

REGULATIONS AND THEIR REVIEW IN THE PEOPLE'S REPUBLIC OF CHINA

by

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ABSTRACT

Administrative regulations are a feature of modern societies that is growing in number and in complexity. This can be observed in North America (the United States and Canada) but also in China. Comparative legal research in the area of public law in a socialist country - China - is faced with distinct problems that only occur in this particular setting. This thesis explains the problems and describes the way they will be dealt with in the course of the research.

Apart from delegated legislation proper all countries also use administrative regulations. In North America, procedural and interpretive regulations can be distinguished; in China the most obvious division is between *fagui* and *guizhang*. A characteristic feature of regulations in the PRC are the conflicts among them, and between them and laws and the constitution. In North America the legal dispute centres on the question of legal force of administrative regulations and whether the courts can enforce them.

Regulation Theory, developed mainly in the United States, which inquires into the justifications and causes for regulation and regulations, is used to explain the Chinese situation of regulation. Regulation theorists come to the conclusion that the justifications advanced by regulators that regulations are meant to address market failure situations, are not fully accurate. Regulations are often enacted either because highly active interest

groups are successfully lobbying for them, or for their symbolic value. Similar results also emerge when looking at Chinese regulations, although there the picture is further blurred by communist ideology and institutions.

Canadian federal institutions provide a concrete example for a North American system of review of regulations. Among the independent organisations the *Parliamentary Committee for Regulatory Scrutiny* has been well researched and seems to be the institution that views most delegated legislation, but administrative regulations cannot be reviewed by this committee. So because of the scope of review that is possible in court - namely reviewing both delegated legislation proper and administrative regulations - and the impact judicial review has on regulations, it is a very important mechanism to achieve responsive regulations.

Since 1982 China has built up its legal system and in the last three 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 Administrative 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 question of review of regulations in China is of high relevance as most concrete administrative acts issued are based on *guizhang*, the lowest level of legislative acts of the administration and these *guizhang* are characterised by multiple contradictions with higher level laws.

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 in the concluding chapter of the thesis how to implement changes in the review system which could lead to judicial review in the long run.

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CHAPTER ONE: INTRODUCTION

Continued social, economic, and technological developments have spawned demands for regulation in a broad range of policy areas.¹ This is true because the modern state is increasingly using administrative units to change or influence social and economic reality. Rule-making as an expedient way of achieving desired policy results is accompanying administrative government.

Regulation is an area of law that is "*shamefully neglected in traditional legal education.*"² There exists, however, a considerable amount of research by lawyers, economists and political scientists in the field. In North America this body of literature has been called Regulation Theory.

This theory has never taken into account any system or country other than western-democratic societies, and the former USSR, Eastern Europe or China where regulations were, and still in part are, all-pervasive, have rarely been examined.³

¹ W. F. West, *Administrative Rule-making - Politics and Processes* (Westport, Conn.: Greenwood Press, 1985) at 19; Luo, Haocai & Ying, Songnian, eds., *Xingzheng faxue* (The study of administrative law) (Beijing: China University of Politics and Law, 1989) at 118. It is observable all over the world and is reflected in a flood of literature on regulation.

² A. I. Ogus & C. G. Veljanovski, eds., "Preface", *Readings in the Economics of Law and Regulation*, (Oxford: Clarendon Press, 1984).

³ It is nevertheless recognized that a nation's approaches to regulation are important factors; P. Manning, "The Limits of Knowledge: The Role of Information" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) 49 at 55. Examples for comparative research on regulations are S. Kelman, *Regulating America, Regulating Sweden, A Comparative Study of Occupational and Health Policy* (Cambridge, Mass.: MIT Press, 1981) and D. Vogel, *National Styles of Regulation, Environmental Policy in Great Britain and the United States* (Ithaca: Cornell University Press, 1986). Hoping for an end of the traditional isolation of Chinese Studies already was Balazs, according to Wright, "Preface" to *Chinese Civilization and Bureaucracy: Variations on a Theme* (New Haven: Yale

But the test for a good theory is whether it is applicable outside the field in which it has been developed. Social science theories, rather than explaining phenomena as accurately as possible in terms relative to specific historical circumstances, should attempt to explain phenomena wherever and whenever they occur.⁴ By taking into account the experiences of the People's Republic of China (hereinafter the PRC or China), Regulation Theory can demonstrate whether it is applicable and accurate on a wider scale than originally conceptualized.

China is a vast, rapidly developing country moving from a planned economy to a market economy. In the PRC regulations exist that control enterprises and their business in every stage of their existence. Control is established not only over the entry into business (possession of a business licence, import/export licence), but also over nearly all aspects of transactions (price of goods and quality standards) and over most features of the production process (environmental protection; food hygiene; worker safety).

One aspect of government regulation is of interest to both worlds, east and west: the reviewability of regulations. The working hypothesis of this thesis is that 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

University Press, 1964) at xiii.

⁴ A. Przeworski & H. Teune, *The Logic of Comparative Social Inquiry* (New York: Wiley Interscience, 1970) at 17. On the use of other western theories applied in the context of communist studies (corporatist/interest groups) see K. Lieberthal & M. Oksenberg, *Policy Making in China, Leaders, Structures, and Processes* (Princeton, N.J.: Princeton University Press, 1988) at 396ff.

reached. This is the case in order to retain regulations as an effective tool of government.

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 commonly⁵ used to achieve these aims is judicial review.⁶ The subordination of the administration to the law of the land as administered by ordinary courts has been described as the very essence of the rule of law.⁷ Research done into specific business regulation also stresses this point.⁸

⁵ 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).

M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971) at 68 sees judicial review as a continuum, ranging from states with non-judicial review of constitutionality (Soviet Union) to those states where review is pre-eminently judicial (U.S.A.).

⁶ *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-Carías, *supra*, note 5 at 81.

⁷ B. Schwartz, "Fashioning an Administrative Law System" (1988) 40 *Administrative Law Review* 415 at 417; his suggestion for the Chinese administrative system on what a properly functioning system of administrative law should include, is threefold:

1. Limits on the powers that may be delegated to administrative agencies and adherence to *ultra vires* restraints on the exercise of those powers;
2. A requirement of fairness in dealings between the citizen and the administrative agency; and
3. The principle that an administrative agency does not have the last word on any action taken by it; instead that the citizen be able to challenge the legality of such action by an independent tribunal, at 419.

⁸ 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

The ambition of this thesis is twofold: I will apply the analytic tools derived from North American regulation theory to render the analysis of Chinese regulations more accurate. This analysis of regulation already in existence is especially useful in providing insights into the origin of regulations. The second aim is to show that in both systems, judicial review of regulations is an important device for certain problems in a world characterized by the growing complexity of regulations as governmental tools. Regulatory complexity is high when a given subject matter is governed by different sets of regulations of either different sources, and/or different rank in the legal hierarchy of norms.

But first of all an effort shall be made to locate the research undertaken in the field of academic scholarship, and set out its basic methodological problems and dangers. Any work in the above mentioned area, which attempts to be more than the standard descriptive - analytical exegesis⁹ is faced not only by the "normal" problems of comparative law, but also (as separate problems that occur "inside" comparative law) by the challenge of working with socialist, public, and Chinese law. Each of these categories poses distinct difficulties and they will be examined in the following.

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.

⁹ Lubman, "Studying Contemporary Chinese Law: Limits Possibilities and Strategy" (1991) 39 *American Journal of Comparative Law* 293 at 310.

COMPARATIVE LAW

Comparative law itself is a discipline in which scholars continuously struggle to ascertain the relevance (even importance) and/or usefulness of the field.¹⁰ There also exist serious problems concerning theory, methodology, and substance.

Most of the time, it is relatively easy to convince a skeptic of the utility of comparative law by showing its service in commerce.¹¹ But that alone does not really validate its existence as an academic discipline.

Generally, comparative law is defined as being the study of the relationship of one legal system and its rules with another; it is about the nature of law and especially about the nature of legal development.¹² Therefore, the main function of comparative law is nowadays seen in the possibility to better understand one's own domestic law, and the effects political and ideological points of view have on law.¹³ Comparative law has to be distinguished from the study of foreign law which can lead to comparative legal work

¹⁰ See generally M. A. Glendon, M. W. Gordon & C. Osakwe, eds., *Comparative Legal Traditions* (St. Paul, Minn.: West Pub. Co, 1985) at 1 - 14; whether comparative law is really *necessary superficial, (...) unsystematic, incomplete, and a thing of shreds and patches* as B. Grossfeld, *The Strength and Weakness of Comparative Law* (Oxford: Clarendon Press, 1990) at 39, states, does not seem overtly convincing.

