

ADMINISTRATIVE “SELF-REGULATION” AND THE RULE OF ADMINISTRATIVE LAW IN CHINA

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From a historical perspective, the formation and evolution of administrative law in many countries and regions have relied upon the important role and contribution of the judiciary. China is no exception in this respect. Over the past roughly thirty years, since the promulgation of the Administrative Litigation Law in 1989, Chinese courts have worked hard to secure the compliance of administrative actions with laws and regulations, and have acted as disguised lawmakers in fashioning new norms in regulating administrative agencies.

The development of administrative law in China has also been propelled by legislation. The National People’s Congress (NPC) and its Standing Committee have promulgated several laws regulating particular types of administrative action, such as administrative punishment, administrative licensing, and administrative compulsion, among others. Moreover, the NPC has passed many laws regulating specific areas of public administration, including but not limited to environmental protection, land administration, taxation, insurance, banking, and securities. In addition to making laws to regulate public administration, the legislature also monitors agencies’ statutory compliance through its “law enforcement inspection” power.¹

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¹ See Lin Yan & Jacques deLisle, *The NPC Standing Committee’s Law*

Presently, in China, however, the legislature and judiciary are inherently limited as external checking mechanisms. It is insufficient to rely on them alone to fully advance Chinese administrative law. Meanwhile, especially since the late 1990's, "self-regulation" or internal control within Chinese administration itself has come to play an important role which ought to be highlighted.² This paper will delineate such "administrative self-regulation" in China through the examples of rulemaking procedures, "filing and check" of normative documents, and criteria for the exercise of administrative discretion.³

Why would the Chinese administration be incentivized to pursue "self-regulation," given its dominant position in the political structure? This paper will argue that administrative self-regulation is driven by a variety of dynamics that include pressures for democratic legitimacy, as well as the demands of the bureaucratic structure.

However, the drivers for administrative self-regulation are limited in terms of their strength and effectiveness. Therefore, while self-regulation is an important phenomenon and cannot be ignored, the rule of administrative law in China cannot ultimately depend upon it. Without future political and judicial reforms enhancing the positions of the legislature and the judiciary in the public power structure, it is doubtful that administrative self-regulation can avoid administrative tyranny and truly ensure that administration is subordinate to the rule of law.

I. EXTERNAL REGULATION OF ADMINISTRATIVE ACTION AND ITS LIMITS

Enforcement Inspection Power: Brief History, Process and Main Functions, U. PA. ASIA L. REV. (forthcoming 2018).

² *Id.*

³ The term "administrative self-regulation" (*xingzheng zizhi* or *xingzheng ziwu guizhi*) in this paper refers to hierarchical supervision from within the administrative regime, as contrasted with "external" supervision by the legislature or judiciary.

A. *The Role of the Legislature*

Since judicial review of administrative action was fully established in China by the promulgation of the Administrative Litigation Law in 1989,⁴ there have been a number of significant developments in the area of administrative law, including legislative enactment of laws on state compensation, administrative reconsideration, and administrative supervision,⁵ as well as laws on administrative penalties, administrative licensing, compulsory enforcement, and rulemaking.⁶ Many basic laws in specific areas of

⁴ Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (China). Actually, it was the Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) (中华人民共和国民事诉讼法(试行)) [Civil Procedure Law (interim)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, expired in 1991) that first introduced judicial review of administrative action in civil procedure. However, on the basis of that law alone, the justifiability of administrative action was not generally confirmed, but rather depended upon specific authorizations in particular statutes.

⁵ Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa (中华人民共和国行政复议法) [Law on Administrative Reconsideration] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999, amended Aug. 27, 2009); Zhonghua Renmin Gongheguo Xingzheng Jiancha Fa (中华人民共和国行政监察法) [Law on Administrative Supervision] (promulgated by the Standing Comm. Nat'l People's Cong., May 9, 1997, effective May 9, 1997, amended June 25, 2010); Zhonghua Renmin Gongheguo Guojia Peichang Fa (中华人民共和国国家赔偿法) [State Compensation Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 12, 1994, effective Jan. 1, 1995, amended Apr. 29, 2010 & Oct. 26, 2012).

⁶ Zhonghua Renmin Gongheguo Xingzheng Qiangzhi Fa (中华人民共和国行政强制法) [Law on Compulsory Enforcement] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2011, effective Jan. 1, 2012); Zhonghua Renmin Gongheguo Xingzheng Xuke Fa (中华人民共和国行政许可法) [Law on Administrative Licensing] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004); Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [Law on Legislation] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015); Zhonghua Renmin Gongheguo Xingzheng Chufa Fa (中华人民共和国行政处罚法) [Law on Administrative Penalties] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996, amended Aug. 27, 2009).

public administration, including environmental protection, land administration, tax collection, insurance, banking, and securities have also been promulgated.⁷ All of these law-makings have been produced by the NPC and its Standing Committee, and have established a general framework for regulating administrative agencies. Through these means, public administration has been constituted, limited, proceduralized, and made accountable.

Of course, most of this legislation (with the notable exception of the Administrative Litigation Law)⁸ was initially drafted by government departments or the Legislative Affairs Office of the State Council.⁹ Inevitably, many administrative priorities were

⁷ Zhonghua Renmin Gongheguo Yinhangye Jiandu Guanli Fa (中华人民共和国银行业监督管理法) [Banking Supervision Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2003, effective Feb. 1, 2004, amended Oct. 31, 2006); Zhonghua Renmin Gongheguo Zhengquan Fa (中华人民共和国证券法) [Securities Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1998, effective Jul. 1, 1999, amended Aug. 28, 2004, Oct. 27, 2005, Jun. 29, 2013, and Aug. 31, 2014); Zhonghua Renmin Gongheguo Baoxian Fa (中华人民共和国保险法) [Insurance Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 1995, effective Oct. 1, 1995, amended Dec. 28, 2002, Feb. 28, 2009, and Aug. 31, 2014); Zhonghua Renmin Gongheguo Shuishou Zhengshou Guanli Fa (中华人民共和国税收征收管理法) [Tax Collection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 4, 1992, effective Jan. 1, 1993, amended Feb. 28, 1995, Apr. 28, 2001, Jun. 29, 2013, and Apr. 24, 2015); Zhonghua Renmin Gongheguo Huanjing Baohu Fa (中华人民共和国环境保护法) [Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989, amended Apr. 24, 2014); Zhonghua Renmin Gongheguo Tudi Guanli Fa (中华人民共和国土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 25, 1986, effective Jan. 1, 1987, amended Dec. 29, 1988, Aug. 29, 1998, and Aug. 28, 2004).

⁸The Administrative Litigation Law was initially drafted by the "Administrative Law Research Group," comprised mostly of legal scholars, which was delegated this task by the NPC Standing Committee's Legal Affairs Working Commission. Neysun A. Mahboubi, Participation and Accountability in Chinese Administrative Procedure (2015) (unpublished manuscript) (on file with author).

⁹ Legislative affairs offices, at each level of government at or above the county level, are charged with overall planning and coordination of rulemaking by the government, *ex ante* review of draft rules, "filing and check" as well as *post hoc* review of promulgated rules, providing legal advice for major decision-

planted therein.¹⁰ Even so, these laws were examined by and issued in the name of the national legislature, and reflect legislative will, external to the administrative regime, as to the regulation of public administration. Over time, it has become increasingly common for agencies to solicit NPC opinions while preparing initial legislative drafts¹¹—or even for the NPC Standing Committee’s Legal Affairs Working Commission or the NPC Special Committees themselves to take over initial drafting.¹² Further, there have been a growing

making (*zhongda juece*) by the government, undertaking administrative reconsideration procedures, and handling administrative litigation cases, among other responsibilities.

¹⁰ In China, this phenomenon is usually referenced as “departmentalist legislation” (*bumen lifa*). *Infra* note 18.

¹¹ As a scholar who is frequently called upon in this respect, I have personally witnessed the trend, in which it is increasingly common for agencies charged with preparing legislative drafts to invite experts from both the national and local people’s congresses, as well as experts from academia and practice, to participate in roundtable discussions on the contents of their drafts. One of the reasons for this may be that such *ex ante* dialogues are presumed to help the agency’s positions or priorities in the later legislative process.

¹² It is rare, in China, for the NPC’s subordinate institutions to make the initial draft of legislation. However, there are a few examples. *See, e.g.* *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa* (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec., 29, 2007, effective May 1, 2008) was drafted by the NPC Standing Committee’s Legal Affairs Working Commission; Wang Wenzhen & Zhang Shicheng (王文珍&张世诚), *Laodong Zhengyi Tiaojie Zhongcai Fa de Xintupo* (《劳动争议调解仲裁法》的新突破) [*New Breakthrough of the Labor Dispute Mediation and Arbitration Law*], 56 *ZHONGGUO LAODONG* [CHINA LAB.] 6, 6–10 (2008); the amendment of *Zhonghua Renmin Gongheguo Huanjing Baohufa* (中华人民共和国环境保护法) [Environmental Protection Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 1989, effective Dec. 26, 1989, amended Apr. 24, 2014) was launched by Quanguo Renda Huanjing yu Ziyuan Baohu Weiyuanhui (全国人民代表大会环境与资源保护委员会) [NPC Environmental and Resources Protection Committee]; Ou Changmei (欧昌梅), *Huanbaofa Ying Xieqingchu Zhengfu Zeren* (环保法应写清楚政府责任) [*Environmental Protection Law Should Stipulate Clearly the Government Responsibility*], *DONGFANG ZAobao* [ORIENTAL MORNING POST] (Mar. 19, 2013), <http://money.163.com/13/0319/10/8QAQRO6G00253B0H.html> [<https://perma.cc/M3XX-329H>] (showing examples of NPC Standing Committee’s Legal Affairs Working Commission or the NPC Special Committees

number of instances where the NPC has declined to approve proposed bills submitted by the State Council.

