1991

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Judicial Review of Administration in the People's Republic of China

Jyh-Pin Fa*
and
Shao-chuan Leng**

I. INTRODUCTION

Since 1979, the People's Republic of China (PRC) under the leadership of Deng Xiaoping has taken steps to institute law reform and to develop "socialist legality with Chinese characteristics." Obviously, this policy is closely linked to China's commitment to the program of four modernizations. The PRC needs a formal legal system to ensure a secure environment, essential to the successful development of its economy. China must also project itself as a stable and orderly society with relevant laws to protect the interests and rights of foreigners in order to expand external trade, import advanced technology, and attract international investment. Deng said in early 1986: "We must use two hands to carry on the four modernizations: grasping construction with one hand and grasping the legal system with the other."

It is in the area of its legislative output that the PRC has proceeded with surprising speed. In the last decade, the National People's Congress (NPC) and its Standing Committee have promulgated eighty laws, twenty amendments, and forty regulatory decisions. During the same period, the State council has issued some 900 administrative regulations and decrees while the authorities at the provincial level have adopted over 1,000 local laws and regulations. Despite the tragic occurrence of the harsh crackdown on the pro-democracy demonstrators in Tiananmen Square on June 4, 1989, the Chinese government has pledged to continue its "open-door policy" toward the outside world and has remained active in enacting new laws and regulations.

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1 Xiang Chienyi, et. al, Making an Effort to Establish a Socialist Legal System with Chinese Characteristics, HONGQI (RED FLAG) 8-12, 18 (Feb. 1, 1984).
3 33 BEIJING REV. 21 (No. 31)(1990).
4 See officials' reports before the National People's Congress in Fazhi Ribao (Legal System
Among the major enactments in Deng's China are the implementation of procedural laws. The first enactment was the Criminal Procedure Law, adopted in 1979. The second was the Civil Procedure Law (for trial implementation only), enacted in 1982. The most recent enactment was the Administrative Procedure Law, which was adopted by the NPC on April 4, 1989, and came into force on October 1, 1990. Thus, a complete modern system of procedural justice was implemented in the course of a single decade. In China, a country without a tradition of private citizens suing the government, and where the all-powerful position of the state has always been emphasized, the historical significance of this new law is apparent. Moreover, the law was enacted at a time when the pro-democracy demonstrations in Tiananmen were demanding, among other things, a clean and responsible governmental crackdown on official profiteering and other corrupt and illegal behavior. The new law, if fully implemented, will help check public officials' abuse of power in the future.

This article will review the historical background and drafting process of this new legislation. The major characteristics of the new Administrative Procedure Law will then be outlined and analyzed. Finally, the article will make a preliminary assessment of the law and the outlook for the future.

II. HISTORICAL BACKGROUND

The PRC's legal system has been influenced in varying degrees by Chinese heritage and Communist ideology. Concerning administrative litigation, no such experience is found in the Chinese legal tradition. Certainly, imperial China had an elaborate system of appeals to allow for the review of criminal sentences by higher authorities, including the emperor himself. A unique censorial institution had the power and duty to watch, scrutinize, and criticize the conduct of all members of the officialdom. However, following the traditional reluctance to resort to the courts, the Chinese were even more hesitant to risk incurring severe punishment by complaining about official abuse or injustice. Despite the review system and the censorate, the traditional administrative system in China never developed individual remedies of the kind long-established

5 Renmin Ribao People's Daily, July 2, 1979, at 1.
6 Id., Mar. 9, 1982, at 1.
7 Id., Apr. 5, 1989, at 1.
8 For the Tiananmen demonstrations, see generally, A. NATHAN, CHINA'S CRISIS 171-92 (1990); L. FEIGON, CHINA RISING: THE MEANING OF TIANANMEN (1990).
as a matter of routine in the West.\(^9\)

In modern China, the Nationalist government promulgated a Law of Administrative Proceedings in 1932. However, when the PRC was established in 1949, the Communist government abolished this and all other Nationalist law immediately.\(^10\) If Chinese tradition offers little background or experience with respect to administrative litigation, socialist ideology and practice are equally deficient in this regard.