¹¹ J. N. Hazard, "Socialist Law as an Academic Discipline" (1987) 61 *Tulane Law Review* 1279. It should be mentioned here that in China comparative law studies have been employed in drafting legislation since 1978, and even before, see 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 at 337.

¹² A. Watson, *Legal Transplants: An Approach to Comparative Law*, reprinted in Glendon, Gordon & Osakwe, *supra*, note 10 at 5/6. Even if one rejects developmental ethics as a structuring idea in comparative law, legal harmonization projects like for example the European Community or other regional organizations, form an important part of comparative legal development.

¹³ F. C. Schroeder, "Methoden und Probleme der Vergleichung zwischen westlichen und östlichen Rechtssystemen" in Institute of Comparative Law Waseda University, ed., *Law in East and West* (Tokyo: Waseda University, 1988) 213 at 216.

in the long run. It is probably true to say that the study of foreign law is a necessary, but by no means sufficient condition for comparative law.

There are no prescribed methods of how to approach comparative law, which makes work in this area both intimidating and fascinating. It is work navigating between the Scylla of banality of broad statements and the Charybdis of minuscule detail;¹⁴ but it is always aimed at the discovery of meaningful relations between legal rules, institutions or systems of two or more countries or regions.

Legal rules, institutions or systems cannot be compared without an understanding how they function, and their function, contents and formation cannot be known without situating them in their legal, economic and cultural context.¹⁵

This means that comparative legal research is invariably inter-disciplinary, using insights from political science, sociology, economics, anthropology *et cetera*. Also, the techniques used in these other disciplines can help to improve the methods of comparative legal research, which can "*aid us to identify and address the urgent legal-political*

¹⁴ These two mythical creatures are evoked in numerous instances: e.g. the Scylla of cultural relativism and the Charybdis of moral or normative absolutism, according to P. Potter stated by S. Lubman; the Scylla of disciplinary irrelevance and the Charybdis of the addressing of issues that generate little interest or light among sinologists, D. M. Lampton, *Policy Implementation in Post-Mao China* (Berkeley: University of California Press, 1987) at xii; the Scylla of an empyrean natural law (...), and the Charybdis of aseptic legal positivism (...), M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) at xiv.

¹⁵ Glendon, Gordon & Osakwe, *supra*, note 10 at 11. *Einzelvergleich von Normen setzt voraus , daß sie in ihren Wirkungen weitgehend kontextfrei sind*, M. Adams, "Normen, Standards, Rechte" (1991) *Juristenzeitung* 941 at 946. In the opinion of D. Kokkini-Iatridou, "The Tertium Comparationis in the Micro-comparative Research" in Institute of Comparative Law Waseda University, ed., *Law in East and West* (Tokyo: Waseda University, 1988) 231 at 241, it is safer in the *case of political, ideological or economic differences to seeking and accepting comparability at the "function" level*.

problems of our time. (...) Method should become a 'framework for collaborative creativity'."¹⁶

SOCIALIST LAW

The sub-heading itself is highly problematic: is there (and today it should maybe even read: "was there") a legal family of socialist law? The legal scholarship has reached a working consensus on the main characteristics of the Western legal tradition, but there is no such agreement as to whether the socialist legal system is a part of western law.¹⁷

The scholarly approaches to socialist law have undergone several phases which have occurred in a somewhat chronological order, but all of them can still be found in contemporary academia. They have been classified as:¹⁸ firstly, benign neglect of socialist legal systems; secondly, the attitude, that the only aspect of socialist law that is worth studying is the part which regulates East-West commercial relations;¹⁹ the third approach promotes the "de-constructing" of socialist law in order to show that there is no

¹⁶ M. A. Glendon, "The Sources of Law in a Changing Legal Order" (1984) 17 *Creighton Law Review* 663 at 698.

¹⁷ Glendon, Gordon & Osakwe *supra*, note 10 at 15 and at 673; see in great detail J. Quigley, "Socialist Law and the Civil Law Tradition" (1989) 37 *American Journal of Comparative Law* 781, who argues that socialist law belongs to the civil law tradition, the points of difference between these two would not have removed it from the civil law tradition.

¹⁸ C. Osakwe, "Introduction: The Greening of Socialist Law as an Academic Discipline, Eason-Weinmann Centre for Comparative Law Eighth Annual Symposium: An Examination of the Unity and Diversity within the Socialist Legal Family" (1987) 61 *Tulane Law Review* 1257 at 1258.

¹⁹ Today this trend is still particularly noticeable with regard to the study of Chinese law, Osakwe, *supra*, note 18 at 1260. A simple look at the titles in journals published in the area of Chinese law suffices to come to the same conclusion; since 1989 human rights issues have gained momentum.

redeeming value in socialist law; and the fourth school treads a middle ground between the de-constructing and the outright glorification of socialist law. This is the attempt made in this thesis: taking the second and third approach as thesis and antithesis and lifting it (as in Hegel's dialectic) to the level of the fourth phase. This fourth approach needs a willingness to probe all aspects of socialist law and note its merits as well as demerits in comparison to other legal systems.²⁰

Although the times when an incomparability of socialist and capitalist systems was argued by proponents of both systems are gone,²¹ today, a study of contemporary socialist law has been placed in yet another jeopardy, as hardly any legal system on Earth still claims to be socialist.²² China is of course one that makes such a claim. A particular feature of a socialist legal system is the merger of the Communist Party, state and society, which results in the fact that the legal system appears to be a projection of the omnipotent (and omniscient) will of the Party which is rubber-stamped by the state.²³

²⁰ Osakwe, *supra*, note 18 at 1262.

²¹ *Nowadays it is accepted in both East and West that an "objective" comparison between the two systems is possible. Socialists such as Szabo and westerners such as Bogdan make a distinction between the general objective of a legal institution which is based on fundamental ideological values, and its immediate direct objectives at a juridical level. When the latter is the same, comparison is possible, Kokkini-Iatridou, supra, note 15 at 239 (footnotes omitted).*

²² On the problems resulting therefrom see I. Padjen, "Approaching Aliens: A Plea For Jurisprudential Recovery as a Theoretical Introduction to (Ex) Socialist Legal Systems" (1991) 14 *Dalhousie Law Journal* at 24. Socialist law will however be of interest to legal historians and history itself knows multiple instances where an ideology believed to be dead had a 'renaissance'.

²³ Padjen, *supra*, note 22 at 34. On these features in the Chinese context see B. McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990); 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 20.

Padjen suggests,²⁴ that knowing the real sources of socialist laws (especially the party institutions) make comprehension of a socialist legal system impossible. It would not be knowable to either internal participants or external observers.

Nevertheless an attempt will be made here to describe some particular features of a socialist legal system and explain their existence.

PUBLIC LAW

More difficulties arise when the comparative research concerns public law.²⁵ Public law, more than private law, is infused with indigenous political, social, and economic realities.²⁶ Whether it is for these or other reasons, most comparative research has focused on private law and this in return has affected the way in which legal systems were grouped into families.²⁷

²⁴ *Supra*, note 22 at 39. M. S. Tanner in *The Politics of Law-making in China* (1990) [unpublished] at 3 arrives at the same conclusion.

²⁵ Public Law is defined by *The Dictionary of Canadian Law* (1991) as: *All law dealing with relations between an individual and the state or between states and the organizations of government; i.e. criminal, administrative, constitutional and international law.*

²⁶ C. Osakwe, "Introduction, The Problems of the Comparability of Notions in Constitutional Law, Eason-Weinmann Centre for Comparative Law Symposium on Comparative Perspectives on Constitutional Law, Problems and Prospects" (1985) *59 Tulane Law Review* 875 at 876.

²⁷ Glendon, Gordon & Osakwe, *supra*, note 10 at 11; it seems possible that new and unconventional groupings of legal systems will emerge and that a country may be said to belong to a given legal group for one purpose but to another for other purposes. The differences between a greater or lesser degree of judicial review could for example form the basis for new and important classifications, cf. Glendon, *supra*, note 16 at 683. Different categories are discussed in Brewer-Carías, *supra*, note 5, *The Diffuse System of Judicial Review*, at 125 - 181, *The Concentrated System of Judicial Review*, at 183 - 262, *The Mixed System of Judicial Review*, at 263 - 326.