Despite this, the role of the NPC as a proponent for the rule of law in China is still quite limited. This is not only because of problems common to legislatures in many countries, but also because of certain deficiencies specific to China. Many legislatures grant administrative agencies quasi-legislative power, almost like a blank check with doctrines of non-delegation existing in name only.¹³ Administrative discretion is further compelled by out-of-date statutes, insofar as legislatures cannot foresee everything or make laws in time to deal with every new change. Moreover, the Chinese legislature has its own particular shortcomings. First, the relationship between NPC deputies and their constituents is so weak that it is difficult for the legislative process to adequately reflect public concerns about regulating administration.¹⁴ Second, many NPC deputies and Standing Committee members are not legal professionals, and thus their capacity to propose and scrutinize bills is quite limited.¹⁵ Third, national legislative sessions are too short,

taking over initial drafting).

¹³ See WILLIAM WADE, *ADMINISTRATIVE LAW* 388 (6th ed. 1988) (observing the connection between discretionary powers and the rule of law); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–77 (1975) (discussing the loose legislative control of administrative discretion).

¹⁴ Jiang Jinsong (蒋劲松), *Quanguo Renda Changweihui de Daibiaoxing Tantaoyan* (全国人大常委会的代表性探讨) [*Discussion On the Representative Nature of the NPC Standing Committee*], 26 ZHENGFA LUNTAN [TRIB. OF POL. SCI. AND L.] 19, 19–31 (2004); Zou Pingxue (邹平学), *Renmin Daibiao Dahui De Guimo Kunjing yu Daibiaoxing de Luoji Beilun* (人民代表大会的规模困境与代表性的逻辑悖论) [*The Scale Predicament and Representativeness Paradox of the People's Congress*], 18 RENDA YANJIU [PEOPLE'S CONG. RES.] 11, 11–15 (2009); Huang Xuexian & Zhu Zhongyi (黄学贤 & 朱中一), *Wanshan Renda Daibiao Daibiaoxing de Tantaoyan* (完善人大代表代表性的探讨) [*On the Improvement of the Representativeness of People's Congress Deputies*], 14 RENDA YANJIU [PEOPLE'S CONG. RES.] 5, 5–9 (2005).

¹⁵ Zhang Ruicun (张瑞存), *Woguo Renda Daibiao Zhuanzhihua de Xianshi Zhang'ai Jiqi Weilai Fazhan* (我国人大代表专职化的现实障碍及其未来发展) [*The Practical Obstacles and Future Development of the*

as there is insufficient time for proper deliberation on proposed bills.¹⁶ Finally, as noted above, many bills are initially drafted by administrative agencies, and even with the new trend noted above,¹⁷ departmentalism in the legislative process remains practically unavoidable.¹⁸

Thus, while the NPC and its Standing Committee have made great progress by setting up the basic framework of Chinese administrative law over the past two and a half decades, it is difficult for the national legislature to promptly meet rising public demands for better laws regulating the administration. For example, it took more than twenty-five years for the NPC to revise the Administrative Litigation Law (“ALL”) in November 2014, notwithstanding the many insufficiencies that became readily apparent and ever more acute as great economic and social changes took place. Legislative promulgation of a general Administrative Procedure Law (“APL”), long discussed by Chinese administrative law scholars, was listed in 2013 in the legislative plan of the Tenth

Professionalization of People's Congress Deputies], 19 LILUN YU GAIGE [THEORY AND REFORM] 64, 64–66 (2004); Liu Shuhua & Guoying (刘淑华&郭颖), *Lun Renda Daibiao Zhuanzhizhua yu Woguo Renmin Daibiao Dahui Zhidu de Wanshan* (论人大代表专职化与我国人民代表大会制度的完善) [On Specialization of People's Congress Deputies and Improvement of the People's Congress System], 29 FAXUE ZAZHI [L. SCI. MAG.] 114, 114–16 (2008); Xie Xiangwei (谢祥为), *Luelun Woguo Renda Daibiao de Zhuanzhizhua* (略论我国人大代表的专职化) [On the Professionalization of People's Congress Deputies], 12 RENDA YANJIU [PEOPLE'S CONG. RES.] 4, 4–7 (2003).

¹⁶ The NPC holds its plenary meeting (lasting twelve days) once a year. The NPC Standing Committee meets for three to five days every two months.

¹⁷ See *supra* notes 11, 12, and accompanying text (detailing the trend).

¹⁸ Mao Shoulong (毛寿龙), *Huajie Bumen Lifa Wenti de Zhidu Jiegou* (化解部门立法问题的制度结构) [Dissolving the Institutional Structure Underlying Departmental Legislation], 20 LILUN SHIYE [THEORETICAL HORIZONS] 40, 40–47 (2012); Xu Yanhua & Han Liqiang (徐燕华&韩立强), *Bumen Liyi: Bumen Lifa Mobuqu de Henji* (部门利益——部门立法抹不去的痕迹) [Departmental Interests: Non-Erasable Trace of Departmental Legislation], 15 SHANXI JINGGUAN GAODENG ZHUANKE XUEXIAO XUEBAO [J. OF SHANXI POLICE ACAD.] 29, 29–32 (2007); Tang Yaoguo & Zhu Yingying (汤耀国&朱莹莹), *Chaoyue Bumen Lifa* (超越部门立法) [Beyond Departmentalism In the Legislation], 27 LIAOWANG [OUTLOOK] 46, 46–47 (2007).

NPC Standing Committee as “a law which should be researched and drafted and, when ripe, submitted for discussion.”¹⁹ Yet in 2008 it was withdrawn from the legislative plan of the Eleventh NPC Standing Committee.²⁰ In 2013, the APL was listed in the legislative plan of the Twelfth NPC Standing Committee, but as a third-category law (i.e., conditions not ripe for legislative review and further researched required) as opposed to a first-category law (i.e., conditions ripe for submission and discussion in the term) or a second-category law (i.e., subject to drafting for submission when conditions ripen).²¹ The arduous process of lawmaking does not necessarily mean that the NPC is not competent to regulate administration agencies, but it does reflect the pre-dominance of the administrative agencies in the ruling of China.

B. *Judicial Review*

In the current administrative law framework, and in particular under the ALL, courts are limited to reviewing “administrative actions.”²² The standard of judicial review is legality in its narrowest sense—although in a few cases, courts do step a little

¹⁹ Shijie Quanguo Renda Changweihui Lifa Guihua (十届全国人大常委会立法规划) [Legislative Plan of the Tenth NPC Standing Committee], <http://www.chinacourt.org/article/detail/2003/12/id/96741.shtml> [<https://perma.cc/EZ4Z-6QAG>] (last visited Mar. 16, 2017).

²⁰ Shi'yijie Quanguo Renda Changweihui Lifa Guihua (十一届全国人大常委会立法规划) [Legislative Plan of the Eleventh NPC Standing Committee], http://www.npc.gov.cn/npc/xinwen/sywx/2008-10/29/content_1455985.htm [<https://perma.cc/J38H-5Y6M>] (last visited Mar. 16, 2017).

²¹ Shi'erjie Quanguo Renda Changweihui Lifa Guihua (十二届全国人大常委会立法规划) [Legislative Plan of the Twelve NPC Standing Committee], http://www.npc.gov.cn/npc/zgrdzz/2013-12/12/content_1816288.htm [<https://perma.cc/3W53-M93E>] (last visited Mar. 16, 2017).

²² Administrative Litigation Law, *supra* note 4, art. 2. According to the newly revised ALL, “administrative action” includes administrative decision or measure without general binding effects, as well as administrative agreements (*xingzheng xieyi*).

further to examine the rationality of administrative actions.²³ Like courts in most other countries, Chinese courts are not inflexible automatons. In some administrative litigation cases, reviewing courts also have played the role of lawmakers, albeit in a somewhat disguised and very careful way.

For example, even though there is no “due process clause” in the PRC Constitution, Chinese courts have, in some cases, required administrative agencies to follow fundamental principles of due process even when they are not clearly provided in relevant laws and regulations. In one case, the appellate court stated:

In the process of house demolition, given the principle of due process, in order to protect the legal interest of the house owner and/or lessee, the assessment report of the house to be demolished shall be served to the house owner and/or lessee, for them to know in time the assessment result, bring out their objections, if any, and apply for reassessment without delay.²⁴

In another case, the reviewing court ruled as follows:

Even though the Law on Administrative Licensing does not specifically stipulate the procedure for annulling an administrative license, under Articles 5 and 7, the establishment and implementation of an administrative license shall abide by the principles of publicity, fairness and impartiality, and citizens, legal persons and other organizations are entitled to make statements and defend themselves while facing an agency

²³ See Administrative Litigation Law, *supra* note 4, art. 70 (providing for the judicial review standards of “abuse of power” and “obvious inappropriateness” which are the basis for rationality review).

