion of the shortcomings of the review mechanism, see *infra* Part IV.A.

249. See Huaide Ma, *Jiang chouxiang xingzheng xingwei naru xingzheng fuyi de fanwei* [Bring Administrative Abstract Acts into the Scope of Administrative Reconsideration], 6 ZHONGGUO FAXUE [PRC LEGAL STUDIES] 39, 40-41 (1998).

250. The 1990 Provisions on the Recording of Rules and Regulations require the filing of Rules with the State Council within 30 days of formulation. See PROVISIONS ON THE RECORDING OF RULES AND REGULATIONS, arts. 3-4 (1990). The Legislative Affairs Office is supposed to review them for consistency with superior legislation. But the large number of Rules makes it practically impossible for the Legislative Affairs Office to carry out a comprehensive review of every Rule. From 1987 to 1996, there were more than 28,000 Rules filed with the State Council, of which more than 1500 were problematic. The State Council decided that more than 400 needed to be revised or abolished. The State Council and its related departments revised 214 and abolished 33. *China: 20 Years of Legal System Developments*, *supra* note 245.

251. According to statistics from 29 provinces, municipalities and autonomous regions, 1572 Government Rules were revised and 1198 abolished between 1987 and 1996. See *China: 20 Years of Legal System Developments*, *supra* note 245; see also ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 22 (calling for changes in filing requirements and review process).

instances local governments and agencies are required to file Rules and Normative Documents with the local people's congress or government, the requirement is often ignored.<sup>252</sup> In 1993 in Heilongjiang, for instance, the provincial government repeatedly sent out notices that all departments were required to submit for the record all Normative Documents within a stipulated time period, but the departments ignored the order.<sup>253</sup> Undeterred, the provincial government then issued a regulation ordering each department to assign a person to file all Normative Documents and providing that the Legislative Affairs Department would be responsible for reviewing all of the submitted documents.<sup>254</sup> Unfortunately, the departments continued to ignore the regulation.<sup>255</sup>

In most legal systems, courts or similar bodies (whether special constitutional review bodies or administrative tribunals) would have the authority to strike down laws or regulations inconsistent with the constitution or superior legislation. However, courts in the PRC do not have the authority to overturn any type of legislation on grounds of unconstitutionality or even to overturn lower level legislation that is inconsistent with superior legislation other than the constitution. Thus, under the ALL, PRC courts may not invalidate administrative regulations (abstract acts) that are inconsistent with the constitution or superior legislation, although the court need not follow lower level regulation in the specific case.<sup>256</sup> This ability to refuse to follow inconsistent regulations in specific cases allows for a kind of indirect review of consistency. However, the inconsistent regulation remains in effect, and the issuing entity may continue to apply it in the future.

There are ways of tackling the problem of inconsistent regulations other than through the courts or the system of recording and oversight, including through administrative reconsideration or supervision.<sup>257</sup> Under the Administrative Reconsideration Law, it is now possible to challenge certain administrative regulations (i.e., abstract acts) provided that one does so in the context of a challenge to a specific act.<sup>258</sup> The reconsideration body may invalidate or amend the inconsistent regulation within its authority.<sup>259</sup>

Inconsistent regulations may also be challenged under the Administration Supervision Law. Administration supervision bodies are somewhat similar to

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252. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 190 (noting that although a Sichuan regulation requires the filing of all Rules and Normative Documents with the people's congress, agencies often do not file).

253. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 233-35.

254. *Id.*

255. *Id.*

256. See ALL, *supra* note 148, arts. 2, 53, in *Changyong falu fagui quanshu*, at 2137, 2142. PRC law distinguishes between abstract acts (i.e., when the agency issues a rule of general applicability) and specific acts (when the agency makes a decision, such as to grant or deny a license, based on generally applicable rules). The distinction is similar to that in the United States between decision-making and rulemaking.

257. Long-term partial solutions include improving the quality and legal professionalism of drafters and reducing the reliance on Rules and Normative Documents by passing more and clearer superior legislation. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 30.

258. See ARL, *supra* note 149, art. 7.

259. See ARL, *supra* note 149, arts. 26-28.

ombudsmen elsewhere in that they are responsible for ensuring good governance. In China, as in some other countries such as the United States, they are part of the executive branch.<sup>260</sup> Supervisory organs have the power to recommend the correction of government regulations that are inconsistent with laws, regulations or state policies.<sup>261</sup> For reasons explained more fully below, however, neither administrative reconsideration nor supervision has been an effective way of dealing with the problem of inconsistency thus far.<sup>262</sup>

China is not unique in providing inherent authority to the executive branch or local governments or in denying the courts the authority to review abstract administrative acts.<sup>263</sup> France and Belgium, for example, provide for inherent executive authority.<sup>264</sup> In Belgium, courts' powers to review abstract acts are also limited.<sup>265</sup> Regular courts and administrative tribunals may refuse to follow an administrative regulation inconsistent with superior legislation but the regulation is not struck down. Only the Council of State, Belgium's highest administrative tribunal, may annul a regulation and then only within 60 days of publication.<sup>266</sup> Additionally, in the Netherlands, administrative courts are not allowed to annul administrative regulations or a law passed by parliament.<sup>267</sup> However, the court may refuse to follow a regulation or law in a particular case, as in China.<sup>268</sup>

Although China is not alone in precluding the review of abstract acts, such systems are the minority. Moreover, whereas other countries have alternative mechanisms to deal with inconsistencies, the alternatives in China, such as the file and review system, administrative supervision and administrative reconsideration, do not work very well in practice. The current system under which PRC courts need not follow an administrative regulation that is inconsistent with su-

260. In contrast, in some countries ombudsmen are part of the legislative branch, as in the case of England's Parliamentary Commission for Arbitration. See CRAIG, *supra* note 112, at 127.

261. See ASL, *supra* note 149, art. 23, in *Changyong falu fagui qianshu*, at 656.

262. See *infra* Parts III.C & III.D.

263. Before the recent reforms, Eastern European socialist countries typically did not allow courts to review abstract acts. See Hiroshi Oda, *Judicial Review of the Administration in the Countries of Eastern Europe Socialist Countries*, 1984 PUB. L. 112, 125-26 (1984) (explaining that Soviet Union courts must apply inconsistent rule while in Romania, Bulgaria and Poland, courts could not invalidate a rule but need not apply it in the particular case).

264. See NEVILLE-BROWN & BELL, *supra* note 178, at 9-13; G. Craenen, *General Background and Legal Characteristics*, in THE INSTITUTIONS OF FEDERAL BELGIUM 21 (G. Craenen ed., 1996). European courts are now also subject to supranational European Union law.

265. Until recently, no court could annul or refuse to apply a law passed by the national parliament. The legislature itself was responsible for review. See Craenen, *General Background*, *supra* note 264, at 26; TREATISE ON BELGIAN CONSTITUTIONAL LAW 8, 109-14 (Andre Alan ed., 1992). Now ordinary courts may review the constitutionality of laws in limited circumstances. Although they do not have the power to annul the law, they can refuse to follow it in specific cases. In addition, a special constitutional body—the Court of Arbitration—may strike down all legislation on certain limited grounds. See *id.* at 8.

266. See Craenen, *General Background*, *supra* note 264, at 26, 36-37; TREATISE ON BELGIAN CONSTITUTIONAL LAW, *supra* note 265, at 46, 231.

267. See A.K. KOEKKOEK, *ADMINISTRATIVE LAW AND THE CONSTITUTION IN IRELAND AND THE NETHERLANDS* 67 (1987). Parliament considered whether to allow courts to review and annul abstract acts in 1998 but rejected the idea. See Arnout Klap, *Administrative Law, The Netherlands*, 6 REDP/ERPL 221, 227 (1994).

268. See KOEKKOEK, *supra* note 267, at 67.

superior legislation although the inconsistent lower regulation remains in effect, is both inefficient and unjust. It forces multiple parties to litigate the same issue over and over and may result in similarly situated parties being subject to different results depending on whether they decide to challenge an administrative decision or not. In other systems, agencies might be expected as part of the legal culture to annul a regulation deemed by a court to be inconsistent with superior legislation. However, given the problems of local and agency protectionism, the low stature of the courts and a different legal culture, agencies in China are not likely to voluntarily repeal the regulation. Predictably, many have called for an expansion of the court's jurisdiction to encompass abstract acts.<sup>269</sup>

### 3. Lawmaking Procedures and Transparency

China does not yet have a comprehensive administrative procedure law. Although efforts to draft one are underway, it is expected to take several years for the law to be promulgated. However, there are various regulations containing provisions on administrative rulemaking procedures. The 1987 Provisional Measures for the Formulation of Administrative Regulations sets out certain procedural requirements for State Council Administrative Regulations.<sup>270</sup> The 1987 Measures apply to Rules only by reference.<sup>271</sup> Apparently, most agencies do not follow the State Council procedures. From 1987 to 1995 in Shandong, only 20% of Rules were passed in accordance with the State Council procedures.<sup>272</sup> While some local governments have issued their own procedures for administrative rulemaking, they are often not implemented in practice.<sup>273</sup>

Even where there are procedural rules, they do not require public input in the rulemaking process. Most Rules and Normative Documents are made without the benefit of public participation or hearings attended by interested parties. Publication also remains a problem. State Council Administrative Regulations

269. See, e.g., ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 17 (arguing that judicial review should include abstract acts); XINGZHENG XINGWEI FA [LAW OF ADMINISTRATIVE ACTS], 755-59 (Songnian Ying ed., 1992); Cuihua Qian, et al., *Chouxiang xingzheng xingwei nengfou tiqi susong de tantao* [Investigation of Whether Abstract Acts Are Justiciable], ZHENGZHI YU FALU No. 2, 20-25 [Politics and Law] (1997) (arguing that abstract acts should be justiciable because they effect the rights and interests of many individuals and depriving the courts of the authority to review them weakens the court); Peng Gao, *Chouxiang xingzheng xingwei kesuxing yanjiu* [Study of the Justiciability of Abstract Acts], FALU KEXUE No. 4, 33-39 [LAW SCIENCE] (1997) (arguing that suits challenging abstract acts should be allowed because the distinction between concrete and abstract acts is largely a superficial one, public supervision through the mechanism of litigation is needed despite other supervisory measures, and that allowing such litigation would realize the intent of existing Chinese administrative law). But see Jiansheng Zhang, *Youguan xingzheng susong shouan fanwei de jige lilun wenti tanxi* [Examination of Several Theoretical Problems Relating to the Scope of Administrative Litigation], 7 ZHONGGUO FAXUE [PRC LEGAL STUDIES] 45, 46 (1998) (arguing for limited scope of judicial review that reflects the need to ensure administrative efficiency and the relative competence of administrative agencies).

270. See PROVISIONAL MEASURES FOR THE FORMULATION OF ADMINISTRATIVE REGULATIONS (1987) [hereinafter 1987 STATE COUNCIL MEASURES].

271. See *id.*

272. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 20.

273. For instance, in Hohot, Inner Mongolia between 1990 and 1995, only 34 of 242 Rules and Normative Documents were passed in accordance with local procedural regulations. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 27.

must be published in the State Council Gazette.<sup>274</sup> Increasingly, administrative agencies are publishing Rules, as required under the Law on Legislation,<sup>275</sup> but there are still many unpublished internal regulations (*neibu guiding*).<sup>276</sup> Even when published, many Rules and Normative Documents are only published in local government gazettes or newspapers or by posting a notice.<sup>277</sup>

### C. A Weak Judiciary

The importance of judicial review in ensuring rule of law in the administrative realm is easily overstated.<sup>278</sup> In fact, experienced lawyers often note that one wins the lawsuit at the agency rather than in court.<sup>279</sup> Moreover, judicial review is only one means of ensuring that administrative officials act in accordance with law. Nevertheless, independent courts or tribunals are still necessary, if not sufficient, for a modern administrative law regime in that they serve as a final backstop against government arbitrariness and oppression, and they structure agency behavior and institutional politics.

The lack of independence and authority of PRC courts undermines their ability to discipline wayward administrative agencies. Article 126 of the Constitution provides independent judicial power in accordance with law and states that the courts are not subject to interference by any administrative organ, public organization or individual.<sup>280</sup> Actual practice, once again, is considerably different. Particularly damaging to the autonomy of courts is their dependence on local government. There are four levels of courts in China: the Supreme People's Court, High People's Courts, Intermediate People's Courts and Basic Level People's Courts.<sup>281</sup> Each is responsible to the people's congress at the equivalent level, which supervises the court's work and appoints and removes judges.<sup>282</sup> Moreover, courts are financially dependent on the corresponding level of government for salaries, housing, benefits and so forth.<sup>283</sup> The lack of secure tenure, combined with financial dependence, leaves judges beholden to

274. See 1987 STATE COUNCIL MEASURES, *supra* note 270.

275. See LAW ON LEGISLATION, *supra* note 212, art. 77, in *Changyong falu fagui quanshu*, at 223.

276. Presumably, the legal effect of failing to publish a regulation in accordance with the Law on Legislation or other laws and regulations is that the regulation is deemed a Normative Document rather than a Rule.

277. See CORNE, *supra* note 16, at 90.

278. See Frank Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1277-79 (1999). See generally PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* (1994).

279. See WILLIAM F. FOX, *UNDERSTANDING ADMINISTRATIVE LAW* 24 (1997) (observing that the cardinal rule of agency lawyering is that "you win your case at the agency or probably not at all").

280. PRC CONST., art. 126, in *Changyong falu fagui quanshu*, at 19.

281. In addition, there are specialized courts for military, maritime and railway cases. BROWN, *supra* note 136, at 4.

282. PRC CONST., art. 128, *supra* note 143; JUDGES LAW, *supra* note 195, art. 11.

283. See Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 42 (1996) [hereinafter *Civil Judgments*].

their government counterparts.<sup>284</sup> Contact between government officials and judges, many of whom have known each other for years, is frequent. Not surprisingly, local protectionism runs rampant as courts refuse to enforce judgments against local entities that have strong government support.<sup>285</sup>

The institutional autonomy of the courts is further diminished by their links to the CCP.<sup>286</sup> While people's congresses are formally empowered to appoint judges, in practice, judges often are selected by the CCP Committee on the same level and the choices then ratified by the people's congresses.<sup>287</sup> Most senior judges are CCP members, including the members of the adjudication committee of the court, which has considerable authority in determining the outcome of difficult or controversial cases.<sup>288</sup> Further, although direct intervention by the CCP in individual cases is clearly the exception rather than the rule and is decreasing,<sup>289</sup> judges still discuss important political cases or cases involving difficult legal issues with the Political-Legal Committee.<sup>290</sup> More generally, the CCP exercises control over the court by setting general policies, accepted by judges implicitly, within which the courts must operate.

The authority of the judiciary is weakened not only by its institutional dependence on local government and the CCP, but also by the limited powers granted courts within the PRC governmental structure. As in many civil law systems, courts in China do not have the formal power to make law.<sup>291</sup> Perhaps

284. There are reports of judges being disciplined or removed from positions for opposing the local government. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 42-43, 345. The Judges Law, however, does provide that judges shall not be dismissed, demoted or punished except for legally stipulated reasons and in accordance with legally stipulated procedures. See JUDGES LAW, *supra* note 195, art. 8.

285. Estimates of the percentage of civil judgments that go unenforced vary from 20 to 50%. While a number of factors contribute to the low enforcement rate, local protectionism is often cited as most important. See Clarke, *Civil Judgments*, *supra* note 283, at 28-30, 41. A recent survey of arbitral awards found that 48% of foreign awards and 53% of CIETAC were not enforced, with local protectionism playing a role in almost two-thirds of the cases. See Peerenboom, *Seek Truth from Facts*, *supra* note 71.

286. See generally Finder, *The Supreme People's Court*, *supra* note 227, at 148-52.

287. See Clarke, *Civil Judgments*, *supra* note 283, at 8 n.22; *id.* at 149.

288. Every court has an adjudication committee that oversees the work of the court and handles difficult cases. Decisions of the adjudication committee are binding on the judge or judicial panel that heard the case. A single judge may hear a minor criminal or civil case of the first instance while other cases are tried by a judicial panel. The president of the court is the head of the adjudication committee and nominates the other members. If the president finds definite error in the determination of facts or the application of law on the part of the judicial panel, he may submit the case to the adjudication committee that he nominates for review of the decision. Accordingly, the president of the court retains considerable power to determine the outcome of individual cases. See Finder, *The Supreme People's Court*, *supra* note 227, at 162; ZHONGHUA RENMIN GONGHEGUO MINSHI SUGONG FA [P.R.C. CIVIL PROCEDURE LAW], art. 177, in *Changyong falu fagui quanshu*, at 2078, 2101.

289. See *supra* note 161.

290. See Finder, *The Supreme People's Court*, *supra* note 227.

291. In practice, courts everywhere make law to the extent that they are allowed to interpret law and such interpretations are then taken as binding in the particular case and on lower courts in subsequent cases. Although the Supreme People's Court's power of interpretation is limited under law, it has expanded its power to interpret national legislation and thus can now be said to make law in a variety of ways, including the issuance of official opinions, explanations or other forms of interpretation of laws and publication of model cases. In addition, the Court will often participate in the drafting process or provide comments on draft legislation, although other bodies will be prima-



most surprising to lawyers from common law systems is the circumscribed interpretative authority of PRC courts. Under the Constitution, the NPCSC has the exclusive authority to interpret laws enacted by the NPC and the Standing Committee itself. Although it has delegated some of this authority to the Supreme People's Court, the Supreme People's Procuratorate and the State Council,<sup>292</sup> the Supreme People's Court was only given the right to interpret laws where necessary for judicial work.<sup>293</sup> Moreover, the interpretative powers of the Court in theory are limited to clarifying laws without altering their original meaning or adding to the content of such laws.<sup>294</sup> The State Council and its subordinate ministries and agencies are responsible for interpreting administrative and local government regulations.<sup>295</sup> When courts encounter a problem interpreting regulations, they generally defer to the issuing body.<sup>296</sup> Most important for present purposes, as already noted, neither the Supreme People's Court, nor any other court has the right to annul administrative regulations that are inconsistent with superior legislation.

Answerable to the local government and CCP committees, courts traditionally have been viewed as Party/State organs and judges as government administrators or bureaucrats. Even within the bureaucracy, the stature of the judiciary and judges has been low. For the most part, judges have tended to be poorly educated; many are former military personnel without college education or any formal legal training.<sup>297</sup>

Given the weak stature of the courts and their dependence on the local government for financial resources, courts naturally are reluctant at times to challenge administrative agencies. Judges sometimes refuse to accept cases for fear of insulting government officials or damaging relations with the local government.<sup>298</sup> To avoid problems, judges have been known to reject a case for

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rily responsible for drafting. See Finder, *The Supreme People's Court*, *supra* note 227, at 167-90, 211, 216; see also Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107 (1991).

292. See RESOLUTION CONCERNING THE STRENGTHENING OF LEGAL INTERPRETATIVE WORK (1981).

293. The NPC did not delegate to the Court the right to interpret the Constitution. *Id.*

294. In practice some of the Court's interpretations have stretched the boundary of "interpretation," at times even creating legal rules that contradict the original legislation. The Court's opinion on the General Principles of Civil Law, for example, consisted of some 200 articles, while the General Principles of Civil Law itself only contained 156 articles. Further, the Court's interpretation allowed for formation of partnerships without a written agreement, even though a written agreement was required by the Civil Law. See Finder, *The Supreme People's Court*, *supra* note 227, at 168; William C. Jones, *The Significance of the Opinion of the Supreme People's Court for Civil Law in China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 97-108 (Pitman Potter ed., 1994).