In the last hundred years, the importance of administration has risen all over the world and with it so has administrative law.²⁸ In the public law realm, maybe even concerning law in general, administrative law is the area that has the most direct impact on the lives of most people. Out of the immediate legal contact ordinary people will have, dealing with administrative law will be most frequent: from zoning and building law over to social welfare, workmen's compensation, food hygiene and environmental law. There is therefore a genuine need to employ comparative research in evaluating its effects:

*"Comparative study warns us that more is at stake here than merely promoting efficiency and minimizing over-regulation. Administrative law, in modern times, has been a principal legal tool of totalitarian regimes."*²⁹

It will thus be of particular interest to study the Chinese situation of this specific area of public law. China has a legacy of a highly specialized administration and bureaucracy, and the current regime can validly be described as totalitarian³⁰ in nature.

CHINESE LAW

Generally, the view is widely, though not unanimously, shared that Chinese law qualifies as a member of the socialist legal family even though it manifests elements of

²⁸ On that development see E. Schmidt-Aßmann, "Basic Principles of German Administrative Law" in M. P. Singh, ed., *Comparative Constitutional Law* (Lucknow, India: Eastern Book Co., 1989) at 405. Also talking about administrative law as a potentially emergent field in the chinese context is Lubman, *supra*, note 9 at 304.

²⁹ Glendon, *supra*, note 16 at 680. Not only there, of course, but most frightfully in totalitarian regimes.

³⁰ There is discussion among political scientists whether China has changed into an authoritarian regime.

pre-revolutionary Chinese legal tradition.³¹ And this "Chineseness" or the "Special Chinese Characteristics" ³² must be considered in their implications for research.

The Chinese legal system comes with its own tradition which grew over millennia, and it is possible to point to these areas when researching.³³ But to construct the modern Chinese legal system in complete parallel to its imperial predecessors would be a flawed approach.

Upon leaving the European legal family, "*a whole Pandora's box of problems opens up.*"³⁴ Scholars are urged to "*resist the pressure (..) to approach distant cultures armed with or in search of 'grand theory'.*"³⁵ Many structuring distinctions employed in

³¹ Osakwe, *supra*, note 18 at 1263; Glendon, Gordon & Osakwe, *supra*, note 10 *Today Chinese law is unmistakably an integral part of the socialist legal family. But, in classifying Chinese law as socialist, we do not rule out the fact that certain elements of Far Eastern legal tradition are still present in it* at 713.

³² The "Special Chinese Characteristics" (*zhongguo tese*) of either the legal system, the economic system or for that matter every policy or institution in China is a frequently used slogan to describe the Chinese way of doing things. Kong, Xiaohong, "Legal Interpretation in China" (1991) 6 *Connecticut Journal of International Law* 491 for example states that the Chinese created a legal system different from any other country of the world. Substantively speaking it refers to the inclusion of moral principles into the law (e.g. Art. 7 of the General Principles of Civil Law) and the use of procedures like mediation and arbitration. As a concept it is used especially by the political leadership to down play the influence foreign law has had on China's legislation process since the begin of the "Open Door" policy. But legal scholars also concede that a balancing act between modern law (often derived from abroad) and old customs still alive in the people, is necessary, see Wang, Weiguo, "The Legal Modernization in China: A Cultural Survey" (1991) 4 *Juridisk Tidsskrift* 645.

³³ On administrative law in ancient China see e.g. Li, Guozhi, *Xingzheng fa cidian* (Administrative law dictionary) (Taiyuan: Shanxi University Press, 1989) at 182 - 251. Examples for legal terminology regarding statutes and sub-statutes in imperial China are given in Bodde & Morris, *Law in Imperial China* (Cambridge, Mass.: Harvard University Press, 1967), 64.

³⁴ Grossfeld, *supra*, note 10 at 47.

³⁵ W. Alford, "'On the Limits of 'Grand Theory' in Comparative Law" (1986) 61 *Washington Law Review* 945 at 946. Although this article may have been much criticised this has not happened in the public forum: only one other author has cited it in an entirely different context. The question is whether all grand theory by its very nature is reductionist and will therefore offend the respective specialists. But human nature seems to be inclined to go on with "grand" theoretical inquiry, Przeworski & Teune, *supra*, note 4 at 18.

research in Chinese law are the products of a Western legal education. Moreover, Westerners will set priorities in their research that people immersed in the Chinese culture might never set.

These inescapable limitations should serve as a reminder of how vital it is that we commence any comparative inquiry by seeking rigorously to identify the values that shape our own thinking, so that we might approach other societies with a better chance of recognizing how our orientation is likely to colour what we see there.³⁶ This thesis will make a conscious attempt to use material written by Chinese scholars in order to at least reduce my own cultural³⁷ bias.

But it is not only the left-over traditions of the past that cause difficulties in studying Chinese law, but especially the Marxist/Leninist-Mao Zedong thought heritage (which is different from general socialist),³⁸ and most of all the current state of politics

³⁶ W. Alford, "The Inscrutable Occidental ? Implications of Roberto Unger's Uses and Abuses of the Chinese Past" (1986) 64 *Texas Law Review* 915 at 966; the whole article is written with the intention to prove this point.

³⁷ Adams *supra*, note 15 defines culture as distinguishable, locally stable balances of behavioral norms at 950. Being in between cultures would, according to him, happen only slowly if at all, because one would lose the advantages created by the fact of belonging to one culture.

Kulturen als ein System von Sozialnormen weisen somit die Eigenschaft auf, daß sie die Träger dazu anhalten können, sich entweder für die eine oder die andere Kultur zu entscheiden und nicht für ein Mittelding zwischen beiden. Kulturen sind somit getrennte, lokal stabile Gleichgewichte von Verhaltensnormen, with further references.

³⁸ The most important ideological addition Mao made to Marxism/Leninism is the applicability of this ideology to a semi-feudal peasant society as opposed to industrialised countries. According to McCormick, *supra*, note 23 at 192, there is a deep confusion about what exactly Marxism-Leninism Mao Zedong Thought is in the new era. On Maoist thought in the legal realm see Wang, *supra*, note 32 at 649. For more on Mao's political views see Wakeman (Jr.), *History and Will, Philosophical Perspective of Mao Tse Tung's Thoughts* (Berkeley: University of California Press, 1973); J. B. Starr, *Continuing the Revolution: The Political Thought of Mao* (Princeton, N.J.: Princeton University Press,

in China. Chinese law can - even less than the laws of other countries - be regarded just as a system with the aim of regulating behaviour in society. Due to the current political situation and the traditions inherited from the past, China still views law as a tool for the public domain, the state. Legal doctrine is inseparably intertwined with policies, occasionally even subject to politics (zhengzhi) and policy (zhengce) and some party cadres view law as just a different expression of policy.³⁹

This thesis will nevertheless work with Chinese law; mainly its doctrine,⁴⁰ as it can be found in written statutes. The reason for this is first and foremost because of the educational training as a lawyer. Legal education enables to decipher the meaning of legal documents and predict the result of disputes litigated under them.

In order to fully understand the relationship between law and politics in China, not only ample statistical data would be necessary, but also a much more restricted topic than the one chosen. The legal approach has moreover been chosen in the hope that policy in China will change in the future, but any developed, substantive doctrine will probably remain or will be used as a basis for new doctrine.⁴¹ In addition, many Chinese legal

1979); S. R. Schram, *The Thought of Mao Tse Tung* (Cambridge: Cambridge University Press, 1989); B. Brugger & D. Kelly, *Chinese Marxism in the Post-Mao Era* (Stanford, Calif.: Stanford University Press, 1990).

³⁹ See 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 159.

⁴⁰ D. T. C. Wang, *Les sources du droit de la République populaire de Chine* (Geneva: Librairie Droz, 1982) at 168 lists doctrine as a possible source of law and defines it as the collection of written work by legal commentators, at 168. He also states that it has great influence on Chinese contemporary legislation.

⁴¹ Similar R. H. Folsom & J. H. Minan, "A Reply by the Authors to Robert Berrings's Review" (1990) 38 *American Journal of Comparative Law* (1990) 732 at 734.

scholars make a real effort to treat law in a doctrinal manner without constant reference or deference to policy.

Every comparative law study becomes flawed when it fails to distinguish between law in print and law in action, between a mere paper legal institution and an institution that actually functions.⁴² It is highly necessary for the sino-jurisprudence to move from the rules themselves to analyzing the practical application of legal concepts intended to reorder the Chinese economy.⁴³ Although the situation in China does not permit a very thorough research of the practice of law, one Chapter of the thesis was intended to examine the review of regulations with the help of court cases. During the course of the research it became clear however, that the findings did not contribute to the argument of the thesis. This Chapter has therefore been moved to a methodological appendix.

⁴² Glendon, Gordon & Osakwe, *supra*, note 10 at 8.

⁴³ Lubman, *supra*, note 9 at 329.

