CLASS 2

CHINA AND THE RULE OF LAW

Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China,* 9 U. MIAMI INT'L & COMP. L. REV. 225 (2000)

2. The National People's Congress (NPC)

a. The Standing Committee of the NPC

Under the Constitution, the National People's Congress of the PRC (hereinafter "NPC") is the highest organ of state power. The permanent body of the NPC is the Standing Committee of the NPC. The NPC and its Standing Committee exercise the legislative power of the state. Among the broad powers of the NPC and Standing Committee is the power to amend the Constitution, appoint the President and Vice-president of the PRC, appoint or remove any member of the Supreme People's Court or Supreme People's Procuratorate and to annul or amend any statutes or regulations enacted by state organs at lower levels which are in conflict with the Constitution or other major statutes. The Supreme People's Court, the State Council and the Supreme People's Procuratorate, report and are responsible to the NPC.

Since the NPC only convenes for a Plenary Session once each year, and because with its over 35,000 members the Plenary Session of the NPC is so unwieldy in size, it is the Standing Committee that performs most of the general legislative functions the rest of the year. The Standing Committee of the NPC meets in a two-week session once every two months, and is comprised of members selected from among the Plenary Session's delegates. The term of office for delegates on the Standing Committee is five years, commencing with the first session of each new NPC. There are no term limits on Standing Committee delegates. In addition to overseeing the NPC's constitutional responsibilities when the Plenary Session is not in session, the Standing Committee also administers the NPC's bureaucracy, formulates and directs the NPC's long-term plans, sets the agenda both for itself and for the Plenary Session, and directs information flow both within the NPC and between the NPC and outside entities.

"Most of the seats in the NPC are elected by the members of the people's congresses of the 31 administrative units at the provincial level, the remainder are elected by the People's Liberation Army in accordance with the Measures on the Election by the People's Liberation Army of Deputies to the NPC and Local People's Congresses (1981)."

The Chairmen's Group heads the Standing Committee. The principal function of the Chairmen's Group is to set and oversee the agenda for the Standing Committee. This includes setting meeting dates and approving the agenda for Standing Committee sessions, overseeing the work of and setting the assignments for the special standing committees and any other special committees the NPC has formed, and serving as the "floor manager" for draft bills. The Chairmen's Group may also develop its own legislative proposals and may instigate changes in the structure of the Standing Committee.

Although these powers are primarily procedural, they give the Chairmen's Group a great deal of control over the activities of the Standing Committee (and, by extension, over the activities of the whole NPC). As acting manager for all bills that come before the Standing Committee, the Chairmen's Group decides not only when a particular bill will go to the floor, but also if a particular draft will go the floor at all. This gives the Chairmen's Group a de facto veto over all legislative proposals submitted to the NPC.

(i) NPC Special Committees

There are seven special committees that have been formed under the NPC. These are: (1) the Committee on Finance and Economy; (2) the Committee on Education, Science, Culture and Public

Health; (3) the Law Committee; (4) the Nationalities Committee; (5) the Foreign Affairs Committee; (6) the Overseas Chinese Committee; and (7) the Committee on International and Judicial Affairs.

(ii) Commission for Legislative Affairs (CLA)

The Commission for Legislative Affairs (hereinafter "CLA") is a support organ for the Standing Committee and is principally responsible for the NPC's legislative drafting. At present, the CLA has a research staff of over 200 people distributed among five research offices. These offices include four departments specializing in economic law, civil law, criminal law, and public law (administrative and constitutional law), as well as a non-specialized "Research Office." Most of the research staff in these offices possess law degrees. The CLA also has its own general office, which oversees the CLA's staffing needs. The CLA is not subject to the CPC's organizational system, and thus, is generally able to control its own hiring. This gives the CLA a more professional and higher quality staff than those found in many other Chinese governmental or political organs.

The CLA also has its own law library, which it administers independently of the NPC's main library. The entire research staff of the CLA also serves as the research staff for the Legal Affairs Working Committee, however, the leadership and the functional roles of each organ remains separate. The CLA has a number of distinct institutional functions within the NPC's legislative process. In addition to drafting legislative proposals for the Standing Committee and Chairmen's Group, it also evaluates legislative drafts submitted to the NPC from other drafters, summarizes and reports to the Chairmen's Group the opinions of the various special standing committees regarding legislative proposals, promulgates "legal interpretations" under its own name, and is frequently consulted by the Supreme People's Court regarding particular interpretive problems.

b. The Plenary Session of the NPC

The Plenary Session is the full meeting of the NPC delegates. Under the Constitution, the Plenary Session must convene at least once a year in the first quarter of the year. Sessions normally run for between two and three weeks. When the Plenary Session is in session, the Standing Committee ceases to exist and control over the NPC's official activities is assumed by the Plenary Session's temporary leadership, the Presidium.

Each Plenary Session is administered by a Presidium. The Presidium is a temporary body that exists only for the duration of one Plenary Session. The Presidium consists of around 150 members, most of who are representatives from each province and from each national minority group of over 100,000 members. The members may also include those who are not delegates to the NPC; such members may include party leaders of the CPC, representatives from the military, various trade associations, and representatives of other social interests. Presidium members are nominated by the Standing Committee and confirmed by the Plenary Session. Once formed, the Presidium elects its own leadership, called the Standing Chairmen, to preside over the Presidium's own agenda. By tradition, the members of the Presidium's Standing Chairmen consist of the NPC Standing Committee's Chairmen's Group, along with one additional person drawn from and selected by the CPC Politburo.

During a Plenary Session, the delegate body is divided into 32 delegate groups, which are more practical for a delegate discussion. Delegate groups are formed according to the appointing jurisdiction. Each delegate group also has the capacity to submit legislative proposals to the Plenary Session.

The NPC generally consists of approximately 3,000 members who serve for five-year terms, and are elected and paid by the province or unit they represent, with a certain number of delegate slots assigned to the People's Liberation Army. A delegate must be over 18 years old, a citizen of China, mentally competent, and not have had any of his or her political rights curtailed by criminal conviction.

In selecting delegates to the Plenary Session for each new term of the NPC, the outgoing NPC Standing Committee determines how many delegate slots shall be apportioned to each province and the People's Liberation Army. The provincial Party Standing Committee then drafts up a name list of

proposed nominees and submits its draft list to the Standing Committee of the Provincial People's Congress for confirmation. At the same time, the Provincial People's Congress draws up its own list of nominees, who are placed on that list upon motion by 10 or more delegates. The Party's list is combined with the Congress's list, and the combined list is then submitted to the floor of the Provincial Congress for deliberation and amendment. Finally, the Standing Committee for the Provincial People's Congress draws up the official list of nominees, which is then submitted to the delegates for formal vote.

Each nominee is voted on individually, and nominees are confirmed if they receive affirmative votes from more than half of those casting ballots. If the number of candidates confirmed exceeds the number of delegate positions available, delegates are selected on the basis of the highest number of affirmative votes received. If the number of confirmed candidates is less than the number of delegate slots to be filled, a second list of nominees is made up for the remaining slots and the process is repeated.

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4. The State Council

The executive body of the NPC is known as the State Council of the PRC, or the Central People's Government. . . . The State Council has relatively broad legislative powers that allow it to draft and promulgate regulations on a wide variety of matters without requiring a parliamentary grant of legislative authority. The State Council, as executive branch, also has the authority to submit draft bills directly to the NPC. The wide and fairly unelaborated powers of the State Council are set out in Article 89 of the Constitution, among which are some law-making powers. The State Council is responsible for carrying out the principles and policies of the CPC, the regulations and laws adopted by the NPC, as well as the affairs such as China's internal politics, diplomacy, national defense, finance, economy, culture, and education. The State Council's law making powers include:

(a) the power to enact, adopt and repeal administrative rules and regulations in accordance with the Constitution and the statutes;

(b) the power to submit proposals to the NPC and its Standing Committee;

(c) the power to exercise unified leadership over the work of various State ministries and commissions, and the work of local administrative organs at different levels, and to direct all other administrative work across the nation;

(d) the power to draw up plans for economic and social development, and to organize, coordinate and administer the social production and economic development;

(e) the power to conduct foreign affairs and to conclude treaties and agreements with foreign states and submit suggestions and proposals to the NPC and its Standing Committee on major issues of foreign affairs;

(f) the power to direct and administer affairs of social life and culture, including the power to declare martial law; and

(g) the power to direct and administer affairs conferred by the NPC and its Standing Committee.

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6. Local People's Congresses and Government's at Various Levels

There is a Local People's Congress for each of the 30 provinces, municipalities and autonomous regions in the PRC. People's Congresses at the provincial and county levels are elected every five years by people's congresses at the next lower level, and the congresses at the county and township level are, in turn, directly elected by citizens for a three-year term. The present means of direct elections of local government officials is carried out according to the Electoral Law of the NPC and Local People's Congresses. The Constitution provides that all citizens aged 18 or above have the right to vote or be a candidate, and that candidates may be nominated by political parties, people's organizations or by ten voters jointly. However, the electoral committee, whose members are generally CPC members appointed

by the standing committee of the county people's congresses, has the power of preparing the "formal list of candidates" to be voted upon, and not every person nominated will appear on the list.

How Laws Are Passed (In Order of Hierarchy of Laws)

Drafting Legislation for the Central Government

Almost all legislative proposals issuing to the NPC in the name of the Chairmen's Group or the Standing Committee are drafted by the CLA. The CLA has been the lead drafter for most of the NPC's more progressive, controversial, and/or high profile legislative initiatives. The first step in the CLA's drafting process involves forming a "drafting group" to research and formulate the initial draft of the legislative proposal. The drafting group need not necessarily be comprised of CLA staffers. Frequently, in fact, it is comprised principally of selected academics. After the drafting group's draft is completed, the CLA circulates it for comment. Copies are sent to relevant substantive special standing committees, each of which replies with its own written evaluations. Comments on the draft are also invited from a wide range of governmental, political and social organizations; from selected members of the academic community; and increasingly from foreign consultants. The CLA also convenes a series of meetings with other governmental officials and outside experts to discuss the draft.

