THE DAWN OF THE DUE PROCESS PRINCIPLE IN CHINA

HAIBO HE*

* The author holds a Ph.D. in Law and is an associate professor at Tsinghua University Law School and a visiting scholar at the China Law Center of Yale Law School. E-mail: hehaibo@tsinghua.edu.cn. The writing of this paper began in 1999 and was in large part completed at the Yale China Law Center during the 2007-2008 academic year. In researching this article, the author interviewed over ten judges. Guan Jun, a graduate student at Tsinghua University Law School, assisted the author in the statistical analysis of all the administrative law cases in *Selections from People's Court Cases*. Thomas Kellogg, Jeffrey Prescott, Paul Gewirtz, and Cheng Jinhua from Yale Law School read the first draft and provided suggestions for its revision. The author has given talks based on this draft at the Harvard Law School East Asian Legal Studies Program, Columbia Law School Center for Chinese Legal Studies and Yale Law School China Law Center, and received many insightful comments during those presentations. Fan Kai meticulously translated the paper from Chinese to English. Thomas Kellogg extensively edited the English translation. The author would like to express his gratitude to the Yale Law School China Law Center for its assistance with this project, administrative judges for their information and opinions, and the reviewers and commentators for their suggestions, as well as Fan Kai and Thomas Kellogg for their excellent work on this translation. The author himself is responsible for all mistakes in the original and its translation.

When laws, regulations, and rules do not provide clear process requirements for administrative organs, can the judiciary apply the due process principle in reviewing the legality of administrative acts? If so, how does the judiciary apply such a principle? Answers to these two questions directly reflect the judiciary's actual functions in contemporary China. By statistically analyzing the legal bases invoked in the administrative rulings in *Selections from People's Court Cases* and presenting more than ten representative cases concerning administrative process, as well as interviews with judges, this article reviews the development of the due process principle in Chinese judicial practice. In China, over a period of more than ten years, "violation of statutory process" has become a crucial basis for the judicial review of administrative acts; judicial awareness of and confidence in the due process principle's application have also been strengthened. Despite its limited power, the Chinese judiciary has demonstrated its activist stance and capacity to uphold justice and developing law. The judicial conception of due process has been jointly shaped by various extra-statutory factors, such as introduction and advocacy by scholars, standard legislation, legal precedents, and the government's emphasis on law-based administration. These factors have enhanced the legitimacy of judges' application of the due process principle in rulings as well. However, due to a lack of judicial authority and respect for legal precedents, the judiciary's innovations in individual cases cannot yet yield a nationwide impact. Nonetheless, innovative rulings may produce ripple effects on similar cases in the future. This suggests that legal development in contemporary China occurs many ways, some of which have yet to be fully appreciated or explored.

I. INTRODUCTION

In 1951, on the eve of a legal transformation in Britain, William Wade, then a young public law scholar, published "The Twilight of Natural Justice?" in which he expressed a deep concern over British courts' apparent retreat from judicial review over administrative process. [1] Wade's fears were short-lived and, interestingly, the transformation that completely reshaped judicial review in Britain over the following years was very much marked by the revival of the

[1] William Wade, *The Twilight of Natural Justice?*, 67 L. Q. REV. 103 (1951).

principle of procedural justice.[2] A few years later, the Supreme Court of the United States launched its due process revolution, which not only expanded the scope of application of the principle of due process, but also promoted the overall development of administrative law,[3] although more recently, as the Supreme Court has tacked rightward, some of these developments have been undone.[4] In Germany and Japan, both part of the continental law tradition, administrative process has also become an increasingly important part of administrative law.[5] The common theme of these stories is that due process is both a key aspect of legal development and in itself a good barometer of legal progress.

Today, in China, a quite different legal context, we are about to witness the growth of the principle of due process. Among various rulings that involve due process, one made by the High Court of Jiangsu Province is especially noteworthy. It states that, "[w]hile the *Administrative Review Law* does not explicitly stipulate the notification of a third party by an administrative review organ to participate in a review, based on the requirement of *due process*, the administrative organ should consider the opinion of the interested person while making an administrative decision that is likely to be disadvantageous to such person."[6] Against the dynamic background of China's legal development, this small step is noteworthy as an example of a Chinese court openly invoking the due process principle without relying on statute. This ruling both demonstrates the recognition of the due process principle in Chinese legal process and suggests the court's activist stance on due process and the development of administrative law.

It has been widely recognized that the Chinese legal tradition has generally not emphasized due process, and that, for the most part, procedural norms were absent from Chinese law. During the Qing Dynasty and the early Republican period, when modern administrative

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[2] Ridge *v.* Baldwin [1964] AC 40. For a survey of the decline and rise of the natural justice principle in Britain, please refer to 何海波，英国行政法上的听证 [He Haibo, Hearings in British Administrative Law], 中国法学 [*China Legal Science*], No. 4, (2006).

[3] *See* Goldberg *v.* Kelly, 397 U.S. 254 (1970).

[4] Richard Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996).

[5] For a discussion of the Japanese case, *see* 朱芒，论行政程序正当化的法根据:日本行政程序法的发展及其启示, [Zhu Mang, A Discourse on the Legal Basis for Rationalization of Administrative Process: the Development of Japanese Administrative Procedural Law and Its Lessons], 外国法译评 [*CASS Journal of Foreign Law*], No. 1, (1997).

[6] 江苏省高级人民人民法院行政判决书 [*Administrative Judgment of the High Court of Jiangsu Province*], 2004 苏行终字第 110 号 [Su Xing Zhong No.110, (2004)]. The passage here is cited from 最高人民法院公报 [*Gazette of the Supreme People's Court*] [SUP. PEOPLE'S CT. GAZ.], No.3, (2005).

law was first transplanted to China, the principle of due process was generally not included.[7] The concept also received scant attention from the government of the newly founded People's Republic in the first decades after 1949. China's legal academic community remained almost completely unacquainted with the idea of due process until the early 1980s, when the study of administrative law resumed after the Cultural Revolution.[8] Most administrative law scholars were not exposed to the concepts of "natural justice" or "due process" in Anglo-American law until they were introduced to them by two senior scholars with foreign educational backgrounds, Professor Gong Xiangrui of Peking University and Professor Wang Mingyang at China University of Political Science and Law.[9] Only in recent years has due process become a more familiar concept in Chinese legal academia; this growing understanding has led to increased calls from scholars for full integration of the due process principle into the legal system.

On the legislative front, due process concerns were completely absent from the body of law that emerged in the early 1980s. The legislative cupboard was so bare that it was considered a remarkable breakthrough when Article 34 of the *Public Security Administrative Penalty Law* of 1986, issued by the Standing Committee of the People's Congress, required that administrative penal process involve four procedures: summons, interrogation, evidence collection, and issuance of a ruling.[10] Progress was significant after that initial breakthrough. Under the *Administrative Litigation Law* of 1989, administrative acts

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[7] For the intellectual background of Chinese Administrative Jurisprudence, *see* 何海波, 中国行政法学的外国法渊源 [He Haibo, *The Foreign Sources of Administrative Law Scholarship in China*], 比较法研究 [J. COMP. L.], No.6, (2007).

[8] For instance, in legal dictionaries, legal process only pertained to litigation process. According to 中国大百科全书 • 法学 [*Encyclopedia of China – Jurisprudence*] 80 (Encyclopedia Press 1984), "Laws that regulate the execution of the substantive laws related to litigation methods are procedural laws, also known as litigation laws;" according to 法学词典 [*The Legal Dictionary*] 914 (Shanghai Dictionary Press 1984), procedural laws are "laws that establish litigation process so as to ensure the actualization of the right-obligation relations prescribed by substantive laws." The entry for "administrative process" is absent in both authoritative dictionaries. Another instance, in the first textbook on administrative law, the term "administrative process" was nowhere to be found. 王岷灿, 行政法概要 [Wang Mincan, *Overview of Administrative Law*], (The Law Press 1983).

[9] 龚祥瑞, 比较宪法与行政法 [Gong Xiangrui, *Comparative Constitutional Law and Administrative Law*], (The Law Press 1985); 王名扬, 英国行政法 [Wang Mingyang, *British Administrative Law*], (China University of Political Science and Law Press 1987).

[10] 治安管理处罚条例 [*Public Security Administrative Penalty Law*], (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1986, effective Jan. 1, 1987) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

which violated legally mandated process were considered invalid;[11] the *Administrative Penalty Law* of 1996 and the *Administrative Licensing Law* of 2003 put forward more comprehensive process requirements, including notification, defense, and hearing.[12] In the *Outline of Comprehensive Promotion of Law-Based Governance*, issued by the State Council in 2004, "due process" was listed as among the basic conditions for achieving law-based governance.[13] Meanwhile, scholars have been proposing an Administrative Procedure Law to systematically regulate all administrative process. In fact, some local governments have tried to test it at the local level.[14] Against this backdrop, the above-mentioned ruling by the High Court of Jiangsu Province demonstrates that the administrative reform process is beginning to generate more respect for the due process principle.

Within the power structure in China, however, the emergence of due process norms does not mean that courts will be able to immediately

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[11] 行政诉讼法 [*Administrative Litigation Law*], (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

[12] 行政处罚法 [*Administrative Penalty Law*], (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.); 行政许可法 [*Administrative Licensing Law*] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

[13] *See* Article 5 Item 3 of 全面推进依法行政实施纲要 [*The Outline of Comprehensive Promotion of Law-Based Governance*], (promulgated by the St. Council, Mar. 22, 2004) ST. COUNCIL GAZ. (P.R.C.). *The Outline* further states, "When an administrative organ exercises administrative regulation, the organ should be open and should pay attention to the opinions of individuals, legal persons, and other organizations; the organ should strictly follow statutory process and should, according to the law, protect the rights to information, participation, and aid of the person concerned in administrative regulation. If a conflict of interests emerges because of the relationship between the administrative organ's official who exercises duties and the person concerned in administrative regulation, the administrative official should avoid involvement in the case." In addition, Article 20 of *The Outline* requires an administrative organ to "strictly follow statutory process while exercising power and performing duties," as, before an administrative organ makes an administrative decision that is disadvantageous to the person concerned in administrative regulation or the interested person, the organ should notify the person concerned in administrative regulation or the interested person and should provide the opportunity to make statements and defense; After the decision is made, the organ should inform the person concerned in administrative regulation that, according to the law, such person enjoys rights to apply for an administrative review or to launch an administrative litigation. In major cases, when the person concerned in administrative regulation or the interested person demand a hearing, the administrative organ should organize a hearing. When the administrative organ exercises its power of independent discretion, the organ should state its reasons in the administrative decision.

[14] The People's Government of Hunan Province, with the assistance from the academy, took the initiative to make the first-in-the-nation comprehensive 湖南省行政程序规定 [*Administrative Procedure Rules of Hunan Province*] (promulgated by Hunan Prov. People's Gov., Apr. 9, 2008, effective Oct. 1, 2008) HUNAN PEOPLE'S GOV. GAZ. (P.R.C.).

and autonomously apply these norms to administrative litigation decisions. According to the orthodox view, the legality of an administrative act depends solely on relevant laws and regulations and the function of the court system is to correctly examine administrative acts based on relevant laws and regulations. Whether legal institutions, including procedural institutions, are themselves flawless or not should not be of the court's concern. The judicial review standard, "violations of statutory process," established by Article 54 of the *Administrative Litigation Law* of 1989, has been widely interpreted as a violation of a process that is explicitly stipulated by laws, rules or regulations.[15] Mainstream scholars also believe that any act that does not contradict the explicit provisions of the above-mentioned legislation belongs to the sphere of administrative discretion and cannot constitute a violation of statutory process.[16] Based on this view, the review of legality in administrative process is generally constrained by existing legal provisions. In general, reformers seeking to improve the administrative process place their hopes not in the courts, but instead in the legislative process. Although some scholars have advocated in favor of allowing courts to directly apply the due process principle to cases,[17] this view – at present at least – appears to lack sufficient status within the legal community as a whole, especially when compared with the orthodox position. To most Chinese judges and even some scholars, in the absence of specific laws and regulations, a Chinese court cannot base a

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[15] *Administrative Litigation Law*, *supra* note 11, Art. 54 §2 cl. 3.

[16] *See* 行政诉讼法学，罗豪才、应松年主编 [*Administrative Litigation Law*, Luo Haocai & Ying Songnian eds.] 247-248 (China University of Political Science and Law Press 1990); 中国司法审查制度，罗豪才主编 [*Judicial Review in China*, Luo Haocai ed.] 373-385 (Peking University Press 1993); 行政诉讼法学，应松年主编 [*Administrative Litigation Law*, Ying Songnian ed.] 257 (China University of Political Science and Law Press 1994); 姜明安，行政诉讼法学 [Jiang Ming'an, *Administrative Litigation Law*] 202-203 (Peking University Press 1998); 章剑生，论行政程序违法及其司法审查 [Zhang Jiansheng, *Illegal Administrative Process and Its Judicial Review*], 行政法学研究 [ADMIN. L. REV.], No.1, (1996) (Administrative process that violates stipulations in laws, regulations, and rules constitutes violation of statutory process, so it constitutes violation of law; Violation of autonomous administrative process does not constitute violation of law). Luo, Ying, Jiang, *et al*, believe that such an act does not constitute a procedural violation of law, but it may be regarded as abuse of official power.

[17] For instance, *see* 杨海坤、章志远，中国行政法学基本理论研究 [Yang Haikun & Zhang Zhiyuan, *A Basic Theoretical Inquiry of Chinese Administrative Law*] Ch.4-5, (Peking University Press 2004); 当代中国行政法，应松年 [*Contemporary Chinese Administrative Law*, Ying Songnian ed.], Ch.2-3 (China Fangzheng Press 2005); 论公法院则，胡建淼主编 [*Principles of Public Law*, Hu Jianmiao ed.], (Zhejiang University Press 2005); 周佑勇，行政法基本原则研究 [Zhou Youyong, *Basic Principles in Administrative Law*], (Wuhan University Press 2005).

decision on the due process principle alone. To them, this is an approach found only in Anglo-American law.[18] Some Chinese scholars have attempted to find a basis in positive law for judicial use of the due process principle, engaging in close textual analysis of existing statutes and even the *Constitution*.[19] However, this very effort only reveals these scholars' concern for the legitimacy of the due process principle, for it implies that the due process principle has yet to become a fully independent legal principle. As of this writing, the legality of judicial review of administrative acts based on the due process principle remains a question that obsesses both academics and legal practitioners.

Given this legal context, the application of the due process principle in administrative litigation provides a venue through which the pragmatic attitude and *de facto* function of Chinese courts can be studied. Generally, Chinese courts are crippled by their limited power, insufficient authority, and low level of public credibility, so much so that administrative litigation lawsuits are commonly regarded as surviving in the breach (for the courts) or as uphill battles (for the plaintiffs), or, to use a Chinese idiom, attempts to crush stones with eggs.[20] However, as a consequence of legal reform, there has been

[18] As in Liu Yanwen's case, the counsel of the defendant, Peking University, responded to the demand for due process in the court, "due process principle does not have sufficient legal basis yet. Thus, while it is a legitimate topic for theoretical discussion, the court should rule based on law."

[19] According to some scholars' understanding, due process principle can be deduced from statutes. As of the statutes to be invoked, different scholars have different opinions. Judge Gan Wen posits, under the current conditions in legislation, interpretation of "statutory process" in Administrative Litigation Law should be expanded to accommodate administrative process that is consistent with the intent of principles of the Law. In accordance, violation of due process principle is also "violation of statutory process." *See* 甘文，WTO与司法审查的标准 [Gan Wen, *WTO and Standards in Judicial Investigation*], 法学研究 [CASS J.L.], No. 4, (2001). On the other hand, according to Professor Zhu Xinli, "abuse of power" in Article 54 of *Administrative Litigation Law* includes abuse of the power of discretion in process; when an organ enjoys the power of discretion in the area of process, invalid process (including omissions of necessary procedures) would constitute procedural violation of law. *See* 朱新力，行政滥用职权新定义 [Zhu Xinli, *New Definitions of Abuse of Administrative Power*], 法学研究 [CASS J.L.], No. 3, (1994). A few scholars have even tried to find basis for due process from the *Constitution*. According to Professor Zhang Jiansheng, although the current *Constitution* of China does not directly provide normative basis for administrative process, we can justify it by invoking the expressions of "citizens' participation" and "law-based state." *See* 章剑生，论行政程序正当性的宪法规范基础：以规范实证分析为视角 [Zhang Jiansheng, *The Constitutional Basis for Legitimacy of Administrative Process*], 法学论坛 [LEGAL F.], No. 4, (2005).

[20] 法治的理想与现实：《中华人民共和国行政诉讼法》 实施与发展方向 调查研究报告，龚祥瑞主编 [*Ideal and Reality of Rule of Law: Report on the Actual Implementation and Future Development of Administrative Litigation Law of the People's Republic of China*, Gong Xiangrui ed.], (China University of Political Science and Law Press 1993); 何海波，行

significant progress in the development of relevant institutions, at least on the technical level.[21] In addition, courts have established a degree of authority through their experience in adjudicating administrative litigation lawsuits over the past two decades.[22] As the due process principle is being applied in some cases, important questions emerge: How much initiative do courts enjoy in administrative litigation? How much impact does such initiative have on such endeavors as achieving justice in individual cases and promoting legal development?

This paper aims to depict the development of the due process principle in legal practice by reviewing relevant judicial decisions in administrative cases, combined with interviews with judges. In this process, Chinese courts, despite severe limitations on their power, have displayed creative activism and innovative initiative in defending justice and developing the legal system. The impulse for judicial initiative demonstrated by these cases suggests a new path for legal development in China and may also introduce new tension to questions surrounding the legality of judicial decisions.