295. See RESOLUTION CONCERNING THE STRENGTHENING OF LEGAL INTERPRETATIVE WORK, *supra* note 292.

296. See Dicks, *supra* note 196, at 99-102.

297. Efforts were made to address the situation. For instance, the 1995 Judges Law increased the qualification standards for new judges and requires current judges to take steps to meet the standards within a reasonable time. See JUDGES LAW, *supra* note 195, art. 9, in *Changyong falu fagui quanshu*, at 95-96. For a more comprehensive discussion, see Peerenboom, CHINA'S LONG MARCH, *supra* note 168.

298. See Ping Jiang, *Xingzheng xiangduiren de quanli jiujii* [The Rights and Remedies of Parties to Administrative Acts], ZOUXIANG QUANLI DE SHIDAI [TOWARD AN AGE OF RIGHTS] 595, 612 (Yong

minor deficiencies in the complaint or to try to duck a case by suggesting to the plaintiff that he or she is not likely to win and should drop the suit.<sup>299</sup> Some have even gone so far as to knowingly decide incorrectly against a plaintiff but then tell the plaintiff to appeal to a higher court less vulnerable to local protectionism.<sup>300</sup>

Nevertheless, the weakness of the courts should not be overstated; to a considerable extent, they are able to perform their duties. In fact, plaintiffs in China have a much higher chance of obtaining a satisfactory result than in the United States, Taiwan or Japan. Plaintiffs prevail in whole or in part in almost forty percent of the cases in China but only twelve percent in the United States and in Taiwan and between four to eight percent in Japan.<sup>301</sup> Of course, that does not mean that the courts are more effective in China than in the United States. One would need to examine the merits of the cases to make any such judgment. One explanation could be that in the United States, administrative agencies generally comply with the law and thus should be expected to prevail more often, whereas in China administrative agencies actually comply with the law even less than the 40% plaintiff victory rate would suggest. That said, clearly the courts are not just a rubber stamp; they do have some authority.<sup>302</sup> But there are certain types of cases that would be difficult for a plaintiff to win,

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Xia ed., 1995); ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 350-54 (noting that courts often try to avoid accepting administrative cases because the fees are low in comparison to civil and economic cases and they take a long time to complete, which could be a black mark on the judge's record).

299. See Ping Jiang, *supra* note 298, at 612-15.

300. See *id.* at 614.

301. In 1995, there were 51,370 administrative suits, with the decision of the administrative unit being modified or quashed 15% of the time. In addition, the plaintiff withdrew suit in approximately 23% of the cases when the administrative unit changed its decision prior to judgment. 1997 ZHONGGUO FALU NIANJIAN [1997 CHINA LAW YEARBOOK] 48 (1997). Despite the increase in total number of administrative suits to over 90,000 in 1997, the success rate was virtually unchanged, with 15% of the decisions quashed or modified and 25% ending in withdrawal after the agency agreed to change its decision. 1998 ZHONGGUO FALU NIANJIAN [1998 CHINA LAW YEARBOOK] 134 (1998). For the U.S. figure, see Peter Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984, 996-1053 (1990) (citing figures for 1985). For Japan and Taiwan, see KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995*, at 254, 257 (1999).

302. Surprisingly, given all of the concerns about judicial independence and the general level of grumbling one hears about the courts, there is some evidence that people are satisfied that the courts can and do render just verdicts in most cases. Ping Jiang cites three surveys that show general support for the court's ability to be just. In a survey of 1041 people in Harbin, 60% of respondents thought the courts would handle administrative cases in a just way, 28% thought that courts could not necessarily handle them in a just way, 3% thought courts could not render a just verdict and 9% did not know. Ping Jiang, *supra* note 298, at 611. A second survey of 180 plaintiffs in administrative suits revealed that 23% agreed with the result while 31% thought the results were fair and had no complaints, 15% thought the results were not too fair and 10% thought the results were not fair. The remaining 20% concluded it was hard to say. These numbers are plausible given that plaintiffs generally prevail to some extent in 40% of cases nationwide. Here, about 53% of the people agreed with the results. Presumably, most of the 40% who prevail in whole or in part would agree with the result. Further, even if one accepts some bias in favor of agencies, presumably at least some of the cases decided in favor of the defendant are just. Accordingly, that a certain percentage of plaintiffs would come to realize that the court's decision in favor of the plaintiff was just is reasonable. A third survey also showed that 71% of plaintiffs thought that judges handled cases in accordance with law and that they could be trusted. *Id.* at 611. The numbers are surprisingly high even assuming that a significant number of people may have provided what they thought were safe answers rather than

including major political cases against the government such as challenges by well-known dissidents to re-education through labor.<sup>303</sup>

#### *D. Legal Professionalism and Consciousness*

The general level of legal awareness in China is relatively low among all sectors of state and society be it citizens, government officials, or even lawyers and judges. A recent poll revealed that almost half of the people surveyed did not know the difference between judges and prosecutors.<sup>304</sup> A 1992 survey of over 1041 citizens in Harbin found that 82% had not heard of administrative reconsideration and 65% had not heard of the ALL.<sup>305</sup> Other surveys have produced similar results.<sup>306</sup>

The role of lawyers in administrative litigation suits is particularly crucial. Representation by legal counsel in administrative law cases is more frequent than in economic or civil cases.<sup>307</sup> When asked about the key to success in administration litigation, 83% of 228 respondents to a 1997 Anhui survey thought having a good lawyer was important.<sup>308</sup> In contrast, only 27% thought connections were important while 18% thought money was important.<sup>309</sup> Lawyers may be particularly crucial in administrative cases because the cases tend to be complicated both legally and politically. People may be afraid to sue officials directly and may want the protection of a lawyer who not only knows the law (and thus might not be intimidated), but who also may serve as a buffer between the plaintiff and the government defendant.<sup>310</sup> While the ALL does not

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their heartfelt views. See also Zongwei Shao, *Judges – A Case of Misunderstanding*, CHINA DAILY, Aug. 6, 1999, at 1.

303. Amnesty International claims that few appeals of re-education through labor and other administrative detention orders have been successful and that all appeals known to have been made by political detainees have been systematically rejected. See AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: LAW REFORM AND HUMAN RIGHTS 24 & n.37 (1997).

304. See Shao, *supra* note 302.

305. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 262.

306. A 1997 survey of 36 market stall owners in Guangxi revealed that 41.7% were not familiar with the ALL. *Id.* at 324. But see Pei, *Citizens v. Mandarins*, *supra* note 15 at 862 n.52 (citing 1992 poll where 88% of respondents claimed to have heard of the ALL).

307. See Pei, *Citizens v. Mandarins*, *supra* note 15, at 854.

308. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 430. Not surprisingly, respondents attributed a positive outcome to a just verdict (100%). They also cited legal knowledge (88%) and having a good case on the merits (81%) as important factors.

309. See *id.*

310. Interestingly, administrative litigation plaintiffs have been engaging counsel less often than in the past. Pei suggests that the decrease may be due to (i) the perceived impact of counsel; (ii) the feeling that lawyers are less needed given the rise in out of court settlement of administrative law cases; (iii) the rapid rise in the number of ALL cases, which has exceeded the growth in the legal profession; and (iv) a decrease in representation by the defendant agencies. Yet the survey results cited above suggest that plaintiffs continue to believe lawyers play a vital role. Nor would plaintiffs be likely to forego a lawyer simply because the agency defendant chooses to do so. On the other hand, the lack of competence of many lawyers to handle administrative law cases might explain the decline in representation rates. Few lawyers are trained in administrative law and many think such cases are too much trouble and not profitable. Whether the rise in out of court settlements would explain the decrease is debatable. Arguably, having a lawyer who can present your case to the court and to an agency facilitates settlement. Alternatively, since parties may be reluctant to sue unless they feel they have a strong case, perhaps they feel they do not need a lawyer. If so, they might want

Despite the importance of lawyers to a just outcome in administrative law cases, there is good reason to be concerned that China's lawyers are not up to the task. In general, many of China's lawyers are poorly educated and trained. It is still possible to qualify as a lawyer without a college education in law, or even a college education at all, and without passing the bar exam. As of 1995, only 25% of China's lawyers had college degrees, 2.78% had masters or doctoral degrees, or overseas training, and another 46% had completed *dazhuan* degrees obtained through two or three years of study, either in full-time universities, part-time colleges or night schools or through correspondence courses and self-study.<sup>314</sup> Thus, almost 30% of China's lawyers have no formal education beyond high school. A lawyer's training in administrative law may be limited to a course in preparation for the national exam. Few, if any, lawyers specialize in administrative law. Administrative law cases account for less than 2% of all lawsuits.<sup>315</sup> Moreover, administrative litigation is less profitable and more burdensome than economic or civil litigation or non-litigation commercial work.<sup>316</sup> Lawyers have complained of difficulties in conducting discovery on administrative agency defendants.<sup>317</sup> In some cases, they may be afraid to challenge powerful administrative or government interests.<sup>318</sup>

to reconsider their choice in light of the 60% failure rate. *See* Pei, *Citizens v. Mandarins*, *supra* note 15, at 853-54.

312. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 416.

314. See ZHONGHUA RENMIN GONGHEGUO LUSHIFA QUANSHU [Compendium of the PRC Laws Law] 42 (Zhang Geng & Hu Kangsheng eds., 1996).

316. See PEERENBOOM, *LAWYERS IN CHINA*, *supra* note 137, at 20.

317. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 419-20.

318. *Id.*

319. JUDGES LAW, *supra* note 195, art. 9.

320. See PEERENBOOM, *LAWYERS IN CHINA*, *supra* note 137, at 98.

judges have an administrative background or specialized training in administrative law.<sup>321</sup> China's courts are divided into specialized divisions, and the administrative law division is not considered a choice assignment.<sup>322</sup> Many judges resist appointment to the administrative division because of the politically sensitive nature of the cases. As a result, the divisions are often staffed by relatively young and inexperienced judges who pay their dues for a year or two before demanding to be rotated to a more prestigious and less political division.

### *E. Legal Culture and Traditions*

China's pursuit of administrative rule of law is influenced inevitably by its general culture and traditions and the more specific culture and traditions of government administration and agencies. While the China of today differs from imperial China in many ways, the attitudes of government officials and lay people still show signs of traditional views about the role of government. In contrast to the notion of a neutral and limited government found in some contemporary western liberal democracies, Imperial China developed a strong, paternalistic state that determined the moral agenda for society.<sup>323</sup> At the head of the state was the all-powerful ruler, whose personal vision of a good society provided the moral compass. Below him were administrators responsible for ensuring that the ruler's vision of a good society was realized. Although the ruler had a moral obligation to ensure the material and spiritual well-being of the people, there were no legal limits on the power of the ruler.<sup>324</sup> Government officials, on the other hand, were subject to legal limits.<sup>325</sup> However, the limits were intended primarily to ensure that administrators faithfully carried out the ruler's agenda rather than as a means of protecting individual rights and interests.<sup>326</sup>

Moreover, government officials were considered parental authority figures and often referred to as *fumu guan* (father and mother officials). The Confucian emphasis on hierarchical social roles reinforced the idea that lay people were supposed to defer to the superior judgments of government officials who knew best what was in their interest and in the interest of society as a whole. The CCP's victory did nothing to challenge these fundamental beliefs about the nature of governance or the relations between government officials and the people. The liberal democratic notion of a neutral state has been rejected in favor of a

321. See Jiang Ping, *supra* note 298, at 646-67 (claiming that 70% of judges have no administrative law training at all).

322. See *id.*

323. See PYE, *supra* note 99.

324. The concepts of *tianming* (the mandate of heaven) and *minben* (the people as the basis) defined the outer moral limits for rulers. See Andrew Nathan, *Sources of Chinese Rights Thinking*, in *HUMAN RIGHTS IN CHINA* 125, 148-54 (R. Randle Edwards et al. eds., 1986).

325. They were also subject to moral limits, as reflected in the concern that they act impartially and in the interests of the general good (*gong*) rather than in a biased way or in their own personal interest (*si*). See HALL & AMES, *THINKING THROUGH CONFUCIUS*, *supra* note 225.

326. See JONES, *supra* note 117, at 9.

strong government that continues to set the moral agenda for society.<sup>327</sup> The core leadership is headed by a single figure whose personal vision of a good society provides the moral agenda.<sup>328</sup> It was assumed that because the Party has no other interest than what was in the best interest of the people (and it knew what that interest was), there was little need for external restraints on the Party or the government that carried out Party policy.<sup>329</sup> If a mistake was made or people felt the need to point out that their interests had been overlooked, they could simply bring the issue to the attention of government officials. Thus, the primary means of challenging an administrative decision was by complaining to the agency or to the procuratorate from which it originated.<sup>330</sup> For the most part, people were expected to defer to the judgment of government officials. Backed up by the awesome power of the Party, government officials were used to giving orders and having them obeyed. Given the low status of formal law during much of the Mao period, officials often ignored the law when compliance was inconvenient.<sup>331</sup>

Socialism did bring about some changes. Bureaucrats became even more entrenched. The politicization of society in general also affected administrative agencies. Government officials became sensitive to subtle changes in the political winds. They learned that there was little incentive to stick out their necks. Bureaucrats everywhere may be risk-averse, but in the politically charged environment of Maoist China, where the consequences for being on the wrong side of an issue were severe, bureaucrats had every reason to be even more cautious and risk-averse. Moreover, the general lack of material incentives and rewards for superior performance resulted in government officials who were disinclined to go out of their way to serve the people or the public interest.

Administrative officials today often display many of the same traits. They tend to expect that people should defer to their better judgment and are disinclined to view themselves as servants of the people.<sup>332</sup> They are more likely to

327. Most notably, the Party has endorsed the four cardinal principles. See P.R.C CONST., *supra* 143, Preamble, in *Changyong falu fagui quanshu*, at 1-3.

328. The first generation was dominated by the egalitarian and revolutionary beliefs of Mao. The second generation was dominated by the more pragmatic vision of Deng. The third generation is dominated by Jiang Zemin, who has attempted to promote socialist ethics, a hodgepodge platform consisting of attacks on wholesale westernization and bourgeois liberalism, celebration of the importance of culture and art, praise for the indigenous and illustrious tradition of Confucianism, and exhortation of the masses to emulate such modern day Lei Fengs as Kong Fansen. Of course the ruler's vision is affected by the views of others. Moreover, it is not the only factor in determining the moral agenda for society. Further, heads of state everywhere are chosen to some extent because of their vision of a good society. However, there are differences between traditional Confucian and liberal views on the nature of political order and how to achieve it. See Randall Peerenboom, *Confucian Harmony and Freedom of Thought*, in *CONFUCIANISM AND HUMAN RIGHTS* 234, 241 (Wm. Theodore de Bary & Tu Weiming eds., 1998).

329. Other socialist countries also took this view. See Marek Wiersbowski & Stephen C. McCaffrey, *Judicial Controls of Administrative Authorities*, 18 INT'L L. 645, 646 (1984).

330. See Jyh-Pin Fa & Shao-chan Leng, *Judicial Review in the People's Republic of China*, 23 CASE W. RES. J. INT'L L. 447, 449-50 (1991).

331. *Id.*

332. See Leung, *supra* note 226 (noting that investors "are often frustrated by not only the uncertainty in the nature of legislation but also by the unhelpful bureaucracy which does not usually volunteer assistance").

pay attention to the shifting political winds and the dictates of their superiors than to the needs of the public. And they still frequently disregard or circumvent law when compliance would be inconvenient.<sup>333</sup>

The tendency to disregard law is in part a function of the continued importance of *renqing* (human feelings)<sup>334</sup> and *guanxi* (personal connections and social networks). Personal connections and social networks are valuable everywhere but perhaps are of greater significance in China and Asian countries than in some parts of the world.<sup>335</sup> Their significance may be traced back to the Confucian emphasis on social roles, clan ethics and *li* (ritual propriety).<sup>336</sup> They are also a reflection of more contemporary economic, social and political realities. Connections were particularly important during the Mao period and in the early Deng years.<sup>337</sup> In the absence of a market economy, people had to rely on connections to avoid being sent down to the countryside, to obtain a good work assignment, to gain access to a good hospital, to have their radio fixed, and so on.<sup>338</sup> The transition to the market economy has also provided ample opportunities to take advantage of one's connections. One result of the transition has been the emergence of clientelist relationships that rely heavily on connections.<sup>339</sup> But while some scholars see the importance of *guanxi* as increasing,<sup>340</sup> others see it as decreasing due to the emergence of a formal legal structure and a market economy.<sup>341</sup> According to the latter view, the market makes it unnecessary to rely on connections in many situations. Often it is simply easier and more convenient to obtain what one wants by paying for it. As the legal system grows

333. See generally ADMINISTRATIVE RULE OF LAW, *supra* note 16.

334. Some authors prefer the term *ganqing* (emotions or feelings). See, e.g., ANDREW KIPNIS, PRODUCING GUANXI (1997).

335. See *id.*; YUNXIANG YAN, THE FLOW OF GIFTS: RECIPROCITY AND SOCIAL NETWORKS IN A CHINESE VILLAGE (1996); MAYFAIR YANG, GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONS IN CHINA (1994); Douglas Guthrie, *The Declining Significance of Guanxi in China's Economic Transition*, 154 CHINA Q. 255 (1998).

336. See Ambrose King, *Kuan-hsi and Network Building: A Sociological Interpretation*, 120 DAEDULUS: J. AM. ACAD. ARTS & SCI. 63, 73-75 (1991). See generally MAYFAIR YANG, *supra* note 335, at 448. Others attribute the significance of *guanxi* to features of contemporary institutions and economic and political factors. See, e.g., JEAN OI, STATE AND PEASANT IN CONTEMPORARY CHINA: THE POLITICAL ECONOMY OF VILLAGE GOVERNMENT 228 (1989); Guthrie, *supra* note 335, at 255. Kipnis steers a middle path by drawing a distinction between culture and tradition. See KIPNIS, *supra* note 335. *Guanxi* is deeply embedded in culture but contemporary Chinese culture differs from traditional culture in significant ways.

337. See MAYFAIR YANG, *supra* note 335, at 147.

338. See ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUS. 7 (1986).

339. See OI, *supra* note 336; WALDER, *supra* note 338; David Wank, *The Institutional Practice of Market Clientelism: Guanxi and Private Business in a South China City*, 147 CHINA Q. 820 (1996).

340. See MAYFAIR YANG, *supra* note 335.

341. See Guthrie, *supra* note 335. On the basis of a survey of general managers, Guthrie suggests that the reliance on *guanxi* practice is decreasing in the urban industrial sector due to the formation of formal legal structures and the emergence of a market economy. Company behavior and decision-making is increasingly determined by legal rules and procedures rather than personal connections. Market reforms have put increasing pressure on managers to show a profit. Therefore, price, quality and reliability are more important than personal connections. However, Guthrie also notes that the importance of *guanxi* practice varies depending on one's place in the administrative hierarchy. Managers of smaller companies view *guanxi* practice as more important. *Id.*

stronger, reliance on one's connections to circumvent legal requirements becomes more difficult and risky.

