

Review of Regulations in the People's Republic of China¹

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Part I: Introduction

The People's Republic of China (PRC) is a vast, rapidly developing country moving from a planned economy to a market economy.² In the PRC - probably to a greater extent than in other countries - regulations exist that control enterprises and their business in every stage of their existence.

One aspect of government regulation is of interest to both worlds, east and west: the reviewability of regulations. The judicial review of regulations is a very important feature for responsive rules once a certain growth of economic development and corollary complexity of regulations has been reached. Judicial review can help to retain regulations as an effective tool of government.³

It is in the interest of every citizen (but especially of those who are engaged in work where they are subject to intensive governmental regulations) to ensure that regulations are in accordance with the law, that they do not violate constitutional or otherwise guaranteed rights, and to ensure that the bureaucracy follows its own regulations. The method most commonly⁴ used to achieve these aims is judicial review.⁵ The subordination of the

¹ The following article is a brief excerpt from the Master's Thesis written during the author's studies at the University of British Columbia, Vancouver, Canada in 1991/1992. Thesis supervisors were Prof. Dr. Pitman B. Potter and Prof. Phil Bryden whom I have to thank for their numerous comments. They do not bear any responsibilities for the remaining errors and inconsistencies in this article. Cited literature (especially the Chinese language material) has been updated as far as possible.

² For an overview on these economic reforms see *M. Klingst*, "Die chinesischen Wirtschaftsreformen seit 1978 unter besonderer Berücksichtigung der Sonderwirtschaftszonen", (1986) *Verfassung und Recht in Übersee (VRÜ)* 57.

³ The methodological questions and problems arising from the fact that socialist public law in China is researched in a comparative way have been addressed in the original thesis; due to limited space those issues cannot be included in this article.

⁴ A thorough study about how wide-spread judicial review is around the world, although with distinctly different features, is provided by *A.R. Brewer-Carías*, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989); Asian countries are, however, not covered; but see *K. Urata*, "The Judicial Review System in Japan -Legal Ideology of the Supreme Court Judges" (1983) 3 *Waseda Bulletin of Comparative Law* 16; *Fa, Jyh-Pin*, *A Comparative Study of Judicial Review under the Nationalist Chinese and American Constitutional Law* (Baltimore: School of Law, University of Maryland, 1980).

administration to the law of the land as administered by ordinary courts has been described as the very essence of the rule of law.⁶ Research done into specific business regulation also stresses this point.⁷

How does the PRC cope with the challenge of installing the rule of law in the area of review of regulations? It is the aim of this article to explain and clarify review possibilities in the PRC and thereby answering the question formulated above.

Part II: Regulation Review Possibilities

Art. 5 Section 2 of the Chinese Constitution of 1982 stipulates that "no law or administrative or local rules and regulations shall contravene the Constitution," but no procedures are in place to ensure the enforcement of this section.⁸

Strictly speaking, there is no judicial review of regulations in China. Article 12 Section 2⁹ of the Administrative Litigation Law (hereinafter ALL) expressively states that these cases are not to be heard in the courts:

- 5 "Two fundamental objects of a system of judicial review: one, ensure that all those acts of the state are adopted or issued in accordance with the law of the said state; two to ensure that the state acts respect the fundamental rights and liberties of citizens", *Brewer-Carias, supra*, note 4 at 81. The other possibility is to prescribe procedures about how administrative decisions have to be made. On the prospect for an administrative procedure law in China see *Ying, Songnian*, "Xingzheng chenxu lifa tansuo" (Inquiry about legislation on administrative procedure), (3/1992) *Zhenfa luntan* 1.
- 6 *B. Schwartz*, "Fashioning an Administrative Law System" (1988) 40 *Administrative Law Review* 415, at 417 to 419.
- 7 For China see *M. Gilhooley*, "Pharmaceutical Drug Regulation in China" (1989) 44 *Food Drug Cosmetic Law Journal* 21 at 39; *S.R. Austin*, "Advertising Regulation in the People's Republic of China" (1983) 15 *Law and Policy in International Business* 955 at 957; both articles also see a trend that in the regulations examined nationals (Chinese citizens) are favoured over foreigners *Gilhooley* at 32; *Austin* at 958; on advertising see also *D.B. King / Gao, Tong*, *Consumer Protection in China: Translations, Developments, and Recommendations* (Littleton, Colo.: F.B. Rothman, 1991) at 9.
- 8 For an excellent overview of the background of the Chinese system of judicial review see *Fa, Jyh-Pin, supra*, note 4, at 9-44.
- 9 Translation into English in 5 *CLP*, Vol. III, June 5, 1989, 37; or by *S G. Wood / Liu Chong*, "China's Administrative Procedure Law: An English Translation with Comments" (1991) 43 *Administrative Law Review* 89; translation into German by *R. Heuser*, "Das Verwaltungsprozeßgesetz der Volksrepublik China" (1989) *Verwaltungsarchiv*, 437; short evaluation by *P. Potter*, "Administrative Litigation Law May Offer Some Protection Against Abuse of Power" (Nov 1990) *East Asian Executive Reports* 9; on the historical background of administrative litigation in China and the ALL see *S. Finder*, "Like Throwing an Egg against a Stone - Administrative Litigation in the Peoples's Republic of China" (1989) 3 *Journal of Chinese Law* 1 at 8.

People's Courts shall not hear suits involving the following matters brought by citizens and legal persons or other organisations; namely (...)

(ii) administrative laws and regulations or universally binding decisions or orders formulated and promulgated by administrative authorities.

Law-making organs alone are empowered to carry out the *actus contrarius*: nullify regulations (Art. 62 Section 11; 67 Sections 7 and 8; 89 Sections 13 and 14 of the PRC Constitution).

Nevertheless, regulations and their application can be challenged by citizens and organisations in various ways in China, and a review in the sense of evaluation of its legality is performed.¹⁰ It is necessary however, to first describe what is meant by "regulations" in the PRC legal system.

I. The System of Regulations

The legal system of the People's Republic of China has to a good part been built with and upon regulations.¹¹ Although it has been said that "a state which is about to perish is sure to have many governmental regulations,"¹² perishing seems not to be on the agenda for the intermediate future and China has to find a way to deal with the problems these governmental regulations create.

¹⁰ This is the opinion of most Chinese scholars according to Wang, Zhengli, "Xingzheng susong fa shishi zhong de ruogan wenti - 1990 nian zhongguo faxue hui xingzheng faxue yanjiu huinian hui conshu" (Some problems concerning the Administrative Litigation Law - Summary of the Annual Meeting of the Administrative Law Association in 1990) (2/1991) Zhongguo faxue (Chinese Law) 121 at 122.

¹¹ Kong, Xiaohong, "Legal Interpretation in China" (1991) 6 Connecticut Journal of Law 491 at 505 speaks of tens of thousands of administrative regulations. One exclusion will be made here: this article will only examine regulations that are in force on a national level and will disregard local (*difang xing*) regulations. On those see Xu Junlun, "Difang renmin zhengfu guizhang zhiding de jiben tezhen" (Basic characteristics of the system of local government regulations) (3/1992) Zhongguo faxue 68; Zhou Wei, "Difangxing fagui mingcheng biao zhunhua yu guifanhua lunyao" (On normalization and standardization of names of local law) (3/1992) Zhongguo faxue 105; Li Kejie, "Ye lun difangxing fagui mingcheng de guifanhua" (Talking about normalization of names of local laws and regulations) (6/1992) Zhongguo faxue 99; Wu Gaosheng, "Shilun difangxing fagui yu guowuyuan bumen guizhang zhi jian maodun de jie jue" (On resolving contradictions between local law and regulations of the State Council), (3/1992) Zhongguo faxue 65.

¹² Quote from the Tso Chuan, translated by Legge, V, 609 and quoted in D. Bodde / C. Morris, Law in Imperial China (Cambridge, Mass.: Harvard University Press, 1967) at 16/17.

Chinese officials and legal scholars increasingly recognize the problems posed by regulations as is reflected in regulations,¹³ numerous law review articles¹⁴ and sections in treatises about administrative law.¹⁵

1. Forms and Levels

What forms do Chinese regulations take? According to Chinese administrative law treatises,¹⁶ the broad category of abstract administrative actions (*chouxing xingzheng xingwei*) - as opposed to concrete administrative actions (*juti xingzheng xingwei*) - includes two separate sub-categories: *fagui* and *guizhang*.¹⁷

