ADMINISTRATIVE PROCEDURE REFORMS IN CHINA'S RULE OF LAW CONTEXT

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I. INTRODUCTION

The law reforms that have been taking place in China since the late 1970s have marked the beginning of a journey toward realizing the rule of law in the country. Comprehensive changes in the field of law witnessing during the past two decades have resulted in a more developed legal system not only as to the arena of civil society but the public life as well. However, in the courses of law reform, two significant phenomena have presented themselves and called for attention. First, compared to other branches of the Chinese legal system, administrative law had long been "forgotten" by both government officials and legal scholars. As a practical matter, even in the 1980, almost ten years after the economic and legal reforms, administrative law still had been viewed as " a forgotten corner" throughout the entire legal system.[1] In other words, there have been a gap or a blank spot for almost four decades in the area of administrative law since the founding of the People's Republic of China (PRC). Second, while the law reforms have focused mostly on the construction of a substantive legal system, the legal procedure, which traditionally has long been the weakest part of China's legal system, has not received enough

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1. *See* ZHOUCU DIGUO DE XINGZHENG FAXUE [ADMINISTRATIVE LAW COMING OUT OF THE DOWNTURN], 1-2 (Zhang Shanzhu and Zhang Shuyi eds., 1987).

attention from either legal scholars or the Chinese leaders. However, under the pressures of China's social transition and active interaction between the state and the society, and especially in the 1990s, as results of China's continuing economic and political changes, reformers have started to realize the significance of legal procedure as a crucial part of the legal system and an effective mechanism to ensure the integrity of the state and the society, legitimacy of public decisions, and procedural justice and fairness. As a result, for the first time, the Seventh National People's Congress (NPC), during its second session on April 4, 1989, enacted the Administrative Litigation Law (ALL), under which procedural legality is required in the decision-making context of the administrative procedure.[2] The ALL marked an important step toward the rule of law in the administrative process by requiring administrative authorities to follow administrative procedures. It subsequently has promoted the progression of China's administrative procedural reform over the past ten years.

This essay aims to analyze the social awareness of procedural justice in China's administrative process, to examine established administrative procedures, and to try to predict the future of administrative procedure reforms in the context of China's social transition and rule of law.

II. THE CONTEXTS OF ADMINISTRATIVE PROCEDURAL REFORMS

Four important factors call for the return of administrative procedure if China continues the journey of economic and political reform that expectedly will lead to a more productive economic system, a better developed legal system, and finally a more desirable community in which we are expected to live. The first is the economic reform and the changing role of the government and, in an ultimate sense, the Chinese Communist Party (the CCP). The second is the social transition that, to a large extent, has been fostered by the economic reform and limited political reform that seemingly are accelerating and certainly will continue in the coming future. Third, as a result of the social transition, a civil society emerging, which promises much more active interaction between the government and individuals than that of the era preceding the economic reform. Finally,

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2. *See* Zhonghua Remin Gongheguo Xingzheng Fa [Administrative Litigation Law of the People's Republic of China](Apr. 4, 1989), *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF P.R.C., art. 54 [hereinafter ALL]. This Article provides, among other things, that if the agency action reviewed by the People's Court violates "procedures required by law", the court shall repeal it.

the increasing autonomy of individuals will undoubtedly lead to more frequent challenges of government action and, therefore, the legitimacy of public policy and concrete agency actions may be more frequently questioned. Confronted with such dramatic changes in the administrative process, and embedded in the changing society, law reform in China inevitably has had to and must continue to respond to the call for procedural justice through procedural reform of the administrative process.

III. ECONOMIC REFORM AND ADMINISTRATIVE DEREGULATION

In the late 1970s, the Chinese leadership initiated the economic reform aiming at the establishment of what later was defined as a "socialist market economy with Chinese characteristics." Deng Xiaoping, the designer and the advocate of the economic reforms, urged the necessity of legal reform from the very beginning, in hope that a newly established or restored legal system would safeguard and further promote the economic reform.[3] As China's economic system has long been centrally planned, with the central government controlling almost every aspect of economic life through its power to allocate and reallocate resources and regulate specific economic activities through various of plans which virtually have the effect of law. The economic reform, however, seeks to change this economic model. This shift began with pragmatism as the guiding theory; but later the leadership decided that economic reform aim at establishing a "market economy with socialist characteristics."[4] At least two significant changes in the economic life should be noticed.

A. Decentralization

Since 1978, the central government has imposed less control over local government. With increasing financial independence, the local

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3. *See* DENG XIAOPING WEN XUANG [SELECTED PAPERS OF DEN XIAOPING] 3, 102-08. More precisely, Deng urged the importance of the reestablishment of the legal system by holding the theory of " two hands". According to this theory, the leadership should focus on the economic construction on the one hand while paying equal attention to the establishment of a legal system to protect and to promote the former on the other hand.

4. The 14th Congress of CCP in 1992 declared that the economic reform aims at establishing the "market economy with socialist characteristics". Before that time, China's economic reform basically embraced pragmatism and had no well-defined targets. As Deng articulated, so long as the cat can catch mouse, it does not matter whether it is a white cat or a black one, implying that pragmatism is a basic ideology for economic reformers at the earlier stage.

governments have enjoyed much more freedom and authority. The decentralization adopted as a way to promote economic potential productivity dramatically resulted in more independence of locales, has also fostered local protectionism and exasperated the "fragmentation" of the country, both economically and politically. By the beginning of the 1990s, substantial clusters of Chinese institutions had emerged, but how meaningful they might become was still lightly uncertain. The following two decades saw ambivalence over law reform that was driven in a way of "from top to bottom" and was largely treated instrumentally.[5]

B. Deregulation

The past two decades of economic reform witnessed a striking decrease in the regulation by the government over private entities and individuals first in economic life and gradually in public life. Under the market economy policy, the government has granted considerable autonomy to the "market", and promises more in the future with the advancing reform. Private parties are expected to enjoy more autonomy. What's more, as the decline of government regulation continues, interest groups in the society are likely to emerge and are expected to have more interaction with the government. They will challenge government policy and decision-making will more frequently be based on the rules justified by market economy in the administrative process.

Admittedly, the decentralization and the deregulation is of crucial importance to the economic reform towards a market economy. However, we must not believe that this is all China's economic reform means. Indeed, the "market economy with socialist characteristics" stresses macro control of government over economy. Chinese scholars generally agree that the macro control is necessary; but they also believe the government macro control should be exercised so as to guard against arbitrariness and capriciousness. As a practical matter, if the government can exercise its macro control power with no rational, fair, and accountable procedure, the substantive decentralization and deregulation will, to a large extent, be meaningless; simply because they lack procedural safeguards.[6]

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5. *See* Su Li, *ZhongguoFazhi Xiandaihua de Kunjing* [*The Dilemma of Modernization of Legal System in China*], FAXUE YANJIU [LEGAL STUDY], No. 3, 1997.