Judicial control over administration, a corollary to the separation of powers, has always been anathema in socialist countries, where the unity of state power is a supreme, guiding principle.\(^11\) This assumption was the basis of the claim that in socialist states, administrative agencies could not be guilty of abuses against individuals because the interests of individuals and the government were identical and there was no room for conflict between them. This is what Trotsky meant when he said that "the workers could not defend themselves against the workers."\(^12\)

Therefore, it is not surprising that although the possibility of a private citizen bringing a governmental department to court was recognized in the PRC as early as 1949 in the Common Program\(^13\) and in the Constitution of 1954,\(^14\) these provisions are more political-philosophical declarations than legally binding norms. No serious consideration was given to the necessary machinery or enforcement process for such action. It was inconceivable that anyone would dare to bring such a case to a people's court or, that the court would entertain it. Until recently, the only available safeguards against the abuse of public power were largely internal, requiring the administrative agency to conduct its own investigations and to remedy its own shortcomings.\(^15\)

One frequently used device has been the "letters and visits" system by which state and party organs establish reception offices to hear complaints about official misconduct from the masses. Over the past ten years, the Public Affairs Division, under the Party Central Committee and the State Council, has supposedly received 7.54 million letters and

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\(^9\) Dicks, Administrative Law in INTRODUCTION TO CHINESE LAW 56 (B. Weng & H. Chang eds. 1987). For traditional Chinese law and judicial practice, see D. Bodde & C. Morris, LAW IN IMPERIAL CHINA (1967); S. Van Der Spinkel, LEGAL INSTITUTIONS IN MACHU CHINA: A SOCIOLOGICAL ANALYSIS (1962).


\(^13\) Art. 19, para. 2. For English text of the Common Program see THE NEW CONSTITUTION OF COMMUNIST CHINA 281-92 (M. Linsay ed. 1978).

\(^14\) Art. 97. For English text see id. at 294-311.

more than 853,000 visitors. More recently, in an effort to combat corruption and other offenses, Chinese authorities have actively sought public complaints and reports. For instance, during the last half of 1988, the procuratorates throughout the country received 147,238 reports on the irregularities of officials. In 1988, the courts of all levels handled over 3,570,000 letters and received more than 4,175,000 visitors. Impressive as these figures may appear, this device is simply not a substitute for a regular law to deal with administrative abuses. As some of China's official publications concede, although the visitation and report system has played an effective role in improving communications between the government and the people, reliance on this single forum has left many problems unresolved. The presence of many anonymous letters and reports, in fact, reflects the people's fear of retaliation and their cynicism toward the system.

Aware of the inadequacy of its non-legal remedies, the PRC gradually took steps toward legal redress. In 1979, China began to open the courts to administrative cases. Courts were authorized to accept appeals against decisions regarding the registering of electors made by election committees. The Law on the Election of Delegates of National People's Congress and Local People's Congresses opened a new chapter in the legislative history of the PRC. This trend continued with legislation concerning foreign elements, and expanded to include certain local statutes. This piecemeal approach was formally confirmed by the Civil Procedure Law, passed for trial implementation in 1982. Article 3, paragraph 2 of this law states: "This Law shall be applied when legislation provides that such administrative cases shall be decided by the people's court." Until 1989, more than 130 regulations and legislative enactments containing such a provision had been passed.

Initially, the economic chamber of the people's court was assigned

17 Id. No. 3, at 30.
18 Renmin Ribao People's Daily, April 9, 1989, at 1.
20 Zhu Weijiu, We Shall Establish an Independent Administrative Procedure System, 15 ZHENGFA LUNTAN (Tribune of Politics and Law) 54, 57 (June 1987).
to handle administrative business, so it was not surprising that most of the cases concerned economic administration. Few individuals appeared as plaintiffs, and the litigants were mostly other governmental departments. This situation began to change in 1986 with the passage of an amendment to the Security Administration Punishment Act.\(^{24}\) The major innovation contained in this amendment was the right to judicial review of administrative decisions. After unsuccessfully appealing to the superior government agency, individuals could then initiate a judicial process.\(^{25}\) In view of the extensive powers of the public security agency and the volume of cases handled under the Security Administration Punishment Act, it became necessary to establish a separate administrative chamber of the people's court. By the time the Administrative Procedure Law was passed, as many as 1,400 administrative chambers had been established.\(^{26}\)

