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“The Rule of Law: Pushing the Limits of Party Rule”

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Thirty years ago at the historic Third Plenum of the 11th Central Committee in December 1978, the Chinese Communist Party adopted as part of its Reform and Opening platform the twin goals of “democratic institutionalization and legalization,” launching China onto the path of establishing a modern legal system. Borrowing from a speech that had been delivered by Deng Xiaoping at the meeting, the Plenum Communiqué looked to law and democracy to defend against a resurgence of the violent and arbitrary Cultural Revolution politics of the 1960s and early 1970s:

“In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is institutionalized and legalized, in such a way as to ensure the stability, continuity and full authority of this type of system and law; *there must be laws to follow, these laws must be observed, they must be strictly enforced and lawbreakers must be dealt with.*”¹

Since the 1978 Third Plenum, “legalization” has been intertwined with China’s political, economic and social modernization. By the 17th Communist Party Congress in October 2007, “ruling the country in accordance with law” had been enshrined in China’s Constitution and was espoused as essential, alongside Party leadership and the position of the people as masters of their own country, to the promotion of political development under “socialism with Chinese characteristics.”² Nonetheless, 30 years after Reform and Opening, and 10 years after making rule of law a constitutional principle, law and legal institutions are still unable to effectively manage the complex tensions and rising conflicts caused by China’s wrenching transition from a command to a market economy and the emergence of a more pluralistic society.

While China has successfully established over the past three decades a respectable body of law to follow, its leaders are having great difficulty in achieving the other three interrelated goals expressed above: broad compliance with and enforcement of the law, and holding lawbreakers accountable. The challenges to making China a truly law-based nation are complex and multifaceted, and ultimately implicate the continued dominance and extra-legal status of the Chinese Communist Party (the Party), which exerts influence both legitimately through state structures but also through parallel, non-transparent mechanisms that place it outside and above the law.

“There must be laws to follow...”

China’s leadership moved quickly to establish the laws necessary to accomplish Deng’s modernization vision, including what would become called the “socialist market economy.” Focused on the goals of using law to safeguard the nation against future chaos, promote social stability and spur economic development, the National People’s

Congress (NPC), China's law-making body, adopted in the next few years new criminal and criminal procedure laws, a trial civil procedure law, a provisional environmental protection law, domestic contract and tax regulations, trademark and patent laws and, beginning in 1979, a slew of laws and regulations to permit private foreign investment in China for the first time since the country's establishment in 1949.

China also revised its Cultural Revolution Constitution, adopting a new version in 1982 that replaced explicit Party control of the state with Party leadership and restored a system of government through state organs duly constituted through lawful procedures set forth in the Constitution. This Constitution called for the state to uphold the uniformity and dignity of the "socialist legal system," proclaimed that no organization, political party or individual was above the Constitution and the law, articulated an impressive-sounding list of rights and duties of Chinese citizens, and formally endorsed the "open-door policy" for foreign trade and investment.

China's rapid and substantial economic reforms called for new legislation to regulate and guide China's transformation. Many laws and regulations were adopted on a "provisional" basis or "for trial implementation," to permit for trial and error. China's legal reform model, paralleling its economic approach, has been notable for its experimental and incremental approach of trying new ideas on an approved local or sectoral basis before applying them to the entire country. Chinese officials began cautiously to study foreign legal experience, especially with regard to how to regulate foreign companies and foreigners who were arriving in increasing numbers and setting up shop within China's borders.

Looking back over the past 30 years, China has done a remarkable job of creating a fairly complete system of substantive law. As of March 2009, China counts 231 laws, some 600 administrative regulations and 7,000 local rules and regulations currently in force,³ as well as roughly 600 regulations issued by the autonomous regions of China and "numerous" departmental rules at all levels that regulate different aspects of daily life.⁴ Although China's Legislation Law differentiates between "laws" that can create rights and can only be passed by the NPC and local enactments passed by local people's congresses and governments, these legally binding, official documents are, following the Chinese practice, all generally referred to herein as "legislation" or "law."

China's domestic law is supplemented by a large number of bilateral and international treaties and agreements that China has joined, including 48 international conventions on environmental protection,⁵ 22 international agreements on human rights⁶ and the World Trade Organization agreements, accession to which required China to commit to many changes in China's legal system and helped to promote China's move toward a more transparent governance model. China is becoming ever more engaged in the international economic and legal "order," although it reserves the right to adopt its own interpretations of these norms.

The 1982 Constitution has been amended four times. In 1999 the NPC added the principles that China exercises the rule of law and is "building a socialist country

governed according to law” and, in 2004, that the state is to “respect and preserve human rights,” as well as protect private property. While constitutional principles are important in articulating general aspirational principles, constitutional rights are not directly enforceable in Chinese courts. Realization of these rights normally requires enactment by the NPC of specific laws to provide the relevant details and procedures for carrying out these principles.

