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**INTRODUCTION—CHINESE LAW IN A TIME OF CRISES:
REGULATORY CHALLENGES AT HOME,
IDEOLOGICAL CONTESTS ABROAD . . . AND MORE**

Jacques deLisle[†]

This special issue of the *University of Pennsylvania Asian Law Review* builds on the journal's proud tradition of presenting noteworthy articles addressing important aspects of law in contemporary China, and reflects the evolution of English-language scholarship on Chinese law during the fifteen years since this journal began publication as the *University of Pennsylvania East Asia Law Review*. This collection appears at a fraught and possibly pivotal time for Chinese law and the context in which it operates. The authors in this issue address and respond to aspects of the defining issues of this critical moment.

China is the world's second-largest economy and on track to become its largest, and it consistently ranks among the top handful of participating states in international trade and investment.¹ Chinese laws and regulatory measures that shape—or respond to—developments affecting China's economy and China's economic engagement with the outside world are, therefore, of global significance. Some of the many salient examples of these phenomena are addressed in the articles in this issue: Chinese investment in the United States (addressed by Salil Mehra); the COVID-19 pandemic

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¹ See generally *China Country Profile*, WORLD BANK GROUP, https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=CHN [<https://perma.cc/B3SG-4BFD>]; Jonathan Eckart, *8 Things You Need to Know about China's Economy*, WORLD ECON. F. (June 23, 2016), <https://www.weforum.org/agenda/2016/06/8-facts-about-chinas-economy/> [<https://perma.cc/AUD9-LDGX>] (providing an overview of China's economy); Yukon Huang, *China Has the V-Shaped Recovery of Which Trump Can Only Dream*, FOREIGN POL'Y (Oct. 29, 2020), <https://foreignpolicy.com/2020/10/29/china-economic-recovery-growth-v-shape-trade-consumption/> [<https://perma.cc/D6N6-HSKD>] (describing China's rapid recovery from COVID-19-induced economic downturn).

that began in China and disrupted the economy in China and around the world (the focus for Samuli Seppänen, and Jacques deLisle and Shen Kui); and China's hugely economically costly environmental challenges (examined by Zhao Yuhong).

U.S.-China relations are routinely and rightly described as the world's most important bilateral relationship. That relationship has become increasingly adversarial and ideationally charged in recent years and especially during the last few years.² Different conceptions of law, law's roles, and related ideological issues have been among the sources and aspects of the mounting friction between these two most powerful states. In this issue, Seppänen addresses such topics in an essay that contrasts China's illiberal model and Western (including U.S.) liberal models for using law and other exercises of state and political power to respond COVID-19. Mehra's assessment of the use of the Committee on Foreign Investment in the United States (CFIUS) process to block Chinese companies' ownership of U.S. assets in social media and related sectors considers U.S.-China conflicts that resonate with ideological differences, including U.S. concerns about too-weak protection for Americans' data privacy in Chinese-owned applications, and possible digital interference by China in the U.S.'s increasingly troubled democratic political processes. Although not explicitly comparative or transnational, deLisle and Shen's article attributes the strengths and weaknesses of China's COVID-19 response to definitive features of China's system of law and governance, and the article contributes to the broader

² See generally Jacques deLisle & Avery Goldstein, *Rivalry and Security in a New Era for US-China Relations*, in AFTER ENGAGEMENT: DILEMMAS IN U.S.-CHINA SECURITY RELATIONS (Brookings Institution, forthcoming 2021) (discussing the overall negative turn and increasingly ideational tone of U.S.-China relations during the last decade); Jeffrey A. Bader, *Avoiding a New Cold War between the U.S. and China*, BROOKINGS INST. BLOG (Aug. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/08/17/avoiding-a-new-cold-war-between-the-us-and-china/> [<https://perma.cc/6GZQ-N9QY>] (highlighting what the U.S. and China need to do, in light of strategic competition and strategic rivalry between the two, to avoid a new Cold War); Steven Lee Myers & Paul Mozur, *Caught in 'Ideological Spiral,' U.S. and China Drift Toward Cold War*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/14/world/asia/cold-war-china-us.html> [<https://perma.cc/PK89-YZ9G>] (“As the two superpowers clash over technology, territory and clout, a new geopolitical era is dawning” with “a confrontation that will have many of the characteristics of the Cold War.s”).

debate over the relationship between political-legal system types and the character and effectiveness of responses to COVID-19 and similar crises.³

China and the world have become profoundly interconnected and interdependent. What goes on in China often has serious global effects. Sometimes, China's sheer scale makes what occurs in China a phenomenon of worldwide importance. Examples include a nationwide epidemic such as COVID-19 (addressed by deLisle and Shen) or environmental challenges such as soil pollution (addressed by Zhao). Other times, what happens in China has substantial and far-reaching effects outside China—having a major impact in such diverse areas as the global COVID-19 pandemic (the topic for Seppänen) and Chinese outbound foreign investment (addressed by Mehra). Either way, features of China's domestic law and governance, and foreign assessments of them, are matters of near-universal significance.

