
Jacques deLisle  
*University of Pennsylvania Law School*

Shen Kui  
*Peking University Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)  
Part of the Asian Studies Commons, Chinese Studies Commons, Comparative and Foreign Law Commons, Emergency and Disaster Management Commons, Health Law and Policy Commons, Health Policy Commons, Health Services Administration Commons, and the Policy Design, Analysis, and Evaluation Commons

**Repository Citation**

[https://scholarship.law.upenn.edu/faculty_scholarship/2239](https://scholarship.law.upenn.edu/faculty_scholarship/2239)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
LESSTONS FROM CHINA’S RESPONSE TO COVID-19: SHORTCOMINGS, SUCCESSES, AND PROSPECTS FOR REFORM IN THE CHINESE REGULATORY STATE

Jacques deLisle and Shen Kui†

成也萧何，败也萧何

(Success and failure from the same cause)

A NOVEL VIRUS CHALLENGES A REFORMED REGULATORY SYSTEM....................................................................................67

SYSTEMIC WEAKNESSES AND A DELAYED RESPONSE................70

    Kuai and Cover-Ups ...............................................................83

    Tiao and Fragmented/Ambiguous Governance ......................93

STRENGTHS OF THE SYSTEM: MOBILIZING TO CONTAIN THE EPIDEMIC ...............................................................113

REFORMS AHEAD? ADDRESSING WEAKNESSES AND PREPARING FOR THE NEXT TIME...............................................................132

CONCLUSION: COVID-19 AS A CASE STUDY OF CHINA’S GOVERNANCE AND REGULATORY STATE...............................147

† Jacques deLisle is the Stephen A. Cozen Professor of Law, Professor of Political Science, and Director of the Center for the Study of Contemporary China at the University of Pennsylvania. Shen Kui, Ph.D., is Professor at the Peking University Law School in China, Director of Research at the Center for Human Rights and Humanitarian Law, and President of the Society of Soft Law in China. The authors thank Ryan McEvoy and Iris Yuqing Zheng for excellent research assistance. We also thank the editors of the Regulatory Review, where blogposts on related issues by both authors appeared. A shorter essay based on the research and analysis that produced portions of this article will appear in the Administrative Law Review as part of a collection of essays on national responses to COVID-19. The authors thank the editors of the Administrative Law Review and the University of Pennsylvania Asian Law Review for agreeing to the publication of both articles in their respective journals.

1 成也萧何，败也萧何 (Cheng ye Xiao He, Bai ye Xiao He) is a Chinese idiom that can be literally translated as “raised up by Xiao He, cast down by Xiao He” and meaning “success and failure from the same cause”—something broadly akin to the English idiom “two sides of the same coin.” The Chinese phrase refers to a tale from the late Qin/early Han dynasty in which Xiao He recommends Han Xin’s appointment as a general to the future founding emperor of the Han dynasty, only to later play a central role in Han Xin’s exposure, and downfall, as a rebel against the Han emperor.
A NOVEL VIRUS CHALLENGES A REFORMED REGULATORY SYSTEM

Near the end of 2019, a novel coronavirus began to sicken residents of Wuhan, a city of more than 11 million and the capital of China’s Hubei province.² The disease caused by the virus, which would soon be known as COVID-19, spread to other parts of China and abroad, prompting the World Health Organization (WHO) to declare a public health emergency of international concern on January 30, and a global pandemic on March 11, 2020.³ Despite a torrent of content on social media (especially WeChat), in Chinese and foreign media, and from government sources in China and elsewhere, there is as yet no fully authoritative account of the relevant actions and omissions at various levels and in multiple units of the Chinese system of governance. A joint WHO-China mission’s nine-day field visit to China in February 2020 offered a laudatory account of China’s response—one that drew serious and mounting skepticism, especially as information about early shortcomings in China’s response to the emergence of COVID-19 became known.⁴ Another

WHO mission dispatched to China in July, 2020 to lay the groundwork for a months-long full investigation of the disease’s origin held out the possibility of providing additional answers, but any findings were sure to be controversial and disputed (in part due to concerns about limited access and charges of bias).5

Although much, thus, remains to be learned, it is apparent that the handling of the outbreak in China reflects characteristic


Skepticism, in advance, toward the WHO’s mission was especially strong from the Trump administration. See Remarks to the Press, Michael R. Pompeo, Secretary, U.S. Dep’t of State, Secretary Michael R. Pompeo at a Press Availability (July 15, 2020), https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-9 [https://perma.cc/KDC5-9Y6Y] (asserting that the WHO will “conduct what I am confident will be a completely, completely whitewashed investigation”).
weaknesses and strengths of the Chinese administrative state. These attributes are shared, to some extent and to varying degrees, by other states, but China’s versions of these features are distinctive, and they appear to have affected its handling of the novel coronavirus pandemic. China could undertake some reforms to reduce the risk that crises like COVID-19 will recur, but they will be difficult to adopt or implement.

COVID-19 posed a serious test for a system that China had reformed to improve its handling of disease outbreaks after the Severe Acute Respiratory Syndrome (SARS) epidemic in 2003. The reforms had sought to: avoid concealment of early indications of an outbreak by government officials and others; ensure prompt reporting of potentially serious infectious disease threats to higher levels of government, including within the public health bureaucracy; provide timely and accurate information and warnings of outbreaks and epidemics to the public; facilitate mobilization of the full range of state and societal resources necessary to address a public health emergency; and prevent fragmented, even balkanized, responses by local officials that impede coherent and coordinated responses.6

The framework put in place after SARS and before COVID included numerous legal and regulatory measures.7 Core elements

---


included the Law on the Prevention and Treatment of Infectious Diseases [\textit{Chuanranbing Fangzhi Fa}] (“Infectious Disease Law,” adopted in 1989, revised in 2004 and again in 2013), the Emergency Response Law [\textit{Tufa Shijian Yingdui Fa}] (enacted in 2007, and greatly influenced by the SARS experience a few years earlier), and an infectious disease outbreak Direct Reporting System [\textit{Zhibao Xitong}] to the China Center for Disease Control and Prevention (CDC) (adopted in 2004)). These and other law-centered mechanisms are, of course, only one part of what structured the response to COVID-19, but they are important in understanding what happened—for good and for ill—and why. Laws and regulations are, among other things, how the state “talks to itself”—a significant channel mechanism that a regime’s leaders use to communicate with lower-level officials and structure their incentives. The laws and rules relevant to public health emergencies, and interactions among them, reflect and instantiate features of the Chinese administrative state and governance that significantly influenced China’s successes and failures in responding to COVID-19.

\textbf{SYSTEMIC WEAKNESSES AND A DELAYED RESPONSE}

The state’s response to COVID-19 was much quicker than its response to SARS, which entailed a lag of more than two months between the first known appearance of the novel atypical pneumonia in southern China in November 2002 and Guangdong provincial health officials’ initial, albeit limited, public confirmation of the emerging epidemic, and another two months before the central government and top leadership openly acknowledged a severe and

\footnotesize{Control] (describing the legal regulatory mechanisms for responding to potential epidemics adopted after SARS).  
ongoing crisis and began earnest efforts to contain the outbreak.\textsuperscript{11} The more rapid initial moves to address COVID-19 still were dangerously delayed, however, and slower than Chinese authorities had hoped given the reforms adopted after SARS.\textsuperscript{12}

Although establishing a date when authorities should have taken major measures to address the serious and highly communicable new illness is a tricky business, reasons for grave concern were present weeks before the central government’s decision in late January 2020 to lock down Wuhan.\textsuperscript{13} The first cases of patients with symptoms of an atypical pneumonia occurred by the beginning of December 2019 (and perhaps two weeks earlier), with the first reports reaching Wuhan local disease control and prevention authorities before the end of the month. By the end of December, Dr. Li Wenliang’s WeChat messages—including ones relaying information provided to him by Dr. Ai Fen, the head of the emergency


\textsuperscript{12} Estimating the costs of delay is very difficult and highly controversial. One study asserts that a three-week earlier imposition of a lockdown of Wuhan—which was done on January 23, 2020—could have prevented 95% of the spread, and a one-week earlier lockdown could have prevented two-thirds of the spread. See Shengjie Lai et al., Effect of Non-Pharmaceutical Interventions for Containing the COVID-19 Outbreak in China, MEDRXIV (Mar. 13, 2020), at 12–13, https://www.medrxiv.org/content/10.1101/2020.03.03.20029843v3.full.pdf [https://perma.cc/3WHM-ZTSM].

\textsuperscript{13} See Chris Buckley & Steven Lee Myers, As New Coronavirus Spread, China’s Old Habits Delayed Fight, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html (describing the lag between emergence of disease and government’s public acknowledgements, and reasons for that lag); Chaolin Huang et al., Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China, 395 LANCET 497, 500–03 (2020) (describing the seriousness of the disease outbreak several weeks prior to the shutting down of Wuhan). Yang Hai (杨海), Wuhan Zaobi Yiqing Shangbao Weihe Yidu Zhongduan (武汉早期疫情上报为何一度中断) [Why the Early Report of the Epidemic Situation in Wuhan Was Interrupted], ZHONGGUO QINGNIAN BAO (中国青年报) [CHINA YOUTH DAILY] (Mar. 5, 2020), https://mp.weixin.qq.com/s/69pdSrjNH_4qN3RtQ-Yk0Q [https://perma.cc/A9CC-BNK9].
department of a major Wuhan hospital—reporting multiple cases of a possibly contagious, SARS-like illness were being widely shared in Wuhan—so much so that they soon drew the attention of local public security authorities, who moved to stop their circulation. On December 31, the NHC and the CDC dispatched the first team of experts to Wuhan, with two others following on January 8 and January 18. Also on December 31, China informed the WHO’s country office about a cluster of cases of “pneumonia of unknown etiology,” and the Wuhan branch of the NHC began issuing public warnings about an “unexplained pneumonia” outbreak. On New Year’s Day, local authorities closed Wuhan’s Huanan Seafood


Wholesale Market, a suspected source of COVID-19’s crossover into the human population.\textsuperscript{16}

Before the middle of January (and perhaps as early as very late December when Dr. Zhang Jixian encountered a cluster of cases among a family), there appears to have been ample evidence of transmission of COVID-19 between people, and thus, signs of a potential epidemic. The risk of a pandemic was underscored by the first report of a case outside China on January 13, the first report of a case in China outside of Wuhan on January 19, and the first reported case of confirmed human-to-human transmission outside of China on January 24.\textsuperscript{17} Serious concern about the atypical pneumonia outbreak, now identified as caused by a novel coronavirus, had taken hold among top-level national authorities by the middle of the month. On January 14, NHC chief Ma Xiaowei held a confidential teleconference, which was followed by documents issuing detailed “internal instructions”—directing provincial officials to prepare to respond to an epidemic and telling health commissions in Wuhan and Hubei to strengthen monitoring, social management and other measures to control the spread of the novel illness.\textsuperscript{18} The CDC set up


\textsuperscript{18} See supra the sources cited in note 15.
working groups to dispatch resources and gather information to affected areas.19

But it was not until January 20 that Zhong Nanshan—an 84-year-old expert in respiratory diseases who led the third team of experts sent to Wuhan20 and who had become prominent during the SARS epidemic for developing treatments and publicly warning against overly optimistic official statements that the epidemic was


waning in April 2003—stated publicly that the illness could be spread from person to person. Xi Jinping made a public announcement on the same day, declaring that all Chinese Communist Party committees and governments at all levels should take effective measures to address the virus. Authorities declared the new virus to be subject to the mandatory reporting regime for “Class B” diseases and directed that the strict disease control and prevention measures for a “Class A” pathogen (under the Infectious Disease Law) would be applied. For the first time, on January 21, People’s Daily carried several stories—and gave prominent coverage—to the outbreak.

During the six days preceding these announcements, Wuhan had seen thousands of new cases, city officials had allowed a large annual community banquet to go forward, and the busy Lunar New

---


Year travel season had begun.\textsuperscript{25} On January 23, a directive to lock down Wuhan was issued, and extraordinarily severe restrictions followed.\textsuperscript{26} Travel to and from the city was prohibited. Businesses were closed. Residents were largely confined to their apartments, except for very limited forays for medical treatment, with daily

\textsuperscript{25}See ASSOCIATED PRESS, supra note 19 (detailing the early timeline of COVID-19, its spread, and how local and central governments reacted); Chen Chen (陈尘), Wuhan Wanji Family Banquet; Zhiqing Ren Zaibao Shijian Neiqing (武汉万家宴视频流出 知情人再曝事件内情) [Wuhan 10,000 Families Banquet Video Released: Insiders Retell the Story], JUIAO WANG (聚焦网) [CBF] (Feb. 14, 2020, 9:38 AM), http://www.cbfau.com/cbf-201585780.html [https://perma.cc/PWH5-XAG2] (describing that a banquet was held in Baibuting, Wuhan with more than 40,000 families participating); Liang Shiting (梁施婷), Wanjijayan 26 Tian Hou, Wuren Zhidaoh Wuhan Baibuting Xinguan Feiyan Quezhen Shulian (万家宴 26 天后，无人知道武汉百步亭新冠肺炎确诊数量) [26 Days after the 10,000 Families Banquet, Number of Confirmed Cases of Novel Coronavirus in Baibuting, Wuhan Unknown], SHIDAI CAIJING (时代财经) [TIME WKLY. FIN.] (Feb. 13, 2020, 8:13 PM), https://www.sohu.com/a/372824937_237556 [https://perma.cc/4T5R-2DYV] (reporting that there were no testing of COVID-19 and no control over entrance into Baibuting).

necessities being brought in by small cohorts authorized to do so. Similar measures were soon imposed in other emerging hotspots, and a “Level 1” emergency (the most serious in Chinese law’s 4-level public health emergency scale) was declared, within days, at provincial levels throughout the country.27

Pervasive and enduring attributes of Chinese governance—ones that had been on display in the SARS crisis as well—contributed to problems in the initial handling of the COVID-19 outbreak. One set of issues was what analysts call tiao-tiao/kuai-kuai and the

resulting pattern of “dual rule.”

Officials at a subnational level with responsibilities for a field of regulation answer simultaneously to two masters: “vertically” to their superiors in a functionally defined, hierarchical bureaucratic structure that reaches up to a ministry in charge of the same field, or a similar central government entity, in Beijing (for which the metaphor is tiao—a long, narrow piece); and “horizontally” to the general-purpose government at the official’s own level—provincial, municipal, or still-lower (for which the analogy is kuai—a lump or block).