6. *See* Luo Haocai and Wang Xixin, Fazhi Guojia Zhong De Chengxu Jiangshe [The Construction of Legal Procedure in China's Rule of Law Context], *in* XINGZHENGFA LUNCHONG [CHINA ADMINISTRATIVE LAW REVIEW] 1, (1999). In this lengthy article, we argued in detail that, while the macro control of government over economy is plausible, its exercise must be governed by

C. *Social Transition*

The most striking features in Chinese society since the beginning of the economic reform is the social transition. From the perspective of sociology, the social transition has become a burning issue for Chinese scholars. It seems doubtless that law reform is closely related to the changing society in which the economic and legal reform has taken place. Yet the discussion of social transition as a background to the reform of law is far from enough as it should receive more attention from Chinese legal academics.[7]

This social transition as a background to law reform in China may have significant impact on the law reform as a whole. Indeed, it generates opportunities and strong demands for the changes to the legal system to meet new social goals. At the same time, the social transition features Chinese society with considerable contradictions that may constitute obstacles for the law reform. First, as a result of the social transition, the gap between the urban areas and the rural areas is exasperated to such a great degree that some Western observers familiar with China suggest that there are "two Chinas" - - - the urban China and the rural China.[8] Still, geographically, there are increasing gaps among different local areas, especially between the south-east coastal areas, where society is better developed economically and politically, and the less developed north-west inner areas. In short, while the Chinese legal system is supposedly uniform, different situations and local diversities in practice, termed "local characteristics" (Difang Tese), inevitably call for a legal system that can take them into consideration. Moreover, the Constitution of the P.R.C., adopted in 1982 (the Constitution) implicitly provides that while the central government shall govern the country uniformly, it should also respect and encourage "local activities and flexibility."[9] One question that seems obvious is: how can the law reform deal with the tension between

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accountable, rational and fair procedural rules aiming to protect against arbitrariness and personal will, and to safeguard private parties in the administrative process.

7. *Id.* We try to disclose contradictions caused by social transition as obstacles law reform may inevitably encounter, and analyze the particular social contexts in which those obstacles arise. In that Article, however, we could only discuss these issues in brief due to constraints on space.

8. For example, Professor Edwards, one of the leading scholars in the field of Chinese legal studies outside China, spoke with me about the gap between urban and rural society, both political, economic and cultural. Based on this assumption, he suggested that the Chinese law reformers always take the "two Chinas" as a social reality in reforming China's legal system, to which I basically agree.

9. XIANFA [CONSTITUTION], art. 5.

the uniformity of the legal system and the demands for local characteristics?

Second, law reform grounded in a radically changing society like that of China today has to face more serious dilemmas concerning the stability and predictability of law and its flexibility. As generally admitted, a legal system should maintain relative stability and be capable of providing the predictability with which individuals are able to efficiently arrange their future.[10] Indeed, law reforms in China are expected to give more predictability and certainty by maintaining the relative stability of the legal system; on the other hand, a society in transition may make established legal system deficient in meeting new social demands and, therefore, increase the likelihood of frequent change or modification. Laws in China today are amended or changed very frequently. While arguably the changes may meet new social demands resulting from the social transition, it has adversely affected the authority of law.[11] This phenomenon has also been observed by some Western scholars who are familiar with China and who have criticized it as a "short-termed" strategy in law reform.[12]

Third, the transition of Chinese society towards modernization through economic, political, ideological and cultural ways has resulted in the loss of an original social consensus, both as a practical matter and as a psychological matter. With the advances in economic reform, the individual consciousness wakes up with the rise of various "interest groups" in the society. It seems inevitable that the original community

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10. *See, e.g.*, F. A. HAYEK, THE CONSTITUTION OF LIBERTY 153-54 (1960).

11. Almost more than half of laws and regulations made after 1978, when the law reforms began, have been amended or modified for the purpose of meeting demands that have occurred during the past two decades. The Constitution of People's Republic of China has been changed four times since 1954, when the first Constitution of the New China was adopted. And the Constitution of 1982, the fourth Constitution of the PRC now still in force, has been amended twice, in 1988 and 1993 respectively, and will be amended this year for the third time (Mar. 1999). Other "basic laws", such as the criminal law, contract law, family and marriage law, civil procedure law, were all enacted after 1978 but have been changed or are to be changed in the 1990s. It is no surprise that "jihua gangbushang bianghua" is a saying in today's China, meaning that plans or schedules can not catch up with changes. By responding to this phenomenon in China's law reform context, Chinese legal scholars argue that it may endanger the public faith in the legal system and law itself. But how China can successfully deal with the problem still remains unclear. *See* Su Li, *supra* note 5, 23-30.

12. *See, e.g.*, Professor Stanley B. Lubman in his introduction to a book titled "Domestic Law Reforms in Post-Mao China". He writes that public discussion of the role of law by Chinese leaders have emphasized its instrumental use to accomplish policy goals, often very short-term, which in my view partly explains the situation caused by social transition. However, arguably the "short-term" phenomenon at the same time is also the prescription that Chinese law reformers can give in a society changing so fast. *See* DOMESTIC LAW REFORMS IN POST-MAO CHINA 4 (Pitman B. Potter ed. 1993).

consensus that was built mainly on a ground of the Party's exhortations and "collective interests" can no longer be maintained.[13] At the same time, a society seeking stability and development like China is in an even more urgent need for social consensus. However, it seems more difficult for a society like China to build its consensus as radical social change is proceeding. This social dilemma briefly discussed above may have a heavy impact on law reforms, besides others. Law, as generally acknowledged, should reflect and be embedded in social consensus in a democratic society. Yet the compelling question for Chinese law reformers is that in what way can the changing society build social consensus upon which law reforms should be based.[14]

The above factors resulting from the social transition that make law reforms in China troublesome constitute a background against which law reforms are adventuring. Being confronted with such social realities, there are scholars in China who propose legal procedure reforms as an extremely important way to resolve those dilemmas and to promote the rule of law.[15] This proposal, to a large extent, makes sense. Since 1978, when law reform began its adventure following the economic reforms, it basically has been more substantive than procedural. This, of course, is closely related to Chinese traditional values that weigh substantive values much more heavily than procedural values. For instance, the notion of "procedural justice" has never been taken seriously in Chinese legal history and, in the journey law reform has taken since 1978, it has been quite obvious that the law reform aimed at establishing a "socialist legal system" has paid much more attention to substantive law than to legal procedures, especially in the field of administrative law previous to 1989.[16] However, it is arguable that legal procedures bear more crucial significance for a legal system embedded in a changing society.