²⁴ See Lutingzuo Su Shanghaishi Zhabei Qu Fangwutudi Guanliju Fangwuchaiqian Xingzhengcaijue Jiufenan (陆廷佐诉上海市闸北区房屋土地管理局房屋拆迁行政裁决纠纷案) [Lu Tingzuo v. Housing and Land Administration of Zhabei District of Shanghai], 2007 SUP. PEOPLE’S CT. GAZ. (2nd Shanghai Interm. People’s Ct. Feb. 27, 2006), <http://www.lawinfochina.com/display.aspx?lib=case&id=633> [<https://perma.cc/3LEH-8PSN>].

implementing an administrative license. These provisions are the principles that shall be followed in the process of administrative licensing. The defendant here shall abide by the above mentioned provisions. However, the defendant did neither notify the plaintiff nor give it the chance of statements and defense, as violated the principle of publicity stipulated by the Law on Administrative Licensing and the defendant's right of statements and defense. Besides, the notification of annulment without giving reasons is inconsistent with the basic requirements of administrative procedure.²⁵

Nevertheless, Chinese courts usually tend to rely on positive laws and regulations as the sole measuring stick for determining the legality of administrative action.²⁶ Furthermore, the status of courts in the overall state power structure is relatively weak, mostly due to the lack of full independence. Altogether, it is very difficult for courts to be a major *producer* of administrative law or act as the major external check on public administration.²⁷ This is why

²⁵ See Beijing Lilaodie Yutou Huoguo Youxiangongsi Fangzhuang Fengongsi Bufu Beijingshi Fengtaiqu Huanjingbaohuju Chexiao Huanbao Xingzheng Xukean (北京李老爹鱼头火锅有限公司方庄分公司不服北京市丰台区环境保护局撤销环保行政许可案) [Fangzhuang Branch of Beijing Lilaodie Fish Hot Pot Co. Ltd. v. Bureau of Environment Protection of Fengtai District of Beijing], (Beijing Fengtai Dist. People's Ct. June 16, 2005), http://www.pkulaw.cn/case/pfnl_a25051f3312b07f3f0f364c54a1ada4b6b0c858c262adcff.html?keywords=%E5%8C%97%E4%BA%AC%E6%9D%8E%E8%80%81%E7%88%B9%E9%B1%BC%E5%A4%B4&match=Exact [https://perma.cc/HF3H-9ZW5].

²⁶ See, e.g., Ji Weidong (季卫东), *Zhongguo Sifa de Siwei Fangshi jiqi Wenhua Tezheng* (中国司法的思维方式及其文化特征) [*The Thinking Style of the Chinese Judiciary and its Cultural Features*], 3 FAL Ü FANGFA YU FALÜ SIWEI [LEGAL METHOD AND LEGAL THINKING] 68, 85 (2005) (“Generally, in modern China, the starting points for judicial thinking are the people's sovereignty and the judiciary being subject to the legislature . . . The metaphor of a vending machine could also be applied.”).

²⁷ WANG QINGHUA (汪庆华), *ZHENGZHIZHONG DE SIFA: ZHONGGUO XINGZHENG SUSONG DE FALÜ SHEHUIXUE KAOCHA* (政治中的司法：中国行政诉讼的法律社会学考察) [THE JUDICIARY IN THE POLITICS: ADMINISTRATIVE

academics and the public hope for the improvement of judicial review of agency action rests not on the prospect of courts becoming more active and dynamic, but rather on the greater judicial authority that might derive from the implementation of the new revision of the ALL and from generally progressive judicial reform.

II. Administrative Self-Regulation

Given the abovementioned limitations on the Chinese legislature and judiciary, as potential checks on administrative action, the notion of the administration itself developing Chinese administrative law should not be discounted. Indeed, administrative authorities have taken on this role ever since the policy of reform and opening-up was adopted in the late 1970s. Most recently, the landmark event symbolizing such “administrative self-regulation” was the issuance of the *State Council’s Decision on Promoting Administration According to Law* in 1999 (“1999 Decision”),²⁸ that was rooted in new language added to the Constitution the same year that identified the PRC as “a socialist country ruled by law.”²⁹ Since the 1999 Decision, the State Council has consecutively promulgated four related policy documents: the *Outline on Comprehensively Promoting Administration According to Law* in 2004 (the “2004 Outline”),³⁰ the *State Council’s Decision on*

LITIGATION IN CHINA FROM THE PERSPECTIVE OF LEGAL SOCIOLOGY] (2011).

²⁸ *Guowuyuan Guanyu Quanmian Tuijin Yifa Xingzheng De Jueding* (国务院关于全面推进依法行政的决定) [State Council’s Decision on Promoting Administration According to Law] (promulgated by the St. Council Nov. 8, 1999, effective Nov. 8, 1999) [hereinafter 1999 Decision].

²⁹ XIANFA art. 5 (1999). *Zhonghua Renmin Gongheguo Xianfa* (1999 Xiuzheng) (中华人民共和国宪法(1999修正)) [Constitution of the People’s Republic of China (1999 Amendment)] (promulgated by the Nat’l People’s Cong., effective Mar. 15, 1999, amended Mar. 14, 2004) [hereinafter XIANFA], art. 5, <http://www.lawinfochina.com/display.aspx?id=18536&lib=law&SearchKeyword=&SearchCKeyword=%d6%d0%bb%aa%c8%cb%c3%fl%b9%b2%ba%cd%b9%fa%cf%dc%b7%a8> [https://perma.cc/9Q6V-338R].

³⁰ *Quanmian Tuijin Yifa Xingzheng Shishi Gangyao* (全面推进依法行政

Strengthening Administration According to Law at Municipal and County-Level Governments in 2008 (the “2008 Decision”),³¹ the *State Council’s Opinions on Strengthening the Building of Rule of Law Government* in 2010 (the “2010 Opinions”),³² and the *Implementing Outline for Establishing Rule of Law Government (2015-2020)* in 2015 jointly by CCCPC and the State Council.³³ Under Chinese law, these are not formal administrative regulations (*xingzheng fagui*) with legally binding effects.³⁴ However, they are issued by the highest authority of the administrative system, and hence exercise very significant influence on State Council departments as well as local governments. Following these policy documents, governments at or above the county level have worked to develop a range of internal checks on administrative behavior.

实施纲要) [Outline on Comprehensively Promoting Administration According to Law] (promulgated by the St. Council, Mar. 22, 2004, effective Mar. 22, 2004) [hereinafter 2004 Outline].

³¹ *Guowuyuan Guanyu Jiaqiang Shixian Zhengfu Yifa Xingzheng De Jueding* (国务院关于加强市县依法行政的决定) [State Council’s Decision on Strengthening Administration According to Law at Municipal and County-Level Governments] (promulgated by the St. Council, May 12, 2008, effective May 12, 2008), http://www.gov.cn/zwgk/2008-06/18/content_1020629.htm [<https://perma.cc/P5AX-U8NB>] [hereinafter 2008 Decision].

³² *Guowuyuan Guanyu Jiaqiang Fazhi Zhengfu Jianshe De Yijian* (国务院关于加强法治政府建设的意见) [State Council’s Opinions on Strengthening the Building of Rule of Law Government] (promulgated by the St. Council, Oct. 10, 2010, effective Oct. 10, 2010), http://www.gov.cn/zwgk/2010-11/08/content_1740765.htm [<https://perma.cc/Y5P9-7MQB>] [hereinafter 2010 Opinions]. It was repealed by *Guowuyuan Guanyu Xuanbu Shixiao Yipi Guowuyuan Wenjian de Jueding* (国务院于宣布失效一批国务院文件的决定) [**Decision of the State Council on Repealing a Group of Documents of the St. Council**, June 25, 2016, effective June 25, 2016] http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=288188 [<https://perma.cc/NP7B-6XG3>].

³³ *Fazhi Zhengfu Jianshe Shishi Gangyao (2015-2020)* (法治政府建设实施纲要) [Implementing Outline for Establishing Rule of Law Government (2015-2020)], (promulgated by CCCPC and the St. Council, Dec. 23, 2015, effective Dec. 23, 2015), http://www.gov.cn/xinwen/2015-12/28/content_5028323.htm [<https://perma.cc/L4V5-NGPZ>].

³⁴ “*Xingzheng fagui*” refers to regulations formally enacted by the State Council.

Some key examples, further described below, include *ex ante* rulemaking procedures, *post hoc* review of promulgated rules, and the elaboration of criteria limiting the exercise of administrative discretion.

A. *Rulemaking Procedures and Examination of Legality*

The Law on Legislation incorporates administrative regulations (*xingzheng fagui*) (行政法规) and rules (*guizhang*) (规章)³⁵ into the category of law (*fa*) (法), and provides principles and frameworks concerning procedures for their formulation. Further and more detailed procedural norms are stipulated in the State Council's Ordinance on Procedures for the Formulation of Administrative Regulations³⁶ and its Ordinance on Procedures for the Formulation of Rules.³⁷ In addition to administrative regulations and rules, there are many so called "normative documents" (*guifanxing wenjian*) (规范性文件) produced by governments at various levels, from the central down to the most local. It is crucial to pay more attention to and better regulate these *guifanxing wenjian* (规范性文件) because many of them directly impact individual rights and duties. Absent a uniform administrative procedure law, it appears the administrative regime is

³⁵ "*Guizhang*" (规章) refers to the formal legislative rules made by the departments of the State Council, the provincial governments, the governments of the municipalities directly under the central government, or the governments of some larger cities.

³⁶ *Xingzheng Fagui Zhiding Chengxu Tiaoli* (行政法规制定程序条例) [Ordinance for Procedures for the Formulation of Administrative Rules] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002, amended Dec. 22, 2017, effective May 1, 2018), http://www.gov.cn/zhengce/content/2018-01/16/content_5257039.htm [<https://perma.cc/QL2E-U74L>].