Despite disagreements about the significance of connections in contemporary Chinese society, the areas of social interaction upon which they have the greatest impact, and the reasons for their enduring significance, no one denies that *guanxi* continues to be important in China today. The salience of connections and the 'economy of gift-giving' puts pressure on administrative officials to bend the rules. An official who treated a family member or a classmate like any other person would be thought to be lacking in human feeling. One sociologist relates the story of an official asked to help out a friend seeking a license. Although the friend did not meet the legal requirements, the official granted the license anyway.

'If you don't give special consideration then your friend loses face (*mianzi*). Others will come to see you as someone who does not behave properly (*zuoren*). [But isn't special consideration illegal?] It may not be legal (*hefa*) by the center but it accords with local sentiment and practice. . . . You also have to think realistically. Xiamen is a small place and everybody knows each other. You must realize you will live here for your entire life. You must pay attention to your reputation. If you do not show sufficient spirit to help others, you will find it difficult to live here. Nobody will support you when you need it.'<sup>342</sup>

Granted, arranging an appointment to save an acquaintance from waiting in line is vastly different from approving an investment project even though it does not meet important substantive criteria for approval. Similarly, there is a clear difference between returning a favor for someone who has helped one obtain an appointment and offering a large bribe to obtain approval of a project that would not otherwise be approved. However, while the extreme cases may be clear, there are many cases in the middle where it is difficult to draw lines.

Given the traditional views of the role and status of government officials vis-à-vis the people, it is not surprising that many officials have been slow to accept the notion that one of the main purposes of administrative law is to protect individual rights and interests; and that rule of law requires that government officials act in accordance with and be subject to the law. According to one survey, almost half of the officials surveyed thought that at the time of the implementation of the ALL it would decrease administrative efficiency.<sup>343</sup> Many feared that it would decrease the authority of government officials.<sup>344</sup> To these officials, the idea of being hauled into courts to account for their actions was both threatening and demeaning.

Officials have responded by developing various techniques to avoid litigation. Sometimes they issue decisions in the name of the CCP.<sup>345</sup> In other cases, a judge might change a decision to appease the plaintiff, negotiate a reduction in

342. WANK, *supra* note 65, at 95.

343. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 348.

344. See Fa & Leng, *supra* note 330, at 461 (observing that one of "major obstacles is the resistant and cynical attitude of the bureaucracy").

345. Ping Jiang, *supra* note 298, at 634. As discussed *infra* in Part IV, Party decisions are not reviewable under the ALL because the CCP is not an administrative entity.



finer in exchange for dropping the suit, refuse to issue the decision in writing, neglect to tell a party of her right to challenge the decision through administrative reconsideration or litigation,<sup>346</sup> or pressure the plaintiff to withdraw the suit.<sup>347</sup> Administrative agencies also pressure courts to reject the case or to find in favor of the defendant. On occasion, administrative officials will seek the assistance of government or CCP leaders. In other cases, they will threaten the court or particular judges.<sup>348</sup> Once a case is accepted, many officials refuse to cooperate with the courts. They refuse to accept the summons, appear in court, respond to the complaint, provide evidence or comply with the court decision.<sup>349</sup>

However, attitudes are changing. In a survey of officials from fifteen work units throughout Hunan, 46% reported that although they originally had thought when the ALL was passed that it would decrease government efficiency, by 1997, only 5% admitted to still thinking so.<sup>350</sup> Moreover, although only 35% thought initially that the ALL would promote legal consciousness and the development of the legal system, now more than 75% think so.<sup>351</sup>

The influence of culture and tradition is also apparent in the attitudes and behavior of Chinese citizens. The idea that an average person could challenge the decision of government officials represents a radical change in the Chinese worldview. Not surprisingly, it has taken some time for the public to get used to this new approach. The number of administrative cases has been growing year by year. In 1995, there were 51,373 ALL suits, an increase of 48% over the previous year.<sup>352</sup> In 1997, there were 90,557 cases, a 13% increase over 1996.<sup>353</sup> Even given such increases in numbers, there are still many fewer cases than one might expect, particularly given how often plaintiffs are successful. In fact, there are amazingly few cases relative to the total number of specific administrative acts. In Harbin in 1991, the public security, administration of industry and commerce, tax and traffic bureaus issued 88,329 fines and penalties, but only 211 (0.2%) were challenged through administrative reconsideration and only 81 (0.1%) under the ALL.<sup>354</sup> In 1996, there were 20,000 driver license confiscation cases in Kunming but not one was challenged through either ad-

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346. See, e.g., *id.* at 635 (reporting that a survey of 2,623 administrative penalty cases revealed that the penalized party was not told of his or her rights to challenge the decision in 69% of the cases).

347. *Id.* at 636-37.

348. See, e.g., Ping Jiang, *supra* note 298, at 635 (reporting two instances of confiscation of court cars in one village).

349. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 352-53.

350. *Id.* at 348.

351. *Id.*

352. 1997 CHINA LAW YEARBOOK, *supra* note 301, at 48.

353. See 1998 CHINA LAW YEARBOOK, *supra* note 301, at 134. Interestingly, after years of rapid increase, the total number of cases increased by only 0.17%, with the total number of cases of first instance actually decreasing 0.46%. See *id.* at 128. Criminal cases decreased by 26.3%, *id.* at 129, civil cases increased 5.93% *id.* at 130, and economic cases decreased by 2.4%. See *id.* at 132.

354. See Ping Jiang, *supra* note 298, at 598 (noting that in 1992 in Hainan, less than 1% of administrative penalties were challenged under the ARR and ALL respectively).

ministrative reconsideration or litigation.<sup>355</sup> There are approximately 50,000 family planning decisions a year in Guangxi but only about 10 challenges under the ALL.<sup>356</sup> And there were 1600 cases of re-education through labor in 1996 but only 35 requests (2.2%) for administrative reconsideration.<sup>357</sup>

There are many reasons for the low percentage of decisions challenged besides a traditional reluctance to challenge authority.<sup>358</sup> People may not understand their rights. They may fear retaliation<sup>359</sup> or believe that challenging the decision is useless because officials protect each other. Disgruntled citizens might believe that it is better to deal with the problem through other, more effective channels, perhaps by relying on personal connections or making their case directly to the CCP. In addition, the costs of litigation may be too high. People may believe that challenging the decision is not worth the time, effort and expense.

### F. Corruption

Corruption is a serious and growing problem in China. Although the exact scope of corruption is difficult if not impossible to determine, there is more than enough evidence to conclude that the problem is serious.<sup>360</sup> Moreover, the nature of corruption is changing.<sup>361</sup> In keeping with the trend of economic reform and Deng's view that to get rich is glorious, money is increasingly the means and the end of corruption, whereas in the past, power and privileged access were more important. Further, the stakes are rising. Corruption cases involve larger and larger sums of money. Corruption is also becoming more democratic. Economic reforms have provided more opportunities for those lower down the ladder to take advantage of their position to extort rents. As a result, corruption has spread to all aspects of society, including the Party, administration, public security, procuracy and courts.<sup>362</sup>

As one would expect, the causes of corruption are many. Economic reform has clearly been a major factor. Price reforms and the dual pricing system have created profiteering opportunities. Decentralization has created more opportunities for local officials to use their new-found authority to approve projects and to make resource allocation decisions in order to extract bribes. The lack of sepa-

355. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 58.

356. *Id.* at 326.

357. *Id.* at 280. More generally, less than 0.4% of public security decisions were challenged in Anwei province between 1994-1996. *Id.* at 438.

358. In some cases people are challenging the decisions but the cases are not being accepted, perhaps because the agency changes its decision before the case is accepted or because the court or reconsideration body is under pressure not to accept the case.

359. Ping Jiang suggests that while there are not many cases of revenge—he estimates only 1 out of 1000—their influence is greater than their numbers. Ping Jiang, *supra* note 298, at 628.

360. See Yufan Hao & Michael Johnson, *Reform at the Crossroads: An Analysis of Chinese Corruption*, 19 ASIAN PERSP. 117 (1995).

361. See *id.* at 136.

362. See Yifa zhiguo yu lian Zheng jianshe yanjiuhui jiyao [Abstract of Conference on Ruling the Country According to Law and Good Governance], 20 FAXUE YANJIU No. 4 [Jurisprudence Studies] 3, 3-4 (1998) [hereinafter *Good Governance*] (summarizing view of Hainian Liu regarding structural and systemic nature of corruption).

ration between the state and enterprises has created incentives for local governments and ministries to steer resources and opportunities toward companies in which they hold an interest.<sup>363</sup> The emergence of a private economy has created new sources of wealth to be exploited by government agencies that need to bolster their revenues in response to central government funding cuts. Many businesses may find that paying bribes to expedite the frequently inefficient approval process of administrative agencies is well justified on economic grounds. Even the courts have become heavily involved in profit-making activities, opening the door to myriad forms of improper influence.<sup>364</sup>

An ethical crisis resulting from loss of faith in socialism exacerbates the problems caused by corruption. The Party lost credibility and legitimacy as a result of a series of tragic miscalculations, from the Anti-Rightist Campaign in 1957–1959, the Great Leap Forward in the late 1950s, the Cultural Revolution of 1966–1976, to the Tiananmen debacle in 1989. Plagued by corruption, the Party is seen by many today as nothing more than a vehicle for personal enrichment and power. Furthermore, the Party's efforts over the years to destroy traditional normative systems such as Confucianism, Daoism, and Buddhism have taken their toll. Confronting an ethical crisis, the Party has attempted to revitalize Confucianism and has taken steps to create a socialist spiritual civilization in hopes of combating the widespread deterioration in moral standards.<sup>365</sup> However, such measures have proved largely ineffectual. To fill the void, many Chinese have turned to money-worshipping, a hard-edged capitalist materialism in which the only goal is to acquire as much money as possible, as soon as possible, and in any way possible. Such unbridled pursuit of riches has resulted in widespread corruption.

The perception of unjust enrichment and a lack of distributive justice further contribute to corruption. The inevitable result of Deng's some-get-rich-first policy was that some people would get rich first, thus increasing the distance between the haves and have-nots. Perhaps more important than the difference between the rich and the poor is the sense that the rich got rich by unfair means. Government officials and their sons and daughters were able to exploit their privileged position to divert state resources to private use or take advantage of other opportunities not available to others. The absence of equal opportunity and fair competition encourage people to ignore the rules to get ahead.<sup>366</sup> Cultural factors also come into play. While many transition countries experience high levels of corruption, China's problems have been traced back to deep-

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363. See You Ji, *China's Administrative Reform: Constructing a New Model for a Market Economy*, ISSUES & STUD., Feb. 1998, at 69, 95.

364. The courts, however, have been ordered to divest their interests in moneymaking enterprises. See *Good Governance*, *supra* note 362, at 4-5 (summarizing views of Feng Rui on problems of corruption in the legislative and judicial branches of government); *Beijing's Political-Legal Organs Cut Business Ties*, available in FBIS-CHI-98-358, Dec. 24, 1998.

365. See, e.g., Willy Wo-lap Lam, *Jiang's Crusade*, S. CHINA MORNING POST, May 3, 1995, at 19; *Curb Moral Decline*, CHINA DAILY, May 22, 1995, at 4.

366. See *Good Governance*, *supra* note 362, at 4 (summarizing views of Xiao Li Wen on corruption in the 1980s and '90s).

rooted patterns of paternalism and nepotism and the reliance on *guanxi* and personal connections.<sup>367</sup>

In other countries, courts usually serve as one of the main ways to attack corruption. However, the low stature of the PRC courts, and their dependence on local governments for funding make them unlikely candidates to hold the line against corruption in the CCP or the more powerful government and administrative agencies.<sup>368</sup> Moreover, the judiciary itself has been plagued by corruption.<sup>369</sup> Similar problems of authority and funding impede administrative supervision organs.<sup>370</sup> In addition, the lack of democracy and limits on free speech undermine the effectiveness of supervision by the public.

Widespread corruption undermines the authority and legitimacy of the state and its branches, whether administrative or judicial. In so doing, it further contributes to the crisis of values, thus leading to a vicious cycle of escalating corruption. Specific acts of corruption also distort administrative decision-making. Although in some cases corruption may have efficiency-enhancing effects, the overall result is likely to be less efficiency and surely a decrease in the quality of justice.<sup>371</sup>

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367. See *id.*

368. See *Good Governance*, *supra* note 362, at 7-8 (summarizing views of Weifang He and Min Cui on how people's expectations that the judiciary should be an instrument through which to mete out punishment for government corruption are undermined by corruption within the judicial system itself; and on three problems with the judiciary: local protectionism, lack of independence and excessive prosecutorial power undermining a balanced adversarial adjudication system, respectively).

369. See Dingjian Cai, *Development of The Chinese Legal System*, *supra* note 134; *Court President on Ranks of Judges, Police*, available in FBIS-CHI-98-264, Sept. 21, 1998 (reporting that Xiao Yang, President of the Supreme People's Court, confirmed comments by Jiang Zemin that law-enforcement personnel are involved in such malpractice as "eating free meals, taking without paying, imposing man-made barriers and soliciting favors, demanding and taking bribes, perverting justice for money, and bullying the common people" and noting that corruption has been growing year by year). In response to protests by the public and NPC over judicial corruption, incompetence and inefficiency, the Supreme People's Court began an "educational rectification campaign" in spring of 1998. The campaign resulted in the issuance of several new regulations, including the Procedures for Trial Implementation for Punishments of Violations of Discipline in People's Courts Trials, Procedures for Trial Implementation for Holding People's Court Judges Responsible for Violations of Law in Court Trials, and Work Regulations of Supreme People's Court Superintendents. See *Supreme Court Promulgates Two Documents*, available in FBIS-CHI-98-262, Sept. 19, 1998. It also resulted in 12,000 reports by citizens of illegal activities by courts and prosecutors, the disciplining of nearly 5000 judges and prosecutors, the correction of 8,110 mishandled cases through August 1998, and the appointment by the Supreme Court of 10 prestigious sitting and retired judges as superintendents. See *Supreme Court Appoints 10 Judicial Superintendents*, available in FBIS-CHI-98-303, Oct. 30, 1998; "Unprecedented" Internal Shakeup of Judiciary Noted, available in FBIS-CHI-98-257, Sept. 14, 1998.

370. See *Good Governance*, *supra* note 362, at 5 (summarizing views of Liu Renwen who notes in his analysis of the governmental and economic factors contributing to corruption that the internal means of control, such as administrative supervision, are not able to deal with corruption at the highest levels).

371. See Paulo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995) (finding a statistically significant correlation between corruption and lower growth).

## III.

## WEAK MECHANISMS FOR REINING IN THE BUREAUCRACY

China relies on many of the same mechanisms as other countries to rein in the bureaucracy, yet they fail to produce comparable results. In part, the difference can be attributed to the particular features of the PRC mechanisms. But to a considerable extent, the various means of controlling administrative officials suffer from the general institutional and systemic problems discussed previously.

A. *Legislative Supervision*

Legislative supervision of the administration takes a variety of forms, including hearing and approving work reports, controlling the budget of administrative agencies, making appointment and removal decisions, investigating hot topics, investigating law enforcement, issuing interpretations of legislation and reviewing local government rules for consistency with higher level legislation.<sup>372</sup> While all of these means are potentially useful, they have inherent limitations, some of which are common to all legal systems and some of which are particular to the PRC context.

For instance, the work report hearing and approval process allows the legislature to express dissatisfaction with administrative agencies. In some cases, criticism by the NPC has resulted in changes in practice.<sup>373</sup> However, the people's congresses only hear a relatively small number of work reports in a year,<sup>374</sup> and their power to effect change is limited largely to moral censure. Similarly, the NPC has the authority to supervise and approve the budgets of administrative agents, but more than half of administrative spending in China is off budget.<sup>375</sup> Furthermore, China has not made much use of potentially useful oversight committees to date, though some provinces have been more aggressive than others.<sup>376</sup>

More generally, the ability of the people's congresses to rein in the government and administrative agencies is undercut by their questionable legitimacy and low level of competence. Due to the election process, people's congresses do not enjoy the same legitimacy and stature that legislatures in other countries do. While people's congresses have begun to shed their rubber stamp image, they are still relatively weak. For example, although they officially have the

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372. See Dowdle, *The Constitutional Development and Operations*, *supra* note 138, at Part III.C.

373. In 1997, the refusal of 31% of the delegates to support the Supreme People's Court's report resulted in a campaign by the Court to investigate and rectify local protectionism, unfair judgments and abuses of judicial power for personal gain. See *Vote of Disapproval Prompts Campaign to Clean Up China's Courts*, AGENCE FRANCE-PRESS, April 2, 1997.

374. The NPC heard 12 work reports in 1992, 14 in 1993, 7 in 1994, 10 in 1995, and 8 in 1996. The Sichuan People's Congress heard 18 in 1992, 25 in 1993, 20 in 1994, 27 in 1995, and 18 in 1996. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 181.

375. See Dowdle, *supra* note 138, at 94.

376. See Li, *supra* note 170, at 204 (reporting that people's congresses in Guangdong conducted more than 800 appraisals of government officials since 1992, resulting in the removal of five elected officials and several hundred non-elected officials).

power to make certain appointments, real appointment authority lies elsewhere. The Henan Provincial People's Congress approved all but six out of 548 nominees for government posts between 1989 and 1993.<sup>377</sup> Since 1993, only one of 684 nominees has been rejected.<sup>378</sup> Moreover, many delegates are retired government officials and are poorly educated, although this is slowly changing.<sup>379</sup> However, given the technical nature of much administrative decision-making, it is not clear that having a well educated and trained legislature second-guessing the administration would produce better results.

Taking a longer view, even if the people's congresses were to become more democratic, legitimate and powerful, there are inherent problems in relying on legislatures to rein in administrative discretion. Legislatures are majoritarian institutions subject to majoritarian pressures. Accordingly, courts are generally more suited to protect the rights and freedoms of individuals against administrative over-reaching. Furthermore, the experience of modern parliaments has been that the head of the ruling party and the executive branch have dominated the lawmaking process.<sup>380</sup> The legislative branch has been reduced largely to a checking function. At best, people's congresses can be expected to play an important but minor role in reining in administrative agencies.

### B. Administrative Supervision and Party Discipline

The Ministry of Supervision was established in 1954, but was terminated in 1959.<sup>381</sup> It was restored in 1986 and in 1993 merged with the CCP Discipline Committee system.<sup>382</sup> In 1990, the State Council passed the Administrative Supervision Regulations, which were subsequently amended and upgraded to a law in 1997.<sup>383</sup>

The Ministry of Supervision and its subordinate bodies function somewhat like ombudsmen in other jurisdictions. Supervisory organs are charged with overseeing government and administrative officials and their appointed personnel.<sup>384</sup> Their goal is to promote good governance.<sup>385</sup> Whereas courts are generally limited to examining the legality of administrative acts, supervision organs may look into the appropriateness of administrative decisions.<sup>386</sup> They have

377. ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 169. However, during the same period 153 officials were removed from office.

378. *Id.*; cf. Li Cheng, *supra* note 157, at 26 (reporting that in 1998 provincial people's congresses elected five vice-governors nominated by people's congresses delegates over Party candidates).