Over the years, lawmaking has also moved from emphasis on regulating the socialist market economy to achieving greater social fairness and justice. China’s leadership recognizes that the legitimacy of its one-party rule depends not only on delivering economic growth but also on ensuring that its people are treated fairly and on creating a “harmonious society.” In its embrace of the market economy, the government recognizes that it has withdrawn perhaps too far from such fundamental areas as public health and education. Recent NPC legislative plans have included more laws on social security, welfare and social relief, health insurance, labor protection, food safety and the environment.

China's leaders have also come to realize that law is useful not only as a tool to regulate the economy and society but also to restrain abuse of state power by government bureaucrats. In the absence of direct elections or other effective mechanisms to hold government officials directly accountable to the public, corruption and abuse of power have led to widespread feelings of disaffection between the Chinese people and their “people’s government.” Reported incidents of mass unrest increased from 58,000 in 2003 to roughly 90,000 in 2006,⁷ at which point the authorities stopped disclosing specific statistics on protests and other manifestations of unrest.

While local leaders continue to rely on heavy-handed tactics to put down disturbances, the central leadership realized the governance model had to change in order to better address the underlying causes of social unrest, including environmental degradation, illegal land seizures and forced relocations for urban development, unpaid wages, police malfeasance and government and business corruption, as well as to better deal with that unrest. Recent central policies and legislation seek to provide clearer procedural restraints upon, and clearer rights in the public to protect their interests against, state power.

After a brief overview of how the legal institutions of the people’s congresses, the government, the courts and the legal profession have developed over the past 30 years, this paper explores in more depth how the Party-state is working through administrative reforms to transform the law-making and policy-making process, to improve administrative mechanisms to manage conflict and to help achieve better compliance with the law by both the public and the state.⁸

“...these laws must be observed, they must be strictly enforced and lawbreakers must be dealt with.”

Having lots of laws, even good laws, is not sufficient to ensure that the law is broadly complied with and enforced, i.e., what we think of as the rule of law. In contrast with the traditional “rule of man” that characterized Imperial China and the Maoist era, or the instrumentalist “rule *by* law” that arguably describes reform-era China, under which the state views and uses law as a tool to regulate the public, the concept of “rule of law” requires that the state itself -- and the Party -- also be subject to law. The 1982 Constitution stipulated that in principle everyone -- including the state, the military and all political parties -- must abide by the Constitution and the law and that no-one is above the Constitution and the law.⁹ It also provides for basic legal institutions including lawmaking congresses and governments at all political levels, and law-enforcing courts and procuracies, and articulates a list of basic rights of Chinese citizens. Even the Party’s own Constitution requires its members to abide by the laws and regulations of the state.¹⁰

Yet, despite its notable legislative and institutional accomplishments, Chinese leaders recognize that China’s rule of law enterprise is not yet complete and admit that at least in some localities and departments “laws are *not* observed, they are *not* strictly enforced, and lawbreakers are *not* dealt with (emphasis added).”¹¹

They have concluded that an important reason why the rule of law remains so elusive is that the formulation of laws and regulations has been insufficiently “scientific and democratic,” resulting in laws that are inadequate to address the rapid economic, social and political changes taking place in China and the lack of public support. Accordingly, the Party-state is undertaking to make the lawmaking and law-enforcement institutions more professional, rules-based, participatory and transparent.

The Legislative and Rulemaking Institutions

Under China’s Constitution, all power ostensibly belongs to the people, and state power is to be exercised by the people through the “democratically elected” National People’s Congress (NPC) and local people’s congresses (together with the NPC, referred to collectively herein as “PCs”) at the provincial, county and township levels. The PCs make law and local regulations, supervise government organs and approve the government budgets. PC elections are becoming incrementally more competitive, and PC deputies somewhat more assertive and representative, but the PC system is still heavily influenced by the Party, which essentially controls the appointment and election of NPC delegates and congressional and state leaders.

The NPC and local PCs now meet regularly, but only once a year. Standing committees make most of the PCs’ decisions between annual meetings in close consultation with the Party, which sets the annual agendas for the full PC meetings at its own Party congresses. Full-time legislative affairs committees under the standing committees are responsible for drafting and submitting national and local laws for approval either by the relevant standing committee or the full PC. In recent years these legislative committees are increasingly staffed by legally-trained employees, including former law professors, in an attempt to improve the quality of legislation.