After these group discussions, the CLA will then modify the drafting group's initial draft. If these modifications are substantial, the CLA will again circulate the now modified draft for comment and may convene additional meetings to discuss the draft. Once the CLA comes up with a suitable draft, called the preliminary draft, it also produces a "drafting report" detailing the main points and purposes of the law, as well as the main points and concerns raised by the special standing committees and other sources in the course of the drafting process. The CLA then submits that report and the preliminary draft to the Chairmen's Group for inclusion on the NPC's legislative docket.

If a proposal is submitted to the NPC by some organ other than the Chairmen's Group or the Standing Committee it first goes to the Secretary's Group for preliminary evaluation. The Secretary's Group decides whether to place that bill immediately on the Chairmen's Group's docket or to first send it to the special standing committees for evaluation and comment.

Once a legislative proposal reaches the Chairmen's Group, the Chairmen's Group decides when and whether to include it in the meeting agenda for the Standing Committee. The Chairmen's Group is not obligated to include the proposal on that agenda. Alternatively, it may decide to send the proposal to the CLA for revision.

The NPC uses four legislative instruments in the creation of law, including (1) statutes, (2) resolutions, (3) declarations, and (4) CLA legislative interpretations. Statutes include both "basic laws" passed by the Plenary Session and ordinary laws passed by the Standing Committee, and are the highest source of law in China other than the Constitution. Resolutions are used primarily to promulgate supplemental legislation that attaches to existing statutes, and are considered to be "legislative interpretations" of the existing law.

Declarations and CLA legislative interpretations are not legally binding, and are not considered by the courts to be official sources of law. Nevertheless, these interpretations occasionally influence the legislative interpretations promulgated by the Supreme People's Court, which are increasingly considered binding sources of law. Declarations are used for non-judicial matters, primarily those relating to the NPC's efforts to supervise the other constitutional organs.

Legislation Passed During the Plenary Session

Chinese jurists tend to consider anything enacted by the NPC itself as a "basic law." The legislation passed by the NPC includes such laws as the Constitution and the major codes. Besides the

Constitution, the "major codes" include such laws as the Code of Criminal Procedure, the Substantive Criminal Law, and the Code of Civil Procedure.

1. Basic Laws

A Plenary Session of the entire NPC is held once a year, and this meeting generally lasts for several weeks. Immediately before this formal meeting, the Standing Committee of the NPC elects a "Presidium." Representatives of the Presidium chair the Plenary Sessions. Because of the large size of the NPC, most discussion on new bills or motions takes place in meetings of delegations formed according to the electoral units for the NPC. The delegation will discuss a matter, and the head of the delegation will report the decisions of the group to the Presidium or the Plenary Session of the NPC. The Presidium also decides whether particular motions or bills are to be included in the agenda for the NPC session.

There are four main stages in the enactment of a law: (1) the presentation of a bill to the NPC; (2) the examination of a bill by the Legal Affairs Working Committee; (3) the passing of a bill by the NPC; and (4) the publication of the law.

The State Council, the Supreme People's Court, the Supreme People's Procuratorate, and the Central Military Commission may submit a draft of a bill to the NPC, and these bills must eventually appear on the NPC's agenda. When the NPC is in session a bill can also be submitted by the various NPC Committees specified under Article 70 of the Constitution, as well as any group of 30 or more deputies or any delegation from an electoral unit; however, such bills are added to the agenda at the discretion of the Presidium.

Once a bill has been submitted, the Presidium of the NPC can decide to either refer the bill to a relevant special committee of the NPC for consideration or to include on the NPC meeting agenda. If the Presidium puts the bill on the agenda the following sequence will occur:

(1) the bill will be explained at an NPC meeting by a representative of the bill;

(2) the proposed bill will be separately considered by all NPC delegations;

(3) the bill is then examined by the legal scholars in the Legal Work Commission who consider the opinions of the NPC delegations, research the subject, review the bill, and suggest any changes;

(4) the Presidium will decide whether or not to approve the amended bill; and

(5) if approved by the Presidium will present the bill to the Plenary Session of the NPC, and the bill may then be passed into law by a majority vote.

A law passed by the NPC will be promulgated by the President of the NPC and published in the Gazette of the NPC Standing Committee.

2. Resolutions

The procedures used by the Plenary Session for considering draft resolutions are almost identical to those used for basic laws, the difference is that there is no second review and amending of the Legal Affairs Working Committee's revised draft by an expanded meeting of the Presidium. Instead, the Presidium body immediately decides whether to send the proposed resolution to the floor of the Plenary Session for vote, or to send in its stead a motion recommending that the resolution be referred to the Standing Committee. If the Plenary Session refers the resolution to the Standing Committee, the Standing Committee revises and votes upon that resolution using its own procedures. If the Standing Committee ultimately passes the resolution, the resolution as passed must be reported to the next Plenary Session. As with all other bills and motions, a draft resolution must receive a simple majority of the full delegate body to pass.

3. Constitutional Amendments

The procedures for passing constitutional amendments are the same as those for passing basic laws except that proposed constitutional amendments may only be introduced to the Plenary Session by either the Standing Committee or if sponsored jointly by twenty percent or more of the total delegate body. Constitutional amendments must receive an affirmative vote of at least two thirds of the total delegate body to pass.

4. Organic Laws

Organic Laws are national laws that are enacted by the NPC, or the Standing Committee when the NPC is not in session. Organic Laws create the framework by which state organs must conform and within which they function. Each governmental organ has its own organic law. These laws are considered "organic" because it is from these laws that rest of the governmental and legal system grows. For example, within the Organic Law of the Local People's Congresses or the Organic Law of the People's Courts are found a description of the functions of each organ, the rules relating to the operation of each organ and the powers each organ possesses. With these foundations established, each organ can then, in turn, branch out in order to take care of the work it must do.

Legislation Passed By the Standing Committee

Each enactment of the Standing Committee falls into one of two broad categories, "statutes" and "resolutions." Both have legal force, but they can be distinguished in at least two ways. First, resolutions are often smaller in scope than laws. Also, a resolution may be passed when there is an urgent need for legislation, but there is uncertainty as to how the legislation will work in practice. If successful, these resolutions may reach statute status in a few years. The NPC and the Standing Committee also have the ability to pass resolutions, which generally act as amendments or supplements to already existing laws.

1. Statutes

After the Chairmen's Group approves a statutory legislative proposal, it places that proposal on the Standing Committee's docket for preliminary review and amending. At the initial review, the preliminary draft of the bill is reported before the floor of the Standing Committee by the bill's drafter or lead drafter. In addition to the legislative draft, the drafter also provides an "explanation," which sets out the general purpose of the draft legislation, notes particularly important provisions contained in the draft, and notes any important issues that arose during drafting. The delegates then retire into groups to discuss the draft. Representatives from the bill's drafters attend these discussions. Delegates also receive copies of the CLA's summary report of the special standing committees' evaluations. The General Office records the group discussions.

Following the preliminary review and amending, the Chairmen's Group sends the proposal to the Legal Affairs Working Committee (hereinafter "LAWC") for revision. The revision process used by the LAWC is similar to the drafting process used by the CLA. The relevant special committees prepare reports suggesting changes to that draft in line with the major points raised in the Standing Committee's preliminary review and amending.

Once it receives the committees' evaluations, the LAWC prepares a "revised draft." If the revisions made to the draft are substantial it may be circulated for comment among governmental bodies, scholars, and representatives from selected public interests. The LAWC also prepares a report detailing the various issues that arose during the preliminary review and amending and in the revision comments obtained from the other special standing committees, why it made the various revisions it did it, and why it rejected other recommended revisions. The LAWC then forwards the revised draft and accompanying report to the Chairmen's Group, which, if it approves, schedules another review on the Standing

Committee floor. Alternatively, the Chairmen's Group may return the draft to the LAWC for further revision.

At the second review and amending, the revised draft and its accompanying report are read out by the LAWC. The delegates again discuss the revised draft in groups also attended by representatives of the bill's drafter. If this review does not reveal significant dissension among the delegates, the Chairmen's Group will send the bill up for vote at the end of the session. Otherwise, the Chairmen's Group will move that the bill be sent down for further revision. A bill may be sent back for revision any number of times, but each time the decision to send the bill back to committee must be approved by the delegate body.

Legislative proposals are passed by affirmative vote of more than half of the total number of delegates to the Standing Committee. If voted down, a proposal is quashed and may not be put up for vote again in subsequent sessions.

2. Resolutions

The Standing Committee's legislative procedures for considering draft resolutions are generally similar to those used for statutory proposals. Draft resolutions may be introduced by anyone with standing to introduce draft legislation. As with statutory proposals, draft resolutions not originating from the CLA will be forwarded by the Secretary's Group to the special committees of the NPC for evaluation and comment before being placed on the Chairmen's Group's docket (with delegates' drafts subject to possible rejection by the Secretary's Group). Upon reaching the Standing Committee, the draft resolution and "explanation" outlining the rationale, purpose, methodology and the important points of the resolution is read out to the Standing Committee by its drafter, after which the delegates retire into groups to discuss the draft.

Unlike statutory proposals, however, a draft resolution is most commonly voted on in the same session in which it is introduced. At the same time the delegates retire into groups to discuss the proposal, the proposed resolution is also sent to the relevant special standing committees for evaluation and report. After discussions are concluded and the special standing committees have issued reports, the LAWC prepares a report summarizing various issues and concerns raised by delegates and the special standing committees. This report is then sent to the Chairmen's Group.

The Chairmen's Group then decides whether to send the proposal up for a vote at the end of that same session, or to send it to the LAWC for revision and re-consideration at subsequent sessions. If the Chairmen's Group decides to send the draft up for vote that session, it will nevertheless commonly request the LAWC make minor revisions to the draft in line with the more important points outlined in that Committee's summary report. Near the end of the session, the LAWC will then report out to the whole floor its revised draft, and along with its revision report, and the revised draft is reviewed and amended once by the delegates meeting in full committee. If no major disagreements arise, the resolution is put to vote at the end of that session. Otherwise, the Chairmen's Group can move that the draft be returned to the LAWC for further revision. If the floor approves that motion, the proposal goes back to committee, otherwise, the proposal must go to vote.