379. *See Name List of Deputies to 9th NPC Published*, available in FBIS-CHI-98-060, Mar. 1, 1998 (reporting that the number of delegates with undergraduate degree or higher increased from 69% to 81%).

380. *See* Sir William Wade, *supra* note 208.

381. *See* ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 214-15.

382. *Id.* at 211.

383. *Id.* at 215.

384. XINGZHENG JIANCHA FA [SUPERVISION LAW], art. 2., in *Changyong falu fagui quan*, at 724.

385. *See id.* art. 1.

386. However, they can only recommend that obviously inappropriate personnel decisions be changed. *See id.* at 727, art. 23(4).

jurisdiction over both administrative rulemaking and decisions about specific acts.<sup>387</sup> In particular, they are to ensure that government agencies follow and implement the law and that the decisions, orders and directions of government departments are consistent with superior legislation and state policies. They may also examine personnel decisions and cases of administrative discipline and punishment.

In practice, supervisory organs investigate a range of matters, including breach of discipline by government officials who live in better housing than they are entitled to or use public funds to buy a house, assess illegal fees and fines, or take bribes.<sup>388</sup> Supervisory organs may initiate a case internally or in response to a citizen complaint. In 1996, CCP discipline committees and supervisory organs in Zhejiang Province received 63,401 letters, visits, and telephone calls raising complaints, an increase of 31% over the previous year.<sup>389</sup>

Supervisory organs have several powers. They may conduct discovery on administrative departments and officials, issue injunctions to cease acts in violation of law or disciplinary rules, temporarily remove or seal evidence, order officials to provide explanations for their acts, freeze bank accounts in cases of suspected corruption, among other powers.<sup>390</sup> If they decide that the government has acted illegally or inappropriately, they may recommend to a competent administrative body that a sanction be imposed.<sup>391</sup> The agency or official should follow the recommendation unless there is good reason, in which case the agency or official may appeal the recommendation to the next highest level supervision organ.<sup>392</sup> The superior organ may also directly modify or annul inappropriate administrative punishments.<sup>393</sup>

Despite these powers, supervisory organs have played only a marginal role in limiting administrative misbehavior. The main reason is that they lack sufficient independence and authority to monitor government agencies. As part of the executive branch, they are answerable to the same level of government that created them as well as to higher level supervisory organs. They must report important investigations to the same level government for the record and must obtain the approval of the government for any important decisions.<sup>394</sup> Critics also note that supervisory organs are understaffed, lack sufficient powers to impose sanctions, depend on local governments for funding, and are incapable of dealing with corruption or violations at high levels of government.<sup>395</sup>

The 1993 merger of CCP discipline committees with supervisory organs has caused additional problems. Different cities have implemented the merger

387. See *id.* art. 23.

388. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 223-24.

389. *Id.* at 217. They accepted 4,978 cases, up almost 29% from 1995, resulting in the sanctioning of 4,494 Party members, up almost 25%. *Id.*

390. SUPERVISION LAW, art. 4, *supra* note 384.

391. See SUPERVISION LAW, art. 24, *supra* note 384, at 727.

392. *Id.* arts. 25, 39, at 727, 728-29.

393. *Id.* art. 38, at 728.

394. See *id.* arts. 29, 34, at 727. They must also report to next higher level supervisory organ and obtain approval in such situations. *Id.*

395. See, e.g., ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 220.

differently, some completely merging both personnel and work load and others trying to maintain some degree of separation. But in practice, the CCP often dominates.<sup>396</sup> While there are a number of drawbacks to Party discipline, some observers have suggested that combining administrative supervision with Party discipline has strengthened the former.<sup>397</sup> Party supervision has the advantage of being able to reach higher level officials, provided the CCP approves. The Party, however, has not been aggressive in investigating and punishing its own members, notwithstanding its get tough propaganda. Moreover, the investigations are often handled by Party members at the same level. In many instances, they will be subject to the same kind of social networking (*guanxi*) pressures that influence administrative decision-making. In addition, they may feel sympathy for the plight of their unfortunate comrades on the theory that there but for the grace of God go I.<sup>398</sup>

### C. Administrative Reconsideration

Administrative reconsideration is a common means for controlling administrative discretion and making administrative agencies act in accordance with law. Administrative reconsideration offers several advantages over judicial review. Administrative review bodies tend to possess a better understanding of the issues than courts of general jurisdiction, particularly with regard to highly technical matters. They may also have a better appreciation for the realities of running the government and the difficulties of setting policies. Additionally, administrative reconsideration is often faster and less expensive than litigation in court.

In China, administrative reconsideration offers a number of additional advantages over litigation under the ALL.<sup>399</sup> First, it is free.<sup>400</sup> Second, administrative reconsideration bodies may consider both the legality and appropriateness of administrative decisions.<sup>401</sup> Third, parties may challenge not only the specific act, but in some cases the abstract act on which it is based.<sup>402</sup> If the reconsideration body finds the regulation inconsistent with higher legisla-

396. See *id.* at 225-26.

397. See *id.* at 228.

398. In any event, many PRC scholars have objected to the merger of the CCP discipline committees and supervision organs, notwithstanding certain short-term benefits, as incompatible with rule of law and not worth it in the long run. One of the lynchpins for rule of law is restricting the CCP's involvement in government to its legally circumscribed role. Creating a separate system of justice for Party members overseen by the Party is not conducive to the long-term goal. See *id.* at 211.

399. PRC scholars frequently argue that it promotes closeness between the people and government and helps solve social contradictions. See, e.g., *id.* at 258.

400. In the past, many administrative agencies were charging for administrative reconsideration. The ARL makes clear that there is to be no charge for reconsideration, and that the agencies are to bear the cost. ARL, *supra* note 149, art. 39, at 658.

401. *Id.* art. 3(3), at 652.

402. See *id.* art. 7, at 653, provides for review of regulations (*guiding*) of the (i) State Council ministries, (ii) people's governments at the county level and above and their work departments, and (iii) village and township people's governments, but *excluding* Administrative Rules and Government Rules. In short, reconsideration bodies may not review Laws, Administrative Regulations or Rules but may review all government and administrative agency Normative Documents. See *id.*



tion, it may annul the inconsistent regulation or, if it does not have the authority, it may refer the problem to the body that has such authority.<sup>403</sup>

Despite the potential value of administrative reconsideration, it has not been an effective means of reining in administrative discretion. Relative to the total number of specific acts, the number of administrative reconsideration cases is miniscule.<sup>404</sup> Moreover, the number decreased annually between 1991 and 1996, whereas the number of ALL cases has been increasing.<sup>405</sup> Further, partial statistics reveal that plaintiffs are less likely to prevail in reconsideration than in litigation.<sup>406</sup>

Administrative reconsideration and administrative litigation are ineffective for many of the same reasons.<sup>407</sup> There are, however, obstacles specific to administrative reconsideration.<sup>408</sup> Some agencies have yet to establish reconsideration organs.<sup>409</sup> Others have not dedicated full-time personnel to this job.<sup>410</sup> Some departments give demerits to those whose decisions are quashed.<sup>411</sup> Originally, the ARR provided for vertical jurisdiction.<sup>412</sup> That is, a petitioner sought reconsideration at the next highest administrative entity. The advantage was that

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403. See *id.* arts. 26-28, at 656.

404. There were only 220,000 administrative reconsideration cases from 1991 until 1997 nationwide. See *NPC Standing Committee to View Administrative Appeals Law*, available in FBIS-CHI-98-300, Oct. 27, 1998.

405. In Beijing, the numbers have decreased from 314 in 1991 to 209 in 1995, before rebounding to 246 in 1996. In comparison, the number of ALL cases in Beijing increased from 142 in 1991 to 430 in 1996, with the largest increase occurring in 1995-1996 from 283 cases annually to 430. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 253.

406. Between 1991 and 1996, administrative reconsideration review bodies in Beijing quashed or modified the decision in just over 30% of the cases. Moreover, over time, they quashed or modified fewer decisions. In 1991-1992, the agencies lost more than 100 times a year. In 1993-1994, they lost less than 100 cases a year, while in 1995-1996 they lost less than 50 times per year. See *id.* at 253. From 1990-1996, in Xinjiang, Urumuqi Public Security Bureau review bodies reportedly quashed or modified on average 43.7% of the cases per year. But the high levels of quashing or modifying of agency decisions in the early years distort the average. For instance, in 1990-1991, review bodies quashed 67% of the shelter and investigation decisions. In 1992, they quashed 73% of such decisions. By 1996, they only quashed 20%. *Id.* at 274-75. In contrast, ALL plaintiffs across China prevailed in approximately 40% of the cases in 1995 and again in 1997. See *supra* note 301.

407. See Shangyi Cai, *Dangqian xingzheng fuyi shao de yuanyin ji qi duice* [Reasons for and Responses to the Low Number of Administrative Reconsideration Cases Today], 5 JINGJI YU FA [ECONOMY AND LAW] 24 (1994) (proposing reasons including a preference to rely on connections, the low level of legal awareness on the part of citizens, fear of retaliation, agency failure to comply with procedural requirements—including to inform parties of the right to reconsideration—and agencies' fear of losing face if a decision were overturned causing agencies to settle disputes with disgruntled parties).

408. See Jiejun Yang, *Lifa zhiliang de shizheng fenxi: tan "Xingzheng fuyi tiaoli" de qianque ji qi wanhan* [Positivist Analysis of Legislative Quality: Discussion of the Deficiencies and Improvements of the Administrative Reconsideration Regulations], 3 NANJING SHEHUI KEXUE: JINGJI FAZHIBAN [Nanjing Social Studies: Economic Law Office] 44 (1997) (noting problems with limits on standing, scope of review, jurisdiction, procedural shortcomings, and the bases for review of decisions, including exclusion of certain normative documents from consideration on review).

409. See, e.g., ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 267.

410. See, e.g., *id.*

411. See Cheng Yang and Jingzhu Liu, *Dui xingzheng fuyi xingtong xushe wenti de tiaocha yu fenxi* [Investigation and Analysis of the Problem of Administrative Reconsideration Becoming an Empty Form], 2 XING ZHENG FAN [ADMINISTRATIVE LAW], 31 (1997).

412. See 1990 ADMINISTRATIVE RECONSIDERATION REGULATIONS, art. 11. The exceptions were where there was no superior organization, where laws and regulations expressly conferred jurisdic-

higher level agencies often had more expertise and were likely to be more impartial and less subject to the pressures of local protectionism.<sup>413</sup> However, this was inconvenient and excessively expensive for many plaintiffs, because the superior agency may have been located in a distant city. The ARR was amended in 1994 to provide jurisdiction at the same level government, as well as with the superior agency, unless the regulations specifically stated otherwise.<sup>414</sup>

However, as feared, this restructuring has led to problems with local protectionism and lack of expertise. Like the courts, reconsideration bodies are subject to a wide range of external pressures, primarily from the local government. However, reconsideration bodies have the additional problem of being part of the agency that made the decision. Some legal systems attempt to ensure greater independence by staffing the reconsideration bodies with personnel who are provided similar tenure to judges and whose promotion and other personnel matters are handled by a different government body.<sup>415</sup> They also require that the person who investigated the complaint not be the same person who hears the case and they impose strict limits on *ex parte* communications between the agency personnel and the persons on the reconsideration body. China has no such restrictions.

There are also numerous doctrinal problems that limit the effectiveness of administrative reconsideration. As under the ALL, the CCP and procuracy are not included within the jurisdictional scope of administrative reconsideration. The deadline for challenging a decision is short—60 days from the time the person becomes aware of the decision, except in unusual circumstances.<sup>416</sup> The ARL spells out very few procedural requirements. The decision to hold a hearing is left to the discretion of the reconsideration body.<sup>417</sup> If a hearing is held, the parties are often passive and confused as to their rights to participate at the hearing, although they may retain counsel.<sup>418</sup> The ARL provides that applicants may review the evidence supplied by the defendant agency except where state secrets, trade secrets or matters that violate individual privacy are involved.<sup>419</sup> However, it does not expressly give the applicant a chance to respond to any of the evidence provided by the agency. The review body can carry out investiga-

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tion on the same level government, and where the State Council would be the administrative superior.

413. However, in some cases, the lower level department will already have sought instructions from the higher department before making its decision, rendering appeal to the higher level department futile. See Jiejun Yang, *supra* note 408.

414. See ARR, art. 11. The revised ARL continues the practice, allowing the plaintiff to choose whether to appeal to the same level government or the administrative superior, unless laws or regulations expressly confer jurisdiction on the same level government or the administrative superior is the State Council. See ARL, *supra* note 149, arts. 12-15, in *Changyong falu fagui quanshu*, at 654.

415. See WARREN, *supra* note 176, at 289-92 (1982).

416. ARL, *supra* note 149, art. 9, in *Changyong falu fagui quanshu*, at 653.

417. See ARL, *supra* note 149, art. 22, in *Changyong falu fagui quanshu*, at 656.

418. See *id.* art. 10, at 653. The ARL reflects the belief that administrative reconsideration should differ from judicial review and that reconsideration procedures should be simpler. See NPC Standing Committee Examines Draft Review Law, available in FBIS-CHI-98-302, Oct. 29, 1998.

419. ARL, *supra* note 149, art. 23, in *Changyong falu fagui quanshu*, at 656.

tions or depose interested parties, but the decision to do so is entirely at the discretion of the review body.<sup>420</sup>

#### D. Letters and Petition System

In China, most governments, people's congresses and courts have a petitions and appeals section to handle citizen complaints.<sup>421</sup> Thus, every year hundreds of thousands of disgruntled citizens write letters to senior government leaders or make a pilgrimage to provincial capitals or even to Beijing to seek an audience with government officials. The effectiveness of filing petitions or beseeching the authorities for relief varies depending on the nature of the complaint, the status and connections of the party making the complaint, the persistence of the petitioner and the petitioner's ability to catch the attention of the powers that be. Gaining the support of the media to champion one's cause increases the likelihood of receiving a prompt response. On the whole, however, the likelihood of letters and petitions producing the desired result is low.<sup>422</sup>

The popularity of this traditional method of protest may be due in part to the persistent belief among citizens that father-and-mother government officials have a moral duty to rectify injustices. On the other hand, it may also be due to the cost of formal proceedings, the poor understanding on the part of many citizens as to the availability of formal mechanisms for obtaining relief, or the ineffectiveness of other legal channels for seeking redress.

#### E. Administrative Litigation

Administrative litigation results in some relief for the applicant in approximately 40% of the cases. Yet the overall effectiveness of administrative litigation has been limited, judging by the small number of suits relative to what are acknowledged to be widespread administrative problems. To some extent, the limited effectiveness of administrative litigation is due to doctrinal shortcomings in the ALL.<sup>423</sup> One problem, for instance, has been determining whether acts of the Public Security Bureau constitute administrative acts or non-administrative

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420. See *id.* art. 22.

421. See Finder, *The Supreme People's Court*, *supra* note 227, for a discussion of how the SPC handles petitions. See also Finder, *Like Throwing an Egg Against a Stone?*, *supra* note 142, for a discussion of letters and petitions as they relate to administrative agencies. The petitions and appeals office may turn the matter over to Administrative Supervision organs or send the complainant back to the agency to pursue administrative reconsideration.

422. One study found that higher level officials rejected or delayed responding to nine out of twenty-five petitions by rural residents. Moreover, in twelve other cases, local officials refused to comply with the decisions of their superiors or delayed performance. David Zweig, *The "Externalities of Development": Can New Political Institutions Manage Rural Conflict?*, in *CHINESE SOCIETY: CHANGE, CONFLICT, AND RESISTANCE* (Elizabeth J. Perry & Mark Selden eds., 2000).

423. See generally Pitman Potter, *The Administrative Law of the PRC*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA*, *supra* note 23, at 270-304.

criminal investigations, though the Supreme People's Courts recent interpretation of the ALL may help to clarify this issue.<sup>424</sup>

Standing requirements also limit the effectiveness of judicial review in China. The ALL allows parties to bring suit when their "legitimate rights and interests" are infringed by a specific administrative act of an administrative organ or its personnel.<sup>425</sup> Article 11 sets out certain acts that can be challenged. The listed acts all involve personal or property rights. Limiting the scope of judicial review to infringement of personal or property rights excludes other important rights, most notably political rights such as the rights to march and to demonstrate, freedom of association and assembly, and rights of free speech and free publication.<sup>426</sup> The requirement that one's legitimate rights and interests be infringed has also been construed narrowly to prevent those with only indirect or tangential interests in an act from bringing suit.<sup>427</sup> The narrow interpretation prevents interest groups or individuals from acting as "private attorneys general" to use the law to challenge the administration. On the positive side, Article 11 contemplates the expansion of judicial review to include other types of cases as provided by laws or regulations. Thus, it is possible that political rights and freedoms may become subject to review over time.<sup>428</sup>

But the biggest constraints on effective judicial review are the institutional or systemic obstacles discussed previously, including the low level of legal consciousness, the unwillingness of many citizens to bring suit, a culture of deference to authority, and a weak judiciary. The weakness of the courts is readily apparent in their handling of administrative litigation cases.

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424. See SHIRONG FANG, LUN JUTI XINGZHENG XINGWEI [DISCUSSION OF SPECIFIC ADMINISTRATIVE ACTS] 98-105 (1996); see also *Zuigao renmin fayuan guanyu zhixing Zhonghua Renmin Gongheguo xingzheng sugong fa ruogan wenti de jieshi* [The SPC Interpretation Regarding Several Problems in the Implementation of the PRC Administrative Litigation Law], art. 1(2) March 10, 2000 (issued by the SPC) [hereinafter *SPC ALL Interpretation*] 164, 164 QUANGUO LUSHI ZIGE KAOSHI DAGANG JI BIXU FALU FAGUI HUIBIAN [NATIONAL CERTIFICATION TEST OUTLINE AND COMPILATION OF ESSENTIAL LAWS AND REGULATIONS (State Council Legislative Bureau Qualification Testing Committee ed., 2000) [hereinafter, *ESSENTIAL LAWS AND REGULATIONS*] (noting that only those acts clearly authorized by the Criminal Procedure Law are outside the scope of jurisdiction of the ALL).

425. See ALL, *supra* note 153, art. 2, in *Changyong falu fagui quanshu*, at 2137. See also, for English translation, LIN FENG, *supra* note 123, at 321.

426. See LIN FENG, *supra* note 123, at 137.

427. See, e.g., Rong Zou, *Xingzheng susong de yuangao zige yanjiu* [Study of Standing to Sue in Administrative Litigation] 8 FAXUE [Jurisprudence] 61 (1998) (discussing a case where the foreign party to a joint venture whose approval certificate was revoked did not have standing to sue because it was not the object of the approval reply revoking the appropriate certificate). The SPC's recent interpretation of the ALL now clearly provides parties to joint ventures the right to challenge an act that affects the joint venture. See *SPC ALL Interpretation*, *supra* note 424, art. 15, in *ESSENTIAL LAWS AND REGULATIONS*, at 165.

