

# CHINA'S REGULATORY REFORM: EXPERIENCES, CHALLENGES, AND PROSPECTS

Zhou Hanhua\*

The installation of a new leadership team by the Eighteenth Party Congress in October 2012 was accompanied by significant discussion among Chinese intellectuals and in the media about restarting the reform agenda that many perceived to have lain dormant in the preceding years. A key part of that agenda, sometimes lumped together with economic reform more generally, but deserving its own special analysis, is the topic of regulatory reform. The relationship between the government and the market, as well as the functions and structure of government agencies, require further clarification in order to push forward the overall reform agenda. In this article, I will provide an introduction to regulatory reform in China over approximately the past thirty-five to forty years. First, I will briefly introduce some characteristics of the earlier Chinese approach to regulation and its disadvantages. Second, I will discuss what steps China has taken thus far in pursuit of regulatory reform since the opening-up period of the late 1970s and early 1980s. Finally, I will share my observations regarding current problems in the area of Chinese regulation, and key challenges to further necessary reforms.

## I. THE TRADITIONAL APPROACH

The approach to regulation in China under the Chinese Communist Party (“CCP”) before 1978 was to manage economic activity through a very centralized regime.<sup>1</sup> The government

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\* Professor of Law, Institute of Law, Chinese Academy of Social Sciences. The author would like to express deepest appreciation and thankfulness to Neysun Mahboubi, Su Miaohan, and Jacques deLisle for their huge help to make this paper possible.

<sup>1</sup> See generally Dong Zhikai, *Zhongguo Jihua Jingji Shiqi Jihua Guanli de Ruogan Wenti* (中国计划经济时期计划管理的若干问题) [*Several Issues with Plan Administration Under China's Planned Economy*], 5 DANGDAI ZHONGGUOSHI YANJIU 30, 30–45 (2003) (discussing several problems of the planned economy regime, *i.e.*, the failure to promulgate four of the first five five-year plans, the difficulty in efficient decision-making, the deficiency of implementation, the rigidity in both micro and macro

allocated or controlled all resources and activities of individuals as well as enterprises. Under centralized planning, each level of government would make its own plan according to the requirements of the central government. Any activities beyond the original plan were deemed illegal and incurred punitive consequences.

In urban areas, there were only two types of enterprises prior to 1978: state-owned enterprises and collectively-owned enterprises. Most enterprises were controlled by government agencies, and all of their activities, including production and sale of goods, were planned in advance by the government.<sup>2</sup> Each individual was affiliated with his or her own work-unit, which provided all of their basic needs—including salary, child care, education, health care, and housing—though the quality of provided goods and services were not always high.<sup>3</sup> In rural areas, the land belonged to the collective, and every individual farmer had to be a member of the People's Commune (which played a role similar to urban enterprises).<sup>4</sup> All products of the People's Commune were purchased by the State for allocation, and farmers or communes had no rights to otherwise dispose of any surplus products.<sup>5</sup> For quite a long time, farmers were treated as “capitalists” even if they traded food items for their own personal consumption.<sup>6</sup>

This centralized and planned approach to regulation was quite successful for the first several years after the inception of the PRC as a vehicle for the government to allocate resources and stimulate national industrialization. But this approach was limited

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management, the geographical isolation in management, and the over-emphasis on infrastructure).

<sup>2</sup> WU JINGLIAN, *DANGDAI ZHONGGUO JINGJI GAIGE JIAOCHENG* (当代中国经济改革教程) [UNDERSTANDING AND INTERPRETING CHINA'S ECONOMIC REFORM] 123–24 (2016).

<sup>3</sup> Li Ming, *Zhengqi Fenkai Shi Jingji Tizhi Gaige de Zhongxin Huanjie* (政企分开是经济体制改革的中心环节) [*The Separation Between Government and Enterprises is Central to Economic Reform*], *JINGJI YANJIU* 22, 22 (1984).

<sup>4</sup> See Xin Yi, *Jianlun Dagongshe de Fenpei Zhidu* (简论大公社的分配制度) [*Brief Comment on the Big Commune Distribution System*], *ZHONGGONG DANGSHI YANJIU* 22 (2007) (describing the big commune distribution system as the combination of a wage system and a supply system).

<sup>5</sup> GUANYU SHIXING LIANGSHI DE JIHUA SHOUGOU HE JIHUA GONGYING DE MINGLING (关于实行粮食的计划收购和计划供应的命令) [DECREE ON THE STATE MONOPOLY FOR PURCHASE AND MARKETING OF GRAIN] (promulgated by the State Council, Dec. 23, 1953).

<sup>6</sup> Bo Yibo, *Tonggou Tongxiao de Shixing* (统购统销的实行) [*On the State Monopoly for Purchase and Marketing of Grain*], 3 *ZHONGGONG DANGSHI YANJIU* 1, 6–7 (1991).

by fundamental problems: it strangled individual creativity and innovation, and produced severe scarcities.<sup>7</sup> Consequently, by 1978, China had reached the edge of collapse. To give a few examples, annual per capita food consumption in 1976 was 191.5 kilograms, which was fewer than the 205.5 kilograms per capita of food consumed in 1956.<sup>8</sup> The average annual income for farmers in 1976 was only 62.8 yuan, and there were 250 million people living in poverty.<sup>9</sup> To combat these and other scarcities, Deng Xiaoping initiated a large scale regulatory reform starting in 1978.<sup>10</sup>

## II. REGULATORY REFORM TO DATE

### A. Separation of Functions

Regulatory reform in China over the past thirty-five to forty years has involved disaggregating various governmental functions and granting individuals, enterprises, and the society at large ever more space and freedom. More specifically, the Chinese government has promoted four types of separation: (i) separation between the government and enterprises, (ii) separation between the government and the owners of state assets, (iii) separation between the government and public service providers, and (iv) separation between the government and society.<sup>11</sup> Separation of the ruling

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<sup>7</sup> *Zhongguo Gongchandang Dishiyijie Zhongyang Weiyuanhui Disanci Quanti Huiyi Gongbao* (中国共产党第十一届中央委员会第三次全体会议公报) [*Communiqué of the Third Plenum of the 11th Central Committee of the Communist Party of China*] (adopted on Dec. 22, 1978), 4 SHISHI QIUSHI 5–6.

<sup>8</sup> Chen Donglin (陈东林), *Wenhua Dageming Shiqi Guomin Jingji Zhuangkuang Yanjiu Shuping* (文化大革命”时期国民经济状况研究) [述评] [*Review of Research on the National Economic Conditions in the Period of “Cultural Revolution”*], 2 DANGDAI ZHONGGUOSHI YANJIU (当代中国史研究) [CONTEMPORARY CHINA HISTORY STUDIES] 71 (2008).

<sup>9</sup> See YANG XIANCAI & ZHANG QIZHI, *ZHONGGUO LISHI: ZHONGHUA RENMIN GONGHEGUOJUAN* (中国历史：中华人民共和国卷) [CHINESE HISTORY: THE PEOPLE’S REPUBLIC OF CHINA VOLUME] 323 (2002) (describing poverty in terms of annual income and the amount it takes to have a healthy lifestyle).

<sup>10</sup> EZRA F. VOGEL, *DENG XIAOPING AND THE TRANSFORMATION OF CHINA*, 423–49 (2011).