Lawmaking by the State Council

1. Administrative Regulations

As mentioned earlier, the executive body of the NPC is known as the State Council, or the Central People's Government. The wide powers of the State Council are set out in Article 89 of the Constitution, among which are some law-making powers. Among the law-making powers of the State Council is the power to establish administrative regulations. These administrative regulations are generally either detailed rules for implementing laws or experimental rules where there are no governing laws. The State Council should not make any laws that contravene either the Constitution or existing law.

2. Administrative Rules

There are many subordinate ministries, commissions and departments under the State Council, each of which has people responsible for drafting laws that relate to the specific branch from which the drafter comes. Generally a draft of a bill is prepared by the appropriate subordinate unit and then submitted to the State Council for examination and possible authorization. This bill is then submitted to the NPC for ratification.

Legal Interpretation

Many statutes adopted in China have been vague and ambiguous, and the resulting inevitable differences in understanding have resulted in a need for detailed explanations of the statutes in order to apply the statutes uniformly and properly. There are three groups with the ability to provide official interpretations of existing legislation. These three groups are:

(1) The NPC's Standing Committee has the constitutional power of legal interpretation concerning the limits and definitions of national statutes.

(2) The State Council, the executive branch of the Chinese government, can interpret national statutes that are unrelated to court trials.

(3) The power of the Supreme People's Court is officially limited to interpreting only national statutes and decrees that govern court trials, and in addition, the Supreme People's Procuratorate shares the power of judicial interpretation for they are granted the power to interpret questions involving the specific application of statutes and decrees with regard to procuratorial proceedings. If the interpretations provided by the Supreme People's Court and the Supreme People's Procuratorate conflict with each other, both interpretations must be submitted to the Standing Committee for final determination.

1. Legislative Interpretation by the Standing Committee of the NPC

China relies on a civil law system in which the power to issue binding interpretations of law is regarded as a legislative or administrative function rather than a judicial function. The Constitution assigns power to issue interpretations to the Standing Committee, in part to allow that body to issue supplemental legislation for even basic laws. Theoretically, Standing Committee interpretations should not contravene the existing text of the law or the fundamental principles underlying the law, nor should they significantly remake the law being interpreted. Interpretations are generally promulgated as resolutions, since the statutory process is time consuming and cumbersome for the more modest matters addressed by these interpretations.

2. Executive Interpretation by the State Council

"The State Council and its relevant departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procedural work."

3. Judicial Interpretation by the Supreme People's Court

The NPC has dedicated itself to drafting legislation on almost every topic imaginable and, as a result, is over extended. The NPC Plenary Sessions are short and filled with the tasks of adopting new statutes and hearing and reviewing governmental working reports, leaving the NPC little time to review problems associated with the application of existing statutes. Because of this, the NPC has effectively encouraged the Supreme People's Court to provide expansive interpretations of all the new legislation. The NPC has enjoyed the benefit of the judicial interpretations of the Supreme People's Court, which have provided much needed help, and have "effectively relieved the Congress from the burden of reviewing and amending statutes."

In addition, the Supreme People's Court is well equipped for performing this function. The Supreme People's Court is composed largely of legal professionals who possess substantial legal expertise and routinely interpret statutes. Supreme People's Court judges also often consult with pertinent ministries or the Congress' Legal Affairs Office before interpreting the law. In doing so, the Supreme People's Court serves as a useful shortcut by producing urgently needed interpretations of, or amendments to, statutes without going through the normal legislative procedure.

The Supreme People's Court has rarely relied upon specific case decisions to interpret the law. The form of judicial interpretations used by the Supreme People's Court includes: (1) letters of reply; (2) opinions, notices, measures, or provisions; and (3) comments on published model cases.

a. Letters of Reply.

The form of judicial interpretation most commonly used by the Supreme People's Court is the "Letter of Reply." When a trial court has a question about a statutory provision during its proceedings, it raises the issue to the provincial higher court. When certain about the answer the provincial higher court will orally answer the question, when uncertain the higher court submits the issue to the Supreme People's Court in writing.

The Supreme People's Court then responds to a question from a provincial court with a Letter of Reply, providing an interpretation. After receiving the Letter of Reply, the higher court then relays it to the trial court that had originally raised the issue. The Supreme People's Court notifies the lower courts that its Letters of Reply function only as advisory documents, so that courts soliciting the views of the Supreme People's Court about the application of statutes to actual disputes must decide their cases independently. If a lower court does follow the opinion expressed in a Letter of Reply, the lower court is not permitted to cite the Supreme People's Court as a source of law. Letters of Reply have had little general application or influence in Chinese legal practice because they have usually been short and case specific, however, they can still affect a specific case or line of cases if the lower courts decided to follow them.

b. Opinions, Notices, Measures, and Provisions

The Supreme People's Court most often uses opinions, notices, measures, and provisions to explain the general application of a specific statute. These forms of judicial interpretation usually provide complete interpretations of the statute as well as answer questions concerning the application of a particular statute, and because of this they are often quite lengthy. Usually the Supreme People's Court itself initiates these interpretations, and they generally take the form of administrative rules purporting to implement a specific statute.

c. Published Model Cases

The Gazette of the Supreme People's Court of the People's Republic of China began reporting cases in 1985. The Gazette is divided into three parts: decrees and opinions, judicial interpretations, and decided cases. Although opinions published by the Supreme People's Court cannot be cited in lower court decisions they might still be seen to have at least some presidential value. In fact, when the Court's spokesman announced the publication of the Gazette in May 1985, he identified the purpose as being to "provide better guidance to local courts for correctly applying laws and decrees." In his 1988 annual report to the NPC, the former President of the Court said:

> The [Gazette's] principal purpose is to achieve uniformity in sentencing standards for important and complex criminal cases, to provide models for determining criminality and sentencing standards in newly emerged criminal cases, and to provide models for civil and economic cases that have arisen recently from activities under the policy of reform and openness.

Most of the cases reported in the Gazette are from decisions of lower courts that are submitted to the Supreme People's Court. The lower courts submit to the Supreme People's Court decisions that involve either important or complex issues. This reporting is part of an "internal reporting channel." The Court selects desirable cases and then substantially edits or rewrites most of these selected cases in order to make them understood and followed the way the Court wants. Besides the open channel of publication in the Gazette, the Court continues to use a traditional "internal channel" as a kind of supplement. If cases are "mature" enough for the Court to give an opinion on the issue and let it serve as a "weather vane" for the general public and/or nationally "representative" or typical enough to warrant such publicity and uniformity the Court will likely publish its opinion. Cases that are less significant or have little national impact are more likely to use the internal channel.

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Local Regulations and Administrative Rules

The Organic Law of Local People's Congresses and Local People's Governments provide that people's congresses at the provincial level and municipal level that have been approved by the State Council have the authority to create laws, and many of these people's congresses have enacted such local regulations. Local regulations are confined within their respective geographical territories. Once a local regulation has been passed it must be reported to the State Council so that the regulation may be recorded.

Local regulation applies to the daily administration of each particular area. At the local level there are four layers of regulations that affect the "man on the street." The legislation at this level includes: (1) the basic laws and major codes passed by the NPC, (2) administrative regulations adopted by the State Council, (3) specific regulations enacted by the people's congresses at the Provincial level, and (4) the local regulations passed by the people's congresses at the city or township level.

There are three basic categories of locally enacted regulations, including: (1) regulations needed to implement the laws of the central government to fit local conditions, (2) regulations of a supplementary nature for general national laws that have no detailed provisions on a specific subject, and (3) regulations that deal with strictly local issues. Such local regulations should not conflict with any national law or policy and are, therefore, reviewed by the Legal Work Commission of the Standing Committee in order to assure constitutionality.

Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives,* 30 HONG KONG L.J. 380 (2000)

It was in the former socialist countries in Russia and Eastern Europe that systems of legislative interpretation and legislatures' review of the constitutionality of legislation really abounded. These countries never accepted even in theory the bourgeois constitutional doctrines of the separation of powers and checks and balances. Their constitutions affirmed the sovereignty of the people, and the people were supposed to exercise political power through their representatives in the national assemblies (Supreme Soviet or National People's Congress). There was a 'unitary orientation toward the exercise of state power'. In theory the national assembly of people's deputies exercised supreme political power; the laws they made were a supreme expression of the will of the people and were not subject to judicial restraint. Courts, like other organs of the state, were themselves accountable to the national assembly. In practice, there was a concentration of power in the leaders of the Communist Party, which provided leadership for the national assembly as well as other state organs (including courts) both in theory and in practice. There were no enforceable constitutional limitations on the powers of either the party central committee (or its political bureau) or the national assembly. The 'constitution' of the socialist countries operated more like political-philosophical declarations than as 'legally binding norms' that regulated the actual operation of

political forces and determined who would become political leaders of the nation. Hence Ludwikowski doubts whether constitutionalism can be said to exist in these socialist states.

In the socialist legal system, the power to interpret laws was regarded as part of the legislative function and usually vested with the presidium or standing committee of the national assembly. For example, under article 49(b) of the 1936 Constitution and article 121(5) of the 1977 Constitution of the USSR, the Presidium of the Supreme Soviet enjoyed the power to 'interpret the laws of the USSR' Under article 64(4) of the 1965 Romanian Constitution, the State Committee (the standing committee of the national assembly) may issue binding interpretations of laws. Supreme Courts in these socialist systems were also authorised to issue interpretations of law. For example, the Organic Law of the USSR Supreme Court (1979) empowered the Court to issue binding explanations 'concerning questions of the application of legislation which arise during the consideration of judicial cases' Similarly, the Law on Court Organization of the Russian Republic (the largest union republic of the former USSR) empowered its Supreme Court 'to give explanatory directives to courts for the application of . . . legislation.'

Since the late 1950's, judicial control of the legality of administrative action (as distinguished from the constitutionality of legislative enactments) began to develop in socialist countries such as Yugoslavia, Hungary, Romania and Bulgaria. In the 1960's, some of the Eastern European states also began to consider introducing institutions to monitor the constitutionality of legislation. In 1963, Yugoslavia established a federal constitutional court. In 1965, Romania set up a constitutional committee under its national assembly to report on the constitutionality of bills. In 1984, a similar body was instituted in Hungary. In the Soviet Union, the Presidium of the Supreme Soviet (equivalent to the NPCSC of the PRC) was responsible for control of the constitutionality of laws. Then, in 1986, Poland achieved a breakthrough in establishing a constitutional tribunal—'a precedent that had been followed by virtually all new European democracies until more recent years'.