In addition to engaging with these broad, defining features of contemporary Chinese law in context, the articles in this issue are engaged in a rich, if implicit, conversation with one another on a specific and complex area of Chinese law: regulatory law, especially in the high-stakes context of addressing severe threats to public health. In the limited compass of this introduction, it is possible only to touch upon a few of the common, often overlapping, themes.

First, Zhao (on soil pollution) and deLisle and Shen (on responding to COVID-19) assess in detail the complicated and

³ See generally the series of essays at *Comparing Nations' Responses to Covid-19*, U. PA. REG. REV. (Apr. 20, 2020), <https://www.theregreview.org/2020/04/20/comparing-nations-responses-covid-19/> [<https://perma.cc/WXA8-UP8P>] (scholars from around the world discussing the administrative law and regulatory dimensions of national responses to COVID-19); Jacques deLisle, *When Rivalry Goes Viral: COVID-19, U.S.-China Relations, and East Asia*, 65 ORBIS (forthcoming Winter 2021) (discussing the contending U.S. and PRC narratives attributing success and failure in handling COVID-19 to features of the two states' domestic political systems); Rachel Kleinfeld, *Do Authoritarian or Democratic Countries Handle Pandemics Better?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (March 31, 2020), <https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404> [<https://perma.cc/6CLC-M5G9>] (comparing different countries' responses to the coronavirus pandemic and arguing the pandemic response could result in a decisive global shift toward an authoritarian model).

sometimes disparate laws and regulations that Chinese authorities have adopted to address major challenges to public health. They attribute some of the observed shortcomings to ambiguity or weakness in legal and regulatory mandates and fragmentation of authority and responsibility across multiple institutions. DeLisle and Shen examine the legal and regulatory reforms adopted in the aftermath of the Severe Acute Respiratory Syndrome (SARS) crisis in 2003, and how they performed, or failed to perform, in structuring a response to the COVID-19 pandemic. They also use the early, troubled phases of the pandemic to illuminate structural challenges in China's system of regulation and governance, including internal tensions, overlapping roles, and ambiguous allocations of authority and obligations among geographically-based governmental units such as provinces and cities (for example, Hubei and Wuhan, where COVID-19 first erupted) and more centralized and functionally specialized institutions (such as the national public health bureaucracies)—and the problems that can arise from their coexistence and interaction, particularly in the context of a rapidly accelerating public health crisis. Zhao details the many state plans and legal and regulatory measures adopted since Chinese authorities began in the mid-2000s to focus more seriously on the dire problem of soil pollution. She, too, addresses the challenges that can arise with the adoption of a complicated mix of standards and rules, and the assignment of multifaceted and complex responsibilities and powers among local governments, numerous ministries, and the courts. Zhao and deLisle and Shen also address the profound regulatory difficulties of detecting, targeting, and crafting effective means for ameliorating significant threats to the public that arise from myriad, diverse, dispersed, and sometimes changing or unpredictable sources.

Second, deLisle and Shen, as well as Seppänen, see foundations for China's ultimately relatively successful containment of COVID-19 in China's highly capable state and party institutions and their ability to act in a top-down, coordinated fashion, relatively unimpeded by the legal rights-based or civil society-driven constraints found in more liberal systems that often struggled in responding to the pandemic. At the same time, all three authors suggest that illiberal features of the Chinese system also may have made China's response less effective or more draconian than it might have been. DeLisle and Shen also argue, and Zhao at least implies,

that better-designed institutions, laws, and rules—including mostly ones compatible with the existing basic structure of China’s systems of law, regulation, and governance—could apply lessons from past shortcomings and could help to achieve better results in the future.