CHAPTER TWO: REGULATION THEORY - NORTH AMERICA

I. Introduction

Society is confronted with an ever increasing number of rules and regulations, and the common perception in North America is that the sheer volume of regulations has become unmanageable.¹ Further complaints about regulations concern the costs of their making, the costs they impose on private business and their alleged undemocratic² and unresponsive nature.

The question is how the use of regulations in a state under the rule of law can be optimized.

There seem to be two remedies available: either participatory procedures for rule-making - to make rules that reflect the wishes and needs of society - because society is

¹ R. Macdonald, "Understanding Regulation by Regulations" in I. Bernier & A. Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 82; P. Bryden, "Canadian Administrative Law: Where We've Been" (1991) 16 *Queen's Law Journal* 7 at 9; D. Hartle & M. Trebilcock, "Regulatory Reform and the Political Process" (1982) 20 *Osgoode Hall Law Journal* 643; for the UK see C. J. Veljanovski, *The Economics of Law - An Introductory Text* (London: Institute of Economic Affairs, 1990) at 73. Apparently more than two-thirds of all current Canadian federal Acts contain at least one statutory provision for the making of regulations, and many individual Acts contain several, R. D. Anderson, "The Federal Regulation Making Process and Regulatory Reform, 1969 - 1979" in W. T. Stanbury, ed., *Government Regulation - Scope, Growth, Process* (Montreal: Institute for Research on Public Policy, 1980) 151 at 153.

² *Regulators are appointed - not elected - officials yet they wield enormous power. How is their exercise of that power to be controlled?*, S. G. Breyer, *Regulation and its Reform* (Cambridge, Mass.: Harvard University Press, 1982) at 3; stating potential conflict with two principles of constitutional government (separation of powers and representative government) is J. R. Bowers, *Regulating the Regulators - An Introduction to the Legislative Oversight of Administrative Rule-making* (New York: Praeger, 1990) at 2. For a general overview about regulation's shortcomings see K. J. Meier, *Regulation - Politics, Bureaucracy, and Economics* (New York: St. Martin's Press, 1985) at 276 - 284.

directly involved in their making;³ or an after the fact control mechanism: review by a third party.⁴

I will try to show, using the Canadian legal system as a backdrop, that the possibility of judicial review of regulations is a very important factor in obtaining responsive rules, given a certain stage of complexity of regulations.⁵

³ See R. A. Harris, & S. M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* (New York: Oxford University Press, 1989) at 4; K. Hawkins & J. M. Thomas, "Making Policy in Regulatory Bureaucracies" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) 3 at 9; on all other aspects of regulatory reform see Breyer, *supra*, note 2 at 341 - 368; F. Heffron & N. McFeeley, *The Administrative Regulatory Process* (New York: Longman, 1983) at 372 - 397. Most western countries seem to favour participatory procedures and have put notice-and-comment rule-making in place. These procedures address the two main defects of delegated legislation at once: unresponsiveness and their undemocratic nature. This thesis will limit itself to the second remedy.

Without going into too much detail, the general problems of participatory procedures can be stated as follows: uncertainty about the parties that have to be involved in the process; dominance of more financially affluent parties, thus making government funding of public interest groups necessary; and ample possibilities for exceptions of participatory procedures when speedy enactment of regulations is necessary. Short evaluation by Bryden, *supra*, note 1 at 14. Heavy critique of pre-adaption procedures for non-legislative regulations see M. Asimov, "California Underground Regulations" (1992) 44 *Administrative Law Review* 43 at 55ff. It seems certain that *ex ante* review of regulations slows down the output of new initiatives, W. T. Stanbury & F. Thompson, "The Prospects for Regulatory Reform in Canada: Political Models and the American Experience" (1982) 20 *Osgoode Hall Law Journal* 678 at 717; how one assesses this depends of course on one's political stance.

⁴ On these two approaches in the Chinese context see H. Harding, *Organizing China - The Problem of Bureaucracy 1949 - 1976* (Stanford, Calif., Stanford University Press, 1981) at 16/17.

⁵ *Responsive Regulations* is the title of a new book by I. Ayres which was published in 1992 and unfortunately was not yet available for my research.

This part of the thesis was written with the aim in mind to use China as a case study for the analysis derived from North American Regulation Theory. It is useful therefore to take North America as a unified legal entity although there are of course decisive differences between Canada and the United States of America.

The uniqueness of the American approach to regulation is the one finding on which every cross-cultural study of regulations is in agreement. The American system of regulation is distinctive in the degree of oversight exercised by the judiciary and the national legislature, in the formality of its rule-making and enforcement process, in its reliance on prosecution, in the amount of information made available to the public, and the extent of the opportunities provided for participation by non-industry constituencies,

D. Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca: Cornell University Press, 1986) at 267. Also stressing the differences in political institutions

II. The Problem of Regulation by Regulations - What are we Talking About ?

1. Regulation

Most often, the term "regulation" refers to the use of legislative instruments to impose "command-and control" behavioural constraints on private entities.⁶ In this paper "regulation" will mean everything that government does to influence behaviour of especially economic actors. It is possible to consider all forms of state intervention as regulatory in some sense.⁷ A loose distinction can be made between regulatory and fiscal operations of government which have a direct impact on the budget and are only indirectly regulatory.⁸

and culture between the United States and Canada are Stanbury & Thompson, *supra*, note 3 at 685. Giving a bibliography on comparative work regarding Canada and the US is J. A. Thomson, "Comparative Constitutional Law: Entering the Quagmire" (1989) 6 *Arizona Journal of International and Comparative Law* 22 at 51 (Appendix C).

The rule of thumb for this paper is that descriptions of institutions always concern Canada unless otherwise indicated, but the general background is derived from a mixture of US and Canadian sources.

⁶ Macdonald, *supra*, note 1 at 82; to stick to that concept however, is problematic, as the available literature sometimes does not distinguish carefully what type of regulation they are addressing, or they do not even attempt to define what is meant by regulation: Breyer, *supra*, note 2 at 7; D. Needham, *The Economics and Politics of Regulation - A Behavioural Approach* (Boston: Little Brown, 1983) at 1. On the distinction between law and regulations see T. J. Lowi, "The State in Politics" in R. G. Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985) 67. On definition see R. G. Noll, "The Political Foundations of Regulatory Policy" (1983) 139 *Zeitschrift für die gesamte Staatswissenschaft* 277 at 378; B. Mitnick, *The Political Economy of Regulation - Creating, Designing, and Removing Regulatory Forms* (New York: Columbia University Press, 1980) at xxi.

⁷ H. W. Arthurs, "Law as an Instrument of State Intervention: A Framework for Enquiry" in I. Bernier & A. Lajoie, eds., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 77 at 98. At the same conclusion arrives C. C. DeMuth, "What is Regulation ?" in R. J. Zeckhauser & D. Leebeart, eds., *What Role for Government ? Lessons from Policy Research* (Durham, N.C.: Duke University Press, 1983) 262 at 263; Breyer, *supra*, note 2 at 7.

⁸ G. J. Stigler, "Preface" in G. J. Stigler, ed., *Chicago Studies in Political Economy* (Chicago: University of Chicago Press, 1988) at xii; a further differentiation can be made between economic and social regulation M. D. Reagan, *Regulation - The Politics of Policy* (Boston: Little Brown, 1987) at 17. In detail on economic regulation see Heffron & McFeeley, *supra*, note 3 at 349 - 354 and social regulation Reagan at 88; A. L. Fritschler & B. H. Ross, *Business Regulation and Government Decisionmaking* (Cambridge, Mass.: Winthrop Publishers, 1980) at 42; Heffron & McFeeley, *supra*, note 3 at 354 - 358 and their further division into subsidiary regulation at 358 - 361. Some scholars

Any policy, be it economic, social, scientific or cultural, must, if it is to pass into reality, be expressed in the form of acts, regulations, ministerial directives, budget guidelines, and so on. Law is then the effective formulation of policy⁹ and therefore regulatory. Characteristics of regulation include: explicit limitations on, or displacement of, personal or corporate autonomy in order to advance the individual or collective interest of other actors and overt reliance on the purposeful use of legal rules to accomplish the ends defined (however vaguely) by the statute.¹⁰ The literature on regulation is so extensive and elective as to defy any neat taxonomy.¹¹ This thesis will limit itself to one specific area of regulation: regulations. The reason for this is that there is a greater necessity for review concerning command-control regulations as opposed to all other forms.¹² This is the case both in North America and in China.

do not agree with the social/economic distinction, DeMuth, *supra*, note 7 at 265 calls it a confusion from the start.