<sup>11</sup> See HU JINTAO, *JIANDING BUYI YANZHE ZHONGGUO TESE SHEHUIZHUYI DAOLU QIANJIN, WEI QUANMIAN JIANCHENG XIAOKANG SHEHUI ER FENDOU—ZAI ZHONGGUO GONGCHANDANG DISHIBACI QUANGUO DAIBIAO DAHUI SHANG DE BAOGAO* (坚定不移沿着中国特色社会主义道路前进，为全面建成小康社会而奋斗—在中国共产党第十八次全国代表大会上的报告) [FIRMLY MARCH ON THE PATH OF SOCIALISM WITH CHINESE

Party and government agencies has also been discussed, and in particular was considered at the Thirteenth Communist Party Congress in 1987, though not again to the same extent since then.<sup>12</sup>

In order to reduce resistance to these different types of reform, the Chinese government adopted an incremental strategy.<sup>13</sup> For example, the household contract responsibility system adopted in rural areas in the late 1970s liberated farmers from collective communes, but still preserved some aspects of collectivism.<sup>14</sup> Beginning in the early 1980s, the Chinese government began to encourage development of the private sector in urban areas.<sup>15</sup> This

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CHARACTERISTICS AND STRIVE TO COMPLETE THE BUILDING OF A MODERATELY PROSPEROUS SOCIETY IN ALL RESPECTS: REPORT TO THE EIGHTEENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA] (2012) (“To reach the goal of establishing a socialist administrative system with Chinese characteristics, we should separate government administration from the management of enterprises, state assets, public institutions, and social organizations, and build a well-structured, clean and efficient service-oriented government that has scientifically defined functions and satisfies the people.”).

<sup>12</sup> ZHAO ZIYANG, YANZHE YOU ZHONGGUO TESE DE SHEHUI ZHUYI DAOLU QIANJIN: ZAI ZHONGGUO GONGCHANDANG DISHISANCI QUANGUO DAIBIAO DAHUI SHANG DE BAOGAO (沿着有中国特色的社会主义道路前进: 在中国共产党第十三次全国代表大会上的报告) [ADVANCE ALONG THE ROAD OF SOCIALISM WITH CHINESE CHARACTERISTICS: REPORT TO THE THIRTEENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA] (1987).

<sup>13</sup> See Li, *supra* note 2, at 47 (discussing the incremental reform strategies adopted in China).

<sup>14</sup> The household responsibility system was a practice introduced in China in 1981 by which peasants were given certain production quotas; whatever food they grew beyond the quota was sold in the free market at the unregulated prices. See generally Justin Yifu Lin, *The Household Responsibility System in China's Agricultural Reform: A Theoretical and Empirical Study*, 36 ECON. DEV. & CULTURAL CHANGE S199 (1988) (discussing the prevalence of the household responsibility system as it relates to changes in rural China). The household contract responsibility system didn't change collective ownership of land. See Cai Hua (蔡华), *Tudi Quanli, Falü Zhixu he Shehui Bianqian—Jiating Lianchan Chengbao Zerenzhi de Falü Shijiao Fenxi* (土地权利, 法律秩序和社会变迁—家庭联产承包责任制的法律视角分析) [*Land Rights, Legal Order and Social Change: Legal Analysis of the Household Contract Responsibility System*], 1 ZHAN LUE YU GUAN LI 100, 102 (2000) (stating that the household contract is actually an agreement regarding common services and taxation that is reached by the rural community, peasants and the nation, rather than a common civil contract).

<sup>15</sup> In 1981, the Eleventh Central Committee of the Communist Party of China passed a resolution that pointed out for the first time that the state economy and the collective economy are the basic forms of the Chinese economy. *Guanyu Jianguo Yilai Dang de Ruogan Lishi Wenti de Jueyi* (关于建国以来党的若干历史问题的决议) [*Resolution on Certain Questions in the History of our Party Since the Founding of the PRC*] (promulgated by the Sixth Plenary Session of the Eleventh Cent. Comm. of the Communist Party of China, effective June 27, 1981). In July of the same year, the State Council issued Provisions on Township Non-Agricultural Micro-Economic Policy. *Guanyu Chengzhen*

program included absorption of foreign investment, which helped to provide new models for state-owned enterprises and collectively-owned enterprises, and cleared the way for their eventual restructuring in the mid-1990s.<sup>16</sup> This later reform included the large-scale shutting down of factories and massive layoffs, as well as the promulgation of the Company Law in 1993 (which, in essence, was intended to cut the link between government and enterprise).<sup>17</sup> During this process, there were many protests by laid-off workers, the reverberations of which are still felt today.<sup>18</sup>

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*Feinongye Geti Jingji Ruogan Zhengcexing Guiding* (关于城镇非农业个体经济若干政策性规定) [*Provisions on Township Non-Agricultural Micro-Economic Policy*] (promulgated by the State Council, July 7, 1981, effective July 7, 1981). A report to the Twelfth National Congress of the Communist Party of China, delivered in September 1982, pointed out that “we must also encourage the appropriate development of the individual economy of urban and rural working people as a necessary and useful complement to the public economy, within limits prescribed by the state and under supervision by industrial and commercial administrations.” HU YAOBANG, QUANMIAN KAICHUANG SHEHUIZHUYI XIANDAIHUA JIANSHE DE XIN JUMIAN: ZAI ZHONGGUO GONGCHANDANG DISHIERCI QUANGUO DAIBIAO DAHUI SHANG DE BAOGAO (全面开创社会主义现代化建设的新局面: 在中国共产党第十二次全国代表大会上的报告) [CREATE A NEW SITUATION IN ALL FIELDS OF SOCIALIST MODERNIZATION: REPORT TO THE 12TH CONGRESS OF THE COMMUNIST PARTY OF CHINA] (1982). See generally Feng Hui & Wan Qigang, *Woguo Geti he Siying Jingji Falü Diwei de Lishi Yanbian* (我国个体和私营经济法律地位的历史演变) [*The History and Development of the Legal Status of the Individual and Private Economy in China*], 11 DANGDAI ZHONGGUOSHI YANJIU 59, 61–62 (2004) (explaining the historical evolution of promoting economies in both rural and urban settings in China).

<sup>16</sup> See Sang Baichuan, *Waishang Touzi de Zhidu Xiaoying yu Waizi Zhanlue Tiaozheng* (外商投资的制度效应与外资战略调整) [*On Institutional Effects of FDI and Readjustment of FDI Strategy*], 137 KAIFANG DAobao 27, 27 (2008) (describing the strategies and effects of restructuring). See also HAN CAIZHEN, *ZHONGGUO WAIZI ZHENGCE HE FALÜ DE JIXIAO FENXI* (中国外资政策和法律的绩效分析) [ANALYSIS OF CHINA’S FOREIGN INVESTMENT POLICIES AND LAWS] 1–32 (2007) (discussing the introduction of foreign investment and its contribution to China’s opening and reform).

<sup>17</sup> The commonly-held principle of separation of ownership and control is considered to a cure for the ills of traditional state-owned enterprises. According to Article 3 of the Company Law, a company is an enterprise with legal person status, has independent corporate property, enjoys all corporate property rights, and assumes civil responsibility for its debts with all property. Thus, a company shall enjoy all legal personhood and property rights (as formed by its shareholders including the state), shall enjoy civil rights, and shall bear civil responsibilities pursuant to law. *Zhonghua Renmin Gongheguo Gongsi Fa* (中华人民共和国公司法) [The Company Law of the People’s Republic of China], art. 3 (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1993, effective July 1, 1994).

<sup>18</sup> See, e.g., Huang Langhui et al., *Guoqi Gaige Wenti Duo—Laizi Diyixian de Diaocha Baogao* (国企改革问题多—来自第一线的调查报告) [*Lots of Problems in State-owned Enterprises Reform—A First-line Survey*], *ZHONGGUO GUOQING GUOLI* 30 (1998) (noting that laid-off workers is one of the biggest problems in state-owned

After the transformation of state-owned enterprises (“SOEs”) and collectively-owned enterprises, and in accordance with the Company Law, SOEs gained the status of independent legal persons rather than affiliates of various government agencies.<sup>19</sup> In principle, SOEs now had to compete with various market players.<sup>20</sup> However, since various government agencies remained major “shareholders” of these SOEs, official priority continued to be placed on the accumulation of state assets and protection of SOEs. Consequently, it proved very difficult for government agencies to adequately implement the law and treat all market players fairly.<sup>21</sup> In order to promote a more level playing field and encourage competition, the Chinese government established the State-Owned Asset Supervision and Administration Commission (“SASAC”) in 2003.<sup>22</sup> SASAC is a special entity—it is a non-governmental body that embodies the

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enterprises reform); Gao Xiaoli & Hu Guiying, *Zhuanbian Zhigong Shenfen Gai Gei Duoshao Qian* (转变职工身份该给多少钱) [*How Much to Pay for Transforming the Status of Employees*], SICHUAN LAODONG BAOZHANG 28 (2004) (discussing the determinants of the calculation of compensation for laid-off workers).