Fundamental differences exist between administrative and civil cases,\(^{27}\) so the PRC government was strongly urged to draft a comprehensive law on administrative procedure, separate from the Civil Procedure Law. The government responded by beginning the drafting process in 1986.

### III. LEGISLATIVE PROCESS

In 1986, the Legal Affairs Commission of the NPC Standing Committee began the legislative process by organizing a special group to prepare a draft of the Administrative Procedure Law. Based on data from Chinese courts' recent experience and foreign administrative litigation systems, a preliminary draft was offered in August 1987, to various quarters for suggestions. In July 1988, a revised version (the draft for comments) was circulated to solicit views from the courts, state agencies, mass organizations, and legal experts. At the same time, special symposiums were held in major cities to discuss the document. As a result, a draft of the Administrative Procedure Law was completed and presented to the NPC Standing Committee in October 1988, for preliminary examination. In November, the NPC Standing Committee had the draft published in the press to invite public comments. Within four months the draft received over 130 opinions from central and local government departments, courts and prosecuting offices, and over 300 opin-

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\(^{24}\) Security Administration Punishment Act, art. 39, reprinted in ZRGFQ, supra note 22, at 1534.


\(^{26}\) Id.

\(^{27}\) The differences are largely due to the distinction between public and private law. For further details, see P. Cane, An Introduction to Administrative Law 4-9 (1986).
ions from individual citizens.\textsuperscript{28}

There was generally strong support for an administrative litigation law, but division regarding several major issues emerging from the nation-wide discussion of the draft:

1. \textit{Scope of the courts' jurisdiction}. Many argued for a broader scope in the form of a general clause to provide the people with better protection. Legal practitioners, on the other hand, insisted on limiting the courts' review to specific administrative acts, so as not to over-burden the courts.

2. \textit{Application of administrative rules}. Administrative organs and legal scholars generally favored the use of administrative rules as a basis for court decisions. But judicial personnel argued that administrative rules are often confusing, contradictory and can even run counter to state laws.

3. \textit{The courts' power to correct administrative decisions}. The judiciary and its staff believed that the courts should have the power to amend administrative decisions. The administrative authorities, however, vigorously objected to judicial interference with their executive power. In addition, questions concerning the basis for tortious acts, the role of mediation, and administrative review as a prerequisite for a court hearing were also important points of discussion and debate.\textsuperscript{29}

Finally, after almost three years of research and revision, solicitation and consideration of opinions from all sides, an expanded draft of seventy-four articles from the original forty-nine was presented to the seventh National People's Congress in March 1989, for consideration and approval. On April 4, 1989, the NPC formally adopted the Administrative Procedure Law which was to become effective on October 1, 1990.\textsuperscript{30}

\textbf{IV. THE ADMINISTRATIVE PROCEDURE LAW}

\textit{Organization of Procedure}

In socialist countries that follow the principle of a unified judicial system,\textsuperscript{31} the adjudication of administrative cases is generally assigned to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} FBIS-CHI, March 28, 1989, at 7.
\item \textsuperscript{30} For text of the Law see \textit{ZRGFQ}, supra note 22, at 2125-31.
\end{itemize}
\end{footnotesize}
the ordinary courts, a practice that may also have developed from the teachings of Engels and Lenin. This is rather unusual considering that the influence of the civil law heritage is strong in these countries, and that a separate and distinct judicial hierarchy for handling administrative cases has always been one of the hallmarks of a civil law system. The PRC followed the example of other socialist states. Its ordinary courts adjudicated administrative cases under the Civil Procedure Law mentioned above. The Administrative Procedure Law allows for the continuation of this practice, stating that “people’s courts shall establish administrative chambers to hear administrative cases.” However, unlike civil cases, all administrative cases must be decided by a collegiate bench consisting of an odd number of judges, or judges and people’s assessors.