- 13 Xingzheng fagui zhiding chengxu zhanxing tiaoli (Preliminary Regulations to establish a procedure for administrative regulations), Zhonghua Renmin Gongheguo Guowuyuan Gongbao (Gazette of the State Council), (1987), No. 13 at 454 [hereinafter Procedures]; Fagui, guizhang beian guiding (Order to put fagui and guizhang on record), State Council Order No. 48, Guowuyuan gongbao (Feb. 18, 1990), Nr. 3, at 86, [hereinafter Order No. 48]. The improvement of legislation is mentioned as point two in the Circular of the State Council concerning the Administrative Litigation Law, Guowuyuan guanyu guanche shishi "Zhonghua renmin gonghe guo xingzheng susong fa" de tongzhi, Guowuyuan gongbao, (1990), No. 1 at 10.
- 14 For example Zhu, Xinli, "Lun faguan dui guizhang yi xia de xingzheng guifanxing wenjian de jianchaquan" (The rights of the courts to inspect administrative statutes under regulations), (5/1993) Faxue zazhi at 18; Zhong, Genda, "Luelun dui fatiao shouquan lifa de kongzhi" (On control of delegated legislation by the enabling law) (2/1993) Zhongguo faxue at 26; He, Naizhong, "Xingzheng shouquan tanxi" (On administrative delegation) (5/1992) Faxue zazhi at 5; Song, Quanzhong, "Guanyu guizhang ruogan wenti de tantao" (Inquiry into some questions concerning guizhang), (5/1991) Faxue zazhi at 10; Liu, Han, "Lun guizhang" (On guizhang) (4/1991) Faxue yanjiu (Legal research) at 24; Yang, Haikun, "Fei xingzheng lifa de chouxiang xingzheng xingwei" (Abstract administrative actions that are not administrative rule-making) (5/1991) Faxue zazhi at 4.
- 15 Wang, Deyi / Long, Yifei / Sun, Maoqiang (eds.), Xingzheng susong shiwu daolun (Practice and Theory of Administrative Litigation), (Beijing: Law Publishers, 1991); Luo, Xiaodang / Bao, Shiqing, "Guifan chongtu he falü guifan de xuanze shiyong" (Conflicts of Standards and the Selection of Applicable Legal Standards), in Luo, Haocai / Ying, Songnian (eds.), Xingzheng shenpan wenti yanjiu (Research on issues on administrative litigation) (Beijing: Beijing University Press, 1990) 233; Luo, Haocai / Ying, Songnian (eds.), Xingzheng Susong Faxue (The Study of Administrative Litigation) (Beijing: China University of Politics and Law, 1990) [hereinafter Susong Faxue]; Luo, Haocai / Ying, Songnian, Xingzheng lifa (Administrative legislation), (eds.) Xingzheng faxue (The study of administrative law) (1989), Chapter 4, at 90-132 [hereinafter Lifa].
- 16 Li, Guozhi (ed.), Xingzheng fa cidian (Administrative law dictionary) (Taiyuan: Shanxi University Press, 1989) at 85; Fang, Xin (ed.), Xingzheng susong zhinan (Guide to administrative litigation) (Beijing: People's Press, 1990), at 588 and at 748; Luo, Xiaodang / Bao, Shiqing, *supra*, note 15 at 235, the hierarchy given there is *jiben fa*, general laws (*putong fa*), administrative *fagui*, departmental *guizhang*, *fagui* of a local nature and local government *guizhang*. There are also abstract administrative actions which are not *fagui* or *guizhang*, on those see Yang, Haikun, *supra*, note 14.
- 17 I will use the Chinese terms throughout this article because this will help to avoid confusion; the term regulations will include both categories. Translating *fagui* as "Verwaltungsvorschriften" and *guizhang* as "Verwaltungsverordnungen" is Heuser, *supra*, note 9 at 444.

Recent studies in the Chinese bureaucracy have stressed the need to understand the bureaucratic system through the terms and distinctions employed by the participants; one cannot fully interpret the nuances of bureaucracy without viewing it in the categories its participants employ.¹⁸ The division into these different categories is not strictly adhered to. One author,¹⁹ for example does not recognize local *guizhang* as *guizhang* at all but then further distinguishes into governmental *guizhang* and those of departments or commissions.²⁰

In the area of regulations one wants to know what exactly is meant by a specific name for a regulation and what is the scope of its applicability.

a) *Fagui*

If we equate forms with names, this question has for the category of *fagui* in part been answered by the "Provisional Regulations concerning Procedures for the Formulation of Administrative Regulations" of the State Council of 21 April, 1987.

These regulations prescribe that only three different terms are to be used when issuing regulations, and to each of the names a defined scope of their allowed content is given, when to apply that specific term:²¹

- tiaoli* = regulations shall mean regulations that are "comparatively comprehensive and systematic in their effect on a particular aspect of administrative work";
- guiding* = provisions is intended for those regulations that affect only "a part of a particular aspect of administrative work"; and
- banfa* = measures is to be applied to those that have "a comparatively specific effect on a particular administrative undertaking".

Before this regulation came into effect more than 40 different designations were used,²² and even now the application of this regulation is far from strict.²³

¹⁸ K. Lieberthal / M. Oksenberg, *Policy Making in China, Leaders, Structures, and Processes* (Princeton, N.J.: Princeton University Press, 1988) at 393.

¹⁹ Zhang, *Chunfa*, "Zhengfu guizhang de ruogan wenti" (Some questions concerning governmental regulations) (1/1991) *Faxue yanjiu* (Legal Research) 15 at 17 and 18.

²⁰ Their status has not yet sufficiently clarified, see e.g. Wang, *Zhengli*, *supra*, note 10 at 123.

²¹ Procedures, *supra*, note 13. Translation provided by Keller, "Legislation in the People's Republic of China" (1989) 23 *UBC Law Review*, 653 at 672; complete translation in *Selected Foreign-Related Laws and Regulations of the PRC*, Vol.2, Institute of Chinese Law, 395; the question of forms becomes even more complicated when translations into a foreign language are involved, on that see T.T. Hsia / C.A. Johnson, "Lawmaking in China" (Sept 1987), *East Asian Executive Reports*, at 12 with concrete suggestions.

b) *Guizhang*

The second category of administrative regulations are called *guizhang*. Most concrete administrative acts are based on them.²⁴ Which forms of regulations belong to it is less clear.²⁵

They include rules formulated by departments of the State Council, as Art. 3 Section 2 of the *Procedures* determines that they shall not be called *fagui* (that is *tiaoli*, *guiding* or *banfa*).²⁶ They can make detailed rules (*shixing xize*), though (Art. 6 Section 2). Occasionally it is stated that the standards issued by relatively low level administrative organs do not possess the effect of law, their effect is dependent on whether the provisions are identical with higher level administration.²⁷ But this is not the prevailing opinion. Another author²⁸ asserts that they have legal nature, belong to the category of law and are an important part of the state legal system. They are flexible instruments and contain a high level of administrative expertise.²⁹

To understand the extent of the usage of this form of administrative rule-making, one should know that out of the total of over 20,000 regulations in China about 80 are law,

²² Hsia / Johnson (Jan 1987), *supra*, note 21 at 6 with further references. A flavour of this situation is given from page 81 to 112 in the *Xingzheng fa cidian* (Administrative Law Dictionary), Li, Guozhi (ed.) (Taiyuan: Shanxi University Press, 1989) where under the heading of administrative actions (*xingzheng xingwei*) different forms are listed, defined and explained.

²³ Examples of that are the several names for documents not to be considered regulations, but still legally binding; especially popular is "*tongzhi*" = circular, also "*yueding*" = arrangement, and "*xize*" = detailed rules can still be found in the 1990/1991 numbers of the State Council Gazette. A contradiction already exists with Order No. 48, *supra*, note 13, Art. 2, Section 2, *guiding* and *banfa* are quoted as examples for *guizhang* !

²⁴ According to Huang, Shuhai (ed.), *Xingzheng fuyi tiaoli jiangzhuo* (Lectures on the Administrative Reconsideration Regulations) (Beijing: Public Security University Press, 1991) at 120 70 % of all concrete administrative acts are based on *guizhang*.

²⁵ Joint legal documents between state and party organisations are also called *guizhang*, Bian, Fuxue / Zhao, Zaichun, "Guizhang zai xingzheng shenpan zhong de jiaoli ji qi shiyong" (The Effects and Application of Rules in Administrative Trials) in Luo, Haocai / Ying, Songnian (eds.), *Xingzheng shenpan wenti yanjiu* (Research on issues on administrative litigation) (Beijing: Beijing University Press, 1990) 257 at 259; on those see also E.J. Epstein, The Role of Legal Consciousness in the Rule of Law - Implications for China, paper presented at the International Conference on the Rule of Law and Socio-economic Development, Beijing September 21-25, 1991, Institute of Law, Academy of Social Sciences [unpublished] at 14/15.

²⁶ *Procedures*, *supra*, note 13. One textbook, Bian, Fuxue / Zhao, Zaichun, *supra*, note 25 lists *banfa* among the forms that are *guizhang*, at 257. Also Order No. 48, *supra*, note 13, Art. 2, Section 2. Song, Quanzhong, *supra*, note 14 at 11 suggests only to allow *guize*, *yueding*, *shixing* ... *xize* or *shixing* ... *banfa* as names for *guizhang*.

²⁷ Luo, Xiaodang / Bao, Shiqing, *supra*, note 15 at 234.

²⁸ Bian, Fuxue / Zhao, Zaichun, *supra*, note 25 at 260.

²⁹ Liu, Han, *supra*, note 14 at 26.

about 2,000 are *fagui* and the rest are *guizhang*. The Ministry of Industry and Commerce uses more than 180 regulations and of those 130 (70 %) are *guizhang*.³⁰

2. Preconditions for Review : The Problem of Secret Law

Publicly available law is a necessary precondition for the control of regulations through judicial review, but it is well known that bureaucracies as an organizational unit have the tendency to keep their rules secret. China has been described as one of the most secretive societies in the world,³¹ and the question is whether the preconditions for review really are in place in China.