<sup>19</sup> Zhonghua Renmin Gongheguo Gongsi Fa (中华人民共和国公司法) [The Company Law of the People’s Republic of China], art. 5 (promulgated by the Fifth Session of the Eighth Nat’l People’s Cong., effective July 1st, 1994).

<sup>20</sup> See Liu Junhai, *Woguo Gongsi Fa de Tedian* (我国公司法的特点) [*The Features of the Company Law of China*], FAXUE ZAZHI 16, 16–17 (1994) (stating that the promulgation of the Company Law of China introduced a new approach to planning the economy, under which corporate legislation is based on principles of responsibility and corporate governance rather than the ownership of investors; this could remove unfair competition between enterprises established by investors with different ownership).

<sup>21</sup> Jin Chengdong, *Minying Jingji de Xingzheng Fa Wenti Ji Qi Gaige* (民营经济的行政法问题及其改革) [*Problems and Reform of Administrative Law of the Private Sector*], 36 ZHEJIANG DAXUE XUEBAO (RENWEN SHEHUI KEXUE BAN) 90, 92 (2006).

<sup>22</sup> The SASAC was founded according to the Decision of the First Session of the Tenth National People’s Congress on the Plan for Restructuring the State Council. Dishijie Quanguo Renmin Daibiao Dahui Diyici Huiyi Guanyu Guowuyuan Jigou Gaige Fangan de Jueding (第十届全国人民代表大会第一次会议关于国务院机构改革方案的决定) [Decision of the First Session of the Tenth National People’s Congress on the Plan for Restructuring the State Council] (promulgated by the First Session of the Tenth Nat’l People’s Cong., effective Mar. 10, 2003) ST. COUNCIL GAZ., 9. According to the Arrangement on Major Responsibilities, Internal Organizations and Staffing of SASAC approved by the State Council, SASAC is the organization authorized by the State Council to perform the responsibilities as the investor of the State-owned asset on behalf of the central government. Guowuyuan Guoyou Zichan Jiandu Guanli Weiyuanhui Zhuyao Zhize Neishe Jigou he Renyuan Bianzhi Guiding (国务院国有资产监督管理委员会主要职责内设机构和人员编制规定) [Arrangement on Major Responsibilities, Internal Organizations and Staffing of SASAC Approved by the State Council] (promulgated by Gen. Office of the State Council, effective Apr. 25, 2003) ST. COUNCIL GAZ., 21.

concept of separation between government and state asset owners.<sup>23</sup> SASAC is responsible for the management of state-owned assets, relieving nearly all government agencies from this role.<sup>24</sup> With its establishment, government agencies were expected to enforce the law equally and fairly against SOEs, like all market entities.

Prior to 1978, the government also monopolized provision of public services, either through state-owned and collectively-owned enterprises or the People's Communes (in rural areas), or through other public service providers affiliated with government agencies. After the initial reform of state-owned and collectively-owned enterprises, and the dismantling of the People's Communes, the responsibility of public service provision was left entirely to the government itself.<sup>25</sup> This overwhelming responsibility made it difficult for the government to provide any public service effectively.

To address this "public service provision" problem, the Chinese government has since endeavored to separate the roles of government and public service providers. In the early 1990s, certain public services, including housing and childcare, were pushed entirely onto the private market.<sup>26</sup> The responsibility to

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<sup>23</sup> Arrangement on Major Responsibilities, *supra* note 22.

<sup>24</sup> Articles 4 through 7 of the Interim Regulation on Supervision and Administration of the State-Owned Assets of Enterprises make clear the six specific functions of SASAC: (1) act as the state-owned assets' investor in accordance with Corporate Law of People's Republic of China and related administrative regulations; (2) guide and push the reform and restructuring of the state-owned enterprises; (3) dispatch the supervisory board to some large enterprises on behalf of the state and be in charge of daily management of the supervisory board; (4) appoint, remove and evaluate the executives of the enterprises through legal procedures and grant rewards and punishments according to their performance; (5) supervise the maintenance and appreciation of state assets' value for those state-invested enterprises and reinforce the management of the state-owned assets; and (6) perform other duties of state-owned assets' investor and undertake other issues assigned by the government at the same level. Qiye Guoyou Zichan Jiandu Guanli Zanxing Tiaoli (企业国有资产监督管理暂行条例) [Interim Regulation on Supervision and Administration of the State-owned Assets of Enterprises] (promulgated by No. 378 Order of the State Council, May 13, 2003, effective May 27, 2003) ST. COUNCIL GAZ., 5.

<sup>25</sup> See generally Yu Jianxing, *Zhongguo de Gonggong Fuwu Tixi: Fazhan Licheng, Shehui Zhengce yu Tizhi Jizhi* (中国的公共服务体系: 发展历程, 社会政策与体制机制) [*China's Public Service System: Developments of Social Policy, Institution and Mechanism*], 43 XUESHU YUEKAN (ACADEMIC MONTHLY) 5, 8 (2011) (explaining how the public service provision switched from the control of state- and collectively-owned enterprises to the control of the government).

<sup>26</sup> See, e.g., Zhongguo Jiaoyu Gaige he Fazhan Gangyao (中国教育改革和发展纲要) [Outline of China's Educational Reform and Development] (promulgated by the Cent.

provide other public services, such as education and healthcare, was to be shared by private providers and the state, which retained some basic responsibilities. Compared to enterprise reform, reforming the provision of public services has proven much more difficult, with limited progress so far. This is largely due to the fact that such reform is closely connected with the development of various non-governmental social organizations (“NGOs”), which remain subject to rigorous controls (such as the requirement of a government or Party sponsor for registration).<sup>27</sup> Drawing on the lessons learned from mass layoffs in the mid-1990s, reformers have been more cautious in their approach to this issue in order to avoid social unrest.<sup>28</sup>

### *B. Creating a New Regulatory Framework*

Altogether, through the disaggregation of functions outlined above, the Chinese government has unburdened itself of many unnecessary tasks and responsibilities. This gave more power and

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Comm. of CPC and the State Council, Feb. 1993) ST. COUNCIL GAZ., 143–60 (stating its goal “to change the pattern of government undertaking education single-handedly,” and gradually establish a system of running educational institutions mainly by governments complemented with social resources); Guowuyuan Guanyu Jixu Jiji Wentuo de Jinxing Chengzhen Zhufang Zhidu Gaige de Tongzhi (国务院关于继续积极稳妥地进行城镇住房制度改革的通知) [Circular of the State Council on Further Promoting the Reform of the Urban Housing System Positively and Safely] (promulgated by the State Council, June 7, 1991) (putting forward ideas to promote reform of the housing system in multiple ways, such as by incrementally raising rent, collecting rent deposits, applying new regulations to newly constructed houses while applying old regulations to the existing houses, building houses with funds collected by buyers, and selling public housing).

<sup>27</sup> See, e.g., Minban FeiQiye Danwei Dengji Guanli Zanxing Tiaoli (民办非企业单位登记管理暂行条例) [Interim Regulations on the Registration and Administration of Private Non-Enterprise Organizations], art. 8 (promulgated by the State Council, Oct. 25, 1998), ST. COUNCIL GAZ. (explaining an NGO’s role in public service reform); Shehui Tuantu Dengji Guanli Tiaoli (社会团体登记管理条例) [Regulations on the Registration and Administration of Social Organizations], art. 9–10 (promulgated by the State Council, Oct. 25, 1989), ST. COUNCIL GAZ., 779–80 (explaining the restrictions on NGOs with regards to social reform).