A second difference between administrative and civil procedure is the process of administrative appeal. Based on respect for administrative autonomy and sound judicial administration, the merits of administrative appeal have long been recognized. The exhaustion of administrative remedies in modern jurisprudence is a well-known example. However, in the PRC, the relationship between administrative appeal and judicial proceedings may follow one of at least six different patterns.

Under legislation following the first pattern, administrative appeal is the only remedy available for the individual. Under both the Patent Law and the Trademark Law, the decision of the review committee to which appeals are made is final. Other statutes allow an individual to bring an appeal before the people’s court, but only after he or she has appealed to the agency superior to that which committed the alleged abuse, or in some cases to both the original administrative agency and

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36 Art. 3, para. 2.
37 The Civil Procedure Law, art. 35, para. 2, states that “simple civil cases may be decided by a judge alone.”
38 Administrative Procedure Law, art. 46.
40 The Patent Law of the People’s Republic of China, art. 43, para. 3.
41 The Trademark Law of the People’s Republic of China, arts. 21, 22 & 35.
42 E.g., Security Administration Punishment Act, art. 39; Individual Income Tax Law, art. 13; Joint Venture Income Tax Law, art. 15.
its superior.\textsuperscript{43} These administrative appeals are obligatory in nature and are a precondition for entering the judicial process. Probably the most popular arrangement is the provision for immediate access to judicial review without the necessity of a preliminary administrative review process.\textsuperscript{44} Several pieces of legislation recognize the right to choose between an internal review process and a suit in the regular courts. However, the laws governing the emigration of Chinese nationals\textsuperscript{45} and immigration of foreigners,\textsuperscript{46} stipulate that once an individual decides to appeal to the superior public security department, the channel of judicial intervention is closed. In contrast, the Customs Law,\textsuperscript{47} the Water Law,\textsuperscript{48} and the River Regulation Statute\textsuperscript{49} all leave the channel of judicial appeal open to those individuals who first opt for administrative appeal.\textsuperscript{50}

Although most of the drafters of the Law of Administrative Procedure favored a single, unified approach and would have preferred to give precedence to administrative over judicial review,\textsuperscript{51} the new law represents a compromise with current practice because it adopts an "open-door" approach. An individual may either file a complaint in court immediately, or opt for appeal to the administrative agency first.\textsuperscript{52} This choice, however, does not apply to statutes which explicitly stipulate that administrative review must precede judicial action.\textsuperscript{53} As for laws which state that the result of the administrative review is final, the door of the court remains closed because under the new law, such explicit stipulations take precedence.\textsuperscript{54}

\textsuperscript{43} E.g., Customs Law, art. 46.
\textsuperscript{44} E.g., Fishery Law, art. 12; Pharmaceutical Products Administration Law, art. 55; Ocean Environmental Protection Law, art. 41; Land Control Law, arts. 13 & 52.
\textsuperscript{45} Art. 15.
\textsuperscript{46} Art. 29.
\textsuperscript{47} Art. 53.
\textsuperscript{48} Art. 48.
\textsuperscript{49} Art. 46. For texts of all the laws cited in notes 34-43, see ZRGFQ, supra note 22.
\textsuperscript{52} Art. 37, para. 1.
\textsuperscript{53} Art. 37, para. 2.
\textsuperscript{54} Art. 12, sec. 5.
Scope of Review

In nineteenth century Germany, disputes concerning traditional administrative law focused on how the jurisdiction of the administrative court should be defined. Many lawmakers considered whether to adopt a general clause which recognized the full availability of judicial review with certain exceptions provided by law, or whether the court’s jurisdiction should be restricted only to those cases explicitly enumerated in the law. Prussia and its successors opted for the latter. Except in police matters over which they had general jurisdiction, Prussia’s administrative courts depended on specific legislative assignment. Courts in Württemburg and other southern states, in contrast, had general jurisdiction over all disputes involving the infringement of an individual’s rights by any administrative action. After World War II, West Germany discarded the Prussian model and opted for a general clause. Of the socialist countries, Bulgaria, Rumania, and Yugoslavia adopted a general clause, whereas others followed the Prussian model. The Soviet Union made a major policy change in 1987, when it adopted a general clause.