After the fall of communism in Eastern Europe and Russia, new constitutional arrangements have been established in the former socialist states. Foreign models have been eagerly transplanted in attempts at 'constitutional engineering'. It has been pointed out that constitutional review of legislative and other government acts has become 'the greatest novelty of the post-socialist world'. In the constitutional debates, one of the most controversial issues involved the selection of an appropriate model for the control of constitutionality of state actions.

. . . .

In their formative years, the political, constitutional and legal systems of the PRC were much influenced by the relevant theory, practice and models of the Soviet Union. The first constitution of the PRC—the 1954 Constitution—established the National People's Congress (NPC) as the supreme organ of state power, and this was the Chinese equivalent of the Supreme Soviet. . . .

Under the 1954 Constitution, the NPC was the sole state organ that was authorised to enact laws (*fald*, as distinguished from *faling*, or decrees, which the NPCSC could make). It was also responsible for constitutional amendment and for 'supervising the implementation of the Constitution.' The NPCSC was given the power to interpret laws and to enact decrees.

The 1978 Constitution, which was the third constitution of the PRC, reaffirmed the relevant powers of the NPC and its Standing Committee as stated in the 1954 Constitution. In addition, it provided that the NPCSC had the power to interpret the Constitution itself.

In 1981, the NPCSC adopted a Resolution on Strengthening the Work of Interpretation of Laws. It provides for four types of interpretation:

> (a) The NPCSC may interpret, or enact decrees (*faling*) on, provisions in laws that need to be further clarified or supplemented. This is known as legislative interpretation.
>
> (b) The Supreme People's Court and the Supreme People's Procuratorate may respectively or jointly interpret points of law arising from the concrete application of the law in the course of their adjudicative and procuratorial work. This is known as judicial

interpretation, as both the courts and procuratorates in the PRC are regarded as judicial (*sifa*) organs.

(c) The State Council and its departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procuratorial work. This is known as executive (or administrative) interpretation.

(d) The standing committee of a local people's congress may interpret, or enact provisions regarding, provisions in local regulations which need to be further clarified or supplemented, and a local people's government may interpret points of law arising from the concrete application of local regulations.

It is noteworthy that until the fourth (and current) constitution of the PRC was adopted in 1982, the NPCSC had no formal power to make or amend *laws* (as distinguished from decrees). The 1982 Constitution introduced for the first time a system in which the NPC and its Standing Committee share legislative power: The NPC is empowered to enact 'basic laws' relating to criminal and civil matters, state organs and other matters; the NPCSC is empowered to enact and amend laws other than those which fall within the jurisdiction of the NPC itself, and, when the NPC is not in session, to supplement and amend laws that have been enacted by the NPC (subject however to the 'basic principles' in such laws).

As in the previous constitution, the 1982 Constitution confers on the NPCSC the exclusive power to interpret both the Constitution and the laws. At the same time, it extends the power to supervise the implementation of the Constitution to the NPCSC (previously this power belonged only to the NPC itself). Thus the NPCSC may annual administrative regulations (made by the State Council) or local regulations (made by local people's congresses) on the ground that they contravene the Constitution or the laws.

In the legal history of the PRC, there were only three occasions on which the NPCSC expressly exercised its power of interpreting laws, whereas its power of constitutional interpretation has never been expressly exercised. The three instances of legislative interpretation were the NPCSC's interpretations on the implementation of the PRC Nationality Law in the HKSAR and in the Macau SAR in 1996 and 1998 respectively, and its interpretation of articles 22 (4) and 24(2)(iii) of the Basic Law of the HKSAR in June 1999. In the cases of the first two interpretations, they were more in the nature of supplementary legislation introducing new provisions into the law (rather than 'interpretation' in the sense of clarifying the meaning of particular words or phrases in a legislative text and resolving any ambiguity therein). The third interpretation, however, was intended to achieve and did achieve the purpose of indicating (in relation to each of the two provisions being interpreted by the NPCSC) which of two possible meanings that the relevant text can bear represents the correct interpretation of the text.

One leading writer, who is himself an official of the NPCSC, has suggested that these are not the only instances of legislative interpretation in the PRC. In an article published in 1993 in *Chinese Legal Science (Zhongguo faxue)*, the leading law journal in mainland China, he and his co-author identified 6 other instances of interpretation by the NPCSC, 5 of which occurred in 1955–56 and the last in 1983. On the first five occasions, the NPCSC made 'decisions' (the documents issued were entitled 'decisions' rather than 'interpretations') that amplified existing provisions in the Constitution or the laws. It should be noted that in the 1950's, the NPCSC did not have any power to make or amend laws, but it had the power to interpret laws. This probably explains why legal norms enacted by the NPCSC to fill the gaps in and thus to supplement existing laws may be regarded as 'interpretations' made by the NPCSC. This broad view of the scope of interpretation was also reflected in the 1981 Resolution on interpretation mentioned above, which regards the making of 'supplementary provisions' as falling within the legitimate sphere of 'interpretation'. It should be noted that even as of 1981, the NPCSC had not yet acquired the formal power to make and amend laws.

Let us turn to the 1983 decision of the NPCSC which has been regarded as the last instance of legislative interpretation before the NPCSC issued the three documents expressly called 'interpretations' in the 1990's as mentioned above. This was the Decision regarding the Exercise by the State Security

Organs of the Public Security Organs' Powers of Investigation, Detention, Preparatory Examination and Arrest. The text of the Decision itself consists of only one sentence, and includes as its annex several relevant provisions of the Constitution and the Law of Criminal Procedure. These provisions vest certain powers in the public security organs, and were enacted before the establishment of the state security organs. What the 1983 Decision did was to provide that the newly established state security organs may also exercise these powers. It can therefore be seen that the Decision is, like its predecessors in the 1950's and its first two successors in the 1990's (i.e. the two interpretations on the Nationality Law), also in the nature of supplementary or amendment legislation.

In the years before the enactment of the new Law on Legislation by the NPC in spring 2000, there was a debate in China about whether legislative interpretation should be abolished and the power of interpreting laws be vested in the courts as part of their adjudicatory function. One view, for example, was that since the NPCSC already enjoys the power of making and amending laws under the 1982 Constitution, its power of interpreting laws is superfluous. If there is a need to clarify the meaning of existing legal provisions or to supplement and elaborate on them, the NPCSC can always resort to legislative amendment. According to this view, there is a distinction between the NPCSC's power to interpret the Constitution and its power to interpret laws. The NPCSC's power of constitutional interpretation is worth retaining, because unlike the case of law (which the NPCSC can amend), the NPCSC does not have the power to amend the Constitution itself. The power of constitutional amendment vests exclusively in the NPC; the plenary session of the NPC is only convened once a year, and there may a need to interpret the Constitution when the NPC is not in session. The case for the retention of the NPCSC's power to interpret laws is weaker, because both the power to amend the law and that to interpret the law are vested in the NPCSC, and the substance of the two powers overlaps to a significant extent.

However, this argument has not been accepted by the authorities, as can be seen in the content of the new Law on Legislation. The Law affirms the NPCSC's power to interpret laws, although the nature of such legislative interpretation has been re-defined (i.e. formulated in a different way from that in the 1981 Resolution on interpretation). Article 42(2) of the Law provides for interpretation of laws by the NPCSC in two kinds of circumstances:

> (a) where it is necessary to further clarify the concrete meaning of provisions in the law; or
>
> (b) where new circumstances have arisen after the enactment of a law, and it becomes necessary to clarify the basis for the application of the law.

It seems therefore that the range of circumstances to which legislative interpretation is now applicable is narrower than that provided for in the 1981 Resolution, which refers not only to the further clarification of the law but also to the making of supplementary provisions.

The Law on Legislation also introduces for the first time in the legal history of the PRC procedural rules for interpretation of laws by the NPCSC. The state organs which can request an interpretation from the NPCSC are specified. It is provided that the work organ of the standing committee will draft the bill for the interpretation, which will go to the Council of Chairpersons (which decides whether to put it on the agenda of the NPCSC) and then the plenary session of the NPCSC. The Law Committee of the NPC will further consider and, if necessary, amend the bill on the basis of views expressed at the plenary session, and the bill will then be ready for adoption by the NPCSC. When adopted, such interpretations of laws have the same force as the laws themselves.

It may be noted that although the making of interpretations of laws by the NPCSC is a legislative act that is subject to the kind of procedural norms applicable to the legislative process, the provisions in the Law on Legislation on the procedures for interpretation are less elaborate than those applicable to the enactment by the NPCSC of laws themselves. For example, the latter expressly provide that bills for laws should normally be considered at three separate meetings of the NPCSC before they are voted on (consideration by the NPCSC includes more detailed examination of the bill by members of the NPCSC

divided into separate groups), and they also provide for the examination of the bills by relevant specialist committees of the NPC. Bills for laws may not only be submitted by relevant state organs but also by ten members of the NPCSC acting jointly. On the other hand, the drafting of bills for interpretation is reserved for the work organ of the NPCSC (normally the Legislative Affairs Commission of the NPCSC).

It has been pointed out above that the NPCSC has never formally and expressly exercised its power of interpreting laws except on three occasions in the 1990's in relation to Hong Kong and Macau. It remains to be seen whether the formal machinery for legislative interpretation introduced by the new Law on Legislation will result in the power being more actively used in future. The same can be said of the formal machinery introduced by this Law regarding the review of lower level legal norms against norms at higher levels of the hierarchy of legal norms in the Chinese legal order.

As regards such review, the most interesting provision in the new Law is article 90. Under paragraph 1 of this article, relevant state organs may request the NPCSC to review administrative and local regulations on the ground that they contravene the Constitution or the laws. Paragraph 2 goes on to provide that any social organisation, enterprise or citizen may also make a written representation to the NPCSC suggesting that it should review the constitutionality or legality of an administrative or local regulation. Under article 91, representatives of the state organ that enacted the impugned regulation may be requested to attend a hearing.