Sensible rationales support both approaches to governance, both in general and in the specific context of the means for addressing outbreaks of contagious diseases that were in place when the COVID-19 pandemic began. Key promises of tiao measures include giving experts—in public health, medicine, and relevant fields of science—early access to information and greater authority to shape responses when a serious contagious disease outbreak threatens. Such rules rely on national public health and medical experts to reach informed and authoritative judgments, shape policy decisions, and make announcements promptly. Especially when the danger is, or seems likely to become, national or international in scope, rules requiring rapid reporting through specialized channels to top levels can expedite and inform central-level policy determinations—including by the nation’s top leadership in serious cases—and adoption of geographically widespread measures, as well as engagement with foreign counterparts and relevant international bodies (such as the WHO).

Rules that emphasize kuai recognize that effective responses—and, often, effective detection—in cases of potential epidemics must rely on local officials to monitor developments in

---

their regions, guide the work of local branches of the public health and infectious disease agencies, coordinate across front-line government units, exercise authority over lower-level officials and medical service providers under their jurisdiction, and mobilize state and social resources. Such rules also assign early-stage responsibility to officials who, in practice and often in principle, will be held principally accountable for bad outcomes.

Either tiao or kuai structures can help to avoid some of the problems associated with China’s multi-layered bureaucracy. Clear imposition of responsibility at a particular tier of government (kuai) can limit opportunities for “passing the buck upward.” Strong requirements for rapid reporting to central authorities in the relevant specialized bureaucracy (tiao) can cut through or bypass the delays that plague comprehensive level-by-level decision-making.

Key elements of the Emergency Response Law principally focus on kuai—geographic units. The law assigns a leadership role and primary responsibility for planning, preparing for, detecting, declaring (at any four levels of severity), informing and warning about, and responding to public health incidents (and other emergencies) to the most local-level government with jurisdiction over the affected area (starting at the county level). Roles and powers of local government include coordinating across local branches of specialized government departments (including those focused on public health and disease control and prevention), ordering restrictions on social and economic activities, taking other preventative measures, and mobilizing public and private resources. This kuai system is tiered, with obligations to report expeditiously to

---

30. See infra the discussion accompanying note 105, concerning firing of officials for assessed failures in responding to COVID-19 and, earlier, SARS.
higher-level governments (ordinarily, the next-higher-level government) when an emergency occurs.  

The Infectious Disease Law includes many kindred provisions concerning epidemics of serious contagious diseases. It assigns to the people’s governments at various levels responsibility for directing the work of prevention of infectious diseases, issuing timely early warnings concerning outbreaks and possible epidemics of infectious diseases, and receiving reports of epidemics. Such reports are received from hospitals and other relevant units within a jurisdiction under the principle of shudi guanli [local management] and from the same-governmental-level branch of the principal public health bureaucracies: the weisheng xingzheng bumen [health administration department] (that is, the same-level “health commission” such as the Wuhan Health Commission (WHC) or the Hubei Health Commission (HHC), and the same-level “disease control and prevention institutions” such as the local branches of the CDC). The law also gives people’s governments at various levels authority—again, in a tiered kuai structure—to address infectious disease outbreaks in their jurisdictions by imposing isolation or quarantine measures (which must be reported to the next-higher-level government), ordering shutdowns of economic and social activities and other emergency measures (with approval from the next-higher-level government), suspending transportation (in order to check the spread of an outbreak), and declaring an “epidemic area”—thereby authorizing an area-wide imposition of the above-described restrictions (again, with the approval of the next-higher-level government). The Law also gives governments at various levels powers to mobilize people and resources to address an epidemic, and to oversee specialized disease control and prevention institutions at the same level.  


32 Zhonghua Renmin Gongheguo Chuanranbing Fangzhifa (中华人民共和国传染病防治法) [Law of the People’s Republic of China on Prevention and
Other elements in the relevant legal and regulatory structure emphasize *tiao*. The Emergency Response Law includes such elements as: tasking departments under the State Council, including the NHC, with developing emergency response plans and structures and establishing criteria for each of the four levels of emergencies (including public health emergencies); directing that when a specific law or regulation provides that a national-level department under the State Council, such as the NHC, is responsible for responding to an emergency, the specific law or regulation governs; and authorizing relevant departments under the State Council (or the State Council itself) to take necessary measures when an emergency seriously affects the national economy.33 Under related regulations on public health emergencies, the NHC system has the roles of dispatching experts to assess possible public health emergencies, determining the category of an emergency within the Class A/B/C categories of infectious diseases, and informing lower level health commissions (HCs) of the existence of a public health emergency.34

The Infectious Disease Law, and related regulations and rules, similarly provide that the NHC, along with local-level HCs, are in charge of prevention, treatment, supervision and control of infectious diseases. The Law gives the NHC mandates to monitor and investigate potential infectious disease epidemics and public health emergencies, to establish the required means and terms for hospitals and other units to report on potential epidemics and emergencies, to receive such reports from those units and state disease control and prevention organs (the local CDCs), to issue timely warnings about epidemics and emergencies to other relevant peer institutions, lower-level HCs, and lower-level disease control and prevention organs, and to receive reports on epidemics from lower-level HCs. The Law also gives the NHC and its subordinate provincial HCs (in some aspects contingent on NHC authorization) the power and obligation to issue early warnings and prompt notifications to the public concerning epidemics.35

---

33 Emergency Response Law, supra note 29, art. 7, 17–18, 42, 51.
34 Regulations on Responses, supra note 31, art. 23–30.
35 Infectious Disease Law, supra note 32, art. 3–4, 6, 17, 19, 34–35, 38; Regulations on Responses, supra note 31, art. 25 (concerning the authority of the
These same laws give the CDC (as the state disease control and prevention institution) and its provincial and lower-level branches related powers and functions in addressing potential outbreaks of infectious diseases, epidemics, and public health emergencies: monitoring, receiving reports (including from frontline medical units concerning cases of infectious diseases of uncertain origin), undertaking analyses, forecasting trends, providing information platforms, reporting to higher authorities (including to HCs), and proposing responsive measures. As the foregoing suggests, the structure contemplated by these tiao-side provisions is hierarchical and top-down, with the NHC directing and overseeing provincial and more local-level HCs, and the CDC system, with its local organs, following a similar arrangement.

The Direct Reporting System sought to strengthen the tiao side. As described by the NHC Director to the National People’s Congress Standing Committee in 2013, the Direct Reporting System had “realized real-time direct online reporting of infectious diseases prescribed by law” in well over 90% of medical institutions at all levels, with average reporting time to each higher level institution falling from five days to four hours—an achievement that approached performance standards set forth in relevant regulations.

---

36 Infectious Disease Law, supra note 32, art. 17–18, 30, 33, 40; Regulations on Responses, supra note 31, art. 12–15; Tufa Gonggong Weisheng Shinjian yu Chuanranbing Yiqing Jiance Xinxi Baogao Guanli Banfa (Measures for the Administration of Information Reporting on Monitoring Public Health Emergencies and Epidemics of Infectious Diseases) [Measures for the Administration of Information Reporting on Monitoring Public Health Emergencies and Epidemics of Infectious Diseases] [Measures for Information Reporting].

37 See Infectious Disease Law, supra note 32, art. 6, 34–35, 53–58; Regulations on Responses, supra note 31, art. 4.

Characteristics of *tiao*, *kuai*, and their uneasy coexistence, impeded the initial response to COVID-19. Although many facts remain unconfirmed or contested, and we cannot know for sure individual actors’ motivations, authorities during the initial phase of COVID-19 acted in ways that were in keeping with the incentives that this structure of regulation and governance created.

*Kuai and Cover-Ups*

Actions by Wuhan officials that slowed the response to COVID-19 reflected risks of mishandling endemic to the *kuai* side of China’s Janus-faced structure of governance. These risks primarily take the form of a “double or nothing bet” that faces local officials. When encountering a problem of uncertain seriousness (with a novel, possibly communicable illness being one of many possible examples), an official can report the emerging issue to superiors. In some cases, this is mandated by legal or policy requirements (as with the Direct Reporting System, the Infectious Disease Law, and other relevant law, in the case of COVID-19). Doing so, however, may have little upside for the official. It often will not be clear whether the counterfactual—the outcome to be avoided by proper reporting and the responses such reporting should trigger—would have been a deadly pandemic, or merely a fleeting concern (as new infectious diseases often have been in various parts of China in recent years), the avoidance of which would not be regarded as a significant accomplishment and the reporting of which might be seen as an attempt to shirk responsibility by passing an issue up the chain.39


39 Although SARS and COVID-19 proved to be disastrous pandemics, other potentially epidemic viruses had been contained in recent years in China without resort to extraordinary measures. *See, e.g.*, Pengfei Wei et al., *Pains and Gains from China’s Experiences with Emerging Epidemics: From SARS to H7N9, 2016* BIOMED. RSCH. INT’L., 2016, at 1–3, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4971293/
Moreover, the outcome for an official who does report can be a good deal worse. If the feared bad-case scenario that seemed to compel reporting does not materialize (or if responsive measures addressing a genuine threat are so successful that the seriousness of the danger is not comprehended), the official may be seen as having “cried wolf.” A local official’s disclosing to the public, or reporting to superiors (which can trigger responses that lead to disclosure to the public), can cause panic in society or lead to state-imposed restrictions on economically or otherwise important activity. In light of the resulting public harm caused by such preemptive or responsive measures, the official may then suffer career-damaging criticism for overreacting (or for being perceived by superiors as having done so).

On the other side of the bet, an official can try to keep the facts about a problem that is not yet serious from getting out, hoping to resolve the matter quietly at the local level and without higher-level authorities or the public learning about it. But, if the issue proves unmanageable and becomes known to higher-ups (whether through official channels, social or traditional media, or whistleblowers), the official may face significantly graver consequences than if he had reported promptly. The initially unreported problem may become more harmful than it would have been if there had been prompt reporting, or the official’s superiors may perceive that to have been the case. The responsibility and the risk of adverse consequences borne by the local official is correspondingly larger. Still worse, in some cases (including some of those involving outbreaks of infectious diseases), the official also will have violated policy and legal requirements to report the emerging problem to higher-level authorities. The local official’s violation of that bureaucratic obligation creates an additional basis for career-damaging sanctions, or worse.

Much that occurred in the initial reaction to the novel coronavirus is consistent with the logic of this “fess up or cover up” choice for local officials. Public security authorities in Wuhan squelched early reporting when they ordered Li Wenliang—along

with other doctors—to stop “spreading rumors” about the mystery illness, admonishing Li that his dissemination of “untrue” information through social media had “severely disrupted social order” and was “an illegal act,” and requiring Li to pledge cooperation. Ai’s superiors at her hospital warned her to keep quiet and cease communicating about cases of the new virus.  

Reports from frontline hospital personnel such as Li Wenliang, Ai Fen, and Zhang Jixian could reach higher-level, state authorities through proper channels only with the approval of higher-ups at their hospitals, who did not comply with the Direct Reporting System to the CDC in December after the first cluster of unexplained pneumonia cases arrived in their institutions.  

Ai’s hospital, like Li’s, answered to the WHC. According to one report, doctors at Wuhan hospitals were told that the WHC had issued a directive not to disclose information about the virus and the disease.  

In early to mid-January, local and provincial health authorities reportedly narrowed the diagnostic

---


41 According to one detailed account, there was brief, but quickly suspended, use of the direct reporting system in early January. See YANG, * supra* note 13; *Wuhan Yiqing, supra* note 40.

standards for reporting cases, and required official—and ultimately HHC—consent for reporting.\footnote{Wuhan Yiqing, supra note 40 (reporting that series of instructions raising the approval requirements for reporting); Myers, supra note 7 (reporting authorities’ directives to hospitals to seek official approval before reporting cases / using direct reporting system); Walsh, supra note 5.}


According to several accounts, the CDC learned of the outbreak at the very end of December only from online leaked versions of the WHC’s pair of emergency notices.\footnote{Dali L. Yang, Wuhan Officials Tried to Cover Up Covid-19—And Sent It Careening Outward, WASH. POST (Mar. 10, 2020, 6:43 AM), https://www.washingtonpost.com/politics/2020/03/10/wuhan-officials-tried-cover-up-covid-19-sent-it-careening-outward/ [https://perma.cc/S7YJ-8NJ3]; Yang, supra note 13; Michael D. Swaine, Chinese Crisis Decision Making—Managing the COVID-19 Pandemic, Part One: The Domestic Component, CHINA LEADERSHIP MONITOR (June 1, 2020), https://www.prcleader.org/swaine [https://perma.cc/Y3AQ-KDAE]; infra text accompanying notes 8–11; Myers, supra note 7.} According to some accounts, an
HHC official directed local genomics labs to stop work on samples of the new virus in early January.\textsuperscript{47} On January 12, the Shanghai laboratory headed by Zhang Yongzhen that had sequenced the novel coronavirus genome and published its findings was abruptly ordered to close temporarily.\textsuperscript{48}

When the NHC expert teams (formally sent jointly by the HHC) reached Wuhan, their access to vital information faced constraints from local actors. WHC officials and hospital administrators steered their visits. They appear to have directed—successfully—medical staff to withhold information strongly indicating human-to-human transmission, and blocked access to formal reports on the discovery of the disease and the results of local investigations. One member of the second team later complained, “They didn’t tell us the truth. . . . They were lying. . . . They didn’t cooperate with us at all.”\textsuperscript{49} That same team member credited the third group’s crucial determination that the disease was contagious among people to its leader Zhong’s expertise and to information from other localities that had become available by the time of the Zhong group’s visit.\textsuperscript{50} Even after the NHC and HHC issued a treatment plan for the novel illness, the WHC nominally complied but reportedly set—and communicated to hospitals—strict diagnostic criteria that led to continued serious underestimation of cases.\textsuperscript{51}


\textsuperscript{50} Id.

\textsuperscript{51} Yu & Li, supra note 49; Yang, supra note 46; Yang, supra note 13.
Much of this behavior flouted, or at best skirted, a variety of legal requirements. These could include obligations of institutions (such as hospitals) and individuals (including medical staff) to report on disease outbreaks and potential epidemics (including the obligations under the Direct Reporting System and the Infections Disease Law, the Emergency Response Law, and related rules), and not to make false statements (including to investigating authorities). More broadly, the many investigative, reporting, and informing missions assigned to health commissions and disease control and prevention institutions not only imposed affirmative obligations on such units in Wuhan and Hubei, but also implied duties of local officials not to impede (and, indeed, to support) the work of those sent out by higher-level units, including the NHC and the CDC.

The familiar “double or nothing bet” or “fess up or cover up” dilemma of Chinese governance was especially acute for Wuhan officials dealing with the novel coronavirus because of a few additional factors that were beyond their control. One was the virus itself. During the crucial few weeks of delayed response, it very likely was not clear to local officials that the new pathogen would prove to be so serious—much more dangerous (particularly in its propensity to spread rapidly) than SARS, or other, less serious disease outbreaks that have occurred in various parts of China in recent memory.