<sup>28</sup> See, e.g., Jiang Handi & Kuang Sheng, *Woguo Shiye Danwei Gaige de Nandian yu Duice* (我国事业单位改革的难点与对策) [*Difficulties of Reform of Public Institutions and Countermeasures*], 10 DANGDAI CAIJING 17, 17 (2005) (arguing that the reform of public institutions should take into account the law enforcement, social security back-up and restructure of relevant rights and titles); Wang Lanming, *Gaige Kaifang Yilai Woguo Shiye Danwei Gaige de Lishi Huigu* (改革开放以来我国事业单位改革的历史回顾) [*Review on Public Institutions Reform Since 1978*], 6 ZHONGGUO XING ZHENG GUANLI 7 (2010) (explaining the history of reform of public institutions).



autonomy to individuals, enterprises, and civil society. This increase in private autonomy is one of the main accomplishments of regulatory reform in China thus far and merits recognition. However, after the transformation of government functions, traditional ways of government regulation have proven to be inadequate. Under the centralized or planned economy, it was quite easy for the government, at every level, to manage economic and social affairs, because everything was state-owned—from Chinese citizens' homes, to their jobs, to their health care. But transition away from state ownership has created the need for the government to establish a new, modern regulatory framework.

There have been three key dimensions to the regulatory reforms that have been undertaken in further response to this need: (i) restructuring government agencies, (ii) redefining the government's role, and (iii) establishing new tools for regulation. First, regarding the structure of government agencies, government ministries used to manage everything in their respective sectors, including nominating leaders for state-owned and collectively-owned enterprises, and determining enterprise inputs and outputs.<sup>29</sup> In 1998, fifteen ministries, and in particular eight “sector management” (*hangye guanli*) ministries—including ministries in the areas of electricity, coal, and electronics—were abolished by the State Council under the leadership of then premier Zhu Rongji.<sup>30</sup> This institutional restructuring confirmed the emergence of—and gave further impetus to—the development of a new kind of government agency that was focused on “regulation” (*jianguan*) rather than sector management, and enjoyed more independence than the general ministries.<sup>31</sup> Examples of this new kind of regulatory agency include the China Securities Regulatory

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<sup>29</sup> Luo Gan, Guanyu Guowuyuan Jigou Gaige Fang'An de Shuoming (关于国务院机构改革方案的说明) [Explanation of the Plan for Restructuring the State Council] (Mar. 6, 1998) ST. COUNCIL GAZ., 408.

<sup>30</sup> Many sector management ministries were transformed into holding companies. See, e.g., Qian Jin, *Lun Woguo Guoyou Konggu Gongsu de Zujian yu Fazhan* (论我国国有控股公司的组建与发展) [On the Formation and Development of State-owned Holding Company], 6 JINGJI YANJIU 31, 40 (1996) (discussing relevant research on the significance of this transformation).

<sup>31</sup> See Ma Yingjuan, *Jianguan Jigou yu Xingzheng Zuzhifa de Fazhan* (监管机构与行政组织法的发展) [Development of Regulatory Agency and Administrative Organizational Law], ZHEJIANG XUEKAN 16 (2007) (describing the regulatory agency development and its impact on administrative law).

Commission (“CSRC”), established in 1992 following the infamous Shenzhen “stock scramble”<sup>32</sup>; the State Food and Drug Administration (“SFDA”) and State Insurance Regulatory Commission (“SIRC”) established in 1998; and the State Electricity Regulatory Commission (“SERC”) and China Banking Regulatory Commission (“CBRC”), both established in 2003. The logic underlying the creation of all these functionally more limited regulatory agencies, though never openly stated, has been to disaggregate the policy-making function of the general ministries from the task of regulation, as well as to promote a concept of regulatory independence of regulation as understood in more developed countries.<sup>33</sup>

In 2008, regulatory reform advanced a step further with the introduction of the so-called “super ministry” model.<sup>34</sup> This terminology refers to combining several agencies with similar functions into new single ministries like the Ministry of Industry & Information Technology (“MIIT”) and the Ministry of Human Resources & Social Security (“MHRSS”), to which extensive jurisdiction and policy-making powers are granted.<sup>35</sup> The super ministry model is expected to reduce duplication of functions and

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<sup>32</sup> See Liu Hongru & Nan Yan, *Zhengjianhui Dansheng de Taiqian Muhou* (证监会诞生的台前幕后) [*Front Stage and Behind the Scenes of the Birth of the China Securities Regulatory Commission*], *ZHONGGUO JINGJI ZHOUKAN* 64 (2009) (noting that Liu Hongru, first Chairman of the CSRC, recalled the establishment of the agency, including how the agency learned regulatory lessons from Taiwan, Hong Kong and other developed regions).

<sup>33</sup> Zhou Hanhua, *Duli Jianguan yu Dabuzhi de Guanxi* (独立监管与大部制的关系) [*The Relationship between Independent Regulation and Super Ministry*], 5 *GONGFA YANJIU* 5 (2007).

<sup>34</sup> For example, the MIIT integrated the National Development and Reform Commission’s functions on industry and trade management, all the functions of the Commission of Science, Technology and Industry for National Defense except those on nuclear power management, and the functions of the Ministry of Information Industry and the State Council Information Office. The MHRSS integrated the functions of the Ministry of Personnel and the Ministry of Labor and Social Security. *Dishiyijie Quanguo Renmin Daibiao Dahui Diyici Huiyi Guanyu Guowuyuan Jigou Gaige Fang’An de Jueding* (第十一届全国人民代表大会第一次会议关于国务院机构改革方案的决定) [*Decision of the First Session of the Eleventh National People’s Congress on the Plan for Restructuring the State Council*] (promulgated by the First Session of the Eleventh Nat’l People’s Cong., Mar. 15, 2008), 3 *STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.*, 400–01.

<sup>35</sup> Song Shiming, *Lun Dabumen Tizhi de Jiben Goucheng Yaosu* (论大部门体制的基本构成要素) [*On the Basic Elements of the Super Ministry System*], 10 *ZHONGGUO XINGZHENG GUANLI* 34 (2009).

overlapping management among central departments.<sup>36</sup> By reducing inefficiency and bureaucracy, bigger ministries should result in smaller government, with fewer opportunities for corruption and dereliction of duty. Altogether, through these various rounds of restructuring, the number of cabinet-level ministries was reduced from forty-five in 1982 down to twenty-seven in 2008.<sup>37</sup>

In March 2013, with the aim of further reducing the government's role and promoting non-governmental and market forces, the Chinese government conducted another round of restructuring, dismantling and merging several important Cabinet-level ministries, and further reducing the total number from twenty-seven to twenty-five.<sup>38</sup> The vast and influential Ministry of Railways was broken up, and the National Population and Family Planning Commission—the powerful family planning authority—was merged with the Ministry of Health.<sup>39</sup> To boost food and drug safety, this restructuring plan established a ministerial-level China Food and Drug Administration (“CFDA”), taking over the respective duties of the State Council's Food Safety Office, the State Food and Drug Administration, and the food supervision branches of the General Administration of Quality Supervision, Inspection, and Quarantine and the State Administration for

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<sup>36</sup> Dishiyijie Quanguo Renmin Daibiao Dahui Diyici Huiyi Guanyu Guowuyuan Jigou Gaige Fang'An de Jueding (第十一届全国人民代表大会第一次会议关于国务院机构改革方案的决定) [Decision of the First Session of the Eleventh National People's Congress on the Plan for Restructuring the State Council] (promulgated by the First Session of the Eleventh Nat'l People's Cong., Mar. 15, 2008), 3 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.*, 400–01.

<sup>37</sup> See Zhao Fei, *Sanshinian Lai Wuci Zhengfu Jigou Gaige Dapandian* (三十年来五次政府机构改革大盘点) [*Overview of the Five Rounds of Government Institutional Reform in the Past Thirty Years*], 3 *ZHONGGUO BAODAO* 67–68 (2008) (overviewing the five rounds of reform: (1) restructure of age structure of cadres, (2) shift in the functions of the government, (3) improvement of the adaptability to market economy, (4) more extensive and in-depth reform, and (5) further shift in governmental functions to embrace the WTO).