The dilemmas law reforms in China are facing demonstrate this. It will be much more difficult for law reforms to resolve these problems merely through substantive laws, because, structurally, substantive law involves norms, criteria, and the allocation of rights and duties and so

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13. We described elsewhere the social realities regarding this situation in today's China. *See supra* note 6.

14. *See id.*

15. *See, e.g.*, Ji Weidong, *Falu Chengxu De Yiyi: Dui Zhongguo Fazhi Jingshe De Lianyizhong Shikao* [*the Significance of Legal Procedure: Another Approach to the Construction of Legal System in China*], in ZHONGGUO SHEHUIKEXUE [J. OF CHINA SOCIAL SCIENCE], vol. 1, 1993.

16. *See* YING SONGNIAN, ADMINISTRATIVE LAW:THE THEORY AND THE PRACTICE OF THE CONSTRUCTION OF ADMINISTRATIVE LAW SYSTEM, Chapter 1 (1992).

forth, which directly affect the parties the law is expected to regulate. While these norms, criteria should be uniform, relatively stable, and based on consensus, the realities of China's changing society may likely make it quite difficult to attain. In contrast, legal procedures may suggest a better resolution. Procedural rules do not directly affect substantive rights and interests; therefore, they can be uniform regardless of distinctions among different economically developed areas, as well as more stable. For example, a procedural rule requiring impartiality must be acceptable regardless of the economic situation. The same is true for procedural rationality. Similarly, the impartiality, fairness, rationality and openness embodied in procedural rules are not contingent on time. Moreover, although legal procedures do not directly affect substantive rights and interests, they provide ways for individuals to communicate, to have dialogues, to comprise, and to make decisions. In sum, procedure provides a way through which people can achieve substantive goals rationally and fairly and makes social consensus-building possible.

IV. INTEGRITY OF THE LEGAL SYSTEM

A legal system absent well-developed procedures cannot work well. Unfortunately, law reforms in China have not paid enough attention to developing legal procedures that they should have deserved, at least in the field of administrative law before 1989. Historically, Chinese legal tradition and legal culture weigh highly substantive legal values but not procedural ones, and law in ancient China was basically deemed instrumental.[17] This legal tradition and legal culture still has a considerable impact on the current legal system. First, the legal system in China is more substantive than procedural. A good example is the Constitution of the P.R.C. Literally, the Constitution provides various constitutional rights, such as freedom of speech, the right to compensation, the right to protest, the right to work, and so on, which are basically similar to those provided by constitutions in Western democratic societies. But in reality, without legal procedures to safeguard these rights, they are very difficult to realize. In China, constitutional rights can not be directly

17. "Law was never perceived as a means of preserving rights, freedom, and justice, since these were completely alien concepts in ancient China. [A]ccording to traditional ideas, law was above all a tool of suppression. It was also one of countless methods of governing, which could be used and constituted at the will of the ruler." *See* Liang Zhiping, *Explicating the 'law': A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. Chinese L. 55 (1989).

realized based merely on the Constitution. Therefore, if citizens seek to realize their constitutional rights, special laws and procedural rules are needed as legal bases. In other words, the lack of legal procedure may to a large extent make substantive rights meaningless. For example, Article 41 of the Constitution provides that citizens of the P.R.C. have the right to make a complaint or charges against any state organ for a violation of law;[18] but until 1990, when the Administrative Litigation Law (ALL) came into force, citizens virtually could not realize that right.[19] The Constitution also provides that citizens who have suffered losses as a result of an infringement of their civic rights by any state organ or functionary have the right to compensation; but again this right could not be realized until 1995, when the State Compensation Law (SCL) was enacted.[20] Even under this law, the right to compensation cannot be fully realized, since citizens can not get compensation for damages caused by legislative and military authorities, simply because the SCL says nothing about legislative and military compensation and no law stipulates how to process military and legislative compensation. In Western society, as Chief Justice Frankfurt commented, "the history of liberty is largely the history of procedural safeguards."[21] More particularly, Justice William Douglas articulated that "the Bill of Rights is basically procedural. It is the procedure that spells out the difference between the rule of law and rule of whim or arbitrary will."[22] The lack of procedural safeguards protecting rights found in the current Constitution of China may, to a considerable extent, be responsible for its weakness and may partly explain why the "Chinese Constitution has no teeth."[23]

Second, even in the administrative process where legal procedures

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18. XIANFA [CONSTITUTION], art. 41.

19. This is not to say that there is no possibility for a citizen to challenge a state organ or its officials before the enactment of the ALL in 1989. As widely known, there has long been a so called "correspondence appeal system" in China, through which an unlucky citizen may complain his or her grievances to some state organs at higher levels, or to some higher officials, sometimes even CCP leaders. But as we can see, in this context, no state organ or its officials can be sued before the Court. In this means, the right to challenge government actions can not be effectively protected.

20. *See* Zhonghua Remin Gongheguo Guojia Peichang Fa [The State Compensation Law of People's Republic of China](May 12, 1994), *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF P.R.C., vol. 4, 1994 [hereinafter SCL]. The State Compensation Law of People's Republic of China, enacted on May 12, 1994 and came into force on January 1, 1995, for the first time in the PRC history provided the criteria as well as procedure for citizens to claim compensation from administrative agency and judicial organs. It is this Law that made citizen's constitutional right to state compensation enforceable.

21. *See* Mcnabb v. United States, 318 U.S. 332, 347 (1943).

22. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951).

23. *See supra* note 15.

are provided, they basically serve as an instrument to vertically control the administrative agency from top to bottom and to control private parties. They are mainly internal and are kept secret from the private parties. The notion of taking procedure instrumentally is not novel. Indeed, in every legal system, procedure may serve functionally as an apparatus to attain substantive goals, but the key problem is that, in China, if a legal procedure can not serve particular goals, the agencies may no longer follow the procedure. In theory, legal procedure has been generally defined functionally as "a supplement part of the legal system which merely serves to attain substantive goals set up by substantive laws."[24] As a practical matter, since 1949, when the P.R.C. was founded, various procedures have been established in the administrative process. But they are basically those that require agencies to solicit opinions and ask approval from higher agencies, to report cases to higher agencies, and to impose procedural control over individuals. What is worse, because most of these procedures are internal and therefore keep secret from individuals, sometimes people have actually been regulated by "secret laws".[25]

V. CHALLENGE TO GOVERNMENT LEGITIMACY

Economic and political reforms also have given rise to the problem of public legitimacy. With the waking up of individuals' rights consciousness and greater awareness of accountability of government acts, the legitimacy of government decision-making is much more likely to be challenged. Legitimacy is closely related to legality, but goes further. Legality derives from law, which itself has to be justified. Questions remain why law should be obeyed. Why should a decision made by government agencies be accepted? In democratic societies, modern political thought suggests that it is democratic procedures that justify results.[26] In proceeding towards social democratization promoted by economic reform and ideological transfer, the lack of legal procedures in

24. *See* FAXUE CHIDIAN [LAW DICTIONARY] 80 (1984).