Two other factors were accidents of the calendar. Local officials made choices that impeded the flow of information to central authorities and the public on the eve of and during the annual sessions Wuhan Municipal (January 6–10) and subsequent the Hubei Provincial (January 12–17) People’s Congress and People’s Political Consultative Conference (the municipal and provincial legislature-like organs and united front organs that convene in preparation for the March plenary meetings of the correlative national bodies in

---

52 See, e.g., Infectious Disease Law, supra note 32, arts. 12, 37, 69; Emergency Response Law, supra note 29, art. 65; Regulations on Responses, supra note 31, arts. 50–51; Measures for Information Reporting, arts. 10, 16–19; National Implementation Plan, supra note 38, §§ 2–3, 6.

53 See, e.g., Infectious Disease Law, supra note 32, arts, 18, 48, 65; Emergency Response Law, supra note 29, art. 65; Regulations on Responses, supra note 31, arts. 21, 47; Measures for Information Reporting, arts. 21, 34, 39; National Implementation Plan, supra note 38, §§ 4, 6.
Beijing), and shortly before the January 24th opening of the week-long national lunar New Year’s holiday (which would bring travel by millions of people returning home to Wuhan from wherever they lived and worked in China, or leaving Wuhan to visit family elsewhere). If Wuhan officials were to have taken steps that would mean the cancellation of the politically high-profile “two meetings” or the disruption of travel plans for millions of citizens, it would have been a very big, controversial, and possibly panic-triggering move. Tellingly, no new cases in Wuhan were publicly reported by official sources between January 3 and the conclusion of the municipal meetings.

On the other hand, not making the outbreak known and not taking aggressive measures to contain it were risky choices, given the prospect that failure to act could seed a much more serious and widespread epidemic and, in turn, cause greater damage to the economy and public opinion of local government far greater than that which would have accompanied the suspension of the political meetings and holiday trips.

Another, broadly kuai-related feature of Chinese governance deepens the predicament for local officials: what might be called the “Spider-Man principle”—that “with great power comes great


responsibility.” Although four decades of legal and institutional reforms have brought extensive retrenchment, the party and the state continue to claim and exert great authority over society, with many outside analyses concluding that their reach has re-expanded significantly during Xi Jinping’s tenure. When something goes awry—whether it is a public health crisis, mass harms due to poor regulation of tainted food, industrial pollution or construction, or even problems that may not stem from failures of regulation or governance—party and state staff and institutions at the relevant level often are held accountable and suffer the consequences. They face the risk of being seen as responsible in public perceptions and also in the judgment of higher-level authorities who “point the spear downward” to blame lower-tier officials. Those who serve as government or party chiefs—and thus as local “top leaders” [yibashou]—for a geographic region are the most vulnerable to this phenomenon.


59 See Cheng Li, Think National, Blame Local: Central-Provincial Dynamics in the Hu Era, CHINA LEADERSHIP MONITOR, Winter 2006, at 5 (explaining that under Hu, the central government sought to pin blame for crises on local leaders, including through promulgation of new regulations); cf. Ran Ran, Understanding Blame Politics in China’s Decentralized System of Environmental Governance: Actors, Strategies and Context, 231 CHINA Q. 634, 651 (2017) (“Decentralizing environmental responsibilities to local governments created a necessary prerequisite and allows more space for blaming local officials.”); see also Dan Chen, Local Distrust and Regime Support: Sources and Effects of Political Trust in China, 70 POL. RSCH. Q. 314, 319 (2017) (“Facing various socioeconomic problems and challenges that arise during rapid economic growth and urbanization, the central government has allowed mild media criticism on local governments and officials and even local protests for the public to vent and let off steam of anger and frustration.”).

60 Minzner, Riots and Cover-ups: Counterproductive Control of Local Agents in China, 31 U. PA. J. INTL L. 53, 121–122 (2009),
In the context of the COVID-19 crisis (again echoing SARS\textsuperscript{61}), phenomena consistent with this pattern were evident. Outside reports blamed local authorities’ fears of the consequences of sharing information about the emerging problem with Beijing—and thus running the risk of being held to blame for the bad news—for the failure of what was supposed to be the automatic system of direct reporting to central public health authorities.\textsuperscript{62} By early February, Xi Jinping, in a speech to the Politburo Standing


[62] See, e.g., Myers, supra note 7 (explaining that after SARS, reporting to the central authorities was supposed to be “automatic,” but that in Wuhan, local health authorities kept Beijing “in the dark” out of fear of sharing bad news); Edward Wong et al., Local Officials in China Hid Coronavirus Danger from Beijing, U.S. Agencies Find, N.Y. TIMES (Sep. 17, 2020), https://www.nytimes.com/2020/08/19/world/asia/china-coronavirus-beijing-trump.html [https://perma.cc/TUSG-EG8Q].
Committee, pointed to shortcomings by local party, government, and public health officials in the initial handling of the outbreak in Wuhan. Echoing the SARS-era ouster of Beijing Mayor Meng Xuenong and lesser officials, the aftermath of the delayed initial response to the novel coronavirus outbreak brought the dismissal of party chiefs Ma Guoqiang in Wuhan and Jiang Chaoliang in Hubei, as well as hundreds of lower-level officials in those jurisdictions and in other COVID-hit areas. Notably, the pace of firings picked up amid rising public outcry over Wuhan authorities having silenced the since-deceased Dr. Li.


64 Central-level officials were spared even though some of the fateful delay occurred after information about developments in Wuhan had reached higher levels.

Many of these moves could find foundation, or at least resonance, in laws and rules providing for demotions, firings, civil, and criminal punishment for local governments (as well as public health institutions), the officials who staff them, or others (including those not holding government posts) who failed to perform, or performed badly, their duties in responding to potential or actual outbreaks of infectious diseases, epidemics or public health emergencies.66

_Tiao and Fragmented/Ambiguous Governance_

During SARS, the sacking of officials deemed at fault for a flawed response (most prominently, Minister of Health Zhang Wenkang) reflected difficulties that extended to the functionally differentiated, central-government-unit-led, _tiao_ side of governance. 67 Although such high-level figures did not fall in 2020 (possibly because the centrally directed response came sooner and was more effective than in 2003), here, too, the SARS experience loosely foreshadowed analogous issues during the initial response to COVID-19. Officials at lower levels in the public health and disease control and prevention bureaucracy were among those disciplined or fired after the problematic initial handling of the novel coronavirus outbreak. 68 Some of the _tiao_-side problems were the obverse of the _kuai_-side issues discussed above, but others involved more distinctly _tiao_-side attributes.

These features include aspects of what is often called China’s “fragmented authoritarianism”69—a system of governance in which

---

67 Mark Oliver, _China Sacks Minister over Sars_, GUARDIAN (Apr. 20, 2003, 8:06 AM), https://www.theguardian.com/world/2003/apr/20/sars.markoliver [https://perma.cc/E9AG-M7U2] (reporting that China’s health minister was fired over the mishandling of SARS).
69 See Kenneth G. Lieberthal, _The “Fragmented Authoritarianism” Model and Its Limitations, in_ BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO
the institutional building blocks (both bureaucratic/vertical and geographic/horizontal) often function as highly discrete actors, with independent and conflicting interests and agendas, that battle and bargain in a largely political process to shape regime policies and priorities. To be sure, coexisting governmental or political institutions that are “siloed” from one another are near-universal problems, but the challenges have been distinctive and highly salient in China. This fragmentation entails several interlinked features, and all of them were evident in the early reaction to COVID-19.

First, members—and especially leaders—of governmental organs tend to identify with their own institutions (such as ministries and similar bodies at the central level, or provincial and lower-level governments and party organs), and view counterparts in other units as outsiders. This identification with the unit, or danwei, is often


70 See, e.g., B. Guy Peters, The Challenge of Policy Coordination, 1 POL’Y DESIGN & PRAC. 1, 4–5 (2018) (pointing to factors including specialization, information-hoarding, and ignorance of collective goals as explanations for the “persistence of . . . ‘silos’ and ‘stove pipes’ that exist in most governments”); Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J. L. ECON. & ORG. 243 (1987) (describing administrative procedures as means to address the principal-agent problem between political leaders and bureaucratic institutions).
robust, notwithstanding the pull of “dual rule” on sub-national-level officials staffing branches of ministry-headed bureaucracies that also are parts of local governments. Very often, kuai dominates tiao in the orientation and behavior of such officials, especially when legal and policy mandates do not clearly give one priority over the other.

These dynamics appear to have been at work in the initial response to COVID-19 in Wuhan and Hubei. Many of the roles that the relevant laws assign in addressing potential epidemics are allocated in overlapping ways to the tiao-side public health and disease control and prevention bureaucracies and to the kuai-side local governments (often in their supervisory capacity over local health commissions and infectious disease control and prevention institutions). By assigning key roles in monitoring, reporting, informing the public, and responding to disease outbreaks to provincial or local-level health commissions and disease control and prevention institutions, the laws encourage (or at least do not discourage) the tendency for such organs to align with their same-level governments more than their higher-level bureaucratic superiors.\(^\text{71}\)

These features are consistent with significant aspects of the early reaction to COVID-19, including: the pattern of failure by key actors in the public health system who were part of, or accountable to, Wuhan authorities to follow faithfully the Direct Reporting System and the requirements that it and other rules imposed to report immediately to central public health authorities (a pattern that included moves by those authorities to impose narrow diagnostic criteria and to require official approval for reporting);\(^\text{72}\) and the obstruction undertaken by many of those same actors and the resulting frustration experienced by the investigative teams dispatched to Wuhan by higher-level authorities in the NHC- and CDC-led public health system. According to accounts from participants in Wuhan, use of, and compliance with, the direct reporting system (and prompt reporting more generally) were effectively impeded by local officials and the hospital leaders who

\(^\text{71}\) See Peters, \textit{supra} note 70; McCubbins, \textit{supra} note 70.

\(^\text{72}\) Both the \textit{Infectious Disease Law} and rules concerning Direct Reporting System outline specific instances which would trigger mandatory reporting requirements. \textit{See Infectious Disease Law, supra} note 32, arts. 30–38; \textit{Measures for Information Reporting, supra} note 36.
answered to them.73 According to a report based on leaked documents from Wuhan, the average time between onset of symptoms and confirmed (and, thus, reportable) diagnosis exceeded three weeks into early March.74 The difficulties encountered by the investigative teams also reflect a second type of tiao-side problem.

Second, the relative strength and status of government units—and, thus, the rules they implement—matter a great deal in China’s fragmented system. The public health/infectious disease institutions (xitong—system—in the argot of Chinese governance) are comparatively weak actors in China’s complex bureaucratic politics. In the official hierarchy of Chinese governance, the CDC is a ting—a sub-ministry-level entity under the NHC, and the NHC is the equivalent of a ministry. The NHC’s director has the rank of buzhang—minister—and thus is formally a peer of the heads of twenty-five other ministries and commissions of the central government and broadly on par with a provincial governor (such as the governor of Hubei).

Formal status is only part of the story in Chinese politics. The public health bureaucracy has been a troubled system, going through multiple recent restructurings, from the Ministry of Health (which was the target of much criticism after SARS), to the National Health and Family Planning Commission in 2013 (which encompassed responsibilities for China’s long-fraught and contentious population control programs), to the current National Health Commission in 2018 (less than two years before the outbreak of COVID-19). Throughout, the national public health bureaucracy has not been headed by officials with the political prominence (or super-ministerial ranks, such as State Councilor) possessed by the heads of some major ministries or commissions that deal with perennially high-priority matters such as economics or national security.

Senior public health experts and officials had long complained that public health policy was generally not a high priority for policy makers, that its importance was not understood by leaders or by the public, and that the CDC’s powers were extremely limited. They drew unfavorable contrasts with the United States’ CDC, which they characterized as well-funded and highly respected (before the reputational damage wrought by the Trump administration’s handling

---

73 See supra discussion and sources accompanying note 43.
74 See Walsh, supra note 5.
of COVID-19) and reporting directly to the White House. Some also were distressed by moves at local levels in China that reportedly merged CDC branches into other government units, thereby undermining upward reporting and accountability to the national-level CDC and further strengthening the tendency for kuai to overshadow tiao.\textsuperscript{75}

Concerns about weaknesses in the state’s public health and disease control system—its lack of capacity and clout, which had been blamed for shortcomings in handling SARS—had spurred reforms to strengthen and centralize the bureaucratic apparatus.\textsuperscript{76}


Admiring comparisons were to the U.S. CDC predated the Trump administration’s moves to marginalize its influence and undermine its independence, insulation from politics, and adherence to norms of science-based assessments and recommendations. \textit{See} Martha Kinsella et al., \textit{Trump Administration Abuses Thwart Pandemic Response}, BRENNAN CTR. FOR JUST. (Nov. 9, 2020), https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response [https://perma.cc/Y7S7-3RWJ]; Lena H. Sun & Joel Achenbach, \textit{CDC’s Credibility is Eroded by Internal Blunders and External Attacks as Coronavirus Vaccine Campaign Looms}, WASH. POST (Sep. 28, 2020), https://www.washingtonpost.com/health/2020/09/28/cdc-under-attack/ [https://perma.cc/5R8S-4D88].

\textsuperscript{76} \textit{See supra} discussion accompanying note 7, of the principal laws and regulations, all of which were adopted or revised significantly after SARS; David
But such reforms did not greatly transform the landscape of power and resources. For example, CDC leadership still pressed criticisms that after the post-SARS-reforms, the CDC was still short on resources, low in morale, and lacking the authority to issue directly early warnings about disease outbreaks to local hospitals and the public, to make policy, or to enforce pandemic-related laws (including by imposing administrative sanctions).

The problem of a relatively weak national public health bureaucracy is hardly unique to China. But it is more pronounced in a system that puts a high emphasis on economic performance. This priority could be set aside—and in the context of COVID-19 to some

See Lilia Wu & Evelyn Cheng, Virus Disclosure in China Was Delayed Because Disease Control Group Lacks Authority, Top Scientist Says, CNBC (Feb. 28, 2020, 7:38 AM), https://www.cnbc.com/2020/02/28/chinas-cdc-lacks-authority-to-alert-public-on-virus-scientist-says.html [https://perma.cc/E69Y-AU7Z] (reporting on “budget cuts and talent losses” at the CDC); Li Liming (李立明) et al., Yiqing Zaoqi, Jibing Yufang Kongzhi Tixi Shisheng Yuanyin Hezai? ([疫情早期,疾病预防控制体系失声原因何在?]) [At the Early Stage of Pandemic, Why Was the Disease Prevention and Control System Silent?], ZHISHIFENZI (知识分子) (Mar. 3, 2020), http://zhishifenzi.com/depth/depth/8392.html [https://perma.cc/QTW7-FKMZ] (describing CDC as a technical institution without supervisory or law enforcement powers or adequate resources, according to CDC Director); Cheng, supra note 75 (describing CDC’s lack of authority to disclose information to the public, make policy, and exercise powers of enforcement/administrative punishment); Sidney Leng, China’s Coronavirus Response Slowed by Bureaucracy, Unstable Funding as Government Never Empowered Lower Level Officials, S. CHINA MORNING POST (Mar. 9, 2020, 6:00 AM), https://www.scmp.com/economy/china-economy/article/3073960/chinas-coronavirus-response-slowed-bureaucracy-unstable [https://perma.cc/RJ5E-WPBE] (noting CDC lacked authority to issue an early warning to hospitals). See also Fan Jiang et al., Towards Evidence-Based Public Health Policy in China, 381 LANCET 162, 163 (2013) (“By contrast with evidence-based medicine, which is mainly practised at the grassroots level, mindset change from opinion-based to evidence-based decision making can start from the top. Administrative officials could exert their influence downward to accelerate the transition.”).
extent it was, at least briefly—under exceptional circumstances, such as an economy-shaking severe public health crisis. But such focus-shifting circumstances tend to arise or become evident—as they did in the COVID-19 pandemic—only after it is too late to address shortcomings in time to avoid a crisis and its adverse economic consequences.