Although some scholars have produced books and articles on the proper approaches to and principles of statutory construction in mainland China, no authoritative set of rules has yet evolved in this regard. This is understandable given the paucity of acts of legislative interpretation in the PRC legal system, and the fact that most of the judicial interpretations issued by the Supreme People's Court are in effect subsidiary legislation designed to supplement and elaborate on existing laws. A few rudimentary rules of interpretation can now be found in the new Law on Legislation. For example, it is provided that laws will not normally have retrospective effect; where there is inconsistency between two legal norms enacted by the same organ, the one later in time will prevail; where there is inconsistency between a general norm and a specific norm enacted by the same organ, the specific norm will prevail. However, where a new general norm conflicts with an older but more specific norm and it is doubtful how they should be applied, the question shall be determined by the NPCSC. Hence, at least in theory, the NPCSC remains the ultimate interpreter of laws in the PRC.

Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001)

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

Dispersion of Lawmaking Authority and Inconsistency of Laws

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

administrative regulations (including Rules and Normative Documents) greatly exceeding the number of NPC Laws.

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

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

To be sure, the high level of inconsistency is due to various factors beyond the dispersion of lawmaking authority. Superior legislation is often general and vague. Accordingly, it is not always clear what the drafters intended. Difficulty in applying and interpreting these vague laws leads lower level entities to pass regulations that are later determined to be inconsistent with superior legislation. The problem is exacerbated by the failure of the NPC and State Council to issue interpretations of the laws and regulations.

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

Administrative agencies are not the only ones who knowingly pass inconsistent legislation to promote their own interests. Local governments regularly do so as well. Economic reform has resulted in greater autonomy and fiscal responsibility for local governments. As a consequence, local governments often pass regulations that conflict with national legislation in an effort to attract investors and promote the growth of the local economy. For instance, although for a number of years PRC laws only permitted the establishment of 22 retail joint ventures, all of which needed central level approval, local authorities approved more than 340. Similarly, local governments have routinely ignored repeated warnings from the central government that they do not have the authority to issue tax breaks to investors.

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

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

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

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

Lack of Effective Means of Resolving Conflicts of Law

The lack of a practical way to sort out conflicts of law is as damaging to a law-based order as the existence of conflicting rules. While in theory there are ways to reconcile inconsistencies, in practice there is often no effective means for doing so. The power of constitutional supervision resides in the NPC and its Standing Committee. Because the CCP rejects separation of powers, there is no independent constitutional review body. Thus the NPC polices itself. Not only has the NPC yet to strike down any of the laws of its Standing Committee as unconstitutional, the Standing Committee has rarely annulled any lower-level rules on grounds of unconstitutionality.

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

As in the case of conflicts of laws, it is difficult if not impossible to resolve conflicts both between Administrative Regulations and among lower level legislation. The State Council, lower level people's congresses and governments have all been reluctant to intervene. Furthermore, although in many instances local governments and agencies are required to file Rules and Normative Documents with the local people's congress or government, the requirement is often ignored. In 1993 in Heilongjiang, for instance, the provincial government repeatedly sent out notices that all departments were required to submit for the record all Normative Documents within a stipulated time period, but the departments ignored the order. Undeterred, the provincial government then issued a regulation ordering each department to assign a person to file all Normative Documents and providing that the Legislative Affairs Department would be responsible for reviewing all of the submitted documents. Unfortunately, the departments continued to ignore the regulation.

In most legal systems, courts or similar bodies (whether special constitutional review bodies or administrative tribunals) would have the authority to strike down laws or regulations inconsistent with the constitution or superior legislation. However, courts in the PRC do not have the authority to overturn any type of legislation on grounds of unconstitutionality or even to overturn lower level legislation that is

inconsistent with superior legislation other than the constitution. Thus, under the ALL, PRC courts may not invalidate administrative regulations (abstract acts) that are inconsistent with the constitution or superior legislation, although the court need not follow lower level regulation in the specific case. This ability to refuse to follow inconsistent regulations in specific cases allows for a kind of indirect review of consistency. However, the inconsistent regulation remains in effect, and the issuing entity may continue to apply it in the future.

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

Inconsistent regulations may also be challenged under the Administration Supervision Law. Administration supervision bodies are somewhat similar to ombudsmen elsewhere in that they are responsible for ensuring good governance. In China, as in some other countries such as the United States, they are part of the executive branch. Supervisory organs have the power to recommend the correction of government regulations that are inconsistent with laws, regulations or state policies. For reasons explained more fully below, however, neither administrative reconsideration nor supervision has been an effective way of dealing with the problem of inconsistency thus far.

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

Although China is not alone in precluding the review of abstract acts, such systems are the minority. Moreover, whereas other countries have alternative mechanisms to deal with inconsistencies, the alternatives in China, such as the file and review system, administrative supervision and administrative reconsideration, do not work very well in practice. The current system under which PRC courts need not follow an administrative regulation that is inconsistent with superior legislation although the inconsistent lower regulation remains in effect, is both inefficient and unjust. It forces multiple parties to litigate the same issue over and over and may result in similarly situated parties being subject to different results depending on whether they decide to challenge an administrative decision or not. In other systems, agencies might be expected as part of the legal culture to annul a regulation deemed by a court to be inconsistent with superior legislation. However, given the problems of local and agency protectionism, the low stature of the courts and a different legal culture, agencies in China are not likely to voluntarily repeal the regulation. Predictably, many have called for an expansion of the court's jurisdiction to encompass abstract acts.

Lawmaking Procedures and Transparency

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

governments have issued their own procedures for administrative rulemaking, they are often not implemented in practice.

Even where there are procedural rules, they do not require public input in the rulemaking process. Most Rules and Normative Documents are made without the benefit of public participation or hearings attended by interested parties. Publication also remains a problem. State Council Administrative Regulations must be published in the State Council Gazette. Increasingly, administrative agencies are publishing Rules, as required under the Law on Legislation, but there are still many unpublished internal regulations (*neibu guiding*). Even when published, many Rules and Normative Documents are only published in local government gazettes or newspapers or by posting a notice.

Stanley Lubman, *Looking for Law in China,* 20 COLUM. J. ASIAN L. 1 (2006)

One of the most important lessons about China that any prospective foreign investor must absorb is that there is not one China, but many. Officially China is a unitary state, but in fact power is greatly decentralized, devolved not only to provinces and major cities, but to lower levels of government as well, and often controlled and coordinated from above with surprising futility. Once foreign investors ventured beyond Beijing during the 1980s, most were often surprised to learn how little China resembled the totalitarian one-party monolith they had imagined. Even before reform, China had not been so authoritarian that orders issued from the center or from higher levels were obeyed without question. Since the onset of reform, local powers have grown; existing regional differences have been further accentuated by the fact that sophistication and experience vary widely around the country.

The practical implications of this disorder understandably cause discomfort among close observers of FDI [foreign direct investment]:

> the opacity and the regulatory tangle of China's market grow more serious by the day and are not likely to abate at any time soon. This is largely due to China's loose political organization. As soon as economic reforms are announced, some regions use them as an excuse to engage in on-the-edge experiments that never receive the full sanction of the local government. Other regions respond by initiating power grabs for local bureaucrats. Each reform, then, leads to accretion of confusing and sometimes contradictory local interpretations.

A plain statement by an Australian business consultant identifies the local financial pressures at work: "Officials use their discretionary local power to advantage their income-gathering, even though their actions may be at odds with central government policies and laws." Some examples follow.

Violation of Law by Local Officials

In Chinese governance, lack of transparency converges with the extremely broad discretion that has been given to officials to interpret and apply laws. As a result, official action is veiled not only from the public, but very frequently from other units of government, including higher-level organizations that theoretically ought to be cognizant of activities below them. Local officials' arbitrary exercise of discretion has been a major source of investor anxiety and resentment since foreign investors were invited back into China in 1979. Foreign investors have often been asked to agree to contracts that structure an FIE [foreign invested enterprise] in a form deliberately designed to evade the law and central scrutiny.

Lower-level violation of central government laws and policies is a matter of continuing concern for Beijing, because it has been endemic in FDI. Some illustrations in matters other than investment transactions will serve to introduce the problem.

The late Michel Oksenberg, a political scientist who specialized in China throughout his long career, conducted extensive research on the governance of a single county in northern China. After

repeated visits over a period of years, during which time he came to be known to county officials, he asked the head of the county Financial Bureau to see the county's budget. The reply: "I can't show that to you, I don't even show that to Beijing."

Similar problems arose in international trade transactions before controls over them were loosened. Two extreme violations of laws or regulations that arose in two sales of electrical generating equipment by a California client in the late 1980s further illustrate the extent of the ongoing problem. In the first, the seller, after several years of negotiations, entered into a contract to sell five units to a provincial-level power authority. Some months after the contract was signed, the seller received a telex from the China National Machinery Equipment Import & Export Corporation (Machimpex) head office in Beijing, notifying it that the buyer had lacked authority to sign the contract. The foreign currency that would have been used to pay the seller had been allocated from Beijing and could only be expended with the consent of the Machimpex head office. Consequently, the contract had been "assigned" to Machimpex, so it was necessary to renegotiate the terms of the contract. However, it was pointed out to Machimpex that under applicable Chinese law, a contractual right could be assigned only with the consent of the bearer of that right, which had not occurred. In a subsequent negotiation in Beijing the Machimpex negotiator protested that the buyer had not only entered into the contract without Machimpex authorization, but that it had also deviated from standard Chinese practice when it agreed to a price that included all costs, insurance and freight that would be fixed by the seller, rather than insisting on freight to be arranged by the buyer. Reluctantly, Machimpex agreed to perform the contract under the terms to which the initial parties had agreed.

The second transaction, in the early 1990s, was an even more extreme violation, an attempt by the Chinese buyer to evade a central government regulation that required the purchase of the equipment involved to be handled by international tender rather than by a negotiated contract. The buyer, the provincial power authority that had previously purchased the five units in the transaction to which Machimpex had objected, contracted directly with the seller to purchase an additional seven units. Thereafter, the validity of that contract was cast into doubt when the seller received an invitation from a central agency to bid on a project which, although not named, was clearly identifiable by the specifications as intended to require equipment like the seven units that it had sold some months earlier. The seller contacted the provincial representatives who had negotiated the original contract; they freely confessed that they had attempted to evade the Beijing regulations, but insisted that the contract would be awarded to the seller if it bid in response to the invitation to tender. The seller complied and was awarded the contract, but only after another negotiation on the price. The earlier contract was never mentioned.