⁹ G. Rocher, "Canadian Law from a Sociological Perspective" in I. Bernier & A. Lajoie, eds., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 137 at 174. Describing a "rule" as the skin of a living "policy" in analogy to O. W. Holmes is C. S. Diver, "Regulatory Precision" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) at 199.

¹⁰ Arthurs, *supra*, note 7 at 99; similar Reagan, *supra*, note 8 at 15; Breyer, *supra*, note 2 at 6; regulatory methods like licensing requirements, the allocation of desired, scarce resources, rate setting or the setting of standards are discussed in detail by Breyer, *supra*, note 2 at 71-95, 36-59, 96-119 respectively.

¹¹ B. M. Owen & R. Braeutigam, *The Regulation Game - Strategic Use of the Administrative Process* (Cambridge, Mass.: Ballinger Pub. Co., 1978) at 9. The standard textbook is S. G. Breyer & R. B. Stewart, *Administrative Law and Regulatory Policy - Problems, Text, and Cases*, Second edition (Boston: Little Brown, 1985).

¹² The only exception being public enterprise which involves an even higher amount of governmental supervision, Noll, *supra*, note 6 at 386. Public enterprise has of course much relevance in China, on the Chinese enterprise system see H. Chao & Yang, Xiaoping, "The Reform of the Chinese System of Enterprise Ownership" (1987) 23 *Stanford Journal of International Law* 365; E. J. Epstein & Ye, Lin, "Individual Enterprise in Contemporary Urban China: A Legal Analysis of Status and Regulation" (1987) 21 *International Lawyer* 397.

2. Regulations

The law of any state consists not only of the formal acts of Parliament, but also of delegated legislation, administrative acts, judicial decisions and customs, and general principles of law. All these precepts, which make up the legal order in force at a given time, have different origins and different ranks, and it is not a question of considering them as coordinated rules in juxtaposition but as being in a hierarchical structure with the rules distributed in various strata, more or less one above the other.¹³

This thesis will use the term "regulations" synonymously with "delegated legislation."¹⁴ Delegated legislation are rules derived from (or enacted by) the executive or administrative branches of government upon whom Parliament has delegated authority to make rules under a statute.¹⁵ Regulations are therefore part of "regulation";¹⁶ they are probably the most visible governmental method to influence behaviour and pose a number of specific problems. Regulations were the primary target of the so-called "de-regulationists".¹⁷

¹³ A. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) at 28.

¹⁴ Thus following Macdonald's distinction, *supra*, note 1 at 147, note 1.

¹⁵ I will not distinguish further between federal and provincial regulations. The federal nature of Canada means that the right to legislate is split between two levels of government. It is probably true to say that 95 % of all administration is provincial, but the doctrine governing both realms is nearly identical and no further insights for the topic of this thesis would emerge when provincial regulations would be distinguished from federal regulations. Statements made in the context of Canadian regulations generally concern federal regulations. China is a centralist state, but there I will also exclude local regulations from the topic examined.

¹⁶ Describing them as a subset is Needham, *supra*, note 6 at 284.

¹⁷ In depth on de-regulation in the United States M. Derthick & P. J. Quirk, *The Politics of Deregulation* (Washington D.C.: Brookings Institution, 1985). The claim of de-regulationists is that it would improve economic efficiency, Stanbury & Thomson, *supra*, note 3 at 683. On the possibility of de-regulation in Canada, Hartle & Trebilcock, *supra*, note 1 at 649.

III. Types of Regulations

I believe that further insights into the structure and characteristics of regulations emerge - especially in view of their reviewability - if one looks at the possible types and forms in which they appear.

1. Delegated Legislation Proper

Delegated legislation is also called subordinate legislation or instruments of a legislative nature. In Canada, the *Statutory Instruments Act*¹⁸ provides for a definition of delegated legislation, describing regulations as one form of statutory instrument:

"Regulation" means a statutory instrument

(a) made in exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

*and includes a rule, or order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any other instrument described as a regulation in any other Act of Parliament;*¹⁹

"Statutory Instrument"

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament or under which that instrument is expressly authorized to be issued, made or established otherwise than by conferring or any person or body of powers or functions in relation to a matter to which that instrument relates or

*(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament.*²⁰

¹⁸ An Act to Provide for the Examination, Publication and Scrutiny of Regulations and other Statutory Instruments, 1970-71-72, c. 38 Section 2 (1). It replaced and repealed the *Regulation Act*.

¹⁹ Section 2 (1) *Statutory Instruments Act*.

²⁰ Section 2 (1) *Statutory Instruments Act*. Exceptions are omitted.

To decide whether an instrument is a regulation, one must therefore decide whether a legislative (as opposed to an administrative) power is being exercised. In general, regulations are rules of broad applicability, whereas a statutory instrument can be a regulation or a direction etc. which is made under the authority of a statute, but with reference only to a limited number of cases.²¹ Sometimes it is difficult to establish the true nature of a regulation, whether it is legislative or not. It has been suggested that a legislative provision which authorizes the making of rules by a person or body is a good *prima facie* indication that the end product was intended to be of a legislative nature.²² There is no provision in Canada for a body to give a definitive ruling on whether a particular instrument is or is not a statutory instrument.²³

The functional characteristics of delegated legislation are the origin: it is authorized by statute, content: it is of normative, general scope, and effect: delegated legislation has the force of law.²⁴ The force of law is derived from the statute which creates the power, and not from the executive body by which they are made.²⁵

²¹ Anderson, *supra*, note 1 at 157.

²² D. C. Holland & J. P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 107/108; they emphasize however, that the terminology used to describe an instrument should never be seen as determinative of the issue, 109. Their view runs counter to Martineau et al. v. Matsqui Institution Inmate Disciplinary Board, (1978) S.C.R. 118 at 129.

²³ G. Levy, "Delegated Legislation and the Standing Joint Committee on Regulations and other Statutory Instruments" (1979) 22 *Canadian Public Administration* 349 at 357/358. In practice it is decided by the Office of the Ministry of Justice.

²⁴ R. Dussault & L. Borgeat, *Administrative Law - A Treatise*, Second edition, Vol. 1 (Toronto: Carswell, 1985) at 317f; Macdonald, *supra*, note 1 at 92.

²⁵ See E. Driedger, "Subordinate Legislation" (1960) 38 *Canadian Bar Review* 1 at 2. This is in keeping with the British tradition of sovereignty of Parliament, Levy, *supra*, note 23 at 350.

Most common recipients of delegated legislative powers include the Governor in Council, a Minister with approval of the Governor in Council, a minister alone, a commission with approval of the Governor in Council or a board or commission alone.²⁶

Often situations arise in which two contradictory provisions claim to be in force. In such cases it will be necessary to choose one over the other by determining which one ranks higher than the other. That means it is necessary to determine which state body is competent to decide this hierarchy.²⁷ Regulations are subordinate to the statute under which they are made, and if there is any conflict between them, the statute prevails.²⁸ Today, the question is no longer whether the power to make regulations is justified, but whether to establish limits upon it and to control its exercise.²⁹

2. Administrative Regulations

Although "*perhaps nine-tenths of injustice of our legal system flows from discretion and perhaps only one-tenth from rules*,"³⁰ some fractions of the nine-tenths consists of injustice occurring during the exercise of discretion to make rules. The reason to distinguish³¹ further between administrative regulations is to show that there

²⁶ Unfortunately I cannot give ratios as to the frequency of each delegatee's holding of delegated powers.

²⁷ Brewer-Carías, *supra*, note 13 at 29.

²⁸ Driedger, *supra*, note 25 at 6 with further references.

²⁹ Dussault & Borgeat, *supra*, note 24 at 308.

³⁰ K. C. Davis, *Discretionary Justice - A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 25.

³¹ Dividing administrative rules into eight different, partly overlapping categories are R. Baldwin & J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1986) *Public Law* 239 at 241ff.

are rules of different scope of application, made pursuant to different kinds of procedure³² by government agencies, and these rules do not constitute delegated legislation proper.

Administrative regulations, also called directives (or a multitude of other names including "quasi-law") are defined as unilateral administrative acts of a general nature which are rules of conduct having internal effect adopted by an administrative authority by virtue of a general power of direction with a view to guiding the actions of subordinates and the enforcement of which cannot be subject to legal sanction.³³ They are not included in the class of statutory instruments.³⁴

Most guidelines are valid by virtue of being a necessary aspect of the administration of government. Administrative rule-making is an especially important tool for both confining discretionary power and for structuring it; rules which establish limits on discretionary power confine it, and rules which specify what the administrator is to do within the limits structure the discretionary power.³⁵

³² California seems to be the only state that requires and strongly enforces elaborate preadaption procedures for their so-called non-legislative or "underground" regulations. They also provide for mandatory scrutiny of every rule by the Office of Administrative Law, Asimov, *supra*, note 3 at 45.