428. See Zheng Liu, *Shilun sheding xingzheng susong yuangao zege yu xingzheng susong shouan fanwei de hudong luoji guanxi* [Discussion of the Interactive Logical Relationship between the Establishment of Standing to Sue and the Scope of Administrative Review Cases], FAZHI YU SHEHUI FAZHAN [LAW AND SOCIAL DEVELOPMENT] 54, 58 (1998) (predicting trend will be toward more lenient interpretation of standing requirements and to include political rights).

A difficult issue faced by all systems is the degree to which judges should defer to agency interpretations of statutes and their own regulations.<sup>429</sup> A 1981 NPCSC resolution gave the State Council and its departments the authority to interpret questions involving the application of laws and decrees in areas unrelated to judicial and procuratorial work.<sup>430</sup> Administrative departments are also responsible for interpreting regulations of a local character.<sup>431</sup> Further, the right to interpret a regulation may be delegated to an agency. For example, the State Council may pass an Administrative Regulation and then delegate the authority to interpret the regulation and pass implementing regulations to a ministry such as MOFTEC.<sup>432</sup> In many cases, an agency will draft a regulation and give itself the right to interpret the regulation.<sup>433</sup>

In contrast to the broad interpretive powers granted administrative agencies, PRC courts have extremely limited interpretive powers. Inevitably, they must interpret a regulation on which a specific act is based to determine if the act was legal, which will in turn depend on whether the regulation is consistent with superior legislation.<sup>434</sup> In doing so, if the court is not sure about the interpretation of the regulation and thus whether it is inconsistent, the court must seek clarification from the entity that issued it or from its superior.<sup>435</sup> If the court then finds that the regulation as interpreted by the agency is inconsistent with superior laws and regulations, the court need not follow the agency's interpretation.<sup>436</sup> In practice, however, courts may be inclined to defer to an agency's interpretation given the courts' weak stature and their dependence on local government.

Moreover, agencies may achieve the same result as an interpretation of a law or regulation by issuing Rules or Normative Documents. Under the ALL, courts are bound by Laws, Administrative Regulations and Local People's Congress Rules, but need only refer to Rules.<sup>437</sup> The ALL simply ignores Normative Documents, which are not binding on the court. Since the court is not bound by Rules or Normative Documents, agencies cannot force their regulations or interpretations on courts—at least as a legal matter—as is sometimes alleged.<sup>438</sup> In practice, however, PRC courts may end up giving considerable

429. Consider the controversy caused by the deferential standard announced by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984). See Schuck & Elliot, *supra* note 301.

430. See RESOLUTION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS PROVIDING AN IMPROVED INTERPRETATION OF LAW, art. 2 (1981).

431. See *id.* art. 4.

432. See, e.g., REGULATIONS ON ADMINISTRATION OF TECHNOLOGY IMPORT CONTRACTS OF THE PRC, art. 12 (1985) (promulgated by the State Council).

433. See, e.g., ADMINISTRATION OF THE PROVISION OF SECURITY TO FOREIGN ENTITIES BY DOMESTIC INSTITUTIONS INSIDE CHINA PROCEDURES IMPLEMENTING RULES, art. 51 (1998) (promulgated by State Administration of Foreign Exchange).

434. See XINGZHENG FAXUE [STUDY OF ADMINISTRATIVE LAW] 158-59 (Haocai Luo ed., 1996).

435. See ALL, *supra* note 148, art. 53, in *Changyong falu fagui quanshu*, at 2142; SPC ALL Interpretation, *supra* note 424, art. 51(5), in ESSENTIAL LAWS AND REGULATIONS, at 165.

436. See STUDY OF ADMINISTRATIVE LAW, *supra* note 434, at 159.

437. See *id.* arts. 52, 53.

438. See, e.g., Keller, *Sources of Order*, *supra* note 122, at 742; see also LUBMAN, *supra* note 3, at 34 (asserting that "[a]dministrative agencies may also require the courts to enforce the rules they

weight to Rules and Normative Documents because there is often no superior legislation on point and the court finds the Rules or Normative Documents reasonable.<sup>439</sup> This is, to some extent, a problem of the immaturity of the legal system, and this problem will be addressed over time as more law is produced. More troubling, however, are instances in which courts' weak stature relative to agencies causes them to defer to Rules and Normative Documents, even when they do not find them reasonable.

The courts' fear of upsetting administrative agencies is also evident in their reluctance to take advantage of the broad standards of review provided under the ALL. The ALL authorizes the court to annul or remand for reconsideration administrative decisions if the agency makes its decision without sufficient essential evidence, incorrectly applies laws or regulations, violates legal procedures, exceeds its authority or abuses its authority.<sup>440</sup> These standards for review are quite broad and could, in the hands of an aggressive judiciary, be developed in a way that permits the courts in effect to review acts for their appropriateness. For instance, whereas courts in many legal systems are generally deferential in reviewing administrative findings of fact,<sup>441</sup> in China the "insufficiency of essential evidence" standard allows for stricter scrutiny of the factual basis for agency decisions. Judges could force officials to be more accountable and to establish a record by setting a high standard for the type, quality and quantity of evidence required to justify an agency decision.

Similarly, "exceeding authority" or "abuse of authority" permit a wide range of interpretation, and have been interpreted in other countries to include principles of proper purpose, relevance, reasonableness, consistency with fundamental rights, proportionality and so forth.<sup>442</sup> For example, was the decision made to further the public interest, as intended, or to enhance one's political future or increase one's personal riches? Did the agency consider all relevant factors in making the decision? Did it consider any irrelevant factors, such as race or the color of the applicant's hair? The principle of reasonableness may be interpreted narrowly, as imposing a minimal rationality standard that would rule out arbitrary and capricious decisions, or more robustly. The more robust the interpretation, the closer the court gets to substituting its own judgment and replacing a review of legality with a review of appropriateness.<sup>443</sup>

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issue," but not specifying whether he means that they have the power as a legal matter or simply as a practical matter).

439. See STUDY OF ADMINISTRATIVE LAW, *supra* note 434, at 162. Article 62 of the revised Supreme People's Court interpretation of the ALL now authorizes courts to cite legal and effective Rules and Normative Documents in their judgments. See SPC ALL Interpretation, *supra* note 424, art. 62.

440. See ALL, *supra* note 148, art. 54, in *Changyong falu fagui quanshu*, at 2142-43.

441. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 632-34 (1991).

442. See Jiangmiao Hu, *Youguan xingzheng lanyong zhiquan de neihan -ji qi biaoxian de xueli tantao* [Theoretical Inquiry Relating to the Connotation and Manifestation of Abuse of Authority], 3 FAXUE YANJIU [JURISPRUDENCE STUDIES] 8 (1992) (comparing interpretation in China to that in the United States, France and Germany).

443. In general, PRC courts may review acts for their legality but not their appropriateness. See ALL, *supra* note 148, art. 5. That is, the court will not substitute its judgment for that of the administrators, provided that the agency has acted within its legal authority. Even if the court would have

The standards of exceeding authority and abuse of authority are still in a state of flux in China. Generally, PRC scholars and courts appear to take the view that excess of authority refers to the case where the agency does not have the authority for the act, whereas abuse of authority refers to the situation where the act is within the jurisdiction of the agency, but is not in keeping with the purpose of the law or is unreasonable.<sup>444</sup> Put differently, excess of authority is where an agency uses powers that do not belong to the agency, whereas abuse of authority is where an agency uses its powers but in the wrong way.<sup>445</sup> Hence, for the Labor Bureau to issue a business license would be to exceed its authority, because the act is not related to the function of the agency. Alternatively, an agency may act in a way that is generally in keeping with its mission, but which exceeds its jurisdiction in a particular case.<sup>446</sup> PRC scholars are even more divided about the meaning of abuse of authority. Some would find an act that is not consistent with the legislative objective, spirit or principle to be an abuse of discretion.<sup>447</sup> Others would subject acts within the discretionary authority of the agency to a reasonableness test.<sup>448</sup> Some would apply an objective test of reasonableness while others would inject a subjective element by requiring that the

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made a different decision or acted differently in the circumstances, the court will defer to the agency unless the act is illegal. The only exception to the general rule is that a court may alter the decision of an agency with regard to an administrative penalty if it thinks the penalty is manifestly unjust. Many commentators abroad and in China have argued that the courts should be able to review the appropriateness of administrative acts and decisions. See Potter, *The Administrative Law of the PRC*, *supra* note 423, at 282; see also Guicai Peng, *Guanyu xingzheng susong kunjing de falu sekao* [Legal Reflections on the Difficult Areas of Administrative Litigation], 3 FAZHI YU SHEHUI FAZHAN [LAW AND SOCIAL DEVELOPMENT] 14 (1999); Songjie Guo, *Lun xingzheng heli linian yu sifa shencha de fanwei* [Discussion of the Concept of Administrative Reasonableness and the Scope of Judicial Review], 4 XINGZHENG FAZHI [ADMINISTRATIVE RULE OF LAW] 38 (1996). That courts review the legality rather than the appropriateness of administrative acts and do not substitute their judgment for that of the agencies is, however, a basic principle of most legal systems. See, e.g., WARREN, *supra* note 176, at 374 ("The word illegal is underscored since the courts cannot provide relief for those who have been hurt by unethical, cruel, insensitive, or blundering administrative acts which are otherwise illegal."). To be sure, some systems do allow courts to review the appropriateness of at least some administrative decisions. Moreover, in many systems, the line between legality versus appropriateness becomes blurred as the courts apply ever-widening standards of review. See TREATISE ON BELGIAN CONSTITUTIONAL LAW, *supra* note 265, at 226 (noting that while courts in Belgium generally may only review administrative acts for legality, they have incorporated a reasonableness test that blurs the line between legality and appropriateness). Reviewing decisions in terms of such vague standards as reasonableness and proportionality or on the basis of whether they violate fundamental rights allows courts to base their decisions on their views of the appropriateness of the administrative act.

444. See LIN FENG, *supra* note 123, at 194-95; cf. Xie Hui, *Lun xingzheng yuequan*, *FALU KEXUE* NO. 6 [LEGAL SCIENCE] 15-18 (1992) (claiming that exceeding authority refers to both internal and external substantive ultra vires and procedural ultra vires). Other scholars argue that Article 54(d) should not include procedural ultra vires because Article 54(c) deals with procedural violations.

445. See SHIRONG FANG, *supra* note 424, at 153-62.

446. See Xinli Zhu, *Lun xingzheng chaoyue zhiquan* [Administrative Excess of Authority], 2 FAXUE YANJIU [JURISPRUDENCE STUDIES] 112, 117 (1996) (arguing that excess of authority does not include consideration of purpose, appropriateness or proportionality as in other countries, but refers to decisions that exceed the jurisdiction of the agency with respect to subject matter, geographic limitations, level within the administrative hierarchy, or quantitative jurisdictional limits).

447. See FENG, *supra* note 123, at 214-16.

448. *Id.*

agency to have intended to abuse its authority.<sup>449</sup> Each of the following has been put forth as an example of abuse of authority: improper motive and purpose, failure to consider relevant factors, consideration of irrelevant factors, arbitrariness or capriciousness, inconsistency in administrative decisions, inappropriate delay, failure to take action, procedural irregularities and manifest unjustness.<sup>450</sup>

Courts have yet to take full advantage of the abuse of discretion standard to limit administrative action,<sup>451</sup> although judicial practice, like scholarly opinion, is unsettled, with cases reflecting the different understandings of the abuse of authority standard.<sup>452</sup> Overall, however, courts have not been aggressive in their application of the available standards of review. They have been particularly reluctant to hold agencies to procedural requirements.<sup>453</sup> Scholars generally draw a distinction between minor procedural violations that do not affect the outcome of the decision and major procedural violations.<sup>454</sup> But even allowing this concession, courts do not seem to take procedural requirements seriously. Traditionally, courts have emphasized substantive justice over procedural justice. Moreover, China has yet to pass an Administrative Procedure Law. Accordingly, procedural requirements are contained in piecemeal legislation and tend to lack detail.<sup>455</sup> Courts may also be willing to look the other way because of the low level of legal training of most government officials. Whatever the reasons, this failure to take procedures seriously has drawn the attention of both scholars and the government. Many hope, perhaps somewhat unrealistically, that the Administrative Procedure Law, currently being drafted, will ameliorate the problem significantly once it is passed.<sup>456</sup>

Although there is no theoretical reason why the courts could not develop broad standards of review, in practice their stature in the political hierarchy, combined with their dependence on local government for funding and personnel decisions, does not augur well for an aggressive court. The low level of professionalism of many judges and corruption within the court make it all the less likely that the courts will be able to rein in administrative discretion by relying on expansive interpretations of the standards of judicial review.

449. *See id.*

450. *See* Hu, *supra* note 442, at 12-13; Yuping Shi, *Shilun xingzheng lanyong zhiquan ji qi falu zhiyue* [Administrative Abuse of Power and Its Legal Restraint], 1 FASHANG YANJIU [COMMERCIAL LAW STUDIES] 81 (1996).

451. *See* Pei, *Citizens v. Mandarins*, *supra* note 15.

452. *See* LIN FENG, *supra* note 123, at 216-48 (discussing several cases).

453. *See* Pei, *Citizens v. Mandarins*, *supra* note 15.

454. *See* LAW OF ADMINISTRATIVE ACTS, *supra* note 269, at 257-59; *see also* Mingan Jiang, XINGZHENG SUSONGFA XUE [STUDY OF ADMINISTRATIVE LITIGATION LAW] 202 (1993).

455. The 1996 Administrative Penalty Law incorporated the most detailed procedural requirements to date. *See* ZHONGHUA RENMIN GONGHEGUO XINGZHENG CUFA FA [PRC ADMINISTRATIVE PENALTY LAW], in *Changyong falu fagui quanshu*, at 640.

456. *See infra* Part V.



## IV.

## THE PATH DEPENDENT NATURE OF ADMINISTRATIVE LAW REFORM

The institutional and systemic obstacles discussed in Part II both determine the agenda for legal reform and set the outer parameters for what is feasible. In this section, I illustrate the path-dependent nature of legal reforms by showing how the context-specific factors discussed in previous sections shape, and in some cases limit, the possibilities for reform.

A. *Tackling Legislative Inconsistency*1. *The Need for Deeper Institutional Reforms*

As we have seen, one of the biggest obstacles to administrative rule of law is the lack of clear lawmaking authority and the shockingly high degree of inconsistency between lower level and higher level legislation. The main proposals for dealing with these problems have been to (1) limit delegation and require the delegating body to state more specifically the purpose of delegation and standards for compliance; (2) eliminate or limit the inherent authority of agencies and local governments to pass regulations; (3) pass an administrative procedure law that would impose procedural requirements on administrative rulemaking; (4) improve the current mechanisms for handling inconsistency, including establishing a constitutional review body and special review bodies under the NPC, State Council, and people's congresses and governments; and, (5) expand the scope of judicial review to include abstract acts and allow the courts to annul lower level legislation that is inconsistent with superior legislation. While all of these suggestions may be pursued simultaneously, inconsistency will remain a problem unless the courts are given the power to review at least some abstract acts.

The recently enacted Law on Legislation limits the authority of the NPC to delegate power to the State Council and executive agencies, and to people's congresses and governments by prohibiting delegation with respect to, *inter alia*, criminal law matters and issues that affect the basic rights of citizens.<sup>457</sup> It also stipulates that the delegating act must indicate the scope and purpose of delegation, and that the authorized entity must act in accordance with the purpose and scope of delegation and may not sub-delegate the matter to another entity.<sup>458</sup> But attempting to rein in administrative discretion by limiting delegation or imposing specificity requirements has not proven effective in other countries where broad delegations of authority to administrative agencies have become the norm.<sup>459</sup> There is little reason to expect that limitations on delegation will be any more effective in China.

457. LAW ON LEGISLATION, *supra* note 212, art. 9, in *Changyong falu fagui quanshu*, at 215.

458. *Id.* art. 10.

459. See, e.g., WILLIAM FOX, *supra* note 279, at 50 ("It is too soon to bury the non-delegation doctrine, although it clearly has had at least one and one-half feet in the grave for the past forty or fifty years."); CRAIG, *supra* note 112, at 16 (observing that broad delegation in England gives agencies wide discretion); Klap, *supra* note 267, at 147-48 (noting that the dominance of the executive over parliament with respect to legislation is exemplified by vague standards of delegation such as it

While other countries also provide the executive inherent rulemaking authority, in China too many entities have been given expansive and vaguely defined rulemaking authority. Although the Law on Legislation clarifies the lines of authority to some extent, it does not deprive the various lawmaking entities of their inherent authority to pass legislation. People's congresses and governments may still issue regulations to implement superior legislation in accordance with local legislation, and ministries and commissions may still issue implementing regulations.<sup>460</sup> Even more damaging, the Law on Legislation does not apply to Normative Documents and thus will not address the most problematic types of legislation. But even bringing Normative Documents under the Law on Legislation would be insufficient, because simply clarifying the lines of authority will not do the trick. Agencies will still possess considerable rulemaking discretion because superior legislation is often vague. Moreover, administrative agencies arguably should have considerable discretion at this stage given the weakness of the legislature, the need to adapt national laws to local conditions, and the novel situations created by economic and political reforms. In periods of reform, there is bound to be more inconsistency. Accordingly, there must be external checks on lawmaking. External checks are particularly crucial given the lack of a procedural law that would ensure public input and monitoring, the existence of widespread corruption, and the skewed incentive structure resulting from continued involvement of administrative agencies as participants in the economy.

An administrative procedure law would impose some limits on administrative rulemaking. It would also allow for more public participation and monitoring. However, the benefits of rules providing for more participation are limited. First, agencies in many legal systems are given a great deal of leeway in setting their own rulemaking procedures. This is inevitable given the diversity of agencies and the wide range of rulemaking from formal rules of very general applicability to informal rules affecting only a narrow range of interests of small number of people. In fact, many countries do not have a general procedure law that applies to rulemaking. When they do, the requirements are fairly minimal. In the United States, for example, most federal agency rulemaking is characterized as informal and is only subject to notice and comment requirements.<sup>461</sup> Second, even more formal procedural requirements can restrain administrative rulemaking outcomes only to a degree, and only then with the assistance of external—usually judicial—review. Thus far, courts in China have been unwilling to hold agencies to even the existing procedural requirements.<sup>462</sup>

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being "necessary for the sake of good environmental planning" or "in the interest of public housing").

460. See LAW ON LEGISLATION, *supra* note 212, arts. 63, 72 and 73, in *Changyong falu fagui quanshu*, at 219-20.

461. Peter Strauss, *An Introduction to Administrative Justice in the United States*, in ADMINISTRATIVE LAW: THE PROBLEM OF JUSTICE 491, 673 (William Wade et al. eds., 1991).