Generally, it is still very difficult to find all regulations relevant to a certain substantive issue. A yearly compendium of laws and regulations (*Zhongguo renmin gongheguo fagui huibian*) is published, but it does not have all laws and regulations in it that are in force. Since 1987 all administrative regulations enacted by the State Council have to be published in the State Council Gazette,³² but no requirement exists to publish either regulations enacted before that date, departmental regulations, regulations designated as internal (*neibu*) or State Council quasi-legal official documents.³³ Citizens and legal persons are thus faced with a huge body of secret law and the resulting confusion as to what they can - and cannot - do.

The classification as *neibu* has several far reaching results: disclosure is a punishable offence, especially if state secrets are divulged to foreigners (Art. 32 State Secrets Law).³⁴ How *neibu* documents are treated in trials is unclear; regulations might not be admitted as evidence, the court might not be able to take official notice of them, or the whole trial might be conducted as closed to the public.³⁵

³⁰ *Bian, Fuxue / Zhao, Zaicun, supra*, note 25 at 264.

³¹ *T. Gelatt, "The New Chinese State Secrets Law" (1989) 22 Cornell International Law Journal 255.*

³² See Art. 16 of the Procedures, *supra*, note 13; legal practioners ascertain though that the practice falls far short of this ideal.

³³ Art. 17 of the Procedures, *supra*, note 13, only speaks of promulgation, not of publishing. Also Order No. 48, *supra*, note 13, in Art. 4 demands filing only for the record and the annual report (Art. 10) does not seem to be a document for a publication of *guizhang*.

³⁴ English translation by *Gelatt, supra*, note 31 at 262; German translation by *R. Heuser, "Das Neue Chinesische Recht zum Staatsgeheimnisschutz" (1989) WGO-MfOR 47.*

³⁵ In the context of Art. 10 Section 2 of the Administrative Reconsideration Regulations (decisions concerning personnel) *Fang, Xin, supra*, note 16, at 75 speaks of the possibilities to make suggestions concerning *neibu* regulations to the supervision offices.

Chinese legal scholars increasingly realize that secret law is a problem and give advice, for example on how to publish *fagui/guizhang* compilations.³⁶ One author says that publication is necessary for regulations to become effective, but this would not apply to *neibu* regulations.³⁷ Most deplorable, too, is that a proper index seems to be unknown in China (though alphabetical indexes would be possible both in *Hanyu Pinyin* and through a stroke number methods). It makes finding information in compilations of regulations or even simple law monographs awfully arduous.³⁸

II. The System of Review

1. Petitions

Article 41 of the Constitution gives citizens of the PRC the right to criticize and make suggestions to any state organ or functionary; to make complaints and charges against relevant state organs or exposure of any state organ or functionary for violation of the law or dereliction of duty. This so-called "letters and visits" system (*xinfang*) is a supra-legal practice to safe-guard socialist legality³⁹ that has no procedural framework attached to it, the only requirement for the state agency being to deal with the petition in a responsible manner after ascertaining the facts.⁴⁰ The system nevertheless seems to be a well-established practice and numerous incidents of its use are reported.⁴¹ There are no legal limits on what can be accepted as a complaint, so complaints about regulations are possible.⁴²

These ombudsperson's offices (*xinfangchu*) are commonly attached to government departments and levels of the Party hierarchy and individuals with work-related or other com-

³⁶ Wang, Deyi et al., *supra*, note 15 at 292/293; Liu, Han, *supra*, note 14, at 27 and 29, critical of publication practices concerning *guizhang* are also Zhang, Chunfa, *supra*, note 19 at 18/19; Zhong, Genda, *supra*, note 14 at 28.

³⁷ Zhang, Shangzhuo (ed.) *Xingzheng faxue* (The Study of Administrative Law) (Beijing: Beijing University Press, 1990) at 195.

³⁸ Which might be exactly why indices are not used.

³⁹ H. Oda, "The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East Asian States" (1987) 61 *Tulane Law Review* 1339 at 1348.

⁴⁰ For more details on the petition system see Finder, *supra*, note 9 at 4 with further references; or R. Heuser, "Vorschriften über den Widerspruch gegen Verwaltungsakte" (1991) *Jahrbuch für Ostrecht* 493 at 494 note 5.

⁴¹ E.J. Epstein, "Administrative Litigation Law" (1989) *China News Analysis* No. 1386, 3 with further references; complaints are still invited by Peng Chong, vice-chairman of the Standing Committee of the NPC, FBIS China 91-063, 2 April 1991, 39; according to statistics more than 180.000 cases have been accepted by supervisory organs and 40.000 cases of lawlessness and indiscipline been handled, FBIS China 90-248, 26 December 1990, 23.

⁴² Wang, Deyi et al., *supra*, note 15 at 29, but only suggestions are possible as outcome. It is further argued that the petition organs have the duty to inform the complainant and the reconsideration agency when the case is suitable for reconsideration under the ARR.

plaints are able to seek assistance from them.⁴³ The ombudsperson's office in China is the continuation of a tradition dating back to early imperial times, when specifically appointed officials were placed in charge of receiving complaints and requests for assistance from the populace.⁴⁴

It should be noted that the words used in the Constitution do not give the right to petition to non-Chinese citizens nor to legal entities.⁴⁵ But even those who have no connection with the wrong doing of the state agency or government officials may bring a complaint. A personal damage or involvement is not necessary. This shows that the complaint procedure is not aimed at redressing the infringed rights and interests of the citizen but at overseeing the activities of the state agencies and officials with the assistance of the citizens by using them as source of information.⁴⁶

With the revitalization of the economy and the working of the vast regulatory apparatus established to control it, disputes have arisen that require more rational and institutionalized methods of solving them.⁴⁷ But Art. 41 of the Constitution is the constitutional basis for all provisions allowing review of administrative decisions.

2. Administrative Supervision

After the Ministry of Supervision (*jiancha bu*) had been reestablished in 1987, on November 23, 1990 the State Council enacted regulations concerning the supervision of administrative organisations (*xingzheng jiancha tiaoli*)⁴⁸, thereby equipping Art. 41 of

⁴³ H. Josephs, "Labour Reform in the Worker's State" (1988) 2 Journal of Chinese Law 200 at 250.

⁴⁴ Josephs, *supra*, note 43 at 250 note 288 with further references; on the history of *xinfang* procedures and their scholarly discussion see also Finder, *supra*, note 9 at 4 note 16.

⁴⁵ Regulations providing for supervision, reconsideration, or review allow a broader circle of potential claimants.

⁴⁶ Oda, *supra*, note 39 at 1348; Heuser, *supra*, note 9 at 439.

⁴⁷ On this "actuality" as the driving force behind legislation see Yu, Xingzhong, "Legal Pragmatism in the People's Republic of China" (1989) 3 Journal of Chinese Law 29 at 45; on the link between economic development and the legal system see also Gao, Fan, "Shichang jinji yu xingzheng quanli" (Market economy and administrative power), (2/1993) Zhongguo faxue 29; A. Dicks, "The Chinese Legal System: Reform in the Balance" (1989) China Quarterly 546 at 568. Arguing for a Petition Law are Li, Mianju / Huang, Biquan, "Xinfang lifa chuyi" (Statement concerning petition legislation) (1/1992) Faxue zazhi 36.

⁴⁸ English translation in FBIS China 90-250, 28 December 1990, 22; German translation with introductory comments by R. Heuser, "Normierung der Verwaltungskontrolle in der VR China" (1990) WGO-MfOR 365.

the Constitution with an enforcement machinery.⁴⁹ Administrative supervision has a long tradition in China.⁵⁰

The Administrative Supervision Regulations (ASR) seem to exist primarily for the purpose of curbing corruption.⁵¹ The system of administrative supervision is collateral to the system of judicial review and the quasi-judicial administrative reconsideration procedures,⁵² although doubts remain concerning the independence of supervision organisations.⁵³

The supervision organisations control the legal validity of administrative decisions, especially concerning matters of discipline (Art. 1). According to Art. 23 Section 2 ASR, the formed supervision organisations are empowered to make suggestions if inappropriate decisions or orders⁵⁴ are issued which must be redressed or revoked. They themselves can alter inappropriate decisions within their jurisdiction (Art. 25), i.e. lower level agencies. Generally, the supervision organisations shall act of their own accord, but according to Art. 7 ASR they shall also establish a system of reports and appeals, so that supervision can be carried out because of outside (e.g. citizen or companies) initiative.

⁴⁹ *Dicks, supra*, note 47 at 569.

⁵⁰ See *Zheng, Chuankuan*, "Woguo xingzheng jiancha lishi fazhan jinkuang" (Brief outline of the historic development administrative supervision in our country) (4/1992) *Xiandai faxue* (Modern Law Science) 36.

⁵¹ Art. 1 enumerates as the purpose of the ASR: "strengthening administrative supervision, improving administration, raising administrative efficiency, and encouraging state administrative organs and their functionaries to be honest, to serve the public, and to observe disciplinary law". See also article by *Xue, Mu*, "Administration Supervision System's Functional Role in New Period" *Renmin Ribao* (19 August 1991) 5, translated in *FBIS China* 91-167, 28 August 1991, 26. But they can address a broad range of issues, inclusive questions of personnel or abstract administrative actions, *Zhou, Weiping*, "Xingzheng fuyi zhidu de shuxing pouxi" (Analysis of the attributes of the administrative reconsideration system) (5/1991) *Faxue zazhi* 6 at 7.