The early days of COVID-19 reflected the continued relative lack of stature and power of China’s public health and disease-response institutions. Leaked documents lament the Hubei provincial center for disease control and prevention’s lack of funding, capacity and staff morale on the eve of COVID-19, and criticize local branches for not having played a leading, rather than merely passive, role in the early phases of the epidemic.\footnote{Walsh, supra note 5 (quoting Hubei CDC report and other leaked documents).} Despite features in the legal and regulatory framework that envisaged greater reliance on central public health and infectious disease institutions and their expertise, the 2004 revisions to the Infectious Disease Law and other laws did not raise the then-new Direct Reporting System to the status of law, nor—at least in the eyes of critics—did they establish sufficiently clear legal thresholds or duties for direct reporting. Because the infectious disease and outbreak reporting system was geared to already-identified diseases and COVID-19 was a new disease, the law left local actors greater latitude in not immediately reporting the novel virus (until central authorities issued a specific directive on reporting requirements and application of the highest-level, Class A protocols for the novel coronavirus in late January).\footnote{See Wang Xixin (王锡锌), Chuanranbing Yiqing Xinxing Gongkai de Zhang’ai ji Kefu (传染病疫情信息公开的障碍及克服) [The Obstacles for Information Disclosure in Infectious Disease Pandemics and the Ways to Overcome the Obstacles], FAXUE (Mar. 28, 2020), https://mp.weixin.qq.com/s/raqY4vkJmKz2UCHTEQgpZg [https://perma.cc/8KRZ-NGYG].} By not adequately directing medical staff to bypass superiors, the monitoring, reporting, and investigation framework was left at greater risk of being undermined by the type of obstructionism by local authorities and hospital leadership that occurred in Wuhan.\footnote{Relevant laws and regulations direct medical personnel to make reports through their hospitals or through local-level disease control and prevention institutions—which are the local branch of the CDC and, as discussed above, are part of notably weak central institutions and have been greatly subordinated to, or even
Direct Reporting System was also undermined by medical personnel’s poor understanding of the reporting procedure, the costs to them (in terms of resources and distraction from the urgent task of treating patients) of filling out reports, and doubts about whether cases fit the uncertain and shifting criteria for reporting, in an environment where the importance of the Direct Reporting System had not been emphasized. These features collectively gave local officials in Wuhan responsible for public health more room, and reasons, to shirk tiao-side obligations and to opt for the side of the “double or nothing bet” that entailed eschewing the Direct Reporting System and not cooperating with the expert teams sent out under the auspices of the NHC.

Some of the most striking—yet archetypical—testimony about relative institutional weakness comes from those frustrated agents of public health units whom higher-level authorities dispatched during the early weeks of the outbreak to the viral epicenter in Wuhan, where they encountered such potent resistance from those associated with the units of local governance. As Dr. Zhong—the leader of the third and crucial investigative delegation—put it, what happened in Wuhan exposed the “shortcomings” of a system in which the “CDC’s position” was “too low” as a mere “technical department” that could “only report upward” and “level by


81 See Shen Kui (沈岿), Lun Tufa Chuanranbing Xinxin Fabu de Falü Shezhi (论突发传染病信息发布的法律设置) [On the Legal Settings of the Information Release of Emergent Infectious Diseases], DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.], no.4, 2020, at 27, 31–32, (describing the lack of competent public health experts at local level and medical personnel’s lack of understanding of the Reporting System).

82 For a detailed account of the non-activation or avoidance of the Direct Reporting System, see Yang, supra note 13.
level”—an arrangement that was contemplated by relevant regulations (including those governing public health emergencies), and that meant slower response times (especially compared to what the Direct Reporting System was designed to achieve), and more influence for geography-based government units (kuai) relative to the CDC-NHC (tiao) structure. 83 Zhong elaborated, “Except for reporting to upper levels of authorities, the CDC has no power to make any decision for the next move.”84 In the words of an expert in the second NHC delegation, they “were not allowed to step in” because “territorial management” was mandated (by the Infectious Disease Law, among other things), and the expert group’s role was “only” to “offer some help.”85 As noted earlier, the relative weakness of the CDC and NHC structures also made the delegations problematically dependent on Wuhan local authorities (and those who answered primarily to them), and thus vulnerable to being hamstrung by recalcitrant responses and non-disclosure.

This is not to say that the tiao side was entirely marginalized during the early weeks of responding to the novel coronavirus. According to an official timeline and other sources, some information about the outbreak had reached the NHC (including through the end-of-December leaks of the WHC documents) and prompted some measures in early and mid-January, including a reported NHC directive to health organizations not to make public reports and to impose narrow diagnostic criteria, the establishment of a COVID-focused leading group within the NHC, the creation of guidelines on early detection, diagnosis, quarantine, prevention, and control, and the dispatch of the three successive expert delegations to Wuhan and more than a half-dozen investigative teams to other locations.86

While these actions might strengthen arguments for assigning to national public health institutions some of the responsibility for

---

83 Wuhan Yiqing, supra note 40; Yang, supra note 1310; Regulations on Responses, supra note 31, art. 20.
84 Wu & Cheng, supra note 77.
85 Infectious Disease Law, supra note 32, art. 30.
86 STATE COUNCIL INFO. OF. P.R.C., supra note 14, § 1. On the order not to report publicly, see Gao Yu et al., supra note 47; Myers, supra note 7; on diagnostic criteria, see Walsh, supra note 5.
shortcomings in the initial response,\(^87\) their relatively limited—and in some cases critically delayed—moves also reflect those institutions’ limited roles and powers, especially when measured against the ambitious aims that motivated the adoption of the Direct Reporting System and other post-SARS reforms to the legal and regulatory framework for handling infectious diseases and public health emergencies. Notably, the shift to a more effective response to the COVID-19 crisis followed intervention by central authorities above the level of the NHC and CDC, including Xi Jinping, Premier Li Keqiang, the State Council and an ad hoc top-level party group established to focus on the pandemic (and with NHC head Ma’s initial national teleconference purporting to relay instructions from Xi, Li, and Vice Premier Sun Chunlan.\(^88\)

Third, the institutional fragmentation of Chinese governance also means that officials often operate in an environment of ambiguity born of legal and policy mandates, from multiple sources, that sometimes do not clearly delineate functions and responsibilities. This can mean significant difficulties for effective governance, all the more so given other characteristics of the Chinese system addressed elsewhere in this article. In principle, China’s legal system does provide for a hierarchy of sources of law, ranging from the constitution to laws adopted by the National People’s Congress or its Standing Committee, to administrative regulations promulgated by the State Council, to rules issued by subnational-level legislative bodies and central government ministries and commissions, to normative documents that do not have the full formal force of law, and so on. In principle, lower level rules must be consistent with higher-level rules to be valid. In practice, the situation is a good deal messier.\(^89\) Lower-level rules are sometimes amended without

---

87 See Swaine, supra note 46 (assigning partial responsibility—and more than what is assigned in many analyses of the initial phase of COVID-19—for early shortcomings to central authorities).
88 These issues are addressed more fully infra note 139; see also Nat’l Health Comm’n P.R.C., supra note 19.
corresponding changes to higher-level sources of law. Officials often regard the most specific, sometimes formally lower-ranking source as the most relevant or dispositive. Meta-rules to resolve, or even discern, conflicts among primary rules are not very systematic, coherent, or robust in governmental (or even much legal) thinking.\(^9^0\) Processes to provide definitive interpretations of, or resolution of conflicts among, rules are relatively weak or informal. Powers of judicial review do not extend formally to the authority to strike down laws or regulations for non-conformity with higher laws, and legislative exercises of powers of oversight and review of lower-tier sources of law are rare and weak in practice.\(^9^1\) Diverse or inconsistent rules from entities of equal rank within China’s fragmented and siloed state often can be resolved effectively only through intervention (often of a legally informal type) by higher levels (often at the level of the “common superior” of the contending institutions).\(^9^2\)

See generally HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (Anders Wedberg trans., 1945) (concerning the importance of higher-level norms for determining the validity of more specific, lower-level norms).


As is addressed later in this article, these attributes within the realm of formal laws and regulations are compounded by their coexistence with directives,
One aspect of the phenomenon of multiple, and collectively ambiguous, rules may be reflected in a notorious incident from the initial response to COVID-19. Facing criticism for not informing the public during the early weeks of the growing epidemic, Wuhan Mayor Zhou Xianwang—who also headed the city’s Novel Coronavirus Infection Control and Prevention Headquarters—explained that he had delayed releasing information because “as a local government, I can only disclose information . . . after I have received authorization.”\footnote{Zhang Yuting (张雨亭), Wuhan Shizhang Cheng Wuquan Gongbu Yiqing? (武汉市长称无权公布疫情?) [Municipal of Wuhan Claiming No Right to Make Public the Pandemic], NANFANG DUSHI BAO (南方都市报) [S. METROPOLIS DAILY]: SOHU (搜狐) (Jan. 30, 2020, 9:36 PM), https://www.sohu.com/a/369630319_161795 [https://perma.cc/43FF-DFHU] (“As a local government, I can only disclose information . . . after I have received authorization.”); Langlang (郎朗) et al., Wuhan Shizhang Chengren Qianqi Xinxi Pilu Bujishi (武汉市长承认前期信息披露不及时) [Municipal of Wuhan Admitted Untimely Disclosure of Information at the Early Stage], SINA (Jan. 27, 2020, 3:49 PM), https://news.sina.cn/gn/2020-01-27/detail-iihnzhha4917463.d.html [https://perma.cc/46JG-26G6]; Wuhan Chengli Xinxing Guanzhuang Bingdu Ganran Feiyan Yiqing Fangkong Zhihui Bu (武汉成立新型冠状病毒感染肺炎疫情防控指挥部) [Wuhan Establishes Novel Coronavirus Infection Pneumonia Prevention and Control Command Center], XINHUA (Jan. 21, 2020) http://www.xinhuanet.com/2020-01/21/c_1125487978.htm [https://perma.cc/TE2A-3M8X]; see also Zhao Hong (赵宏), “Weijing Shouquan Bude Pilu” Beihou de Xinxi Gongkai Zhidu yu Wenti (“未经授权不得披露”背后的信息公开制度与问题) [Information Disclosure System and Problem Behind “No Unauthorized Information Disclosure”], PENGPAI (澎湃) [THE PAPER] (Jan. 31, 2020, 2:27 PM), https://www.thepaper.cn/newsDetail_forward_5700131 [https://perma.cc/ZZ5J-JQJL] (discussing whether the Wuhan Mayor’s position on disclosure has legal justification).} If sincere, the mayor’s position adopts a plausible but problematic construction of relevant law. Provisions in the Infectious Disease Law give the NHC responsibility for issuing warnings and releasing information to the public about outbreaks or epidemics (and potential outbreaks and epidemics). The same law and relevant regulations contemplate provincial-level HCs receiving specific NHC authorization to release information about such developments to the public.\footnote{Infectious Disease Law, supra note 32, art. 19, 38; Regulations on Responses, supra note 31, art. 25; Measures for Information Reporting, supra note 36, art. 32.} The NHC’s authorization for
provincial-level HCs to release information has been granted, on a general, not case-by-case, basis.\textsuperscript{95} None of that would have legally required, or authorized, Zhou—as a sub-provincial-level leader—to make a public announcement about the emerging epidemic. Yet, the Emergency Response Law authorizes local people’s governments (such as the one in Wuhan headed by Zhou) to issue an early public warning and provide the public with information and guidance about an imminent public health emergency, so long as such actions are consistent with relevant statutes and regulations.\textsuperscript{96}

If the mayor’s statement is disingenuous, it shows the potential for an official to exploit regulatory ambiguity and adopt self-serving readings of law in an effort to shirk responsibility or shift blame. This can be a tempting, and sometimes effective, defensive move for an official who has erred in wagering that he or she could contain an escalating problem—such as the COVID-19 outbreak—without attracting game-changing attention from higher levels.

Another example of the consequences of collectively ambiguous rules in China’s fragmented governance may be in the delayed reporting of the COVID-19 outbreak in Wuhan. The Direct Reporting System called for rapid direct reporting to central CDC authorities of potentially dangerous infectious disease outbreaks of uncertain origin, and relevant rules called for use of the Direct Reporting System. But those rules also left room for the use of “report cards” to be submitted through alternate channels, particularly for entities that had not yet adopted or were not authorized to use the Direct Reporting System. Although the rules called for speedy transmission through such channels, they relied in part on a structure that was more dependent on level-by-level, geographic-unit based reporting.\textsuperscript{97} That more kuài-leanining structure remained embedded in


\textsuperscript{96} Emergency Response Law, \textit{supra} note 29, art. 42–45.

\textsuperscript{97} Measures for Information Reporting, \textit{supra} note 36, art. 18–19; National Implementation Plan, \textit{supra} note 38, § 3 (2004); Weishengbu Guanyu Yinfa
more general, formally higher-level laws and regulations that also governed reporting on such outbreaks.\(^9^8\)

In the circumstances of COVID-19’s emergence, both sets of rules arguably applied (as did other legal requirements concerning reporting). Critical reports indicate that, in a move of questionable legal propriety, local authorities in Wuhan opted, during the crucial early weeks of January, not to have medical staff follow the Direct Reporting System and—at best—to apply the less demanding alternatives for providing timely information to central authorities. Those alternatives allowed for “consultations” at local levels that could delay reporting, and had an imprecise and therefore malleable definition of cases of pneumonia that required urgent and direct reporting.\(^9^9\) Reported directives from the NHC and provincial and lower-level public health authorities to apply narrow standards for defining reportable cases further muddied the waters by adding specific, if formally lower-tier, measures undermining direct reporting mandates.\(^1^0^0\)

The effects of indeterminate sets of legal rules and fragmented government institutions are compounded by the role played by the Chinese Communist Party and its rules. The party famously—and, in the Chinese system, legitimately—penetrates and guides state

---

\(^9^8\) See Infectious Disease Law, \textit{supra} note 32, art. 30–38; Regulations on Responses, \textit{supra} note 31, art. 20.