25. Because most administrative procedural rules employed by agencies are internal, these rules are not required to be made public by law. However, when agencies enforce laws and regulations, affected parties may very likely be imposed upon procedural burdens to obey those "secret rules". For more discussion on this issue, *see* WANG XIXIN, PROCEDURAL JUSTICE AND DUE PROCESS: A STUDY OF ADMINISTRATIVE PROCEDURE IN CHINA'S RULE OF LAW CONTEXT (forthcoming Dec. 1999).

26. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE, chapter 1 (1971). *See also* J. HABERMAS, THE THEORY OF COMMUNICATION OF ACTION, vols. 1 and 2 (1984 and 1987).

the administrative process has led to increased challenges to the legitimacy of government acts and the challenges will increase even more in the future. More particularly, the lack of administrative procedure as a way to encourage public participation in the administrative process has caused the loss of public confidence in government rule-making and decision-making, resulting in a crisis of government legitimacy. This partly explains why the implementation of rules and agency decisions has become an increasingly serious problem in China's administrative context. Beginning to realize the significance of legal procedures as a way to legitimize government action, the Chinese leadership has called for a "fair, just and open" system of procedure in the administrative process.[27] Chinese scholars frequently echo this call. Many argue that the "rule of law", to a large extent, in essence means a "government under the law". To achieve this, the administrative procedure system is extremely important.[28]

The four factors that have been touched on here establish a basic background against which law reforms in China are proceeding. In this context, the call for administrative procedure reform in the legal system is not merely a matter subject to the pragmatic thinking of China's leadership, but a necessary dictate deriving from China's social reality. This means that the procedure reform - and most importantly, the administrative procedure reform - is inevitable, provided that law reform continues in general.

A. Administrative Procedure Reforms in Practice

Responding to the cry for procedure reform, law reformers in the late 1980s began to restore or establish legal procedures in the administrative process that shifted their basic purposes from emphasizing the control over the individual to that of administrative power, to promoting procedural fairness and openness, and to encouraging individual participation. But generally speaking, the journey will take time, which can be perceived by examining the administrative procedure reforms in practice.

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27. Jiang Zemin, the General Secretary of the CCP, in the 15th National Congress of the CCP urged the necessity of establishing a "fair, just, and open" procedure system in the administrative process to promote the perfection of legal system in China.

28. *See, e.g.*, Jiang Ming'an, *Xingzheng De Xiangdaihua Yu Xingzheng Chengxu Zhidu* [*The Modernization of Administrative Process and Administrative Procedure*], 55 PEKING UNIVERSITY L. J. 33-34 (1998).

1. Rule-Making Procedure

In the administrative state, the rule of law is by "rule of rules".[29] In present China, as in many other countries, regulations and rules made by administrative agencies are one main source of law. China is characterized by written law. The family of law today consists of 339 laws made by the NPC and its Standing Committee, 780 administrative regulations made by the State Council, and more than 6,300 local rules and regulations made by locales that are constitutionally authorized to enjoy law-making power.[30] These numbers demonstrate the significance of rule-making in rule of law context. Questions then arise here: how are these rules made? In what way can rules and the rule-making process attain the legality, rationality and legitimacy that are crucial to rule of law? These questions remind law reformers as well as common people of the matter of rule-making procedures.

Yet in the rule-making process, a unitary procedure that is expected to provide public participation, a consensus-building mechanism, rationality, and accountability has yet to appear. Of all the sources of formal laws in China, the administrative regulations made by the State Council are most significant, not only because of the huge quantity, but also because administrative regulations usually interpret laws that are generally too abstract to be enforced without being submitted to the NPC for consideration. Therefore they are, practically speaking, laws recreated and laws directly implemented. This means that the procedure for making administrative regulation is very important. In practice, China does have a "regulation" providing procedure for making administrative regulation; it is the Notice of Making Administrative Regulation (Xingzheng fagui Zhidiang Zangxing Banfa), which was issued by the Secretary Office of the State Council on April 21, 1987.[31] According to this Notice, administrative regulation-making shall employ the following procedural steps:

(a) Compiling a five-year legislation plan and annual legislation

29. *See* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE, chapter 1 (1985).

30. These statistics come form Mr. Zhang Chunsheng, the director of Legislative Affairs Committee of the Standing Committee of the NPC, which was delivered at a international conference on Chinese administrative law held at Shanghai on November 15th, 1998.

31. *See* Xingzheng Fagui Zhidiang Zangxing Banfa [Notice of Making Administrative Regulation] (Apr. 21, 1987), *in* GAZETTE OF THE STATE COUNCIL OF PEOPLE'S REPUBLIC OF CHINA, vol. 4, 1987.

plan

The contents of a five-year plan, usually near 1,000 pieces of legislation, are strongly influenced by the concurrent five-year economic and social development plan which is also compiled by the State Council. In this sense, the inclusions of a law on a five-year plan is no guarantee that it will be drafted. The annual plan, on the other hand, is followed much more by the Legal Affairs Bureau of the State Council. If a regulation is to be drafted and to be promulgated, usually a prerequisite is to get it on the annual plan. Beginning from the very first stage, law-making invites struggles. As a Western scholar observed, the Ministries employ various tactics to get their preferred legislation on the annual plan.[32]

(b) Drafting regulations

While the Legal Affairs Bureau of the State Council usually takes a considerable bulk of the regulation drafting work, not all administrative regulations are drafted by it. Many regulations are drafted by Ministries to which the drafted regulations are relevant. Usually, if a ministry wins a place on the agenda for its proposed draft regulation, the ministry and the Legal Affairs Bureau will establish a drafting group (qicao xiaozu). The group is led by the Bureau and will include representatives of the principal drafting ministry and of other "concerned departments" to produce an "opinion-solicitation draft" (zhengqiu yijian gao).[33]

(c) Soliciting opinions

When the draft is finished, the Legislative Affairs Bureau circulates the draft to all other closely concerned ministries or departments, and then later to other departments and provincial governments, and, in recent years, to selected legal scholars to solicit opinions on the draft. Opinions suggesting revisions are then returned to the Legislative Affairs Bureau which is to forward the comments and opinions to the drafting group, together with the Bureau's comments summarized from the solicited opinions. The drafting group will then revise the draft. This process is

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32. Murry Scot Tanner, *Organizations and Politics in China's Post-mao Law-making System*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 69 (Pitman B. Potter ed. 1993).