³⁷ *Guizhang Zhiding Chengxu Tiaoli* (规章制定程序条例) [Ordinance on Procedures for the Formulation of Rules] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002, amended Dec. 22, 2017, effective May 1, 2018), http://www.gov.cn/zhengce/content/2018-01/16/content_5257080.htm [<https://perma.cc/BE49-BR3Q>].

attempting to “self-regulate” by delineating the procedures for formulation of such “normative documents.” The 2004 Outline stipulates several requirements, including:

- 1) The formulating agency shall hear wide-ranging public opinions in various ways while drafting *guifanxing wenjian* (规范性文件). The agency shall solicit opinions from society on final drafts of great significance, through multiple and alternative procedures such as formal hearing, discussion meeting, or publication.
- 2) The contents of the *guifanxing wenjian* (规范性文件) shall be concrete, clear, and flexible, as well as capable of resolving problems in practice.
- 3) The *guifanxing wenjian* (规范性文件), after being finalized, is to be published in the relevant government’s gazette, and on its official website, as well as in general circulation newspapers or journals.
- 4) The agency shall attempt to set up and develop a regularized review system, aimed at “cleaning up” (*qingli*) (清理) conflicting or out-of-date *guifanxing wenjian* (规范性文件).
- 5) The formulating agency and the enforcing agency are to regularly evaluate the enforcement of *guifanxing wenjian* (规范性文件), with the enforcing agency reporting its ongoing evaluation to the formulating agency.³⁸

Building on the 2004 Outline, the 2010 Opinions add these further requirements:

- 1) No *guifanxing wenjian* (规范性文件) is permitted to serve as the basis for an administrative license, administrative punishment or administrative compulsory

³⁸ 2004 Outline, *supra* note 30, art. 16, 18.

measure, or to impose new duties on a citizen, legal person or other organization.

2) *Guifanxing wenjian* (规范性文件) which directly influence the rights and duties of a citizen, legal person or other organization must be publicized for public comment, reviewed for lawfulness by the relevant legislative affairs office, and discussed by the executive conference of the local government.

3) Local governments are to work towards unifying the registration, serial numbers, and publication of their (or their departments') *guifanxing wenjian* (规范性文件).³⁹

The prescriptions in the 2004 Outline and the 2010 Opinions do not have legally binding effects under orthodox administrative law doctrines, but they do have significant practical influence on subordinate administrative agencies. There are at least six departments of the State Council,⁴⁰ and thirty-eight provincial and

³⁹ 2010 Opinions, *supra* note 32, art. 9.

⁴⁰ See, e.g., Guojia Zongjiao Shiwuju Guizhang He Guifanxing Wenjian Zhiding Chengxu Guiding (国家宗教事务局规章和规范性文件制定程序规定) [Provisions of the State Administration for Religious Affairs on Procedures for the Formulation of Regulations and Normative Documents] (promulgated by the St. Admin. Religious Affairs, Aug. 11, 2010, effective Aug. 11, 2010), <http://sara.gov.cn/xxgk/zcfg/bmgz/5089.htm>; Zhonghua Renmin Gongheguo Haishiju Guifanxing Wenjian Zhiding Chengxu Guiding (中华人民共和国海事局规范性文件制定程序规定) [Provisions of the Maritime Safety Administration on Procedures for the Formulation of Maritime Normative Documents] (promulgated by the Mar. Safety Admin., May 4, 2010, effective July 1, 2010); Guojia Zhiliang Jiandu Jianyan Jianyi Zongju Guifanxing Wenjian Guanli Banfa (国家质量监督检验检疫总局规范性文件管理办法) [Administrative Measures of the General Administration of Quality Supervision, Inspection, and Quarantine for Normative Documents] (promulgated by the Gen. Admin. Quality Supervision, Inspection, & Quarantine, March 15, 2010, effective May 1, 2010); Shuishou Guifanxing Wenjian Zhiding Guanli Banfa (税收规范性文件制定管理办法) [Administrative Measures for the Formulation of Tax Normative Documents] (promulgated by the St. Admin. Taxation, Feb. 1, 2010, effective Jul. 1, 2010), <http://www.chinatax.gov.cn/n810341/n810765/n812161/n812579/c1086146/content.html> [<https://perma.cc/5RAJ-865G>]; Zhongguo Minyong Hangkong Zongju

municipal governments that have issued follow-up regulations concerning the procedures for formulating guifanxing wenjian (规范性文件).⁴¹ In addition, there have been at least six ministerial or local government rules issued concerning the “lawfulness review” of guifanxing wenjian (规范性文件).⁴² Of course, the actual

Zhineng Bumen Guifanxing Wenjian Zhiding Chengxu Guiding (中国民用航空总局职能部门规范性文件制定程序规定) [Procedural Provisions on the Formulation of Normative Documents by the Functional Departments under the General Administration of Civil Aviation of China] (promulgated by the Gen. Admin. Civ. Aviation, Aug. 31, 2007, effective Oct. 10, 2007), <http://tfs.mofcom.gov.cn/article/zcfb/200212/20021200059849.shtml>; Duiwai Maoyi Jingji Hezuobu Falü, Xingzheng Fagui Qicao Ji Guizhang, Guifanxing Wenjian Zhiding Banfa (对外贸易经济合作部法律, 行政法规起草及规章, 规章规范性文件制定办法) [Measures of the Ministry of Foreign Trade and Economic Cooperation for the Drafting of Laws and Administrative Regulations and the Formulation of Ministerial Rules and Normative Documents] (promulgated by the Ministry Foreign Trade & Econ. Cooperation, Aug. 1, 2002, effective Sept. 1, 2002), <http://www.lawinfochina.com/display.aspx?lib=law&id=5731&CGid=https://perma.cc/RG7J-5FF7> (listing examples of follow-up regulations concerning the procedures for formulating guifanxing wenjian issued by six departments of the State Council).

⁴¹ *Infra* note 41. The referenced provinces and municipalities are Shenzhen, Tianjin, Zhengzhou, Anhui, Shanxi, Guangzhou, Shanghai, Qingdao, Jiangxi, Xinjiang, Yunnan, Sichuan, Hainan, Ningxia, Guangxi, Shantou, Urumqi, Shijiazhuang, Nanchang, Shaanxi, Wuhan, Suzhou, Jinan, Xi'an, Luoyang, Gansu, Heilongjiang, Handan, Jiangsu, Xining, Hunan, Liaoning, Chengdu, Guiyang, Zhuhai, Zhejiang, Hebei, and Xiamen.

⁴² *See, e.g.*, Changshashi Guifanxing Wenjian Hefaxing Shencha Shenqing Banli Gongzuo Guiding (长沙市规范性文件合法性审查申请办理工作) [Measures of Changsha for the Application for and Handling of Lawfulness Review of Normative Documents] (promulgated by the Standing Comm. Changsha Municipality, Dec. 16, 2010, effective Feb. 1, 2011), http://www.changsha.gov.cn/xxgk/gfxwj/wjcl/201601/t20160111_872858.html [<https://perma.cc/FZ2L-ZF79>]; Huizhoushi Zhengfu Bumen Guifanxing Wenjian Hefaxing Shencha Zhidu (惠州市政府部门规范性文件合法性审查制度) [Lawfulness Review System for Normative Documents by the Functional Departments of Huizhou Municipality Government] (promulgated by the Standing Comm. Huizhou Municipality, Feb. 23, 2010, effective Feb. 23, 2010), <http://xxgk.huizhou.gov.cn/0000/0201/201608/ee0975abb57f4b898b42c211e7710127.shtml> [<https://perma.cc/J9QG-B4U4>]; Guotu Ziyuan Guanli Guifanxing Wenjian Hefaxing Shencha Banfa (国土资源管理规范性文件合法性审查办法)

implementation of these rules is still unclear and requires more empirical study. Promulgation itself does not necessarily suggest that there have been great advances in the regulation of *guifanxing wenjian* (规范性文件) in practice. However, since these rules are well-publicized, it is certainly within legitimate public expectation that administrative agencies shall follow these procedural requirements when formulating *guifanxing wenjian* (规范性文件).

B. *Filing and Check*

The processes of NPC review for constitutionality and legality established by the Law on Legislation apply *inter alia* to administrative regulations (*xingzheng fagui*) (行政法规) and local regulations (*difangxing fagui*) (地方性法规).⁴³ Any citizen or

[Measures for Lawfulness Review of Normative Documents on Land and Resources Administration] (promulgated by the Ministry Land & Res., Nov. 27, 2006, effective Jan. 1, 2007), http://www.mlr.gov.cn/zwgk/flfg/gtzybl/200612/t20061227_648779.htm [<https://perma.cc/P8YP-WDM7>];

Shengzhengfu Bumen Guifanxing Wenjian Hefaxing Shencha Zaxing Guiding (省政府部门规范性文件合法性审查暂行规定) [Interim Provisions on Lawfulness Review of Normative Documents by the Functional Departments of Hebei Provincial Government] (promulgated by the Standing Comm. Hebei Provincial Gov't, Nov. 4, 2006, effective Dec. 1, 2006); Zhejiangsheng Guotu Ziyuan Guanli Guifanxing Wenjian Hefaxing Shencha Banfa (浙江省国土资源管理规范性文件合法性审查办法) [Measures for Lawfulness Review of the Normative Documents on Land and Resources Administration of Zhejiang Province] (promulgated by Zhejiang Admin. Land & Res., Sep. 27, 2006, effective Sep. 27, 2006), www.zjlic.com/admin/eWeb/uploadfile/20090730084200409.doc; Hebeisheng Laodong He Shehui Baozhangting Guifanxing Wenjian Hefaxing Shencha He Bei'an Banfa (Zaxing) (河北省劳动和社会保障厅规范性文件合法性审查和备案办法) (暂行) [Interim Measures for Lawfulness Review and Filing of Normative Documents by the Labor and Social Security Department of Hebei Province] (promulgated by Hebei Dep't Lob. & Soc. Sec., Aug. 3, 2005, effective Aug. 3, 2005) (listing six examples of ministerial or local government rules issued concerning the "lawfulness review" of *guifanxing wenjian*).