\(^1^0^0\) See \textit{supra} discussion accompanying note 38.
The many government officials and staff who are also party members are formally subject to party, as well as state, rules and disciplinary procedures. One example of such rules relevant to the response to COVID-19 is the Xi-era “Regulations of the Communist Party of China on Requests for Instructions and Reports on Major Issues,” which require reporting to higher levels in the party on implementation of policies and seeking instructions from higher levels on a broad and open-ended range of “major matters,” including major diseases (and then following higher-level instructions). Another example is the COVID-specific Party Central Committee “Notice on Strengthening the Party’s Leadership and Providing a Strong Political Guarantee for Winning the War of Prevention and Control of the Epidemic,” which foregoes regulation-like directives but generally exhorts party committees and members to take leadership roles in COVID response work by government agencies and public health departments, as well as in mobilizing non-state actors.

The non-law character of party rules and directives does not make them clearly or consistently less significant than state laws and policies in influencing matters of governance, such as responding to


103 Notice, supra note 102.
COVID-19. In the Chinese political hierarchy, party secretaries have power and, often, responsibilities greater than those of mayors at the city level and governors at the provincial level. Although earlier periods during the Reform Era emphasized separating party and government functions, during Xi’s tenure, the role of the party and its leadership over government have re-expanded (a point reflected, and stressed, in the Central Committee’s COVID-19 Notice). ¹⁰⁴ Tellingly, in the wake of the troubled initial response to the novel coronavirus outbreak, the most prominent dismissals mainly targeted the incumbents of party, rather than government, posts.¹⁰⁵

Fourth and finally, fragmentation of authority means that coordination among siloed institutions is necessary for effective government action, but such coordination can be difficult to achieve, especially in contexts like the COVID-19 outbreak. Despite post-SARS reforms, responsibility for public health issues remained spread across numerous central and local government organs.¹⁰⁶ In Wuhan during the initial COVID-19 outbreak, a monitoring system


¹⁰⁵ See Xu, supra note 65 (reporting dismissal of numerous party secretaries in different institutions); Woo, supra note 61 (reporting the firing of “two top Communist Party officials in Hubei province” as a result of their mishandling of the early response to COVID-19); Chao Deng, China Fires Official After New Coronavirus Cases Emerge in Wuhan Community, WALL. ST. J. (May 11, 2020, 10:49 AM), https://www.wsj.com/articles/china-fires-official-after-new-coronavirus-cases-emerge-in-wuhan-community-11589205412 [https://perma.cc/6FVH-GGQH] (reporting on the firing of a party secretary in charge of a Wuhan residential complex in which new COVID cases emerged).

that was premised on active engagement and cooperation among hospital administrators, the local public health authorities, other units of local governance, and central public health authorities failed—“monumentally,” in the words of one expert observer. A full response (beyond detection and reporting) to an epidemic would require coordination with still more state entities.

Here, the problem is compounded by China’s version of a widespread and common problem of governance: the relatively low importance generally accorded to public health policy and preparedness. Unless or until a disease outbreak or other issue has become a major crisis (or appears to be on track to do so), the concerns that are within the ambit of the public health and disease control institutions are overshadowed by other matters, such as the economy or social order. Those issues are within the immediate and primary responsibilities of other xitong headed by more powerful central government entities, and are in ordinary times higher priorities for omnicompetent local leaders such as governors, mayors, or party secretaries.

Concerns about triggering public panic—and thus putting at risk high-priority goals of maintaining social order and

---


promoting economic activity—reportedly motivated Wuhan officials’ initial delay in fulfilling their public health-related duties of reporting on the emerging disease outbreak or taking steps that would have signaled to the public the existence of a serious threat posed by the novel coronavirus.  

Signals from the top leadership to lower-level officials about the persisting primacy of concerns with the economy and stability quickly reemerged once the worst phase of the COVID-19 crisis had passed. In March and April 2020, a series of speeches by Xi Jinping and directives from the party’s COVID-focused leading small group and others began to emphasize reopening the economy, while in some cases also noting the need for continued attention to social order (something that might be helped by lifting the strict, often discontent-promoting restrictions imposed to check the spread of the disease).  

In April, the Supreme People’s Court declared that a priority in handling civil lawsuits and other judicial work would be to minimize the pandemic’s economic consequences. The court’s directive called for, for example, a narrow reading of transaction-disrupting force majeure claims in contracts, and a flexible approach to requests for property preservation in litigation (which would protect the interests of pandemic-imperiled defendant small businesses.)  

To be sure,

---


The tension is hardly limited to COVID-19. See Dali L. Yang, China’s Troubled Quest for Order: Leadership, Organization and the Contradictions of the Stability Maintenance Regime, 26 J. CONTEMP. CHINA 35 (2017); Anthony Giddens, Risk and Responsibility, 62 MOD. L. REV. 1 (1999) (politics “marked by the push-and-pull between accusations of scaremongering on the one hand and cover-ups on the other”).

110 See generally STATE COUNCIL INFO. OFF. P.R.C., supra note 14, at § II.4.

111 Sun Hang (孙航), Zuigao Renmin Fayuan Yanjiushi Fuze Ren jiu Chutai Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidaoyu Yijian (Yi): Da Jizhe Wen (最高人民法院研究室负责人就出台依法妥善
pushes to return to economic normalcy and worries about the unpopularity of lockdowns and other restrictions quickly emerged in many COVID-stricken countries, but the pivot taken in China’s response to COVID-19 was particularly striking and telling, given China’s especially high and long-running pre-COVID emphasis on economic growth and stability issues, the severity of the COVID-related restrictions that had been imposed in much of China, and the relative insulation of the Chinese regime from public political pressure.

Centralization of power has long been a principal method for addressing the challenges born of fragmentation in China’s governance, and centralization has been a major trend in politics and governance during the Xi era. Somewhat paradoxically, however, centralization of power can exacerbate the problem of lower-level officials shirking responsibilities—a major problem for the effective performance of tasks such as responding to a fast-moving disease outbreak. In a more centralized system, lower-level officials have incentives to: be passive and adopt wait-and-see attitudes (because they expect directives to come from above and are reluctant to act in the absence of such directives); favor nonfeasance over possible malfeasance (because malfeasance may be, other things being equal, more likely to be detected and sanctioned by watchful superiors); and eschew aggressive or proactive measures to address major issues (unless and until the top-level leaders issue the decisions or send the signals that come from on high in a centralized system).112

112 On the problem of “shirking,” see, e.g., Ni Xing & Wang Rui (倪星 & 王锐), Quanze Fenli yu Jiceng Bize: Yizhong Lilun Jieshi (权责分立与基层避责: 一种理论解释) [Separation of Power and Responsibilities: A Theoretical Explanation], ZHONGGUO SHEHUI KEXUE (中国社会科学) [CHINA SOC. SCI.], no. 5, 2018, at 116, http://sociology.cssn.cn/xscg/zxwz/201809/W020180917437129089398.pdf [https://perma.cc/F4WX-MDRM] (arguing that the separation of power and responsibility and the loss of power by local governments leads to shirking); Yan Jirong (燕继荣), Guanyuan “Lanzheng” Buzuowei Xianxiang Fenxi (官员“懒政”不作为现象深层原因分析), ZHONGGUO GONGCHANDANG
Xi’s first public statement concerning the virus on January 20 was such a signal. It was followed by assertions that Xi had been fully in charge of directing the epidemic response from an early date, including through instructions issued at a Politburo Standing Committee meeting on January 7.\(^\text{113}\) Although surely meant to indicate attention and direction from the top in a self-consciously centralized system, the claim had a problematic political side-effect. It prompted skepticism about its veracity, and—if the claim were accepted as true—questions about why an informed and capable top leadership had not moved more swiftly to mobilize a full-fledged response to the emerging epidemic.\(^\text{114}\)

---

\(^\text{113}\) Xi, supra note 63 (stating that Xi issued instructions on control and prevention of the epidemic at a January 7 Politburo Standing Committee meeting and special instructions on January 20); see also STATE COUNCIL INFO. OFF. PRC, supra note 14, at § II.1 (providing official timeline of events).

\(^\text{114}\) See, e.g., Amy Qin, China’s Leader, Under Fire, Says He Led Coronavirus Fight Early On, N.Y. TIMES (Feb. 15, 2020), https://www.nytimes.com/2020/02/15/world/asia/xi-china-coronavirus.html (examining the backlash that resulted from statements of Xi Jinping); Chun Han Wong, Beijing Portrays President Xi Jinping as Hero of Coronavirus Fight, WALL ST. J. (Mar. 8, 2020, 10:34 AM), https://www.wsj.com/articles/beijing-portrays-president-as-hero-of-coronavirus-fight-11583678054 [https://perma.cc/CK2Q-KWFR] (examining how Chinese authorities presented Xi Jinping’s efforts to contain the spread of coronavirus); Wong et al., supra note 62 (describing assessments of implications of whether Xi and top leadership knew of epidemic at earliest phases or learned only later because of local officials’ concealment); Opinion, What Did Xi Jinping Know About the Coronavirus, and When Did He Know It?, WASH. POST, (Feb. 19, 2020, 6:05 PM), https://www.washingtonpost.com/opinions/global-opinions/what-did-xi-jinping-know-about-the-coronavirus-and-when-did-he-know-it/2020/02/19/35482fe2-5340-11ea-b119-4faabc6674f_story.html
STRENGTHS OF THE SYSTEM: MOBILIZING TO CONTAIN THE EPIDEMIC

Once centrally mandated efforts to contain COVID-19 began, they were formidable and effective—as well as draconian. Success was achieved through the regime’s extraordinary ability to mobilize people and resources on a massive, national scale.\(^\text{115}\) Tens of thousands of medical personnel and large stores of equipment (including PPE from rapidly ramped-up production) were dispatched to Wuhan, and elsewhere in Hubei, including through a system that paired supplier provinces with recipient Hubei cities. Basic, temporary hospitals were constructed within two weeks after the lockdown was imposed.\(^\text{116}\) Teams composed of, or under the direction of, government staff were dispatched within neighborhoods and apartment blocks to conduct health checks, provide daily necessities, impose isolation and quarantine, erect barriers, and conduct contact tracing. Special *fangcang*—shelter—hospitals were

\(^{115}\) For an overall account of these responses, see STATE COUNCIL INFO. OFF. PRC, *supra* note 14, §§ III.3–III.4.

established to remove not-seriously-ill patients from the general population. In terms of funds expended and economic activity foregone, the cost of these undertakings was very high.

By early March, Chinese authorities declared the outbreak in Wuhan and Hubei “curbed,” and an easing of travel bans and other restrictions on activities soon followed. By the end of November 2020, the reported death toll nationwide was under 5000 and the official number of cases was under 100,000, with consistently low new case rates after early March and infection and death rates very far below global averages. China’s statistics have met with some skepticism abroad. Undercounting COVID-19 infections and fatalities has been a problem in many countries. But critics have


argued that China seriously understated the damage that COVID-19 wrought in Wuhan and elsewhere (a view partly borne out by leaked documents and an official upward revision of early counts)—especially concerning deaths during the early weeks of the epidemic—and have challenged the accuracy of China’s reported COVID statistics more generally.\textsuperscript{122} As illustrated by the June 2020 outbreak in a Beijing wholesale food market, cases in Qingdao a few months later (prompting a massive, city-wide testing initiative), and resurgence of case counts in many other places around the world where the virus had seemed under control, success can be precarious.\textsuperscript{123} Notwithstanding these caveats and doubts, China’s


containment efforts were notably successful by international standards and severe recurrences have been avoided into the final months of 2020.

China’s legal framework for responding to public health emergencies and infectious disease outbreaks reflects an appreciation of what is needed to handle the daunting challenges of governance that COVID-19 and similar threats pose. Although too often evaded or less than zealously followed in the initial phases of the pandemic, the laws and rules that called for energetic monitoring, reporting, and investigating still were part of the story behind taking the necessary first steps toward—and the subsequent unfolding of—the large-scale, center-driven response. Some aspects of making the outbreak known to higher-level public health authorities, conducting on-the-ground investigations, and informing the public paralleled what the laws contemplated (although sometimes belatedly and grudgingly, to the frustration of many, including the expert teams sent to Wuhan and higher-level authorities). And departures from legal requirements were criticized and sometimes sanctioned. Many of the more dramatic moves undertaken in Wuhan and elsewhere in late January and early February tracked provisions in laws authorizing the imposition of isolation and quarantine, suspension of travel, addressing and eliminating animal sources of human disease outbreaks, provision of medical and other support and assistance, and so on.

The ability to direct vast state and societal, human and material, resources to pursue the regime’s high-priority goals—as occurred in Wuhan and elsewhere in China during the COVID-19


See supra discussion accompanying note 119. See also generally STATE COUNCIL INFO. OFF. P.R.C., supra note 14, §§ I.2–I.3.