⁵² *Heuser, supra*, note 48 at 365.

⁵³ It seems plausible that the organisations formed under the ASR are the same that carry out reconsideration under the ARR (see below), thereby reducing the chance that reconsideration will provide for alterations in decisions that already ran through the system of supervision. Not very clear on this question is *Zhou, Weiping, supra*, note 51 at 6/7. Speaking of two kinds of supervising organisations in the context of reconsideration is *Wang, Deyi et al., supra*, note 15 at 37. The Chinese distinguish different relationships between agencies which cannot be captured by simple organisation charts; on this difference between a superior unit having "leadership relation" (*lingdao guanxi*) resulting in a substantial degree of direct control and its having just "professional relation" (*yewu guanxi*) see *Lieberthal / Oksenberg, supra*, note 18 at 394.

⁵⁴ Inappropriate orders or decisions are those that conflict with other regulations, are not made according to proper procedures, are ultra vires or do not fulfil the goal of the regulations, *Jiancha bu zhengce fa gui si* (Law and Policy Office of the Ministry of Supervision) (ed.), "Zhonghua renmin gongheguo xingzheng jiancha tiaoli" shiyi (Interpretation of the "PRC Administrative Supervision Regulations" (Beijing: China University of Politics and Law, 1991) [hereinafter *Jiancha*] at 50/51.

Reporters names will be kept secret in order to protect them from repercussions and as reporting is beneficial for the state, it should be encouraged and rewarded.⁵⁵

Article 49 ASR is interesting in that it provides for direct applicability of the ASR for personnel of state-owned enterprises which are appointed by state administrative organs. They are subject to all the powers of the supervision organisations (Arts. 19 to 28) which are very broad. It is therefore imaginable that a joint-venture formed by a state-owned enterprise and a foreign company is supervised under Art. 22 of the ASR.⁵⁶

Doubts remain concerning the real effectiveness of these supervision possibilities, but unfortunately, no data on it is yet available. By just looking at the text of the ASR, the powers granted to the supervisory organs are substantial and would allow order to be brought into the "regulations jungle". But generally, inner-administrative review has serious flaws and tends to be an insufficient method to check regulations.

3. Administrative Reconsideration

No systematic evaluation or study in English has yet been made on the Administrative Reconsideration Regulations (ARR), adopted by the State Council on November 9, 1990 and effective since January 1, 1991.⁵⁷

The purpose of the law is to have a control mechanism available inside administrative organs to prevent and correct specific illegal or inappropriate administrative measures (Art. 1) without having to go to court. Art. 1 also mentions the aim to protect the legitimate rights and interests of citizens and legal persons.

These regulations are an attempt to enlarge the system of objective control over administration with a subjective possibility: citizens ascertaining their rights.⁵⁸ It is a faster and easier method than administrative litigation.⁵⁹ Administrative reconsideration is not a condition for trial. But if described as mandatory by other regulations, those regulations

⁵⁵ Jiancha, *supra*, note 54 at 15.

⁵⁶ On this possibility see Heuser, *supra*, note 48 at 367 and Wang, Yan, "Xingzheng jiancha lifa de zhongyao fazhan" (Important development of the Administrative Supervision Legislation) (2/1991) *Zhongguo faxue* (Chinese Law) 70 at 72.

⁵⁷ Translation into English by FBIS China 3 January 1990, 20; with comments of the editor in CLP 5 (1991) May 13, 41 and in (1991) 24 *Chinese Law and Government* 86; into German by Heuser, *supra*, note 40 at 493. Brief analysis by P. Potter, "The Administrative Litigation Law of the PRC: Editor's Introduction", (1991) 24 *Chinese Law and Government* 3 at 16f.

⁵⁸ Heuser, *supra*, note 40 at 495.

⁵⁹ Zhou, Weiping, *supra*, note 51 at 7.

prevail (Art. 37 ALL). Apparently, 70 % of the cases accepted by the courts have been previously reconsidered, and in public security cases the rate is 85 %.⁶⁰

A review of regulations is not available under the ARR. Art. 10 Section 1 excludes administrative laws, regulations or rules (*fagui*, *guizhang*) or a universally binding decision or order from the matters for which review is at hand. Indirectly though, review of regulations seems to be possible. Art. 41 ARR determines that cases should be handled

"on the basis of laws, administrative regulations, local regulations and rules (*falü*, *xingzheng fagui*), as well as universally binding decisions and orders *formulated and promulgated according to law* by higher level administrative agencies" (emphasis added).

This provision is ambiguous: on the one hand it suggests that regulations on which a concrete administrative act is based itself must be according to law, and this would imply the right of the reconsidering agency to evaluate the legality of these regulations.⁶¹ On the other hand, the fact that these regulations are those of higher level agencies suggests that they have to be followed without a primary evaluation.⁶² This conflicting interpretation is not fully resolved by Art. 43 ARR, which gives guidance in instances where the reconsidering agency finds that the rules upon which the act being reconsidered is based on conflicts with laws or other regulations. The agency shall then quash such act according to law and to the extent it has power to so.

While it seems possible that by reconsidering a concrete administrative act an indirect review of the underlying regulations is carried out, only the act can be changed by the reconsidering agency.⁶³ All matters concerning unlawful regulations have to be handled according to Art. 43 Section 2 ARR: report to the superior or appropriate agency to handle the matter and suspension of the case until a decision has been made.

⁶⁰ Wang, Deyi et al., *supra*, note 15 at 30. Of administrative acts reconsidered, 60 % would be altered or rescinded, Heuser, *supra*, note 40 at 497 with further references.

⁶¹ This interpretation is supported by Huang, Shuhai, *supra*, note 24 at 120-123 who gives four criteria to decide whether *guizhang* were legally established or not.

⁶² This opinion is held by Wang, Deyi et al., *supra*, note 15 at 38, the organs have to rely on *fa*, *fagui* and *guizhang* because otherwise their binding effect would be denied. The issue is however hotly debated in China, an overview about the different opinions give Ying, Songnian / Dong, Hao, "Xingzheng fuyi shiyong falü wenti zhi yanjiu" (A study on the problems of application of law in administrative reconsideration) (1/1990) Zhengfa luntan 46.

⁶³ See Ying, Songnian / Dong, Hao, *supra*, note 62 at 49. But if it is a regulation of a lower level agency, the reconsidering agency can change the regulations themselves.

The procedures (who can ask for consideration of what by whom) are set out in the ARR quite straight forwardly and need not to be discussed any further.⁶⁴

The major difference between reconsideration under the ARR and review under the ALL is the possibility to have a decision quashed if the act is obviously improper (Art. 42 Section 4 (e)) whereas the ALL allows this only when an administrative sanction is manifestly unfair (Art. 54 Section 4).

4. Judicial Review

The review institutions mentioned thus far are all internal organisations, meaning ones that belong to the administration itself, if not necessarily to the same level. The possibility that an administrative reviewing organ will change the decision under review is relatively slight, because bureaucrats in general have a common interest in upholding and protecting their decisions.⁶⁵ The administration is the judge in its own case and cannot be expected to be impartial. Due to the politics of recruitment in the administration⁶⁶ and a common interest in their work, the terms of departmentalism and local protectionism (*benwei zhuyi*)⁶⁷ adequately describe Chinese administration.⁶⁸

Judicial review, however, is characterized by the fact that an outside institution is looking at the administrative decision made. The courts as outside bodies are uniquely equipped to structure the existing body of regulations into a hierarchy. This happens in review in

⁶⁴ The notes of the editor in China Law and Practice give the necessary overview about deadlines, jurisdiction, scope of application, etc.

⁶⁵ For the West see *F.E. Rourke*, Bureaucracy, Politics and Public Policy, Third edition (Glenview, Ill.: Scott, Foresna, Little Brown Higher Education, 1984). The Chinese expression for this phenomenon is *Guanguan xiang hu* (Officials protect each other), quoted in *Liu, Desheng*, "Buyi zai xinzheng jiguan nei shili xunhui fating" (It is not suitable to establish wandering courts inside administrative organizations) (5/1993) *Faxue zazhi* 46.

⁶⁶ *J.P. Cabestan*, "The Modernization of Elites: The Evolution of Leadership Recruitment in the Central State Administration of the People's Republic of China from 1965 to 1985" in *S. Feuchtwang / A. Hussain / T. Pairault* (eds.), Transforming China's Economy in the Eighties, Vol. II (London: Zed Books, 1988) 63.

⁶⁷ Further explained in *W. Zafanalli*, "A Brief Outline of China's Second Economy" in *S. Feuchtwang / A. Hussain / T. Pairault* (eds.) Transforming China's Economy in the Eighties, Vol. II (London: Zed Books, 1988) 138 at 146. See also *Bian, Fuxue / Zhao, Zaicun*, *supra*, note 25 at 259. According to Guo Daohui, translated in *M.S. Tanner*, The Politics of Law Making in China (1990) (unpublished), note 3 at 24, common manifestation of the phenomenon of *benwei zhuyi* are:

1. using the law to expand a departments rights beyond its own sphere;
2. using law to push one departments duties on to other departments;
3. using law to force resolution of larger problems a department cannot solve in its daily work;
4. drafting laws which are either illegal or unconstitutional.