This paper discusses the due process principle from the pragmatic rather than the normative perspective. In China, many scholars working on the due process principle and other legal principles devoted themselves to introducing foreign laws or arguing for certain legislative reforms. Few have examined the question of how Chinese courts use and push forward the development of legal principles; even less frequently has it been subject to scholarly scrutiny.[23] Besides the fact that this approach is unusual in Chinese academia, another reason for the deficiency is the scarcity of relevant cases. The discussion here is also insufficient for illustrating the development of the law. Fortunately, extant cases involving due process constitute a

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政诉讼撤诉考 [He Haibo, *A Survey of Withdrawals in Administrative Litigation*], 中外法学 [PEKING U. L.J.], No. 2, (2001); Kevin O'Brien & Li Lianjiang, *Suing the Local State: Administrative Litigation in Rural China*, in *Engaging the Law in China: State, Society and Possibilities for Justice*, (Neil Diamant, Stanley Lubman & Kevin O'Brien eds., Stanford University Press, 2005).

[21] Randall Peerenboom, *China's Long March Toward Rule of Law*, 298-343, 420-450 (2002); Benjamin Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620 (2007).

[22] 何海波, 行政诉讼受案范围：一页司法权的实践史 [He Haibo, *The Scope of Accepted Cases in Administrative Litigation: A Short History of Judicial Review in China*], 北大法律评论 [PEKING U. L. REV.], Vol. 4, No. 2, (2002).

[23] For a review of the limited discussion thus far on this topic, *see* Thomas Kellogg, *Courageous Explorers: Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141 (2007); 管君, 法槌下的正当程序原则 [Guan Jun, *Due Process Principle under the Court Hammer*], 行政法学研究 [ADMIN. L. REV.], No. 3, (2007).

discontinuous, yet sensible, line and present a good vantage point for legal development.

This survey is generally chronological, using cited cases mainly from the *Gazette of the Supreme People's Court* and *Selections from People's Court Cases*.[24] There are also cases in which the author was personally involved, cases retrieved from the internet, and cases recommended by certain judges. These cases are not necessarily representative of the ordinary dynamics of administrative litigation in China, but they nonetheless help illustrate progress in judicial application of the due process principle. The author suggests weighing the process from these aspects: 1) whether the court applies the due process principle in the absence of explicit statutory provisions and frankly admits its absence; 2) how much weight the court has given to the procedural reason, i.e., is it used as an appended reason, a major reason or the sole reason to invalidate an administrative action? 3) Does the court use it merely to deal with an individual case, or attempt to apply the principle in all such cases?

II. STATUTORY PROCESS AND EARLY APPLICATIONS OF THE DUE PROCESS CONCEPT

Before exploring judicial application of the due process principle, it will be useful to investigate the application of statutory process in practice. In China's administrative litigation, the specific provision of "statutory process" came before the general principle of due process. The requirement of due process grows out of the application of statutory process requirements, and this provision also provides one important pillar of legitimate support for the development of the due process principle.

The *Administrative Litigation Law* of 1989 includes an unprecedented clause that the court can invalidate a specific administrative act that constitutes a "violation of statutory process," i.e., that violates legally mandated procedural requirements.[25] This clause remains in effect to this day, yet few have studied its application by courts. This section begins with a statistical analysis of the legal basis for rulings in *Selections from People's Court Cases,* in which

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[24] 最高人民法院公报 [SUP. PEOPLE'S CT. GAZ.], officially administered by the Supreme Court to publish judicial interpretations, notices, as well as other documents. 人民法院案例选 [*Selections from People's Court Cases*] , 最 高人民法院中国应用法学研究所 [Edited by the Supreme People's Court Center for Legal Research and Application].

[25] *Administrative Litigation Law*, *supra* note 11, art. 54 §2 cl. 3.

administrative acts were invalidated, aiming to demonstrate the weight of the "violation-of-statutory-process" clause in judicial practice followed by studies of several representative cases illustrating the progress and limitations of "statutory process" in judicial practice.

Selections from People's Court Cases, edited by the Supreme People's Court's Center for Applied Legal Research, constitutes a valuable resource for the statistical study of administrative rulings by the Chinese judiciary. It consists of "major cases, crucial cases, controversial cases, and representative cases that reflect new challenges" (cited from the editors' preamble) selected by judges from around the country. Although such a sample is not sufficiently representative of the ordinary dynamics of civil rights protection by the judiciary,[26] there is no evident sampling bias with regard to the issue under discussion here – the bases of judicial rulings. When judges select cases for publication, they are mainly concerned with novel case types, the correctness of judgments, and potential social impact, not questions as specific as which particular subsection of Article 54, Section 2 of the *Administrative Litigation Law* provides the basis for the judgment.

In Issues 1 through 58 (Issues 25 through 28 are currently unavailable) of *Selections from People's Court Cases,* there are 614 administrative cases from the period between the enactment of the *Administrative Litigation Law* and the year of 2005. In 297 of these cases, administrative acts were invalidated or partially invalidated by the judiciary (See Table I). These 297 cases will be the basis for further analysis because the court may invoke in its judgment any of the standards laid out in Article 54, Section 2 of the *Administrative Litigation Law.*

[26] In *Selections from People's Court Cases*, the percentage of cases in which courts concluded with judgments and the percentage of cases in which the plaintiff won were both well above the average levels for administrative cases in China, while cases which courts refused to accept were particularly rare.

Table I. Results of Judgments over Administrative Acts in the Selections[27]

Judgment Results	Number of Cases	Percentage
Administrative Action Invalidated	297 (including 36 partial invalidations)	48%
Administrative Action Amended or Defendant Ordered to Perform Duty	44 (including 8 partial amendment or performance)	7%
Administrative Action Sustained	133	22%
Other outcomes (Rejected, Indemnities Granted, Withdrawn, etc.)	140 (including 56 cases rejected; 41 indemnities granted; 6 withdrawn by the plaintiff)	23%
Total	614	100%

Among cases in which administrative acts were invalidated, in 99 cases courts cited Article 54, Section 2, Subsection 3 of the *Administrative Litigation Law* (violation of statutory process) as the basis of judgment, constituting 33% of all invalidation cases (see Table II). Although this frequency was lower than that for "insufficient major evidence" (53%) and the "misapplication of law" (40%), it was higher than that for "exceeding authority" (26%) and the "abuse of power" (8%). In 36 of these cases, making up 12% of all judgments involving the invalidation of administrative acts, violation of statutory process was invoked as the sole basis of judgment. The high frequency of reliance on procedural bases in these judgments shows the extent to which procedural legality has become an important standard by which the Chinese judiciary reviews the legality of administrative acts. It also demonstrates that this legal standard has established a foothold in judicial practice. As indicated by the cases presented later in this paper, judges have developed a belief in due process through the application of the "violation-of-statutory-process" clause.

[27] Results of cases here pertain to results of final judgments in regard to administrative acts, including results of judgments of first instance (in which there were no appeals or appeals were withdrawn), judgments of second instance or additional instances. Given the purpose of this discussion, the few cases in which acts were partly invalidated and partly sustained are included among cases in which acts were invalidated.

Table II. Legal Bases for Invalidating Administrative Acts in the Selections[28]

Basis of Judgment	Cases on the Reason		Cases on the Sole Reason	
	Number	Frequency	Number	Frequency
Insufficient Major Evidence	156	53%	66	22%
Misapplication of Law or Regulation	119	40%	41	14%
Violation of Statutory Process	99	33%	36	12%
Excess of Power	78	26%	43	14%
Abuse of Power	25	9%	10	3%

The above analysis may obscure the transformation of the "violation-of-statutory-process" standard in the practice of judicial review. Actually, in the early days of the implementation of the *Administrative Litigation Law*, cases in which administrative acts were invalidated because of unlawful process were rare. Since the phrase "violation of statutory process" was widely interpreted as referring to violations of explicit legislatively mandated procedures, and also because most laws and regulations at that time lacked procedural requirements, opportunities to apply this clause were exceedingly rare. It is also questionable, under the then popular conception of procedures-less-important, whether judges paid sufficient attention to such issues even when laws and regulations contained procedural rules pertaining to administrative acts. Early on, the requirement of procedural legality established in the *Administrative Litigation Law* may have been of greater symbolic than practical import.

[28] In judicial practice, several bases may be invoked in one judgment. Such judgments are counted under respective categories of bases that were invoked.
Procedural controversy can be brought up at different levels in litigations, e.g. 1) mentioning of the procedural issue by the concerned person, 2) the court's explanation of reasons for the judgment, 3) the court's citation in bases for the judgment, 4) mentioning of the issue by judges outside of the trial (e.g., case analysis in news media). The author only counted cases in which courts cited the procedural issue in bases for judgment.

The *Administrative Penalty Law* of 1996 was a milestone in the emergence of legally regulated administrative process.[29] This law provides relatively detailed regulations on the decision-making process (specifically summary process, ordinary process, and hearing process) and the enforcement process of administrative penalties. Among them, the regulations on the hearing process are the first of their kind in Chinese law. Article 31 of the *Law* states that, "Before an administrative organ makes an administrative penalty decision, the organ must inform the person concerned of the facts, reasons, and basis of the administrative penalty decision; and inform the person concerned of the legal rights that he enjoys."[30] Article 32 states that "the person concerned has the right to make statements and present a defense."[31] In Chapter V, Section 2, which covers all "Ordinary Process," the Law further states that, "if, before an administrative organ or its law enforcement official makes the administrative penalty decision, such organ or official does not follow Article 31 and Article 32 of this Law by failing to inform the person concerned the facts, reason, and basis for imposing the administrative penalty decision, or refusing to hear statements and defense by the person concerned, such administrative penalty decision is invalid."[32] The fact that administrative penalty cases make up a substantial portion of all administrative litigation cases, ranging from 1/4 to 1/5 during past decade, demonstrates the *Administrative Penalty Law*'s importance.

The impact of the *Administrative Penalty Law* quickly became evident in judicial rulings. There has been extensive media coverage of cases in which courts have invalidated administrative penalty decisions due to the agency's failure to inform concerned persons of relevant facts or rights, or its failure to perform the required hearing process or other statutory processes before issuing decisions. A comparison of administrative cases in *Selections from People's Court Cases* before and after the enactment of this law indicates its impact on judicial review. Issues 22 and 23 of *Selections from People's Court Cases* can be roughly regarded as the dividing line between the cases decided before and after the enactment of the *Administrative Penalty Law* in October 1996.[33] In the 22 issues before the enactment, 28 of 122 judgments in

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[29] 行政处罚法 [Administrative Penalty Law] (Mar. 17, 1996, effective Oct. 1, 1996). STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

[30] *Id.* art. 31.

[31] *Id.* art. 32.

[32] *Id.* art. 41.

[33] *See* 人民法院案例选 [SELECTIONS FROM PEOPLE'S COURT CASES]; 行政处罚法 [Administrative Penalty Law].

which administrative acts were invalidated employed violation of statutory process as the basis for the decision, which constituted 23% of total cases. In the issues published after the enactment, 71 of 175 invalidation judgments employed violation of statutory process as the reason for invalidation, which constituted 41% of total cases, an almost one-fold increase. In the 22 issues before the enactment, 7 judgments invoked a procedural reason as the sole basis for invalidating administrative acts, which constituted 6% of total cases in which administrative acts were invalidated. By contrast, in issues after the enactment, there were 29 such cases, or 16% of total cases in which administrative acts were invalidated. Courts cited the relevant provisions of the *Administrative Penalty Law* in at least 32 invalidation judgments, and, among them, relied on the *Administrative Penalty Law* as the main basis for invalidating administrative acts in 13 cases.

The enactment of the *Administrative Penalty Law* has not only increased the frequency of courts' reliance on procedural reasons to invalidate administrative acts, but has also strengthened judges' confidence in reviewing administrative acts according to the "violation-of-statutory-process" standard. This may be seen quite clearly in two authoritative cases separately published in the *Gazette of the Supreme People's Court* in 1992 and in 1997.

Chen Yingchun v. Lishi County Public Security Bureau[34] in 1992 was the first authoritative case mentioning the question of administrative process. In this case, the police identified Chen Yingchun as the party who had printed an unsigned document that contained defamatory material, so the police placed Chen under custody and investigation. In the court's view, the police's decision to detain Chen did not meet the conditions for lawful custody and the investigation and did not appear to be based on any concrete evidence. The detention was therefore illegal. Remarkably, the ruling states that, "the defendant's officers wore plain clothes and presented no legal documents. After coaxing the plaintiff to leave her office, the officers brought her to the Xinyi Police Station of Lishi County by force and asked the plaintiff to sign a summons. On March 12th, the defendant further asked the plaintiff to sign a 'Custody and Investigation Notification Form' that had been filled out on March 10th." [35] After arguing that the police action constituted "a misapplication of laws and regulations," the ruling further states that, "the process of the defendant's custody and investigation by the plaintiff

[34] *See* 陈迎春诉离石县公安局收容审查决定案 [*Chen Yingchun v. Lishi County Public Security Bureau*], SUP. PEOPLE'S CT. GAZ., Vol. 2, 1992, at 62.
[35] *Id.*

is *also* illegal."[36] The court does not elaborate further, but it seems to refer mainly to the carrying out of procedures in reverse order, as the defendant issued the summons after making the decision to arrest. The court's use of the word "also" expresses the idea that violation of statutory process is illegal while suggesting that violation of statutory process is relatively less important. The court thus mentions the procedural issue as an appendix to a decision based on substantive reasons. Nonetheless, attention has been given to the legality of administrative process in an actual trial in the early practice of administrative litigation.

Shortly after the enactment of the *Administrative Penalty Law* of 1996, the *Gazette of the Supreme People's Court* published *Pingshan County Bureau of Labor and Employment (BLE) v. Pingshan County Bureau of Local Taxation (BLT)*,[37] in which the judicial position with regard to administrative process was perhaps most unambiguously stated. In this taxation case, the BLT believed that the BLE, formerly Pingshan County Labor Service Company, did not pay the required taxes while collecting labor regulation fees, labor service fees, and other fees. The BLT twice requested that the BLE pay within specified periods of time, but to no avail. The BLT then imposed a fine of more than 90,000 Yuan on the BLE. The central controversy in this case was whether the Labor and Employment Bureau, as a financially autonomous public entity exercising certain administrative capacities, should pay taxes. However, the court focused on a serious oversight in the administrative penalty decision process, namely, that the BLT held no hearings before making the penalty decision. The court invalidated the defendant's decision, stating that,"(t)he decision can be invalidated simply because of its unlawful process, so there is no need to further examine the substantive controversy."[38] There are several dynamics at work in this case, some of which bear little relation to due process: it is possible, for example, that the Pingshan County Court relies on due process concerns in part to avoid involvement with a serious dispute between two government departments.[39] At the very least, the court's statement that "there is no need to further examine the substantive

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[36] *Id.*

[37] *See* 平山县劳动就业管理局不服税务行政处理决定案 [*Pingshan County Bureau of Labor and Employment v. Pingshan County Bureau of Local Taxation*], SUP. PEOPLE'S CT. GAZ., Vol. 2, 1997, at 71.

[38] *Id.*

[39] The court did not rule on the substantive dispute. The tax authority could insist that the plaintiff should pay the taxes, and, after holding a hearing, make a decision for penalty once again. This could lead to unnecessary repetitive litigations, even (after demonstrating that the tax authority should not collect the taxes) the tax authority's repetitive administration.

controversy" merits further examination. Nonetheless, the court's assertion that "the decision can be invalidated merely because of its illegal process" elevates procedural legality to the status of a free-standing legal principle, on equal footing with substantive legality.[40] The fact that the Supreme Court chose this case as the first administrative case to publish in the *Gazette* after the implementation of the *Administrative Penalty Law* both underscores the Court's view of the importance of statutory process and demonstrates its desire for Chinese courts to engage in more rigorous review of proper adherence to administrative procedure.

The above described application and development of the "violation-of-statutory-process" standard in judicial practice did not go beyond the domain of statutory law. Still, courts conducted judicial review solely on the basis of existing laws, rules, and regulations. Since the *Administrative Litigation Law* went into effect, the standards for judicial review established by the law have not changed at all on the legislative level, and there has been little progress in developing due process norms through the issuance of judicial interpretations by the Supreme Court. The Court has issued two comprehensive interpretations on administrative litigation law, 1991 and 2000.[41] Yet neither involved standards for judicial review. After China became a member of the World Trade Organization, the academic community recognized that WTO administrative process requirements are stricter than those in existing Chinese law. However, the relevant judicial interpretations provided by the Supreme Court simply reiterate the language found in Article 54 of the *Administrative Litigation Law,* without offering any guidance.[42] In another circumstance, the Supreme Court issued an interlocutory reply that clarified the scope to which the hearing process stipulated by the *Administrative Penalty Law* is applicable. According to the Supreme Court, before an administrative organ makes an administrative penalty decision that entails the

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[40] *Pingshan County Bureau of Labor and Employment v. Pingshan County Bureau of Local Taxation*, *supra* note 37, at 71.

[41] *See* 最高人民法院印发《关于贯彻执行<中华人民共和国行政诉讼法>若干问题的意见(试行)》的通知[失效] [*The Supreme People's Court's Opinion in Regard to Certain Issues in the Implementation of Administrative Litigation Law*][Voided], 法 [1991]19 号 [SUP. COURT], No. (1991) 27; 最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释 [*The Supreme People's Court's Opinion in Regard to Certain Issues in the Implementation of Administrative Litigation Law*], 法释[2000]8 号, [LEGAL INTERPRETATION], No. 8, 2002.

[42] *See* 最高人民法院关于审理国际贸易行政案件若干问题的规定 [*The Supreme People's Court's Regulations in Regard to Certain Issues in Reviewing Administrative Cases Concerning International Trade*], 法释[LEGAL INTERPRETATION], No. 27, 2002, Sec. 6.

confiscation of property that is worth a relatively large sum of money, the concerned person should also be offered the opportunity for a hearing.[43] This reply expounded upon the meaning of relevant provisions in the *Administrative Penalty Law* and firmly supported the *Administrative Penalty Law*'s spirit of procedural protection. However, with regard to development of the general principle of due process, it did not constitute a significant breakthrough.