The State Council, China's cabinet appointed by the NPC, is the highest executive body and the center of state power, headed by the premier. It oversees China's central government ministries and commissions and the work of local governments at each level. Legislative affairs offices (LAOs) at each level of government draft administrative rules and regulations to carry out and enforce the laws and to regulate the government bureaucracy, as well as handle administrative appeals brought by the regulated public. The Party controls the appointment or "election" by the PCs of high-ranking government officials at the corresponding political level. However, lower-ranking staff are part of an increasingly competitive and merit-based civil service system, and the trend is for LAO personnel to be law-trained.

Both of these law-making institutions are also moving toward a more transparent and participatory legislative process involving the use of public hearings, advice from subject matter experts and written public input, drawing on research into international practices and experimentation.¹² Public participation is encouraged, but not required, for legislation deemed to be of particular public interest under the Legislation Law and its implementing regulations.

The PCs have historically been somewhat more open than the government, utilizing discretionary mechanisms such as visiting localities to listen to the people's opinions directly and permitting the public to "audit" or observe their annual meetings. While local PCs started experimenting with legislative hearings in 1999, the NPC Standing Committee held its first public hearing in September 2005, on draft revisions to the Individual Income Tax Law. Prior to 2008, the NPC selectively released a number of draft laws since 1949, including the 1954 Constitution, for public comment. In April 2008, the NPC Standing Committee announced that, going forward, all drafts submitted to it for review and adoption will ordinarily be made public as a standard practice, observing that an open and transparent legislative process would better ensure the public's "right to know, participate, express and supervise" and provide the people with a better understanding of new laws through participation in their formulation.¹³ It has also promised to continue to experiment with public hearings and the broadcasting of its deliberations.

Following initial experiments by some central ministries and local governments, the State Council LAO first released draft regulations for public comment in October 2002. Thereafter, it gradually increased the number of draft regulations that it made public each year, until it announced in 2008 that it and the central ministries should henceforth release virtually all draft rules and administrative regulations -- other than those relating to state secrets or national security -- for public comment. State Council Work Rules adopted in 2008 similarly call for increased public participation in major policy decisions and draft regulations, through written input as well as hearings when appropriate, and Premier Wen Jiabao directed in his 2008 Work Report that governments at all levels should henceforth release information about and hold public hearings before making major decisions.

The Courts

China's judicial system, which applies and enforces the law, is comprised of some 3,631 people's courts at four levels corresponding to the political structure, with the Supreme People's Court (SPC) at the apex, and staffed by roughly 200,000 judges. It also includes the 160,000-member procuracy that prosecutes cases and the public security apparatus, China's police.¹⁴ The procuracy and public security organs primarily handle criminal cases.

Institutionally, the courts are not an independent branch of government but rather part of the government structure, subject to oversight by the procuracy and answerable to the PCs at the same political level. The NPC Standing Committee, rather than the SPC, has the authority to interpret national law, although the SPC issues judicial interpretations on questions arising out of specific application of law. Some of these interpretations are as a practical matter tantamount to supplemental legislation, and some draft interpretations have even been released for public comment, following the practice of government agencies and PCs in recent years.

Chinese courts are supposed to exercise their adjudicatory power independently, in principle through open trials and free from interference.¹⁵ However, judges are appointed (in accordance with Party guidance) and remunerated by the PCs at the corresponding governmental level, a system that fosters local protectionism and undue political influence. In practice, government officials may apply pressure on courts in particular cases, and the Party may intervene through court-based adjudication committees that supervise the work of the judges and other channels. Consequently, the courts frequently decline to accept jurisdiction over sensitive cases, such as lawsuits relating to land seizures, official corruption, or "hot" social issues like government liability for the shoddily-constructed elementary schools that collapsed and killed thousands of children in the Sichuan province earthquake of May 2008.

In addition to institutional constraints on their authority and independence, the courts have traditionally been plagued by incompetence, lack of professionalism and corruption, which undermine the public's trust. In the early days of the People's Republic, judges were frequently drawn from the ranks of the retired military and were not required to have any legal training. Now, new judges must hold university degrees and pass a national unified judicial exam, as well as participate in ongoing legal education programs. However, the quality of judicial personnel outside the major cities is still uneven, and low salaries contribute to widespread judicial corruption.

Lack of transparency in the judicial system also contributes to potential corruption. Since China follows a continental or civil law system, court decisions do not have binding precedential value as in a common law system like the United States, and legal opinions have not normally been made public, although selected decisions are published for reference by other courts and lawyers. Moreover, trials are frequently closed off to the public and media even though, in principle, they are supposed to be open to the public. The SPC announced reforms in early 2009 to introduce greater judicial transparency, including publishing court opinions and enforcement decisions online and permitting greater public access to trials,¹⁶ as well as to prohibit acceptance of gifts and *ex parte*

communication between judges and lawyers and to otherwise curb inappropriate and corrupt judicial behavior.