<sup>38</sup> Dishierjie Quanguo Renmin Daibiao Dahui Diyici Huiyi Guanyu Guowuyuan Jigou Gaige he Zhineng Zhuanbian Fang'An de Jueding (第十二届全国人民代表大会第一次会议关于国务院机构改革和职能转变方案的决定) [Decision of the First Session of the Eleventh National People's Congress on the Plan on the Institutional Restructuring and Functional Transformation of the State Council] (promulgated by the Twelfth Nat'l People's Cong., Mar. 14, 2013), 2 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.*, 338–42.

<sup>39</sup> *Id.*

Industry and Commerce.<sup>40</sup> Lastly, the State Electricity Regulatory Commission, the first independent regulator of China's infrastructure industries, was dissolved and its responsibilities taken over by a reorganized National Energy Administration, under the main state planning authority, the National Development and Reform Commission ("NDRC").<sup>41</sup>

Second, on the redefinition of the government's precise role, the transformation has been from an "all-in-one" control of all facets of social and economic life to a more limited focus on four core aspects, as outlined by Working Guidelines of the State Council: (i) economic adjustment, (ii) market regulation, (iii) social administration, and (iv) public service.<sup>42</sup> This shift has been reinforced by laws, such as the 2003 Law on Administrative Licensing, which carve out a larger role for the market, civil society, and individuals, and place new restrictions on governmental intervention.<sup>43</sup> For example, Article 13 of the Law on Administrative Licensing specifies that administrative licenses may not be necessary if the relevant matters may be regulated by market competition mechanisms or other more private means, or at least later addressed by post hoc administrative supervision.<sup>44</sup>

Third, regarding the tools for regulation, with "command and control" tools such as licensing, sanctions, inspections, and enforcement well established in various administrative laws,<sup>45</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Guowuyuan Gongzuo Guize (国务院工作规则) [The Working Rule of the State Council] (promulgated by the State Council, Mar. 23, 2013).

<sup>43</sup> See Xingzheng Xuke Fa (行政许可法) [Administrative License Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 5 (placing more restrictions on the government and allowing for more power to the people or private entities). See, e.g., Zhou Hanhua, *Xingzheng Xuke Fa: Guannian Chuangxin yu Shijian Tiaozhan* (行政许可法: 观念创新与实践挑战) [*Administrative License: Law-Concept Innovations and Practical Challenges*], 2 FAXUE YANJIU 3-24 (2005) (discussing fundamental principles of the Administrative Approval Law).

<sup>44</sup> Xingzheng Xuke Fa (行政许可法) [Administrative License Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004), art. 13, STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 5.

<sup>45</sup> See, e.g., Xingzheng Qiangzhi Fa (行政强制法) [Administrative Compulsion Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2011, effective Jan. 1, 2012) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 5 (showing the tools available in the Administrative Compulsion Law); Administrative License Law, *supra* note 43 (showing the tools available in the Administrative License Law); Xingzheng Chufa Fa (行政处罚法)

Chinese authorities are now trying to promote innovation in social administration by introducing more incentive-based regulatory tools, such as tradable allowances, franchise bidding, adverse publicity, and cooperative regulation.<sup>46</sup> Many non-formal modes of administration have also been created or used in practice, and they supplement and enrich legal methods that focus on approval and sanction.<sup>47</sup>

The above analysis shows the ways in which regulatory reform has been accomplished in China in the past thirty-five to forty years. One important characteristic to note is that this has been an incremental reform. This incrementalism can be distinguished from the “shock therapy” approach pursued in the former Soviet Union and Eastern European countries.<sup>48</sup> So far,

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[Law on Administrative Penalty] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 3 (showing the tools available in the Administrative Penalty Law).

<sup>46</sup> See, e.g., Yaopin Anquan “Heimingdan” Guanli Guiding (Shixing) (药品安全“黑名单”管理规定(试行)) [Administrative Measures on Drug Safety “Blacklist” (For Trial Implementation)] (promulgated by the St. Food & Drug Admin., Aug. 13, 2012), <http://www.sda.gov.cn/WS01/CL0844/74236.html> [perma.cc/VPJ3-H5P5] (discussing negative incentives in the CFDA arena); Wenshi Qiti Ziyuan Jianpai Jiaoyi Guanli Banfa (温室气体自愿减排交易管理办法) [Interim Regulations on Voluntary Greenhouse Gas Emission Trading] (promulgated by the National Dev. and Reform Comm'n, June 23, 2012), [http://qhs.ndrc.gov.cn/zcfg/201206/t20120621\\_487133.html](http://qhs.ndrc.gov.cn/zcfg/201206/t20120621_487133.html) [perma.cc/8QAJ-B8M3] (discussing positive and negative incentives in the emissions and environmental spaces); Shizheng Gongyong Shiye Texu Jingying Guanli Banfa (市政公用事业特许经营管理办法) [Measures for the Administration on the Franchise of Municipal Public Utilities] (promulgated by the Ministry of Hous. and Urban-Rural Dev., Mar. 19, 2004), [http://www.mohurd.gov.cn/fgjs/jsbgz/200611/t20061101\\_159064.html](http://www.mohurd.gov.cn/fgjs/jsbgz/200611/t20061101_159064.html) [perma.cc/JFN4-W3MQ] (discussing incentives regarding public utilities and other social services).

<sup>47</sup> See generally WAN JUN, SHEHUI JIANSHE YU SHEHUI GUANLI CHUANGXIN (社会建设与社会管理创新) [SOCIAL CONSTRUCTION AND SOCIAL MANAGEMENT INNOVATION] (2011) (describing some informal methods of achieving innovation in administrative law); Cui Zhuolan & Liu Fuyuan, *Shehui Guanli Chuangxin Guocheng Zhong de Xingzheng Jiguan Jiqi Xingwei* (社会管理创新过程中的行政机关及其行为) [*Administrative Agencies and Their Activity in the Process of Social Management Innovation*], 3 SHEHUI KEXUE JIKAN 75, 75–80 (2012) (describing the informal and formal methods of administrative agencies that promote innovation in social management).

<sup>48</sup> See generally JEFFERY SACHS, UNDERSTANDING SHOCK THERAPY (1994) (showing that shock therapy often involves radical reform programs carried out over a relatively short period of time). Jeffrey Sachs, former professor of economics at Harvard University and director of the Earth Institute at Columbia University, who helped develop shock therapy reform programs in Latin America and Eastern Europe, characterizes shock therapy as “a rapid, comprehensive, and far-reaching program of reforms to implement ‘normal’ capitalism.” Jeffrey Sachs, Address at the Tanner Lectures on Human Values at the University of Utah: Shock Therapy in Poland: Perspectives of Five Years (April 6–7,

incremental regulatory reform in China can be deemed successful according to various indicators of economic development and living standards. For example, from 1978 to 2012, the per capita annual income of urban residents increased from 343 yuan to 24,565 yuan; that of rural residents increased from 134 yuan to 7917 yuan.<sup>49</sup> From 1978 to 2007, the population living below the poverty line in rural area was reduced from 250 million (1978 poverty line was annual per capita income of 100 yuan) to 14.79 million (2007 poverty line was annual per capita income of 785 yuan).<sup>50</sup> And there are other measurements to consider. After six rounds of reform from 2001 to 2012, the central government has cut administrative approval items by 69.3%.<sup>51</sup> Currently, over 90% of the prices of commodities and services are determined by the market rather than the government.<sup>52</sup> In 2012, private sector contributions accounted for more than 60% of GDP.<sup>53</sup>

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1994) (stating that, in economics, shock therapy refers to the sudden release of price and currency controls, withdrawal of state subsidies, and immediate trade liberalization within a country; it usually also includes large-scale privatization of previously publicly owned assets).