⁴³ "*Difangxing fagui*" (地方性法规) refers to the local statutes made by provincial and municipal people's congresses and their standing committees.

organization has the right to submit a proposal or request for such review to the NPC Standing Committee.⁴⁴ In the absence of Western-style separation of powers, in practice, this review mechanism has developed into, this paper would call, a model of “proposal + self-correction.”

The Sun Zhigang (孙志刚) case in 2003⁴⁵ and the Tang Fuzhen (唐福珍) case in 2009⁴⁶ are the best illustrations of this

⁴⁴ See Articles 99 and 100 of the Law on Legislation (stipulating individual and other organizations have rights to submit written legal review suggestions).

⁴⁵ On March 17, 2003, a 27 year old migrant worker named Sun Zhigang (孙志刚) was sent to and detained in the housing & repatriation center in Guangzhou only because he was found without an ID card by the local police. At the station, he was beaten to death by other detainees. Media reports on this case aroused widespread concern, as well as brought attention to the legality of the State Council's *Measures for Housing and Repatriating City Vagrants and Beggars* (*Chengshi Liulang Qitao Renyuan Shourong Qiansong Banfa*) (城市流浪乞讨人员收容遣送办法). See Sun Zhigang An Zhongjie Shourong Qiansong Qiansong Banfa? (孙志刚案终结收容遣送办法?) [The case of Sun Zhigang terminated the Measures for Housing and Repatriating City Vagrants and Beggars?], SOHU WANG [SOHU.COM] (last visited Nov. 4, 2017), <http://news.sohu.com/04/92/subject209299204.shtml> [<https://perma.cc/MAP5-B4M5>] (discussing the Sun Zhigang case and relevant impact it brings). In large part due to the petitions for review of this regulation that were successively made by three law Ph.D. students, followed by five more senior legal scholars (of which the author was one), the State Council eventually annulled the aforementioned regulation, and replaced the outdated housing & repatriation system with the social relief system.

⁴⁶ On November 13, 2009, a female entrepreneur named Tang Fuzhen set herself on fire to protest the forced demolition of her factory buildings, which were controversially determined to be illegal by the local government in Sichuan province. Her death, after sixteen days of hospital treatment, provoked extensive discussion in the media. See Chengdu Chaiqian Zifen Shijian Diaocha Tongbao (成都“拆迁自焚”事件调查通报) [The Investigation report on Chengdu “Self-burning during House Demolition” case], SICHUAN XINWENWANG (Dec. 3, 2009), <http://society.people.com.cn/GB/41158/10506824.html> [<https://perma.cc/HEZ2-EXPE>] (introducing the case background and government disposal of the case). On this basis, five law professors from Peking University Law School (including the author) submitted to the NPC Standing Committee a proposal for review of the constitutionality and legality of the State Council's *Regulation on Urban Housing Demolition* (*Chengshi Fangwu Chaiqian Guanli Tiaoli*) (城市房屋拆迁管理条例). After more than a year, the State Council

model. In both cases, legal academics (including this author) filed a request to the Legislative Affairs Committee of the NPC Standing Committee, hoping to activate the review procedure with respect to two problematic regulations. However, the review procedure was not formally initiated in either case by the NPC Standing Committee. Instead, largely opaque communications between the NPC and the State Council substituted for formal NPC review.⁴⁷ Ultimately, it was the State Council itself, rather than the NPC, that abolished the challenged measures: in the Sun Zhigang (孙志刚) case, through its Measures on Custody and Repatriation of Vagrants and Urban Beggars,⁴⁸ and in the Tang Fuzhen (唐福珍) case, through its Regulation on Urban Housing Demolition.⁴⁹

This model of administrative self-correction extends broadly. In 1987, the General Office of the State Council issued its Notice of Archival Filing of Rules by Local Governments and Departments of the State Council,⁵⁰ which expressly required that ministerial rules (bumen guizhang) (部门规章) and local government rules (difang guizhang) (地方规章) be submitted to the State Council for archival

annulled this regulation and replaced it with a new, improved regulation on urban takings and compensation thereafter.

⁴⁷ Based on this author's personal experience, these communications between the two governmental organs were supplemented by several semi-formal hearings in which the NPC and the State Council solicited public and expert opinions.

⁴⁸ Chengshi Liulang Qitao Renyuan Shourong Qiansong Banfa (城市流浪乞讨人员收容遣送办法) [Measures on Custody and Repatriation of Vagrants and Urban Beggars] (promulgated by the St. Council, May 12, 1982, effective May 12, 1982, abolished Aug. 1, 2003).

⁴⁹ Chengshi Fangwu Chaiqian Guanli Tiaoli (城市房屋拆迁管理条例) [Regulation on Urban Housing Demolition] (promulgated by the St. Council, Jun. 13, 2001, effective Nov. 1, 2001, abolished Jan. 21, 2011).

⁵⁰ Guowuyuan Bangongting Guanyu Difang Zhengfu He Guowuyuan Gebumen Guizhang Bei'an Gongzuo de Tongzhi (国务院办公厅关于地方政府和国务院各部门规章备案工作的通知) [Notice of Archival Filing of Rules by Local Governments and Departments of the State Council] (promulgated and effective Mar. 7, 1987).

filing. In 1990, the State Council promulgated an administrative regulation for this system of “filing and check” (bei’an) (备案), the Provisions on the Filing of Regulations and Government Rules.⁵¹ Under this regulation, the Legislative Bureau of the State Council⁵² undertook the task of “filing and checking” regulations (fagui) (法规) and government rules (guizhang) (规章), examining the legality and consistency of this administrative work-product. Some ten years later, the passage of the Law on Legislation in 2001 also propelled the State Council to issue a new Ordinance on the Filing of Regulations and Government Rules,⁵³ which abolished the earlier regulation but retained the system of “filing and check.” The new ordinance follows the Law on Legislation by also permitting individuals to request such agency review.⁵⁴

The 2004 Outline expands the “filing and check” mechanism to all guifanxing wenjian (规范性文件) issued by administrative agencies.⁵⁵ The 2010 Opinions further stipulates in detail:

A request for examination by a citizen, legal person or other organization shall be handled strictly according to relevant provisions. Illegal government rules and normative documents shall be reported without delay to the authoritative organ for revocation, and the results of the examination shall be publicized. Also, the filing

⁵¹ Fagui Guizhang Bei’an Guiding (法规规章备案规定) [Provisions on the Filing of Regulations and Government Rules] (promulgated by the St. Council, Feb. 18, 1990, effective Feb. 18, 1990, abolished Jan. 1, 2002).

⁵² The Legislative Bureau of the State Council was the predecessor of the Legislative Affairs Office of the State Council.

⁵³ Fagui Guizhang Bei’an Tiaoli (法规规章备案条例) [Ordinance on the Filing of Regulations and Government Rules] (promulgated by the St. Council, Dec. 14, 2001, effective Jan. 1, 2002).

⁵⁴ Article 9 of the *Ordinance on the Filing of Regulations and Government Rules*.

⁵⁵ See Article 29 of the 2004 Outline cited *supra* note 30 (stipulating that should any individual or organization dispute the regulation or government rules, the promulgating agency or executing agency should study and deal with it).

oversight body shall publish a catalog of government rules and normative documents that have been filed and examined.⁵⁶

On the impetus of the State Council, many of its departments⁵⁷ and at least thirty provincial and municipal governments⁵⁸ have since promulgated rules in regards to the “filing and check” of *guifanxing wenjian* (规范性文件).

C. Criteria for Exercise of Administrative Discretion

In any modern administrative state, it is unavoidable that legislators will delegate broad discretion to administrative agencies. However, the exercise of such discretion by administrators can result in substantial unfairness. In order to try to regularize the exercise of administrative discretion, the 2008 Decision provides:

It is necessary to earnestly induce administrative agencies to comb through provisions that stipulate discretion concerning administrative punishments and administrative licensing, and to detail their administrative discretion in terms of the practical development of the local economy and society, to

⁵⁶ Article 10 of the 2010 Opinions cited *supra* note 32 (detailing the requirements on government to deal with citizen or organizational request).

⁵⁷ See, e.g., Shuilibu Guifanxing Wenjian Shencha Yu Bei'an Guanli Banfa (水利部规范性文件审查与备案管理办法) [Administrative Measures of the Ministry of Water Resources on the Examination and Filing of Normative Documents] (promulgated and effective Aug. 3, 2005); Jiaotong Guifanxing Wenjian Bei'an Shencha Zhidu (交通规范性文件备案审查制度) [System of the Filing and Examination of Normative Documents of Communication Administration] (promulgated Sep. 25, 1996, effective Oct. 1, 1996); Nengyuanbu Guizhang, Guifanxing Wenjian Bei'an Banfa (能源部规章规范性文件备案办法) [Measures of the Ministry of Energy on the Filing of Regulations and Normative Documents] (promulgated and effective Oct. 5, 1990) (all listing the “filing and check” rules on normative documents).

⁵⁸ These are Zhengzhou, Liaoning, Jiangxi, Handan, Fushun, Guizhou, Shanxi, Gansu, Qinghai, Xinjiang, Hubei, Inner Mongolia, Yunnan, Sichuan, Shandong, Yinchuan, Hainan, Ningxia, Beijing, Nanchang, Anhui, Suzhou, Henan, Luoyang, Lanzhou, Heilongjiang, Jiangsu, Guiyang, Shanghai, and Fujian.

quantify discretion that is capable of quantification, and to publicize and implement such detailed and quantified standards for the exercise of administrative discretion.⁵⁹

This provision does not expressly reference the concept of “criteria for administrative discretion” (xingzheng cailiang jizhun) (行政裁量基准), but instead uses the concept of “standard for administrative discretion” (xingzheng cailiang biao zhun) (行政裁量标准). Yet, both academics and practitioners soon began to use the terminology of “criteria,”⁶⁰ and the 2010 Opinions hence adopted that common usage:

They shall establish basic criteria for administrative discretion, scientifically and reasonably detail and quantify administrative discretion, improve the rules for application, strictly standardize the exercise of administrative discretion, and avoid arbitrary law enforcement.⁶¹

Local governments have initially focused on discretionary criteria for the exercise of administrative punishment, and these form the main bulk of existing “criteria for administrative

⁵⁹ 2008 Decision, *supra* note 31, art. 18.