Local governments continue to exercise their power in a variety of ways and in many areas that depart from national laws and policies. The extent of local disregard for central policies was demonstrated in an extreme and purely domestic case early in 2005 when the Chinese press reported that the State Environmental Protection Administration had suspended work on 30 large construction projects, 26 of which were in the power industry, because they had begun work before their environmental impact statements had been approved.

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Local Governments and Foreign Business: Relationships

The Chinese term for the "relationships" that many Western analyses of business in China have urged as a key (sometimes *the* key) to successful operations is *guanxi*. Foreign investors have had to confront the nature and significance of building personal relationships among the parties to a transaction, and with officials whose approvals and assistance are important to the success of their projects. Their importance is rightly said to be a distinguishing characteristic of Chinese life, commercial and otherwise. At the same time, because too often *guanxi* is excessively described as completely different in kind and intensity from comparable behavior in the West, it is necessary to put it and Western views of it into perspective.

The instrumental use of personal relationships in business is hardly unique to China, The term "old boy network" was first used in England to express business and career links among mutual acquaintances who shared important elements of their social origins and educational backgrounds. The continued relevance of personal relationships to business in the West is so obvious that it does not require extended discussion here. What does appear different is that, historically, in the West, a lack of personal acquaintance was not an absolute bar to entering into business relationships and impersonal business grew faster and earlier in the West than in China.

Guanxi: A Definition

Guanxi has been defined as relating to "particularistic ties," which are "based on ascribed or primordial traits such as kinship, native place, and ethnicity, and also on achieved characteristics such as attending the same school . . . serving together in the same military unit, having shared experiences, such as the Long March, and doing business together." For another scholar, guanxi denotes

> 'social connections,' dyadic relationships that are based implicitly (rather than explicitly) on mutual interest and benefit. Once *guanxi* is established between two people, each can ask a favor of the other with the expectation that the debt incurred will be repaid sometime in the future.

Emphasis on the importance of these informal relationships is deeply rooted in Chinese tradition. Commerce in imperial times was largely unregulated by formal law and was intensely relational, and people generally conducted business with counterparts they knew personally or with whom they came into contact through mutual acquaintances or relatives. Informal relations operated as a mechanism that substituted for the rules, procedures and enforcement mechanisms associated with a formal legal system.

Traditional *guanxi* was based on "reciprocal obligations and indebtedness," but Western perceptions have often overlooked one aspect:

> Although many foreign commentators (business people prominent among them) believe that *guanxi* functions almost exclusively for instrumental purposes, Chinese frequently stress that true *guanxi* must possess an affective component.

This component is sentiment, *ganqing*, and is reflected in the "warmth and intensity" of the relationship between the parties concerned.

Today, however, it has been noted that *guanxi* has in practice sometimes become "commodified" so that monetary payments replace more subtle practices, and the practice "begets money or the means for acquiring money." As a result, for the foreigner who must sort out instrumentalism and sentiment, *guanxi* is even more difficult to understand and to put into practice when he attempts to use it "to navigate institutionally uncertain environments."

Guanxi: Necessary? Indispensable?

Some foreigners may assume that only *guanxi* matters. Two observers not only argue that, for foreigners doing business in China, getting to know counterparts is more important than in the West, but insist that *guanxi* is indispensable. They go so far as to say, conclusorily, that *guanxi* will take care of risk if "properly and patiently managed." They further address the relationship between contracts and *guanxi* in this way:

> Chinese businesses rely on relationships rather than legal bonds. A contract is worth only the paper it is written on; the real contract exists in the minds of the parties and its strength consists in their relationship and whether they believe they can trust each other. To many Chinese, a broken contract does not signify that one party has done something dishonest; it merely signifies that the original contract had little value in the first place.

Another Western observer advises that "[i]f you have *guanxi*, there is little you can't accomplish . . . . There are few rules in China that can't be broken, or at least bent, by people or firms with the right *guanxi."* A more balanced analysis suggests an appropriate approach to *guanxi* and its contemporary functions. As a fact of economic life, "it is clear that guanxi meets a real need and provides real economic benefits to the economy." One explanation suggests that when local governments and businesses build particularistic ties that often lead to violations of national laws and policies, these are justified by the need to adapt them to local conditions. In another view, the uncertainties of Chinese law justify and indeed require the use of personal relationships to accomplish constructive business results. The question remains, then, of how foreigners should cope with this disorder.

An Alternative View of Relationship-Building

Blackman has counseled a focus on building relationships, but, significantly, without using the term *guanxi.* Rather, she recommends that the foreigner must, even while getting to know influential individuals and valuing relationships with them, also build credibility by taking Chinese questions seriously and bargaining while remaining mindful of the need not to cause the Chinese counterpart to "lose face." The foreigner must also keep an "emotional distance" and "use informal occasions to check facts and assumptions."

This analysis nowhere conflates *guanxi* with corruption, as some foreigners do. The difference, at least in principle, is not difficult to perceive: *guanxi* is generally legal while corruption is not; it more often involves longer-term relationships than corrupt ones, and "builds on trust" rather than on a "commodity" exchange between money and power.

How Should Relationships Work in Practice?

Relationships with Chinese counterparts or powerful officials must be balanced against other factors of obvious importance, such as the economic feasibility of a project under negotiation. Relationships cannot make up for the absence of a sound commercial basis for the business for which support may be desired. Thus, a feasibility study jointly conducted by the parties ought to underlie any contract for an FIE whether or not it is legally required, and the foreign investor should participate actively in its preparation.

Foreigners must keep in mind that *guanxi* is personal—and that, therefore, the person with whom the relationship has been established may cease to be available to help the foreigner who has cultivated him. Also, the *guanxi* on which the foreigner might be tempted to rely may always be subject to potentially superior or competing sources of power.

The Complementarity of Law and Guanxi

Although some Western observers seem to regard *guanxi*-based relations as the functional equivalent of law-based expectations and property rights, it is more accurate to consider *guanxi* and law as complementary. One scholar, Pitman Potter, has argued that *guanxi* relations and formal legal rules can be seen to work together.

Illustratively, in informal conversations with Shanghai businessmen, Potter found some acceptance of formal legal rules on the *formation* of civil law relations, i.e., using documents to evidence agreements to lend money, but simultaneous preference for using informal methods regarding *performance and enforcement.* Difficulties in contract relations arise when Chinese partners ask to modify contract terms due to changed conditions; foreigners may view such requests as evidence of bad faith, while Chinese may expect that the parties to the transaction ought to assist each other because they are in a relationship. Potter concludes that, because of difficulties in obtaining contract performance and enforcement, *"guanxi* relations play an essential role by providing predictability to legal actors." The incompleteness of the legal system means that it would "have little effect at all were it not for the

informal mediating mechanisms such as *guanxi* relations." He further predicts that the complementary relationship between *guanxi* and law will continue to mark the Chinese legal system "for the foreseeable future."

Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China,* 23 MICH. J. INT'L L. 471 (2002)

Rule of law, like any other important political concept such as justice or equality, is an "essentially contested concept." Yet the fact that there is room for debate about the proper interpretation of rule of law should not blind us to the broad consensus as to its core meaning and basic elements. At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the State and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law.

Theories of rule of law can be divided into two general types: thin and thick. A thin theory stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.

In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception. Thick versions then incorporate elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal, communitarian, collectivist, "Asian Values," and so on).

Thus, the liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

Although rule of law has ancient roots and may be traced back to Aristotle, the modern conception of rule of law is integrally related to the rise of liberal democracy in the West. Indeed, for many, "the rule of law" means a liberal democratic version of rule of law. In striking contrast to the many volumes on rule of law in the Western literature, relatively little work exists to clarify alternative conceptions of rule of law in other parts of the world. There is no reason to assume, however, that at the end of China's legal reform rainbow lie liberal democracy and a liberal democratic rule of law.

The tendency to equate rule of law with liberal democratic rule of law has led some Asian commentators to portray the attempts of Western governments and international organizations such as the World Bank and International Monetary Fund (IMF) to promote rule of law in Asian countries as a form of economic, cultural, political, and legal hegemony. Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, social solidarity, and harmony. Significantly, although a handful of legal scholars and political scientists in China or living in exile abroad have advocated a liberal democratic rule of law, there is little support for liberal democracy, and hence a liberal democratic rule of law, among China's State leaders, legal scholars, intellectuals, or the general public. On the contrary, studies show most people are more concerned about stability and economic growth than democracy and civil and political liberties.

Although China's leaders have officially endorsed rule of law, they have not sanctioned the liberal democratic version. In 1996, Jiang Zemin adopted the new *tifa*, or official policy formulation of ruling the country in accordance with law and establishing a socialist rule of law State (*yifa zhiguo, jianshe shuhui zhuyi fazhiguo*), which was subsequently incorporated into the Constitution in 1999. Since 1996, People's Republic of China (PRC) scholars have debated the new policy and the concept of rule of law more generally. Some have questioned whether rule of law, and especially a liberal democratic version of rule of law, will take root in China's very different soil. What is needed, they suggest, is an indigenous theory of rule of law—rule of law with Chinese characteristics—one that takes into consideration China's native resources and China's particular circumstances, its culture, traditions, and history, as well as other such contingent factors as ideology, the current stage of development of its legal and political institutions, and the fact that China is still in the midst of a dramatic transition from a centrally planned economy to a more market-oriented one. Others argue that an explicitly socialist theory of rule of law is necessary.

Accordingly, if we are to understand the likely path of development of China's system, and the reason for differences in its institutions, rules, practices, and outcomes in particular cases, we need to rethink rule of law. We need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China's own circumstances. To that end, I describe four competing thick conceptions of rule of law: Statist Socialism, Neo-Authoritarian, Communitarian, and Liberal Democratic.

In contrast to Liberal Democratic rule of law, Jiang Zemin and other Statist Socialists endorse a State-centered socialist rule of law defined by, *inter alia*, a socialist form of economy (which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the (Chinese Communist) Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the Statist Socialism type championed by Jiang Zemin and other central leaders and the Liberal Democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism. This form favors a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian or collectivist interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.