33. *See supra* note 31.

usually repeated several times before the Bureau submits the draft to the Standing Committee of the State Council for discussion and a vote.

(d) Coordinating competing opinions among departments and between central departments and local governments

Since regulations relate to the allocation of powers and interests among different agencies, in the drafting and opinion-soliciting process those agencies involved usually struggle to benefit more from the coming regulation. Thus, the opinions solicited from involved agencies are sharp contentions, thus making coordination necessary. In essence, the process of coordinating competing opinions is a process in which departments and local governments bargain and compromise with each other in order to maximize each party's interests, advocated by the Legal Affairs Bureau.

(e) Reviewing the revised draft and compiling an explanation and report of the draft

Before sending the draft to the standing committee of the State Council, the Legislative Affairs Bureau reviews the revised draft (cao'an) to check its legality and consistency with laws of the NPC and with existing regulations. The Bureau then explains (shuoming) the proposed draft, prepares a detailed report of the draft (shencha baogao), and offers its own final recommendation (yijian).

(f) Ratifying of the draft

The draft, together with the explanation, report, and final recommendation made by the Legal Affairs Bureau, then goes to the Standing Committee of the State Council for discussion and ratification. Usually there is a formal meeting - the executive meeting (changwu huiyi) - presided over by the Premier and attended by Vice-Premiers, State Councilors, and the Secretary General of the State Council,[34] in which an official from the Legislative Affairs Bureau and a representative of the drafting departments present the draft, the explanation, the report, and the recommendation. The Constitution does not state the procedure for the State Council to follow in passing its regulations. In practice, however, the Premier has the power to make the final decision since the

34. XIANFA [CONSTITUTION], art. 88(2).

Constitution of 1982 provides the Premier with overall responsibility for and direction over the work of the State Council.[35] And the pass of a regulation takes the form of that the Premier sign his/her name to ratify it.

(g) Publicizing of the ratified regulation

According to a notice concerning administrative regulation-making procedures issued by the State Council on May 31, 1988, all administrative regulations ratified and signed by the Premier shall be published in both the State Council Gazette (guowuyuan gongbao) and the People's Daily to make them public.

Summarized above is the procedure for administrative regulation-making. As to another huge and important source of Chinese formal law - administrative rules (xingzheng guizhang) - no unitary procedure is provided. While some ministries and local governments do have procedural requirements for rule-making, they are usually very similar to that of administrative regulation-making described above.

What can we say about the procedural requirements for rule-making in China? If in a society in which rules play such a very important role in public and private life, how should we deal with the "rule of making rules"? As China moves towards a society based on the rule of law, what rule-making procedures should be established and how? These are questions frequently asked by Chinese legal scholars today.

Obviously the current rule-making procedure is far from desirable. As has been rightly pointed out by many Chinese scholars, rule of law does not mean "ruling the country using law".[36] In my view, if the law comes from the will of the leadership without any effective mechanism to restrain potential arbitrariness, to add rationality and legitimacy, and is nevertheless backed up by coercive force, the rule of law is no different from the rule of a person. Besides, law in this sense conceptually contradicts rule of law. In a society ruled by law, the law itself needs to be legitimatized, which, in modern societies, is usually met through democratic legislative procedures. In particular, we can argue that because the rule-making process directly affects those who are concerned, it is then

35. *Id.* art. 86.

36. *See, e.g.*, Li Buyun, *Lun Yifa Zhiguo[On the Conception of Rule of Law], in* YIFA ZHIGUO JIANSHE SHEHUI ZHUYI FAZHI GUOJIA [RULING THE COUNTRY ACCORDING TO THE LAW SO AS TO ESTABLISH THE SOCIALIST RULE OF LAW],132-45 (Wang Jiafu ed., 1997).

important for them to participate in the rule-making process. And because, as a practical matter, rule-making always involves value choices, the procedure should be more democratic, representative, and accountable so that the value choices made in the process can be more rational and less arbitrary. What's more, public participation and the interactions between the government and people promotes public confidence in the government, at least social psychologically.[37]

Partly in response to criticisms of the rule-making procedures, the NPC in the early 1990s initiated the work of making Legislation Law to govern the legislative process, especially the rule-making process. The law was drafted in 1992 and 1993, and in 1993, two draft versions were produced and discussed by both the Legislative Affairs Committee of the NPC, the Legislative Affairs Bureau of the State Council and the Chinese legal community. However, the enactment of this law proves to be a struggle for legislative power among the NPC, the State Council, ministries and departments, and between the central government and local governments. There is little reason to believe that this law will be passed in the near future. Nevertheless, so long as the law reforms continue in the social context touched upon above, the development of a "rule for making rules" is a key step.

2. Procedure Reforms in Decision-Making Process

In contrast to the procedure reforms in the rule-making process, procedure reforms in the decision-making context is much more remarkable even though a systematic development of administrative procedure has yet to come without a unitary administrative act to provide general principles for agency actions.

In the development of procedural reform in decision-making context, the year 1989 should be viewed as a *coteau* due to the enactment of the Administrative Litigation Law (ALL). It is generally recognized that before 1989, the development of administrative procedure in the decision-making process, although in place more or less since 1979, has been unconscious and dispersed. Law reforms during this period had stressed

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37. A social psychological study based on empirical analyses of procedural justice reveals that participation of parties in a legal process functions as a mechanism to meet the psychological need of justice. *See* Latour, Houlden, Walker, and Thibaut, *Procedure: Transnational Perspective and Preferences*, 86 YALE L. J.258 (1976). *See also* Houlden, Latour, Walker, and Thibaut, *Preference for Models of Dispute Resolution as a Function of Process and Decision control*, 14 J. EXPERIMENTAL SOC. PSYCH. 13 (1978).

substantive law, through which the administrative authorities have enjoyed much power with few effective procedural restraints. For example, the Trademark Law of 1982, the Patent Law of 1984, and the Regulation for Public Security Punishment of 1986 - all enacted by the Standing Committee of the NPC - while granted great power to agencies in making decisions affecting private parties. Yet, virtually no procedural rules were seriously required of the agencies and no judicial remedy was provided for private parties whose rights and interests may be adversely affected by agency decisions. From the Western perspective of procedural justice, it is no wonder that a foreign observer would believe that the requirements of due process or natural justice had never been satisfied. However, since the enactment of the ALL in 1989, procedure reform in decision-making context have been advancing.