Third, Seppänen, Zhao, and deLisle and Shen consider various ways in which the regime’s limited reliance on formal law (as opposed to other, more discretionary, political means)—and its ambivalence about law and, especially, law conferring enforceable rights on citizens—can complicate the pursuit of public health regulatory goals. Thus, Seppänen argues that a lack of attention to procedural legitimacy and a significant degree of ambivalence toward individual rights and rule-based governance are among the reasons that the illiberal Chinese model failed to live up to its aspirations—or the Chinese regime’s claims—in handling the pandemic. Somewhat similarly, deLisle and Shen attribute some of the issues in China’s response to COVID-19 to the complicated relationship between state laws and regulations and party directives and leadership, and to the absence of clearer legal mandates to front-line healthcare workers to report disease outbreaks, or stronger legal rights for those who might bring lawsuits to seek redress and thereby expose governmental malfeasance in handling an epidemic. Zhao identifies legal shortcomings as among the crucial weak links in China’s regime—including the judicial remedies it provides—for contaminated land: weaknesses in implementing the legal principle of “the polluter pays;” the absence of a system of truly strict, retroactive, and joint and several liability for soil pollution; and inadequate requirements for government disclosure of soil pollution-related information.

Fourth, all of the authors in this issue address, in a variety of complementary ways, the difficult and politically charged intersection among privacy rights (and related individual liberties), official commitments to transparency, and governmental capacity to respond effectively to challenges of regulation. In Zhao’s view, the weakness of the government’s obligation to disclose relevant information to the public—and, indeed, the government’s extensive authority to classify some information as secret—seriously compromises the transparency-dependent role of public participation and supervision in addressing the pressing problem of soil pollution. DeLisle and Shen address several issues in this area, including: the lack of legal protections for would-be whistle-blowers such as the doctors in Wuhan who first encountered the novel coronavirus and its

spread; the growing, but still-weak, conception of privacy rights that did little to restrict the state's use of pervasive surveillance methods to corral the epidemic; and the still-contested notion of a public "right to know" that might have led to more effective early detection and response to COVID-19. Among the key themes Seppänen examines in his comparative analysis of Western liberal and Chinese illiberal ideologies in responding to the COVID-19 pandemic is the question of whether rights to free expression and access to information produce better public health outcomes in such crisis situations. For Mehra, as well, discordant views in two contrasting systems about the importance of protecting privacy rights are part of what underlies the significant aspect of the U.S.-China conflict over transnational investment that is the focus of his article.

In addition to these substantive features, these articles collectively highlight other characteristics of contemporary Anglophone writing on Chinese law. They illustrate the depth and range of such scholarship today. In terms of methodology, Zhao and deLisle and Shen undertake detailed, qualitative empirical analyses of laws and rules, institutions, and practices to provide in-depth case studies that reflect and reveal broad features of Chinese law and regulatory governance. Seppänen and Mehra, in contrast, offer essays that grapple with broader themes in legal interactions and contrasts between China and liberal Western systems, such as the United States.

The interdisciplinarity that increasingly has come to characterize the study of Chinese law in English-language writing (and Chinese-language scholarship as well) is evident throughout the articles in this special issue. Seppänen uses some of the tools of political theory as well as comparative law, drawing on literatures that compare liberal and illiberal / authoritarian regime types. DeLisle and Shen combine relatively conventional modes of Chinese law scholarship with comparative politics, including the study of political institutions and causes of regulatory failure. After framing his essay in terms drawn from international relations theory, Mehra engages with a long-running discourse from law and economics. He takes a skeptical view of consumer sovereignty and contractarian approaches to privacy rights, finding them insufficient to address issues of privacy protection in a world where the balance has shifted between politics and markets, and where transnationally invested firms routinely obtain, and profit from, users' information.

This collection of articles also shows some of the considerable variety among producers of contemporary scholarship on Chinese law and related issues. The authors include: two scholars from China and three from elsewhere; two based in Hong Kong, two in the U.S., and one in Mainland China; four who are primarily or exclusively specialists in Chinese law and one who engages China-related issues as part of a not-China-focused research agenda.

The editors and staff of the *University of Pennsylvania Asian Law Review* are to be congratulated for this issue of the journal and other issues in this volume. They join their predecessors—and surely will be joined by their successors—in making significant contributions to the production and dissemination of significant work on, and relating to, law in China and elsewhere in Asia. They also have my thanks (and, I am sure, that of my fellow authors in this volume) for the prodigious work and admirable dedication they brought to the project of selecting, improving, and publishing the articles that appear in the pages that follow.