462. See Pei, *Citizens v. Mandarins*, *supra* note 15.

2. *The Need to Expand the Scope of Judicial Review and Enhance the Independence and Authority of the Courts*

Clarifying the lines of authority and imposing procedural requirements will not be sufficient to address the inconsistency problem. External review of laws and regulations is essential. The Law on Legislation strengthened the existing system of review by clarifying the procedures for challenging lower level legislation that is inconsistent with the Constitution or Laws. Under the new law, citizens, social groups, enterprises or government entities may petition the NPCSC for review of lower level legislation they believe to be at odds with the Constitution or Laws.<sup>463</sup> The NPCSC's specialized subcommittees are responsible for reviewing the legislation for consistency. If a subcommittee believes there is an inconsistency, it can inform the entity that passed the legislation of its opinion or have the issuing entity attend a meeting to explain the legislation in question.<sup>464</sup> If the subcommittee decides the legislation is inconsistent, the issuing entity has two months to determine whether to annul or revise the legislation and to report back to the NPCSC.<sup>465</sup> If the issuing entity does not revise the legislation, the subcommittee may turn the matter over to the Chairman's Committee. The Chairman's Committee may then request that the NPCSC annul the inconsistent legislation.<sup>466</sup>

The Law on Legislation breaks new ground in establishing more detailed procedures for challenging inconsistent legislation and in providing interested individuals the right to raise a complaint. But by itself the Law on Legislation will not be able to fully address the problem of inconsistent legislation. The process established in the Law on Legislation is itself flawed. First, the law creates a two-tier track.<sup>467</sup> Complaints from the State Council, Central Military Committee, Supreme People's Court and Procuracy, NPC subcommittees and standing committees of provincial, major city and autonomous zone people's congresses must be reviewed by the relevant NPC subcommittee. In contrast, complaints from individuals, social groups and enterprises are first screened by the "work unit" (*gongzuo jigou*) of the NPCSC. The work unit will pass on to the specialized subcommittees for review only those petitions that it believes pass muster.<sup>468</sup>

The Law on Legislation also fails to set time limits for several crucial steps in the process. How long the work unit has to forward a complaint to the relevant subcommittee is not stipulated. Nor is there a stipulated deadline for the subcommittee to make a decision once it receives the petition, for the subcommittee to turn the matter over to the Chairman's Committee if the entity that passed the legislation refuses to abide by the subcommittee's decision, for the

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463. See LAW ON LEGISLATION, *supra* note 212, art. 90, in *Changyong falu fagui quanshu*, at 225-26.

464. See *id.* art. 91, in *Changyong falu fagui quanshu*, at 226.

465. *Id.*

466. *Id.*

467. See *id.* art. 90, in *Changyong falu fagui quanshu*, at 225-26.

468. *Id.*

Chairman's Committee to forward the matter to the NPCSC, or for the NPCSC to annul the legislation.

Equally, if not more worrisome, interested parties are allowed to submit written petitions but they are not given an opportunity to make their case at the subcommittee's hearing or to the Chairman's Committee. The legislature is, in effect, performing a judicial or tribunal function without affording affected parties the procedural rights they would enjoy in a judicial proceeding.

The Law on Legislation is also limited in scope in that the review procedure applies only to inconsistencies with the Constitution or Laws.<sup>469</sup> Inconsistencies between and among Administrative Regulations, Local People's Congress Regulations, Government Rules and Administrative Rules are to be handled by a file and review system that remains largely unchanged. Unfortunately, the Law on Legislation leaves it up to the lower level review entities to formulate their own review procedures. The Law on Legislation does not require that the reviewing entity accept individual petitions. It does not even expressly require that local governments establish a designated body to receive and review the submitted legislation.

In the past, many lower level congresses, governments and administrative agencies failed to submit legislation for review as required.<sup>470</sup> Compliance with filing requirements may improve with the passage of the Law on Legislation. But whether better compliance with recording requirements will solve the problem is doubtful. Many people's congresses and governments have yet to establish a special review organ to review subordinate legislation. Even if they do, it is unlikely that any such body could keep up with the large number of Local People's Congress Regulations, Rules and Normative Documents.<sup>471</sup> In many cases, the review body will lack the technical competence to pass judgment on certain administrative regulations and in the absence of a case in controversy may not be able to identify inconsistencies with superior legislation.<sup>472</sup> The review body will also be subject to local protectionism because the review body typically will have the same incentive as the issuing entity to promote local interests.

Given these shortcomings, there are obvious advantages to assigning primary responsibility for invalidating inconsistent legislation to the courts. Courts deal with particular cases and therefore could rely on the parties to point out inconsistencies. Moreover, courts do not have the conflict of interest that administrative agencies have. Further, the current system is complicated. Different entities have different powers and jurisdiction, and no single entity is responsible for invalidating all types of inconsistent legislation. Allowing the courts to invalidate all inconsistent legislation would simplify matters as the

469. The likelihood that the NPCSC would find its own law, or a law passed by the NPC, unconstitutional is slim indeed.

470. See *supra* note 251.

471. See ADMINISTRATIVE RULE OF LAW, *supra* note 16, at 190.

472. See Huaide Ma, *supra* note 249, at 41 (noting lack of party to bring suit renders review process passive and ineffective).

courts have the authority to issue judgments that cut across bureaucratic and territorial lines. Judicial review may also be faster than the current methods. Finally, increasing the power of the courts would be beneficial to the larger project of realization of rule of law in China.<sup>473</sup> Providing PRC courts greater authority would show that the government is committed to rule of law.<sup>474</sup>

To be sure, there are certain disadvantages and problems associated with assigning the task of review to the courts. Some are generic to judicial review everywhere. Judges are not necessarily qualified to decide policy or technical issues. Courts typically lack the resources to research all of these issues, and even if they had the resources, it would be a waste to duplicate the agency's work. Moreover, courts must proceed on a case by case basis and are not in a position to monitor the effect of their decisions, which may not be the ideal way to make policy.<sup>475</sup> But these criticisms are less apposite with respect to judicial review of the consistency of administrative regulations. Although the court will need to address some technical issues and cannot escape policy issues entirely, the question of the consistency of an administrative regulation is often a narrower issue.

A more significant obstacle is that empowering the courts to invalidate abstract acts would require a change in the Constitution and a fundamental realignment of power. Simply amending the Constitution to provide for judicial review would not produce the desired result unless the lack of independence and weak stature of the courts were addressed simultaneously. This would require structural reforms. Specifically, the current system where courts are funded by the same level government and judges appointed and removed by the same level people's congresses, would need to be changed to ensure greater independence and autonomy. Funding responsibility should be shifted to the provincial or central level. Personnel decisions could be handled in a number of ways. The decision-making authority could be shifted to the provincial level people's congress. Alternatively, responsibility could be turned over to or shared with a committee of judges, perhaps under the Ministry of Justice but preferably under the bar association.<sup>476</sup>

Even if courts were given the authority to invalidate administrative regulations, they would need time to build their stature. A newly empowered court could force a constitutional crisis were it to challenge directly an NPC Law,

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473. It is not surprising that one of the first reforms in many central and eastern European countries was to establish independent courts. See REIN MÜLLERSON, CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE xiv (Rein Müllerson et al. eds., 1996).

474. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2034 (1997) (noting the self-transformative aspect of judicial review and how judicial review may demonstrate differences between a prior regime and a new regime with respect to rule of law and constitutionalism).

475. See WARREN, *supra* note 176, at 373. For a particularly negative view of judicial review of administrating rulemaking in the United States, see Cross, *supra* note 278.

476. Cf. *Good Governance*, *supra* note 362, at 10 (discussing the recommendations of Hu Yunteng of CASS that personnel decisions be handled by the Ministry of Justice).

State Council Administrative Regulation or even a ministry level Rule.<sup>477</sup> Given the current political realities, it may be unwise (even assuming it were politically possible) to permit the court to invalidate State Council Administrative Regulations. It would be more prudent to limit the court's authority to review of everything below the level of State Council Administrative Regulations or perhaps lower levels. Most of the problems are with regulations enacted below the level of the State Council anyway. Moreover, the courts could expect support from the central authorities because conflicts between lower level regulations and Laws or State Council Administrative Regulations do not benefit the nation.

For the courts to have sufficient authority to challenge central level ministries directly responsible to the State Council would represent a major realignment of power. It may not be politically feasible at this point. Similarly, the courts may have difficulty invalidating Local People's Congress Regulations by provincial level people's congresses and Rules by provincial governments, particularly if personnel decisions were left in the hand of provincial level people's congresses and funding decisions in the hands of provincial level governments. Even if changes were made with respect to funding and appointments, the judiciary at present suffers from problems of competence. Thus, one possibility would be to limit the ability of the courts to invalidate abstract acts to all Normative Documents.<sup>478</sup> Over time, as the courts gained in confidence and stature, their scope of review could be expanded, first to Rules, then to Local People's Congress Regulations and Administrative Regulations.

### B. Administrative Discretion and the Licensing Law

One of the most frequent complaints about China's legal system is that administrative officials possess too much discretion. China, however, is hardly alone in struggling to reconcile the requirements of rule of law with the wide-ranging authority afforded government agencies in modern bureaucratic states. Indeed, whether discretion is compatible with rule of law, and if so what kind and how much, are much debated issues. One extreme view portrays discretion as the antithesis of rule of law. Government agencies must always deduce their decision from generally applicable laws promulgated in advance.<sup>479</sup>

On the other hand, there are those who argue that discretion is not only compatible with rule of law but that no system could operate without it. Indeed,

477. In Malaysia, for instance, the Mahathir government reacted to a string of judicial decisions against it in 1986 and 1987 by impeaching the Supreme Court judges that dared to defy the government. See Khoo Boo Teik, *Between Law and Politics*, in LAW, CAPITALISM AND POWER IN ASIA, *supra* note 2, at 219-21.

478. This is essentially the approach taken in the ARL.

479. See, e.g., BRITISH COMMITTEE ON ADMINISTRATIVE TRIBUNAL AND ENQUIRIES, FRANKS COMMITTEE REPORT 6 (1957); see also FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944) ("Stripped of all technicalities, [rule of law] means that government in all its action is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances and to plan one's individual affairs on the basis of this knowledge.").

discretion is desirable: legal systems are better off for allowing a certain degree of discretion.<sup>480</sup> Proponents of this view allow that administrative officials often make decisions in the absence of principles or rules known in advance (and in many instances are responsible for creating the rule by which the particular case is to be decided), but argue that a decision may be discretionary in the sense that it is not guided by legal principle or laws and yet not be irrational or unjust.<sup>481</sup> If rule of law actually required the elimination of all discretion and that all decisions be based on principles or laws known in advance, then no country would possess rule of law. Accordingly, rule of law does not require that all discretion be eliminated, only that discretion be limited by law.<sup>482</sup>

Although arguments can be made for or against the compatibility of discretion with rule of law, in the end not much hinges on whether discretion is incorporated into the concept of rule of law or left outside of it. Rule of law is only one of many social values. Defining rule of law to exclude discretion accentuates the virtues of predictability and certainty but makes it more likely that rule of law so defined will in certain circumstances give way to other important values, such as practicality, government efficiency or equity in particular circumstances.<sup>483</sup>

Whether or not one builds discretion into the concept of rule of law, as long as one accepts that some degree of bounded discretion is desirable, one will need to address a number of important issues. How much discretion is desirable? Too much discretion will undermine many of the most important virtues of rule of law: predictability, certainty, equal treatment of similarly situated people, and the ability of law to guide behavior and make planning possible.<sup>484</sup> But too little discretion will unduly restrict agencies from governing effectively and achieving just results in particular cases. Under what circumstances will agencies be given the discretion to make new laws or interpret existing ones or to deviate from the letter of the law at the point of application? Do we want administrative agencies to have the final authority? Or should the job of doing equity and interpreting laws be left to the courts? And perhaps most important, what kinds of constraints will there be on the agency's discretion? If the decision is subject to judicial review, how rigorous will the review be?

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480. See DAVIS, *supra* note 30, at 25 ("Discretion is a tool, indispensable for individualization of justice. . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and modern justice. Discretion is our principle source of creativeness in government and in law."). See also Jeremy Waldron, *Rule of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* No. 1, at 79, 82 (1989) (noting that while consistent application of a rule may enhance predictability it may not be desirable if the rule is not a good one).

481. See DAVIS, *supra* note 30, at 29.

482. See Rakoff, *supra* note 184, at 161 (contrasting the views of many European scholars with those of American administrative law scholars who favor the less rigid view of rule of law).

483. See Summers, *supra* note 127, at 159.

484. See *id.*; D. J. GALLIGAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* (1986); Stephen Macedo, *The Rule of Law, Justice and the Politics of Moderation*, in *NOMOS XXXVI: THE RULE OF LAW* (Ian Shapiro ed., 1994) (noting that while discretion in the name of equity may promote justice in certain circumstances, following rules has advantages as well and that allowing decision-maker discretion opens up the possibility of abuse of discretion and decision-making based on personal prejudice and bias).

Although these questions can be debated in the abstract, different situations require different responses.<sup>485</sup> In China today, several factors weigh in favor of affording administrative officials considerable discretion at the point of application. In comparison to their counterparts in more stable economies, administrative officials in China need more discretionary authority to deviate from existing rules to meet the demands of a rapidly changing economy. Many laws, written with a centrally planned economy in mind, are at odds with today's more market-oriented economy.<sup>486</sup> Further, in a country as large and diverse as China, general regulations that may make sense for most of the country may not make sense in a particular area. The lack of experience and low level of legal training of many of the drafters often result in poorly drafted or impractical laws and regulations, and inadequate publication of many rules that may catch the regulated unaware. Hence, officials may be justified in not applying the regulation in a particular case to avoid an unjust result.

Similarly, a number of factors support giving administrative officials in China greater discretion with respect to rulemaking than in other countries. In any system, administrative agencies are given the authority to make and interpret regulations and to set standards due to the technical nature of the subject matter. Issues of competence may be even more pressing in China and support more rulemaking by the administration as opposed to the legislature because of the technical subject matter of much regulation and the low level of professionalism of the legislature relative to the administration.<sup>487</sup> Moreover, people's congresses tend to be big and unwieldy. The NPC has nearly 3000 members and meets once a year.<sup>488</sup> There is no way the legislature can meet all of the need for regulations created by economic reforms. Administrative agencies need to share rulemaking responsibility. In fact, in many instances, administrative agencies have been forced to issue rules because the NPC has not been able to pass legislation in the area.<sup>489</sup> The only available rules are administrative rules. Further, although the legislatures are often responsible for interpreting legislation, they are ill-equipped and too over-burdened to do so. Thus, much of the burden for interpretation has fallen to administrative agencies that are faced with the need to resolve concrete problems arising in practice.

China's legal reformers face a dilemma. They can either provide administrative officials sufficient discretion to meet the demands of a fluid economic environment and accommodate widespread variations in local conditions and economic context, in which case they must accept certain abuses of discretion that are bound to occur in the absence of more effective means of limiting ad-

485. See Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995) (setting out some general guidelines but noting a need for context-specific determinations).

486. See Dingjian Cai, *Development of the Chinese Legal System*, *supra* note 134.

487. See *supra* Part III.A.

488. See *Name List of Deputies to 9th NPC Published*, *supra* note 379 (reporting that the current NPC has 2979 delegates).

489. For instance, until the passage of the Securities Law in 1999, China's securities markets were regulated primarily by administrative regulations. Even with the passage of the Securities Law, administrative regulations will continue to be an important source of legislation. See ZHENGQUAN FA [Securities Law] (1998), 550-74 *Changyong falu fagui quanshu* (2000).



ministrative discretion. Or they can pass laws that give administrative officials less discretion than is optimal. The latter approach will produce sub-optimal results in some cases where officials follow the law. It will also force, or at least encourage, officials to disregard the law where circumstances are compelling, thus exacerbating the gap between law and practice and contributing to an atmosphere in which law is not taken seriously.

The dilemma is nicely illustrated by the debates surrounding the scope of authority of local governments and administrative agencies to create licensing requirements. Fearing that local governments and administrative agencies would abuse any discretion given them, drafters of the Administrative Licensing Law sought to rein in local entities by imposing severe constraints on their authority to create licensing requirements.<sup>490</sup> However, as some of the U.S. administrative law specialists asked to comment on the draft observed, there are a number of circumstances where licensing by local governments and agencies is not only appropriate but necessary. The drafters were forced to choose between passing a law that unduly restricts local governments and agencies, which would produce sub-optimal results, or passing a law that when considered by itself, would be a more reasonable law, but when considered in the overall context of China's current legal system would provide local governments and officials too much discretion.

Although the long-term solution is clearly to improve the various mechanisms for checking administrative discretion, in the meantime tough choices must be made. In the case of the Licensing Law, the drafters seemed to be leaning toward imposing excessively tight limits on local officials.<sup>491</sup>

In sum, the common complaint that administrative officials have too much discretion in China fails to address the crucial issue of how much and what kind of discretion officials should have. Although reasonable people may disagree on these issues, it is unrealistic to expect that all discretion could be eliminated and overly simplistic to think that it should be. On the other hand, at times the complaint is the very different one that agency officials are exceeding or abusing their discretion. This complaint goes to the failure of the various means for checking agency discretion to impose meaningful restraints on administrative officials. The inability to effectively check administrative decisions suggests that China may have difficulties living up to its commitments once it enters the WTO.

### C. WTO

In acceding to the WTO, China will undertake many obligations, both commercial and legal.<sup>492</sup> Besides lowering tariffs and allowing foreign companies

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490. See XINGZHENG XUKEFA (ZHENGQIU YUIAN GAO) [ADMINISTRATIVE LICENSING LAW (DRAFT FOR COMMENTS)] (Oct. 30, 1998) (on file with author).

491. The drafters were mainly members of the NPC's Legal Committee. Naturally, local governments may have a different opinion on the matter, so the outcome is by no means determined.

492. See *Summary of U.S.-China Bilateral WTO Agreement*, available at <http://www.uschina.or/public/991115a.html>.

administrative decisions by a judicial authority.<sup>494</sup>

Proponents of China's accession have argued that apart from the obvious potential economic benefits for foreign investors,<sup>495</sup> China's accession to the WTO will promote rule of law,<sup>496</sup> and could lead to political reforms and better protection of human rights.<sup>497</sup> Yet there is good reason to be cautious about the immediate impact of the WTO on rule of law in China and the economic benefits for foreign investors in the absence of further legal reforms.

China's entry into the WTO will not have an immediate impact on many of the problems that make doing business in China difficult, such as the low level of competency among the judiciary and the legal profession, the confusing array of inconsistent legislation, the rapid change in laws, corruption, and the general disrespect for law.

Moreover, WTO rules are strongest with respect to prohibiting quantitative barriers to trade such as high tariffs or numerical quotas. They are less successful in dealing with non-tariff barriers. But this is likely to be the area where investors will encounter the most problems.<sup>498</sup> One of the biggest obstacles for foreign investors has been the need to obtain approval for virtually every type of commercial activity, whether it be the establishment of a company, the import or export of technology or the provision of security by PRC parties to foreign parties. China's membership in the WTO will not lead to the immediate dismantling of the entire burdensome approval system. Many transactions will still be subject to approval (or several approvals) on a case by case basis.<sup>499</sup> As a result, the fate of foreign investors will remain in the hands of administrative officials who have considerable discretion whether to approve the transaction.

As we have seen, in practice, the various means of reining in the bureaucracy and controlling agency administration discretion are of limited effectiveness in practice. Judicial review in particular remains weak. Even though it is easy to overstate the importance of judicial review, it does provide the final

493. See GENERAL AGREEMENT ON TARIFFS AND TRADE, art. X (1947).

494. See, e.g., AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, INCLUDING TRADE IN COUNTERFEIT GOODS, art. 41, cl. 4.

495. But see *Life After the WTO Honeymoon: Theory and Practice*, 4 CHINA ECON. Q. 17 (2000) (arguing that even the likely economic benefits will be limited).