In the dispute over management of state-owned property between *Guangdong Province Drug Materials Company (DMC) v. People's Republic of China Department of the Treasury (DOT)*, the issue of procedural legality beyond the legislative requirements was clearly raised.[44] However, the High Court of Guangdong Province missed an important opportunity to promote the development of the due process principle. The defendant DOT stated in a document that the administrative review decision made by the National Bureau of State-Owned Property Management (BSPM) "is now revoked because it is inconsistent with the relevant provisions of the *Regulations of Administrative Review*."[45] In the administrative litigation lawsuit launched by the DMC, the decision made by the DOT was invalidated by the Court of First Instance; the invalidation was also upheld on appeal. In the litigation, the plaintiff's counsel, Peking University Law professor Chen Duanhong raised the issue of procedural validity.

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[43] 最高人民法院关于没收财产是否应进行听证及没收经营药品行为等有关法律 问题的答复 [*The Supreme People's Court Replies to Whether A Hearing Is to Be Held When Property Is Confiscated and the Question Concerning the Act of Confiscating Commercial Drugs and Other Legal Questions*], 2004 行他 [XING TA] NO.1, Sec. 1. The reply states, "before an administrative organ makes an administrative penalty decision that entails the confiscation of property that is worth a relatively large sum of money, if such organ did not inform the person concerned of his right to demand a hearing to be held, or if the hearing is not held according to regulations, the court should, according to the relevant stipulations in Administrative Penalty Law, recognize such administrative penalty decision as a violation of statutory process." This reply involves interpretation of Article 42 of Administrative Penalty Law. The confiscation of property that is worth a relatively large sum of money is not among explicitly stated conditions for holding hearings. Nonetheless, whether based on the statutory language or the legislative process, it is entirely consistent with the legislative intent of Administrative Penalty Law for an administrative organ to provide the person concerned the opportunity to a hearing before confiscating property that is worth a large sum of money. For the legislative intent reflected from the legislative process, *see* 薛驹，全国人大法律委员会关于〈中华人民共和国行政处罚法（草案）〉审议结果的报告[Xue Ju, *The Legal Committee of the People's Congress's Report Concerning (the Draft of) Administrative Penalty Law of the People's Republic of China*] (Mar. 16, 1996).

[44] *See* 广东省高级人民法院行政判决书 [*The Judgment of the High Court of Guangdong Province*], 1999 粤高法行终字 [YUE GAO FA XING ZHONG] No. 22, *available at* http://www.gdcourts.gov.cn/fynj/2000/12/xz/t20040618_5020.htm.

[45] *Id.*

However, the rulings of the lower court and the higher court on this issue were not identical. According to the Court of First Instance, 1) the DOT did not support its decision with any factual evidence or legal basis, so the DOT's mistake constituted a misapplication of laws and regulations; 2) before the defendant made the decision to revoke, it not only failed to inform the plaintiff about its re-investigation of the review decision, but also failed to search and collect evidence, to file an inquiry with the BSPM, or to provide the plaintiff the opportunity to state its opinion. In conclusion, "because the DOT did not follow the basic administrative process, the decision constituted a violation of statutory process."[46] The court of appeal generally agreed with the first reason based on facts and evidence and hence supported the lower court's decision to invalidate the decision. With regard to the question of whether the DOT's revocation of the BSPM's decision violated statutory process, the higher court came to a different conclusion. The court concurred with the DOT's position,[47] stating:

> Existing laws provide no explicit regulations in regard to the process to be followed by a superior administrative organ when it revokes a decision made by a lower organ; since it (the DOT) followed the principle of the superior organ's supervision over the lower organ's work and the general practice, the decision did not violate administrative process. The DMC's assertion that the DOT violated statutory process lacks basis in laws and regulations, so this assertion is rejected. The opinion in the first ruling that the DOT's decision of revocation violated statutory process is not sound, so the judgment should be corrected according to the law.[48]

The DOT's statements can be accepted at face value, because the DOT went through an internal process before making the decision to

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[46] *Id.*

[47] The appellant, DOT, argued in the litigation: "In the current laws and regulations, there are no clear stipulations for the process to be followed by the higher governing organ when the organ revokes the review decision made by a lower organ. The revocation decision made by the appellant was based on the written opinions by the Legal Bureau of the People's Government of Guangdong Province and the requests by the former Legal Bureau of the State's Council. The decision was made after conducting group discussion and receiving approval from the departmental leaders, so it is entirely consistent with the business process established by the General Office of the State's Council and the Department of the Treasury." *Id.*

[48] *Id.*

invalidate and this process is generally consistent with the "principle of the higher organ's supervision over the lower organ's work and the general practice."[49] However, in terms of the development of the due process principle, this ruling was a serious setback. A major decision, which was gravely detrimental to the interests of the party concerned, was made without the knowledge of the concerned party. The court stayed surprisingly aloof when faced with such a blatant violation of the due process principle. Compared to the innovative cases about to be discussed below, the ruling by the High Court of Guangdong Province may be representative of the common practice in administrative process at that time. This case demonstrates the heavy reliance in statutory process cases on explicit provisions of laws and regulations such that, in those cases, the due process principle cannot be said to have a life of its own.

III. A BRIEF APPEARANCE OF THE PROCEDURAL ARGUMENT IN THE *TIAN YONG* CASE

The case of *Tian Yong v. University of Science and Technology Beijing (USTB)*, published in the *Gazette of the Supreme People's Court*, is noteworthy in the development of the due process principle.[50] One significant impact of this case was that it expanded the scope of accepted cases in administrative litigation, launching a "student v. school" wave of lawsuits. On the issue of disciplinary sanctioning process to be discussed here, it is remarkable that the Haidian Court of Beijing City brought up the demand for procedural legality absent any statutory basis. This demand was further highlighted when the case was published in the *Gazette*.

Tian Yong was an undergraduate at USTB. In February 1996, he was caught cheating during a school exam by bringing into the exam room a small paper with relevant notes. The university authorities shortly made a decision to expel Tian without an in-person hearing. However, with the support of some faculty members, Tian stayed at the university for the remaining two years of his course, lived in the student dormitory, took part in classes, exams and other school-organized activities as usual, paid tuition and even received a re-issued student ID

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[49] *Id.*

[50] *See* 田永诉北京科技大学拒绝颁发毕业证、学位证行政诉讼案 [*Tian Yong v. University of Science and Technology*], SUP. PEOPLE'S CT. GAZ., Vol.4, 1999 at 139. For the original text, *see* 北京市海淀区法院行政判决书 [*The Administrative Judgment of the Court of Beijing City Haidian District*], 1998 海行初字 [HAI XING CHU] No. 142.

card. When the time came to graduate, the university authorities realized what had happened and refused to grant Tian his academic certificate on the grounds that he had been expelled and hence no longer held valid student status. After Tian made his way to the Haidian Court, it ruled in his favor.

The Haidian Court held that the original disciplinary sanction leveled at Tian lacked a legal basis and, moreover, that the University's later actions showed that it had "in actuality" revoked its previous decision. Besides these reasons, the Haidian court stated with respect to the expulsion decision making process:

> Furthermore, the decision to expel the student from school involved the plaintiff's right to education. Considering from the principle of full protection of the concerned person's rights, the defendant should have directly notified the plaintiff himself about this decision and should have allowed the person concerned to argue in self-defense. However, the defendant neither acted according to this principle by respecting the concerned person's rights, nor in fact performed procedures such as canceling academic status or changing residency status and records for the plaintiff.[51]

This passage raised a crucial issue of the defendant's duty to notify the concerned person of the decision to expel him from school and to allow the concerned person to present his case. But, the court did not identify the legal basis for this duty. In fact, when the defendant made the decision to expel Tian from school, none of the relevant laws, regulations, rules, and other regulatory documents included notice and hearing requirements.[52] Thus, the judges did not rule according to

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[51] 北京市海淀区法院行政判决书 [*The Administrative Judgment of the Court of Beijing City Haidian District*], 1998 海行初字 [HAI XING CHU] No. 142.

[52] According to Article 64 of 普通高等学校学生管理规定[*Rules on Administration of Students in Ordinary Higher Education Institutions*] (made by National Education Committee in 1990), "in regard to students who have committed mistakes...the student should be informed of the punitive conclusions in person; the school should allow the student to argue in self-defense and petition and reserve dissenting views. After receiving the student's petition, the school has the duty to conduct a review." Considering the background against which this regulation was made and the general practice of that time, "the student should be informed of punitive conclusions in person" appears to place more emphasis on the demand that student should have the knowledge of punitive conclusions, and there appears to be no requirement for any type of defined process; the phrase that "the school should allow the student to argue in self-defense, petition and reserve dissenting views" emphasizes that the student should not be barred from arguing in self-defense or petitioning, and there is no requirement for a hearing of

specific legal provisions. If the word "law" in "ruling according to law" is to be narrowly interpreted as written provisions issued by specific state organs, then the court's reasoning on this point arguably had no "legal basis;" or, one could argue that its reasoning was created or fabricated, depending on the observer's point of view. In retrospect, the court's reasoning appears directly linked to the due process principle of Anglo-American law.

The intriguing question about the case is this: given that, at the time the verdict was issued, judicial decisions were widely understood as "applications of laws and regulations," what prompted the judges to use these words? Did the judges themselves view what they were doing as departing from the accepted judicial role of "applying" the law? To address these questions, the author visited Mr. Wang Zhenfeng, the Chief Judge for the Court of First Instance, Ms. Rao Yadong, the presiding judge, and other participants in the ruling.[53] There is no evidence to indicate that while adjudicating the *Tian Yong* case, the judges involved possessed sufficient knowledge of the due process principle of Anglo-American law to directly apply it to the case at hand. Neither was there any evidence to suggest that the judges had a clear intent to apply the due process principle in their verdicts. However, it is certain that the judges had a plain notion of fair procedure; and this basic concept informed the judges' thinking during the trial.

During a discussion of the reasoning behind the decision, Chief Judge Wang Zhenfeng, then Vice President of Haidian Court, agreed that the *Tian Yong* decision lacked a clear statutory basis in some aspects, but argued that the case was handled based on the "spirit of the law."[54] He mentioned to the author the role of the "spirit of the law" in the legal system, defects in legislation, and the need for judges to correct such defects.[55] Incidentally, during the interviews, both judges mentioned the *Administrative Penalty Law*'s requirement of an administrative organ to listen to the punished person's statements and

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a student's defense before making the punitive decision. In fact, the court did not cite this provision, which suggests that the court's ruling is not based on this provision.

[53] He Haibo's Interviews, Oct. 1999, the Haidian Court.

[54] *Id.*

[55] A few years ago, when Judge Wang Zhenfeng taught law classes as a part-time professor at a university in Beijing, he gave an opening lecture with the title "Spirits of Law." The follow is found in the lecture outline, "there are so many legal rules that it is almost impossible for one to know all of them. An understanding of spirits of law will help us know, comprehend, obey, and enforce laws and regulations, so it is conducive to the implementation of the fundamental policy of law-based governance and to the construction of a socialist democratic law-based state." Wang Zhenfeng also summarized his understanding of spirits of law with the following phrase, "fairness and order, liberty and self-discipline."

defenses. Although the *Administrative Penalty Law* was not applied in this ruling, as disciplinary sanction was not deemed to be a kind of administrative penalty and it is improper for the judges to extend the application of the *Administrative Penalty Law*'s provisions on process to an unrelated case, it is nonetheless discernable that this law had a profound impact on the judges' thinking. Because disciplinary sanctions such as mandatory expulsion from school are in some ways similar to administrative penalties, it was natural for the judges to compare them during the trial. It can be assumed that the consequence of such a comparison was to strengthen the judges' confidence in their pre-conception, namely that the defendant should have offered the plaintiff an opportunity to present his case. During the trial, the Haidian Court consulted several experts and scholars of administrative law for their opinions. In one such conversation with scholars, when the presiding judge, Ms. Rao Yadong, questioned the procedural legality of the defendant's decision to expel the plaintiff from school, one scholar mentioned the due process principle.

It is necessary to consider as context that, in its verdict, the court cited three reasons for ruling in the plaintiff's favor. The first reason, that the decision for expulsion from school violated substantive law, and the third reason, that Tian Yong was allowed to remain at the school even after being expelled, were both quite compelling and crucially important, as they could strike a chord with many people and be used to counter objections against the verdict as a whole. The second reason, that the school had failed to follow certain procedural requirements, was relatively weak, appearing to have been appended to the other two more solid reasons.

During the interview, the author asked Vice President Wang Zhenfeng: "If there were no other problems in the decision for expulsion itself, but there were the subsequent series of school's actions allowing Tian to stay on, for example, re-issuing the student's ID, collecting tuition, permitting registration, permitting attendance in lectures and examinations, etc., would you have supported Tian's request for litigation?"

"Certainly," Vice President Wang replied.

The author then asked, "If the above-mentioned series of subsequent actions had not occurred, and there were only substantive and procedural defects in the decision for expulsion from school, would you have supported Tian?"

After a moment of hesitation, Vice President Wang said, "I am afraid that I would have to think about that question a bit more."

"However," he added, "there was no basis for expelling Tian from school."[56]

At no point did Vice President Wang emphasize due process concerns.

Because it was not decisive, the use of the due process argument introduced little risk, nor did it attract much attention at first. From the perspective of the concerned parties and others who happened to read the judgment, the procedural rationale seemed so trivial that its appearance could be ignored. In fact, there was no objection to this rationale in the appeal filed by the defendant, in defense counsel's more than 6000-character-long brief in the appeal, or in the petition made by the defendant after the final ruling. Shortly after the decision was issued, it seemed destined to sink in the ocean of court verdicts issued in China. But, one incident changed its fate. The *Gazette of the Supreme People's Court* published the case and, in so doing, emphasized the application of due process. According to its general practice, the *Gazette* publishes selected rulings by the courts at various levels after they are recommended by local or supreme judges, approved by the adjudication committee of the Supreme People's Court and, more often than not, modified by the editors of the *Gazette.* The following is the revised version of the above-cited passage:

> Furthermore, the expulsion decision involved *the penalized person*'s right to education. Considering from the principle of full protection of the concerned person's rights, *the organization that made the penalty decision* should have directly notified *the penalized person* himself about this decision and should have allowed the person concerned to argue in self-defense. However, University of Science and Technology Beijing (USTB) did not act according to this principle and overlooked the concerned person's right to petition. *Such an act of administrative management does not possess legality.* [57] [emphasis added]

Besides a revision of the language, there were two noteworthy changes: 1) the designations of "the plaintiff" and "the defendant" were respectively changed to "the penalized person" and "the organization

[56] He Haibo's Interviews.

[57] *See* 田永诉北京科技大学拒绝颁发毕业证、学位证行政诉讼案 [*Tian Yong v. University of Science and Technology*], SUP. PEOPLE'S CT. GAZ., Vol. 4, 1999

that made the penalty decision," which carried the implication that the principle used in this individual case may be universally applicable; 2) While the *Gazette* reiterated the procedural principle to be followed when a school expulsion decision is made, it also employed firm and clear language to highlight the legal consequence of violation of this principle, stating that "such an act of administrative management does not possess legality."[58] This language can be read to suggest that the procedural reason alone was sufficient for invalidating the defendant's decision to expel Tian. The statement of reasons, shrewdly modified by the Supreme People's Court, clarifies the way in which the due process principle can be applied and the emphasis on the due process principle becomes more salient, in contrast to its initial form, where it looked like an appended rationale with little influence on the final outcome.

It is common for the *Gazette* to modify the language of the original version of a ruling. The question is whether and how much the *Gazette* intentionally emphasized the due process principle while making the revision. The author interviewed Mr. Ma Qunzhen, then the sole editor of the *Gazette of the Supreme People's Court*, to determine whether he had due process in mind during the editorial process.

The author asked, "Did you notice that there is no statutory basis in the ruling's requirement of the defendant to listen to the plaintiff's petition before making the punitive decision?"

"Indeed there is none," Mr. Ma affirmed. He further explained the reasoning behind his revision of the passage:

> However, this principle is necessary for the protection of human rights. There were numerous tragic incidents during the Cultural Revolution. For instance, even after a person had been penalized and the penalty had been documented, this person still did not know about the penalty and there was nowhere to file a petition. As a result, there were many wrong penalty decisions. This kind of incident still occurs today. If a person is not given a chance to voice his opinion before a penalty decision is made, isn't such a decision in effect made behind the concerned person's back? How could this be right? Therefore, I seized this opportunity and used the *Gazette* to advocate for this notion (of fair process). I hope that this notion can become a principle one day."

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[58] *Id.*

The author then asked, "Have you heard of the phrase 'due process principle'?"

Mr. Ma replied, "I do not understand such theories very well. It is up to scholars like you to explore (such things)."[59]

Acting on the basis of lessons from his own experience rather than knowledge of Western practices, Mr. Ma chose to reinforce the judicial language related to the necessity of proper procedure, in particular the need to hear from the affected party before making a penalty decision. It seemed that he was not overly concerned by the absence of the principle from relevant statutes. As the editor of the *Gazette of the Supreme People's Court*, however, Mr. Ma understood the potential impact of the *Gazette*, and, through it, wanted to influence society.

An exploration of the objective conditions under which the judges included the due process requirement should not lead to a de-valuation of the significance of the judges' novel contribution. Many remarkable institutional innovations have occurred under contingent conditions or even in absence of conscious design. One can hardly ask judges to innovate without regard to real pressures and costs, even if such innovations represent an important theoretical step forward. For judges, it is crucial to seize opportunities as they arise and act courageously to create precedent. Both innovation and replication are critical to forming an institution. As one of China's most prominent legal scholars has pointed out, "(a) precedent is simply the start. It cannot become an institution until others follow the precedent. ... In this sense, institutions are constructed by imitators, not innovators."[60]

Tian Yong v. USTB attracted academic attention shortly after the ruling came down. *Discourses on Administrative Law*, edited by Professor Luo Haocai (then Vice President of the Supreme People's Court), sponsored a series of studies on the case,[61] in one of which, "Developing the Law through Judgments," this author identified the case as an application of the due process principle. The author optimistically predicted that, "[a]s a precedential ruling based on the due process

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[59] He Haibo's Interviews, March 2003, at the Editors' Office of the *Gazette of the Supreme People's Court.*

[60] 苏立，制度是如何形成的：关于马伯里诉麦迪逊案的故事[Suli, *The Formation of Institutions: the Story of Marshall v. Madison*], 1998 比较法研究 [RESEARCH ON COMPARATIVE LAW] No. 1, 66, 70. The article was later included in Suli's anthology: 制度是如何形成的 [*The Formation of Institutions*] (中山大学出版社[Sun Yat-Sen University Press], 1999).