⁶⁸ *Zafanalli*, *supra*, note 67 at 146.

concrete litigation when judges decide which regulations to apply. Advantages of judicial review are that it regularizes the means of dealing with disputes, permits correction of clear abuses of discretion and thereby contributes to the willingness of those regulated to accept the results.⁶⁹ Independent review is seen as the most important requirement for an administrative law under the rule of law, because without it the only practical restraint on administration would be the self-restraint of the administrator.⁷⁰

a) *By the Supreme People's Court*⁷¹

It has been argued that in China judicial review by the Supreme People's Court exists when the functions of judicial review are defined as: a device to protect the principle of checks and balances which gives the courts the final word in interpreting the constitution and thereby creates a method to adopt the constitution to changing circumstances.⁷²

Although the Chinese Constitution nominally leaves these tasks to the National Peoples Congress (NPC) and its Standing Committee, it is a well-known fact that these two state organs have not exercised their rights, due to a lack of procedures and subsequent delegation of the power to interpret laws or regulations.⁷³ Judicial review by the Supreme People's Court would be exercised in three ways:

- by selection and publication of typical cases;
- by granting particular requests; and
- by issuing documents on selected legal topics.⁷⁴

All these methods of review are dependent upon the decisions of the Supreme People's Court to be published in the Gazette⁷⁵ of the Supreme People's Court. Judicial interpretation has resulted in additional stipulations to laws and definitions for terms included in the laws.⁷⁶

⁶⁹ Gilhooley, *supra*, note 7 at 39.

⁷⁰ Schwartz, *supra*, note 6 at 428 with further references; independent shall mean wholly independent of the active administration; also H. Harding, *Organizing China - The Problem of Bureaucracy 1949-1976* (Stanford, Calif., Stanford University Press, 1981) at 359.

⁷¹ Overview on the court structure in China see article by Zhang, Min / Shan, Changzong, "Inside China's Court System" Beijing Review (No. 45 November 1990) 11, reprinted in FBIS China 90-218, 9 Nov. 1990, 12.

⁷² Liu, Nanping, "'Judicial Review' in China: A Comparative Perspective" (1988) 14 Review of Socialist Law 241.

⁷³ Liu, Nanping, *supra*, note 72 at 244; the Supreme People's Court has declared some local laws invalid because they contravene the Constitution.

⁷⁴ Called "subtle" ways by the author, Liu, Nanping *supra*, note 72 at 247.

⁷⁵ Extensive discussion of the Gazette by Liu, Nanping, "An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court" (1989) 5 Connecticut Journal of International Law 271.

⁷⁶ Kong, Xiaohong, *supra*, note 11 at 501 with further references.

But the limits of this kind of review are quite apparent: Up to now, the Constitution itself has never been directly interpreted, and national laws cannot be declared unconstitutional by the Court.⁷⁷ Judicial review exercised by the Supreme People's Court in the way described operates in a very informal way and does not provide a thorough scrutiny of governmental actions.

b) Prescribed by Law

Up to the end of March 1989 there were more than one-hundred thirty laws and regulations which stipulated that the people's courts have jurisdiction over administrative cases arising out of them.⁷⁸ These cases were decided by using the Civil Procedure Act which provided for its applicability in Art. 3 Section 2. In 1984, the Supreme People's Court directed that administrative cases were to be heard in the economic divisions, because so many of them concerned economic matters.⁷⁹ From January 1983 (when the administrative litigation scheme was first established) to October 1990, the courts accepted a total of 35,973 first hearings of administrative cases.⁸⁰ In 1989 people's courts at all levels in the whole country conducted the first trials of 9,934 administrative cases, and concluded the first trial of 9,742 cases.⁸¹

The range of administrative acts that could be reviewed was quite broad, examples being taxation, patents, trademarks, public security, environmental protection, urban planning,

⁷⁷ *Liu, Nanping supra*, note 72 at 250; more demerits (theoretical and practical) of the current Chinese system of judicial review can be found by *Dong, Chenmei*, "Viewing the Chinese Review Organ for Unconstitutionality in Comparison with the Review System for Unconstitutionality Worldwide" in *Institute of Comparative Law Waseda University* (ed.), *Law in East and West* (Tokyo: Waseda University, 1988) at 466.

⁷⁸ *Epstein, supra*, note 41 at 2; *Kong, supra*, note at 97 speaks of 180 administrative statutes; examples for those laws are given in *Finder, supra*, note 9 at 617, note 27 and in *Oda, supra*, note 39 at 1350.

⁷⁹ *Epstein, supra*, note 41 at 5. Although China moved from a planned economy to a more liberal so-called commodity economy, most economic matters are perceived to belong to the realm of administrative law. See also overview in casebooks, in *Gan, Musheng / Qiu, Shi / Yang, Kainian* (eds.), *Xingzheng susong anli xuanbian* (Compilation of administrative litigation cases) (Beijing: Economy Press, 1990).

⁸⁰ FBIS China 91-019, 29 January 1991, 39. This numbers become somewhat trivial when seen in relation to the numbers of cases in civil (2 million) and criminal (300,000) matters just in 1988, *Epstein, supra*, note 41 at 5. In Germany, 130,000 cases per year are decided in the administrative courts alone, *Heuser, supra*, note 9 at 440, note 13.

⁸¹ Supreme People's Court Report by Ren Jianxin, FBIS China 90-073, 16 April 1990, 15, 16; the cases related to public security, land management, industrial and commercial administration, taxation, environmental protection and maritime customs; in 4,135 cases the original decision was maintained, in 1,364 cases the case withdrawn, in 587 cases the administration changed the decision and in 1,364 (14 %) the decision was rescinded.

land resumption, customs, fisheries, and postal services.⁸² Regulations could not be reviewed, and if contradictions among regulations and laws or the Constitution were discovered, the courts had no power to decide but had to report to the appropriate state body.⁸³

c) *Administrative Litigation Law*

The Administrative Litigation Law came into force on October 1, 1990. The ALL provides for judicial review of administrative decisions and is a mixture of substantive and procedural norms, intended to make review of administrative actions available on a broader scale and regulate the proceedings. Chapter 10, Art. 70 to 73 ALL addresses foreign related administrative litigation; the rules follow international standards and grant foreigners the right to sue if the foreign state grants this right to Chinese nationals.⁸⁴

Article 11 ALL enumerates which concrete administrative acts can be challenged, including those whose challengeability is provided for in other laws. The reason an enumerative system is chosen instead of making all administrative acts and decisions subject to judicial review is the fact that the courts are seen as of equal rank with administrative organs.⁸⁵

No clear theory or definition exists in China as to what constitutes a concrete administrative act.⁸⁶ A January 1989 draft included a definition whereby a concrete administrative act was a "unilateral act, committed by an administrative authority in regard to a specific citizen or organisation and involving rights and obligations of the citizen or organisation".⁸⁷

⁸² *Epstein, supra*, note 41 at 2.

⁸³ *Ying, Songnian* (ed.), *Xingzheng susong zhishi shouce* (Handbook of knowledge on administrative litigation) (Beijing: China University of Politics and Law Press, 1988) at 45.

⁸⁴ In detail *Yang, Jiayun / Zhang, Lin*, "Lun xingzheng susong zhong de waifang susong canjia ren" (On foreign nationals as participants in administrative trials) (4/1991) *Faxue pinglun* (Law Review) 51.

⁸⁵ *Luo, Haocai*, "The Establishment of Chinese Judicial Review System and its Main Characteristics" paper supplied to Pacific Rim International Law Conference in Seoul, Korea Nov. 1-3, 1991 [unpublished] at 4. On the rationale of administrative reconsideration see also *Wang, Deyi et al., supra*, note 15 at 26.

⁸⁶ But Chinese scholars are well aware of the criteria and devote considerable space in textbooks to elaborate, see *Zhang, Shangzhuo, supra*, note 37 at 165-175.

⁸⁷ *Finder, supra*, note 9 at 17 note 93. The German system provides a definition in § 21 VwVfG (Administration Procedure Law). Five criteria must be fulfilled in order for an administrative decision to become a concrete administrative act (Verwaltungsakt): it has to be (1) an order (2) by a government agency (3) in the area of public law (4) which decides a concrete case (5) has effects outside the agency.

The object of review under the ALL is to ascertain the legality of the concrete administrative act; its reasonableness or expediency is not reviewable in the courts. The reason given for this is the "division of labour": administrative supervision and reconsideration are meant to address these questions.⁸⁸ As a result, courts are not overloaded with cases and do not handle matters for which they are not qualified. Instead they leave the exercise of discretion to the administration. The only exception from this rule are administrative fines that are obviously unfair: they can be reviewed for reasonableness.⁸⁹

Although Article 12 ALL does not allow review of abstract administrative actions (regulations),⁹⁰ it is recognized and can be expected that the courts will have reviewing power in some degree over abstract administrative actions. This supplementary power to review is seen to arise from Art. 53.⁹¹

Article 53 was added to the ALL as a compromise between administration authorities and political factions in favour of more review.⁹² It provides that the courts shall "make reference to" (*canzhao*) *guizhang* in reaching their decisions. Epstein⁹³ doubts whether this will lead to judicial review, because in other laws the meaning of "make reference to" has been understood as following them. To discover what the exact scope of judicial review under Article 53 ALL is or could be, see below III.