(a) Administrative Litigation Law

The Administrative Litigation Law, enacted in 1989, represents the first comprehensive act of the PRC legislation aimed at restraining government actions through judicial review. The law requires procedural legality. In the view of a Western observer, "[t]his use of law to 'govern the governors' represents a culmination of the legal reform effort by providing a framework for applying positive legal regulation to administrative actions."[38] One of the most remarkable achievements of the ALL, as noticed by many scholars, is that it establishes general principles and a procedural framework for the exercise of judicial review over the administrative action - basically those actions involving decision-making.[39] However, there is another achievement that is equally remarkable, though few scholars have noticed it; the ALL for the first time explicitly spells out legal consequences of procedural illegality. It provides that administrative actions in violation of legal procedure shall be invalid, and authorizes the courts to annul administrative actions devoid of procedural legality.[40] These two giant steps taken by the ALL demonstrates that administrative law in China is focusing on its goals of controlling administrative power

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38. Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA, *supra* note 32, at 270.

39. The ALL provides, as a principle, that the People's Court shall exercise the judicial power to review the legality of " concrete administrative action", which was defined later in the Interpretation of the ALL issued by the Supreme People's Court as basically decision-making. *See supra* note 2, arts. 2 and 5.

40. *See id.* art. 54.

and protecting individual rights from abuse of power through judicial review and procedural safeguards. In this sense, an administrative law system from the view of the West is emerging, promoted by the establishment of judicial review over administrative actions and law reformers' conscious stressing of procedural legality.[41]

The requirement of procedural legality articulated in the ALL has been reaffirmed by laws and regulations. For example, the Law of Assembly, Procession and Demonstration, enacted by the Standing Committee in 1989, provides that, in the decision-making process concerning an application for assembly, procession and demonstration, the agency (Public Security Bureau) must inform the applicants of their decision in writing two days before the date applied for. If the application is denied, the applicants must be given reasons and informed of the ways for remedy. If the agency fails to make any decision within the given time, it shall be construed as permitting the application.[42] This provision, together with other similar ones provided later in many laws and regulations, marks the growing up of procedural legality and rationality, and the emergence of the ideology of procedural justice.

(b) The Administrative Reconsideration Regulation

Echoing the call for procedural legality of the ALL, the Administrative Reconsideration Regulation (ARR), enacted by the State Council on December 24, 1990, and revised slightly on October 9, 1994, furthers the development of procedure reforms in the decision-making context in two aspects. First, the ARR explicitly states that "the administrative body for reconsideration shall, according to the law, conduct a review over the legality and appropriateness of a specific administrative act."[43] The noteworthy point in this provision is that the appropriateness of administrative acts, like its legality, is then required and

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41. Administrative law as conceived in the Anglo-American legal tradition has been defined as the law concerning the powers and procedures of administrative agencies. Judicial review over the administrative action and the procedures to govern agency action are two key factors of administrative law as understood in Western societies. *See* H. W. R. WADE, ADMINISTRATIVE LAW(6th edition), 1990, at 1-2. *See also* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATIES (St. Paul, MN: West Publishing Co., 1958), at 1.

42. *See* Zhonghua Remin Gongheguo Juhui, Yiuxing Fa [Law of Assembly, Procession and Demonstration of the PRC] (Oct. 31, 1989), *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., arts. 9-11.

43. *See* Administrative Reconsideration Regulation, *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., vol. 27 (1990) and vol. 24 (1994).

reviewable. This is very necessary, though not sufficient, because almost all laws in China relating to administrative process grant a huge room of discretion to agencies, both substantively and procedurally. Thus, the check on appropriateness at least provides a way for individuals to challenge the exercise of discretion. Logically the appropriateness of administrative acts concerns both substantive and procedural aspects.

Second, the ARR establishes a standardized procedure for administrative reconsideration. Prior to the ARR, procedures for administrative reconsideration were many and sharply different in their procedural requirements, like time limits for applying for reconsideration and requirements of reason-giving, procedural fairness and the like. Undoubtedly, the establishment of administrative reconsideration procedure marks an achievement in procedure reform and another step towards the rule of law.

(c) The State Compensation Law

The ALL provides a very narrow scope for state compensation in the administrative process and no precise procedure for determining compensation. It broadly states that individuals whose lawful rights and interests are infringed by agency acts, have the right to compensation provided that they have the right to bring a case against the agency charged.[44] The State Compensation Law (SCL), which was enacted on May 12, 1994, provides substantive stipulations as well as procedures for state compensation, including both administrative and criminal compensation.

According to the SCL, a two-step procedure is provided for administrative compensation. First, claimants must file their claims in the form of an application with the state agencies which are responsible for compensation. The agency which assumes the obligation of compensation shall accept the claim and calculate the amount of compensation according to methods laid down in Chapter 4 of the SCL.[45] Second, if the claimants are not satisfied with the decision made by the agency, they may then file a suit with the People's Court in accordance with the ALL.[46] Besides the procedure stipulated in the SCL, the Supreme People's Court issued an interpretation of the SCL concerning administrative compensation, in

44. *See* ALL, *supra* note 2, art. 67.
45. *See* SCL, *supra* note 20, arts. 12, 13.
46. *Id.*, art. 13.

which the two-step procedure is more precisely laid.[47]

(d) The Administrative Punishment Law

Administrative punishments have been a feature of the administrative process since the founding of the PRC, and with the law reforms, it has proved to be a very controversial area, one in which the relationship between the public interest and individual rights is directly implicated. In the present administrative context, an estimated 90% of laws and regulations grant the power to impose punishment, especially fines, upon individuals and legal persons. Moreover, the discretionary power to impose punishments is astonishingly great. For example, the amount of a fine imposed for a violation of the Unfair Competition law may range from 10,000 to 200,000 yuan.[48] As a matter of fact, this is a rather common example which demonstrates agencies' discretion to impose fines and other punishments. In addition, the lack of procedural constraints on the discretion of agencies adds even more problems to administrative punishment.

Against this background, the Administrative Punishment Law (APL) admittedly lays much stress on restraining the power to impose administrative punishments by providing substantive and procedural rules.[49] From the perspective of procedure reform, remarkable efforts are made in this law to attain procedural fairness.

The APL made its most remarkable effort toward attaining procedural fairness by introducing a hearing procedure into the process of imposing a punishment. Under the APL, before making an administrative punishment decision for the suspension of production or a business operation, revocation of certificates or business licences, imposition of relatively large fines or other administrative punishments, agencies shall notify the parties concerned of their right to a public hearing. If the parties concerned ask for a public hearing, the agencies shall organize one. The parties concerned shall not bear the expense of public hearings organized

47. *See* Zhuigao Renmin Fayuan Guangyu Xingzheng Peichang Ruogan Wengti De Guidian [The Interpretation of the Supreme People's Court on Administrative Compensation], *in* GAZETTE OF THE SUPREME PEOPLE'S COURT, vol. 5 (1997).