See, e.g., Infectious Disease Law, supra note 32, arts. 20, 40, 42–45 (authorizing relevant level people’s government to undertake necessary prevention and control measures, including but not limited to isolating potential sources of infection, suspending economic and social activities and transportation in and out of affected areas, eliminating animal sources of disease); Emergency Response Law, supra note 29, arts. 45, 49 (authorizing relevant level people’s government to muster and deploy resources, shutdown places and activities, and take other necessary prevention, control, and protection measures in the event of Level 1 or 2 emergency, and to provide treatment, control sources of danger, and isolate dangerous sites and areas in the event of a public health incident).
crisis—reflects strengths of Chinese governance and China’s administrative state, despite the weaknesses evident in the early response to the novel coronavirus outbreak.\textsuperscript{126} China has, in the parlance of comparative politics, a highly capable state, with institutions robust enough to govern society, manage politics, and extract and deploy resources effectively.\textsuperscript{127} The regime’s formidable capacity derives in part from a system of one-party authoritarian rule, a preeminent leader, an in-principle unitary state, and mutually reinforcing party and state structures of top-down hierarchical authority and discipline.\textsuperscript{128}

\begin{flushright}
\end{flushright}

127 For the classic statement of the importance of state capacity to political order and regime success, see \textit{SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES} 1 (1968) (“The most important political distinction among countries is not their form of government but their degree of government.”). On China as a capable state, see, e.g., \textit{DALI L. YANG, REMAKING THE CHINESE LEVIATHAN} (2004) (analyzing success of government institutional reforms as means to sustained growth, political stability, and addressing corruption); World Governance Indicators, 2018, \textit{WORLD BANK}, https://databank.worldbank.org/reports.aspx?source=worldwide-governance-indicators [https://perma.cc/EG5D-NF4W] (last visited Oct. 6, 2020) (ranking China at 71.6th percentile globally on “government effectiveness” and at 42.8th percentile on “regulatory quality”).

\begin{flushright}
\textsuperscript{128} \textit{See generally} HUNTINGTON, \textit{supra} note 127, 335–343 (characterizing communist and Leninist systems as highly institutionalized and therefore politically effective); \textit{PHILIP SELZNICK, THE ORGANIZATIONAL WEAPON} 1–16 (1952) (characterizing Leninist structures as an effective “organizational weapon”); \textit{see also} Jacques deLisle, \textit{Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping}, 26 J. CONTEMP. CHINA 66, 75–76, 79 (2017) (concerning Leninist features of law in China during Xi era).
\end{flushright}
For China, success in containing the coronavirus (as in pursuing many other difficult policy priorities) depended on—among other things—overcoming the challenges of fragmentation and the difficulties of implementation on a mammoth scale. Moves to suppress COVID-19 in Wuhan, Beijing, and elsewhere (in areas with a population in the hundreds of millions) and measures to prevent the disease’s further spread and recurrence necessarily relied on many actions—and, in many cases, coordinated actions—by numerous organs of the Chinese state. These included the NHC and CDC, health commissions and disease control and prevention institutions at various levels, other public health-related government departments, public security forces, the Ministry of Transportation (which collaborated with the NHC and three other government departments on the “Notice” to prevent transmission of COVID over transportation networks), local public transport agencies (to limit access and enforce safety policies on subways and buses), public works crews (to build physical barriers), the Ministry of Commerce (to help address supply issues), the Ministry of Industry and Information Technology (for big data and AI tracking measures), the People’s Liberation Army (to help build temporary hospitals and provide supplemental medical staff), the Ministry of Education (to extend school closures beyond the New Year’s holiday, on the orders of the State Council, and to institute coronavirus screening and prevention measures in schools), party committees at many levels (to exhort people and monitor their behavior), and many others.

From formal laws to more ad hoc measures, an emphasis on creating and using wide-ranging and cross-sectoral mobilizational capacity is notably pervasive in epidemic and public health-related contexts. The most extraordinary legal provisions (for example, formally declaring a constitutional “state of emergency”) were not invoked amid the novel coronavirus outbreak. Short of such measures, the Emergency Response Law—adopted partly to implement lessons from SARS—and the Infectious Disease Law—also revised in the wake of SARS—and other laws explicitly contemplate a whole-of-government (and whole-of-society) mobilizational response to public health crises, especially where—as

---

129 For an argument that the effective response (after the initial missteps) reflects specifically the strengths in crisis management of the Chinese system, see Swaine, supra note 46.
occurred with COVID-19—the highest sub-constitutional level of emergency (Level 1) and the most serious level of infectious disease-fighting measures (Class A restrictions) are invoked. The acknowledgement of the importance of coordinating across often-fragmented units of governance is explicit in such legal provisions. They set forth the authority of the State Council and provincial and local governments—as coordinating organs—to require the mobilization of state and social resources, and the duties of government units across many functional systems, party-state-linked residents’ committees, and ordinary citizens and enterprises to cooperate with such mobilization directives and other government-led responses to infectious disease outbreaks or public health emergencies. Therein lies a broad, law-embodied imperative for

130 See Emergency Response Law, supra note 29, art. 69 (stating that National People’s Congress Standing Committee and State Council have the authority to declare a “state of emergency” as contemplated in the Constitution); see also deLisle, supra note 8, at 352–56 (discussing distinction between constitutional state of emergency and lesser forms of emergency response in Chinese law and in the formulation of the Emergency Response Law).

131 See Infectious Disease Law, supra note 32, art. 6, 9, 39, 45, 49 (setting forth: the obligation of departments other than NHC—and their local branches—to undertake disease control and prevention work within their scope of work; the obligation of residents’ committees and villagers committee to participate in disease control and prevention work; obligations of hospitals and medical institutions in combatting epidemics; the State Council’s and provincial and local government’s authority to mobilize people, deploy state resources, and requisition private resources in response to a serious infectious disease outbreak; and the obligations of producers of essential medical supplies and transportation services—many of which are government entities—to give priority to work needed for addressing epidemics); Provisions on Disease Control, supra note 7, art. 3–4 (emphasizing the principles of “integrated resources” [zhenghe ziyuan] and “clear allocation of [coordinated] responsibilities” [mingque zhizhe], and noting the roles of multiple relevant agencies [youguan bumen] in addressing infectious disease challenges). See also Emergency Response Law, supra note 29, art. 6, 8, 12, 14, 32, 48–49, 52, 55, 57 (providing that: the state shall establish social mobilization mechanisms; the State Council or provincial and local governments shall coordinate and direct responses to emergencies; the PLA shall participate in emergency response efforts; the state shall secure material and agreements with enterprises to provide material to address possible emergencies; the people’s governments shall organize relevant departments and deploy state and social emergency resources to respond to emergencies, including public health emergencies; the people’s governments have authority to requisition property; and residents’ committees and villagers’ committees are obligated to organize and mobilize citizens and maintain order in emergencies; citizens are
the coordinating and mobilizational strengths that were on display in the active phase of the Chinese state response to COVID-19.

Top-level coordination efforts, often invoking formal legal authority, figured prominently in the response to COVID-19. As the centrally mandated response began in earnest around January 20, under the direction of Premier Li and the State Council, the National Health Commission declared that the novel coronavirus was a Class B disease under the Infectious Disease Law, and triggered the stricter measures that the law provided for Class A diseases. This move appears to have been consistent with the Infectious Disease Law provisions that contemplate applying Class A measures to specified Class B diseases (such as SARS, to which COVID-19 was closely related) and other infectious disease outbreaks of unknown cause for which the State Council determines Class A-style measures are warranted. A month later, as central authorities moved to adjust

---

required to obey and assist the government and residents’ committees and villagers’ committees); Regulations on Responses, supra note 31, art. 3, 32–34, 38, 40 (establishing the obligation of departments of transportation to assure timely delivery of needed medical materials in emergency; ad hoc “headquarters/command bodies” authority to mobilize and deploy people and material, and to exercise power of requisition; the obligation of transportation operators to cooperate isolating infectious passengers; and the obligation of residents’ committees and villagers’ committees to assist public health authorities and other government authorities to address public health emergencies).

132 Sun Meng (孙梦), Jiefeng Zaiji, Li Lanjuan Shouci Pilu Wuhan Fengcheng Xijie (解封在即, 李兰娟首次披露武汉封城细节) [In the End of Lockdown in Wuhan, Li Lanjuan Disclosed Details of Implementation of the Lockdown for the First Time], ZHONGGUO YILIAO (中国医疗) [MED.CHINA.COM.CN] (Mar. 27, 2020, 10:17 PM), http://med.china.com.cn/content/pid/167168/tid/1023[https://perma.cc/Z3EZ-R5EQ]; Infectious Disease Law, supra note 32, arts. 3–4, 39. Reports attributed the announcement to the State Council itself, whereas the Infectious Disease Law contemplates announcement by the NHC after approval by the State Council of a recommendation from the NHC. The formal Announcement was issued by the NHC, with a statement that it was approved by the State Council, as contemplated under the law. Guojia Weisheng Jiankangwei Huitong Xiangguan Bumen Lianfang Liankong Quanli Yingdui Xinxing Guanzhuang Bingdu Gannan de Feiyan Yiqing (国家卫生健康委会同相关部门联防联控 全力应对新型冠状病毒感染的肺炎疫情) [National Health Commission of the People’s Republic of China and Relevant Departments Joint Prevention and Control Mechanism: All-Out Efforts to Combat COVID-19 Epidemic], STATE COUNCIL P.R.C.(Jan. 21, 2020), http://www.nhc.gov.cn/yjb/s7860/202001/d9570f3a52614113ae0093df51509684.
measures to the evolving challenges, a formal Notice on Further Differentiated, Region-Specific, and Tiered Control and Prevention was issued pursuant to the State Council’s capacious regulatory authority to address epidemics and public health emergencies—a pattern broadly paralleled by lower-tier state units in their roles in an “all hands” response.\(^{133}\)

In an early February speech to the Politburo Standing Committee, Xi asserted the importance of a law-based approach to epidemic control and prevention, calling for increased public attention and adherence to the Infectious Disease Law and other laws, and for using the law to punish officials’ dereliction of duty, and any criminal activities that impeded the pandemic response or took advantage of pandemic conditions.\(^{134}\) In that speech and other remarks, Xi argued that it was important to pursue pandemic prevention and control “according to law” and to “follow the path of the rule of law” in such work.\(^{135}\) The State Council White Paper recounting the first months of the response to COVID-19 stated, without details, that the Infectious Disease Law and implementing measures had been “strictly followed,” reported that the authorities had addressed incidents of fraud and other crimes committed in connection with trade in PPE and other matters, and asserted, rather obliquely, that “legal disputes associated with the epidemic” had been “resolved in accordance with law.”\(^{136}\)

---

\(^{133}\) See, e.g., the Notice issued jointly by the NHC, the Ministry of Transportation, and three other government units discussed earlier in this subsection.

\(^{134}\) Xi Stresses Law-based Infection Prevention, Control, XINHUA (Feb. 5, 2020), http://www.xinhuanet.com/english/2020-02/05/c_138758782.htm [https://perma.cc/9TBQ-7GNG]; Xi, supra note 63.

\(^{135}\) Xi Jinping, Quannian tigao yifa fang kong yifa zhili nengli, jianquan guojia gonggong weisheng yingji guanli tixi (全面提高依法防控依法治理能力, 健全国家公共卫生应急管理体系) [Comprehensively Improving Law-Based Epidemic Prevention and Control and the National Public Health Emergency Management System], QIUSHI (求是) [CPC CENT. COMM. BIMONTHLY] (May 2020), http://www.qstheory.cn/dukan/qs/2020-05/29/c_1125641632.htm [https://perma.cc/S3J9-4HSM] (reprinting several Xi speeches from February).

\(^{136}\) STATE COUNCIL INFO. OFF. PRC, supra note 14, § II; see also Regulations on Responses, supra note 31, art. 52 (concerning criminal penalties for offenses in the context of public health emergency).
To address the COVID-19 epidemic, the Chinese leadership also turned to other organizational fixes that long had been in the repertoire of governance for addressing urgent problems. New bodies were established by late January with responsibilities for overseeing, coordinating, and steering the response across otherwise possibly fractious or sluggish units. One major example was the State Council’s Joint Control and Prevention Mechanism. With a leadership role for Vice Premier Sun Chunlan (whose preexisting portfolio included oversight responsibility for the NHC), it was charged with coordinating across thirty-two specified sectors. This approach was reprised at lower levels in Wuhan and other localities, where novel coronavirus epidemic control and prevention emergency headquarters were set up. Such arrangements, too, resonated with relevant laws’ mandates for establishing task-specific “headquarters” or “command bodies” [zhihui bu/zhihui jigou] under the State Council or lower-level governments to respond to public health emergencies, including serious infectious disease outbreaks.

Another key example was the establishment of a party-based “leading small group” [lingdao xiaozu]. One of many such subject matter-based elite ad hoc entities created during Xi’s tenure (and echoing a similar move undertaken in the 2003 response to SARS, but with a lessened role for public health experts), the Central Leading Small Group for Work to Counter the New Coronavirus Epidemic was announced immediately after the lockdown began in

---


138 See Emergency Response Law, supra note 29, art. 8 (authorizing ad hoc headquarters/command body under State Council and lower-level governments to handle responses to emergencies); Regulations on Responses, supra note 31, art. 3 (specifying State Council’s “headquarters” or “command body” roles in responding to public health emergency).
Wuhan and was chaired by Premier Li Keqiang—who, as the head of the State Council, also oversaw the Joint Control and Prevention Mechanism, manifesting the close integration of party and government authority at the top levels of the Chinese system. A leading small group was established within the central NHC structure as well. Throughout, Xi and others among the top leadership repeatedly stressed the importance of following rules and directives issued on behalf of central party and state authorities.

At times, the response to COVID also resonated with other, more heavily political and less institutionalized means that were often employed in an earlier time in the history of the P.R.C. Although the Reform Era that began in 1978 brought a sharp turn away from the “campaign” mode of governance that characterized the Mao era and some of its most disruptive excesses, the notion of pursuing a heroic fight against an abstract enemy echoed, albeit faintly, in the fight against epidemic diseases in the first decades of the twenty-first century. During SARS, China’s then-top leader Hu Jintao spoke of an unrelenting “people’s war” by “the whole nation” under “strong and correct” party leadership against the viral enemy. Such


141 deLisle, supra note 6, at 598 (quoting People’s Daily).
language was less prominent in the early effort against COVID, but it was not absent. In late January, for example, Xi, too, referred to the fight against the epidemic as a “people’s war”¹⁴² and called the coronavirus a “devil” that his administration “will not let hide.”¹⁴³

During and after the initial emergency response, Chinese authorities were able to rely on a robust apparatus of old-style, labor-intensive methods, and new-fangled, high-tech means for monitoring and constraining the behavior of citizens to prevent the spread and reemergence of COVID-19. The ubiquitous guards at the entrances to apartment blocks enforced prohibitions on entry and exit. Bounties were offered for reporting neighbors’ violations of COVID containment rules. Prosecutors’ offices encouraged citizens to inform them—including through the “letters and visits” [xinfang] system that went remote and online amid the pandemic—of COVID-risk-creating unlawful behavior.¹⁴⁴ Residents’ committees [shequ...

¹⁴² Xi, supra note 63; see also Notice, supra note 102 (referring to the response to COVID-19 as a war).
jumin weiyuanhui]—an extra-governmental body under party-state leadership created early in the PRC’s history to establish control at very local levels in cities—were tasked with enforcing quarantine and isolation orders, securing necessary supplies for people under lockdown, and intensively monitoring citizens’ behavior and health status. COVID containment efforts also relied on a ubiquitous “grid” system (established after 2013 to provide more proactive urban social management) that, in the case of Wuhan, divided the city into 10,000 units, with staffing reinforced amid the outbreak by the redeployment of more than 40,000 municipal government staff, to conduct monitoring, transmit directives and information, and provide resources to citizens. Many of these measures had foundations in various laws and regulations, including those that formally gave governmental and other entities expansive authority—and imposed extensive duties on medical institutions, enterprises and citizens to

cooperate—in responding to infectious disease epidemics and public health emergencies.\footnote{See the many provisions cited in note 131. For example, there was, at least arguably, an affirmative legal basis for assigning such roles to the residents' committees. \textit{See}, e.g., Infectious Disease Law, \textit{supra} note 32, art. 9 (providing that residents’ committees are responsible for organizing residents to participate in control and prevention of infection diseases); Emergency Response Law, \textit{supra} note 29, arts. 55, 57 (providing that residents’ committees are to undertake publicity and mobilizational measures to respond to an emergency situation).}

tools included taking the temperatures of people entering factories, office buildings and schools, scanning QR codes to check the “red, yellow, or green” health status of people seeking to use public transportation, tracking down travelers who had been on trains and planes with infected fellow passengers, and tracing the contacts of people who were determined to be infected. Chinese media carried striking reports of people wanted by the authorities turning themselves in because life on the lam had become so difficult amid COVID-driven restrictions on mobility for those who could not obtain the necessary digital permissions.