⁶⁰ See, e.g., Yu Lingyun, *Youzou Zai Guifan Yu Jianghua Zhijian: Dui Jinhua Xingzheng Cailiang Jizhun Shijian de Sikao* (游走在规范与僵化之间：对金华行政裁量基准实践的思考), *Wandering Between the Regulation and the Ossification: Reflection on the Practice of Criteria for Administrative Discretion in Jinhua*, 3 QINGHUA FAXUE [TSINGHUA L. REV.] 54, 54-80 (2008); Zhang Yan, et al., *Shenzhen Shixing Zhi'an An Ziyou Cailiang* (深圳试行治安案自由裁量) [*Shenzhen Tries the Discretionary Criteria in Public Security Cases*] SHENZHEN SHANGBAO [Shenzhen Economic Daily], July 16, 2004. Zhu Mang, *Riben Xingzheng Chengxu Fa Zhong de Cailiang Jizhun Zhidu* (日本行政程序法中的裁量基准制度) [*Discretionary Criteria System in the Japanese Administrative Procedure Law*], 1 HUADONG ZHENGFA XUEYUAN XUEBAO [J. E. CHINA U. POL. SCI. AND L.] 73, 73-79 (2006); Zhou Youyong, *Cailiang Jizhun de Zhengdangxing Wenti* (裁量基准的正当性问题) [*On the Legitimacy of the Discretionary Criteria*], 6 ZHONGGUO FAXUE [China Legal Sci.] 22, 22-32 (2007).

⁶¹ 2010 Opinions, *supra* note 32, art. 16.

discretion” thus far. Examples include rules promulgated by the Construction Commission of Hangzhou City in 2010, by the Housing and Urban-Rural Development Department of Zhejiang Province in 2010, by the Education Bureau of Changsha City in 2010, and by the Bureau of Supervision and Administration of Work Safety of Jiangsu Province in 2009.⁶²

Discretionary criteria are, on one hand, useful for controlling the exercise of broad administrative discretion within the scope of rationality. On the other hand, they may be so detailed and concrete that they “ossify” the exercise of discretion.⁶³ However, given the breadth of discretion that is granted to administrative agencies in China, and the serious abuses that have resulted, the advantages of administratively developed “criteria for discretion”—binding not through legal obligation but on the basis of bureaucratic hierarchy—outweigh the disadvantages.

D. *Additional Examples*

⁶² Zhejiangsheng Zhufang He Chengxiang Jiansheting Gongcheng Jianshe Lingyu Xingzheng Chufa Cailiang Jizhun (Shixing) (浙江省住房和城乡建设厅工程建设领域行政处罚裁量基准(试行)) [*Zhejiang Housing and Urban-Rural Development Department (Trial) Discretionary Criteria for Administrative Punishment in the Area of Engineering Construction*] (promulgated by Zhejiang Housing and Urban-Rural Development Department, Dec. 22, 2010, effective Jan. 1, 2011); Changshashi Jiaoyuju Xingzheng Chufa Cailiangquan Jizhun (长沙市教育局行政处罚裁量权基准) [*Changsha Education Bureau Discretionary Criteria for Administrative Punishment*] (promulgated by Changsha Education Bureau, effective Nov. 1, 2010); Hangzhoushi Gongcheng Jianshe Guanli Xingzheng Chufa Cailiang Guize (杭州市工程建设管理行政处罚裁量规则) [*Hangzhou Construction Commission Rules on Discretion in Administrative Punishment for Engineering Construction*] (promulgated by Hangzhou Construction Commission, Oct. 15, 2010, revised June 16, 2011); Jiangsusheng Anquan Shengchan Xingzheng Chufa Ziyou Cailiangquan Shiyong Guize (江苏省安全生产行政处罚自由裁量权使用规则) [*Jiangsu Bureau of Supervision and Administration of Work Safety Rules for Discretion in Administrative Punishment in the Area of Work Safety*] (promulgated by Jiangsu Bureau of Supervision and Administration of Work Safety, Aug. 31, 2009).

⁶³ See Yu Lingyun, *supra* note 60 (discussing the discretionary criteria for administrative discretion in Jinhua).

The areas or issues covered by “administrative self-regulation” are certainly not limited just to the above-mentioned examples of ex ante rule-making procedures, post hoc review of promulgated rules, and criteria for the exercise of administrative discretion. Chinese administration is also working to realize “the rule of rules” by creating a large body of rules on aspects of major decision-making procedures, disclosure of government information, and administrative accountability, among other topics.⁶⁴

The term “major decision-making” (*zhongda juece*) first appeared in the State Council’s 2004 Outline, and subsequently was included in the 2008 Decision and the 2010 Opinions. Pursuant to these documents, by July 2014, the departments of the State Council and governments at or above the county level issued at least 2,226 rules or documents stipulating major decision-making procedures, at different levels of detail.⁶⁵ Although the precise definition of “major decision-making” is still not sufficiently clear and unified, this national and local normative elaboration has actually, to some extent, regularized the procedures for administrative decisions which may have significant, large-scale impact. However, this term has not yet appeared in any statute promulgated by the NPC and its Standing Committee.

Neither has the disclosure of government information ever been made a legal requirement by the NPC and its Standing Committee. Since the enactment of the State Council’s Regulation on Open Government Information (“OGI Regulation”) in 2007, the General Office of the State Council has issued nine documents,

⁶⁴ “The rule of rules” is actually an extension of “the rule of law,” premised on the fact that public matters are mostly regulated under agency rules rather than law enacted by the NPC. See Xixin Wang, *Rule of Rules: An Inquiry into Administrative Rules in China’s Rule of Law Context*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM*, 71-89 (The Mansfield Center for Pacific Affairs, 2000) (explaining “the rule of rules”).

⁶⁵Laws & Regulations Database of China Law Info, <http://chinalawinfo.com> (accessed by searching the keyword *zhongda xingzheng juece* [major decision-making]).

departments of the State Council have issued 293 documents, and governments at or above the county level have issued 2,205 documents, altogether meant to promote government openness by providing more detailed interpretations, guidance, and procedural requirements, as well as by publicizing relevant work reports.⁶⁶ Although many of these additional rules elaborating the disclosure of government information are essentially very similar to the OGI Regulation, the sum total really does help to push forward gradual and incremental changes.

Lastly, a new approach to top-down accountability was set in motion by the eruption of SARS in 2003, which caused 349 death all over the country, and eventually led to the dismissals of many government officials, the highest being the Minister of Health, Zhang Wenkang, and the mayor of Beijing, Meng Xuenong.⁶⁷ Many provincial governors were shocked by these dismissals, and for a time adjusted their focus from enhancing GDP to handling SARS.⁶⁸ The so-called “accountability storm” from this period is widely accepted as the basis for strengthening top-down accountability more systematically. Since that time, the CCP Central Committee and the State Council have separately or jointly issued a series of rules designed to heighten accountability for Party and government leaders at different levels. The most significant and regularized mechanisms are provided in the Interim Provisions on Accountability for Party and Government Leaders (Guanyu Shixing Dangzheng Lingdao Ganbu Wenzhe de Zanxing Guiding) that was

⁶⁶ This data is obtained from the Laws & Regulations Database of China Law Info, <http://www.chinalawinfo.com> (accessed by searching the keyword *zhengfu xinxi gongkai* [open government information]).

⁶⁷ See Zhang Hui, “Feidian” *Shinian: Shenghuo Jiu Zheyang Gaibian* (“非典”十年：生活就这样改变) [*The Decade of SARS: Life Has Changed*], MINZHU YU FAZHI SHIBAO [THE DEMOCRACY AND LAW TIMES], Apr. 8, 2013.

⁶⁸ See Shou Beibei, *Wenze Yinian: “Xiake” Guanyuan Jin Anzai?* (问责一年：“下课”官员今安在?) [*After One Year: Where Are the Dismissed Officials?*], NANFANG ZHOUMO [S. WEEKEND], July 8, 2004 (discussing what happened after the dismissals).

issued by the General Offices of the CCP Central Committee and the State Council in 2009. Subsequently, there have been at least twenty-two implementing rules issued by local party offices and governments.⁶⁹ This top-down internal instrument is to make the administrative leaders at different levels accountable for important decisions and serious incidents or accidents which arouse wide concern. The fact that it is mostly not based on democracy but rather on bureaucracy may discount the expected effect of this kind of accountability to improve the competence as well as the reliance of public administration. However, it really places more burden than before on the shoulders of the administrative leaders to be responsive to the public needs or concerns.

III. Dynamics

The insufficiency of external regulation is, of course, one of the reasons for the rise of “administrative self-regulation.” The key question is why the administrative regime has the motivation to consider self-constraint notwithstanding the loopholes of external regulation, rather than “gallop in the broad land” granted by the legislators? Also, to what extent is administrative self-regulation, as a driver for the advancement of the rule of administrative law, worthy of belief and reliance? Arguably, it is the following dynamics that are in favor of such administrative self-regulation.