[61] *See* Vol. 3 行政法论丛 [DISCOURSES ON ADMINISTRATIVE LAW] (罗豪才主编 [Luo Haocai ed.], 法律出版社 [The Law Press], 2000).

principle, this case will serve as an example for various levels of local courts that hear administrative cases in the future."[62] Partly as a consequence of the attention garnered by the related 2001 case *Liu Yanwen v. Peking University (PKU)*,[63] *Tian Yong v. USTB* has frequently been mentioned in academic discourse and has become one of best known administrative cases. As an increasing number of higher education cases have found their way into court, the judges at the Haidian Court, which tried both *Tian Yong v. USTB* and *Liu Yanwen v. PKU*, have received telephone calls from their judicial colleagues across China seeking their advice on similar cases and asking for copies of relevant case material.[64]

Courts followed the due process principle in several cases inspired by *Tian Yong v. USTB*. Among them, *Wang Changbin v. Wuhan University of Technology (WHUT)*, triggered by WHUT's refusal to award the bachelor's degree certificate, was perhaps the closest to *Tian Yong v. USTB* in terms of the factual pattern and the court's legal rationale. Because Wang Changbin brought notes with relevant information to an exam, he was punished with a one year probationary period. Although Wang later passed a make-up exam, the school refused to award a degree certificate (he received only a diploma). The central controversy in that case involved the lawfulness of an internal university regulation which forbade all students who had been placed on probation from receiving their degree. However, procedural questions were also raised. According to the plaintiff, the school did not notify him about the penalty decision through either oral or written communication in a timely manner, so he lost the opportunity to argue in self-defense. The defendant argued that the school committed some flaws in the process of implementing the penalty decision, but that these minor errors would not affect the substantive content of the penalty decision. The courts of Wuhan city in both instances ruled in favor of the plaintiff. In 2001, Wuhan City Hongshan District Court stated that, since the defendant did not inform Changbin

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[62] 何海波，通过判决发展法律：田永案中行政法原则的运用 [He Haibo, *Developing the Law through Judgments: The Use of Administrative Law Principles in Tian Yong Case*], Vol. 3 行政法论丛 [DISCOURSES ON ADMINISTRATIVE LAW] (罗豪才主编 [Luo Haocai ed.], 法律出版社 [The Law Press], 2000).

[63] *See* 北京市海淀区人民法院行政判决书 [THE ADMINISTRATIVE JUDGMENT OF THE PEOPLE'S COURT OF BEIJING CITY HAIDIAN DISTRICT], 1999 海行初字[HAI XING CHU] No. 103, 104; 北京市第一中级人民法院行政裁定书 [THE ADMINISTRATIVE JUDGMENT OF THE BEIJING NO. 1 INTERMEDIATE PEOPLE'S COURT] 2000 一中行终字[YI ZHONG XING ZHONG] No. 43, 45.

[64] He Haibo's Interviews. *See also* Thomas Kellogg, *Courageous Explorers: Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141, 171 (2007).

Wang about the penalty decision in a timely manner, it deprived the plaintiff of his right to defend himself at a hearing. Such an administrative act in which the process is "inconsistent with relevant rules" constituted an invalid penalty decision. This holding was upheld by the Wuhan Intermediate Court in the final verdict.[65] Several years later, when a university student sued his school for its expulsion decision, the above-mentioned passage in the *Tian Yong* case was reiterated by the local court in Zhengzhou, Henan Province.[66] This time, lawyers may not have regarded it as a judicial novelty.

IV. HEATED DEBATES IN *LIU YANWEN V. PKU*

Liu Yanwen v. Degree Evaluation Committee of Peking University (PKU) in 1999 was certainly the largest and most controversial case generated by the *Tian Yong* decision. While the judges might not have fully appreciated the significance of their own due process holding in *Tian Yong*, the procedural issue was hotly contested in *Liu Yanwen v. PKU,* both inside and outside the courtroom.[67] The author of this paper (then a Ph.D. student at Peking University Law School) was involved in the trial as Liu Yanwen's counsel, so, in a sense, was a direct participant in this debate. To some extent, his participation both made due process a more salient theme in this debate and inspired his sustained attention to the issue of due process. However, in the discussion here, the author has tried to narrate this debate from a spectator's perspective.

Liu Yanwen was a Ph.D. student in the Department of Electronics at Peking University. In January, 1996, his Ph.D. dissertation was approved, after oral defense, by the dissertation defense committee and by the department's academic committee. According to

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[65] 苦读四年拿不到学位证将母校告上法庭 [*Suing the Alma Mater: A Student Did not Receive His Degree After Four Years of Hard Work*], 武汉晨报 [WUHAN MORNING NEWS], Nov. 16, 2001, *available at* http://media.news.sohu.com/16/24/news147282416.shtml; 考试作弊不给学位：违法！首例学生状告高校不发证书案原告胜诉 [*Denying the Degree Because of Cheating in an Exam, This Is Illegal! The First Case a Student Wins Against a University for Not Receiving a Degree*], 江南时报 [JIANGNAN TIMES], May 3, 2002.

[66] 井长水，"起哄"学生告赢郑州大学 [Jing Changshui, et al., Trouble-making Student Defeats Zhengzhou University], 法制日报[Legal Daily], Nov. 16, 2005.

[67] For discussions on this case, *see* 刘燕文诉北大案 [*Liu Yanwen v. PKU*], *in* 北大法律之路论坛 [PKU FORUM ON ROAD TO RULE OF LAW] 195 (李富成主编 [Li Fucheng ed.], 法律出版社 [The Law Press] 2002); 高等教育行政诉讼 [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION] (湛中乐主编 [Zhan Zhongle ed.], 北京大学出版社 [Peking University Press] 2003).

the *Academic Degree Act* of 1980, one of "oldest" laws in the P. R. China, the approval should be further reviewed and sanctioned by the university degree evaluation committee (UDEC),[68] whose members were drawn from various departments of the entire university and whose duty was to review hundreds of Ph.D. dissertations across the entire university each year. At this level of review, Liu's dissertation was rejected. Liu received no chance for a hearing before the UDEC made the decision, nor was any specific reason revealed for the rejection. The UDEC did not formally notify Liu of its decision, in accordance with the UDEC's routine practice.

As a consequence of Liu's persistent efforts (including an ineffectual petition to Haidian Court in 1997 and a retry inspired by *Tian Yong*), his case was finally accepted by Haidian District Court of Beijing City in September, 1999. In contrast to the exam cheating controversy at the heart of *Tian Yong v. UTSB*, *Liu Yanwen v. PKU* involved a highly technical task, the evaluation of a Ph.D. dissertation. It was neither possible nor appropriate for the court to judge whether Liu's dissertation met the standards of a Ph.D. degree based on substantive content. As a result, the controversy was focused on the process by which the Ph.D. dissertation was evaluated and rejected. Although the laws, rules, and regulations of that time did not stipulate a specific process for evaluating Ph.D. degree candidates, the plaintiff asserted that the evaluation process violated the requirement of due process, and was therefore illegal.[69]

During the public debate triggered by the court case, Liu Yanwen underscored the fact that his dissertation met the standards necessary for the awarding of a Ph.D., and stated his belief that the UDEC rejected the dissertation because of a malicious reprisal by a member of the committee. As a person with no legal training, Liu was unaware of the concept of due process. Nonetheless, as he recounted the various injustices that he encountered, references to procedural fairness emerged as part of his list of suffered indignities:

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[68] 中华人民共和国学位条例(1980 年 2 月 12 日通过) [Academic Degree Act of P.R.C, enacted on February 2nd, 1980] STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

[69] Besides the above-mentioned reasons, the plaintiff also pointed out that it was improper for 3 members of the PKU degree evaluation committee to abstain from voting. There is no explicit stipulation in laws. But, based on the requirement that "(in regard to whether the university degree evaluation committee approves the decision to award a Ph.D. degree made by the degree dissertation defense committee), the decision can be approved if more than half of the committee members vote yes," it was insufficient to refute the dissertation defense committee's conclusion that the degree evaluation committee had the voting result in which 6 voted yes, 7 voted no, and 3 abstained.

> My impression from these encounters is that, from their perspective, to ruin a student who has worked very hard for more than two decades is just as trivial as to kill an ant ... Before you shoot someone, you should at least tell him a reason so that he knows why he must die.[70]

He Bing, who served as plaintiff's co-counsel, stated, somewhat emotionally:

> The dispute between us and the defendant is not on the defendant's decision per se, but also the defendant's decision process. We do not merely demand a certificate on which the plaintiff's livelihood depends. More importantly, we demand due process from the defendant, specifically, when our fates are being decided, please grant us due process.[71]

The plaintiff's co-counsel He Haibo devoted around 4000 characters to elucidating the due process principle in a brief that was just over 6000 characters in length. As the brief pointed out, the UDEC had neither the ability nor the time to evaluate the substance of every Ph.D. dissertation from numerous departments of the university. The existing evaluation mechanisms did not sufficiently protect fairness and justice in the evaluation of academic degrees, as the process left ample opportunity for the abuse of power. As a precautionary measure, the UDEC should have given Liu Yanwen the opportunity to make a statement and present his case before it rejected the dissertation committee's conclusion; moreover, the UDEC should have explained the reason for the rejection. The brief emphasizes this point, stating that, "while there is not a single statute that requires this form of action, it is demanded by due process of law!" In the end, the brief called upon the judges to "observe the principle in the ruling of *Tian Yong v. USTB*, and to apply the due process principle while examining the degree evaluation institutions of our nation":

> Honorable Judges...I sincerely hope that you could write the following in the ruling, "When the defendant Peking University made the decision to deny Liu Yanwen his Ph.D. degree, it did not give Liu Yanwen the opportunity

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[70] Liu's statement in the court hearing, Nov. 12, 1999.

[71] PKU FORUM ON ROAD TO RULE OF LAW, *supra* note 68, at 195.

> to argue in self-defense, did not explain its reasons, and did not make a written notification to Liu. Therefore this decision does not possess legality." I sincerely believe that, if the due process principle could once again be applied in this case, it certainly would promote the perfection of the current degree evaluation institutions, and the public image of China's administrative judges would also be glorified.[72]

After two court sessions, in December 1999, the Haidian Court ruled in favor of the plaintiff's litigation request, identified the defendant's decision as illegal, and mandated the UDEC of PKU to re-evaluate Liu Yanwen's Ph.D. dissertation. When the judge read out the verdict in court, the due process principle was not mentioned. However, one last opportunity for reconsideration remained: before the written decision was issued, the court could supplement the reasoning presented.

Some of the participants in the case sought to make maximum use of this remaining opportunity: After the first ruling for *Liu Yanwen v. PKU* was proclaimed orally but before the written judgment was prepared, Peking University Law School held an academic conference called "Evaluation by Experts and Due Process." It is unclear how much of an impact the event had on the judges' thinking, but at the least it can be said that the conference reached an important element of its target audience: the presiding judge in *Liu Yanwen v. PKU*, Ms. Rao Yadong, and the legal clerk in this case, Shi Hongxin (who later became a Ph.D. student at Peking University Law School) were both invited to audit the conference, and both attended. At the conference, the due process principle triggered heated debate. Professor He Weifang, Dr. Jiang Shigong and several other scholars expressed their sense of hope and support for courts' application of the due process principle. After the conference, Dr. Jiang Shigong published an essay on the Bulletin Board System (BBS) of PKU Legal Information Network, in which he once again called for the inclusion of due process into the court's written judgment:

> We are waiting; we are waiting, we are waiting not only for a ruling that will decide one individual's fate, but also for the attitude of our judges and our law towards

[72] *Id.*, at 193; 何海波，刘燕文诉北京大学、北京大学学位评定委员会案件代理词 [He Haibo, *Liu Yanwen v. PKU, Liu's Argument*], 北大法律信息网 [PKU LEGAL INFORMATION NETWORK], *available at* http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23449 (last visited Nov. 1, 2008).

> things...I hope that there can be two phrases in the written judgment of this case, "according to the precedent..." and "according to due process of law."[73]

Although there was significant controversy at the conference and on law school bulletin boards afterwards, the voice of approval for the due process principle clearly prevailed over the naysayers in a legal forum filled with debates. From the outset, the judges held empathy towards Liu Yanwen because of his situation and were critical of existing mechanisms for evaluating degrees. This sympathy may also have made them more receptive to the due process ideas presented at the conference. After listening to various legal scholars' opinions, they believed that the due process principle would be accepted by the legal field, and became more confident of the situation under which the due process principle could be applied. With the help of the various factors mentioned earlier, the due process principle made its debut in this case.

The courts issued its written judgment a few days later. After an overview of the respective opinions of the plaintiff and the defendant on the debate over due process, the court stated:

> The UDEC's decision to deny a degree directly affects the issue of whether a degree applicant can be awarded the corresponding degree certificate. Therefore, before the UDEC makes the negative decision, it should notify the degree applicant and it should listen to the degree applicant's arguments and views; after the decision to deny the Ph.D. degree has been made, based on the principle of full protection of the degree applicant's legal rights, the UDEC should notify the applicant himself of the decision. In this case the defendant UDEC did not listen to Liu Yanwen's arguments or views before making the decision to reject the award of the Ph.D. degree to Liu; after the decision was made, it did not in fact notify Liu of the decision, which infringed upon Liu's right to petition to relevant organs and to launch an administrative litigation lawsuit. Therefore the decision should be invalidated.[74]

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[73] 强世功, 希望的判决书 [Jiang Shigong, *A Written Judgment of Hope*], 北大法律信息网 [PKU Legal Information Network], Dec. 22, 1999.

[74] 北京市海淀区法院行政判决书 [*The Administrative Judgment of the Court of Beijing City Haidian District*], 1999 海行初字 [HAI XING CHU] No. 103.

It is evident that in the written judgment, the court accepted the arguments made by the plaintiff's counsel (though the court had some reservations about the argument that the UDEC should have revealed its reasons for rejecting the thesis). This passage resonates with the relevant language in the ruling of *Tian Yong v. UTSB* published in the *Gazette of the Supreme People's Court*, but its meaning is even clearer. Even though the court neither explicitly acknowledged the application of the due process principle nor engaged in any significant analysis or discussion, it is nevertheless plain that, with this case, Chinese judges began consciously to introduce the due process principle into their verdicts. *Tian Yong v. UTSB* and *Liu Yanwen v. PKU* were similar types of cases: they were tried in the same court, and the language in one written judgment is close to that in the other. Yet the most important step forward may be one of judicial intent: while the due process principle was found in a sentence almost unintentionally written by the judge in the earlier case, it was consciously applied in the later one.

Another important aspect of *Liu Yanwen* lies in the high level of attention it attracted both before and after the ruling. In each of the case's two court sessions, hundreds of people, including reporters from several media outlets, observed the trial. After the Haidian court issued its first ruling, *Liu Yanwen v. PKU* was widely reported, and the case triggered heated debate, of an intensity which was perhaps unprecedented in the history of administrative litigation.[75] Stimulated by this case, a series of academic conferences were held at China's top universities, including Peking University, Renmin University of China, China National School of Administration, and Tsinghua University;[76]

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[75] Besides the reports mentioned later in the paper, there is other media coverage. *See, e.g.*, 李东颖, 北大沉着当被告 [Li Dongying, Beida Being Sued], 北京青年报 [Beijing Youth Daily], Dec. 24, 1999, at 25; 方舟, 教学双方, 对簿公堂：国内首例学位诉讼案引起广泛关注 [Fang Zhou, The Teaching *v.* the Taught in the Court: First Academic Degree Certificate Case Triggered Wide Attentions], 科学时报 [SCIENCE TIMES] Jan. 13, 2000, at B1;谢圣华, 谁是谁非，焦点何在：北大博士生状告母校 [Xie Shenghua, *Right or Wrong? Ph.D. candidate Peking University Sued His Alma Mater*], 人民法院报 [PEOPLE'S COURT DAILY], Jan. 18, 2001, at 3. In addition to numerous reports by newspapers, Law Today, a show on Chinese Central Television (CCTV), held two special reports with comments made by legal experts. In addition, the internet, which had recently become popular, also provided a medium for reports and discussions. On December 21, 1999, Peking University Legal Information Network established a BBS discussions area, titled *Liu Yanwen v. Peking Univ.*, on this particular case. Some of its articles and reports have been collected online. *See* 刘燕文诉北大案专题 [*The Special Section for Liu Yanwen v. Peking Univ.*], 北大法律信息网 [CHINALAWINFO], *available at* http://www.chinalawinfo.com/flzk/flzk15.htm (last visited Nov. 8, 2008).

[76] These conferences are:

and several academic papers were published.[77] In virtually all of these

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1. An academic salon, titled *Experts' Evaluation and Due Process: Liu Yanwen v. Peking Univ.*, was held by Graduate Students' Association of Peking University Law School. Some of faculty members and students of Peking University Law School attended the salon. *See, e.g.*, 刘万永，高校面临的将不仅仅是一起诉讼：博士生告北大备受关注依法，依法治校刻不容缓 [Liu Wanyong, *Universities Face More than a Litigation: The Lawsuit of A Ph.D. Candidate against Peking University Attracted Much Attention; It Is Time to Start Administrating Universities in Accordance with Law*], Dec. 23, 1999, *available at* http://dailynews.sina.com.cn/culture/1999-12-23/44916.html (last visited Nov. 8, 2008); PKU FORUM ON ROAD TO RULE OF LAW, *supra* note 67; 刘燕文案学术沙龙 [*Academic Salon on Liu Yanwen v. Peking Univ.*], 北大法律信息网 [CHINA LAW INFO], *available at* http://www.chinalawinfo.com/fxyj/fxjz/liuyanwen/index.asp (last visited Nov. 8, 2008).