Legal underpinnings for some of the more intrusive monitoring measures are relatively attenuated and problematic. The principal and most accepted bases are the provisions in the Infectious Disease Law that direct disease control and prevention organs (with an underlying planning role for local governments and the NHC and local HCs) to “monitor/undertake surveillance” [jiance] of infectious diseases and outbreaks of infectious diseases. More specific operational directives to conduct tracking and tracing of people who have COVID-19 and their close contacts, and to use artificial intelligence and big data, as well as extensive low-tech/labor-intensive “grid” surveillance, to contain or prevent spread are contained in a variety “normative documents” [guifanxing wenjian] or “departmental work documents” [bumen gongzuowenjian] that do

[https://perma.cc/DST3-EB7U] (crediting use of big data and AI for playing a significant role in China’s response).


152 Yuan, supra note 148; see also STATE COUNCIL INFO. OFF. PRC, supra note 14, § II.5.


154 See Infectious Disease Law, supra note 32, art. 7. 17–18, 20.
not have the force of law and are issued by the State Council’s Joint Control and Prevention Mechanism or the NHC. The absence of a more clear and robust legal basis has been a source of concern, especially because the measures used for tracking, tracing, and surveilling can involve or lead to coercive measures and entail significant intrusions on personal rights.

---


Finally, in combatting the pandemic, Chinese authorities also benefited from the absence or weakness of features that have been barriers to some types of state responses in some other countries. As a matter of constitutional principle, China is a unitary state in which powers legitimately exercised by lower-level governments are delegated at the discretion of the central government and can be reclaimed or overridden, unlike in a federal constitutional system.\(^\text{157}\) In practice, extensive powers of governance and policymaking have devolved to provincial and sub-provincial units, partly as a conscious strategy during much of the Reform Era. Although the initial reaction to COVID-19 in Wuhan showed the difficulties that can arise from local autonomy, central authorities have retained de facto as well as de jure capacity to reassert control, especially in times of crisis or in pursuit of high-priority goals, and there has been an overall trend toward recentralization since Xi Jinping came to power.\(^\text{158}\) These features were reflected in the response to COVID-19. Once the central leadership moved to implement lockdowns, travel bans, and pervasive surveillance, its actions were not constrained—nor was its ultimate responsibility muddled—by notions about subnational authority or ambiguous allocations of powers and duties between center and localities.\(^\text{159}\)

Efforts to monitor, trace, and contain COVID-19 cases also did not face significant limitations from laws or norms protecting privacy interests. The proper balance between public interests (in the COVID-19 context, public health interests) and privacy rights (in the COVID-19 context, data privacy and surveillance-related issues) has

---


\(^{158}\) See ZHENG YONGNIAN, DE FACTO FEDERALISM IN CHINA (2008); Shirk, supra note 92; Mertha, supra note 28; and supra the discussion accompanying note 112.

become a focus in legal and policy-relevant discussions in China. To the reported frustration of some public health experts trying to implement tracking and tracing to manage COVID-19, some Chinese internet companies resisted providing user information, citing data privacy concerns. But, overall, the regime faced only weak constraints on these fronts. Legal protections for data privacy, privacy rights more broadly, and civil liberties still more broadly (including rights not to be detained in the interest of protecting public health) did not significantly limit state-mandated measures to fight COVID-19. Despite significant changes in China in recent years, cultural norms favoring individual privacy are generally seen as less potent and central in China than in Western societies, and thus are not likely to produce effective pressure on the Chinese government and

---

160 See Shen Kui, The Stumbling Balance between Public Health and Privacy amid the Pandemic in China, CHINESE J. COMPAR. L. (forthcoming 2021) (discussing the factors that have caused China to “stumble” in finding a proper balance between public health surveillance and privacy protection).


effective obstacles to its authoritarian methods for coping with a major crisis.

Although there are reports of popular discontent with some of the methods the authorities adopted to address the COVID-19 epidemic in China, there was no prospect that centrally mandated, high-priority measures would be compromised by lawsuits challenging mask requirements or quarantine orders, mass refusals to install tracking apps or cooperate with contact-tracers, or large-scale defiance among the public or sub-national officials of state-ordered, science-based public health directives. The narrow scope and fragile tolerance for social resistance to legal and policy directives, and the effective tools that authorities can wield to stifle open opposition, constrain the possibilities for public action to affect the regime’s choices. Moreover, many of the measures adopted by the authorities to counter the pandemic appear to have been accepted as legitimate by much of the general public. Social behavior in much of the Chinese Mainland paralleled what was found throughout much of East Asia, from South Korea to Taiwan to Hong Kong to Vietnam, where there were high levels of public compliance with government rules and policies to detect, monitor, and contain COVID-19, and acceptance of restrictions on, or suspension of, ordinary economic and social activities and liberties.

---


Several reforms might improve responses to novel coronavirus-like problems in China. Some signs point to substantial prospects for reform in the aftermath of the COVID-19 crisis. Laws relevant to addressing potential epidemics and public health emergencies underwent significant revisions after the most closely analogous prior crisis—the less disruptive and damaging SARS epidemic in 2003. In June 2020, the government’s White Paper on the response to COVID-19 noted that the battle against the pandemic had exposed various “deficiencies in the national response system” that China would address through measures that were likely to include legal changes. Two weeks after the lockdown was imposed in Wuhan, Xi Jinping called for legal reforms, implicitly to address shortcomings revealed in the COVID-19 response, including moves to “strengthen construction of the rule of law,” to “revise and improve” the Infectious Disease Law and the Wild Animal Conservation Law [Yesheng Dongwu Baohu Fa], and to enact a new Biosafety Law (which was promulgated in October 2020 and in relevant part largely tracks the Infectious Disease Law’s general provisions on reporting, prevention, and control of infectious diseases). A few months later, Xi called for improvement of the systems for detecting diseases of unknown origin and assuring accurate and timely monitoring and reporting of epidemics—an agenda item that echoed the rationale of the post-SARS creation of the Direct Reporting System and acknowledged the need for further reforms.

https://journals.sagepub.com/doi/full/10.1177/0275074020943707

167 STATE COUNCIL INFO. OFF. P.R.C., supra note 14, § II.
changes in the same vein. Still, legal reforms that might achieve significant change face several considerable, and diverse, impediments.

First, as such official statements suggest, post-COVID reforms to laws and rules on preparing for, detecting, and responding to serious disease outbreaks and other emergencies might address some of the issues discussed in this article and other assessments of China’s handling of the novel coronavirus pandemic. Legal reforms could reduce ambiguities in the content—and the allocation—of the powers and responsibilities of officials in local governments and in the central government’s public health and disease control apparatus, including those related to detecting and disclosing to higher levels or to the public an outbreak of a potentially serious infectious disease and the occurrence of a public health emergency. More precise and, often, narrower mandates for specific officials could ameliorate the “Spider-Man principle,” and the confusing or perverse incentives that can affect officials’ responses to early signs of a possible pandemic. Building on provisions in existing laws, reforms


\(^{170}\) See the discussion of the “Spider-Man principle” at supra note 57.

\(^{171}\) See, e.g., Regulations on Responses, supra note 31, art. 24 (stating that all individuals and entities have right to report on potential public health emergency to relevant government organ and to report nonfeasance or malfeasance of relevant government organs to higher level government organs; and granting awards and prizes for individuals and entities for their meritorious work in reporting emergencies); Measures for Information Reporting, supra note 36, art. 37 (requiring an individual or entity to report to relevant-level health commission failure by a reporting entity—such as a medical institution—to make an accurate report of epidemic or public health emergency).

See also Infectious Disease Law, supra note 32, arts. 12, 21, 30–31, 37 (establishing the general duty of units and individuals to provide truthful information on infectious disease incidents; the duty of medical institutions [jigou] to task staff with reporting on epidemics; and the duty of medical institutions and staff obligations to report on infectious diseases and on epidemics); Emergency Response Law, supra note 29, arts. 39, 69 (specifying citizens’, legal persons’, and organizations’ duty to report emergency situations to relevant government agency; and sanctions for individuals or entities disseminating false information about emergency situation or response); Regulations on Responses, supra note 31, arts. 21, 51 (proscribing individual or entity delaying or concealing or making false report on public health emergency,
could give clinicians and hospitals clearer legal rights and duties to effectuate compliance with the goals of the Direct Reporting System, including by bypassing their bosses and local governments to give the CDC, NHC, and other central authorities timely access to vital information. Rules demanding more extensive and more rapid disclosures of disease outbreaks and public health emergencies to the public could increase outside-the-party-state pressure on, and thus accountability of, local officials. Such reforms could offset somewhat the incentives that local officials face to focus on upward accountability to higher-level officials and to succumb to the temptation to take the “cover up” side of the double-or-nothing bet.\(^{172}\)

If such laws were adopted, challenges would still remain. As troubled aspects of China’s response to COVID-19 remind us, while poorly designed laws are likely to lead to failures, even well-designed laws do not assure success. Difficulties arising from structural features of the Chinese administrative state, local government, and the roles of the party can be mitigated only to a limited extent even by clear and well-crafted laws. As discussed earlier in this article, there are sound reasons, and enduring appeal, for both tiao and kuai solutions to problems of Chinese governance. Notably, commentators in China made arguments on both sides of the tiao vs. kuai dilemma when assessing weaknesses in the Emergency Response Law and the Infectious Disease Law in the immediate aftermath of the flawed initial response to COVID-19.\(^{173}\)

Effective reform of complex legal frameworks is all the more difficult when drafters have complex, multifaceted agendas, as they would here. Managing public health threats remains only one

---

172 See Shen, supra note 81, at 34–35 (stating that a reform allowing free disclosure to the public and free discussion of information about risks would create sufficient pressure on governments to respond to risks in a timely fashion).

concern among many for those who design and implement China’s laws. As noted earlier, it is rarely the top worry. Wuhan officials’ delay in publicly disclosing the threat from the novel coronavirus apparently partly reflected concerns about triggering public panic and social disorder. An emphasis on other, traditionally preeminent concerns—such as restoring economic activity—very quickly resurfaced as national-level policy priorities a few weeks into the epidemic once the prevention and control measures appeared to be effective. Dilemmas arising from conflicting and dissimilar policy priorities chronically bedevil political decisionmakers, law-drafters, and regulators everywhere, and China—where their decisions reshape the rules of a very-high-stakes game of “double or nothing” bets for officials bearing multiple duties—is certainly no exception.

Another significant obstacle is captured by a common saying about law in China: zhixing nan—“implementation is hard.” Difficulty in implementation is a ubiquitous issue, but it is especially challenging in systems with several features found in China, including relatively high levels of bureaucratic fragmentation and vast scale (and therefore more layers of government and more numerous and far-flung targets of regulation). As many assessments have noted, the seemingly promising and evidently sincere efforts to build, partly through legal reforms, a more effective system for addressing SARS-like challenges floundered in implementation in the context of the strikingly similar challenges posed by COVID-19.

Second, China could adopt more ambitious laws to address the origins or sources of potential pandemics. The discussion at the beginning of this article joins China’s COVID-19 story in its second chapter, after a tale of earlier failure, including of laws and policies to regulate and limit the risks of deadly and contagious viruses crossing into the human population. Public health authorities in China—and elsewhere—were already well aware that devastating communicable diseases could cross from wild animals to people, and that markets selling wild animals for human consumption offered a dangerously effective pathway (as was recognized to some degree in pertinent laws).174 SARS and other infectious diseases emanating

---

174 See Infectious Disease Law, supra note 32, arts. 25, 42, 75 (concerning control of infectious diseases transmissible between humans and animals, including regulation of trade in wild animals).
from China in recent years had leapt from animals to people through such vectors, and then spread rapidly and widely.175

Yet, when COVID-19 emerged, the post-SARS versions of a principal relevant law—the Wild Animal Conservation Law—still permitted hunting, trapping, breeding, marketing, sale, and consumption of animals that were not on the very limited list of species that authorities had declared rare or endangered and under “priority conservation” [zhongdian baohu].176 Provided that proper licenses and certificates are obtained, the law permits trafficking, including as food for human consumption, of non-domesticated species that are potential hosts for diseases that could pass to humans.177 The law also echoes the tiao vs. kuai ambiguities and tensions of “dual rule” in allocating roles and responsibilities among units in the central specialized bureaucracy and lower-level governments that beset emergency response and infectious disease laws and contributed to the problematic early response to the COVID-19 outbreak.178

On January 26, 2020, three days after the lockdown of Wuhan, the State Administration for Market Regulation, the Ministry of Agriculture and Rural Affairs, and the National Forestry and Grassland Administration—consistent with provisions in the Infectious Disease Law—issued a joint Notice on Prohibiting Trade in Wild Animals. The Notice banned the transportation, trading, and sale of wild animals for human consumption for the duration of the epidemic, called on local governments and relevant departments to strengthen inspections, shut down violators and refer serious violators for criminal prosecution, and encouraged citizens to report illegal


177 Id. arts. 21–23, 27, 30–33.

178 Id. arts. 7–8, 10–19, 25–28, 34–35.
trade in wild animals. Nearly a month later, on February 24, 2020, the National People’s Congress Standing Committee—which has wide-ranging law-making powers—issued a “Decision on Completely Prohibiting Illegal Trade in Wild Animals, Eliminating the Bad Habit of Indiscriminately Eating Wild Animals, and Earnestly Ensuring the Life, Health, and Safety of the People.” The Decision banned hunting, trading, transportation, and use—for human consumption—of wild species of land animals. It also called for heavy penalties for violating existing law and directed governments at all levels to increase supervision, investigation, and punishment of the prohibited activities. Some local governments issued even stricter rules.


The NPC also reportedly decided to fast-track amendments to several public health and safety laws, including revising the Wild Animal Conservation Law to make permanent the restrictions on trade and consumption of wildlife adopted amid the COVID-19 outbreak. But no new amendments were adopted—and further study was ordered—at the NPC’s 2020 session. Initial indications were that the law would continue to permit marketing and consumption of many species as part of traditional Chinese medicine—an exception, critics argued, that would permit public-health-endangering practices to continue relatively unabated.