A. Demand for Rational-Legal Authority

It appears that the “New China”—from the leadership of Mao Zedong, to Deng Xiaoping, Jiang Zemin, Hu Jintao and now Xi Jinping—has experienced the progressive decline of Weberian

⁶⁹“Laws & Regulations Database” of China Law Info, <http://www.chinalawinfo.com> (accessed by searching the keyword *dangzheng lingdao ganbu wenze* [accountability for the leaders of the Party and Government]).

charismatic authority.⁷⁰ In the process of leading China to transform from an agricultural society to an industrial society, and overseeing migration from rural areas to cities, it has proven impossible for Chinese rulers, facing the continuing task of modernization, to withdraw to traditional forms of authority.⁷¹ Rational-legal authority seems to be the sole option for China's rulers, provided the aims remain fixed to economic growth, political stability, social justice, and long-term acceptance by the Chinese people. Basically, this has become the consensus of China's leadership since Deng Xiaoping's tenure. In December of 1978, Deng Xiaoping said:

It is necessary to strengthen the legal system in order to guarantee the people's democracy. It is necessary to institutionalize democracy and concretize it into laws. The institutions and laws thus created are not to be changed just due to the change of leaders, are not to be changed just due to the change of viewpoints and attention of leaders.⁷²

Ye Jianying, another very important and influential leader during the time of Deng Xiaoping, also declared that a country must

⁷⁰ See JOANNA WALEY-COHEN, *THE SEXTANTS OF BEIJING: GLOBAL CURRENTS IN CHINESE HISTORY* 279 (1999) (noting that many government leaders of the 1990s lacked the prestige of Mao Zedong or Deng Xiaoping). See also Li Lin, *Deng Xiaoping Yu Dangdai Zhongguo Zhengzhi Quanwei de Lixinghua* (邓小平与当代中国政治权威的理性化) [*Deng Xiaoping and the Rationalization of Current Political Authority in China*], 2 *ZHONGGONG QINGDAO SHIWEI DANGXIAO, QINGDAO XINGZHENG XUEYUAN XUEBAO* [J. OF THE PARTY SCH. OF CPC QINGDAO MUN. COMMITTEE (QINGDAO ADMIN. C.)] 15, 15–18 (2006) (describing the type of leadership of Deng Xiaoping).

⁷¹ Weberian traditional forms of authority are arguably more easily rooted in societies consisting of a small-peasant economy, totalitarian politics, and closed culture. Ren Jiantao, *Daode Yu Zhongguo Chuantong Zhengzhi de Hefaxing* (道德与中国传统政治的合法性) [*Morality and the Legitimacy of Traditional Politics of China*], 1 *HUAZHONG SHIFAN DAXUE XUEBAO* (RENWEN SHEHUI KEXUE BAN) [J. OF HUAZHONG NORMAL U. (HUMANITIES AND SOC. SCI.)] 27, 27–34 (2005).

⁷² DENG XIAOPING (邓小平), *DENG XIAOPING WENXUAN* (邓小平文选) [SELECTED WORKS OF DENG XIAOPING] 146 (1994).

be ruled by laws and institutions that have stability, continuity, and foremost authority; he said it is only through legal procedures that laws and institutions are to be revised—they should not be changed due to the change in will of any particular leader.⁷³ Since the end of the Cultural Revolution, the demand for rational-legal authority has been continuing and even increasing.⁷⁴ Given that background, and where the legislature or judiciary lacks capacity to control the administration, there is reason for the administrative regime itself to pursue a type of “self-regulation,” aiming thereby to realize an “administration by rules.” The mostly hierarchical administration would operate more on the rules rather than on the arbitrary and unaccountable wills of the leaders, which are deemed as one of the evil sources of huge disorders such as the Cultural Revolution.

B. *Soil for Ideologies of Democracy and the Rule of Law*

China currently remains in transition from an agricultural society to a more urban one. In 2010, the population of rural areas remains 720 million. (This number does not include the approximately 170–180 million people who are still classified as farmers in terms of the residence registration (hukou) system, but who have left the countryside and lived for more than six months in

⁷³ Liu Zheng, *Xinshiqi de Renda Gongzuo Cong Zheli Qibu: Wujie Quanguo Renda Erci Huiyi de Gongji* (新时期的人大工作从这里起步——五届全国人大二次会议的功绩) [*The Work of the People's Congress In the New Era Starts From Here: Achievements of the Second Session of the Fifth National People's Congress*], 12 ZHONGGUO RENDA [CHINESE PEOPLE'S CONGRESS] 40, 40–41 (2002).

⁷⁴ When emphasizing the importance of stability and continuity of laws and systems, Ye Jianying observed that the cost of this lesson was paid with the blood drawn by Lin Biao and the “Gang of Four.” *Id.* at 40. It reflects a starting point for the Chinese demand for rational-legal authority in the aftermath of the Cultural Revolution. Wang Xiaoming & Huang Weiping, *Lun Xinshiji Zhongguo Gongchandang de Zhizheng Jichu* (论新世纪中国共产党的执政基础) [*On the Legitimate Basis of the Chinese Communist Party's Ruling Position in the New Century*] 5 SHENZHEN DAXUE XUEBAO [J. OF SHENZHEN U.] 13, 21–22 (2001).

cities or towns).⁷⁵ The transition in question is and will be from a situation of rural areas suffering negative effects from cities to the unified development of urban-rural areas; from a society based on acquaintances (*shuren shehui*)⁷⁶ to a society of strangers; and from fragmented and diverse rural lifestyles to a relatively uniform urban lifestyle. Amidst this transition, there is ever greater economic and social “soil” for the ideologies of democracy and the rule of law to take root.

Indeed, democracy and the rule of law have been recognized by the Chinese leadership as among the ruling ideologies. This is illustrated by the addition of this sentence: “[t]he People's Republic of China governs the country according to law and makes it a socialist country under rule of law” into the PRC Constitution in 1999,⁷⁷ and also by the State Council’s subsequent issuance of the 1999 *Decision*, the 2004 *Outline* and the 2010 *Opinions*. With further change in economic and social conditions, there certainly will be a greater number of people supportive of these ideologies and aware of the significance of democracy and the rule of law for

⁷⁵ Xing Shiwei, *Zhongguo Nongcun Renkou 30 Nianhou Jiang Jianzhi 4 Yi* (中国农村人口30年后将减至4亿) [*The Population of Rural Areas Will Be Decreased to 400 Million 30 Years After*], XINGJING BAO [BEIJING NEWS], (Feb. 24, 2010).

⁷⁶ The concept of “*shuren shehui*” was proposed by a well-known sociologist Fei Xiaotong, which is regarded as a classical description of the characteristics of Chinese traditional rural society. People in *shuren shehui* not only know each other but also have mutual trust and subconscious compliance with behavioral customs due to their long life together and intimate relationships. FEI XIONGTONG (费孝通), *EARTH-BOUND CHINA REPRODUCTIVE SYSTEM*, 9–10, 44, (Beijing: Peking University Press, 1998); Chen Baifeng, *Shuren Shehui: Cunzhuang Zhixu Jizhi de Lixiangxing Tanjiu* (熟人社会: 村庄秩序机制的理想型探究) [*On the Acquaintance Community: An Ideal-Type Exploration of the Mechanism in the Village Order*], 1 SHEHUI [CHINESE J. OF SOC.] 223, 224–26 (2011).

⁷⁷ *Zhonghua Renmin Gongheguo Xianfa* (1999 Xiuzheng) (中华人民共和国宪法(1999修正)) [Constitution of the People's Republic of China (1999 Amendment)] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Mar. 15, 1999), art. 5, § 1 (1999); *see also* art. 13 (amending Article 5 to include “The People's Republic of China governs the country according to law and makes it a socialist country under rule of law”).

the protection of their rights and interests.⁷⁸ Facing such growing demands from the public, the administrative regime may be compelled to adopt more self-regulation in response.

C. *Pressure of Democratic Legitimacy*

Like many other countries, the legitimacy of public administration in China is also proclaimed to be founded on the basis of democracy. In principle, the State Council is the executive arm of the NPC and its Standing Committee, while the local governments at various levels are the executive arms of the local congresses and their standing committees.⁷⁹ However, the problem of a “loose transmission-belt”⁸⁰ typical in Western countries is even more serious in China, because of which the public administration

⁷⁸ For example, a questionnaire survey demonstrates that, compared with the low-income people, the higher-income people are more concerned with the constitutional protection of private property. Almost 99% of the surveyed private sector owners hold with the opinion that the legitimate private property should get equal protection with the public property, and 81.3% of the people who show indifference to the constitutional article on the private property protection are at the low-income level. Sun Changjun & Zhang Huihua, *Siyou Caichan Baohu de Shehui Xinli Diaocha ji Xiangguan Yanjiu* (私有财产保护的社会心理调查及相关研究) [*The Research and the Countermeasure about the Public Psychology in Protecting Private Property*], 2 HENAN SIFA JINGGUAN ZHIYE XUEYUAN XUEBAO [J. HENAN JUD. POLICE VOCATIONAL C.] 99, 101 (2005).

⁷⁹ *Zhonghua Renmin Gongheguo Xianfa* (1982 Xiuzheng) (中华人民共和国宪法(1982修正)) [Constitution of the People's Republic of China (1982 Amendment)] (promulgated by the Nat'l People's Cong., Dec. 4, 1999), art. 85, 105 (Article 85: “The State Council, that is, the Central People's Government, of the People's Republic of China is the executive body of the highest organ of state power; it is the highest organ of state administration;” Article 105: “Local people's governments at various levels are the executive bodies of local organs of state power as well as the local organs of state administration at the corresponding levels. Governors, mayors and heads of counties, districts, townships and towns assume overall responsibility for local people's governments at various different levels”).

⁸⁰ See Stewart, *supra* note 13 (discussing the loose legislative control of administrative discretion).

seems to lack a solid foundation of its legitimacy.⁸¹ Furthermore, representative democracy, although having undergone large changes in the past thirty years, still remains weak and subordinate to the dominance of the administration. The administrative regime has a very powerful and influential position in the structure of government.