496. See *WTO Will Promote Rule of Law in China*, available at <http://www.uschina.org/public/wto/ruleoflaw.html>.

497. See William J. Clinton, *Remarks by the President on China* (March 8, 2000) (regarding China's accession to the WTO); see also Asia Watch, at <http://www.hrw.org/press/1999/nov/chann1115.html>. But see *Clinton Administration's Deal with China on WTO*, IV HUMAN RIGHTS FOR WORKERS, BULLETIN No. 21, at 2-3 (pointing out that Burma, Pakistan, Congo and Cuba have been GATT/WTO members for years and concluding, therefore, that WTO membership is not a magic formula for ensuring a government will assume positions more favorable to human rights and rule of law).

498. See *Life After the WTO Honeymoon*, *supra* note 495.

499. However, some types of transactions, such as import-export trade agreements, may no longer require approval; and, in some cases, the nature of the approval process will change from one of substantive review to registration.

check on administrative decision-making. Unless steps are taken to address the weak stature of the courts and their dependence on the local government for financial resources, courts will be unable to play the role contemplated under GATT rules. Foreign investors who are unable to obtain justice in PRC courts are likely to turn to the WTO for assistance. Whether the WTO has the capacity to handle the potentially huge number of suits that could arise is unclear. Nor is it clear what the effects of repeated confrontation with China would be on the WTO as an organization.<sup>500</sup>

There is ample reason to be cautious about the immediate impact of the WTO on legal reform in China and the possible harm to the WTO that could result from China's inability to provide acceptable domestic remedies to commercial disputes. Nonetheless, China's accession most likely will have a positive effect on the long-term development of the legal system. Reformers within China will be able to take advantage of the WTO to work for further reforms, including institutional reforms, whose influence will spread beyond the limited area of foreign investment. Party reservations notwithstanding, the WTO may provide reformers with the political capital necessary to push through some of the reforms aimed at strengthening the judiciary.

#### *D. Separation of Government and Enterprises*

During the era of the centrally planned economy, administrative agencies were integrally involved in commercial activities. A ministry would be responsible for carrying out Party policies and regulating the industry; and, as the department in charge of a particularly industry, it would be responsible for allocating resources, resolving disputes between companies under its charge and ensuring that such companies met their quotas. In many cases, ministries had a virtual monopoly. It became clear early on in the reform period that the transition to a market economy required separating government from enterprises. State-owned enterprises were to be given greater autonomy in operating. Ministries were to be divided in two, with the ministry retaining responsibility for regulating but distancing itself from commercial activities. In the process, new companies were established or existing companies reorganized. Although the new or reorganized companies were meant to be independent of the ministry, in fact they frequently have retained close ties. A similar process occurred at lower levels of government. Despite the efforts to clearly separate government from enterprises, local governments and administrative entities still often maintain a formal commercial interest in particular companies or at least close ties to them. Moreover, in response to the pressure to raise revenues, many administrative agencies have set up subsidiaries.<sup>501</sup>

The widespread involvement of administrative agencies in commercial activities creates numerous problems, particularly given the ineffective means for

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500. See Steinberg, *supra* note 29.

501. See Yimin Lin & Zhanxin Zhang, *Backyard Profit Centers: The Private Assets of Public Agencies*, in *PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA*, *supra* note 79, at 204.

challenging their decisions. Administrative agencies frequently use their regulatory power to benefit the companies in which they have an interest.<sup>502</sup> They may pass regulations that limit competition, refuse to approve the establishment of competitors, or force companies into joint ventures with their affiliates in order to gain approval and access to the PRC market.<sup>503</sup>

For instance, in 1997, the Ministry of Agriculture pushed through new regulations to protect domestic seed companies, including the Ministry's own affiliated entity, the National Seed Group Corporation ("NSC").<sup>504</sup> The new regulations limited foreign investment to a minority share in seed crop joint ventures.<sup>505</sup> The Ministry sought to ensure that NSC would emerge as a global competitor in other ways as well. For example, when one large multinational corporation sought to set up a joint venture with one of NSC's domestic competitors, the Ministry let it be known that the chances of obtaining approval to establish the joint venture were not good. As a result, the foreign company and local competitor decided to establish a company that would fall below the \$30 million threshold necessitating central approval. In response, the Ministry moved to close that route in the 1997 regulation by requiring central approval for all projects, regardless of size.<sup>506</sup>

The incomplete separation of government and enterprises has contributed both to widespread predatory behavior by local governments and the growth of clientelism and corporatism. In the absence of clearly defined property rights and a court system capable of enforcing them, private, collective and state-owned firms have sought to cultivate relations with government.<sup>507</sup> The government controls key resources such as access to technology and loans, is responsible for a variety of approvals that are required to do business, and may at times be in a better position to broker a settlement or enforce contractual obligations than the court.

On the other hand, local governments may take advantage of their position to muscle their way into companies or interfere with their operations. Often, they will impose random and arbitrary fees on companies. Thus, although some companies may benefit from close relations with the local government, others would prefer that government officials be kept at a safe distance. Indeed, companies may increasingly want to go it alone, providing some evidence that corporatist and clientelist arrangements may be short-term reactions to an

502. Chang, *supra* note 83; Shen, *supra* note 83.

503. *Id.*

504. See Peerenboom & Zhou, *supra* note 82.

505. *Guanyu Sheli Waishang Touzi Nongzuo Wu Zhongzi Qiye Shenpi He Dengji Guanli De Guiding* [ADMINISTRATION OF THE EXAMINATION, APPROVAL AND REGISTRATION OF FOREIGN-INVESTED CROP SEED ENTERPRISES PROCEDURES], art. 4, cl. D (1997) (issued jointly by the Ministry of Agriculture, State Planning Commission, MOFTEC and the State Administration of Industry and Commerce).

506. See *id.* art. 5, sec. A.

507. See Oi, *supra* note 66; PEARSON, *supra* note 66; WANK, *supra* note 65.

undeveloped and immature market economy and weak legal system.<sup>508</sup> The cost-benefit analysis has changed for many firms because they have reached the size where they no longer need to rely on the government for financing or technology. Given their size, they do not want to tolerate the many costs of corporatist arrangements such as government interference in management, pressure to merge with unsuccessful companies or an excessive number of employees on the payroll, diversion of profits and other business issues.<sup>509</sup> But for companies to be independent, the administrative law regime must be capable of protecting them against over-reaching government officials. Without further legal reforms, the efforts to achieve separation of government and enterprises will be slowed. More important, the most dynamic segment of the economy—those companies that can succeed without government assistance—will be hampered.

Ironically, local governments are also rethinking the wisdom of corporatism.<sup>510</sup> From the perspective of local governments, corporatist arrangements have always been a mixed blessing. On the positive side, the government is able to allocate resources in a way that achieves its goals, including curbing unemployment. But there are also costs. The government has to offer services to companies and respond to non-economic goals such as minimizing unemployment by finding ways to support failing companies. Although collectives and township village enterprises ("TVEs") were relatively successful in the 1980s, by the 1990s many were floundering.<sup>511</sup> The credit crunch during the late '80s made growth difficult. Moreover, TVEs faced increasing competition from state owned enterprises ("SOEs"), foreign investment enterprises ("FIEs"), international companies and even other TVEs. Without more sophisticated technology, many have not been able to survive. The lack of clear property rights has also become an issue. Seeking to minimize unemployment, village leaders would take from the rich to support the poor, forcing strong companies to purchase weaker ones.<sup>512</sup> When TVEs did go bankrupt, local banks were left with the

508. See Oi, *supra* note 66, at 92-93; Gregory Ruf, *Collective Enterprise and Property Rights in a Sichuan Village: The Rise and Decline of Managerial Corporatism*, in PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA, *supra* note 79, at 27.

509. See James Kai-sing Kung, *The Evolution of Property Rights in Village Enterprises: The Case of Wuxi County*, in PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA, *supra* note 79, at 96 ("As markets develop, the relational-specific *guanxi* input formerly supplied by local cadres has become less important as it is gradually replaced by arm's-length transactions undertaken by the enterprise manager. And as competition intensifies and the number of village enterprises multiplies and businesses expand, sound enterprise performance relies increasingly on the efforts of the manager.").

510. See *id.*; see also Michael Hubbard, *Bureaucrats and Markets in China: The Rise and Fall of Entrepreneurial Local Government*, 8 GOVERNANCE 335, 348 (1995) (arguing that local government entrepreneurship increases as market-oriented reforms begin, and wanes as market development proceeds, and that high returns to bureaucratic entrepreneurship in the transition are a symptom of low levels of market development); Cheng-Tian Kuo, *Privatization Within the Chinese State*, 7 GOVERNANCE 387, 397 (1994) (suggesting that market reforms will decrease collusion between regulators and regulated because collusion harms the general investment environment, causing investors to invest elsewhere, and thus local governments will be forced to weigh the collusion rents against the benefits of increased investment).

511. See Oi, *supra* note 66, at 92-93.

512. See *id.*

bad debt. As a result, private companies increasingly have assumed a larger role in the economy as market reforms removed many of the previous barriers and restrictions. Since private companies have, on the whole, outperformed other types of companies, local governments have found it less beneficial to continue to prop up SOEs, collectives, and TVEs. Accordingly, governments have begun to divest from TVEs and collectives where possible, abandoning them to the marketplace.<sup>513</sup> While eager to cut loose failing companies, local governments continue to prey on successful companies.

*E. Walk Before You Run: Postmodern Administrative Law Reforms in the Absence of the Basic Infrastructure of a Modern Legal System and Liberal Democracy*

An expansive regulatory state has been one of the defining features of modernity along with a market economy, democracy, human rights and rule of law. The modern regulatory state arose as a response to technological advances and increasingly complex economic issues. Overwhelmed by a growing number of technical scientific and economic issues, legislatures delegated much of their rulemaking responsibility to specialist agencies. Recently, however, disenchantment with the regulatory state has led to proposals for new postmodern approaches to regulating. The initial view of administrative agencies as neutral problem-solvers who serve the public interest proved too naïve and idealistic. Agencies are subject to capture and tend to advance their own institutional interests. The traditional hierarchical, top-down, overly centralized command and control mode of regulation has been attacked for being undemocratic and failing to allow for sufficient public participation. Furthermore, the process often produces poor results. Critics argue that top-down solutions assume that one-size-fits-all.<sup>514</sup> In reality, the particular circumstances of different localities require more nuanced solutions. Top-down solutions tend to be either over- or under-inclusive and fail to respond to local needs. This happens, in part, because they fail to tap into local knowledge. Moreover, the rulemaking process is often exceedingly slow. Meanwhile, technology and initial conditions are changing rapidly. As a result, proposed solutions are already out of date by the time they are ready to be implemented.

One of the proposed cures for the ills of the modern regulatory state has been deregulation. A second response to the agency-centered, top-down approach is to increase the role of private actors in rulemaking, service provision, policy design and implementation. If agencies are subject to capture, then let private actors take on some of their functions. Presumably, private actors on the ground are better positioned to understand the problems and to identify possible solutions. Moreover, greater private actor involvement reduces the democracy deficit by inviting more public participation, thus holding out the possibility of shared-governance or perhaps even self-governance.<sup>515</sup>

513. See *id.*; see also Andrew Walder, *supra* note 66, at 64-65.

514. See Dorf & Sabel, *supra* note 38.

515. See Freeman, *supra* note 37.

An even more radical approach would replace the hierarchical, agency-centered command and control system with a directly deliberative polyarchy based on democratic experimentalism.<sup>516</sup> This approach, derived from Japanese industrial management techniques, relies on a fundamentally different method of problem-solving. The first step is benchmarking, which entails surveying current or promising ways of solving problems that are superior to those currently used, yet within the existing (local) system's capacity to emulate and eventually surpass. Next comes simultaneous engineering, where interested parties propose changes to the provisional design or solution based on their own experiences and needs. The final component is error correction and learning by monitoring. Participants and independent actors monitor progress by pooling information from their own experiment with information from other localities about the results of their approach to similar problems.

This mode of regulating is direct because much of the input about goals, standards for assessment and program design comes from below. Citizens define the problems, determine standards, weigh options and choose solutions. It is deliberative because decisions are based on reasoned discussion rather than just voting.<sup>517</sup> It is a polyarchy in that the performance of each jurisdiction is taken into consideration in the deliberations of other similar jurisdictions. Furthermore, it is democratic in that citizens hold government officials accountable through elections. With its emphasis on political participation, local governance, and individuals taking the lead in identifying and solving local problems, the system is rooted in civic republicanism and a pragmatic, Dewey-inspired participatory democracy.

Each of the branches in this system has a somewhat different role than they currently do in the United States. The legislature authorizes and finances experimental reforms, in exchange for a commitment by the funding recipients to pool information.<sup>518</sup> Government officials campaign and are elected on the basis of their proposals for solving problems that take into account current best practices, local conditions and benchmarking for new solutions. Administrative agencies coordinate information and assist local, provincial and national governments in benchmarking, simultaneous engineering and error correction, and serve as a link between the national government and local governments. When agencies issue rules, they do so based on rolling best practices. The judiciary ensures that the experiments fall within the scope authorized by the legislature and that the solutions do not violate individual rights. Courts also verify that the decision-makers engaged in a deliberative process, and review the records that set forth the agency's reasons for its decision. Plaintiffs who wish to challenge an agency's rule or decision do so by arguing that the decision-maker failed to engage in a deliberative process or adopted practices that were inferior to the best practices in other jurisdictions. The agency would then have to explain its reason for adopting the practice and why other practices would not work as well

516. See Dorf & Sabel, *supra* note 38, at 287-88.

517. When consensus is not possible, voting is used to break the deadlock. See *id.* at 320.

518. See *id.* at 288.

in light of the particular circumstances. Judges would become active problem-solvers rather than just passive referees.<sup>519</sup>

To what extent are these alternatives suitable to China? As we have seen, deregulation is generally not a viable option in China, given the relatively undeveloped state of its markets. But what about privatization and experimental democracy? Both appear to offer certain advantages.

China has yet to rely much on private actors. Greater reliance on private actors, however, is consistent with the recent move to downsize the administration and the government's efforts to separate government and enterprises and turn various government functions over to non-state actors. For instance, local governments have begun to contract out for mediation services.<sup>520</sup> Private schools and universities are popping up, and private hospitals are providing medical care to those who can afford it.

The experimental, pragmatic nature of a directly deliberative polyarchy is consistent with a deep streak of pragmatism running through Chinese political philosophy,<sup>521</sup> socialism's commitment to uniting theory with practice and modern leaders' emphasis on results—captured in Deng's famous quip that the color of the cat does not matter as long as it catches mice. Indeed, one of the defining features of PRC governance is the heavy reliance on experiments. As discussed previously, the central government regularly approves experiments on a regional basis or passes provisional regulations. Similarly, the emphasis on local solutions to local problems responds to the tremendous regional variation in China and is consistent with the spirit of current practices. China has developed various ways of dealing with local variation, including the establishment of separate regulatory regimes for different areas (as with special economic zones) or drafting very general laws and then giving local governments the discretion to interpret or implement the laws in light of local circumstances. Finally, the more bottom-up, incremental approach is appropriate for China's current state of transition. All too often, China's legislatures and administrative agencies have been unable to keep up with the rapid pace of change. As a result, local governments have forged ahead with experimental reforms in response to market demands without any legal basis. Because laws and regulations are frequently outdated by the time they are issued, they are routinely ignored.

On the other hand, there are many reasons to question the feasibility of greater reliance on private actors and democratic experimentalism given China's current circumstances. A bottom-up, experimental approach is consistent with some aspects of socialist ideology but at odds with other aspects. Democratic centralism assumes that once the center has accumulated information from the various localities, the center will make the final decision.<sup>522</sup> Furthermore, the

519. See *id.* at 288-89.

520. See Hualing Fu, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211, 232 (1992).

521. See RANDALL PEERENBOOM, *LAW AND MORALITY IN ANCIENT CHINA* 105-17 (1993); see also HALL & AMES, *DEMOCRACY OF THE DEAD*, *supra* note 115.

522. See ANDREW NATHAN, *CHINESE DEMOCRACY* 64 (1985).



pragmatic aspect of the process of uniting theory and practice co-exists uneasily with the more dogmatic aspect of socialism that insists on a single scientifically correct solution and unification of thought around the Party line.<sup>523</sup>

Moreover, both approaches assume organized interest groups and a vibrant civil society. Neither exists in China.<sup>524</sup> Nor are there any signs that the ruling regime intends to loosen its grip. On the contrary, it appears committed to maintaining tight controls on China's fledgling civil society.<sup>525</sup> Although the ruling regime has been forced to turn over some responsibilities to private actors, it remains deeply suspicious of the private sector.

Even if these new approaches were politically feasible, their effectiveness would be compromised by many of the factors that undermine the current administrative law regime. Both privatization and democratic experimentalism assume a citizenry capable of participating in the process of designing standards, weighing options and correcting errors. Literacy rates and education levels are much lower in China than in developed western liberal democracies. Even advocates of democracy in China worry about the ability of their fellow citizens to sort through technical issues. To be sure, such concerns on the part of the urban elite often mask the real worry that China's rural population will understand all too well what is at stake and use their disproportionate numbers to reverse the preferential policies whereby rural areas have subsidized urban centers. As the experiment with village elections shows, uneducated peasants understand local issues and know what is in their immediate interests. Yet given long-standing patterns of deference to authority, it remains unclear whether they will challenge local officials and demand a say in the decision-making process.

The fierce turf struggles that have resulted from the recent downsizing of the government suggest that administrative agencies, for their part, are likely to resist giving up control to private actors. Meanwhile, central agencies are likely to object to the greater role played by local governments and agencies. In addition, the experimental approach's heavy reliance on agencies sharing information across department lines runs counter to the vertically organized bureaucratic system (*xitong*) and the agencies' institutional interests in survival during this period of transition.<sup>526</sup>

Local government and administrative officials play a key role in the more decentralized experimental approach. China today, however, suffers from excessive decentralization and fragmentation. Economic reforms have produced

523. See Peerenboom, *Confucian Harmony and Freedom of Thought*, *supra* note 328.

524. See Edward X. Gu, "Non-Establishment" Intellectuals, Public Space, and the Creation of Non-Governmental Organizations in China: The Chen Ziming-Wang Juntao Saga, 39 *CHINA J.* 39 (1998) (noting the limited space for civil society); see also WHITE ET AL., IN SEARCH OF CIVIL SOCIETY (1996); Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 *CHINA Q.* 124 (2000).

525. See Saich, *supra* note 524, at 125-27 (noting that the Leninist tendency to thwart organizational plurality is compounded by the fear of the potential for social unrest resulting from economic reforms, but also observing that the state's capacity to exert formal control is increasingly limited).