³³ R. Dussault, "Quasi-Law: Directives and Guidelines" in *Second Commonwealth Conference on Delegated Legislation*, Vol. 3 (Ottawa: Supply and Services Canada, 1983) 35.

³⁴ Anderson, *supra*, note 1 at 158 with further references.

³⁵ Davis, *supra*, note 30 at 97.

a) Procedural Regulations

Procedural regulations govern the internal mechanics of the administrative process. The nature of an agency's internal procedures influences its level of competence,³⁶ and especially in attempting to explain regulatory agency behaviour, an approach that emphasises the decision rules and procedures within an agency achieves good results.³⁷ Administrative process and procedures can be viewed then as one example of means mitigating the problems inherent in bureaucratic discretion by ensuring that agency decision-making conforms with broad political and administrative norms.³⁸

b) Interpretive Regulations

The use of rule-making to guide the subsequent application of policy is seen as a way of improving the quality of bureaucratic discretion.³⁹ It has to be recognized, however, that the power to decide the meaning of a rule is no less a regulatory power than the power to make the rule.⁴⁰ The aim in making such rules is not to legislate *per se*, but to facilitate the administration's work. The essence of the problem is therefore to determine the extent to which a body may, through use of such rules, predetermine the

³⁶ T. Greenwood, *Knowledge and Discretion in Government Regulation* (New York: Praeger, 1984) at 137.

³⁷ Needham, *supra*, note 6 at 114.

³⁸ W. F. West, *Administrative Rulemaking - Politics and Processes* (Westport, Conn.: Greenwood Press, 1985) at 102f.

³⁹ West, *supra*, note 38 at 35; R. Baldwin, "Accounting for Discretion" (1990) 10 *Oxford Journal of Legal Studies* 422 at 428.

⁴⁰ Macdonald, *supra*, note 1 at 103. Providing a lengthy list of constitutional issues that give ground to concern regarding interpretive regulations (in the British context) are Baldwin & Houghton, *supra*, note 31 at 267f.

issues which arise before it.⁴¹ Agencies need not to be authorized by statute to issue interpretative rules (although they often are).⁴²

Whether the statements designated as interpretative rules have legal force, or are applicable directly to outsiders, is far from simple and far from obvious.⁴³ The theory is that interpretative rules clarify existing law but do not add to it; they cannot create new rights or new obligations.⁴⁴ Three different forces of interpretative rules can be distinguished:⁴⁵ with force of law, with authoritative effect but less than force of law, and with little or no authoritative effect. Concerning the second category, an agency may have established standards or principles or lists of factors that must be employed in decision-making but they do not always govern the outcome.⁴⁶

The question of legal force is of material importance. Internal rules to "guide" outside decisions are highly problematic because they have the possibility of raising

⁴¹ Holland & McGowan, *supra*, note 22 at 118.

⁴² West, *supra*, note 38 at 41; also Dussault, *supra*, note 33 at 36: *if Parliament makes an administrative authority responsible for the direction of a body, it gives to that body at the same time certain power to make directives.*

⁴³ Davis, *supra*, note 30 at 70. An interesting approach to determine the legal force of administrative rules suggest Baldwin & Houghton, *supra*, note 31 at 246; they use the principles the European Court of Justice developed to determine the direct applicability of community law to citizens of a member state.

⁴⁴ Davis, *supra*, note 30 at 76; J. M. Evans, H. N. Janisch, D. J. Mullan & R. C. B. Risk, *Administrative Law - Cases, Text, and Materials*, Third edition (Toronto: Emond Montgomery, 1989) at 793, no legal force but significant legal effect. "*They become a problem when they take legislation beyond the point envisaged by Parliament,*" Baldwin, *supra*, note 39 at 428.

⁴⁵ Davis, *supra*, note 30 at 70.

⁴⁶ D. J. Gifford, "Discretionary Decisionmaking in Regulatory Agencies: A Conceptual Framework" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) 233 at 238; calling that "*practically binding*" is R. A. Anthony, "Agency Efforts to Make Non-legislative Documents Bind the Public" (1992) 44 *Administrative Law Review* 31 at 32.

legitimate expectations in people dealing with the agency.⁴⁷ Sometimes it is argued that these rules have a binding effect on the body which they are given, but have no such effect on third parties who could be affected indirectly.⁴⁸ So administrators in Canada dealing with regulations, live between the Scylla of the doctrine of legitimate expectations and the Charybdis of the doctrine concerning the illegal fettering of discretion by rules.

At the bottom of the issue lies the fact that

*"[r]ules cannot, in reality, be classified into neat internal/external categories. A major characteristic of contemporary public administration is the move to publicise what in the past have been internal rules. This process of externalizing internal rules creates something of a dilemma. If internal rules are made legally binding this could compromise the discretion given the administrative agency. At the same time it is repugnant to our notion of decency in government that when there has been a degree of reliance placed on internal rules, the government may ignore them and resile on any expectation it may have raised."*⁴⁹

IV. Why do we regulate ?

The question of the rationale of regulations is important in the context of reviewability. Teleological interpretation is used by the courts, and in order to apply it, the "telos" of the regulations has to be clear. So the judges' conception of the grounds for regulation will flavour their decisions.

⁴⁷ Although this doctrine has up to now only been used as source of procedural rights there are indications that it will be extended to include some substantive rights Evans et al., *supra*, note 41 at 793.

⁴⁸ Dussault, *supra*, note 33 at 36; Evans et al., *supra*, note 44 at 793. Anthony, *supra*, note 46 at 40, wants agencies to be required to follow legislative rule-making if they intend to bind, because then the affected private parties have a final agency action they can take to court while the agency gets the protection of a narrower scope of judicial review.

⁴⁹ Evans et al., *supra*, note 44 at 793.

Legions of scholars have been fascinated by the question for the origin of regulation.⁵⁰ Their answers to the question 'why do we regulate' are always very much influenced by their respective disciplinary background.⁵¹

Lawyers are most likely to give as explanation for regulations the requirements of the rule of law; advancing that it is more just to articulate criteria for administration before statutory programs are brought to bear on individuals. In this sense, rules are said to promote formal justice by precluding or at least mitigating retroactivity, arbitrariness, and capriciousness in the application of policy and also live up to democratic expectations.⁵² To a sociologist or political scientist who is analyzing a piece of legislation or a set of regulations, it appears as the product of power struggles whose origins must be sought in

⁵⁰ This fascination is expressed by T. K. McCraw, "Introduction" in T. McCraw, ed., *Regulation in Perspective - Historical Essays* (Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1981) i at vii:

The issue of government regulation embraces a number of themes inherent in the study of industrial society: the cultural and ideological tension between individualism and communitarianism, the inescapable trade-offs between efficiency and equity, and the contest - real and imagined - between economic growth and environmental quality. The debate over regulation and deregulation, as broad as it is, implies a still broader debate over the advantages and disadvantages of adversarial business - government relations compared with cooperative ones, and even over the preponderance and relative legitimacy of the two at any given time. Regulation, then is a complex and sometimes intractable topic, but nonetheless an irresistible one.

Extensive overview over existing literature and proposal of a new modelling approach by Mitnick, *supra*, note 6 at 79 - 241.

⁵¹ Generally on the complexity and multi-disciplinary of regulation see Meier, *supra*, note 2 at 7.

⁵² West, *supra*, note 38 at 48; similar Mitnick, *supra*, note 6 at 399; D. J. Galligan, *Discretionary Powers* (Oxford: Clarendon Press, 1986) at 171/172:

the virtues of rules are that they constitute a clear and certain basis for official action, and they may be effective and efficient in achieving goals. They provide a good level of stability in legal relationships, they ensure a certain level of procedural fairness, and they constitute a firm basis for outside scrutiny.

the political, social and economic structure as much as in the sphere of values and ideologies.⁵³

An economist is more likely to see the rationale of regulations in a combination of complexity and interdependence, engendered by industrialisation⁵⁴ and tends to look for causes, instead of justifications.

If one talks about the origin of regulation one has to be careful to distinguish between the justifications for regulation and its possible causes. The relationship between justifications and causes can be viewed as one of surface and deep rationale: the justifications are universally advanced, but the causes may be completely different. The distinction is important because every reviewing institution is influenced by its respective perception of regulation, whom it favours, what problems it is meant to address, and whether it is successful.