The appointment in March 2008 of Wang Shengjun as President of the SPC caused some pessimism about the road to judicial independence and rule of law. Wang's background was in party politics and public security rather than in law, and his appointment raised concern that the courts were being politicized. Continued momentum on a variety of judicial reforms, including some movement toward centralized funding of all courts to help overcome local protectionism, judicial transparency and the promotion of judicial ethics, suggests that incremental progress toward a more professional and somewhat autonomous judiciary might continue.

Nonetheless, the Party seems conflicted about the degree of judicial independence it wants to actually foster and it is not clear, 30 years after China began to develop a modern legal system, whether the courts will be permitted to effectively carry out their potentially critical role in resolving conflict, especially with the government, and in strengthening rule of law.

Lawyers

Of little relevance in traditional China, lawyers enjoyed a tenuous status in Republican China and the early years of the People's Republic. Less than 2,000 lawyers could be identified at the beginning of Reform and Opening in 1978. By the end of 2008, however, China had more than 600 institutions of higher learning offering bachelor's degrees in law, nearly 157,000 licensed lawyers and over 14,000 law firms.¹⁷

The overall number of practicing lawyers for a country the size of China is still low (slightly more than one lawyer per 1,000 people), and they are subject to the often strict "supervision and guidance" of local judicial bureaus under the Ministry of Justice (MOJ), which supervises the legal profession. Nonetheless, the legal profession is increasingly recognized as an important institution to help ensure that law is understood, observed and enforced. Like lawyers around the world, Chinese lawyers not only handle a wide range of criminal, civil and administrative cases and counseling; many lawyers and legal scholars also undertake "public interest" lawyering and get involved in drafting and proposing legislation.

Government agencies have begun to hire law graduates as "public service lawyers," although many of these seem to be assigned to perform legal aid for government-sponsored legal aid centers rather than fill the same kind of role as government lawyers do in the United States. Indeed, most legally-trained officials working within government agencies are not technically qualified to be lawyers under the current Lawyers Law.

Government-supported and private legal aid are also developing rapidly. China's legal aid system dates back to 1994 but only began to flourish in recent years. The MOJ now requires all lawyers to handle a certain number of legal aid cases each year, and Chinese law now requires that criminal defendants must have access to legal assistance if

they cannot afford it. Moreover, low-income citizens can apply for legal aid when seeking state compensation, social security, welfare, pensions, alimony, maintenance, child support and labor payments.

Chinese trade unions are beginning to offer legal aid to migrant workers and others with labor disputes, and the government-supported All-China Consumers Association announced in early 2009 that it had received authorization to bring lawsuits. Law schools and non-governmental organizations sponsor legal aid clinics that assist low income citizens with criminal defense, employment discrimination, family disputes, juvenile justice, urban relocations and rural land takings. Although rural areas remain significantly underserved, legal aid seems to be becoming firmly rooted in China's changing legal culture and helping to raise rights consciousness among sectors of society that have not had much access to the formal legal system in the past.

Chinese lawyers are also becoming more politically active. A lawyer was elected as a deputy to the NPC for the first time in 1988. Since then law school professors and lawyers increasingly seek posts on local PCs to promote their law reform agendas, sometimes winning appointment by the local Party but sometimes running as independent candidates. As of 2008, some 519 lawyers reportedly served as deputies to the PCs at all levels, and 2,845 are members of various levels of the Chinese People's Political Consultative Conference, a political advisory body.¹⁸

A growing number of Chinese lawyers have begun to file "public interest" cases that highlight particularly difficult or widespread social problems. Some practitioners estimate there are only about 120 public interest lawyers throughout the country, although the establishment of a nationwide public interest lawyers network in March 2009 to share and tap into professional expertise,¹⁹ taking advantage of the Internet in China, may expand these numbers. While these lawyers frequently lose their lawsuits, the public attention thereby drawn to the issues through litigation often leads to beneficial changes in law or policy.

In recent years, a small number of courageous lawyers -- sometimes referred to as "rights defenders" -- have taken on and publicized sensitive cases involving criminal defendants, peasant activists, displaced urbanites, religious worshippers, unpaid migrant laborers and others who find themselves in conflict with the state. Such representation frequently places these lawyers themselves in direct conflict with the local governments that license them. Criminal defense lawyers in particular and others who speak out on politically sensitive issues face the prospect of being jailed on such grounds as falsifying evidence or revealing state secrets and may lose their jobs and their licenses to practice law. As one prominent Chinese lawyer put it: "...you cannot be a rights lawyer in this country without becoming a rights case yourself."²⁰

Despite the sobering limitations on the role of the courts and the legal profession in helping realize rule of law in China, statistics show that these two institutions are in fact playing an ever greater role within Chinese society. In the five-year period 2003-07, the courts heard approximately 26 million cases,²¹ and the total number of cases heard in

2008 alone increased by 11% to over 10.7 million.²² During this period, lawyers handled millions of criminal and civil cases, as well as administrative proceedings against the government, and provided a wide range of advisory services to both the public and the government.²³ Today, the coercive power of the Party-state generally intervenes in the normal functioning of the judicial process only when a private interest is at odds with an important government or Party interest. However, it is precisely these kinds of cases, involving state or Party power, that most call into question the role of law in China and are most likely to cause wider-spread social unhappiness and unrest.