The differences between the two models may not be as significant as they seem, if various exceptions are attached to the general clause or the enumerative clause to cover a wide range of categories. In the PRC, though a general clause has yet to be incorporated into the law, the scope of judicial review has gradually been expanded.

The system of judicial review of administration in the PRC began with the Civil Procedure Law, which states that administrative cases may be brought to the people’s court if authorized by other legislation. Despite this explicit mention of legislation, an interpretation by the Supreme People’s Court subsequently extended this to include regulations issued by the State Council or those passed by the people’s congresses of provinces, autonomous regions, or municipalities directly under the central government, or their standing committees. Regardless of whether this

55 SINGH, supra note 39, at 10-11.
56 Id. at 112.
57 Oda, supra note 31, at 123.
58 Since only the actions of individual government officials can be reviewed and most important decisions are made by collegiate bodies, it is suggested that this limitation makes judicial review almost meaningless. Oda, supra note 11, at 116-17, 119-21.
60 Art. 3, para. 2.
61 The Supreme People’s Court, A Response to the Question Whether the People’s Court Shall Receive Administrative Cases Under the Authorization of a Local Regulation Issued a People’s Government, October 9, 1987, in GAOSU GONGZUO SHOUCE (Handbook on Litigation) 312 (The Chamber of Appeal of the Supreme People’s Court and the Intermediary People’s Court of Wuhan City) (Hubei Province eds. Oct. 1988).
interpretation was accurate,\textsuperscript{62} it did expand considerably the scope of judicial review in practice. More than 120 such items of legislation and regulations had appeared by the end of 1988.\textsuperscript{63}

Although the general clause principle did not win sufficient support during the drafting of the Administrative Procedure Law, the adoption of an enumerative clause which is more unified and clear must be seen as progress. The law contains a list of eight areas of administrative law in which an individual may petition for review by the people's court. The list includes decisions concerning the restriction of personal or property rights, imposition of administrative sanctions, infringement of autonomy to carry on business, refusal or failure to issue a license, neglect or refusal to protect personal or property rights, failure to allocate pensions, etc.\textsuperscript{64}

Thus the right to judicial review has been extended to many new areas of administrative omission, and in particular, it now applies to sanctions under the program of re-education through labor.\textsuperscript{65} However, cases concerning national defense, foreign affairs, the appointment or dismissal of government employees, and other internal disciplinary measures are specifically excluded from the court's jurisdiction. Rule-making acts and those decisions which are stipulated as final and conclusive, are also beyond judicial remedy.\textsuperscript{66}

\textit{Object of Review}

The distinction between a rule and an order has procedural significance in that the latter determines whether a notice or a formal hearing is required,\textsuperscript{67} and this plays a major role in deciding the availability of judicial review. Only an order is subject to court proceedings and, with the exception of the United States where the "ripeness" doctrine is applied,\textsuperscript{68} general regulations are for the most part considered to be beyond the reach of the courts. As in other socialist countries which have estab-