1. Justifications

The main justification for regulation, according to the body of literature which has been termed "Regulation Theory", can be divided into three broad rationales:

1. Improving economic efficiency by compensating for market failure;
2. redistributing wealth and income, and
3. pursuing social and cultural objectives.

⁵³ Rocher, *supra*, note 9 at 151.

⁵⁴ Reagan, *supra*, note 8 at 35.

The following phenomena are regarded as market failures: natural monopoly, destructive competition, externalities or spill-overs, inadequate provisions of information, and the improper use of common natural resources.⁵⁵

2. Causes

To explain why regulation comes into existence,⁵⁶ to uncover their causes, is hotly debated and there probably is no single theory that gives an answer for all kinds of regulation.⁵⁷ We can summarize the result of the research undertaken by 'regulation theorists' by stating that the goals advanced as justifications of regulations are not really achieved, but different explanations why this happens, are given.

a) Capture Theory

Probably the most prominent theory that is advanced is the "Capture Theory".⁵⁸ It states that regulatory agencies are established for "public interest" purposes, but they subsequently become the tools of the industry they regulate. Capturing occurs because the more complex and advanced the technology subject to regulation is, the more the

⁵⁵ Macdonald, *supra*, note 1 at 86; at length on typical justifications for regulation Breyer, *supra*, note 2 at 15; sometimes scholars divide the reasons for regulation into two rationales: economic and non-economic.

⁵⁶ On theories see Needham, *supra*, note 6 at 11; it should also be kept in mind that legislative deregulation is determined by exactly the same kind of forces that result in regulation; it is the result of demands for regulation by interest groups in society and by legislator's response to their demands, Needham, *supra*, note 6 at 395.

⁵⁷ *A single-explanation theory of regulatory politics is about as helpful as a single-explanation of politics generally, or a disease.* J. Q. Wilson, "The Politics of Regulation" in J. Q. Wilson, ed., *Politics of Regulation* (New York: Basic Books, 1980) 357 at 393.

⁵⁸ Survey of these theories in Owen & Braeutigam, *supra*, note 11 at 11; main protagonist is R. A. Posner, "Theories of Economic Regulation" in A. I. Ogus & C. J. Veljanovski, eds., *Readings in the Economics of Law and Regulation* (Oxford: Clarendon Press, 1984) 240.

regulators will have to rely on trust as the basis for their relationship with the regulated.⁵⁹

Another branch of this theory states that regulating agencies are in fact created to serve the industry they regulate.⁶⁰ The regulated industry has an interest in that to happen, because regulations reduce the risks faced by individuals (by delaying change and subjecting it to a judicial process that is "fair"). So voters in a society of risk averse individuals will prefer a regulated economy to a free market economy.⁶¹

b) Symbolic Politics

Another school of theory about the origin of regulation can be characterised with the key-words "symbolic politics". Regulation is pursued by legislators because of its symbolic value.

Especially highly dogmatic forms of regulation - "hazardous products are banned" or "pollution must stop" - drastically reduce the information costs faced by voters in determining a government's policies in these matters, and have high symbolic value in signalling strong ostensible commitments by government to these goals. Also, command-and-control type regulation, in part because of its highly symbolic commitment to given

⁵⁹ Hawkins & Thomas, *supra*, note 3 at 17. On the role and importance of trust inside bureaucracies see A. Breton & R. Wintrobe, *The Logic of Bureaucratic Conduct - An Economic Analysis of Competition, Exchange, and Efficiency in Private and Public Organizations* (Cambridge: Cambridge University Press, 1982).

⁶⁰ According to S. Peltzman, "Toward a More General Theory of Regulation" in G. J. Stigler, ed., *Chicago Studies in Political Economy* (Chicago: University of Chicago, 1988) 234, politicians do that to redistribute income to benefit majorities of the electorate.

⁶¹ Owen & Braeutigam, *supra*, note 11 at 25.

goals and interests, enables differences between perceived and real benefits, and perceived and real costs to be maximised.⁶² Moreover, no agency wishes to be accused of "doing nothing" with respect to a real or imagined problem; hence every agency proliferates rules to cover all possible contingencies out of a defensive, threat avoiding, scandal minimizing instinct.⁶³

V. Why are Regulations used to regulate ?⁶⁴

Subsequently, we will pursue the question why regulations are used to regulate, or, in other words, what triggers the decision to enact a law (parliamentary statute) or leave it to the administration to issue regulations.

Justifications and causes can be distinguished here, too. The distinction is important, because it is the justifications that legitimise delegated legislation and redress for their alleged undemocratic nature, and it is the causes which result in vague or even contradictory regulations which in turn cause inconsistent application of rules.⁶⁵

⁶² D. N. Dewees, G. F. Mathewson & M. J. Trebilcock, "The Rationale for Government Regulation of Quality" in D. N. Dewees, ed., *The Regulation of Quality - Products, Services, Workplaces, and the Environment* (Toronto: Butterworths, 1983) 3 at 23.

⁶³ Wilson, *supra*, note 57 at 377.

⁶⁴ The origin of regulation and regulations are distinguished here to achieve greater analytical clarity. A case could be made however that there are strong links between these two sections. Maybe regulation only occurs or is denser when the state has the power and the means (i.e. regulations) to do so.

⁶⁵ Davis, *supra*, note 30 at 39. Discretion is described as a *natural, but unfortunate response to political conflict*, West, *supra*, note 38 at 27, which facilitates the use of regulatory statutes as symbols. Opposed to the lamenting about vague statutes is E. L. Rubin, "Law and Legislation in the Administrative State" (1989) 89 *Columbia Law Review* 369 at 395, real protection from administrative arbitrariness could only be found in the due process clause and perhaps in the equal protection clause, at 407.

Not only Parliament has discretion to decide whether to delegate legislation; the rule-making executive also is endowed with discretion whether to issue regulations or not.⁶⁶

1. Justifications

Rationales for the necessity of delegated legislation are the in-expertness of elected members of Parliament when it comes to highly specific, technical problems;⁶⁷ the slowness of decision-making in Parliament and their therefore limited case handling capacity and lack in full-time oversight.⁶⁸ Decisions would also suffer under a lack of continuity, as the members of Parliament change more often than the bureaucrats handling certain regulated areas.⁶⁹

An agency issues rules when it knows that a multitude of cases have to be decided and it already knows how it is going to dispose of them. In most cases, regulations are made to guide and structure the discretion given to the agency.⁷⁰

2. Causes

The most important underlying cause for the origin of regulations seems to be the fact that regulatory issues would be subjected to political-partisan influences were they to

⁶⁶ Davis, *supra*, note 30 at 23; not delegated legislation, though, just administrative regulations; Dussault & Borgeat, *supra*, note 24 at 313.

⁶⁷ Mitnick, *supra*, note 6 at 328; Davis, *supra*, note 30 at 39.

⁶⁸ Mitnick, *supra*, note 6 at 328/329; on reasons for subordinate legislation see also D. P. Jones & A. S. DeVillars, *Principles of Administrative Law* (Toronto: Carswell Legal Publications, 1985) at 58; E. C. S. Wade & A. W. Bradley, *Constitutional and Administrative Law*, Tenth edition (London: Longman, 1985) at 609.

⁶⁹ Mitnick, *supra*, note 6 at 329.

⁷⁰ Proposing that this should happen at a very early point is Davis, *supra*, note 30 at 59.

go through the legislative process.⁷¹ For that reason the legislator may sometimes not desire to act or perform a given task themselves and may not even want the task performed at all.⁷² Other causes include the failure of legislators to agree, or the preference of legislators to compromise disagreements by tossing the problem to administrators.⁷³ The legislator's choice of whether to enact a general standard or a set of precise rules is implicitly a choice between legislative and judicial rule-making, because more broadly defined legislation leads to litigation and an eventual need for interpretation by the court.⁷⁴

An agency's decision to enact regulations is mainly caused by the desire to structure the discretion given to it.⁷⁵ But as they do not fully want to loose their discretion, they do not have the desire to communicate these rules to the public at large. This can result in unpublished regulations.

VI. The Vicious Cycle

Concerning regulations, modern society is faced with a vicious cycle:⁷⁶ in a complex world full of technology and potential hazards legislators are unable to provide

⁷¹ Mitnick, *supra*, note 6 at 329; it can be argued, however, that these influences are in place inside the bureaucracy, they only take up a different appearance.

⁷² Mitnick, *supra*, note 6 at 335.

⁷³ Davis, *supra*, note 30 at 39 and at 46.