Law as an Instrument to Restrain State Power

The idea of using law to constrain state power is a relatively recent development in China. Traditional Chinese law contained numerous administrative regulations and codes, but these were primarily designed to regulate government practices, not to establish rights in the public to contest state actions. Only with adoption of the unprecedented Administrative Litigation Law (ALL) in 1989 were ordinary Chinese citizens for the first time given the right to challenge the legality of official action through lawsuits in the people's courts. Since then, China has been building a body of administrative law to better regularize government behavior and the government's interaction with the public.

Allowing the Chinese public to sue the government was heralded as a "revolution" in legal system development. The administrative tribunals have recorded a respectable plaintiff success rate of 20-40 percent over almost two decades. However, after an initial enthusiastic response, the number of administrative lawsuits levelled off, fluctuating around 95,000 per year. This flattening was attributed to a combination of lowered expectations due to the ALL's limits on what cases the courts can adjudicate and the reluctance of courts to accept complaints in more politically sensitive cases, rather than to a decline in grievances against the government.²⁴

Nonetheless, plaintiffs (and groups of plaintiffs) have won some notable successes, including in the areas of environmental protection and land takings, and the number of administrative lawsuits seems to be inching upwards in recent years, exceeding 109,000 in 2008,²⁵ with a plaintiff success rate of about 30 percent.²⁶ It is not clear whether this uptick in administrative lawsuits represents a long-term trend, but revision of the ALL is on the NPC's legislative agenda and many scholars and officials are working to broaden its scope to allow more cases to be heard in the courts.

The 1994 State Compensation Law permitted citizens to sue the government for monetary compensation for injuries caused by official action. Possibly due to its low levels of mandated compensation and some of the same limitations that discourage litigation against the government generally, relatively few compensation claims have been filed and only 34% of those awarded compensation, leading many to refer to it as the "State Non-Compensation Law." This law is also undergoing revision by the NPC.

As an alternative to suing the government, the 1999 Administrative Reconsideration Law (ARL) permits citizens aggrieved by unlawful or inappropriate government action to request review or “reconsideration” within the government agency itself. An average of slightly over 80,000 disputes – less than those taken to the courts -- have been filed under the ARL every year since it came into effect.²⁷ Applicants can normally appeal the final administrative decision to the courts or bypass the administrative reconsideration (AR) system altogether and sue directly in the courts.

In principle, AR should be quicker than court proceedings, broadly accessible and free of charge, and, because it is handled by career government personnel who may better understand the relevant regulatory background, potentially more professional. In practice, AR is fundamentally constrained by the same political environment that undermines the effectiveness of administrative litigation: the lack of truly independent or neutral adjudicators. While the officials who review the case may be somewhat removed from the issues in dispute, they are still within the same chain of agency command. Both the Party and government leadership support reforms to make AR more professional and neutral, so the Chinese public will trust and accept the outcome, and begin to use this “in-house” dispute resolution mechanism more frequently.

Instead, a large number of disputants remain unsatisfied with both administrative litigation and reconsideration and have preferred resort to a traditional petitioning or “letters and visits” system called *xinfang*, which is governed by State Council Regulations on Letters and Visits. The State Council has a Letters and Visits Office, whose function is replicated throughout the bureaucracy at each level of government and in individual government agencies, the courts, the procuracies and the PCs. While the courts nationwide heard close to 11 million cases in 2008, Chinese government agencies, including the courts themselves, have been flooded in recent years with upwards of 11-12 million citizen petitions seeking assistance to resolve a range of grievances, including complaints about government behavior. Many Chinese legal scholars call for the abolition of the *xinfang* system altogether on the premise that it perpetuates disputes and undermines “rule of law” and the role of the courts, which need to be strengthened so that they can more effectively and finally resolve disputes.

The above laws seek to restrain Chinese state action by providing some redress to aggrieved citizens *after* the fact. Others seek to impose procedural constraints on government action *in advance* and have introduced unprecedented requirements of procedural due process.