2. China Renmin University Law School and China Renmin University Education Science Research Center held the *Conference on China's First Academic Degree Litigation* on January 6, 2000. This conference was attended by administrative officials from around 20 universities of China and officials from the state's academic degree management agency. *See, e.g.*, 郑玲，刘燕文诉北大一案判决引起专家学者激烈探讨 [Zheng Lin, *The Ruling of Liu Yanwen v. Peking Univ. Triggered Heated Debates among Experts and Scholars*], 中国青年报 [CHINA YOUTH DAILY], Jan. 9, 2000; 芳和、张爱萍，法的思考：中国首例学位诉讼案相关问题学说研讨会发言摘要 [Fang He and Zhang Aiping, *Pondering about Law: Excerpts from Talks at the Conference on China's First Academic Degree Litigation*], 中国教育报 [CHINA EDUCATION], Jan. 13, 2000; 王锋：刘燕文诉北大案的法律思考 [Wang Feng, *Legal Thoughts on Liu Yanwen v. Peking Univ.*], 法制日报 [LEGAL DAILY], Jan. 16, 2000.

3. China Society of Administrative Law held the *Conference on Education Administrative Litigations* in China National School of Administration on January 20, 2000. This conference was attended by some administrative law scholars of the Beijing region and the judges of four levels of courts, from the Court of Haidian District to the Supreme Court. *See* 李鸣，大学自治与司法监督：刘燕文案引起法学界的广泛关注 [Li Ming, University Autonomy and Judicial Supervision: Liu Yanwen Case Attracts Wide Academic Attentions], 科学时报 [Science Times] Jan. 27, 2000; 高娣，法院：说理的最后地方，关于学生告学校的新感悟 [Gao Di, *The Court Is the Ultimate of Rational Discussion: New Thoughts about Student Suing Their School*], 法制日报 [LEGAL DAILY], Feb. 14, 2000, at 5.

4. In July of 2000Tsinghua University Law School held the *Conference on Reform and Legislation for China's Academic Degree Institutions*, which was attended by officials from Ministry of Education. *See* 秦平，加快学位制度改革，切实推进学位立法：中国学位制度改革与立法研讨会记实 [Qin Ping, *Accelerating Reform of Degree Institutions and Promoting Legislation Concerning Degree: Reports from the Conference on Reform and Legislation for China's Academic Degree Institutions*], 法制日报 [LEGAL DAILY], July 23, 2000, at 3.

[77] *See, e.g.*, 沈岿，制度变迁与法官的规则选择 [Shen Kui, *Evolution of Institutions and Judges' Choices of Rules*], 北大法律评论 [PEKING U. L. REV.], No. 2, 2002, at 159; 程雁雷，司法审查对大学自治的有限介入 [Cheng Yanlei, *Judicial Review's Restrained Intervention of Universities' Autonomy*], 行政法学研究 [ADMIN. L. REV.], No.2, 2000, at 33; 湛中乐、李凤英，刘燕文诉北京大学案：兼论我国高等教育学位制度之完善 [Zhan Zhongle & Li Fengying, *Liu Yanwen v. Peking Univ.: Improvement of China's Higher Education Degree System*], 中外法学 [PEKING U. L.J.], No. 4, 2000, at 318; 朱峰，从刘燕文诉北大案看行政正当程序的评判标准 [Zhu Feng, *Standards in Administrative Due Process: A Case Study of Liu Yanwen v. Peking Univ.*], 政治与法律 [POL. SCI. & L.], No. 5, 2000, at 70; 胡锦光，北

conferences, discussions, and written reports, due process was a key topic. While some media focused their reports on how "the light of law shines on the ivory tower," many others highlighted the issue of due process.[78] Some scholars hailed the verdict as "a monumental victory" for the due process principle.[79] The defendant attacked the application of the due process principle in its appeal, while members of the legal profession were somewhat split, some criticizing and others rising in the court's defense.

The court's critics put forth a number of arguments. The most common was based on a somewhat technical distinction, specifically that PKU's act was "unreasonable, but not unlawful."[80] In the view of those who advanced this argument, the judges in the *Liu* case had "no legal basis" to invalidate the action by the Degree Committee; the court had, in their view, "conflated the concept of due process and the requirement for lawful process."[81]

大博士学位案评析 [Hu Jin'guang, *Remarks on Liu Yanwen v. Peking Univ.*], 人大法律评论 [RENMIN U. L.J.], No. 2, 2000, at 281, *available at* http://www.cncasky.com/get/lltt/alpx/000659212.htm; 秦惠民，学位纠纷与司法裁判：对刘燕文诉北京大学学位评定委员会案的评析 [Qin Huimin, *The Dispute over the Degree and Judicial Adjudication: Liu Yanwen v. Peking Univ.*], 判解研究 [JURID. STUD.], NO.1, at 62; 杨建顺，行政诉讼与司法能动性：刘燕文诉北京大学(学位评定委员会)案的启示 [Yang Jianshun, *Administrative Litigation and Judicial Activism: Lessons from Liu Yanwen v. Peking Univ.*], 法学前沿 [JURIS. FRONTINERS], No.4, 2001, at 209. In addition to the above academic discussions, 科学时报 [Science Times] published a number of scholars' op-eds on January 20, 2000, at B1, B3, *See*, 包万超，刘案将决定学位制度改革的走向 [Bao Wanchao, *The Case of Liu Yanwen v. Peking Univ. Will Determine the Path of the Reform of Academic Degree System*]; 杜钢建，受教育权保障与行政说明责任 [Du Gangjian, *Protection of the Right to Education and Administrative Authority's Duty to Explain*]; 贺卫方，现行教育管理制度中的缺陷 [He Weifang, *Defects in the Management of Current Education System*]; 姜明安，北大拒发两证欠缺证据 [Jiang Ming'an, Evidential Insufficiency for Beida to Deny Liu's Certificates]; 李鸣，大学自治与司法监督 [Li Ming, *University Autonomy and Judicial Supervision*]; 劳凯声，司法应否介入教育 [Lao Kaisheng, *Should the Judiciary Intervene into Education*]; 杨支柱，学术民主与专家治校 [Yang Zhizhu, *Academic Democracy and Administration of Universities by Experts*]. *Reprinted in* 高等教育与行政诉讼 [*Higher Education and Administrative Litigation*] by 湛中乐[Zhang Zhongle ed.].

[78] Zheng Lin, *supra* note 77.

[79] 朱峰，从刘燕文诉北大案看行政正当程序的评判标准 [Zhu Feng, *Standards in Administrative Due Process: A Case Study of Liu Yanwen v. Peking Univ.*], 政治与法律 [POL. SCI. & L.], No. 5, 2000, at 70, 73.

[80] Jiang Ming'an believes that "[i]t is very difficult to say that Peking University's act is unlawful. It is merely unreasonable." *See* PKU FORUM ON ROAD TO RULE OF LAW, *supra* note 67. *See also* 姜明安老师的发言[*Remarks by Jiang Ming'an*], 北大法律信息网 [CHINA LAW INFO], *available at* http://www.chinalawinfo.com/fxyj/fxjz/liuyanwen/07.asp (last visited Nov. 8, 2008).

[81] On the BBS of PKU Legal Information Network, according to one radical view, judges do not have the power to "make laws," so every judgment should be made according to statutes;

Other critics questioned the court's application of the due process principle from the perspective of fairness to the defendant. Professor Zhan Zhongle, who served as Peking University's counsel in *Liu Yanwen v. PKU*, argued that it was "unfair to the defendant" to impose the "invented" obligation of due process on it, even though, as a scholar, he believed that it was necessary to introduce the due process principle into the field of education administrative management.[82]

Dr. Shen Kui, then an instructor at Peking University Law School, raised another question from the perspective of legal development: since the due process principle was barely acknowledged in China and there were few "indigenous beliefs" (a phrase coined by Professor Suli) that could be used to support the principle, wasn't such a revolutionary verdict unsuitable to China's current system? How many people would understand the message being sent by the judges through the ruling? How many institutional actors would learn from the court verdict and pay closer attention to procedural rules or call for better protection of procedural rights?[83]

Still other commentators, aware of the realities of the judiciary's current situation, expressed concerns over the potential political consequences of judicial innovation. A senior judge from the High Court of Beijing City feared that ill-considered innovations, such as the ones introduced in the *Liu* case, would quickly get courts entangled in controversies, warning that, "There are many injustices in society, but courts cannot run the world."[84]

"reform of degree evaluation institutions is not the purpose of the judiciary;" a judgment based on due process principle is a "betrayal" of the judiciary's duties and an "abuse" of the power of judicial review.

[82] 湛中乐、李凤英，论高等学校之法律地位 [Zhan Zhongle & Li Fengying, *The Legal Status of Higher Education Institutions*], *in* 行政法论丛 [ADMINISTRATIVE LAW REVIEW] (罗豪才主编 [Luo Haocai ed.] 2001). Vol. 38, at 496. Interestingly, Professor Zhan would later serve as pro bono counsel for 3 petitioners expelled by the Central University for Nationalities and successfully made the decision revoked by the Beijing Bureau of Education.

[83] 沈肖，制度变迁与法官的规则选择 [Shen Kui, *Evolution of Institutions and Judges' Choices of Rules*], 北大法律评论 [PEKING U. L. REV.], No. 2, 2002, at 159.

[84] 王振清，在国家行政学院"教育行政诉讼研讨会"上的发言 [Wang Zhenqing, Address at the China National School of Administration Conference on Education Administrative Litigations] (Jan. 20, 2000), noted by He Haibo. He said:

> [T]oday the experts here have reached consensuses on many issues, but if we ignore the current legal stipulations, it will be impossible to reach consensuses on many issues. The debate has just begun. The Court of Haidian's competence is unquestionable, but if this court is allowed to make a breakthrough, and that court also makes a breakthrough, how would it be possible to stabilize the legal order? There are many injustices, but courts can not run the world.

Finally, some observers approved of the due process principle conceptually and even agreed that the courts should play an important role in promoting legal development, but asserted that it "is still too early for China" to establish legal principles through judicial activism.[85] Others were concerned that the court's promotion of the due process concept may "have been too rash, so there might be unintended negative consequences in the future."[86] Professor Yu An of Tsinghua University argued that it is necessary to consider "the issue of courts' ability to uphold justice."[87] According to Prof. Yu, it is very difficult for courts to establish behavioral rules to be followed by administrative organs; therefore such an important issue "is more suitably handled by legislative organs."[88] It is necessary to emphasize that among all participants in the debate, almost all of them believed that degree evaluation institutions at that time were flawed and that almost none of them conceptually opposed the due process principle. The focal point of the controversy was whether it was legitimate for the court to apply that principle in this case.

Some scholars defended the court's application of the due process principle from different angles. In response to some scholars' argument that academic assessment made by reviewers of academic papers should not be questioned and it is unnecessary for the reviewers to offer any explanation, Professor Du Gangjian of China National School of Administration argued that the UDEC rejected Liu Yanwen's dissertation without giving him the opportunity to make arguments in his own defense, or formally notifying him, or explaining its reasons. Such an act not only violated the plaintiff's "right to acquire degrees," but also "defied the academic authority of the dissertation defense committee."[89]

In the conference at PKU Law School, Professor He Weifang responded to Dr. Shen Kui's doubts about the applicability of the due process principle to China by questioning whether due process ideas were in fact fully absent from China's past:

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[85] *See* Qin Huimin, *supra* note 78, at 62.

[86] *See* Hu Jin'guang, *supra* note 78, at 281, 310.

[87] *See* 加快学位制度改革，切实推进学位立法：中国学位制度改革与立法研讨会记实 [*Accelerating Reform of Degree Institutions and Promoting Legislation Concerning Degree: Reports from the Conference on Reform and Legislation for China's Academic Degree Institutions*], 法制日报 [LEGAL DAILY], July 23, 2000, at 3.

[88] *Id.*

[89] 杜钢建，受教育权保障与行政说明责任 [Du Gangjian, *Protection of the Right to Education and Administrative Authority's Duty to Explain*], 科学时报 [Science Times], Jan. 20, 2000, at B1, *reprinted in* 高等教育与行政诉讼 [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION] (page 377) (湛中乐主编 [Zhan Zhongle ed.] 2003).

> "Dr. Shen Kui has pointed out that China does not have the tradition of due process, which is absolutely right. However, what puzzles me is whether the lack of this tradition can be an excuse...I think that, in a sense, due process is a dream shared by people from every nation and every society. What due process demands is that a government cannot deprive a person of his life, liberty, or property without going through a legitimate process. How could the ancient Chinese people not have dreamed for such a principle?"[90]

The author responded to criticisms of the court verdict by publishing several articles on the Peking University law school internet bulletin board. In one essay, entitled "Defending the Due Process Principle," the author argued that, "a law that is not supplemented by principles is lifeless; a judge who cannot rule based on principles is mechanical!"[91] To address the question of whether it was proper for the due process principle to be applied in this case, the author put forward three reasons: 1) without the protection of the due process principle, justice would become an elusive goal for Liu Yanwen and others who share his fate; 2) while it is somewhat revolutionary to protect Liu Yanwen through due process, the principle does not run contrary to the public's expectations; 3) it is consistent with the basic character of legal development in contemporary China for courts to make revolutionary rulings even at the cost of the predictability of legal outcomes.[92]

The due process principle seems to have enjoyed the approval of the majority of administrative law scholars. In the conference held by the China National School of Administration, in response to Professor Zhan Zhongle's question "whether courts could establish obligations for universities by going beyond the law," several scholars firmly and definitely answered "yes."[93] Professor Ying Songnian, a leading scholar of Chinese administrative law, argued that, given that administrative agencies hold hearings and issue explanations when they impose even a 50-yuan fine, there is no justification whatsoever for making a much more

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[90] PKU FORUM ON ROAD TO RULE OF LAW, *supra* note 68, at 136.

[91] 何海波，刘燕文案件回响（二）：为正当程序原则辩护 [He Haibo, *Reflections on Liu Yanwen v. Peking Uni. (second): Defend Due Process*], 北大法律信息网 [CHINA LAW INFO], *available at* http://article.chinalawinfo.com/article/user/homepage.asp?UserId=70188 (last visited Nov. 8, 2008).

[92] *Id.*

[93] Gao Di, *supra* note 77.

consequential decision regarding the awarding of an academic degree without holding a hearing.[94] Professor Ying Songnian's analogy seems to reflect some influence by the passage of the *Administrative Penalty Law*. Professor Liu Xin from China University of Political Science and Law appealed to a form of natural justice. According to Prof. Liu, procedural fairness is an element of natural law and a basic requirement of the rule of law.[95] Regardless of whether the principle is actually written in the law or not, an administrative organ must follow a fair and reasonable process in making administrative decisions.[96]

The debates with regard to the due process principle are related in some length here, not because academics had achieved any consensus on *Liu Yanwen*, but because of the long-run effects these debates might yield. Debaters' views aside, the debate itself made the theme of due process more salient and the concept of due process spread further. If the *Liu Yanwen v. PKU* case is still remembered a few years hence in the legal community, the reason may well be that the case was a stormy stage in the development of due process.

After triggering a great storm, however, the first ruling of *Liu Yanwen v. PKU* was overturned by the higher court in April, 2000. In the end, Liu Yanwen gained nothing from the once hopeful suit. Speculation was rampant in Beijing legal circles that the court was pressured by the academic establishment to reverse the verdict. Nonetheless, the higher court used pure technical reason that "the litigation period had expired" and did not negate the lower court's application of the due process principle.[97] So, the due process rationale in the Haidian Court's judgment stands.

Despite the reversal, the *Liu* case has had a significant impact. Examples abound of the combined effect of *Liu Yanwen v. PKU* and *Tian Yong v. USTB*. In the wake of the *Liu* and *Tian* verdicts, Department of Education officials started drafting a revised *Academic Degree Law*. The draft included procedures requiring that relevant academic entities hold

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] 北京市第一中级人民法院行政裁定书 [Administrative Ruling of the First Intermediate Court of Beijing City], 一中行终字 [YI ZHONG XING ZHONG], No. 2000-43 (returning the case for re-trial on whether the case should be barred on the statute of limitation); 北京市海淀区人民法院行政裁定书[Administrative Ruling of Haidian District Court of Beijing City], 海行初 [HAI XING CHU], No. 2000-157 (the case be dismissed bases on the statute of limitation); 北京市第一中级人民法院行政裁定书 [Administrative Ruling of the First Intermediate Court of Beijing City], 一中行终字[YI ZHONG XING ZHONG], No. 2001-50 (maintaining the re-trail ruling of first instance).

hearings and issue written notifications.[98] In 2005, the Ministry of Education reissued its *Rule on Administration of Students of Ordinary Higher Education Institutions*.[99] According to the new *Rule*, when a student is punished by his academic institution, the school must fulfill a specific set of obligations, which include adherence to certain due process requirements (Article 55).[100] Specifically, under the *Rule*, before making a penalty decision, the school should allow the student or his counsel to present his case (Article 56); after the school has made a penalty decision, the school should notify the penalized person himself (Article 58). After this *Rule* was implemented, every major Chinese university, including Tian Yong's alma mater USTB, created implementing regulations in accordance with the *Rule*.[101]

V. "DUE PROCESS" WRITTEN INTO JUDGMENTS

Tian Yong v. USTB and *Liu Yanwen v. PKU* not only triggered heated debate about due process; it also inspired several judges to apply procedural norms that went beyond the explicit requirements of law. It is not entirely clear how much impact these two early cases had on later ones. But, at the least, they were not the end of the development of due process. Three cases from the *Gazette of the Supreme People's Court* and

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[98] This draft can be contrasted with the fifth draft of the Academic Degree Law, which was drafted a year before the case. *See* 中华人民共和国学位法（草案）[*Academic Degree Law of the PRC (draft)*], 博客法网 [BLOGGERS' LAW NETWORK], Oct. 10, 2002, *available at* http://www.8k8k.com/shownews.asp?newsid=1547 (last visited Nov. 8, 2008).