\begin{itemize}
\item \textsuperscript{62} According to the PRC Constitution, items of legislation originating with the National People's Congress and its Standing Committee are called "statutes" (art. 62, sec. 3; art. 67, sec. 20), whereas administrative regulations are issued by the State Council (art. 89, sec 1) and local legislation is produced by people's congresses of provinces, autonomous regions, or municipalities under the direct jurisdiction of the central authority or their standing committees (art. 100). These three categories are thus clearly separated. For text of the 1982 Constitution, see ZRGFQ, \textit{supra} note 22, at 3-16.
\item \textsuperscript{63} Y. Songnian & Z. Weiju, \textit{supra} note 51, at 321-22.
\item \textsuperscript{64} Art. 12.
\item \textsuperscript{65} \textit{Information Department, Ministry of Justice, Zhonghua Renmin Gongheguo Xingzheng Susongfa Jianghua} (Talks on the Administrative Procedure Law of the PRC) f25-26 (March 1990)[hereinafter \textit{Information Department}].
\item \textsuperscript{66} Art. 12.
\item \textsuperscript{67} B. Schwartz, \textit{supra} note 39, at 145.
\item \textsuperscript{68} \textit{Id.} at 522-25.
\end{itemize}
lished a system of administrative procedure, the powers of the people’s court under the PRC’s Administrative Procedure Law are limited to review of individual, concrete administrative acts. Neither normative, abstract administrative actions (by-laws, regulations, rules) nor administrative contracts are justiciable.

In Western countries, the courts exercise jurisdiction incidentally or indirectly when they review the legality of the general rule which is the basis of an individual order. A rule may be declared null and void if the court concludes that it contradicts the law or has serious defects. This is not the case in socialist countries. At one extreme, courts in the Soviet Union are obliged to apply the dubious rule regardless, while in Rumania, Bulgaria, and Poland courts are permitted to nullify an individual decision, but may only inform the administrative agency concerning the illegality of the administrative rule.

The circumstances in the PRC are somewhat different. Regulations issued by ministries or commissions under the State Council or by local people’s governments may be referred to, but have no binding force on the people’s courts as statutes, State Council regulations, or local legislation do. The court’s function is limited to raising the legality problem with the legislative body or superior administrative department. If a local regulation issued by a people’s government is deemed to conflict with a regulation issued by a ministry or commission under the State Council, or if the latter two are in conflict, they must be referred to the State Council for interpretation or adjudication according to the law.

An analogous construction may be applied to other cases. Since the National People’s Congress Standing Committee is authorized to interpret the law and may revoke inconsistent State Council regulations, regulations issued by ministries or commissions which conflict with the law should also be sent to the NPC Standing Committee for interpretation. As the State Council is authorized to change or revoke regulations issued by its subordinate agencies, it should have sole jurisdiction

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69 Oda, supra note 31, at 125; Wiessowski & McCaffrey, supra note 32, at 650.
70 Art. 2.
71 Art. 12.
72 Singh, supra note 39, at 24-25.
74 Id. at 126; Garlicki, supra note 59, at 1295-96; Wiessowski & McCaffrey, supra note 32, at 650-51.
75 Administrative Procedure Law, art. 53, para. 1.
76 Id. art. 52, para. 1. But according to the Constitution, the courts exercise judicial power according to the law (i.e. statutes) alone (art. 126).
77 Administrative Procedure Law, art. 53, para. 2.
78 Constitution, art. 67, secs. 4 & 7.
79 Zhang, supra note 51, at 229.
80 Constitution, art. 89, sec. 13.
over the resolution of conflicts among these subordinates. As a result, the functions of the people’s courts are rather restricted here. The court is not empowered to set these illegal regulations aside, but may adjourn proceedings and await a binding interpretation as a guide to future action.

**Proceedings and Judgment**

In view of the basic principle of the separation of powers and the public interest involved in administrative cases, some other special points deserve attention. Mediation, a major element of civil procedure in the PRC is, with one exception, expressly excluded from the new Administrative Procedure Law. When an administrative suit is instituted, the original administrative action is suspended if the plaintiff so petitions the court, or if suspension is provided for in other statutes or regulations. These circumstances are effected if the court considers a suspension to be necessary when implementation would cause irreparable damage or if the public interest would also be served by such a suspension.

After reviewing the case and finding the administrative decision to be illegal, the people’s court in general cannot directly change the decision nor substitute its own decision for that of the administrative agency; it may only quash the decision and require the agency to issue a new order according to the court’s interpretation of the law. The agency is then obliged not to issue a similar decision, as that would make the judgment meaningless. However, in exceptional cases, where an administrative sanction is manifestly unfair, the people’s court may alter the decision directly. It is reported that during the 1987-89 period, judgment went in favor of the plaintiff in roughly fifteen percent of administrative cases. Whether this percentage will change under the new law is an interesting and important question.