The 1996 Administrative Penalties Law gave the Chinese public clear procedural rights for the first time, by requiring government agencies not only to publicize the range and standards for potential penalties, but also to give affected persons advance notice when the government proposes to impose a penalty, such as shutting down production, revoking a license or levying a fine. This law further affords Chinese citizens the right to provide a defense to the charges and proposed penalty and to request a public hearing at no cost. The 1998 Price Law subsequently introduced the hearing into the broader administrative decision-making process, requiring that public hearings be held when government-set or guided prices are being determined or changed.

The 2003 Administrative Licensing Law also established procedural requirements for government action. Responding to a nationwide proliferation of government approval requirements that were unduly burdening both economic and social activity and fuelling official corruption, it restricts government from imposing a license or permit requirement unless it can demonstrate that individual initiative, associations or the market are not able to regulate the activity effectively. This law, which has no counterpart anywhere in the world, limits the government entities that have authority to issue licenses and the types of activity that can be so regulated. The law also stipulates procedures, including public hearings, to ensure transparency, fairness and impartiality in the establishment and implementation of licensing requirements and in the licensing process. The number of matters requiring approvals at all levels has been nearly halved since the law's adoption, and some plaintiffs have successfully sued to stop polluting projects based on their failure to obtain required environmental licenses under this law.

Most recently, the State Council adopted nationally-applicable regulations that require governments at all levels to disclose a broad range of records on their own initiative as well as upon request, albeit subject to broadly-crafted exceptions for information constituting state secrets, commercial secrets or privacy. The Regulations on Open Government Information (OGI), which took effect May 1, 2008, are yet another "leg" of China's evolving administrative law and are seen as important step toward a national law on information disclosure that will further promote government transparency.

Unlike many of the administrative laws discussed above, the OGI Regulations do specifically provide that agency failure to abide by their requirements can be appealed through administrative reconsideration or directly in the courts. Within the first seven days after they took effect, Chinese media reported seven cases brought by retired workers and peasants, in addition to lawyers and law professors. Many of the initial lawsuits were rejected or not acknowledged, but a few courts did rule that government agencies had to comply with the Regulations and disclose the requested information. Moreover, the publicity surrounding some information requests pressured government to respond positively. For example, a Shanghai lawyer in January 2009 filed a request for details on China's stimulus plan to counter the global economic downturn starting in 2008 and, after he threatened to sue, the National Development and Reform Commission publicly pledged to disclose the plan on its website once it was approved by the NPC.

Other legislation to round out the administrative law framework and standardize government behavior is being drafted, including a law to regulate and prevent abuse of compulsory law enforcement measures, to regulate the imposition of administrative or user fees, and to require disclosure of civil servants' assets to curb corruption.

Law-based and Open Government

Recognizing that the remedies provided by the administrative laws described above were insufficient on their own to address the continuing failures in observance and enforcement of law as well as holding lawbreakers accountable, and that these failures

were undermining the government's credibility, the Party-state has begun to promote a Chinese version of "reinventing government" under the rubric of "administration in accordance with the law" (*yifa xingzheng*). The State Council committed itself in 2004 to a 10-year reform program,²⁸ extending it down to the municipal and county levels in 2008.²⁹ The program calls for establishing clear rules on the scope of administrative power; fair, rational and transparent administrative procedures to regulate the exercise of government power; more open government information and "scientific and democratic decision-making" with greater public participation; doing a better job of preventing and administratively resolving social tensions; introducing better law-enforcement mechanisms; and ensuring greater accountability for government actions. Some of these systems have been "legalized" through the administrative laws discussed above or in planned amendments thereto. Others are still at the policy stage.

Party Secretary Hu Jintao has promoted the complementary theme of Party "governance in accordance with the law," calling for protection of the people's rights and interests and ensuring social fairness and justice in pursuit of a "harmonious society." He and Premier Wen have urged all segments of government and society to experiment with "innovations" in governance to "build a just, transparent, hard-working, efficient, honest, upright and clean government that follows a well-defined code of conduct, a government with which the people are satisfied."³⁰

The Party and the central government have identified reform of the way decisions are made and laws and regulations formulated as critical to improving the entire administrative process. Public participation and increased transparency in law-making were identified as key mechanisms to build trust in government, curb rampant corruption and help maintain social stability. The 2008 Government Work Report to the NPC promised to improve the quality of legislation by seeking views from many sources and publishing drafts to solicit the public's opinions, as well as developing the positive role of civic organizations to expand public participation in government affairs and give voice to the concerns of the people.³¹

To be sure, the handling of various forms of public participation is still in the experimental stage. The solicitation of written public input on legislative drafts, while steadily spreading in practice, is not yet standardized. Legislative or decision-making hearings in China all too often suffer from inadequate openness, hand-picked participants who are not necessarily representative of the diversity of views on a matter, and the lack of a public record of the hearing proceedings. Both the written comment process and public hearings need to provide better feedback to the public on the impact of their input on the final decision. Chinese commentators complain that these proceedings are often just "for show" and call for more standardized and transparent procedures that would truly serve to curb arbitrary exercise of power and safeguard citizens' rights and interests.