However, at the same time, the administrative regime is also increasingly propelled by public opinion and forced to be more directly accountable to the people, while ideologies of democracy and the rule of law are slowly but irreversibly expanding.⁸² The growth of internet technology can help to shape public opinion

⁸¹ For example, most of the tax legislation in the past was not enacted by the National People's Congress, but by the State Council. Recently it has incurred more and more criticism from some deputies of the NPC as well as many scholars. Hence the Law on Legislation was amended in 2015 by stating that "the establishment of any category of tax, determination of tax rates, tax collection administration, and other basic taxation rules" are the matters that shall only be governed by law except for the cases where laws have not yet been developed on the matters and the NPC or its Standing Committee delegate the legislating power to the State Council. *Zhonghua Renmin Gongheguo Lifa Fa (2015 Xiuzheng)* (中华人民共和国立法法(2015修正)) [The Law on Legislation of the People's Republic of China (2015 Amendment)] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective Jul. 1, 2000, amended Mar. 15, 2015), art. 8(6). Furthermore, Ms. Fu Ying, the spokeswoman of the third plenary of the 12 NPC in 2015, released that it will be no later than the year of 2020 that the establishment of any new tax shall only be vested in the NPC or its Standing Committee. Yin Hong & Wang Haokui, *2020 Nianqian Quanmian Luoshi Shuishou Fading Yuanze* (2020年前全面落实税收法定原则) [The Principle of Statutory Taxation Will Be Fully Implemented Before the Year of 2020], GUANGMING RIBAO [GUANGMING DAILY], Mar. 5, 2015.

⁸² The development of an administrative accountability system since 2003, notwithstanding its limitations, is generally regarded as an attempt to realize some form of democracy in the current political context of China. See, e.g., Lin Congjian & Zhou Yayue, *Woguo Wanshan Xingzheng Wenze Zhizhi Lujing Fenxi* (我国完善行政问责制止路径分析) [Analysis of the Path to Improve the Administrative Accountability in China], 3 NINGBO DAXUE XUEBAO (RENWEN KEXUE BAN) [J. NINGBO U. (LIBERAL ARTS)] 105, 105–11 (2006); Cao Liu, *Cong Wenzhou Dongche Shigu Chuli Kan Woguo Xingzheng Wenzhezhi de Fazhan* (从温州动车事故处理看我国行政问责制的发展) [On the Development of China's Administrative Accountability System By Observing the Treatment of Wenzhou Bullet Train Accident], 1 XINGZHENG FAXUE YANJIU [ADMIN. L. REV.] 112, 112–17 (2012).

extremely rapidly, and voices criticizing the administration for breach of democracy or the rule of law can immediately pose huge pressures on both lower-level and superior officials.⁸³ Both potential and actual pressure from the public has been forcing the administrative regime, particularly the State Council at the very top, to seek to bind administrators (both leaders and lower-level personnel) by self-regulation in order to decrease or eliminate their misconduct, corruption or other abuses of power, and further to strengthen the democratic legitimacy of the administrative regime.

D. *Structure of Bureaucracy*

Another important factor driving administrative self-regulation is the bureaucratic structure of the administrative regime. One of the defining characteristics of such a hierarchical structure is that the superior commands the subordinate.⁸⁴ And yet, in practice,

⁸³ Hu Xue, *Cong Wangluo Kongjuzheng Kan Wangluo Wenze dui Guanyuan de Yinxing Yingxiang* (从网络恐惧症看网络问责对官员的隐性影响) [*On the Invisible Influence of Administrative Accountability through Internet on the Officials by Observing the Cyberphobia*], 5 LILUN GUANCHA [THEORETICAL OBSERVATION] 61, 61–62 (2009); Zhou Yayue & Han Zhiming, *Gongmin Wangluo Wenze: Xingdong Luoji Yu Yaosu Fenxi* (公民网络问责：行动逻辑与要素分析) [*Administrative Accountability through the Internet: An Analysis of the Logics of the Public Action and the Elements*], 5 BEIJING HANGKONG HANGTIAN DAXUE XUEBAO (SHEHUI KEXUE BAN) [J. OF BEIJING U. OF AERONAUTICS AND ASTRONAUTICS (SOC. SCI.)] 1, 1–5 (2011); Luo Yong, *Wangluo Shidai Xia de Wangluo Wenze: Yizhong Xinxing Minzhu Xingtai de Kaoliang* (网络时代下的网络问责：一种新兴民主形态的考量) [*Administrative Accountability through the Internet in the Internet Era: Examining a New Form of Democracy*], 4 YUNNAN XINGZHENG XUEYUAN XUEBAO [J. YUNNAN ADMIN. C.] 64, 64–66 (2009).

⁸⁴ MAX WEBER, *JINGJI YU SHEHUI* (经济与社会) [ECON. & SOC'Y] 246 (Lin Rongyuan trans., Shangwu Yinshuguan (商务印书馆) [Commercial Press] 1997) (1922); Ma Jianyin, *Xiandai Fazhi Guanliao Zhiyu "Lixing Tielong": Cong Weibo de Shehui Lilun Zhifa Chufa* (现代法治官僚之余“理性铁笼”：从微博的社会理论执法处罚) [*Modern Rule of Law, Bureaucracy and "Iron Cage of Rationality": Starting from the Law Enforcement and Punishment under the Social Theory of Weber*], 2 QINGHUA FAXUE [TSINGHUA L. REV.] 33, 41–42 (2008); Huang Xiaoyong, *Weibo Lixing Guanliao zhi Fanchou de Zairenshi* (微博理性官僚之范畴的再认识) [*Rethinking of Weber's Theory of Rational*

the leadership at various levels of the government in China fear the severe public criticism that might arise from serious problems or scandals.⁸⁵ Given this concern, administrative self-regulation has a two-fold function: (i) to restrict arbitrariness by administrative subordinates, and (ii) to share with or transfer accountability to these subordinates. Besides, the engineering of advancing the administration by law, which is mostly initiated by the State

Bureaucracy], 2 QINGHUA DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) [J. TSINGHUA U. (PHIL. & SOC. SCI.)] 50, 51–52 (2002).

⁸⁵ Such fear is reflected by the development of administrative accountability at the urging of the central government. See Guanyu Shixing Dangzheng Lingdao Ganbu Wenzhe de Zanxing Guiding (关于实行党政领导干部问责的暂行规定) [*Interim Provisions on the Implementation of the Accountability System for the Leaders of the Party and Government*] (issued by the Gen. Office of the Cent. Comm. of the Chinese Communist Party and the Gen. Office of the St. Council, Jun. 30, 2009, effective Jun. 30, 2009), art. 5 (2009):

- Under any of the following circumstances, a leader of the Party and government shall be held accountable:
1. He/she makes serious faulty decisions, which leads to severe losses or adverse effects;
 2. He/she neglects his/her duties, which leads to the occurrence of an extremely serious accident, incident, or case, or successive occurrences of serious accidents, incidents, or cases in the region, department, system or entity where he/she worked during a relatively short period, causing severe losses or adverse effects;
 3. A functional department of a government has a poor administration and supervision, which leads to the occurrence of an extremely serious accident, incident, or case, or successive occurrences of serious accidents, incidents, or cases within the scope of its duties during a relatively short period, causing severe losses or adverse effects;
 4. He/she abuses power in administrative activities, forces or instructs others to conduct illegal administrative activities or has a nonfeasance, which causes a mass incident or other serious incidents;
 5. He/she improperly handles a mass or emergent incident, which worsens the situation and causes adverse effects;
 6. He/she violates the relevant provisions on selecting and appointing cadres, which leads to the evaluation failure or faulty use of personnel, causing adverse effects; or
 7. He/she conducts other neglect of duties, causing severe losses of national interests, human life and property, and public property, or causing adverse effects, etc.

Council, could be used by administrative superiors to better control their subordinates.

IV. Conclusion

Due to the above dynamics, administrative self-regulation seems to be playing a positive role in advancing the rule of administrative law in China. However, it is only one of the forces that might push forward the process, and it has its own inherent and formidable limitations. Indeed, the dynamics of administrative self-regulation are limited in terms of both steadiness and effectiveness.

First, the State Council, the most important driver of administrative self-regulation, does not have sufficient time and resources to supervise the practical performance of self-regulation by the innumerable subordinate administrative agencies across the country. Likewise, the “transmission belts” between the State Council, provincial governments, municipal governments, county governments and the town governments are loose. It is still unclear whether the self-regulation provisions promulgated by local governments and their departments will nominally cater to the demands of superiors, or will actually be carried out and put into effect.

Second, the pressure of public opinion that to some extent drives and supervises administrative self-regulation is mostly formed and represented through the media. The space in which the media has to operate may be limited, and some illegal actions or decisions by the central or local governments may not be allowed to receive full reports and disclosure. Separately, news reports may rapidly give rise to certain public opinion, but also may just as rapidly transfer attention to other subjects or topics, making it difficult to keep continuous pressure on the governments or their departments. The pressure of public opinion is limited if it is very hard to transform it into systematic, steady and effective checks and balances by legislative or judicial bodies. Hence, the contribution

of administrative self-regulation to the rule of administrative law in China must be observed, analyzed and recognized systematically and carefully. Expectations might be placed on administrative self-regulation for its contribution to the rule of administrative law in China; however, it is highly unlikely that the rule of administrative law can be achieved solely through administrative self-regulation. External regulation and its effectiveness are not only indispensable, but more important. Otherwise, the final results of one-sided development of administrative self-regulation would be ubiquitous glass ceilings.