All in all, the review of abstract administrative actions is still limited, because *fagui* of the State Council itself cannot be reviewed and have to be applied. As well, a review of regulations is possible only as *incidenter* review, that is when they form the basis of a specific case.⁹⁴

⁸⁸ Luo, *Haocai*, *supra*, note 85 at 6.

⁸⁹ Interestingly most cases reported in casebooks pertain to administrative fines. On administrative discretion see Jiang, Mingan, "Lun xingzheng ziyou cailiang quan ji qi falü kongzhi" (Research on administrative discretion and its control), (1/1993) Faxue Yanjiu 44.

⁹⁰ Luo, *Haocai* / Ying, Songnian, Susong Faxue, *supra*, note 15, at 115 and Fang, Xin, *supra*, note 16 at 42/43 give as reason that the same prohibition would be in place in Japan, West Germany, the Soviet Union etc.; for Germany this is clearly wrong. See § 47 VwGO and Bundesverfassungsgerichtsgesetz.

⁹¹ Explicitly Susong faxue, *supra*, note at 115; Ma, Huaide, "Xingzheng susong fanwei de jige wenti" (Some questions about the scope of administrative litigation) (2/1991) Faxue zazhi 17 at 18; similar Zhu, Xinli, *supra*, note 14, at 18; Luo, Xiaodang / Bao, Shiqing, *supra*, note 15 at 244: Under the concept of administration according to law, all administrative action, including abstract administrative action, except for legal exceptions, are in the scope of judicial examination.

⁹² Epstein, *supra*, note 41 at 8; dispute described by Finder, *supra*, note 9 at 23; and Heuser, *supra* note 9 at 437. Some of the articles by Chinese authors taking part in the debate are translated into English in (1991) 24 Chinese Law and Government 43 to 53.

⁹³ *Supra*, note 41 at 8.

⁹⁴ Luo, *Haocai*, *supra*, note 85 at 6.

5. *Special Review Organ for Unconstitutionality*

In the Chinese political system the People's Congresses and their Standing Committees can examine the legitimacy of abstract administrative activities and legislation.⁹⁵ China's People's Courts are of equal rank with the administrative organs and they are accountable to the organs of state power.⁹⁶ In 1985, the Supreme People's Court issued a notice to lower courts that in the case of conflicts between local and national legislation, the courts should report the conflict to the local People's Congress and their Standing Committee.⁹⁷ Although Liu Nanping considers this to be evidence for judicial review, it seems more likely that the motive for the required report is linked to gathering information and the outcome of the People's Congresses and their Standing Committee's evaluation is unclear.

It has been suggested therefore that an organ to review unconstitutionality be created.⁹⁸ This organ would take the form of a Constitution Committee of the NPC. It should be an auxiliary body, its membership consisting half of NPC deputies, half of legal experts. The powers suggested to be given to this committee are quite substantial and resemble the powers of a constitutional court combined with those of a parliamentary committee.⁹⁹ But there seems to be no hope that these suggestions are going to be implemented in the near future.

⁹⁵ *Xiao, Xun*, "Several Questions Concerning the Administrative Procedural Law" *Renmin Ribao* (10 March 1991) 5, translated in FBIS China 91-056, 22 March 1991, 22; *Dong, Chenmei*, "Viewing the Chinese Organ for Unconstitutionality in Comparison with the Review System for Unconstitutionality Worldwide", in Institute of Comparative Law Waseda University (ed.) *Law in East and West* (Tokyo: Waseda University, 1988) 463; *Luo, Haocai, supra*, note 85 at 6.

⁹⁶ For these reasons scholars have been stating the impossibility for China to set up a judicial review system resembling that of the USA, *Shen, Zongling*, "Comparative Law Studies in China" in Institute of Comparative Law Waseda University (ed.), *Law in East and West* (Tokyo: Waseda University, 1988) 333; *Dong, Chenmei, supra*, note 95 at 470.

⁹⁷ *Finder, supra*, note 9 at 25. Again in the 1988 to 1992 work outline for the NPC's Standing Committee it was called on the legislative committee to redouble efforts to exercise and revoke unconstitutional statutes, *K.J. O'Brien*, *Reform without Liberalization - China's National People's Congress and the Politics of Institutional Change* (New York : Cambridge University Press, 1990) at 167.

⁹⁸ This organ would resemble what in North America would be called a Human Rights Commission, this impression is at least created by the examples given at 468, *Dong, Chenmei, supra*, note 95. The analogy to a parliamentary committee for regulatory scrutiny is also striking. Unfortunately, the article makes no references in footnotes whether the existence of these committees was known to the author. According to *O'Brien, supra*, note 97, at 154 with further references, the same idea has been suggested already in 1982 by other Chinese scholars.

⁹⁹ *Dong, Chenmei, supra*, note 95 at 476.

III. Scope of Judicial Review

Chinese administrative litigation textbooks¹⁰⁰ devote considerable space and effort into giving principles how to select the applicable law in cases with conflicting legal standards, bringing them into a hierarchy.¹⁰¹ Concepts like *lex superior derogat legi inferiori* (higher level law takes precedent over lower level law); *lex posterior derogat legi priori*¹⁰² (new law over old law)¹⁰³ are the most obvious. Special law takes precedent over general law, if both are of equal rank,¹⁰⁴ and another rule apparently being followed by the courts is that specific local law takes precedent over departmental law.¹⁰⁵

If these principles cannot produce a solution to the question which law is applicable, the courts have then the power to examine laws and regulations for their legality,¹⁰⁶ because courts can only rely on valid regulations.¹⁰⁷ Courts have no power to decide on the nature of the abstract administrative actions but they can decide which they will apply and which they won't. If they would not do this, they would be relying on them and the standards of a lower level and these would become law.¹⁰⁸

This view is shared by Luo Haocai,¹⁰⁹ who states that the power of the courts to review administrative regulations includes (emphasis added):

- 1) the power to *ascertain* the legality of the regulation according to which the specific action was carried out.

That means that the courts will have to address the question of illegality or unconstitutionality of regulations, and cannot just state their legality.

¹⁰⁰ For example Susong faxue, *supra*, note 15 at 239ff or law review articles like Dong, Hao, "Woguo xingzheng falü guifan shiyong chongtu de tiaozheng yuance" (Regulating principles for conflicts in the application of administrative law standards in our country) (2/1991) Faxue zazhi 9.

¹⁰¹ On the hierarchy of norms and its importance see W. Müller-Freienfels, "Zur Rangstufung rechtlicher Normen" in Institute of Comparative Law Waseda University (ed.), Law in East and West (Tokyo: Waseda University, 1988) 3; the 1988 ALL draft included a provision that in the case of a conflict between local legislation or rules promulgated by the State Council and national laws, national laws would take precedent.

¹⁰² On this concept see H. Kelsen, General Theory of Norms (Oxford, Clarendon Press, 1991) at 126.

¹⁰³ Susong faxue, *supra*, note 15 at 239.

¹⁰⁴ Susong faxue, *supra*, note 15 at 240. It was a regular principle in the law of the Qing dynasty that whenever a statute and a sub-statute were both applicable to a given case, the decision was to be based on the sub-statute rather than on the statute, even though that might sometimes result in serious modifications or even virtual nullification of the intent of the statute, Bodde / Morris, *supra*, note 12, at 67.

¹⁰⁵ Susong faxue, *supra*, note 15 at 241.

¹⁰⁶ *Ibid.* at 247.

¹⁰⁷ Luo, Xiaodang / Bao, Shiqing, *supra*, note 15 at 243.

¹⁰⁸ *Ibid.* at 245; Zhu, Xinli, *supra*, note 91 at 18.

¹⁰⁹ Luo, Haocai, *supra*, note 85 at 5.

- 2) The power *to take as reference* regulations if they think that this regulation is consistent with the law and administrative rules and regulations, decisions or orders of the State Council and other concerned regulations;
- 3) the power *not to take as reference* the regulations which the court considers are inconsistent with the law and administrative rules and regulations, decisions or orders of the State Council and make judgement directly according to relevant laws and regulations;
- 4) the power *not to take as reference* regulations formulated and announced by a local people's government which the courts find to be inconsistent with regulations formulated and announced by a Ministry or commission under the State Council.¹¹⁰
- 5) The power *not to take as reference* regulations formulated and announced by ministries or commissions under the State Council which the court finds to be contradictory with each other.

The general idea is that courts have to rely (*yiju*) on law and *fagui*, but only have to refer to (*canzhao*) to *guizhang*.¹¹¹ *Guizhang* are only to be referred to because they are rather complex and conflicts among them may occur.¹¹² One author suggests to give the courts the right to accept challenges concerning standards below the rank of *guizhang*.¹¹³

Due to the vagueness in the formulation of Chinese regulations, the doctrine that a government organ can only act when it is expressively empowered to do so by statute¹¹⁴ is consequently not adhered to. This is not yet a Chinese concept; on the contrary, the Constitution seems to invite a leading role of the administration. Especially in the economic arena the state's method is control: Art. 11 Section 2 of the Constitution: "The state guides, helps and supervises the individual economy by exercising administrative control."

¹¹⁰ It remains unclear what exactly the difference between 3) and 4) is; both possibilities seem to concern local regulations. This is just one example about the confusion in translation of *fagui* and *guizhang*.