Another variant is a Neo-Authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-Authoritarians permit democracy only at lower levels of government or not at all.

. . . .

Notwithstanding competing thick conceptions of rule of law, there is general agreement in China and elsewhere that rule of law requires at minimum that the law impose meaningful limits on State actors. There is also general agreement that a rule of law system must meet the standards of a thin conception, though there are some differences in the way scholars define a thin theory. For present purposes, the constitutive elements of a thin conception include, in addition to meaningful restraints on State actors, the following:

> There must be procedural rules for lawmaking and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid;
>
> Transparency: laws must be made public and readily accessible;

Laws must be generally applicable: that is, laws must not be aimed at a particular person and must treat similarly situated people equally.

Laws must be relatively clear;

Laws generally must be prospective rather than retroactive;

Laws must be consistent on the whole;

Laws must be relatively stable;

Laws must be fairly applied;

Laws must be enforced: the gap between the law on the books and law in practice should be narrow; and

Laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.

That laws be reasonably acceptable to the majority of those affected by them does not mean that the laws are necessarily "good laws" in the sense of normatively justified. The majority might support immoral laws. Historically, immoral laws are often buttressed by prevailing social practices and widely held norms and values. Furthermore, many laws serve an amoral purpose. For example, whether cars drive on the right or left is not a moral issue. Laws that solve such collective action problems, facilitate commercial transactions, or otherwise make it easier for people to get on with their lives will be acceptable to most people simply because they work.

A thin theory requires more than just these elements. A fully articulated thin theory also specifies the goals and purposes of the system as well as its institutions, rules, practices, and outcomes. Typical candidates for the more limited normative purposes served by thin versions of rule of law include:

stability, and preventing anarchy and Hobbesian war of all against all;

securing government in accordance with law—rule of law as opposed to rule of man—by limiting arbitrariness on the part of the government;

enhancing predictability, which allows people to plan their affairs and hence promotes both individual freedom and economic development;

providing a fair mechanism for the resolution of disputes; and

bolstering the legitimacy of the government.

A variety of institutions and processes are also required. The promulgation of law assumes a legislature and the government machinery necessary to make the laws publicly available. It also presupposes rules for making laws. Congruence of laws on the books and actual practice supposes institutions for implementing and enforcing laws. While informal means of enforcing laws may be possible in some contexts, modern societies must also rely on formal means such as courts and administrative bodies. If the law is to guide behavior and provide certainty and predictability, laws must be applied and enforced in a reasonable way that does not completely defeat people's expectations. This implies normative and practical limits on the decisionmakers who interpret and apply the laws and principles of due process or natural justice, such as access to impartial tribunals, a chance to present evidence, and rules of evidence.

Advantages of Thin Theories

Depending on one's purpose, thin theories may offer several advantages over thick conceptions. One potential advantage is that thick conceptions require a complete moral and political philosophy. As Joseph Raz observes:

> If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to rule of law just in order to believe that good should triumph. . . .

> A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of rule of law better than any of the legal systems of the more enlightened Western democracies.

Even the more limited thin version of rule of law has many important virtues. At minimum, it promises some degree of predictability and at least some limitation on arbitrariness and hence some protection of individual rights and freedoms. By narrowing the focus, a thin theory highlights the importance of the virtues of rule of law.

A thin interpretation also allows for focused and productive discussion of rule of law among persons of different political persuasions. As Robert Summers notes: "A substantive theory necessarily ranges over highly diverse subject matter, and thus sprawls in its application. On a full-fledged substantive theory, arguments and criticisms purportedly in the name of 'rule of law' tend to be arguments and criticisms in the name of too many different things at once." Being able to narrow the focus of discussion and avoid getting bogged down in larger issues of political morality is particularly important in cross-cultural dialogue between, for example, American liberals and Chinese socialists or Muslim fundamentalists.

As a practical matter, much of the moral force behind rule of law and its enduring importance as a political ideal today is predicated on the ability to use rule of law as a benchmark to condemn or praise particular rules, decisions, practices, and legal systems. To the extent that there is common ground and agreement on at least some features of a thin rule of law, many of the theoretical and practical problems associated with normative valuations in a pluralist society and world are avoided. Criticisms are more likely to be taken seriously and result in actual change given a shared understanding of rule of law. Conversely, criticisms of China's legal system that point out the many ways in which the system falls short of a liberal interpretation of rule of law are likely to fall on deaf ears and may indeed produce a backlash that undermines support for rule of law, thereby ironically impeding reforms favored by liberals.

Some PRC scholars suggest an additional reason for emphasizing a thin or procedural rule of law over a thick or substantive rule of law for China at this time. China has historically favored substantive justice over procedural justice and, in the clash between morals and law, morals have often won out. The tendency has been to favor particular justice at the expense of generality and rationality. While strong normative arguments may be made in favor of a particularized substantive justice, in practice this emphasis gives decisionmakers considerable discretion and makes the process more subjective. To correct for the tendency toward substantive justice, the legal system should arguably stress the more rule-oriented procedural aspects of a thin rule of law.

Normative Concerns About Thin Theories and the Relation Between Thin and Thick Theories

PRC scholars object to thin theories primarily on normative grounds. First, many fear that an authoritarian government may use a thin rule of law to strengthen the regime while diminishing individual rights. In the absence of democracy and opportunities for public participation in the law-making processes, the ruling regime can pass illiberal laws that limit individual rights, such as broad State secrets laws, rules against endangering the State, or regulations requiring that all social groups register with government authorities. By grounding rights in a thick conception of rule of law, some scholars hope to offset the socialist tendency to view law in instrumental terms and to consider rights as positivist grants from the State that may be revoked and limited by the State as it sees fit.

Second, and related, many people simply find thin theories lacking in sufficient substantive normative content. Given the traditional emphasis on substantive justice, the virtues of a largely procedural thin theory appear insubstantial. For many both in China and abroad, a rule of law that is compatible with morally reprehensible evil empires like Nazi Germany is simply not worth pursuing.

To remedy the lack of an adequate normative content to a thin rule of law, scholars both in the PRC and elsewhere have suggested that rule of law requires "good laws." Harold Berman, for instance, claims that rule of law requires laws that are grounded in some normative foundation that transcends the legal system itself. In the past, divine law or natural law provided the foundation; today, a more secular notion of democracy and human rights provide the foundation. Similar to Berman, Liu Junning has distinguished rule of law (*fazhi*) from *fazhiguo*, which he interprets as a rule of law State or Rechtsstaat. Liu argues that rule of law is based on a natural law tradition whereas Rechtsstaat is based on legal positivism. Grounded in natural law, rule of law takes rights more seriously, whereas rights in a Rechtsstaat are granted by the State and may be limited by a simple majority of the legislature. A Rechtsstaat emphasizes following laws rather than the purpose or values of the law and the need to protect individual freedom; it puts more importance on the origin of laws rather than whether the laws are good or not.

In the absence of a deeply rooted natural law tradition, those who do not support democracy but believe that rule of law entails good laws must look elsewhere for a normative basis for laws. Pan Wei, for example, contends that laws should be derived from "generally-accepted moral principles of the time," and therefore accepted as just by the public.

Like Pan, PRC scholars, going beyond the contention that rule of law requires good laws, assert that it entails justice for all. Dong Yuyu, for instance, argues that ruling the country in accordance with law (*yifa zhiguo*) is not the same as rule of law (*fazhi*), even allowing that the former entails the supremacy of the law. He believes that rule of law requires more—specifically, peace, order, freedom, and justice.

Although justice is a popular requirement for rule of law, there is little agreement over what justice is. Liberals, Socialists, Communitarians, Neo-Authoritarians, Soft Authoritarians, New Conservatives, Old Conservatives, Buddhists, Daoists, Neo-Confucians, and New Confucians all differ on what is considered just, and hence what rule of law requires. By incorporating particular conceptions of the economy, political order, or human rights into rule of law, thick conceptions decrease the likelihood that a consensus will emerge as to its meaning. Indeed, one reason for limiting the concept of rule of law to the requirements of a thin theory is to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.

While thin and thick versions of rule of law are analytically distinct, in the real world there are no freestanding thin rule of law legal systems that exist independently of a particular political, economic, social, and cultural context. In other words, any legal system that meets the standards of a thin rule of law is inevitably embedded in a particular institutional, cultural, and values complex, whether that be Liberal Democratic, Statist Socialist, Neo-Authoritarian, Communitarian, some combination of them, or some other alternative.

Concentric circles offer one way to conceive of the relationship between a thin rule of law, particular thick conceptions of rule of law, and their broader context. The smallest circle consists of the core elements of a thin rule of law, which are embedded within a thick rule of law conception or framework. The thick conception is, in turn, part of a broader social and political philosophy that addresses a range of issues beyond those relating to the legal system and rule of law. This broader social and political philosophy is one aspect of a more comprehensive general philosophy or world view that might include metaphysics, aesthetics, and religious beliefs.

The use of a thin rule of law as a benchmark to assess China's legal system does not allow one to completely avoid all substantive issues of the type that advocates of a thick theory of rule of law must address. It merely reduces the range of issues where such substantive values are relevant and, hence, the scope of possible conflict. Although the features of a thin rule of law are common to all rule of law systems, they will vary to some extent in interpretation and implementation depending on one's substantive political views and values. Socialists and liberals, for example, may agree that one purpose of a thin rule of law is to protect individual rights and interests, but disagree about what those rights and

interests are. Or, they may agree that rule of law requires creation of laws by an entity with the authority to make laws, but disagree as to whether members of that entity must be democratically elected. Accordingly, they will still diverge to some extent with respect to purposes, institutions, rules, and outcomes due to the different contexts in which they are embedded.

Randall Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?*, 603 ANNALS 192 (2006)

China is frequently portrayed as a problem case for the law and development movement. For some, the problem is that China has enjoyed remarkable economic growth in the past several decades, apparently without the benefit of "the rule of law," thus challenging the prevailing view that a legal system that enforces property rights is necessary if not sufficient for sustained economic growth.