48. Anti-Trust Law of the PRC, article 22,23,24,25,26,and 27. The law was enacted on September 2, 1993 by the Standing Committee of the NPC. *See* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., vol 5, 1993.

49. *See* Wang Xixin, *Xingzheng Chufa Fa de Lifa jingshen Jieshi [Understanding the Core Essence of the Administrative Punishment Law]*, *in* J. OF SOUTH CENTRAL UNIV. OF POL. SCI. AND L., vol. 6, 1996.

by the agencies. Detailed procedural steps are provided for the proceeding of a public hearing:[50]

(1) If a public hearing is requested by the parties concerned, the request shall be submitted within three days after the parties concerned are notified by the agency in charge;

(2) The administrative agency shall notify the parties concerned of the time and the place of the hearing, seven days before it is held;

(3) With the exception of cases involving state secrets, business secrets or individual privacy, hearings shall be held in public;

(4) Public hearings are to be presided over by a person appointed by the agency in charge, who must not be the one involved in the investigation of the case in question. If the parties believe that the person presiding over the hearing is unqualified, they have the right to ask the person to withdraw;

(5) The parties have the right to counsel at the hearing;

(6) The disclosure of evidence and cross-examination are required at the hearing;

(7) A record must by made based on the hearing, which shall be checked by the parties and signed by them.

These provisions for a hearing in the punishment-imposing process seem quite similar to those of trial-type hearings in the administrative adjudication process in the U.S. However, here at least, two factors inevitably limit the function of the hearing. One is that the hearing procedure does not apply to imposition of a punishment that deprives a citizen of his liberty, like detention. In such a case, the person subjected to the punishment should be provided with more procedural safeguards. The other is that the APL does not say clearly that agencies must make their decision solely on the record made through the hearing. Thus, it is questionable whether the hearing is meaningful as a practical matter.

3. The efforts to attain procedural fairness.

In addition to the provisions for hearing procedures, the APL makes other efforts aims at attaining procedural justice and fairness. The APL provides simple, and general procedures to be employed in different

50. *See* Zhonghua Remin Gongheguo Xingzheng Chufa Fa [Administrative Punishment law of the PRC] (Mar. 17, 1996), *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., vol. 3, 1996, art. 42. [hereinafter APL].

cases.[51] A summarized analysis will be helpful in understanding what the law tries to attain.

(a) Procedural impartiality

The APL requires a decision-maker to be impartial. If the decision-maker is alleged to be biased, he or she may be disqualified. The bias may derive form a direct interest in the case in question or from a personal relationship between the decision-maker and parties involved. For example, the law gives the parties in the hearing have the right to ask for the withdraw of the presiding person who is allegedly biased.[52] Another example is that the person who was in charge of the investigation of the case must not be the person who presides the hearing or who makes the decision.[53]

(b) Commingling of functions eliminated

The APL also makes an effort at eliminating elements that might destroy the independence of the decision-maker by separating the function of investigation or prosecuting from that of decision-making. This effort is closely related to that of attaining impartiality, but differs in that the separation of functions also introduces a mechanism of checks among the different functions. It may also avoid prejudgement. The law requires the separation of functions by stating that the investigator in a case must not be the decision-maker, and that the administrative agency that decides on a fine must not be the collector of the fine imposed.[54]

(c) Procedural rationality

In the decision-making process, a statement of facts and reasons supporting the decision serve as the grounds for decision. The requirement of reason-giving is necessary for attaining procedural rationality.[55] The APL makes considerable efforts to promote the procedural rationality by

51. *See* APL, *id.*, arts 33-34, 35-40.
52. *Id.*, art. 42(4).
53. *Id.*, arts. 38, 42(4).
54. *Id.*, art. 46.
55. A statement of reasons, including a conclusion of law, is perhaps the most important aspect of the principle of giving reasons and findings. *See* MICHAEL D. BAYLES, PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS 75.

requiring that before agencies make the decision of imposing an administrative punishment, they must inform the affected parties of the facts, reasons, and grounds upon which the decisions are made. If the agencies fail to perform the duty of reason-giving, the decisions are invalid.[56]

(d) Procedural safeguard

The efforts mentioned above, while imposing procedural restraints on the agencies, also serve as apparatuses to safeguard individuals involved in the decision-making process. Indeed, the APL also provides other procedural rights to individuals. Besides the right to be heard, one of the most significant procedural rights granted in this law is the right to resist. That is, if the agency makes a decision without following the required procedures, the affected party has the right to deny the legality of the decision and to refuse to perform duties imposed upon the decision.[57] The right to resist as a procedural right will heavily impact the development of procedural legality.[58]

4. The Administrative Supervision Law

Internal supervision from top to bottom is one of the most striking characteristics of the Chinese administrative system. Administrative supervision as a legal practice has a long history since the founding of the P.R.C., and is embedded in a long-going legal tradition. In theory, administrative supervision and its decisions, usually concerning the punishment imposed upon officials or the staffs of administrative agencies, are deemed "internal administrative acts" (neibu xingzheng xingwei) which are not subject to judicial review under the ALL.[59] Therefore, procedures for administrative supervision is quite crucial to those on whom punishment may be imposed.

Under the new Administrative Supervision Law (ASL), adopted by the Standing Committee of the NPC on May 9, 1997, supervisory organs enjoy considerable power, including that of conducting inspections, investigations, prosecutions, and the imposition of punishments on those

56. *See* APL, *supra* note 50, art. 41.
57. *Id.*, art. 49.
58. *See* Wang Xixin, *supra* note 49.
59. *See* ALL, *supra* note 2, art. 12(3).

who are supervised. In contrast, the procedural safeguards provided to the supervised are relatively insufficient. No hearing is required before making a decision on the imposition of punishment. No judicial remedy is available to challenge the decision.