<sup>49</sup> Feng Yilin, *Fanying Jumin Shouru Shiji Zengzhang Yao Kouchu Jiage Shangzhang Yingxiang* (反映居民收入实际增长要扣除价格上涨影响) [*Reflecting Real Residential Income Growth after Offsetting Price Increases*], NATIONAL BUREAU OF STATISTICS OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.stats.gov.cn/tjsj/sjjd/201311/t20131114\\_461380.html](http://www.stats.gov.cn/tjsj/sjjd/201311/t20131114_461380.html) [perma.cc/G9FG-DFBT].

<sup>50</sup> Guojia Fazhan Gaige Wei Jingji Tizhi Zonghe Gaige Si & Guojia Fazhan Gaige Wei Jingji Tizhi Yu Guanli Yanjiusuo (国家发展改革委经济体制综合改革司、国家发展改革委经济体制与管理研究所) [Comprehensive Reform of Economy System Division of the NDRC & Institute of Economy System and Management of the NDRC], *GAIGE KAIFANG SANSHINIAN: CONG LISHI ZOUXIANG WEILAI—ZHONGGUO JINGJI TIZHI GAIGE RUOGAN LISHI JINGYAN YANJIU* (改革开放三十年：从历史走向未来——中国经济体制改革若干历史经验研究) [REFORM AND OPENNING UP IN THIRTY YEARS: FROM HISOTRY TOWARD THE FUTURE—RESEARCH ON SEVERAL HISTORICAL EXPERIENCES OF CHINA'S ECONOMY REFORM], 70 (2008).

<sup>51</sup> Wen Jiabao, *Zhengfu Gongzuo Baogao* (政府工作报告) [Report on the Work of the Government] (delivered at the First Session of the Twelfth Nat'l People's Cong., Mar. 5, 2013) RENMIN RIBAO.

<sup>52</sup> Guojia Jiwei, *Jianshao Jiage Shenpi Xiangmu, Fangkai Shangpin Fuwu Jiage* (减少价格审批项目，放开商品服务价格) [To Reduce Price Review and Approval, Deregulate Prices of Goods and Services] (promulgated by the State Council Info. Office, July 11, 2001), XINWEN FABUHUI Ji, 351.

<sup>53</sup> Pan Yue, *Minying Jingji Zhan GDP Bizhong Chao 60%* (民营经济占 GDP 比重超 60%) [*Share of Private Sector in GDP Over 60%*], RENMIN RIBAO, 1, (2013).

### III. CHALLENGES TO FURTHER REFORM

Finally, I will elaborate upon the challenges and problems faced by the Chinese government in pursuing further regulatory reform. In my view, there are four fundamental challenges that will prove very difficult to overcome. First, the incremental approach to reform tends to focus more on immediate problems, and less on developing overall strategy.<sup>54</sup> As a result, it leaves the most difficult tasks to the future, and prevents certain core reforms from ever being initiated. For example, though separation between government and enterprise has been a main theme of Chinese reform for more than thirty years, local governments still have remained enmeshed in economic activities for the sake of local revenue, investment, and GDP. This involvement has created misallocations between government and enterprise,<sup>55</sup> as well as distortion of law enforcement, such as selective enforcement<sup>56</sup> and entrapment practices.<sup>57</sup>

In addition, despite the fact that the central government has cut bureaucratic red tape by 69.3%, the items that have been cut mostly are not that significant, and cutting them has not changed the fact that the government rather than the market has remained the dominant player in resource allocation. Even today, private capital

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<sup>54</sup> See generally CHINA'S ECONOMIC REFORMS: THE COSTS AND BENEFITS OF INCREMENTALISM (STUDIES ON THE CHINESE ECONOMY) (Qimiao Fan & Peter Nolan eds., 1994) (explaining an analysis of the advantages and disadvantages of "incrementalism"); Alwyn Young, *The Razor's Edge: Distortions and Incremental Reform in the People's Republic of China*, 115 Q. J. ECON. 1091, 1092-94 (2000) (examining incremental reforms in China and the new distortions they created in the economy).

<sup>55</sup> See, e.g., Zhao Shukai, *Nongcun Fazhan yu Jiceng Zhengfu Gongsihua* (农村发展与基层政府公司化) [*Rural Development and Local Governments as Corporations*], 10 ZHONGGUO FA ZHAN GUANCHA 48 (2006) (describing the development of local governments in rural areas as if they were corporations); Andrew G. Walder, *Local Governments as Industrial Firms: An Organizational Analysis of China's Transitional Economy*, 101 AM. J. SOC. 263, 268-69 (1995) (presenting an analysis of industrial organization as one where the relationship between governments and enterprises is analogous to the relations within a corporation).

<sup>56</sup> Dai Zhiyong, *Xuanzexing Zhifa* (选择性执法) [*Selective Enforcement*], 4 FA XUE YAN JIU 28 (2008).

<sup>57</sup> Sang Benqian, *"Diaoyu Zhifa" yu "Hou Diaoyu Zhifa" de Shidai Kunjing: Wangluo Quntixing Shijian de Ge'an Yanjiu* ("钓鱼执法"与"后钓鱼时代"的执法困境: 网络群体性事件的个案研究) [*Dilemma of Law Enforcement in the Post-"Entrapment" Era: A Case Study of Cyberspace Mass Disturbance*], 2011 ZHONG WAI FA XUE 204.

still cannot invest in certain key areas like energy and telecommunications.<sup>58</sup>

Moreover, when it comes to government restructuring, many agencies are placed in charge of designing the blueprint for reform and then implementing this plan themselves—combining the roles of “player and referee.”<sup>59</sup> The “super ministry” reforms of 2008 and 2013 have not changed this trend; in fact, the super ministry model has only reinforced the problem, making core reform, such as functional transformation, even more challenging. Indeed, how to compel these bigger ministries to deregulate and decentralize may prove to be an even more arduous task in the years to come. To use the terminology of Professor Wu Jinglian, China needs to overcome “big obstacles,”<sup>60</sup> and all these big obstacles are difficult to overcome. Although the incremental approach has enjoyed some success thus far, it has not always proved sufficient to overcome such big or critical obstacles, and so there is reason to doubt it would ultimately be successful.

The second challenge is that the driving impetus for reform has been diminishing in China. There have been two major driving forces for Chinese regulatory reform over the past thirty-five years, which have been most effective. The first has been outside pressure. External competition has always been the most powerful driving force for reform in China. For example, if someone tells our leaders, “well, India has been doing this and that,” these leaders cannot wait—they have to do it too.

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<sup>58</sup> For an excellent case study, see ROSELYN HSUEH, CHINA’S REGULATORY STATE: A NEW STRATEGY FOR GLOBALIZATION, 193–270 (2011) (explaining why private capital investments in certain key areas are problematic).

<sup>59</sup> See generally Liu Hong, *Tigaiwei: Gaige de Zhongshu* (体改委: 改革的中枢) [State Economic Structure Reform Commission: Center of Reform], JINGJI GUANCHA BAO, 45 (2010) (noting the roles of the State Economic Structure Reform Commission in three momentous events in reform, i.e., the establishment of market economy, change in the tradition of planned economy, and clarification of the relationships among the government, market and enterprises); Liu Jipeng, *Cong Xiangnian Tigaiwei Shuoqi* (从想念体改委说起) [Beginning with Recalling State Economic Structure Reform Commission], NANFANG ZHOUMO (2004) (discussing the decision-making process of the State Economic Structure Reform Commission).

<sup>60</sup> See generally WU JINGLIAN, GAIGE: WOMEN ZHENGZAI GUODAGUAN (改革: 我们正在过大关) [REFORM: WE ARE NOW AT A CRITICAL POINT] 102–103 (2001) (arguing that four key problems need to be solved during the process of economic reform: adjusting ownership structure, addressing discriminatory treatment against private enterprises, building market-supportive institutions, and establishing the rule of law).