Here, the issue of zhixing nan—implementation is hard—looms especially large. In addition to the challenges endemic to

---


putting regulatory laws into practice in China, rules that might address the likely sources of COVID-19 and similar epidemics are particularly difficult to execute because they must tackle such widely dispersed behavior by so many actors, and restrict activities on which targeted actors immediately rely for their livelihoods. Pre-COVID-19 efforts to regulate broadly analogous phenomena illustrate the challenges. One example is a mandate to reduce pollution from small-scale factories, the implementation of which would threaten significant numbers of jobs in surrounding communities. Enforcement efforts ultimately turned to what one scholarly account calls “blunt force” implementation—local officials meeting quotas through shutting down some factories, while leaving others to operate, on grounds that bore limited relation to the law’s articulated standards and showed little concern for advancing the law’s policy goals efficiently or with attention to procedural propriety. Another example is rules that sought to end dairy farmers’ malnutrition-causing dilution of milk used for baby formula. In response to those measures, some of China’s many thousands of small producers added toxic melamine to their product to fool government-mandated tests for protein content, which led to tens of thousands of injuries and several deaths of poisoned infants.

Similar problems confront regulatory efforts to restrict or close the wild animal markets that have been the initial pathway for

184 The challenges of sheer scale and multiple levels of government that faced infectious disease and emergency response laws and regulations extend to this context as well. As noted earlier, although less pronounced, the coexistence of tiao and kuai, overlapping or ambiguously allocated authority among specialized functional bureaucracies and local governments, and the need for cooperation across units of governance are also present to some degree in the law addressing trade in wild animals, including for human consumption. See generally Wild Animal Conservation Law, supra note 176, arts. 7–8 10–19. 25–28, 34–35.

185 Denise Sieli van der Kamp, Blunt Force Regulation and Bureaucratic Control: Understanding China’s War on Pollution, GOVERNANCE (forthcoming).

SARS, COVID-19, and other diseases. Measures targeting such markets also would face additional hurdles because they would seek to prohibit something popular with many consumers. In such contexts, effective administrative enforcement and sanctions can be impossibly costly, as well as unpopular in affected sectors. More limited measures to reduce the problematic behavior would require fewer resources, and risk less resistance, but they are likely to be too weak to effect the necessary changes in behavior. Publicity and education campaigns are much touted and often tried, but are likely to fall short of achieving widespread compliance.

Third, reforms could allow mechanisms outside the administrative state to play greater roles in ameliorating some types of problems seen in the COVID-19 epidemic. Legal reforms, including expanded legal rights for non-state actors to expose emerging problems, or tightened restrictions on state authorities’ discretion to censor and sanction them, could reduce impediments to early warnings by doctors and others at the front lines of handling disease outbreaks, and reporting by old and new media. These could provide effective supplements to, or substitutes for, state channels and thereby mitigate problems of error, shirking, and concealment by officials.

A key moment in accelerating the belated response to SARS had come when surgeon Jiang Yanyong made public, through outside media, a level of infection far exceeding official accounts. When


the novel coronavirus first emerged in 2019, opportunities for a fast and effective response were lost when local authorities in Wuhan silenced medical staff—most notoriously when police warned Dr. Li and others that communicating information about the disturbing new pneumonia via social media was unlawful, when hospital officials warned Dr. Ai—a key source for Li—to keep silent, and when censors blocked COVID-related posts by Li and others. On the other hand, in the early days of the novel coronavirus outbreak, China’s constrained cyberspace informed policy responses in ways that could not have occurred sixteen years earlier—possibly having alerted central authorities to the emerging problem in Wuhan (by leaking the WHC’s previously undisclosed documents) and pushing local authorities to adopt more effective or less abusive methods to combat the virus (through a torrent of critical posts by netizens targeting mayors, municipal party secretaries, and other officials and institutions).

Reform advocates long have urged more robust legal protections for whistleblowers and, a more diffuse public “right to know,” particularly during public emergencies. Such reforms would be consistent with, and could be justified as serving, the principle—long accepted by the party and state—of “people’s supervision” over political and governmental authority. There are some foundations for a modest public right to know—or at least the correlative obligation to inform—in the provisions in emergency response and infectious disease laws and regulations concerning public warnings and announcements of measures to address imminent or occurring epidemics. Reforms in this vein thus could

https://www.ft.com/content/cf59b132-43d7-11ea-a43a-c4b328d9061c [https://perma.cc/GM34-PTR5].

189 See supra text accompanying note 40.
191 See Xiaoling Zhang, Breaking News, Media Coverage and “Citizen’s Right to Know” in China, 16 J. CONTEMP. CHINA 535, 535 (2007) (“[A]lthough the Chinese media do not lack the capacity to honor the ‘citizen’s right to know’, the coverage of breaking news is determined by the state’s perception of a given situation.”); deLisle, supra note 8, at 386–87.
192 See Infectious Disease Law, supra note 32, arts. 65, 68(5) (imposing legal responsibility/sanctions on government entities that conceal facts on epidemic
build on provisions in existing law and policy. In assessing the early phases of the handling of COVID-19, Chinese authorities implicitly acknowledged that suppressing warnings from society was improper and counterproductive: Li—who in the interim had died from COVID-19—received praise in official media as a hero, posthumous awards and recognition from party-linked organizations, a revocation of the Wuhan Public Security Bureau’s admonition, and further vindication in the form of statements from a CDC official and the Supreme People’s Court’s social media account that criticized the behavior of the Wuhan police in stifling Li and others.193

China’s internet and social media are a promising space for achieving vital transparency, as the early days of COVID-19 illustrated. For a brief time, Wuhan doctors and their friends

situation or unlawfully fail to perform responsibilities under the law—a category that includes notifying the public when the laws so require). See also supra the provisions that address reporting obligations of medical institutions and staff in note 158.

managed to post reports about the eruption of the virus. Disgruntled netizens were able to circulate deleted media articles on COVID-related issues. Wuhan resident and eminent Chinese author Fang Fang wrote quickly censored but widely read “diary” posts for her nearly four million Weibo followers detailing the experiences of residents and governmental missteps in Wuhan under lockdown—except for a period in February 2020 when her account was suspended. Conventional media offer another potential avenue, as the initial weeks of the novel coronavirus showed. Exposés and journalistic first-draft post-mortems of flawed initial responses to COVID-19 appeared in Caixin magazine, Zhongguo Qingnian Bao [China Youth Daily], and other media venues. Amid the pandemic, some prominent scholars in law and other fields identified a lack of protections for freedom of the press and freedom of expression as a cause of the government’s failure to deal with the emerging pandemic earlier and more effectively.

Prospects for major changes on these fronts remain modest. As the experiences of Dr. Li, Fang Fang, and other would-be informers of the public underscore, social media content and other citizen statements unwelcomed by authorities can be taken down, content-providers sanctioned, and prospective voices deterred—in


part pursuant to broad and vague rules that prohibit and punish spreading rumors.\footnote{See generally Rogier Creemers, Cyber China: Upgrading Propaganda, Public Opinion Work and Social Management for the Twenty-First Century, 26 J. CONTEMP. CHINA 85, 91–93 (2017) (detailing the development of policy against spreading rumors online that may cause “social panic”); Maria Repnikova, China’s Lessons for Fighting Fake News, FOREIGN POL’Y (Sept. 6, 2018), https://foreignpolicy.com/2018/09/06/chinas-lessons-for-fighting-fake-news/ [https://perma.cc/2Y6X-5CKK] (discussing widespread measures taken by the Chinese government to crack down on online rumors); Emergency Response Law, supra note 29, arts. 65, 68 (imposing sanctions, including criminal punishment, for spreading false information concerning emergency situation or response).} As illustrated by the taking down of state-linked People magazine’s WeChat-posted interview with Ai Fen, state control and party directives still impose serious—and, in recent years, tightening—limitations on the media, restricting their ability to report on emerging crises and governance failures.\footnote{Kuo, supra note 14; Huang, supra note 42. See also 2020 World Press Freedom Index, REPORTERS WITHOUT BORDERS, https://rsf.org/en/ranking_table [https://perma.cc/PT9K-NE95] (last visited Aug. 14, 2020) (ranking China 177 out of 180 entities in press freedom); Susan L. Shirk, Changing Media, Changing China, in CHANGING MEDIA, CHANGING CHINA 1, 2–3 (Susan L. Shirk ed., 2011) (noting that despite increased commercialization of the media in the 1990s, “China is nonetheless still a long way from having a free press”).} At the same time, China’s information environment of controlled and censored institutional media and sometimes-rumor-filled social media can lead audiences to infer that the real situation well may be more dire than what often-unforthcoming official and establishment sources reveal. This is all the more likely to be the case in frightening and fast-moving crises such as COVID-19.\footnote{Issaku Harada, Surge in Chinese Virus Cases Fuels Public Distrust of Official Data, NIKKEI: ASIAN REV. (Feb. 14, 2020, 2:05 AM), https://asia.nikkei.com/Spotlight/Coronavirus/Surge-in-Chinese-virus-cases-fuels-public-distrust-of-official-data [https://perma.cc/H7D4-VXK2]; Daniel Victor, Panic and Criticism Spread on Chinese Social Media Over Coronavirus, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/world/asia/china-social-media-coronavirus.html [https://perma.cc/Q4Z8-WXMF].} Such public misimpression and mistrust pose additional problems for the regime’s capacity to respond effectively to COVID-19-like challenges. This, in turn, suggests that the authorities could be better able to pursue their own goals in preventing, detecting, and containing infectious disease outbreaks and public health emergencies if new and old media faced lesser restrictions.
Major changes on these fronts will be difficult to achieve absent more fundamental and wide-reaching reforms, such as robust protection for freedom of speech and the press, or tolerance for the development of a more autonomous civil society. Tellingly, many months after the beginning of the COVID-19 crisis, there still have been almost no public discussions or published investigations in China into the origins of the epidemic, despite serious public concern about such issues and the regime’s handling of it.\textsuperscript{199}

Finally, reforms could make more permissible and promising lawsuits by injured or aggrieved citizens that could increase retrospective accountability for flawed government responses to crises akin to COVID-19 and, in turn, incentivize officials to avoid recurrence in future potential crises. In the melamine-tainted milk scandal, the aftermath of the Wenchuan earthquake (when several thousand children died in shoddily constructed school buildings approved by corrupt or indolent officials), and other large-scale disasters, victims and their lawyers have sought remedies from China’s judiciary. These efforts have included both administrative lawsuits against officials and government entities and mass tort claims against officials or private defendants in cases that have involved, and exposed, government failure.\textsuperscript{200}


When they go forward (and sometimes even when they do not), such lawsuits can serve a purpose that the regime should welcome as consistent with its interests in effective governance and its expressed preferences for rule by law. They can enlist harmed or at-risk citizens to expose malfeasance in governance, and thereby spotlight needs for corrective measures that can reduce the likelihood of public health and other emergencies, and the threats they can pose to the economy, social stability, and the regime’s popular legitimacy.

Yet, here too, prospects for major change appear modest. Such legal claims sometimes will fail for any number of reasons, including courts’ refusal to adjudicate the cases on their own initiative or under directives or pressure from political authorities at various levels. The melamine milk, Wenchuan earthquake, and kindred public health and safety crises have spawned lawsuits, but they rarely get very far in court. Early attempts to bring COVID-19 suits seem very unlikely to fare better. State-brokered compensation schemes sometimes have followed for groups of victims, but, absent significant and effective reforms expanding court access and judicial remedies, potential plaintiffs often will be deterred by slim chances for success or concerns about retaliation by targeted officials. Class action suits, a vibrant cadre of crusading mass tort lawyers, and doctrinally innovative pro-victim courts have played major roles in fostering legal means for promoting accountability for regulatory

---


---

[Permalink](https://perma.cc/8AWH-S6NB).
failure—and, in turn—recurrence-reducing reforms in some countries, but such “bottom-up” forces for law-driven change have not been present in China, and they are not likely to emerge in the near future.203

CONCLUSION: COVID-19 AS A CASE STUDY OF CHINA’S GOVERNANCE AND REGULATORY STATE

China’s response to the challenges of COVID-19 offers a case study of law, the regulatory state and governance in China. The initial, troubled response to the outbreak of the novel coronavirus in Wuhan improved upon the early handling of the SARS crisis in 2003, in part reflecting the partial success of legal and regulatory reforms adopted to implement the lessons of SARS. At the same time, the damaging delays in reporting and responding to COVID-19 reflected not only shortcomings in those reforms but also, and more importantly, distinctive and enduring features of the system, including: the coexistence of, and tensions between, kuai-based approaches that give power and responsibility to local-level governments, and tiao-based approaches that assign key roles to centralized, functionally specialized bureaucracies; the perverse incentives local-level officials face to try to cover up potentially serious emerging problems, which ultimately can make the consequences far worse; the fragmentation of institutions that stems from officials’ strong identification with their particular units and the relative weakness of some vital systems (such as the national public health bureaucracy) and that results in collectively ambiguous rules emanating from multiple sources and daunting challenges of coordinating among siloed entities to achieve coherent government action (especially

where the necessary measures could imperil traditionally higher-priority policy goals).

After these initial shortcomings, China’s largely successful, centrally mandated efforts to contain the pandemic, and prevent its recurrence, also reflected defining and durable features of the Chinese systems of law, regulation, and governance. The response relied significantly, but only partly, on law-based means. It showed a highly capable, centralized and authoritarian party-state that could: mobilize vast governmental and societal resources; overcome challenges of steering fragmented and sprawling institutions; deploy a repertoire that included high-profile directions from top-level leaders, new ad hoc government and party coordinating bodies, informal political exhortations, and a formidable array of long-standing low-tech and newer high-tech mechanisms for monitoring and controlling citizens’ actions; and operate free from much constraint by quasi-federalist powers of local governments, autonomy or privacy rights of individuals, or popular resistance and public protest.

Finally, prospects for post-COVID reforms, too, illustrate characteristic features of Chinese law, regulation, and governance. Post-COVID measures are likely to follow a typical pattern of adopting legal reforms to address the perceived sources of past shortcomings, such as structural and procedural problems of regulation that seem to have led to an initial slow response and local-level cover-up (in the case of the Wuhan outbreak), and tightening regulation of underlying sources of the problem (trade in wild animals, in the case of the novel coronavirus). But such reform measures will face familiar and pervasive impediments: the compelling appeal and stubborn entrenchment of both the kuai and tiao approaches (despite their problematic interactions); the pervasive difficulty of implementing ambitious policies (especially where they target large-scale, dispersed, and valued behavior); and a persisting reluctance to adopt more transformative laws or policies that would protect whistleblowers, allow freer traditional and new media, accept a public “right to know,” or permit accountability-promoting civil or administrative lawsuits by victims of regulatory failure.

To acknowledge these limits to prospective legal reforms—and to the roles of law in China’s response to crises and means for managing crises—is not, however, a counsel of despair. Past legal reforms have achieved some success. More reforms are likely in the aftermath of the COVID-19 crisis. And, for good and for ill, the tools
of regulation and the roles of law in China have proved susceptible to significant, and sometimes relatively sudden and dramatic, change.