¹¹¹ Gao, Ruomin, "Tan xingzheng guizhang yixia xingzheng guifanxing wenjian de xiaoli" (The validity of administrative statutes under administrative regulations) (3/1993) Faxue Yanjiu 12; Bian, Fuxue / Zhao, Zaicun, *supra*, note 25 at 260. But courts could do nothing regarding abstract administrative actions that are neither *fagui* nor *guizhang*, Yang, Haikun, *supra*, note 14 at 4. Synonyms for *canzhao* are *cankao* (to consult, to refer to as reference) and *yizhao* (accordingly, in the light of). *Yiju* denotes a criterion, a standard to measure legality and appropriateness, Bian, Fuxue / Zhao, Zaicun at 264; Wang, Shaoquan, "Xingzheng susong yu shangye lifa" (Administrative litigation and business legislation), in Wang, Zhenrong (ed.), Shangye xingzheng susong yu shangye fazhi (Administrative litigation of business matters and the legal system for business) (Beijing: Law Publishers, 1990) at 110 at 114 states that the courts have to *cankao* if there is higher level law in existence and to *yizhao* if there is no law.

¹¹² Fang, Xin, *supra*, note 16 at 140.

¹¹³ Ma, Huaide, *supra*, note 91 at 18. Arguing that they already have it is Zhu, Xinli, *supra*, note 91 at 18.

¹¹⁴ H.W.R. Wade, Administrative Law, Sixth edition (Oxford: Clarendon Press, 1988) at 23.

In order to arrive at a state which is governed by the rule of law, Schwartz¹¹⁵ listed the requirement of limits of delegated powers first. There may be no wide-sweeping delegation of powers and every delegation of powers must be accompanied by discernible standards.¹¹⁶ This doctrine of *ultra vires* - well-known in the West - is also gaining standing in China - at least in academia.¹¹⁷

Until very recently in China, no limits seemed to exist on the subdelegation of authority.¹¹⁸ Indeed, the concept that the state could or should not be limited is in tension with both the system's legitimizing Marxist-Leninist doctrine and two millennia of autocratic history before Karl Marx.¹¹⁹ If one looks at concrete examples of regulations, they nearly always provide for enactments of further, more detailed regulations.¹²⁰

The above elaborations should be sufficient to illustrate that Art. 53 ALL is far from clear on the question what a court can do concerning the review of regulations. Only *guizhang* can definitely be evaluated; and although the courts are not bound by them, if the court thinks that the *guizhang* before them are inconsistent, the court has no authority to invalidate them but has to ask the Supreme People's Court to apply to the State Council for interpretation and a decision.¹²¹

¹¹⁵ *Supra*, note 6 at 419.

¹¹⁶ *Schwartz, supra*, note 6 at 422 on the doctrine of delegatus non potest delegare; in Germany this principle is enshrined in Art. 80 Section 1 Second Sentence of the Grundgesetz.

¹¹⁷ See *Bian, Fuxue / Zhao, Zaicun, supra*, note 25 at 261. It can also be found in Art. 2 Section 2 of Order No. 48, *supra*, note 13. Arguing for adherence to it are *Zhu, Xinli, supra*, note 91, *Gao, Ruomin, supra*, note 111, at 14, *He, Naizhong, supra*, note 14, at 5.

¹¹⁸ On that see *Wade, supra*, note 114 at 874, the reason for continuous sub-delegation seems to be that legislation is used as a means to extend authority of a department instead as an administrative tool, *Keller, supra*, note 21 at 679 with further references; *Zhang, Genda, supra*, note 14 at 26.

¹¹⁹ *D.M. Lampton*, *Paths to Power: Elite Mobility in Contemporary China* (Ann Arbor: Centre for Chinese Studies, University of Michigan, 1986) at 297. On modern historiography see *H.G. Herrmann*, "Aspects theorethique de l'historiographie chinoise des annees 1980" (1991) Vol. X, No. 1-2 *Etudes chinoise* 161.

¹²⁰ Examples for this are: Art. 50 Administrative Supervision Regulations; Art. 17 Female Labour Protection Provisions; Art. 17 Child Labour Prohibition Provisions; Art. 41 Water, Soil Conservation Law; Art. 31 Detailed Rules for Implementation of the PRC Law on Prevention and Control of Atmospheric Pollution; Art. 28 Provisions for Employment Agencies; Art. 32 Drug Regulations, *Gilhooley, supra*, note 7 at 29; Art. 18 Advertisement Regulations, *Austin, supra*, note 7 at 970; common are also provisions establishing which authority is authorized to give interpretations of regulations. The examples for this are too numerous to be listed here.

¹²¹ *Finder, supra*, note 9 at 24; *Zhang, Chunfa, supra*, note 19 at 17.

Part III: Conclusions and Outlook

China possesses three layers of inner-administrative review mechanisms that go from very informal (ombudspersons) to quite formal (administrative reconsideration). Administrative actions are reviewed mainly in order to arrest inefficiency and corruption in the bureaucracy - the state apparatus is meant to operate smoothly. Control is thus objective, initiated by the state itself with citizens required to help to achieve this goal.¹²²

According to Western state theory the state has to respect and safeguard citizens' inalienable rights. Review initiated by the citizens is the tool to achieve this result. Even if the protection of rights and interests is attempted in the PRC, one is soon confronted with the fact that constitutional rights in China all are under the qualifier of state interest.

China seems well aware that judicial review has a role to play concerning the drawing of borders for agency jurisdiction and to achieve consistency of regulations. This is seen in the debate about Art. 53 ALL.

The question is then whether institutionalization of judicial review of regulations would help to solve China's regulations problem. I think that only when the courts are empowered to review the validity of administrative rules will the foundations be laid for the legal system, as opposed to the bureaucracy, to legitimate administrative action.¹²³

The system of separation of powers has worked well in North America and most parts of Europe to ensure that administrative government follows standards set in a Constitution, thereby protecting the rights and interests of the citizens of this state.

Also, with regard to regulations, a state has to watch the so-called opportunity costs: what happens if regulations are not reviewed? In the case of China, the regulations jungle could jeopardize this country's effort to open itself up to the outside world in order to induce foreign investment and modernize the economy. Up to now, in Asian Socialist countries, judicial control over administration is even less developed than in European socialist countries or the former Soviet Union.¹²⁴ China's system of judicial review can still be called embryonic.¹²⁵

¹²² On this aspect see *Gao, Fan, supra*, note 47 at 34.

¹²³ *Epstein, supra*, note 41 at 16.

¹²⁴ That was true even before the changes in Eastern Europe and the break-up of the Soviet Union; Yugoslavia had a functioning Constitutional Court and Poland a well working administrative court system.

¹²⁵ *Oda, supra*, note 39 at 1355.

What is the prospect of judicial review in China growing to a greater size, becoming a possible method to balance administrative power?

A primary obstacle to this goal is socialist ideology. One of the basic principles of the constitutional systems of socialist countries is the principle of the unity of state power based on the assignment of all legislative and executive powers of the state to one representative democratic body. This representative political organ is the supreme organ of state power and the only one able to create law and control the activities of other state organs.¹²⁶ Such a concept necessarily implies the rejection of any form of separation of state powers and the incompatibility of any sort of judicial review of constitutionality of statutes.¹²⁷ Moreover, in the former Soviet Union and other socialist countries, judicial review was repudiated as one aspect of the "bourgeois doctrine" of the separation of powers. Thus the laws which emanate from the supreme organ whose members are popularly elected represent "the will of the whole sovereign people" and accordingly, because of the principle of the unity of powers and the supremacy of the people flows the corollary that, under socialist systems, constitutional control may not be exercised by extra-parliamentary bodies nor modelled on the experience of Western European countries and the US.¹²⁸

Apart from the purely ideological issues, in China there is the reality of interference of the Communist Party with court decisions or simply by recruitment policies. Courts are working under the "guidance" of the Communist Party. It is hard to tell whether the legal system of socialist countries will ever be able to assume true independence, or whether it will remain subservient to dictates of party policy. Although questions are frequently raised about the independence of non-socialist, Western legal systems from political considerations and outright interference,¹²⁹ by and large, the West has an independent judiciary able to fulfil its function in the system. This cannot be said about China.¹³⁰

In the early years of communist rule in China, political leaders distrusted the courts,¹³¹ and even now, despite the modernization process, lawyers and courts are under tight

¹²⁶ For a description see e.g. Xu, *Anbiao*, "Jianlun falü he xingzheng fagui de tiaozheng jixian" (Brief essay on the limits of adjustment of law and administrative regulations) (4/1991) *Zhengzhi yu Falü* 8.

¹²⁷ *Brewer-Carías*, *supra*, note 4 at 236.

¹²⁸ *M. Cappelletti*, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971) at 7.

¹²⁹ *J.V. Feinerman*, "Economic and Legal Reform in China, 1978-1991" (Sept-Oct 1991) *Problems of Communism* 62 at 71.

¹³⁰ *Tao, Dehai*, "China Democracy Movement and Legal Crisis" (1990) 8 *UCLA Pacific Basin Law Journal* 390 at 404.