For those agencies which defy the judgment of the court, the new law provides a number of specific methods of enforcement: ordering a bank to transfer funds directly from the agency’s account in the case of a fine or the awarding of damages, assessing a daily fine of fifty one hundred yuan if the agency fails to comply with the court’s order, instituting

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81 Zhang, supra note 51, at 29.
82 Civil Procedure Law, arts. 97-102.
83 Administrative Procedure Law, art. 54, sec. 2.
84 Id. art. 44.
85 Administrative Procedure Law, art. 54, sec. 2.
86 Id. art. 54, sec. 4.
87 Id.
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a judicial suggestion to the agency's supervising department, or investigating possible criminal proceedings.\(^8\)

The law contains a separate chapter on foreign nationals and foreign organizations. Foreign nationals and organizations are treated similarly to Chinese\(^9\) citizens unless the foreign country concerned restricts the right of Chinese nationals to conduct administrative litigation (in which case the principle of reciprocity is applied).\(^9\) However, if the foreign plaintiff engages a lawyer, he or she must be employed by a Chinese law firm.\(^9\)

**Tortious Liability**

The principle that a government agency could be held tortiously liable for its illegal actions was recognized in the PRC's 1954 Constitution.\(^9\) At least one statute—the Temporary Statute on Port Management of 1954—specifically stated that a ship owner might claim damages from the port authority if the latter refused to issue an exit permit.\(^9\) However, these rather advanced provisions remained only on paper for decades.

Since the initiation of the reform policy in 1979, governmental tortious liability has again become the focus of attention. The 1982 Constitution reconfirmed this principle,\(^9\) and within a few years concrete progress was achieved. One major breakthrough is contained in Article 42 of the 1986 amendment to the Security Administration Punishment Act, which apart from requiring a public security department to admit its mistake, refund the fine, and return confiscated property when its sanction is judged to be wrong, the Act also stipulates that the plaintiff should be compensated for any loss suffered.\(^9\) A comprehensive framework for such cases was contained in the General Principles of the Civil Law passed at the same time.\(^9\) Civil tortious liability is imposed on a governmental department when it causes damage to the legitimate rights or interests of an individual or corporation during the course of performing its public functions.\(^9\)

However, the imposition of civil liability on a governmental agency in the course of performing its public functions is contradictory in na-

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\(^8\) Art. 65, para. 2.
\(^9\) Art. 71, para. 1.
\(^9\) Art. 71, para. 2.
\(^9\) Art. 73.
\(^9\) Art. 97.
\(^9\) Art. 20. *Quoted in Yingsongnian & Zhu Weijiu, supra* note 51, at 281-82.
\(^9\) Art. 41, para. 3.
\(^9\) See ZRGFQ, *supra* note 22, at 1534.
\(^9\) Art. 121.
ture, and it is indeed difficult to apply civil law and process to administrative cases. In view of these considerations, a chapter on governmental tortious liability has been incorporated into the new Administrative Procedure Law. Two channels are now open to people claiming damages from the government. Individual citizens, legal persons, or other organizations may bring a damage suit incidentally with the original petition to revoke or change the administrative decision. 99 They may also petition first the administrative agency concerned and then the people’s court, 100 and this is the one point at which meditation is permitted. 101 In general, damages shall be paid from public funds at all levels, 102 but the agency is entitled to claim the entire sum or part of the sum from the public servant whose deliberate action or gross neglect is deemed to be responsible for the damage. 103

V. CONCLUSION AND OUTLOOK

After three years of intensive work and nationwide discussion, the PRC finally produced the new Administrative Procedure Law, an important piece of legislation reflecting some compromises among divergent points of view. As explained by Wang Hanbin, vice-chairman of the NPC Standing Committee, because of China’s deficiencies in experience and preparatory work, it was necessary to limit the scope of the new law’s jurisdiction and to have an interval of one and one half years between the adoption of the law and the time of its taking effect. 104