Another area where China is introducing greater "open government" is in making various kinds of official meetings open to the public. Peoples' congresses have permitted citizens to "audit" or observe their meetings for a number of years. Some localities have begun experimenting with holding open government meetings, a "government under the sunshine" practice that is encouraged under Hunan province's pioneering 2008

Administrative Procedure Provisions.³² As another sign of increasing openness, many governors and mayors now provide “mailboxes” for public comments and questions on their official government websites and hold online “chats” to discuss current issues with the public, a modern channel for interacting with the people that has even been utilized by China’s top leaders, Party Secretary and President Hu Jintao and Premier Wen Jiabao.

More recently, in a new model for better dealing with protests, high-level local officials have held “hearings” or informal meetings with aggrieved protesters to discuss their issues and promised to do a better job of soliciting their input to prevent future problems. A series of taxi strikes prompted by largely similar grievances concerning unlicensed competition, fuel prices and fees, unrolled in different cities through out the country in November 2008. In one of the first, the Party Secretary of Chongqing Municipality held a televised and podcast open hearing with aggrieved taxi drivers following a city-wide strike.³³ Quick action, promises to address the complaints, the meeting with the Party Secretary and a government apology to the public for not having managed the taxi system effectively convinced most drivers to go back to work, while the responsive handling of the incident was reported to have improved the Chongqing government’s credibility.³⁴

In the wake of these taxi-driver strikes, and other well-publicized protests and riots in 2008, former Public Security Minister and Politburo member Zhou Yongkang observed that “[m]ore channels should be opened to solicit public opinion and local governments should spare no effort to solve people’s problems,”³⁵ so as to prevent these problems from intensifying and leading to social instability. Clearly, the benefits of greater transparency and interaction with the public are increasingly recognized by Chinese leaders, if not always implemented.

While public participation procedures are not yet legally mandated at the national level, their increasing use and adoption of the OGI Regulations seem to reflect a growing appreciation of how greater openness and consultation can elicit public support and compliance with law and policy, as well as a growing confidence on the part of the Chinese leadership about their ability to interact with, respond to and manage conflict with the Chinese public.

The Next Thirty Years

Thirty years after launching the Reform and Opening program, China has achieved at least one important plank of its legal reform objectives, that of establishing a sound and fairly complete body of law and regulations for not only the people, but also the government, to abide by. Basic legal institutions, including the people’s congresses, the courts, the legal profession and government agencies themselves, are becoming more professional, transparent and responsive to public concerns.

However, the Chinese leadership recognizes it continues to face formidable challenges in achieving the other three goals of general compliance with and strict

enforcement of the law and accountability for violations of the law. The conclusion to China's 2008 White Paper on establishing the rule of law observes:

“The development of democracy and the rule of law still falls short of the needs of economic and social development; the legal framework ... calls for further improvement; in some regions and departments, laws are not observed, or strictly enforced, violators are not brought to justice; local protectionism, departmental protectionism and difficulties in law enforcement occur from time to time; some government functionaries take bribes and bend the law, abuse their power when executing the law, abuse their authority to override the law, and substitute their words for the law, thus bringing damage to the socialist rule of law.”³⁶

What the White Paper does not acknowledge is that undoubtedly the largest obstacle to achieving those goals is the ambivalence of the Party itself about how far it is willing to permit the country to move toward true rule of law. Despite continued lip-service to the importance of rule of law and the principle that Party members must also be subject to the Constitution and the law, the Party remains unwilling to give judges the authority to decide cases independently and the legal profession the latitude to zealously help the public achieve justice, particularly when cases involve the Party-state. Moreover, the Party maintains its own parallel, secretive system of “justice,” under which the Party Central Discipline Inspection Commission investigates corruption and other forms of wrongdoing by Party members, subjects them to the extra-legal *shuanggui* or “double treatment” system, and only at its discretion turns those cases over to the judicial system for disposition.

In part due to its reluctance to permit the courts to handle the rising number of increasingly complex social conflicts, the Party is advocating “transformation” of the Chinese government. The premise is that enhanced transparency, participation and accountability will make government more efficient and effective and thereby reduce and better resolve disputes over government actions and policies and achieve better compliance with laws and policies. With increasing confidence, the Party-state is beginning to standardize the use of public participation in different forms in legislation and policy-making and has already issued executive regulations requiring government at all levels to disclose a wide range of information both on its own initiative and upon request by the public.