¹³¹ *Oda*, *supra*, note 39 at 1349.

supervision by party authorities.¹³² A system of judicial review can only be effective with judges who are genuinely independent, not only in the sense that their individual decisions are not directly influenced or controlled by the political branches of government, but also in the sense that their education and professional experience shall have equipped them with true intellectual independence.¹³³ In return, it is necessary to inspire the people with respect for judges who exercise legal power and traditional authority, so that the people will accept court decisions and policy-making.¹³⁴

Courts are not yet perceived as authorities in resolving emerging problems, and therefore the general status of Chinese judges cannot at all be compared with that of for example their North American counterparts. This might partly be a cultural problem, as also in Taiwan it can be observed that traditional concepts still more or less influence the people, and their attitude towards the government is passive; to sue the government is a totally alien and unthinkable idea.¹³⁵ Citizens tend to be sceptical of the worth of formal petitions or official organization and are fearful of the sanctions that often accompany open and direct interest advocacy.¹³⁶ Generally though, for Taiwan a favourable outlook for judicial review is given.¹³⁷

But even presuming that all institutions and legal possibilities for judicial review were present in China, a system of review cannot be taken as a panacea:

It is the attitude of the society and its organised political forces, rather than of its purely legal machinery alone, that is the controlling force in the character of free institutions. Democracy without the rule of law is a contradiction in terms at the same time, judicial control can be discharged only in a democratic society.¹³⁸

Institutions alone are never sufficient to change the working process of a state, but they have to be created first to eventually obtain the desired results. The process of changing legal culture inevitably begins by establishing legal bureaucracies and educating legal

¹³² On judicial independence see *Epstein, supra*, note 25 at 16ff with further references.

¹³³ *G. Jolowicz*, "Summary of the 1984 Scientific Colloquium of the International Association of Legal Science on "Judicial Review and its Legitimacy"" in *Glendon, Gordon / Osakwe* (eds.), *Comparative Legal Traditions* (St. Paul, Minn.: West Pub. Co, 1985) 69 at 72.

¹³⁴ *Urata, supra*, note 4 at 36.

¹³⁵ *Fa, Jyh-Pin, supra*, note 4 at 41. On regulation of the economy in Taiwan see *W. Lasars*, "Die Wirtschaftsverfassung von Taiwan: Die Situation am Wendepunkt" (1993) VRÜ at 49.

¹³⁶ *V.C. Falkenheim*, "Citizens and Group Politics in China: An Introduction" in *V.C. Falkenheim* (ed.), *Citizens and Groups in Contemporary China* (Ann Arbor: Center for Chinese Studies, University of Michigan, 1987) 1 at 4.

¹³⁷ *Fa, Jyh-Pin, supra*, note 4 at 167, and again in *Fa, Jyh-pin*, "Constitutional Development in Taiwan: The Role of the Council of Grand Justices" (1989) 40 *International and Comparative Law Quarterly* 198 at 209.

¹³⁸ *Schwartz, supra*, note 6 at 432.

bureaucrats with a specialized legal methodology.¹³⁹ In other words: There is a symbiosis between infra-structure and superstructure.¹⁴⁰

It remains a fact that no totalitarian government has yet proven itself willing to tolerate an effective system of judicial review.¹⁴¹ It would seem that China is yet another example of this. But as experience with developing countries tells us, it is not enough to reject the Western version of modernity philosophically, politically, or even militarily. Instead, a solution to the problem of modernity must be found. Nations that fail to create efficient institutions and competitive economies are trapped in poverty and denied freedom.¹⁴²

In the Chinese case, I believe several approaches can be taken to remedy the problem of regulations: The most obvious one is to allow judicial review of abstract administrative actions, which would entail an amendment to Article 12 ALL.

But there are a number of steps in between the situation of judicial review of regulations now, and the one that could be achieved with the suggested amendment. There are good reasons why a country would not opt for the possibility of *principaliter* review of regulations in its legal system, but would limit judicial review to review *incidenter* to a concrete case; the question of standing does not become an issue and the administration has the privilege of having collected some experience with the regulations concerned. *Principaliter* review creates the danger of discussing hypotheticals and thereby leaving the field entirely to expert witnesses.

Given the obstacles in place for a system of judicial review in China in general, the following suggestions might for the time being be preferable. One Chinese author¹⁴³ suggests to put regulations in order every year in each department by outlining in a report, which regulations are still in force, which have been altered and which are outdated. This suggestion has to be augmented with the requirement to publish these reports to inform the public of the regulation situation.

Another piece of advice already stressed by several Chinese authors is the strengthening of the *ultra vires* rule. If ministries or administrative agencies in general were restricted in the areas and scope in which they are allowed to enact regulations, the regulation problem would be soothed considerably.

¹³⁹ *Epstein, supra*, note 25 at 10.

¹⁴⁰ *Ibid.* at 9.

¹⁴¹ *M. Cappelletti*, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis" (1979) 2 *Legal Issues of European Integration* 1 at 10.

¹⁴² *B.L. McCormick*, *Political Reform in China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990) at 194.

¹⁴³ *Wang, Shaoquan, supra*, note 111, at 117.

I also fully endorse the suggestion of Dong, Chenmei.¹⁴⁴ A Parliamentary Committee with real powers to address regulatory confusion is a useful institution, and moreover, it is in line with the socialist doctrine of unity of state powers. Although in the North American context the effectiveness of a parliamentary committee for regulatory scrutiny is limited, it is one "filter" in place to eliminate regulatory injustice.

The last device I will mention that would be useful in establishing a system of judicial review of regulations in China, is clarification of Art. 53 ALL, meaning the extent to which courts have to rely or to refer to *fagui* and *guizhang*. But of course these clarifications cannot be given if no clarity exists concerning the question: what is a *fagui* and what a *guizhang*. And so I will end with the words of Confucius:

"The master said: (...) If names are not correct then one's words will not be in accord [with one's actions]. If words are not in accord, then what is to be done cannot be [correctly] implemented."¹⁴⁵

¹⁴⁴ *Supra*, note 95 at 463.

¹⁴⁵ Lunyu 13, 3: Ming bu zhen, ze yan bu shun. Yan bu shun, ze shi bu cheng. Translation by B. Schwartz, *The World of Thought in Ancient China*, (Cambridge, Mass.: Harvard University Press, 1985) at 92. On the proper usage of names see also Zhou, Wangsheng, "Fa, falü, fagui zhu gainian shiyong he biao xian" (Reform of the usage and expression of the names of law, laws and regulation), (5/1993) Faxue zazhi at 6.

restored, it is suggested that the people of Australia will suffer. They will lose the precious value of decision-makers who are independent of government. That independence has, until now, been a mainstay of liberty in Australia.

Social or Socialistic Possibilities of Market Economy – Economic Development Through Constitutional and Administrative Law

By Christoph Müller

After the internal collapse of the former USSR, it seemed to many that capitalism would then triumph worldwide. However, in no country in the world does there exist a pure market economy. Rather, a "mixed economy" is in existence almost everywhere. In the economy, a private sector and a public sector are to be found, with the latter regulating the structural conditions of the system through infrastructure policy, intervening in various ways in the economy, and participating directly in economic life in the form of public utilities. The systems of today can only be differentiated by considering the respective size of the two sectors (private and public) and what goals the public sector hopes to achieve. In a system of "socialistic" market economy, the public sector must assert those aims of development conducive to public wellbeing, and create clear and consistent perspectives and conditions for the private sector. In this paper, some practical and realizable examples will try to demonstrate how a "socialistic" market economy could be advantageously different from a "neoliberal" or only "social" market economy if it makes correct use of the "productive force of science", intelligent use of the instruments of constitutional and administrative law, and creative use of the possibilities of a socialistic democracy.

Review of Regulations in the People's Republic of China

By Anke Frankenberger

Administrative regulations are a feature of modern societies that is growing in number and complexity. In China the most obvious distinction in administrative regulations is between *fagui* and *guizhang*. Regulations in the PRC are characterized by multiple conflicts among them, and between them and laws and the constitution.

Since 1982 China has built up its legal system and in the last five years has enacted several laws and regulations concerning the review of administrative actions. There are

three levels of inner-administrative review: the ombudsperson's office (*xinfangchu*), the Administrative Supervision and the Administrative Reconsideration organisations. The Administration Litigation Law, enacted in 1989, expressly states that abstract administrative actions cannot be accepted by the courts for review. But Chinese legal scholars are intensively debating the way the courts will still be considering administrative regulations and to what extent they are bound by them. The prospect that judicial review will soon be used in China as a checking device is rather low. Separation of powers is not part of the Chinese governmental structure and one-party rule makes an independent judiciary, a precondition for judicial review as well as publicly available law, a myth. Several suggestions are put forward how to implement changes in the review system which could lead to judicial review in the long run.

Recent Case Law on Custody and Second Marriage in Bangladesh: A Trend Towards Secularisation of the Legal System?

By Shahdeen Malik

Bangladesh, in its recent history, has gone through several periods of changing influence of Islamic principles and norms on the one hand and secularism on the other hand with respect to its constitution, legal system and society. The article discusses the nature of these influences with a comparative view to other Islamic and Christian countries. It argues that despite the constitutional Islamic character of the state, according to a respective constitutional amendment in 1988, recent case law in matters of Muslim family law is applying liberal-egalitarian paradigm instead of Islamic norms. This trend towards a secularization of the legal system seems to point to an emerging societal consensus concerning the role of religion in state and polity.