Nevertheless, the ASL still exhibits its tentative efforts to establish an internal supervisory procedure system in many respects. To assure fairness, the law requires supervisory personnel to avoid handling cases in which they have interests or their relatives have interests;[60] when conducting an investigation or an inspection, agencies must hear opinions from the inspected or investigated;[61] and, if there is an infringement upon or damage to the lawful rights and interests of citizens, legal persons, or other organizations as a result of the illegal exercise of power by the supervisory organ or its personnel, state compensation shall be paid.[62] The law sets up systematic procedures for supervision, including: (a) procedures for conducting inspections and investigations;[63] (b) procedures for setting up a case or for withdrawing from a case;[64] (c) procedures for making decisions;[65] (d) time limits for determining a case;[66] (e) procedures for applying remedies;[67] and (f) procedures for implementing decisions.[68]

VI. RULE OF LAW AND ADMINISTRATIVE PROCEDURE REFORMS IN THE FUTURE: TOWARD A PROCEDURAL REVOLUTIONARY ERA?

The brief descriptions of administrative procedure reforms in the administrative context reveal a noteworthy trend of law reforms in China, that is, to systematize legal procedures so as to integrate the legal system and to give procedural justice its due. That phenomenon, however, is not accidental. Quite the contrary, as analyzed above, it is a trend of law reforms deriving form the very requirement of rule of law and Chinese society that is in a radical transition.

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60. *See* Zhonghua Remin Gongheguo Xingzheng Jiandu Fa [Administrative Supervision Law of the PRC] (May 9, 1997), *in* GAZETTE OF THE STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., vol. 3, 1997, art. 14, [hereinafter ASL].

61. *Id.*, art. 33.

62. *Id.*, art. 47.

63. *Id.*, arts. 29, 30.

64. *Id.*, arts. 31, 32.

65. *Id.*, art. 34.

66. *Id.*, arts. 36, 37, 39, 42.

67. *Id.*, articles 39, 40, 41, 42.

68. *Id.*, arts 24, 25.

To analyze the procedure reforms prospectively, it would be helpful to consider two more efforts that law reformers in China are making now to promote procedure reform, that is, the makings of the Administrative Licensing Law and Administrative Procedure Act (APA).[69]

A. The Making of a Unitary Administrative Licensing Law.

The drafting work for the Administrative Licensing Law was initiated in 1996, soon after the enactment of the APL. Chinese scholars argued that administrative licensing, like administrative punishments, is one area in which a unitary law is extremely necessary. In response, the Legal Affairs Committee of the NPC, in consultation with the China Administrative Legislation Research Group (CALRG), decided to draft the Administrative Licensing Law. As of November, 1998, the law was in its "opinion-soliciting draft" and hopefully will be proposed to the NPC for discussion and voted on in March 1999.[70]

The draft Administrative Licensing Law reinforces the efforts of pursuing procedural legality, rationality and procedural fairness. Hearing procedures are reaffirmed. Various efforts are made in this law to restrain administrative power and discretion in issuing licenses and to safeguard individuals' rights. The most significant one is the law's prohibition of *ex parte* communication in the decision-making process to assure procedural fairness and rationality. From the standpoint of procedural justice, the objection to *ex parte* communication will provide a safeguard of the rights to be heard and in pursuing the independence and impartiality of the decision-maker.[71] In addition, the prohibition of *ex parte* communication can be more effective in curbing the abuse and the corruption of power, which are severe social and legal problems plaguing the country.

B. The Making of a General Administrative Procedure Act (APA)

There seems to be disagreement among Chinese scholars and officials as to such questions as when the APA should be made and on what the APA should focus. The Legislative Affairs Committee of the

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69. *See* Zhang Chunsheng, *The Development and Prospect of the Administrative Procedure Law in China.* (Report delivered in the International Symposium of Administrative Procedure law and the 3rd East Asia Administrative Law).

70. The CALRG provides academic assistance to the Legal Affairs Committee of the NPC in drafting the ALL, APL, ARR and many other legislation.

71. *See supra* note 55, at 35-37.

NPC appears to have embraced the proposal that, instead of direct approach, two steps should be taken in making the APA.[72]

The first step in developing the administrative procedure system in the future is to establish laws providing legal procedures as well as substantive rules to govern areas where individuals' rights are intricately involved and agency power is enormous. At this stage, four remarkable laws are currently being drafted: the Administrative Licensing Law, the Administrative Fee-Collection Law, the Administrative Reconsideration Law, being drafted to replace the present ARR, and the Administrative Compulsory Enforcement Law.[73] The Administrative Reconsideration Law has been submitted to the Standing Committee of the NPC for discussion and is expected to be adopted soon. The draft of the Administrative Licensing Law is currently under intensive discussion among scholars and agencies and will be submitted to the NPC for further discussion and a vote, hopefully in early next year. As to the Administrative Fee-Collection Law, law reformers prefer the State Council to first issue a regulation regulating the area and then have the PC enact it into law after a period of experimental practices. The Administrative Compulsory Enforcement Law is now under intense study. In sum, China hopes to enact or issue the four laws within the coming five years.[74]

Based on the achievements of this first step, China plans to promulgate a General Administrative Procedure Act by the year 2010 as the second step in the development of an administrative system.[75] The APA, then, will systematize procedures provided in the various laws governing different administrative processes by stipulating general principles of administrative procedure, such as procedural legality, impartiality, rationality, fairness, and transparency, and by providing general procedural rules and institutions for rule-making and decision-making processes. In drafting the APA, of which there have been intensive studies, debates lie in issues such as how to deal with the tension between administrative efficiency and fairness; what procedural rights should be granted to individuals to protect against arbitrariness and abuse of power; and what particular procedural mechanism should be employed to pursue administrative efficiency and fairness.

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72. *See* Zhang Chunsheng, *supra* note 69.
73. *Id.*
74. *Id.*
75. *Id.*

C. *Conclusion: The Emerging Procedural Revolution*

The future administrative procedure reforms described herein, together with the procedure reforms in other contexts, like those in the criminal, civil procedure and policy-making contexts, marks an emerging procedural revolution. However, one question remains as to whether this procedural revolution would succeed. A short and optimistic answer is "yes". Undoubtedly, the procedural reforms, like any other reform, will encounter obstacles, both economic and political. Seeking to promote fair administration, they could be especially troublesome for the executive branch which appears to be unwilling to relinquish its privileges and power. To some extent, the difficulties encountered in the current judicial procedure reform, which also tries to obtain judicial independence from the Party and the government, may be a good example. Nonetheless, the future seems encouraging. Foremost, as analyzed above, the need for procedural reforms comes from the present Chinese society. As pointed by one Western scholar, the CCP and the government cannot refuse or ignore the social reality and its urges.[76] Moreover, procedure reform, as I suggested above, may serve as an alternative way for China to go toward the rule of law in a gradual and spontaneous manner in what is a radically changing society. Thus there are reasons to believe that the CCP and the government will prefer procedural reforms to substantive ones, even though it may be with hesitation. In the long run, assuming that the economic and legal reforms will continue their journey, this may be a very modest source of optimism.

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76. *See* Stanley B. Lubman, *supra* note 12, at 5.