Despite the influence of competition, because of the consequences of economic growth, Chinese government officials now enjoy many financial resources, and generally appear satisfied with the status quo. Some even say, “now socialism can not only save China, it can save the world.”<sup>61</sup> So where is the pressure for reform? Recently my colleagues and I were entrusted to draft a new regulation for promoting economic reform. As a result, we conducted very intensive field investigations. I visited Shenzhen and talked to some officials there. The impression I got was that no one cared too much about reform. Everyone has a nice house, a good salary, and a fancy car. With those factors in place, there is little incentive for change.

The second major driving force for reform in the past thirty-five to forty years has been governmental incentives, from the “top down” and “bottom up” (i.e. from both the central and local governments). This form of motivation has been very effective. But now, many officials do not have the proper incentives for further reform. Local governments can just raise the price of housing, collect on this increase, sell land usage rights, and then allocate the money for their own purposes—rendering incentives for reform ineffective. The electricity sector provides another good illustration: until 2002, independent generators contributed nearly half of nationwide electricity production while the State Electricity Group produced the other half.<sup>62</sup> However, since the State Electricity Group monopolized the state grid, it tended to hinder competition in the wholesale market, by not purchasing enough electricity from the independent generators.<sup>63</sup> In order to promote fair competition, the central government launched a series of reforms in 2002,<sup>64</sup> dismantling the State Electricity Group into two grid operators and five major electricity generation companies, and

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<sup>61</sup> See, e.g., CHEN SIJIN, ZHIYOU SHEHUI ZHUYI CAINENG JIU MEIGUO (只有社会主义才能救美国) [ONLY SOCIALISM CAN SAVE THE UNITED STATES] 211–212 (2010) (arguing that the Obama Administration is using socialist policies to rescue the US economy).

<sup>62</sup> Liu Shujie, *Ruhe Bimian Fan Luoji* (如何避免反逻辑) [*How to Prevent Electric Restructuring from Being Illogical*], 12 NENGYUAN PINGLUN (2016).

<sup>63</sup> Wang Xiaobing, *Dianli Gaige Fang'an Shimo* (电力改革方案始末) [*The Whole Story of the Electricity Reform Plan*], 4 ZHONGGUO GAIGE, 58 (2004).

<sup>64</sup> The State Council approved *Dianli Tizhi Gaige Fang'an* (电力体制改革方案) [*Reform Plan of the Electricity Sector*] in 2002, and launched a series of reforms.

passing regulations aimed at promoting competition. The State Electricity Regulatory Commission was established in 2003, based on electricity sector reform in other countries.<sup>65</sup> Despite these changes, after ten years, a competitive market has not emerged, and no other substantial reforms have been adopted. The power to regulate tariffs and market entry in the electricity sector has continued to belong to the National Development and Reform Commission. As long as the NDRC can raise the price of the electricity, which has been the case in past years, major stakeholders including generators and grid operators continue to make money, and hence accept the status quo without pushing for further reform. Under these circumstances, the SERC has neither jurisdiction nor incentive to regulate at all, and so has been nicknamed the “research institute of electricity.”<sup>66</sup>

A third challenge has to do with the difficulty of transition. Rule of law, a market economy, freedom—all of these elements are part of that goal. But in such a big and complicated country, the most difficult question is, how do we reach that goal? There are all kinds of challenges—including social unrest—that are occurring during this transitional period. Against this backdrop, one can observe a recurring swing from the newer regulatory model back to the traditional management approach, which is still effective for dealing with some problems.

For example, during the Olympics, the Chinese government applied its traditional approach to security and was very successful; it prevented all major accidents and potential bombings.<sup>67</sup> However, this approach based on political mobilization could not be later

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<sup>65</sup> Zhang Guobao, *Dian Gai Shinian de Huiyu yu Sibian 2* (电改十年的回顾与思辨 2) [Review and Thoughts on the Ten Years of Electricity Sector Reform, Part II], ZHONGGUO JINGJI ZHOUKAN, 43 (2013).

<sup>66</sup> Mr. Shao Bingren, former vice chairman of the SERC, openly criticized the stagnation or even regression of electricity reform during 2012 National People’s Congress and CPPCC sessions. Tong Xiaobo, Cheng Zhen, Li Yongqiang & Hu Xuecui, *Daibiao Weiyuan Reyi Nengyuan Tigai yu Jiagai* (代表委员热议能源体改与价改) [Representatives of the National People’s Congress and Members of the National Committee of Chinese People’s Political Consultative Conference Discuss Energy Reform and Price Reform], ZHONGGUO NENGYUAN BAO, 2 (2012).

<sup>67</sup> Meng Jianzhu, *Ba Aoyun Anbao Chenggong Jingyan Zhuanhua Wei Changxiao Jizhi* (把奥运安保成功经验转化为畅销机制) [Turning the Successful Experience of the Beijing Olympics Security into a Permanent Mechanism], RENMIN RIBAO (HAIWAI BAN), 2 (2008).

sustained because of its high cost. Hence, the pendulum swung back to newer regulatory approaches, which are more cost-effective. These new approaches might continue to be applied during “normal” periods, but whenever there are accidents or crises, the government will revert back to its traditional approach. In the public health arena, the Chinese government’s approach to the outbreak of SARS in 2003 provides another good illustration.<sup>68</sup> So there is an ongoing challenge of not being able to rely on new regulatory approaches being used consistently, or predictably operated.

The fourth challenge is the lack of rule of law and judicial independence in China. In many respects, the legal framework calls for further improvement; in other respects, well-crafted laws are not observed or strictly enforced.<sup>69</sup> This all contributes to a serious dilemma. On the one hand, traditional rules, which mostly are not consistent with a market economy and not able to be amended in time due to legislative weakness, must be ignored or even broken in order to promote a new regulatory system. Indeed, China’s reform process has been one in which traditional rules have been gradually tossed away. In Guangdong Province, for example, it is common wisdom that one must move quickly when facing “a yellow light” (*i.e.*, rules) and circumvent when facing a “red light” (*i.e.*,

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<sup>68</sup> Due to China’s weak public health protection system, after the SARS outbreak, many local governments (including Beijing’s) relied on mass mobilization, almost martial in nature, to register, monitor and control the movement of their populations. The titles of newspaper reports from that time illustrate the ubiquitous use of these measures. *See, e.g.*, Zhao Hong & Sun Haihua, *Quanmin Da Hao Kangfei Gongjianzhan* (全民打好: “抗非”攻坚战) [*Mobilizing the People of the Whole Country and Declaring the Hard War against SARS*], XI’AN RIBAO (2003) (describing the SARS incident as a war and the people as the military); Li Jian, *Zhunbei Changqi Zuozhan Yanba Beijing Damen* (准备长期作战严把北京大门) [*Preparing Long-term Battle, Tightly Controlling the Gate of Beijing*], BEIJING RIBAO (2003) (advocating the people in Beijing to take their responsibility to fight against SARS); Zhang Zhengjun & Li Changjiang, *Qunfang Qunkong Kangji Feidian: Henan Sheng Junqu Dongyuan Minbing Touru Fang Feidian Zhandou* (群防群控 抗击非典: 河南省军区动员民兵投入防非典战斗) [*Fighting SARS by Mass Prevention and Control: Henan Provincial Military Command Enters the Battle with People’s Militia*], JIEFANGJUN BAO (2003) (mobilizing people’s militia to be responsible for SARS control).

<sup>69</sup> GUOWUYUAN XINWEN BANGONGSHI, *ZHONGGUO DE FAZHI JIANSHE* (中国的法制建设) [*CHINA’S EFFORTS AND ACHIEVEMENTS IN PROMOTING THE RULE OF LAW*] (2008). *See also* Chen Hongyi, *Zhongguo Zouxiang Fazhi zhi Lu de Huiyu* (中国走向法治之路的回顾) [*Review of China’s Road Towards Rule of Law*], 115 *ERSHIYI SHIJI* 9–11 (2009) (arguing that the tension between traditional Chinese conception of social governance and the modern conception of law in some sense prevents China to approach modern rule of law).

prohibitions) in order to pursue reform.<sup>70</sup> However, regulatory reform that contradicts current rules too much will damage the people's confidence in the law, and the rule of law more generally.