Much remains to be done regarding implementation of the new law. To fill the glaring legislative gap in the administrative area, the Legal Affairs Bureau under the State Council reportedly has been busy drafting the rules and regulations related to the Administrative Procedure Law to cover administrative decrees, penalties, compensation, etc. 105 Central and local governmental departments, led by the State council, also have been examining the existing administrative rules to see whether they are consistent with state laws. So far, more than 10,000 government regulations have been declared invalid. 106

To prepare for the implementation of the Administrative Procedure Law, promotion campaigns have been launched throughout the country,
and special seminars and training sessions have been held for judicial personnel. China now is said to have 2,600 administrative chambers under the courts with 8,000 judges.\textsuperscript{107} Over 31,000 administrative cases have been handled by the courts at various levels since they set up administrative divisions in the 1980s. More than twenty administrative departments have been involved in these cases, including public security, industry and commerce, taxation, customs, mineral resources, environment protection, and food hygiene.\textsuperscript{108} Of all the administrative cases handled, the departments sued won over forty percent. Charges were withdrawn in thirty percent of the cases while administrative decisions were revoked or changed in twenty percent of the cases. To date, the number of cases involving public security is the largest.\textsuperscript{109} In one case, reporting was not permitted when a public security organ lost out.\textsuperscript{110}

In fact, among the major obstacles is the resistant and cynical attitude of the bureaucracy and the indifference and skepticism of the populace toward the new law. Some officials regard the law as restricting their ability to perform their functions. Others take it as a loss of face to be a defendant in court trials. Still others claim that conditions in China are not yet ripe for administrative litigation. As to the general public, some have no idea how to use the law to protect their interests because of their ignorance. Many others refuse to do so out of fear and a lack of confidence in the judicial process.\textsuperscript{111}

The problems and difficulties mentioned above are serious but not insurmountable. They certainly should not detract from the fact that the enactment of the Administrative Procedure Law is another landmark in the PRC's legal reform program launched in 1979. Its significance is more apparent than the 1979 Criminal Procedure Law of the 1982 Civil Procedure Law because it has a direct bearing on the rule of law. Whether the government, like a private party, is held responsible for its illegal actions and whether the court is independent enough to exercise its function of adjudicating cases involving governmental departments is considered to be the touchstone of the principle of government under law.\textsuperscript{112} Since the late 1970s, developments in the PRC's legal system have mainly been aimed at serving the interests of the state administra-

\begin{thebibliography}{99}
\bibitem{107} \textit{Id.} Sept. 28, 1990, at 1.
\bibitem{108} \textit{Id.} Sept. 15, 1990, at 1.
\bibitem{109} According to the statement of Huang Jie, Chief Judge of the Administrative Division under the Supreme People's Court. \textit{XINHUA} (New China News Agency) (July 26, 1990).
\bibitem{110} Yu Fu, \textit{Talks about the Judgement Against the Public Security Agency}, \textit{9 FAXUE} (Law Science Monthly) 44 (Sept. 10, 1987).
\end{thebibliography}
tion and economic advancement rather than limiting government powers to shield individuals from state or party abuse.\textsuperscript{113} Equally true is the fact that limited improvement in certain areas of human rights conditions have been overshadowed by renewed abuses of other basic rights in China since Tiananmen.\textsuperscript{114} But the new law in question is the first of its kind ever enacted in the PRC to permit individuals to challenge and sue administrative agencies. To allow law coming into effect now may well be a hopeful sign that Chinese leaders are beginning to understand the necessity to demonstrate a genuine commitment for respect of the law if they wish to secure some measure of reconciliation with Chinese intellectuals after Tiananmen. The degree of their sincerity and commitment toward the rule of law will be tested by how far they will go in implementing the Administrative Procedure Law.

\textsuperscript{113} See Alford, "Seek Truth from Facts"—Especially When They are Unpleasant: America’s Understanding of China’s Efforts at Law Reform, 8 U.C.L.A. PAC. BASIN L.J. 177, 182 (1990).