The Party-state is experimenting with making more government decisions publicly available, holding face-to-face adjudicatory hearings, improving the use of negotiation or mediation to resolve administrative disputes, and making the in-house administrative reconsideration system more professional, effective and credible. The goal of these reforms is to satisfactorily settle disputes with the government so the people feel they have been fairly treated and do not subsequently resort to overburdened and often unhelpful courts or the *xinfang* system.

China's legislative accomplishments, the cautious movement toward a new model of government administration that is regulated and constrained by law, the rise of the

beleaguered but resilient “rights protection” lawyers movement and the Chinese people’s seeming enthusiasm for continuing to use the courts and other legal avenues even though the track record seems so dismal, all do reflect substantial progress over the past three decades. From this perspective, China can be said to be moving further along the continuum from the traditional rule of man that Deng Xiaoping denounced, beyond the instrumental concept of rule *by* law that appeared pervasive in the first years of Reform and Opening, toward a rule *of* law under which all citizens, government entities and political parties are truly subject to law.

China had no tradition of either democracy or rule of law on which to draw when it began this journey. We have learned in the United States that democracy and law are not settled but are dynamic works in progress. Both China’s leadership and the Chinese people are experimenting with new practices, adopting new perspectives, and continually refining their unique “legal system with Chinese characteristics.”

Looking back to reflect on the legal reform accomplishments over the past 30 years, the Chinese have established a comprehensive, modern and sometimes innovative body of law. They are professionalizing their legislative and enforcement institutions. They are cautiously “democratizing” the legislative and decision-making processes through greater transparency and public participation to better involve the public and obtain their compliance with the law, and they are moving to make the judicial system more transparent and accessible.

The continuation of the generally positive trends of the past 30 years is by no means inexorable. The paradox, of course, is that China’s Communist Party continues to espouse a rule of law that also constrains state power while insisting on the primacy of the Party. The tension between promotion of greater “rule of law” and one-Party rule permeates the entire legal system.

However, the official rhetoric of legality and positive development of law and the legal institutions and processes discussed above, including the rapid growth of administrative law to not only regulate but also limit state power, is fostering a new culture of legality in the public and the Party-state. These developments suggest that an increasingly transparent, participatory and accountable China may well continue to progress farther along the continuum toward rule of law.

¹ The Communiqué of the Third Plenum of the 11th Central Committee of the Communist Party of China of December 22, 1978, *Peking Review*, No. 52 (December 29, 1978) at 14, online at <http://www.marxists.org/subject/china/peking-review/1978/PR1978-52.pdf>. The Chinese of the italicized language is “*youfa keyi, youfa biyi, zhifa biyan, weifa bijiu*.”

² Hu Jintao, “Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in all,” Report to the 17th Party Congress, October 15, 2007, English translation at <http://www.china.org.cn/english/congress/229611.htm> [hereafter “17th Party Congress Report”].

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- ³ “Highlights of NPC Standing Committee Chairman Wu Bangguo’s Work Report, March 9, 2009, at http://www.npc.gov.cn/englishnpc/Special_11_2/2009-03/09/content_1487180.htm.
- ⁴ State Council Information Office, “White Paper: China’s Efforts and Achievements in Promoting the Rule of Law,” February 28, 2008, at http://www.gov.cn/english/2008-02/28/content_904901.htm [hereafter “ROL White Paper”].
- ⁵ Wang Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms, 8 Vt. J. of Env’tl L. 159, 163 (2006-07).
- ⁶ ROL White Paper, *supra* note 4.
- ⁷ “Post-Olympic Stress Disorder,” *Economist*, September 11, 2008, at http://www.economist.com/world/asia/displaystory.cfm?story_id=12209848.
- ⁸ Some of the themes and examples discussed in this paper draw on the author’s chapter on “Rule of Law in China: Incremental Progress,” in C. FRED BERGSTEN, N. LARDY, B. GILL & D. MITCHELL, THE BALANCE SHEET IN 2007 AND BEYOND (Center for Strategic and International Studies and The Peterson Institute for International Economics, April 2007). For a general overview of the Chinese legal system, see JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION (Martinus Nijhoff Publishers, 2008). For earlier classics on the Chinese legal system, see STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (Stanford University Press, 1999) and RANDALL P. PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (Cambridge University Press, 2002).
- ⁹ Article 5, Constitution of the People’s Republic of China, as amended March 2004, English translation at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.
- ¹⁰ Article 3, Constitution of the Communist Party of China, as amended October 2007, English translation at http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm.
- ¹¹ ROL White Paper, *supra* note 4 (in Chinese: “youfa buyi, zhifa buyan, weifa bujiu”).
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