Always, in practice, there is a tension between lawfulness ("law by the books") and rationality ("law in action"). At the extremes, this tension becomes a dilemma between legal nihilism and legal formalism. Because China has not had a "rule of law" tradition, steps must be taken to establish the authority of law. But, the other end of the spectrum of legal formalism may be in conflict with social requirements and pose obstacles to reform. Just as the pendulum swings between the old and new regulatory approaches in China, so too when it swings to the extreme of legal formalism (which also happened in the United States in the 1930s),<sup>71</sup> the pendulum then inevitably swings back to legal nihilism. This is the reason for the call for innovation of social administration in recent years: certain government leaders have found out the legal system does not work at all and cannot solve difficult problems.<sup>72</sup> Quite often law professors only criticize administrative actions, saying "you cannot do this, you cannot do that." But government officials reply, "well, tell me what I should do—I have to get the job done."

Regulatory research is extremely important for these purposes. From the regulatory perspective, officials must not only be told what they cannot do, but also what they *can* do and the

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<sup>70</sup> Some Chinese scholars have referred to these phenomena as "positive violations of law" (*liangxing weifa*), and suggested they should not be refuted totally. See, e.g., He Li, *Liangfa Zhi Zhi he Liangxing Weifa* (良法之治和良性违法) [*Rule of Good Law and Positive Violation of Law*], 3 YUNNAN XINGZHENG XUEYUAN XUEBAO 73 (2003) (discussing positive violations of law and their effects). Other Chinese scholars insist that so-called "positive violations of law" should not be tolerated by a society based on rule of law. See, e.g., Li Kejie, *Fazhi Shehui Buneng Rongren "Liangxing Weifa"* (法治社会不能容忍"良性违法") [*"Positive Violation of Law" Cannot Be Tolerated in a Rule of Law Society*], 2 FAZHI YU SHEHUI 25 (2007) (dismissing positive violations of law as a valid principle to use).

<sup>71</sup> See, e.g., *United States v. Butler*, 297 U.S. 1, 62 (1936) ("When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former").

<sup>72</sup> Zhonggong Zhongyang Guowuyuan Guanyu Jiaqiang Shehui Chuangxin Guanli de Yijian (中共中央国务院关于加强社会创新管理的意见) [Opinions of the CPC Central Committee and the State Council on Social Management Innovation] (promulgated by the CPC Cent. Comm. and the St. Council, July 2011), <http://www.reformdata.org/content/20110919/24066.html> [perma.cc/7HP7-SZZM].

smartest way to get the job done. This is a big challenge, not only for government, but also for legal scholars who are only familiar with pure legal rules.

#### IV. CONCLUSION

China's regulatory reform is by and large analogous to regulatory reform generally, in other countries. There is no such thing as a "China Model" as has been promoted in recent years by different parties.<sup>73</sup> However, China does have its own problems and challenges due to its unique history and current regime. There is a big question as to whether China's incremental approach ultimately will be successful. So far, it has been proven repeatedly that the incremental approach cannot overcome fundamental shortcomings, and obstacles to reform have only accumulated. In order to transcend government-imposed limits, it is important to develop a comprehensive governance structure, and let the market, civil society, and the legal system each play a bigger role. All of these mechanisms have been emerging in practice and it is worthwhile to observe how they have interacted with the government regulatory mechanism. The interactions among different driving forces will determine the future of regulatory reform in China.

Moreover, China's regulatory reform has also shown that theory and ideology can play a very important role in institutional development. Actually, the term "regulation" ("*jianguan*") is a relatively new word in China. Before 1995, *jianguan* was limited to the areas of prison management and customs; there was no broader understanding of this term at all.<sup>74</sup> For example, the Eighth Five

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<sup>73</sup> See ZHONGGUO JINGJI ZHONGCHANGQI FAZHAN HE ZHUANXING—GUOJI SHIJIAO DE SIKAO HE JIANYI (中国经济中长期发展和转型: 国际视角的思考和建设) [MEDIUM AND LONG TERM DEVELOPMENT AND TRANSFORMATION OF CHINESE ECONOMY: THOUGHTS FROM AN INTERNATIONAL PERSPECTIVE] 5 (Edwin Lim & Michael Spence eds., 2011) (noting that since World War II, there have been only thirteen economic entities with annual growth rates above 7% for more than twenty-five consecutive years. They have five common features, though each one has its own characteristics). See generally HUANG YASHENG, CAPITALISM WITH CHINESE CHARACTERISTICS (2010) (discussing Professor Huang Yasheng of MIT's Sloan School's now famous analysis and critiques of the so-called "China Model"); HUANG YASHENG, "ZHONGGUO MOSHI" DAODI YOU DUO DUTE? ("中国模式"到底有多独特?) [HOW UNIQUE IS THE CHINA MODEL?] (2011).

<sup>74</sup> See, e.g., ZHONGGUO ZHENGFA DAXUE JIANYU SHIXUE YANJIU ZHONGXIN, JIANYU WENHUA JIANSHE YU JIANGUAN ANQUAN GONGZUO YANJIU (监狱文化建设与监管安全工

Year Plan issued in 1991 did not use the term “regulation” at all.<sup>75</sup> The Ninth Five Year Plan issued in 1996 was the first official document to mention the term.<sup>76</sup> Most recently, the Twelfth Five Year Plan issued in 2011 mentioned the term “regulation” forty-seven times.<sup>77</sup>

Indeed, the term has become so popular that even government agencies tend to go out of their way to link themselves to it. Strictly speaking, the English names of such agencies like the CSRC, SIRC, and CBRC should be translated into “supervision and administration commissions”—in Chinese, the word “regulatory” does not actually appear (the only exception is SERC, whose Chinese name does connote a regulatory body).<sup>78</sup> It seems that these agencies all chose technically improper English translations of their names in order to emphasize their role in regulation rather than their general supervisory or administrative roles. From the translation of these agency names, as well as many practical steps the agencies have been taking, one can infer the influence of regulatory theory and the mindset of agency officials who want to catch up with the international trend of regulatory reform.

China’s regulatory reform started much earlier than the adoption of regulatory theory. But since the introduction of new concepts in the mid-1990s, China’s regulatory reform has had a new blueprint.<sup>79</sup> Regulatory reform has obtained new momentum, and

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作研究) [STUDY ON CULTURAL DEVELOPMENT IN PRISONS AND SAFETY IN PRISON ADMINISTRATION] 1 (Ma Zhibing & Jiao Ningya et al. eds., 2011) (describing the use of the term *jianguan* in prisons).

<sup>75</sup> The Ten-Year Layout for National Economy and Social Development and Eighth Five-Year Plan (approved by the fourth session of the Seventh National People’s Congress (NPC) in March 1991).

<sup>76</sup> Guomin Jingji he Shehui Fazhan Jiuwu Jihua he Erlingyiling Nian Yuanjing Mubiao Gangyao (国民经济和社会发展“九五”计划和二零一零年远景目标纲要) [The Ninth Five-Year Plan on National Economy and Social Development and Long-Range Objectives for the Year 2010] (promulgated by the Eight Nat’l People’s Cong. Fourth Session, Mar. 17, 1996) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., at 2 (introducing this concept officially).

<sup>77</sup> The Twelfth Five-Year Plan (approved by the National People’s Congress on March 14, 2011).

<sup>78</sup> The full name of SERC is “Guojia Dianli Jianguan Weiyuanhui” (国家电力监管委员会), and “*jianguan*” (监管) is the Chinese translation of regulation.

<sup>79</sup> Liu Peng, *Zhongguo Jianguanxing Zhengfu Jianshe: Yige Fenxi Kuangjia* (中国监管型政府建设: 一个分析框架) [*Regulatory State Building in China: An Analytical Framework*], 2 GONGGONG XINGZHENG PINGLUN 53 (2011).

institutional arrangements have been established on a much more solid foundation. Based on the above analysis, it is apparent that serious theoretical discussion and effective international cooperation will be necessary for further reform and progress in China.