[99] 普通高等学校学生管理规定, [Rule on Administration of Students of Ordinary Higher Education Institutions] (promulgated by the Ministry of Educ., Mar. 29, 2005, effective Sept. 1, 2005), *translated in* LAWINFOCHINA (last visited Nov. 12, 2008) (P.R.C.).

[100] In the press conference about the amended *Rule on Administration of Students of Ordinary Higher Education Institutions*, Lin Huiqing, the director of the Higher Education Students Division of the Department of Education, stated that "The new *Rule* implements due process principle to its full extent." 林惠青, 在《普通高等学校学生管理规定》、《高等学校学生行为准则》颁布实施新闻发布会上的讲话 [Lin Huiqing, *Speech on The Press Conference for the Implementation of Rule on Administration of Students of Ordinary Higher Education Institutions and Behavioral Standards for Students of Higher Education*], 教育部 [MINISTRY OF EDUCATION], Mar. 9, 2005, *available at* http://www.edu.cn/20050329/3132615.shtml (last visited Nov. 8, 2008).

[101] *See* 北京科技大学学生违纪处理规定（试行）[*University of Science and Technology Beijing's Disciplinary Rule on Students' Behavioral Violations (Provisional)*], 北京科技大学 [UNIVERSITY OF SCIENCE AND TECHNOLOGY BEIJING], *available at* http://teach.ustb.edu.cn/bencandy.php?id=782&l_page=1 (last visited Nov. 8, 2008) and 北京科技大学学生校内申诉管理办法（试行） [*University of Science and Technology Beijing's Rule on Administration of Students' Petitions within the University (Provisional)*], 北京科技大学 [UNIVERSITY OF SCIENCE AND TECHNOLOGY BEIJING], Sept. 19, 2005, *available at* http://student.ustb.edu.cn/page/xssw/list.asp?sid=17&id=3455 (last visited Nov. 8, 2008).

several other cases discussed below demonstrate that in recent years, other courts have picked up on the innovations of the Haidian court and the evolution of the due process principle has continued in judicial practice. Among these cases, *Zhang Chengyin v. People's Government of Xuzhou City (of Jiangsu Province)* in 2004, is perhaps the most significant: in that case, the phrase "due process" appeared in a written judgment for the first time, signifying a milestone in the judicial application of due process norms.[102]

Another of the cases in this series was *Lanzhou Changde Resource Development Corporation (CRDC) v. People's Government of Lanzhou City (of Gansu Province)* in 2000. [103] The defendant, Lanzhou City Government, withdrew the right to use of state-owned land from the plaintiff and transferred it to another corporation. The High Court of Gansu Province negated the government's executive order on several grounds, including "unclear facts and insufficient major evidence," "violation of statutory process," "exceeding the limits of authority," and "administrative interference over judicial authority."[104]

Relevant to this discussion is that, according to the written judgment, the city government made an executive order withdrawing land use rights from CRDC and granting them to a third party, but the government never sent this executive order to CRDC, which constituted a "violation of statutory process." However, the written judgment did not identify which law mandated the process to which the court referred. A review of relevant regulations, including the *Land Administration Law*[105] and the "*Implementing Regulations of Gansu Province for Land Administration Law*,"[106] indicates no clear requirement that the relevant government actor must send documents to an impacted party when withdrawing land use rights. In this case, the court once again made use of judicially-applied due process standards to evaluate administrative acts, although the court did not explicitly acknowledge that it was doing so.

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[102] 张成银诉徐州市人民政府房屋登记行政复议决定案 [Zhang Chengyin v. Xuzhou Mun. of Jiangsu Province], SUP. PEOPLE'S CT. GAZ., Mar. 1, 2005, at 43, 46 (Jiangsu High People's Ct., Dec. 10, 2004) [hereinafter *Zhang Chengyin Case*].

[103] 兰州常德物资开发部诉兰州市人民政府收回土地使用权批复案 [Lanzhou Changde Commodity Dev. Dep't of Gansu Province v. Lanzhou Mun. of Gansu Province], SUP. PEOPLE'S CT. GAZ., Apr. 1, 2000, at 142 (Gansu High Peoples' Ct., Aug. 9, 1999).

[104] *Id.* at 144.

[105] 土地管理法 [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, effective Jan. 1, 1987),

[106] 甘肃省实施土地管理法办法 [Implementing Regulations of Gansu Province for Land Administration Law] (promulgated by the Standing Comm. People's Cong. Gansu Province, Sept. 20, 1988).

In *Song Lili v. Suqian City (of Jiangsu Province) Bureau of Development*, which involved an administrative ruling over compensation for a resident of a building about to be demolished, the court explicitly stated that in the absence of statutory regulations, an administrative organ should follow "fair rules."[107] According to current law, the local bureau of real estate management and development shall make a ruling, based on the report of an independent evaluation agency, if the real estate developer and the residents cannot reach an agreement as to the value of the building about to be demolished. The issue at stake involves the process of valuating the about-to-be-demolished building. The Sucheng District Court of Suqian City found the defendant's ruling unlawful since it was conducted solely in light of the application of the Wanxing Corporation, while the real estate developer and the plaintiff had no chance to state her case. The court went further:

> Although neither the State Council's *Regulations for Urban Demolition Projects* nor *Regulations of Jiangsu Province for Urban Demolition Projects* provide clear stipulations for administrative demolition process, an administrative organ should fully protect the concerned person's legal rights while making the decision; it should allow the concerned person to make defensive arguments and statements in regard to disagreements. However, when the Suqian City Bureau of Development judged the dispute between Song Lili and Wanxing Corporation over the issue of demolition, it did not allow Song Lili to make statements or defensive arguments in regard to the disagreement, which lacked fairness...[108]

Based on the context of this written judgment, what the court meant was that the Wanxing Corporation unilaterally hired an evaluation agency, which was already an infringement on Song Lili's right to participate in the selection of evaluation agencies; the Suqian City Bureau of Development made its decision based on the evaluation provided by this evaluation agency, which to a great extent "lacked fairness." The initial "although" underscores not only the statutes' blind spots, but also the court's stance of preserving justice. Compared to all of the cases discussed earlier, this court's stance was the clearest.

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[107] 宋莉莉诉宿迁市建设局房屋拆迁补偿安置裁决案[Song Lili v. Suqian Constr. Bureau of Jiangsu Province], SUP. PEOPLE'S CT. GAZ., Aug. 1, 2004, at 33 (Suqian Interm. People's Ct., Dec. 9, 2003).

[108] *Id.* at 35.

The culmination of this series of cases was an administrative review case of a housing registration dispute *Zhang Chengyin v. People's Government of Xuzhou City (of Jiangsu Province)* in 2004. As noted above, this was the first case in the history of the People's Republic in which a court, in this case the High Court of Jiangsu Province, used the phrase "due process" in the text of a judgment itself.[109] The facts of the case are as follows: there was a property rights dispute between Zhang Chengyin, who held the house deed, and one of her relatives. After Zhang's relative applied for an administrative review of the dispute, the Xuzhou City government revoked Zhang Chengyin's deed. Unhappy with the revocation, Zhang sued. The courts in both instances invalidated the review decision by Xuzhou City government and restored Zhang's property rights in the house. But the two reviewing courts—the Intermediate Court of Xuzhou City, the Court of First Instance, and the High Court of Jiangsu Province, the Court of Second Instance—each cite different reasons. Exploring their differences may underscore the use of the due process principle in the second instance.

A key reason why the Intermediate Court of Xuzhou City invalidated the administrative decision in the first instance was that the review organ did not take appropriate measures to notify Zhang Chengyin of his right to participate in the review.[110] According to the court, this "serious violation of administrative process" constituted "a violation of statutory process," as defined in Article 54 of the *Administrative Litigation Law*. This holding highlights the issue of process with regard to an interested third party in an administrative review. The *Administrative Review Law* states that "[o]ther citizens, legal persons or other organizations whose interests are concerned in the specific administrative act under administrative review can participate in the administrative review as a third party," but it does not *require* that the review organ notify the third party of his right to participate in the administrative review.[111] The question here was whether the third party should receive notification from the review agency so that he may understand his situation (that his rights are in dispute) and that he may

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[109] *Zhang Chengyin*, *supra* note 103, at 43.

[110] According to the judgment of the court of first instance, the review organ "failed to prove that it had taken appropriate measures to notify Zhang Chengyin to participate in the review." In fact, the People's Government of Xuzhou City claimed that it had notified Zhang Chengyin of his chance to participate in the review by phone, but it could not prove that it had performed this act. According to Zhang Chengyin's response, the People's Government of Xuzhou City "did not notify her to participate in the review through measures ordained by law." *Id.* at 44-45.

[111] 行政复议法 [Administrative Review Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), art. 10.

participate in the administrative review process in a certain form (by supplying written or oral statements).[112] Because of the lack of specific regulations, at that time it was not entirely clear whether an administrative organ had a legal responsibility to notify the third party to participate in the review process.[113] In this sense, the Intermediate Court of Xuzhou City's argument supplemented the existing due process requirements under the pretext of "violation of statutory process."

The appellate judgment by the High Court of Jiangsu Province in December 2004, important for a number of reasons, featured the debut of the due process principle in China.

First, compared with the lower court verdict, the procedural debate in the higher court judgment was more salient and focused. In the lower court verdict, each side's points of contention, according to the summary in the written judgment, were plural, including whether the deadline ordained by law had passed when Zhang's relative applied for administrative review and whether it was lawful for the former Real Estate Bureau to grant Zhang Chengyin the house deed. According to the court, the deadline ordained by law had passed when the application for administrative review was filed, which meant that the review organ should not have accepted the review application. On these grounds alone, the court could have invalidated the administrative review decision, and there was no need to evaluate the legality of the administrative review process, which means that the use of the phrase "serious violation of administrative process" was not necessary.

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[112] It is necessary to clarify that the point of contention here was not whether a participant of an administrative review can be granted with hearings, an issue that has attracted wide attention in the academia. This argument has been explicitly excluded by *Administrative Review Law*. The Article 22 of the *Administrative Review Law* stipulates:

> In principle, an administrative review shall be mainly conducted on the basis of written documents, but when the applicant has made such a request or when the administrative review agency's legal affairs office deems such an act necessary, the agency may collect information from relevant organizations and individuals and listen to the opinions of the applicant, the second party, and the third party. *See id.* art. 22.

[113] Regrettably, this issue was not well resolved in 行政复议法实施条例 [Measures of Implementation of Administrative Review Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 23, 2007, effective Aug. 1, 2007), which was introduced a few years later. According to Article 9 of the Implementation Regulation, "During an administrative review, if the administrative review organ believes that, other than the applicant, there is a citizen, a legal person or another organization whose interests are concerned in the administrative act under review, it *may* notify him to participate in the administrative review as a third party. During an administrative review, a citizen, a legal person or another organization whose interests are concerned in the administrative act under review other than the applicant, *may* apply for the administrative review organ's permission to participate in the administrative review as a third party. If a third party does not join the administrative review, the processing of the administrative review case *should not be affected*." [Emphasis added]

On appeal, the High Court of Jiangsu Province took a different view, holding that the deadline ordained by law had not yet passed when the review application was filed. As a result, the other procedural grounds for the decision became much more important. Given this change, the appeals court summarized the case's "main point of contention" as procedural in nature, framing the dispute as follows: "if a person's interests are directly affected while an administrative organ reviews an administrative decision according to the *Administrative Review Law*, whether it is necessary for the review organ to take appropriate measures to notify this person to participate in the review and to listen to this person's opinions."[114]

Secondly, the court's response to the due process issue is much clearer than that of the lower court. In response to the initial court verdict, the defendant argued that "the stipulation in regard to third parties in *Administrative Review Law* is an elastic clause, so whether a third party participates in the administrative review depends on the review organ's discretion. Although Zhang Chengyin did not participate in the review, it should not be concluded that the review organ had violated statutory process."[115] The Jiangsu High Court responded to this argument directly and forcefully:

> Although *Administrative Review Law* does not clearly stipulate that an administrative review organ must notify a third party to participate in the review, based on the requirement of *due process*, when an administrative organ makes an administrative decision that is unfavorable to a concerned party, it should listen to the concerned party's opinions...the People's Government of Xuzhou City made the administrative review decision without listening to Zhang Chengyin's opinions, which constituted a serious violation of statutory process."[116]

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[114] *Zhang Chengyin*, *supra* note *103*, at 46.

[115] *Id.* at 45.

[116] When the case was published in the *Gazette of the Supreme People's Court*, there were minor revisions of the passage so that the argument became more coherent. According to the *Gazette* (changes are highlighted in bold): Although the Administrative Review Law does not clearly stipulate that an administrative review organ must notify a third party to participate in the review, based on the requirement of *due process*, when an administrative organ makes an administrative decision that *might be* unfavorable to a person, it should *specifically* listen to *the interested person's* opinions...the People's Government of Xuzhou City, without listening to *the interested person's* opinions, made an administrative review decision *that was unfavorable to this person*, which constituted a serious violation of statutory process. *Id.* at 46. [Emphasis added]

The importance of this passage is hard to overstate. "The requirement of due process" – a phrase Chinese scholars had dreamed of, a phrase that judges knew but dared not write – had finally appeared in a written judgment. While the due process principle was almost unconsciously invoked in *Tian Yong v. USTB*, the endeavor to promote the principle met a severe setback in *Liu Yanwen v. PKU.* Nonetheless, the due process principle blossomed in *Zhang Chengyin v. People's Government of Xuzhou City*. Certainly, the phrase "due process" does not in and of itself have great intrinsic value, but in this context it stands succinctly and powerfully for a viewpoint, a concept, and an intellectual system.

In a phone interview with the author, the presiding judge in the case, Judge Zhen Lingling, confirmed that the issue of due process was the main reason why the court invalidated the administrative review decision, and that the other reasons mentioned in the written judgment were merely secondary to the due process concerns.[117] In Judge Zheng's view, the reason the case had been selected for the *Gazette of the Supreme People's Court* was also because "in local courts, there are few judgments that have applied the due process principle."[118] When asked about the basis for invoking the due process principle in this case, she pointed out that in judicial practice, when there is no statutory basis, "it is permissible to use legal principles."[119] When asked the source of her knowledge about due process, Judge Zheng, who graduated as a law major in 1990, mentioned a joint conference held by the Supreme Court and the government of Germany, as well as literature she had read elsewhere.[120]

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[117] According to the judgment of second instance, the "review decision made by the People's Government of Zuzhou City directly adjudicated the disputes over house ownership, which was beyond the limits of a review organ's power. So the review decision should be invalidated." *Id.* at 46. This reason is completely unrelated to the "major points of contention" summarized by the court of second instance. Furthermore, it appears to be untenable even as a subsidiary reason. According to the written judgment, the administrative review only determined that it was unlawful to grant Zhang Chengyin the certificate of house ownership. The statement that "Zhang Chengyin was not the lawful heir of the house" was simply a reason for the review decision, not the conclusion. *Id.* at 44. Thus, it is inaccurate to say that the review decision "directly adjudicated the disputes of house ownership." *Id.* at 46. So it is somewhat flimsy to say that the decision was "beyond the limits of a review organ's power." *Id.* at 46.

[118] Telephone Interview with 郑琳琳[Zhen Lingling], (Nov. 22, 2007).

[119] *Id.*

[120] *Id.*

After issuing the verdict in this case, she explained her position through case analyses and case discussions in legal journals and newspapers.[121]

It was no mere coincidence that the due process principle was used in *Zhang Chengyin*. Before this case, the same court had invoked "the basic principles of administrative process" in another case where Judge Zheng had participated. In that case, the local education authority arbitrarily cancelled Zhang Zhenlong's license to operate a school and was denounced by the court. Among other reasons, the judgment of the High Court of Jiangsu Province stated:

> When the Xuzhou City Bureau of Education makes a cancellation decision, it should follow basic procedural principles, including fairness, openness, etc., and listen to the concerned party's opinions. However, when the Bureau made the cancellation decision which was unfavorable to Zhang Zhenlong, who was the former host and the school's director, it neither informed this person in advance nor listened to his defense and arguments. Thus, it violated the basic principles of administrative process.[122]

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[121] 郑琳琳, 张成银不服房屋登记行政复议决定一案评析 [Zhen Lingling, Case Analysis of *Zhang Chengyin v. People's Government of Xuzhou City*], *in* 13 行政执法与行政审判 [*Administrative Regulation and Judicial Review*], (最高人民法院行政庭编 [Supreme People's Court Administrative Division ed.], 法律出版社 [The Law Press], 2005) [hereinafter *Case Analysis*]; 郑琳琳, 试论合理性司法审查的根据和内容：由一起行政诉讼案件引发的思考 [Zhen Lingling, Basis and Contents of Legitimate Judicial Review: Thoughts Provoked by an Administrative Litigation], 人民法院报 [*People's Court Daily*], Dec. 14, 2006 [hereinafter *Thought*]. In "*Case Analysis*," Zhen states a belief that due process is the best means to ensure the actualization of citizens' substantive rights; listening to the concerned party's opinion is an important manifestation of the principle of participation in administrative process; and "the participation by concerned parties in administrative process is the primary standard for just administrative process." *Id.* In "*Thoughts*," she stated, "there is a practical necessity to exercise reasonable and effective control over administrative discretion;" "Administrative review shall apply principles which give equal importance to both legality and legitimacy." She argues that the exercise of administrative discretion should be reviewed from three aspects, including "the legislative intent and spirit," "fair and just legal principles (including equal treatment, proportionality, and the observation of precedents)," and "the due legal process." *Id.*

[122] 张振隆诉徐州市教育局注销社会力量办学许可证案件，人民法院案例选 [*Selection from People's Court Cases*] Vol. 50, 2005, at 170. In this case, the court believed that Xuzhou City Bureau of Education's cancellation notice "relied on apparently unlawful evidence; identified erroneous facts; the act of cancellation had no legal basis and followed unlawful process; and abused the administrative power, and it should therefore be invalidated according to law." In the previous litigation, Xuzhou City Bureau of Education retracted its order to grant a third party the licensee instead of to Zhang Zhenlong, so Zhang Zhenlong withdrew from the litigation; however, on the very next day from the withdrawal, Xuzhou City Bureau

Perhaps at the time the case was decided, the judges involved felt that it would have been too revolutionary to directly use the expression "due process," and so instead employed more general and familiar expressions such as "basic procedural principles including fairness, (and) openness," and "basic principles of administrative process."[123] While the verdict did not explicitly articulate the term "due process," it seemed clear that the concept was ripe for use. More importantly, the presiding judge Geng Baojian, was clearly very familiar with the concept.[124] According to Judge Geng, who received a bachelor's degree in law in 1995 and is currently a Ph.D. student studying administrative law, the concept of due process should be "basic knowledge" for a judge; the validity of the due process principle is "self-evident, so it does not need to be proved."[125] Judge Geng and colleagues appear to share these views on modern administrative law.