For others, the problem is political in nature. China has resisted the third wave of democratization and remains officially a socialist state, albeit a unique twenty-first-century version of a socialist state that has endorsed a market economy and rule of law.

Setting aside the issue of democracy, for others the problem is China's poor record on civil and political rights.

Is China a problem case? I think not, or at least it is too early to tell. China is now following the path of other East Asian countries that have achieved sustained economic growth, established the rule of law, and developed constitutional or rights-based democracies, albeit not necessarily liberal rights-based democracies. This appears to be the most successful "model" for relatively large countries in the contemporary era to achieve high levels of economic growth, implement rule of law, and eventually democratize and protect the full range of human rights through some form of constitutionalism.

Five East Asian countries or jurisdictions rank in the top quartile on the World Bank's rule of law index: Singapore, Japan, Hong Kong, Taiwan, and South Korea. This is a remarkable achievement given the well-documented failures of the earlier law and development movement in the mid-1960s and 1970s and of its more recent reincarnation under the banner of rule of law and good governance in the past twenty years. Despite large sums of money and the best efforts of international and domestic actors, the results have on the whole been rather poor (Carothers 2003; Dezalay and Garth 2002). Apart from North American and Western European countries, Australia, and Israel, the only other countries in the top quartile are Chile and French Guiana from Latin America, Slovenia as the lone (non)representative from Eastern Europe, and a handful of small island states and oil-rich Arab countries.

The seemingly random countries in this odd grouping have one thing in common: wealth. All of the countries in the top quartile of the World Bank rule of law index, including the East Asian countries, are high-or upper-middle-income countries. This is consistent with the general empirical evidence that rule of law and economic development are closely related ($r = .82$, $p < .01$) and tend to be mutually reinforcing. Indeed, notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic development, the empirical evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is necessary though by no means sufficient for sustained economic development.

The (East) Asian Path to Constitutional Democracy

The "East Asian path"—a notion that admittedly serves a useful purpose only at a high level of generalization, if at all, and conceals considerable diversity when subject to closer scrutiny—involves the sequencing of economic growth, legal reforms, democratization, and constitutionalism, with different rights being taken seriously at different times in the process. In particular, the "model" involves the following:

1. An emphasis on economic growth rather than civil and political rights during the initial stages of development, with a period of rapid economic growth occurring under authoritarian regimes.

2. As the economy grows and wealth is generated, the government invests in human capital and in institutions, including reforms to establish a legal system that meets the basic Fullerian requirements of a procedural or thin rule of law; over time, as the legal system becomes more efficient, professionalized, and autonomous, it comes to play a greater role in the economy and society more generally.

3. Democratization in the sense of freely contested multiple party elections is postponed until a relatively high level of wealth is attained.

4. Nascent but limited constitutionalism begins during the authoritarian period, including the development of constitutional norms and the strengthening of institutions; the emergence of social organizations and the development of "civil society," albeit often with a different nature and political orientation than in Western liberal democracies, and with organizations with a political agenda subject to limitations; citizens enjoy economic liberties, rising living standards for most, some civil and political rights although with limitations especially on rights that involve political issues and impinge on the control of the regime; moreover, judicial independence remains limited, with the protection of the full range of human rights and in particular politically sensitive rights suffering accordingly.

5. After democratization, citizens have greater protection of civil and political rights although with ongoing abuses of rights in some cases and with rights frequently given a communitarian or collectivist rather than liberal interpretation.

This very roughly describes the arc of several Asian states, albeit with countries at various levels of economic wealth and legal system development, and with political regimes ranging from democracies to semidemocracies to socialist single-party states. South Korea and Taiwan have high levels of wealth, rule of law compliant legal systems, democratic government, and constitutionalism. Japan does as well, although it is a special case given its early rise economically and the postwar influence of the United States on legal and political institutions. Hong Kong, Singapore, and Malaysia are also wealthy, with legal systems that fare well in terms of rule of law, but are either not democratic (Hong Kong) or are nonliberal democracies (Singapore and Malaysia). Thailand, less wealthy than the others, has democratized but has a weaker legal system and has, under Prime Minister Thaksin, adopted policies that emphasize growth and social order rather than civil and political liberties. China and Vietnam are at an earlier stage. They are lower-middle-income countries and have legal systems that outperform the average in their income class but are weaker than the rest. They remain single-party socialist states, with varying degrees and areas of political openness.

There are also examples of less successful paths in Asia (and elsewhere) measured in terms of wealth, rule of law, human rights, and other indicators of well-being. Some involve countries that democratized at lower levels of wealth. Others involve authoritarian systems that failed to invest in human capital and institutions. They tend to have the weakest legal systems and to be mired in poverty, with all of the human suffering that entails.

China

Given the high correlation between wealth and rule of law and virtually all human rights measures and indicators of human well-being, countries are arguably best evaluated relative to other countries in their income class. At this stage of development, for all of its problems, China is meeting or exceeding expectations on most measures. The legal system has played a greater role in economic growth

than often suggested and is likely to play an even greater role in the future, which is consistent with the experiences of other countries in Asia and elsewhere.

China has made remarkable progress in a short time in improving the legal system, having essentially begun from scratch in 1978. As of 2002, China's legal system ranked in the 51st percentile on the World Bank's rule of law index, having risen from the 32nd percentile in 1996. While far from perfect, China's legal system outperforms the average in the lower-middle income class.

Moreover, notwithstanding the repeated attempts by the United States and its allies to censure China for human rights violations and the steady stream of reports from human rights groups claiming deterioration in rights performance, Chinese citizens enjoy more freedoms, including civil and political freedoms, than ever before. In fact, despite many problems, China outperforms the average country in its income class on most major indicators of human rights and well-being, with the exception of civil and political rights.

Of course, this process of development will take decades at least to reach a relative state of equilibrium. Even then, the process of change will continue, if perhaps in less dramatic fashion, just as it does in Euro-America. Moreover, capitalism, rule of law, democracy, and human rights are sufficiently contested in theory and varied in practice that the final outcome in China cannot be specified at this point—much to the chagrin of those who would choose to impose a highly idiosyncratic version of liberal democracy on China. As China negotiates modernity, and indeed postmodernity, it may very well give rise to one or more novel varieties of capitalism, rule of law, democracy, and human rights. On the other hand, there is enough minimal determinate—dare I say universal—content to each of these four aspects of modernity to provide a teleological orientation to the process that is likely to survive into the next decades, barring extraordinary catastrophes that change radically the nature of contemporary society.

Conclusion: China—Problem or Paradigm?

It is still too early to sit in final judgment of China's efforts to establish rule of law and constitutional democracy. We do not know whether China will succeed in its efforts to achieve the same level of wealth as Japan, South Korea, Taiwan, Singapore, or Hong Kong. Nor do we know whether it will be as successful in implementing rule of law as they are, or in achieving the same level of success on human rights measures and other indicators of human well-being. Nor do we know when it will democratize in the sense of general elections for even the highest level of office or when, if ever, it will obtain a rank of 8–10 on the Polity IV index. However, China's performance to date has exceeded expectations, and it appears to be progressing well along the same general path of its East Asian neighbors.

To be sure, China today will be judged a failure by those for whom the metrics are civil and political rights and democracy now, not later. But then the other East Asian countries would also have been deemed failures at similar points in the developmental arc. Indeed, these East Asian states might still be judged a failure by those who insist on a liberal interpretation of rights, as these countries continue to score lower on civil and political rights measures than others in their income class and to limit rights in ways consistent with a communitarian or collectivist interpretation. But then, many in Asia would judge Western countries a failure by their preferred normative standards.

If China is not a problem case, is it a possible model or paradigm for other developing countries, as some have suggested? It is doubtful that China or the "East Asian path" more generally can serve as a model for other states. First, the developmental state has been undermined by economic globalization and democratization in most countries. Moreover, legal reforms are path dependent and in that sense inherently local. Thus, no single model is likely to work everywhere given the diversity of initial starting conditions and the complexity of the reform process. Indeed, the East Asian model presented here is stated at too high a level of abstraction to be of much use to policy makers. Any attempt to be much more specific, however, runs into the uncomfortable fact that these Asian countries varied in significant ways in their economies, legal systems, political systems, and societies. In any event, many international actors

and important domestic constituencies would object to the "East Asian model" given the delayed transition to democracy and the limits on civil and political rights.

In short, China may be neither problem nor paradigm. Indeed, if we have learned anything about law and development, it is the need to be pragmatic about legal reforms. The reform process inevitably involves many discrete decisions, which produce winners and losers. As such, the process is not only inherently local but inherently political. China, like other developing countries, is struggling to overcome a host of problems with limited resources. It has for the most part been able to resist international pressure to conform to a particular legal paradigm, in part because of its size and geopolitical importance and in part because the leadership remains fundamentally pragmatic. While the scientific background of state leaders is often cited as a negative, such a background fosters a pragmatic, problem-solving outlook determined more by consequences than ideology, the latest theory of development, or the latest version of the Bretton Wood/Washington consensus. Much as China's leaders resisted the advice of international experts to go for big bang economic reforms in favor of a more gradual approach, so have they resisted efforts to blindly ape a liberal democratic rule of law. And just as the slower approach to economic reforms resulted in impressive economic growth without many of the severe negative consequences of shock therapy, so has the contextualized approach to legal reforms resulted in steady progress.

To be sure, critics would argue that the slow pace of reforms has delayed the day of reckoning and increased the ultimate costs of more fundamental reforms. Which side will have the better of the argument remains to be seen and hinges on the ability of Chinese reformers to continue to improve the legal system and ultimately to address the political obstacles that are currently barriers to the full realization of rule of law and likely to become even more serious barriers in the future. There is a real danger that government leaders will move too slowly on political reforms and fail to implement in a timely way deep institutional reforms of the legal system, including greater independence and authority for the judiciary.

Pragmatism has always been about the application of creativity and intelligence to contemporary problems to devise novel and ameliorative solutions—which themselves will lead to further problems and the need to continue to experiment with an open mind. Open-minded reformers cannot afford to look only West or only East; only up to the state or down to civil society; or only to culture, politics, or economics. They need a more context-sensitive approach. Fortunately, no one seriously engaged in legal reforms in China seems to think there is any other alternative.