526. Government entities are organized along vertical (*tiao*) and horizontal (*kuai*) lines. Vertically, lower level entities are responsible to higher-level entities; horizontally, each entity is responsible to the local level people's congress and ultimately to the Party Committee.

increasingly independent local governments intent on achieving economic growth. Thus, even when the central government identifies rolling best practices, there is no guarantee that local governments will follow them. As we have seen, in their pursuit of growth, local governments regularly pass local regulations that are inconsistent with national laws and fail to implement central laws.<sup>527</sup> For instance, they offer tax breaks to investors despite repeated warnings from the central government that they are not authorized to do so. As a result, the ratio of tax revenues relative to GDP is much lower in China than in other emerging economies, even Russia.<sup>528</sup>

Although some local variation is desirable, there are times when national standards are needed. The experimental approach assumes that central authorities will be able to pool information from various localities facing similar problems, coordinate and disseminate information, and establish rolling best practices. But local governments that routinely engage in local protectionism, erect barriers to inter-regional trade and pressure courts to find in favor of local companies are unlikely to pool information. This is all the more true when the local governments have gone ahead with experiments without proper authorization and wound up with poor results. Not all local experiments are success stories.

While greater reliance on private actors and bottom-up experiments are partly a response to the problem of holding agency officials accountable, they create their own accountability problems.<sup>529</sup> Under China's current laws, private actors are relatively insulated from legislative, executive and judicial oversight. In most cases, they could not be challenged under the ARL or ALL systems, as is the case under comparable laws in other countries.<sup>530</sup> Moreover, private actors have their own incentives, which may not coincide with the interests of the broader public. They are generally driven by profit. They may be part of an interest group with a particular narrow agenda. They may lack norms of professionalism or public service, especially given the moral vacuum that exists nowadays.

In a corrupt environment where much depends on closely knit clientelist and corporatist relationships, outside monitoring is not likely to be effective and those on the inside are not likely to share their results with others. Without the flow of information, learning by monitoring and error correction do not work. Moreover, democratic experimentalism also assumes an open, tolerant environment in which to engage in reasoned deliberation. But newly emerging groups are often neither liberal nor tolerant.<sup>531</sup> They frequently are more interested in guarding jealously their privileged access to power than expanding the circle to

527. See *supra* Part II.B.

528. See Nicholas Lardy, *Fiscal Sustainability: Between a Rock and Hard Place*, 4 CHINA ECON. Q. 36 (2000).

529. See Freeman, *supra* note 37, at 574.

530. Of course the scope of jurisdiction could be expanded.

531. See PEARSON, *supra* note 66; WANK, *supra* note 65; Heath Chamberlain, *Civil Society with Chinese Characteristics*, 39 CHINA J. 69 (1998) (reviewing CIVIL SOCIETY IN CHINA (Timothy Brook & Michael Frolic eds., 1997)); see also WHITE, ET AL., *supra* note 524, at 216-17 (observing

include others in a deliberative process. More generally, monitoring by the public assumes a variety of organized public interest groups and freedom of information, press and association, none of which exist in China.

An alternative would be to rely on agencies to oversee private actors or monitor the experimental process. However, that approach presupposes agencies that are basically competent and disinterested, whereas agencies in China frequently seek to protect their own interests and are susceptible to corruption. In theory, democratic elections could provide a means of monitoring. But without elections, government and agency officials cannot be thrown out of office. As we have seen, reliance on legislative oversight, ombudsmen or internal administrative review have not been effective means of monitoring Chinese administrative agencies to date.

Ultimately, then, the courts would have to remain the final backstop. They would have to ensure that agencies are not captured by special interests and that relevant interest groups are not excluded from the process due to clientelist or corporatist relationships. They would also have to hold private actors to their contractual obligations when the government contracted out for services.<sup>532</sup> In addition, they would have to be capable of assessing the relative technical merits of various alternative solutions. Unfortunately, PRC courts are not up to the job at present. Beholden to the local government, they are unlikely to challenge the local government's choice of one method over another. Even assuming there are individuals who would be so bold as to bring suit, PRC courts lack the authority and training to become active problem-solvers. To date, judges have been given very little power even to interpret laws, and legal education in the PRC emphasizes black-letter law rather than creative thinking and problem-solving skills.

The solutions of greater reliance on private actors and bottom-up experimentalism rely on the infrastructure of a modern state, including a legal system that meets the basic requirements of rule of law, democratic elections, and an active civil society. That infrastructure is not yet in place in China. Noting that these postmodern approaches assume, and are more effective given, the existence of the infrastructure of a modern state does not preclude the possibility that they could be adapted to the Chinese context and useful in certain circumstances. Obviously there are advantages to involving those affected by a problem in the process of finding of solution, and pooling information and relying on benchmarking is only common sense. Similarly, there may be instances where contracting out government functions to private actors is a viable alternative. Moreover, in the future, China may become democratic and develop a more robust civil society, particularly if Communitarians prevail over Statist Socialists and Neo-authoritarians. In the meantime, however, the postmodern approaches

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that social organizations have different ideas about political reform but most seem to prefer stability and a gradual approach).

532. Indeed, contracting out to private actors assumes the participation of agencies that can draft contracts, lawyers that can make legal arguments, citizens that will bring suit and courts that provide competent judicial review.

should be viewed as complements rather than alternatives to a more traditional administrative law regime and should not detract from efforts to establish the foundations of a modern regulatory state.

## V.

### CONCLUSION: ADMINISTRATIVE REFORM AND THE LIMITS OF LAW

There is ample evidence of globalization both as cause and effect in all areas of contemporary China: economics, politics, culture and law. Although the wide diversity among administrative law systems around the world complicates the task of measuring convergence, China's administrative law regime shows clear signs of convergence with respect to a common set of goals, institutions, and rules shared by other well-developed legal systems. There is even evidence of convergence with respect to outcomes. Given that China is in the midst of creating a modern legal system, greater convergence in the future is likely, regardless of which particular thick conception of rule of law prevails.

Nevertheless, the ways in which the PRC legal system continues to diverge from other systems are perhaps as important as the ways it converges. Even where China has established similar institutions or adopted similar rules, outcomes often differ because the institutions do not work as designed and rules are not followed due to a host of context-specific factors.

Moreover, despite signs of convergence, the nature, pace and effect of administrative reforms have been, and will continue to be, shaped mainly by China's particular circumstances. Legal reforms have proceeded in an incremental fashion, much like economic reforms. Senior Party leaders have been wary about major institutional changes that could threaten the Party. As a result, they have moved slowly on political reforms and in so doing impeded the development of the administrative law system. The refusal to permit elections above the village level, for instance, prevents citizens from throwing corrupt officials out of office. Apart from elections, public participation in the legislative law-making and administrative rulemaking and decision-making processes remains limited. The courts are weak, beholden institutionally to local governments and limited under the Constitution in their powers to strike down or interpret administrative regulations.

Looking into the future, ideological struggles over the proper conception of rule of law will be one factor shaping administrative law reforms. At first, the legal system may resemble most closely a Statist Socialism version, although it will undoubtedly contain elements of other forms as well. Perhaps over time the legal system will pass through a more Neo-authoritarian phase. In the end, however, it is likely to end up approximating most closely a Communitarian rule of law. If so, Chinese citizens would enjoy democracy and rule of law but forgo the extremes of liberalism in favor of a more balanced form of rule of law in which law both strengthens and limits the state, and the rights of individuals are weighed against the interests of others in the community and in society as a whole.

On a concrete level, administrative law reformers in China face a number of challenges, whatever form of rule of law is adopted.<sup>533</sup> Many of the political, economic, cultural, historical and institutional factors that have influenced reforms to date will continue to interact in sometimes expected, sometimes unexpected ways to determine the path of development of China's administrative law regime. Because China's administrative law woes are due in large part to general institutional or systemic problems, addressing them will require far-reaching changes that will alter the nature of Chinese society and the current balance of power between state and society, Party and government, the central government and local governments, and among the three branches of government.

Market reforms have already shifted the balance of power away from the state toward society to some extent. The balance will continue to shift with the further separation of government and enterprises, the elimination of administrative monopolies, and the creation of a professional civil service in which government officials serve the public as regulators rather than extracting rents or competing with private companies in the marketplace. At present, the government continues to subject most economic and social activities to licensing requirements. The decision as to what needs to be regulated is ultimately a political one. Statist Socialists and Neo-authoritarians would impose tighter restrictions on a wider range of economic and social activities than Communitarians or Liberal Democrats, though all would tolerate more private activity, particularly in the economic area, than in the past. Laws such as the Administrative Licensing Law will help delineate the boundaries of individual autonomy and freedom. Holding government officials to clearly defined substantive and procedural standards will ensure that citizens are able to take full advantage of whatever freedoms they are granted.

Administrative law reforms have empowered society to some extent by giving citizens the right to challenge state actors through administrative reconsideration, administrative litigation and administrative supervision. The next step is to increase public participation in the rulemaking and decision-making processes. The Law on Legislation opens the door slightly for greater public participation in the making of national laws. The Administrative Procedure Law may go even farther in providing the public access to administrative rulemaking and decision-making.

A more robust civil society, a freer media, and greater reliance on private actors would all benefit the cause of administrative law reform but would require a further shift in power toward society. This is not likely in the short term. A more robust civil society would provide the interest groups that play such a central role in bottom-up alternatives to command and control regulation. Along with a more independent media, interest groups could shoulder more of the responsibility for monitoring administrative behavior.

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533. PRC scholars have made numerous suggestions for improving the system. See, e.g., Chunxie Pi and Yuji Li, *1997 nian xingzheng faxue yanjiu de huigu yu zhanwang* [1997 Administrative Law Studies in Retrospect, and Future Prospects], 1 FAXUEJIA [LEGAL SCHOLAR] 36 (1998).

The degree and nature of public participation afforded by the Administrative Procedure Law and the extent to which civil society is allowed to develop are determined in part by the political power of the various rule of law factions. Statist Socialists are likely to favor more limited public participation and a more restricted civil society than the others. However, the ultimate outcome will turn on factors other than ideology, including the particular beliefs of the drafters of the law and the various other forces underlying legal reforms discussed previously.

The balance of power among the branches of government, especially the judiciary and executive, must also change if administrative reforms are to be effective. The courts are simply too weak. The independence of the courts needs to be increased by changing the way they are funded and judges are appointed, and their authority must be enhanced in various ways, including by giving judges the right to overturn certain abstract acts.<sup>534</sup>

Because economic and legal reforms are ongoing and political reforms have been limited, the balance of power between the central government and local governments remains in flux.<sup>535</sup> Local government and administrative officials violate or bend central rules usually to promote local economic development. While it may be possible to alter the allocation of resources to some extent or to permit areas facing especially dire straits certain privileges, tensions are likely to continue as long as some regions remain poor and local governments are forced to bear much of the cost of economic reform. In the long run, effective administration will require some mix of command and control and bottom-up modes of regulation. The immediate task facing the central government, however, is to find some way to rein in local authorities and ensure that central policies are implemented while still allowing local government and administrative officials sufficient flexibility to respond to local circumstances. The obvious solution—to strengthen the various mechanisms for limiting administration discretion—requires time.

One possibility might be to explore ways to change the incentive structure for local officials. Currently, local officials are evaluated in accordance with a cadre responsibility system that emphasizes quantifiable targets over qualitative factors.<sup>536</sup> Officials who meet their targets are rewarded financially with bonuses and larger allocations of discretionary funds and in other ways such as promotions or honorary awards. Perhaps a quantifiable rule of law index could be created. Officials would be evaluated based on indices such as the percentage of local regulations that are inconsistent with superior legislation, court judgments and arbitral awards that are unenforced at year's end, administrative cases in which the administrative agency decision is reversed in whole or in part,

534. For instance, the stature of the courts would be enhanced greatly by eliminating the procuracy's right to challenge final judicial decisions in specific cases, and by restricting, if not eliminating, the similar right of people's congresses.

535. See Richard Baum & Alexei Shevchenko, *The "State of the State" in Post-Reform China*, in *THE PARADOX OF CHINA'S POST-MAO REFORMS* (1999).

536. See Kevin O'Brien & Lianjiang Li, *Selective Policy Implementation in Rural China*, 31 *COMP. POL.* 167-86 (1999).

local court judgments that are reversed on appeal, local judges subject to discipline for corruption and other factors relevant to rule of law.<sup>537</sup>

As for the more traditional means of controlling administrative behavior, legislative oversight, for instance, could be enhanced by creating more oversight committees staffed by full-time employees with the proper legal and technical background. Committees to examine corruption in the administration or the effectiveness of particular agencies could play a positive role. Giving people's congresses greater powers to supervise administrative budgets and expenditures might help to some extent.

Administrative supervision would be improved by increasing the independence and authority of administrative supervision organs. This could be achieved by making them answerable only to the legislature and not the local governments and funding them at the provincial level. Separating supervision organs from CCP discipline committees might reduce their authority in the short term but would have long-term rule of law benefits. Supervision by the public and media could also be improved. First, people need to be made aware of their rights. The misperception on the part of some that suing officials is fruitless should be corrected through greater publicity of the many cases in which citizens prevail. Tough rules against retaliation by government officials combined with their strict implementation would help alleviate the fears of many citizens. Realistically, however, it is unlikely that the public or media will emerge as strong force for reining in the administration any time soon. China is not likely to pass a freedom of information act in the foreseeable future. Nor is the government likely to relax its control on the media.

Citizens would be more likely to resort to administrative reconsideration if the review bodies were more independent. China might consider tough rules against *ex parte* communication and a system where reconsideration personnel are not members of the agency whose actions they are reviewing. Unfortunately, drafters of the revised ARL failed to take advantage of the opportunity presented by the upgrading of the ARR to a law to improve the reconsideration process in any significant way. Accordingly, the popularity of administrative reconsideration will most likely continue to wane. To be sure, administrative reconsideration by its nature is subject to inherent limitations due to the lack of, or at least the appearance of the lack of, independence. Nevertheless, it is disappointing that the legislators did not do more to give the reconsideration process teeth.

Administrative litigation could be strengthened in a variety of ways. In addition to allowing courts to review abstract acts and enhancing the independence of the courts, the scope of review could be expanded to include rights

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537. The system would have to be structured to avoid creating perverse incentives for local government officials to pressure courts to cover up mistakes in order to obtain a high score—for example by refusing to hold administrative agencies liable in administrative litigation cases or to overturn on appeal incorrect decisions of the lower courts. Thus, officials would receive points for voluntarily addressing certain issues. In addition, outside monitors could be used for audit purposes. If the monitors discovered that local governments were covering up problems to avoid losing points, they would be penalized by a loss of several times the amount of points at stake.

other than personal or property rights, such as political rights. While China need not adopt a private attorney general theory of standing, a clearer and more liberal interpretation of standing would be useful. Enhancing the stature of the judiciary will help the courts overcome their reluctance to take full advantage of the ALL's rather broad review standards. For example, they may take a broader view of what counts as inconsistent and use the abuse of power standard to examine purpose, relevance, reasonableness, proportionality and so on. A more expansive interpretation and aggressive application of the current standards would go a long way toward achieving a review of the appropriateness of agency decision-making without substituting the judgment of the court for that of the agency.

However, to allow the courts to review the appropriateness of agency decisions at present, untethered by the need to find agency abuse of discretion, would be unwise. During a period of transition, agencies will need more discretion than in more settled periods. Agencies are grappling with a number of novel issues, many of them technical in nature. The current level of legal education and technical training of most judges and the lack of judicial resources to examine many of the technical and policy issues argue against giving the courts expansive authority to second-guess agencies. Further, court challenges of the appropriateness of agency decisions are likely to meet with much greater hostility and resistance than a decision that a regulation is inconsistent with higher level legislation. The courts should marshal their political resources and choose their battles judiciously.

Although China is likely to continue to converge on the best practices of other administrative law systems, such convergence need not preclude the possibility of China developing its own unique institutions. For instance, it is possible that China could develop a censorate system along the lines proposed by Sun Yatsen or create an independent anti-corruption agency as in Hong Kong.<sup>538</sup> Of course, China currently has ombudsmen-like administrative supervision bodies and a system of letters and petitions. As we have seen, supervision bodies are very weak, in part because they are subordinate to the State Council. But perhaps a stronger, more independent entity could be created. While it is unlikely that the censorate would be created as a constitutional equal to the NPC given the current constitutional structure, perhaps it could be established under the

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538. Sun advocated five branches of government, with the control and examination branches complementing the legislative, executive and judicial branches. The examination branch would set the standards for membership in the other branches and oversee appointments, while the control branch or censorate would monitor the behavior of the members of the other branches. See SUN YATSEN, *THE THREE PRINCIPLES OF THE PEOPLE* (F. Price trans., 1990). The idea of a separate agency to monitor other agencies has been revived recently. See Wei Pan, *supra* note 133 (advocating a "consultative rule of law" built on, *inter alia*, a professional civil service of the type enjoyed in Hong Kong and Singapore, an anti-corruption system that would be headed by an entity which is independent of the civil service and partially insulated from judicial review, and consultative committees comprised of retired civil servants, concerned citizen representatives and entrepreneurs who would oversee the civil service); see also Rubin, *supra* note 11 (suggesting a separate agency, like an auditor or inspector general's office, that would monitor other agencies).



NPC. Nevertheless, the effectiveness of any such entity would still depend on various context-specific factors, including the lack of a culture of legality.

Although various external checks can reduce administrative abuse of discretion, there are limits to what the law can achieve. In the end, no legal system can rely primarily on compulsory enforcement to ensure compliance.<sup>539</sup> The core of any administrative law regime is government officials who respect the law. Citizens and officials alike must internalize norms of respect for law that render compulsory enforcement unnecessary in most cases. It is therefore essential that efforts to establish rule of law and internal norms of legality continue. The Party will need to promote rule of law. Party leaders must make good on their promise to separate the Party from government and on their own commitment to act in accordance with law.<sup>540</sup> Party organizations must make known their displeasure with interference in court affairs by Party members or government officials, take corruption seriously and subject Party members to the courts. And they must encourage government officials to change their attitudes, provide them more legal training and subject them to stricter discipline.

Unfortunately, however, senior Party leaders and legal reformers cannot simply legislate a culture of legality. It will take time to overcome the lingering influence of culture and tradition, weak institutions and the challenges presented by the still incomplete economic transition. Ultimately, Party leaders will need to sign off on deeper institutional reforms that could in the end come back to haunt the Party. While the Party may be forced to risk such reforms to stay in power, whether it will do so is a matter of realpolitik and power and exceeds the limited reach of the law. If the Party does decide to continue to retreat from day-to-day governance and to turn over certain functions to other state actors, these other actors can be expected to contest for power. Retreat of the Party and the central state does not create a power vacuum. Rather, the result is a semi-structured space in which the existing institutions seek to gain additional power. The State Council and administrative agencies have shown themselves to be effective gladiators in the struggle for power among the other branches. Although a stronger court would be less of an immediate threat to the legislative branch, people's congresses would also lose some power vis-à-vis the courts.

Inevitably, the path of development of a country's legal system reflects its contingent circumstances. Although China can draw on the experiences of other countries, it will need to solve its problems in light of its own particular circumstances. The creation of a modern administrative law system is a slow process. While considerable progress has been made in realizing rule of law generally, and administrative rule of law more particularly, clearly much remains to be done.

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539. See NEVILLE-BROWN & BELL, *supra* note 178, at 37 ("The standard of behaviour of an administration depends in the last resort upon the quality and traditions of the public officials who compose it rather than upon such sanctions as may be exercised through judicial control.").

540. See *Beijing's Political-Legal Organs Cut Business Ties*, *supra* note 365 (reporting that Beijing Political-legal organs handed over to receiver units 212 enterprises worth RMB 2.7 billion).