What is somewhat surprising and regrettable is that *Zhang Chengyin v. People's Government of Xuzhou City* attracted only limited attention from the legal community. No news media reported the on the case, either before or after the ruling. Even after the case's publication in the *Gazette of the Supreme People's Court*, few web sites have discussed the case, despite the Internet's propensity to duplicate information.[126]

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of Education once again made a decision of canceling Zhang's license. The court believed that the administration acted capriciously, which constituted an abuse of power.

[123] Telephone Interview with 耿宝建[Geng Baojian], a presiding judge of *Zhang Zhenlong v. Xuzhou City Bureau of Education*, 江苏省高级人民法院 [High Court of Jiangsu Province] (Nov. 22, 2007).

[124] In an analysis of *Zhang Zhenlong* written by the judges of the High Court of Jiangsu Province, there was a particular discussion on the question "whether process becomes necessary when there is no specific process stipulated by law." *See* 耿宝建、朱嵘, 张振隆不服徐州市教育局注销社会办学许可证案[Geng Baojian & Zhu Rong, *Zhang Zhenlong v. Xuzhou City Bureau of Education*], [*Selection from People's Court Cases*] Vol. 50, 2005, at 178. The judges wrote, "when an administrative organ performs an administrative act, even if there is no explicit procedural stipulation from the law, the organ should still follow a certain procedure based on the basic principles of openness, fairness and justice. The essence of 'due process' is that when a decision concerns a person's interests, such person must enjoy the rights to express his own opinions and to refute the opposing opinions in the decision making process." *Id.* at 178.

[125] Telephone Interview with Geng Baojian, *supra* note 124.

[126] Through Google search, the keywords 张成银 徐州市人民政府 [Zhang Chengyin and People's Government of Xuzhou City] yielded 453 web pages; the keywords 张成银 正当程序 [Zhang Chengyin and due process] yielded 209 web pages. In contrast, the keywords 刘燕文 北京大学 [Liu Yanwen and Peking University] yielded 15,600 web pages; the keywords 刘燕文 正当程序 [Liu Yanwen and due process] yielded 3,210 web pages. The search results for 田永 北京科技大学 [Tian Yong and University of Science and Technology Peking] were 895, 000 web pages; the keywords 田永 正当程序 [Tian Yong and due process] yielded

Commentaries about this by legal professionals are, as of this writing, extremely rare: one lawyer mentioned that the due process principle has been implied in this case,[127] a local legal official suggested that the administrative review institutions should be perfected in light of the *Zhang Chengyin* judgment,[128] and a law student in the author's class remarked on the significance of this case in the development of due process.[129] Among the judges the author has spoken with, very few of them were familiar with this case. Restricted by the current format for written judgments, a judge can not openly cite a judicial precedent in the judgment, even if the case has been published in the *Gazette of the Supreme People's Court*. Thus, it is impossible to know the extent to which the case has been relied upon by other judges and reasonable to infer that many judges and lawyers are not overly concerned with judicial precedents.

Nonetheless, ignorance of *Zhang Chengyin* does not imply an ignorance or rejection of judicial application of the due process principle. A vice president in charge of administrative trials at a local court told the author that his court never engaged in judicial application of the due process principle, as doing so required "some courage."[130] This judge, who holds an undergraduate degree in law and was interested in intellectual inquiry, told the author that the demand for due process was mentioned in both the State Council's *The Outline of Comprehensive Promotion of Law-Based Governance* and perhaps also in a case (in which "PKU was sued").[131] After the author briefly described *Zhang*

86,200 web pages. The search time was November 23, 2007. Even considering the fact that *Liu Yanwen v. PKU* and *Tian Yong v. USTB* occurred earlier, the degree of attention on *Zhang Chengyin v. Xuzhou City* is still relatively low. [All searches were performed in Chinese characters.]

[127] 杨乾武（律师），行政法的正当程序原则：简评"张成银诉徐州市人民政府房屋登记行政复议决定案" [Yang Qianwu (lawyer), *Due Process Principle in Administrative Law: A Brief Commentary on Zhang Chengyin v. People's Government of Xuzhou City*], May 2, 2006, http://www.china-lawyer.org/view.asp?id=545 (this author notices that the case sets forth the requirement of due process); 金涛（辽宁省抚顺市人民政府法制办公室），对完善行政复议制度的思考 [Jin Tao (from the Legal Affairs Office of the People's Government of Liaoning Province Fushun City), *Thoughts on the Perfection of Administrative Review Institutions*], http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co2021392593 (this author points out the meaning of "perfecting the administrative review system"); 管君，法槌下的正当程序原则 [Guan Jun, Due Process Principle under the Legal Hammer], 行政法学研究 [*Administrative Law Review*], 3 (2007).

[128] *See* Jin Tao, *Id.*

[129] *See* Guan Jun, *Id.*

[130] Telephone Interview with the Vice President of a local court (Dec. 6, 2007).

[131] *Id.*

Chengyin, the judge immediately asserted, "This act (the review organ's failure to notify the third party) was certainly unacceptable."[132] Judge Li Qian, the director of the Administrative Division of the High Court of Guangxi, said that she had not seen a ruling by a local court in which the due process principle was directly applied. This judge, holding a master's degree in administrative law, identified as the reason for its absence that local judges were "conceptually unprepared."[133] However, she pointed out that when facing this type of problem, courts might invalidate review decisions based on other reasons, such as the absence of the necessary concerned person in the review process, failure to identify facts clearly, or other related reasons.[134] The director of the Administrative Division of an intermediate court noted that, "there are very few judgments that directly cite (due process), but we have been using this concept (in recent years)."[135]

Generally speaking, *Zhang Chengyin v. People's Government of Xuzhou City* is obviously not the only case of judicial application of the due process principle. While similar court rulings may exist that have not been reported either in the internet or the news media, the author has found three such rulings. In *Yimin Corporation v. People's Government of Zhoukou City, etc.*, an administrative action case tried in March 2005, the Supreme Court invoked the due process requirement.[136] According to the judgment of the Supreme Court, the defendant, the Development Planning Committee of Zhoukou City, had the authority to organize bids for the natural gas pipe network project. However, having granted the monopoly right of operating the city's natural gas pipe network to the plaintiff, Yimin Corporation, "following due process, the Development Planning Committee should have first revised, cancelled or revoked that permit, and it should have given reasonable compensations to the legal investments made by Yimin Corporation relying on the trust in this permit" before organizing the new bids for the city's natural gas pipe network project.[137] The Development Planning Committee ignored the then legally valid document and directly issued its own *Guidelines for*

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[132] *Id.*

[133] Telephone Interview with 李轩 [Li Xuan], 广西高级法院行政庭庭长 [Chief Judge of the High Court of Guangxi Administrative Division] (Dec. 6, 2007).

[134] *Id.*

[135] Telephone Interview with 谢立新 [Xie Lixin], 成都市中级法院行政庭庭长 [Chief Judge of the Intermediate Court of Chengdu City Administrative Division] (Nov. 28, 2007).

[136] 益民公司诉河南省周口市政府等行政行为案 [Yimin Corporation v. People's Government of Zhoukou City, etc] 最高人民法院行政判决书[Administrative Judgment of the Supreme Peoples' Court] 2004 行终字 [XING ZHONG] No.6; SUP. PEOPLE'S CT. GAZ., Vol. 8 2005 at 23.

[137] *Id.* at 30.

Bidding, which constituted a violation of statutory process. In addition, in *Hubei Runhai Real Estate Development LLC (RRED) v. Yichang City Bureau of Urban Planning (BUP)*, the Intermediate Court of Yichang City stated in its judgment, "based on the ordinary principles of administrative law and the requirement of due process in administrative acts, when the party concerned in the administrative management makes an application to the administrative organ, as long as the application meets the basic conditions for acceptance, the organ is obliged to accept the application with no right to reject."[138] In the third case, *Chengdu Erjie Hotel v. Chengdu Wuhou District Construction Quality Inspection Station (CQIS)*, the plaintiff Erjie Hotel (the developer) and the third party Division IX of Wuhou Construction Corporation (the constructer) had disagreements over the quality of construction.[139] According to the Intermediate Court of Chengdu City, after the defendant Wuhou CQIS made *the Construction Project Quality Level Evaluation Notification*, "according to the requirement of due process," the CQIS should have sent the notification to both the developer and the constructor; in fact, it only notified the constructor, but did not notify the developer Erjie Hotel (the notification was re-issued three years later pursuant to Erjie Hotel's request), so the CQIS followed "illegal process."[140]

In addition to these rulings, some local courts have even issued normative documents that require courts to pay special attention to due process norms when adjudicating cases. In 2006, the Intermediate Court of Chengdu circulated to lower courts a writing format for judgments of first instance, which included language on adherence to relevant

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[138] 宜昌市中级法院行政判决书[Administrative Judgment of the Intermediate Court of Yichang City], 2005 宜行终 [YI XING ZHONG] No. 3. According to the court, "the essence of 'the Refusal to Accept RRED's Petition' was that the BUP refused to carry out the inspection because RRED's construction project did not meet the conditions for a project inspection as well as its failure to make proper adjustments, It is just that the title of the *Refusal* was inconsistent with its content." *Id.* Therefore, the actual point of contention in this case was whether the BUP should have perform its legal duty to conduct a project inspection, not whether the BUP should have accepted the application for inspection.

[139] According to Article 8 of the 建设部 [Department of Construction]'s 建设工程质量管理办法 [*Construction Projects Quality Management Methods*] (promulgated in 1993, but repealed in October 2001), quality inspections on construction projects are to be performed by professional quality inspection agencies. In practice, if a project has not been inspected by a quality inspection agency (QIA) or if a project is found to be unqualified after the inspection, the project can not be considered complete and the project cannot undergo its final settlement. Qualified projects shall receive a *Construction Project Quality Level Evaluation Notification* from QIA. However, neither *Management Methods* nor its replacement, *Construction Projects Quality Management Rule*, makes explicit requirements for the inspection process.

[140] 成都市中级人民法院行政判决书 [Administrative Judgment of the Intermediate People's Court of Chengdu City], 2006 成行终 [CHENG XING ZHONG], No. 191, http://cdfy.chinacourt.org/public/detail.php?id=6241.

procedural norms. According to this format, a court, when explaining the reasons for a ruling and the legality of a specific administrative act under review, should "contrast the process of the specific administrative act under review on the one hand with statutory process and due process on the other. The court should determine whether the specific administrative act violated statutory process and due process and the court should explain its reasons."[141] This format is a clear breakthrough beyond what the Supreme Court provided, which concerns "whether the administrative act under review followed statutory process," but does not mention due process.[142] In an interview with Director Xie Lixin and Vice Director Chen Yonghong of the Administrative Division of the Chengdu Court, both believed that the phrase "due process" in this document meant the most basic procedural standards to be followed by administrative organs in addition to statutory process. Among the justifications for "due process," besides elaborate expressions such as "the intrinsic requirement of modern rule of law" and "the requirement of law-based administration," Judge Xie Lixin specifically pointed to the requirement of due process in the State Council's *Outline of Comprehensive Promotion of Legally Compliant Administrative Acts*.[143] Judge Chen Yonghong referred to works by several Supreme Court judges, such as Judge Jiang Bixin, Judge Kong Xiangjun, and Judge Gan Wen. Although both judges claimed that they had not heard of similar rulings by other courts (including *Zhang Chengyin v. Xuzhou City* published in the *Gazette of the Supreme People's Court*), they clearly sensed that the Supreme Court has introduced some "modern concepts" in recent years.[144] Judge Xie Lixin mentioned a Supreme Court case invoking the principle of proportionality; and both of them clearly remembered the

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[141] 成都市中级法院 [Intermediate Court of Chengdu City], 自认部分证据事实一审行政判决书 [Format Administrative Judgment for First Instance Cases with], 原审事实基本正确二审再审行政判决书 [Format Administrative Judgment for Second Instance Cases in Which Facts Were Generally Correct at First Instance Judgment], http://cdfy.chinacourt.org/swgk/more.php?sub=3 (follow hyperlink of the respective documents under "Rules and Institutions").

[142] *See* 最高人民法院 [the Supreme People's Court], 关于印发〈一审行政判决书样式（试行）〉的通知 [*Notification regarding the Issuance of the Format of Judgments of First Instance (Provisional)*], 2004 法发 [FA FA] No. 25. This format emphasizes that "when applicable to the reasoning of final judgments, the stipulations in Article 54 (1), (2), (3) and (4) of *Administrative Litigation Law* and their relevant judicial interpretations should be applied respectively."

[143] Telephone Interview with 谢立新 [Xie Lixin], 行政庭庭长 [Chief Judge of the Administrative Division], 成都市中级法院 [Intermediate Ct. of Chengdu City] & 陈永红 [Chen Yonghong], 行政庭副庭长 [Vice Chief Judge of the Administrative Division], 成都市中级法院 [Intermediate Ct. of Chengdu City] (Nov. 27, 2007 and Nov. 28, 2007).

[144] *Id.*

case in which they made the ruling based on the due process principle.[145] With regard to the consideration of due process in the writing format for judgments, Judge Xie Lixin explained that she wished through this means to "introduce some new concepts."[146] This format does not impose legal constraints, but in China's judicial practice, it has a strong guiding power. In addition, the Intermediate Court of Chengdu has made it part of its "rules and institutions," which implies that lower courts should follow the suggested format.[147] The writing format issued by the Intermediate Court of Chengdu may not yield significant material results, but this act has at least a symbolic significance, indicating the courts' conscious institutionalization of due process.

VI. THE FUTURE OF THE DUE PROCESS PRINCIPLE

This section sketches some applications of due process in judicial practice, including breakthroughs and likely future obstacles. It points to the preliminary establishment of due process as a general legal principle in administrative litigation and the courts' display of its activist approach, and analyzes the meaning and limitations of a judicial activist approach to legal development in China.

The cases discussed above cover a period of more than ten years since the implementation of the *Administrative Litigation Law*, involve courts from disparate regions and levels, and thus have a certain level of representativeness. In aggregate, these cases piece together a rough picture of the judicial applications of the due process principle. In concrete terms, this picture contains three pieces of information: the applicable scope of the due process principle, the content of the due process principle, and the due process instinct of the judges.

First, the applicability of the due process principle has been expanding continuously through individual cases. With regard to applicable entities, it has been expanded from government agencies at the county level to governments at the larger city level (so far no provincial or departmental agencies have been involved in a due process case). It has also expanded to administrative organs, as well as public institutions that exercise administrative functions, such as higher education institutions and construction quality inspection stations. With regard to applicable types of cases, the process requirement has been expanded from the most common disputes concerning either custody review

[145] *Id.*
[146] *Id.*
[147] *Id.*

administrative penalties, to new types of cases, such as disciplinary sanctions and academic degree evaluations at institutions of higher education. It has also been applied in various administrative acts such as administrative permissions, administrative adjudications, and administrative reviews. The due process principle has generally been applied in all the major types of administrative acts and most fields of administrative management.

Second, the meaning of the due process principle has also gradually expanded. In *Chen Yingchun*, the court brought up the most basic procedural requirement of "collecting the evidence before making a judgment."[148] In *Pingshan County BLE case*, the court firmly upheld the stipulations in the *Administrative Penalty Law* and demanded that an administrative organ give the concerned party the opportunity for hearings before imposing a relatively large fine. In cases such as *Lanzhou CRDC* and the *Chengdu Erjie Hotel*, the courts upheld another basic procedural requirement – that administrative decisions (especially those unfavorable to the concerned party) be sent directly to the concerned party. In *Hubei RRED*, the court demanded that, as long as a concerned party's application meets the basic conditions for acceptance, the administrative organ should accept the application, with no right to reject it. In several other cases, such as *Tian Yong*, *Liu Yanwen*, *Song Lili*, and *Zhang Chengyin*, the courts required that before an administrative tribunal makes a major unfavorable decision against an individual, it should listen to her arguments. In *Yimin Corporation*, the court required that before an administrative organ performs an act that contradicts a concerned party's reasonable reliance it should first cancel the original document and pay compensation to the concerned party. In aggregate, these cases form a general picture of the due process requirement in China's current judicial practice. In contrast to other scholars' comprehensive depiction of the theory, this picture remains incomplete. For instance, requirements such as the abstention of law enforcement officers with conflicts of interest, the explanation of administrative acts, and the prohibition of unilateral contacts have been either not addressed or rejected by courts. Nonetheless, to Chinese judges, due process does not seem to be a fixed laundry list of requirements. When facing specific cases, the standards of justice guide them to supplement as appropriate.

Last and most important, judges' awareness of the due process principle's application has been getting consistently stronger. Judging by the three aforementioned guidelines on observing the actual applications

[148] *Chen Yingchun*, *supra* note 34.

of the due process principle: whether an open admission of the shortcomings of statutory laws exist, the weight of due process in judicial reasoning, and whether there is a general requirement of due process, all three areas have developed through the cases discussed above. From the appended language that "the implementation process is also illegal"[149] in *Chen Yingchun* to the assertion that "the decision can be invalidated simply because of its unlawful process" in *Pingshan County PLE*, judges have relied on statutes and reviewed procedural legality with increasing rigor.[150] Beginning with the clear rejection of the court of second instance in considering the legality of process in addition to statutory requirements in *Guangdong Province Drug Materials Company*, to the brief appearance of procedural rationales in *Tian Yong* and the heated debates in *Liu Yanwen*, judges have begun to introduce procedural requirements outside of statutory law. The appearance of supplementary reasoning in *Tian Yong*, as well as the importance of due process in the reasoning of invalidating judgments in *Liu Yanwen* and *Zhang Chengyin*, indicate an increase in the weight accorded due process in judicial reasoning. From "although (no statute) provides clear stipulations for administrative demolition process, but ..."[151] in *Song Lili* to the formal debut of "due process" in *Zhang Chengyin*, judges' awareness of the due process principle's application has become clearer. In addition to the application of due process in a handful of cases, as well as the publication of multiple cases in the *Gazette of the Supreme People's Court*, the Intermediate Court of Chengdu City's issuance of a general requirement to review whether administrative acts follow due process points toward the institutionalization of the due process principle. If the above summary of applicable scope and content may be described as a horizontal expansion, then what these interconnecting cases and events have shown is the vertical deepening of judges' instincts in applying due process. Each of these steps was not likely, or even imaginable, a few years ago. However, they have been acknowledged and approved after the judges' rulings and form the basis of the next steps to be taken. It is on this basis that the due process principle has developed through judicial practice.

The critical factor among the forces behind the development of the due process principle is the fact that Chinese judges, as a group, show a growing appreciation of procedural justice. This appreciation has been supported both by the judges' own intuitive sense of procedural justice, as

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[149] *Id.* at 62.
[150] *Id.* at 71.
[151] *Song Lili*, *supra* note 108, at 35.

well as a system of legal concepts and legal knowledge. It would be interesting to identify the sources of judges' knowledge about due process. Though it remains difficult to describe how it has spread, from the sporadic cases and interviews, we understand that its expansion channels are multiple and its effects are diverse. The introduction, confirmation and promotion of the due process principle by legal scholars (including academic-style judges), as well as debates over due process by lawyers in the courts, often constitutes the direct source of judges' knowledge of due process. Existing judicial precedents, particularly those that have been approved by the *Gazette of the Supreme People's Court*, also strengthen judges' confidence in applying the due process principle. The passing of the *Administrative Penalty Law* and other relevant legislation not only have had a governing effect over particular areas of administrative process, but have also nurtured a general concept of due process and created a spillover effect beyond the applicable regime. The State Council's call for legally compliant administration (especially the demand for due process), while not having an obvious bounding effect, still strengthens the legality of the judicial application of the due process principle. As more and more judges who have received comprehensive legal education hold key positions in administrative courts at various levels, administrative judges, as a group, seem more receptive to new ideas. It can be confidently predicted that the due process principle will spread even more widely in the future.

At the same time, it is important not to exaggerate the application of due process in judicial practice. Judges' neglect of the due process principle in certain cases and their ignorance of the application of the due process principle in existing precedents have hindered the aforementioned developments.

First, the few positive cases presented here are culled from over a million administrative cases. They cannot be considered representative of the day-to-day workings of the judiciary in practice. In many cases, judges face great difficulties, and in some cases must ignore major statutory requirements explicitly provided for by law, including due process. Beyond unambiguous statutory requirements, the application of due process is far from a triumphant march. For instance, in the sensational case of *Qiao Zhanxiang v. Department of Railway (DOR)*, caused by an increase of railway fares, the High Court of Beijing City held that, although the *Price Law* stipulates that hearings should be held when determining the prices for public enterprises that directly concern the people's interests, when the DOR made the *Notification of Raising Fares for Some Passenger Line during the Spring Festival of 2001*, the state had not established standard institutions for price hearings and, thus,

requiring that the DOR hold a price hearing lacked a concrete legal basis.[152] Furthermore, the court held that before the DOR made the *Notification*, it had conducted market research, held price-consulting conferences, submitted its specific execution plan to the relevant authority, and obtained permission from such authority. Therefore, the DOR should be considered "to have performed the necessary due process."[153] Although the acceptance of the case by the Beijing City courts is admirable, the court's decision neglected the hearing process required under the *Pricing Law* and instead was satisfied with the administration system's internal procedures. Regrettably, the "due process" mentioned in the judgment was actually a deviation from due process. In another case, the Fuyang City Bureau of Planned Reproduction (BPR) charged 360,000 Yuan (about $50,000) in Social Child Care Fees to Mr. He, who unlawfully gave birth to a second child. In the litigation, the plaintiff's counsel pointed out, the fact that the defendant informed the plaintiff of his rights to present and argue his case on the very same day as it made the decision to charge the fees and sent "the Decision to Charge Social Child Care Fees" to the plaintiff was a violation of statutory process. After reviewing the case, the court found that while the defendant's act did not meet the requirement of due process, it did not constitute a violation of statutory process, so the act did not meet the conditions for revocable acts as stipulated in the *Administrative Litigation Law*.[154] The essence of presentation and argument required under the due process principle is the genuine invitation of opinions and genuine consideration of such opinions by the administrative authority. Accordingly, the administrative authority must provide the affected party a reasonable period of time in which to prepare, instead of just a moot pretence.[155] When the court faced the collection

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[152] 北京市高级人民法院行政判决书 [Administrative Judgment of the High People' Court of Beijing City], 2001 高行终 [GAO XING ZHONG], No. 39.

[153] *Id.*

[154] 林高贤，关于高收入违法生育对象征收社会抚养费的思考：对一例 36 万社会抚养费征收案件的启示[Lin Gaoxian, *Thoughts in Regard to Charging Social Child Care Fees from High Income Families That Unlawfully Reproduce: Lessons from a Case in Which 360,000 Yuan Social Child Care Fees Were Charged,*] 当代家庭[*Modern Families*], 10 (2005). The author, who participated in the entire investigation of this case, reflected, "although this administrative error did not eventually affect the judgment, the case should serve as warning to law enforcement officials in the field of planned reproduction. It reminds our planned reproduction agencies at all levels that, as required by law-based administration, we should not only enforce the substantive law, but also follow the procedural law, so that we can demonstrate law's justice and fairness."

[155] A comparative case by the English courts is R. *v.* Secretary of State for Social Services, *ex parte* Association of Metropolitan Authorities [1986] 1 W.L.R. 1. In that case, the law empowered the Secretary of State for Social Services to make regulations constituting the

process of a vast amount of Social Child Care Fees, its official rejection of proper "due process" was a great defiance of due process. These instances of misapplication and neglect of the due process principle are not exceptions. They suggest that there is still a long way to go before due process is firmly established in China.

In addition, even the positive cases mentioned above may not become predictable rules for future court decisions. First, among the rulings mentioned in this paper in which due process was applied, over half of them were made by higher courts under relatively permissive environments, suggesting that practical considerations figured into the application of the due process principle. It is difficult to replicate such outcomes in cases where the courts may face more pressure. Second, in most cases mentioned above, the procedural issue that goes beyond the statutory requirement is neither the only reason for judicial rulings nor the judges' major basis for decision making. Cases that truly use due process as the key decision factor remain rare. This indicates that the due process principle still needs to go through more tests and overcome more hurdles. Third, like most judicial opinions, when a judge introduces the due process principle, it is rare that the reason is explained in detail. The question of the applicable boundaries of the due process principle requires further exploration and discussion. Fourth, because the tradition of observing legal precedents has yet to be established, after an excellent ruling has been made, it is uncertain whether courts will consider this ruling when trying similar cases. Furthermore, it is also questionable whether many pay attention to the cases published by the *Gazette of the Supreme People's Court*. Accordingly, even though the application of the due process principle in practice has resulted in a number of positive cases, and even received encouragement from the highest judicial institutions, it has yet to become a predictable general rule of judicial practice.

Based on the reasons mentioned above, it is too early to assert that the due process principle has already been established in China's judicial practice. The dawn of the due process principle has arrived, but there will no doubt be a significant period of time before the principle reaches full ascendancy.

The description of the development of the due process principle in judicial practice in this article is not intended to change the basic

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housing benefits scheme, but the Secretary had to consult with certain organizations. The Secretary of State only gave Association of Metropolitan Authorities several days to give advice on proposals of regulations and also failed to provide some materials. The judge held that there must be sufficient time and information for the organization to provide its advice.

assessment of administrative litigation in China, as the courts face difficult circumstances and judicial functions are rather limited. However, it is under such circumstances that the development of the due process principle illuminates the unique position and role of Chinese courts seeking to evolve.

The implementation of due process reveals that China's courts lack neither the impulse for judicial activism nor the space for its legal application. In many cases referred to in this article, such as *Liu Yanwen* and *Zhang Chengyin*, had they been confined by existing laws, rules, and regulations, it would have been difficult for the parties to correct the abuse of power by public institutions and obtain justice. However, the judges did not mechanically rely on statutes or leave the passing of new laws to the legislature. Facing the deficiency of specific provisions in existing laws and regulations, they instead plugged the law's loopholes with the due process principle and delimited the legal boundaries in the field of administrative management. In practice, the judges could strictly interpret statutes and determine the consequence of violating "statutory process" to be the invalidation of the administrative act under review; they could also add the requirement of due process under the pretext of "statutory process;" they could even openly and explicitly write "due process principle" in judgments when they found it to be appropriate. The practice of due process demonstrates that there is an undercurrent of judicial activism under the glacier of legal formalism. In this relatively confined area, courts in China have shown their positive position in maintaining just procedures.

In addition, the application of due process demonstrates that the judiciary not only applies the law, but develops it. Although China is not a country that builds its legal system on cases and the decisions of its higher courts (even the Supreme Court) do not bind the lower courts, judicial decisions may still create ripple effects that go beyond individual cases. As discussed herein, some cases have triggered scholarly debates, attracted public and judicial attention, or even directly caused an administrative organ to change its mode of action. In particular, this effect does not only flow vertically from higher courts to lower courts, but expands in all directions. Sometimes, a decision from a lower court can have national impact. Unlike the consistency established by common law countries, courts in China do not consistently apply legal principles, but innovative cases can mark the direction of legal development, to be elaborated on by academics, serve as references to other courts, be interpreted by the Supreme Court or even inspire the legislature. Each case affects other cases and the effects of multiple individual cases interacting with each other can slowly break through existing boundaries,

change current practices, and restructure the legal community's understanding. Without these cases, due process would remain a textbook doctrine and a story of foreign law. These cases, however, raise the possibility that due process is becoming a part of Chinese legal requirements. Lawyers' assertions of due process in courts are no longer without basis and judges' citations of due process no longer represent the judiciary making law at will. Considering that the Chinese judiciary is subject to many limitations both in law and in practice, as well as the brevity of implementation in administrative litigations, the development of the due process principle has been so rapid that it may have startled many common law judges.

The application of due process also raises the issue of potential and the limitation of judicial activism. First of all, while the legislature has been perfecting the institutions of administrative process, the judiciary also participated in the construction of administrative procedural law through individual case rulings. In theory, based on the accumulation of each judicial ruling and academic commentary on these rulings, it is possible to build a system of administrative procedural institutions. However, given China's situation, it would be a long process to rely solely on judicial rulings for the promotion of the goals of a clear definition of the boundaries of due process, wide acknowledgement of the concept, and general compliance by administrators and judges. Considering the guiding power of judicial precedents, if judges were allowed to cite authoritative rulings in their judgments, it would be another significant step in the principle's development. With regard to the goals of the due process principle, the most effective means in the short term would be to rely on the Supreme Court's judicial interpretation. Laws and rules of administrative process established by central and regional governments would be the most effective method. In the long term, the establishment of an *Administrative Procedure Law* and even the inclusion of due process in the *Constitution* would further aid the implementation of procedural protections. Nonetheless, the judiciary's application of due process is still meaningful. We cannot expect that an ideal administrative procedural law can be designed by legislators based on abstract principles; we cannot expect that a procedural law that is deprived of the soul of due process can be properly enforced; we cannot expect that a hollow provision in the *Constitution* would have any effect. The establishment of due process in administrative law requires the judiciary to accumulate its experience and enrich the principle's meaning through successive trials.

Second, the implementation of the due process principle helps achieve justice, but the cases discussed earlier did not involve abstract

administrative acts, such as administrative institutions, nor sensitive political issues. The former is at the legal margin of current administrative litigations, while the latter is at the political margin of current administrative litigation. The due process principle is no exception. Compared with such major themes of contemporary society as democratic politics and human rights protection, the application of the due process principle is to a large extent a technical issue. Even with regards to the goals of administrative litigation, namely the supervision of administrative power and protection of civil rights, procedural protection is often the means of last resort. In the face of an administrative organ that lacks impartiality or integrity, procedural institutions are essentially powerless to prevent the abuse of power. However, the accumulation of technical rules is still indispensable to establishing the rule of law. Once the due process principle is fully established, a system of predictable rules may gradually form and inevitably impose a degree of constraint on those who exercise power.

Finally, the application of due process also raises the question of legitimacy. The cases discussed in this paper represent what has been approved as the "minimum procedural justice" in Chinese judicial practice and are to be approved in most circumstances.[156] However, they do not indicate that judges are free from doubts in their applications of due process. Questions remain, such as: what is the content of the due process principle? Who should determine its content and concrete application? And, what is the court's justification for deciding a case based on the due process principle when there is no statutory basis? While relevant foreign literature abounds, these questions must be answered, to a large extent, based on China's current conditions. As of yet, we have not reached consensus on these issues. As reflected in *Liu Yanwen v. PKU*, the judiciary's application of the due process principle may be subject to strong criticism. An innovative ruling may, because of backlash, become "a milestone turned backward."[157] As one judge said during the debate over *Liu Yanwen v. PKU*, while we may reach

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[156] 王锡锌，程序正义之基本要求解释：以行政程序为例 [Wang Xixin, Explanation of the Basic Requirements for Due Process: Taking Administrative Process as an Example], *Vol.* 3 行政法论丛 [*Administrative Law Theories*] (罗豪才编 [Luo Haocai], 法律出版社 [The Law Press], 2000); 王锡锌，行政程序法理念与制度研究 [Wang Xixin, *Concepts and Institutions of Administrative Procedural Law*] (民主法制出版社 [Democracy and Rule of Law Press], 2007).

[157] 贺卫方，转了向的里程碑：评刘燕文诉北京大学案二审判决 [He Weifang, A Milestone Turned Backward: Comments on the Second Instance Judgment of Liu Yanwen v. Peking University], *available at* http://blog.21cn.com/heweifang2008/article/56898 (last visited Nov. 23, 2008).

consensus on certain issues today, it will be impossible to do so on many issues in the future. In that sense, according to this judge, "the debate has just begun."[158]

VII. CONCLUSION

In China, as administrative law has developed, procedural legality requirements have strengthened. However, apart from laws, rules, and regulations, the question of whether a court may review administrative acts based on a general due process principle remains unresolved. Observing applications by the courts of the due process principle in administrative litigation provides a window for understanding the position and functions of Chinese courts.

The series of cases from *Chen Yingchun* in the early years of the *Administrative Litigation Law*, through *Tian Yong* and *Liu Yanwen* to *Zhang Chengyin* outlines the dawn of the due process principle in China. Through the cumulative ripple effects of each case, this transplanted concept has started to become a part of Chinese law. The development of the due process principle also shows that the Chinese courts may play an activist role in a confined space, pointing to one path to legal development.

The discussions in this article are not intended to exaggerate the existing and potential influence of the Chinese courts in the process of institutionalizing administrative procedural law. Further development of the due process principle in judicial practice awaits the appearance of more litigation and discussion of due process issues. Owing to the limitations of the judiciary, it is difficult for individual decisions by courts of different regions decisively to construct an entire administrative procedural law system. The complete and eventual establishment of the due process principle still relies on the completeness of the statutory laws and the establishment of judicial authority.

From a broader perspective, attention to the judicial application of the due process principle could have a value exceeding the particular question of due process, and even a value beyond the context of present day China.

First, in recent years the Chinese academic community has been discussing the general principles of administrative law. But, these discussions have rarely focused on the application of these principles in

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[158] 王振清，在国家行政学院 教育行政诉讼研讨会 上的发言[Wang Zhenqing, Address at the China National School of Administration Conference on Education Administrative Litigations] (Jan. 20, 2000), noted by He Haibo.

judicial practice. The observations of this article on the due process principle are perhaps applicable to such other legal principles as the proportionality principle and the reliance protection principle. Research on such topics as expansion of the scope of accepted administrative litigations, developments of the psychological damages remedy in civil litigations, and the applicability of the presumption of innocence in criminal litigations, might well draw similar conclusions.

Second, the issues raised in this article have value from a comparative law perspective. Unlike in Europe and the U.S., the intrinsic authorities of Chinese courts have yet to be fully established – the legality of "judge-made law" is in doubt and procedural instinct in Chinese culture is relatively weak. In China, there is no provision of administrative procedural requirements in the *Constitution* nor is there a procedural code. There is not even a common law tradition on which to rely. There is only an abstract requirement regarding "violating statutory procedures" in the *Administrative Litigation Law* and a few individual stipulations. The development of a transplanted Western legal principle in China tells one story of a potential contribution from a legally developing country to the broader legal world.

Finally, the discussions in this article may be relevant beyond present judicial practice. While the issues addressed herein may provide a precedential support for assertions and applications of the due process principle to practitioners and judges, administrative judges in China are participating in legal development and working diligently toward the goal of maintaining judicial fairness. Though small on the individual level, their efforts may nevertheless achieve a lasting impact; this article may thus be regarded as an early lightning bug in the greater effort to illuminate.