⁷⁴ Needham, *supra*, note 6 at 136; N. J. Vig, "The Courts: Judicial Review and Risk Assessment" in S. G. Hadden, ed., *Risk Analysis, Institutions and Public Policy* (Port Washington, N.Y.: Associated Faculty Press, 1984) 60 at 62; similar L. E. Gerwin, "The Deference Dilemma: Judicial Response to the Great Legislative Power Giveaway" (1987) 14 *Hastings Constitutional Law Quarterly* 289 at 290.

⁷⁵ This could also be achieved by strictly following precedent, seeing this happening in the future was M. Shapiro, "Administrative Discretion, The Next Stage" (1983) 92 *Yale Law Journal* 1487 at 1521.

⁷⁶ See Bryden, *supra*, note 1 at 7.

more than broad outlines of policy. Also, administrators need flexibility for their actions. This flexibility and the discretion for the administrators resulting from it is mistrusted; industry in particular wants predictability and structured discretion. The tool to achieve these goals are regulations! But, made by un-elected officials in enormous quantities they seem to add complexity to the world without really addressing the complex problems they were enacted for in the first place.

This vicious cycle creates the need for a control mechanism in the form of judicial review. The foremost aim of every administrator is it to make a good, correct and timely initial decision. Review of any kind is an exception, a procedure that starts operating when something went wrong along the way. But again, regulations are the tools used in achieving even this initial decision. The mushrooming of rules seems to be unavoidable. Judicial review is not only able to achieve corrections in the regulations themselves but through the procedure of reviewing to justify and legitimize them.

Regulations are the result of direct state action, can change corporate conduct within a short time frame,⁷⁷ and more often than not are created without participation and even representation of the persons affected. They are also characterized by a confusion of forms and names which can result in a confusion about their respective legal force. It is beyond the intellectual power or capacity of any person to write rules that

⁷⁷ J. Braithwaite, "The Limits of Economism in Controlling Harmful Corporate Conduct" in A. I. Ogus & C. G. Veljanovski, eds., *Readings in the Economics of Law and Regulation* (Oxford: Clarendon Press, 1984) 258 at 261.

will be satisfactory for all future cases without knowing all the facts of such cases.⁷⁸
They will inevitably be subject to demands for further clarification.

In a state under the rule of law, regulations are in need of a special legitimization, whereas regulation like the so-called new or economic methods that consist of, for example, the extension of liability law, and fees for the right to engage in certain behaviour or the creation of certain marketable rights that can be traded freely,⁷⁹ only operate in participation with the people affected and in retroactivity. In short, citizens are given more autonomy and the need for legitimisation is not as high.

Before Chapter Four and Five of the thesis examine whether review can help to soothe the described dilemma of regulations, the situation of regulations in China will be described.

⁷⁸ Davis, *supra*, note 30 at 37, 42; K. Hawkins & J. M. Thomas, "Rule Making and Discretion: Implications for Designing Regulatory Policy" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) 263 at 265.

⁷⁹ On liability law Reagan, *supra*, note 8 at 147; on other methods see M. S. Baram & K. McAllister, *Alternatives to Regulation: Managing Risks to Health, Safety and the Environment* (Lexington, Mass.: Lexington Books, 1982).

CHAPTER THREE: THE SITUATION OF REGULATIONS IN CHINA

I. Introduction

The legal system of the People's Republic of China has to a good part been built with and upon regulations.¹ Although it has been said that "*a state which is about to perish is sure to have many governmental regulations*,"² 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.

Chinese officials and legal scholars increasingly recognize the problems posed by regulations as is reflected in regulations,³ numerous law review articles⁴ and sections in treatises about administrative law.⁵

¹ Kong, Xiaohong, "Legal Interpretation in China" (1991) 6 *Connecticut Journal of Law* 491 at 505 speaks of tens of thousands of administrative regulations.

² 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.

³ *Xingzheng fagui zhiding chengxu zanxing 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.

⁴ For example 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.

⁵ 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,

Again, two remedial possibilities spring to mind: ensuring that the administrators act according to the law by prescribing procedures how their decisions have to be made⁶ or by instalment of a review mechanism. At the moment, China is drafting an administrative procedure law and a general administration law so that this kind of control will be in place soon.

But before we will examine the institutions for review of regulations, we need to take a closer look at Chinese regulations themselves.

II. Types of Regulations

1. Definitions

The definition of regulation (see above Chapter Two, II. 1.) used in the North American context can validly be used for the Chinese situation.

"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); Luo, Haocai & Ying, Songnian, *Xingzheng lifa* (Administrative legislation), (eds.) *Xingzheng faxue* (The study of administrative law) (1989), Chapter 4, at 90 - 132 [hereinafter *Lifa*].

⁶ On that principle in the German administrative law system see E. Schmidt-Aßmann, "Basic Principles of German Administrative Law" in M. P. Singh, ed., *Comparative Constitutional Law* (Lucknow, India: Eastern Book Co., 1989) 405 at 413; a very sketchy and now probably outdated overview about Chinese administration is given by J. A. Worthly, "Public Administration in the People's Republic of China: An Overview of Values and Practices" (1984) *Public Administration Review* 518; on the reform of the administrative structure see article by Gu, Jiaqi, "Carry Out Reform of Administrative Management Vigorously and Prudently" in *Guangming Ribao* (1 February 1991) 3 translated in FBIS China 91-044, 6 March 1991, 14; restructuring shall be carried out over the next five years, FBIS China 91-071, 12 April 1991, 23. Some local People's Congresses have also promulgated regulations on the procedures that have to be followed when issuing local regulations, i.e. "Provisional Decision of the Guangdong Province People's Congress on the procedure for establishing regulations (fagui) of a local nature" from Oct. 13, 1985. Demanding enactment of procedures is also Zhang, Chunfa, "Zhengfu guizhang de ruogan wenti" (Some questions concerning governmental regulations) (1/1991) *Faxue yanjiu* (Legal Research) 15 at 18.

Generally western legal scholars distinguish "regulations" from "law" by using a formal qualifier: i.e. who has enacted these rules? Only rules enacted by the legislative body of the state (parliament) are to be called law.⁷ But as China does not accept the system of separation of powers, regulations cannot that easily taken to mean "delegated legislation," i.e. statutory instruments enacted by government departments.⁸ As in North America, regulations in China do not operate as a clear-cut subsystem of law and there is discussion about the validity of regulations, the scope of their applicability and other issues.

Regulations are a matter of rules and these rules can come from various sources, take various forms and operate on various levels.⁹ One exclusion will be made here: this thesis will examine only regulations that are in force on a national level and will disregard local (*difang xing*)¹⁰ regulations.

⁷ A. R. Brewer-Cariás, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) at 33, *Law is conceived as formal law, that is to say Acts issued by Parliament.*; also further on the hierarchy of norms at 28; this distinction is e.g. also used in Taiwan, on that see T. T. Hsia & C. A. Johnson, "Lawmaking in China" (Sept. 1987) *East Asian Executive Reports* 13 with further references; treatises on regulation written by economists seem not to be concerned with this distinction.

⁸ Some Chinese textbooks distinguish administrative rules enacted as legislation by the power of authority (*zhiquan lifa*) and delegated legislation (*shouquan lifa*). *Zhiquan lifa* is created by the Constitution or an Organic Law, *shouquan lifa* is created by delegation in a general law, Zhang, Shangzhuo, ed., *Xingzheng faxue* (The Study of Administrative Law) (Beijing: Beijing University Press, 1990) at 189/190; *Lifa*, *supra*, note 5 at 94. According to the North American definition, both categories are regulations.

⁹ L. M. Friedman, "On Regulation and Legal Process" in R. G. Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985) 111. For a political analysis of the "law-making system" in China see M. S. Tanner, *The Politics of Law-making in China* (1990) [unpublished] at 4ff.

¹⁰ Art. 100 of the Constitution; on regional legislation see P. Keller, "Legislation in the PRC" (1989) 23 *UBC Law Review* 653 at 680; Hsia & Johnson, (April 1987), *supra*, note 7 at 11. They pose some similar problems like national regulations but are different concerning reviewability. More on them in *Lifa*, *supra*, note 5 at 97.

Sources, forms and levels of Chinese regulations will be examined more closely in the following sections.

2. Sources

The question of the sources of regulations touches upon legislation or law-making in China. If viewed in its totality, this area is characterized by a high level of uncertainty about the relations between issuing agency and the documents issued by them.¹¹ We will thus take a closer look on each of the agencies that can issue regulations.

a) The National People's Congress and its Standing Committee¹²

According to Articles 57 and 58 of the Chinese Constitution of 1982, the National People's Congress (NPC) is the highest organ of state power and together with its Standing Committee exercises the legislative power of the state.¹³ Out of the same source, regulations are issued during the course of proper law-making, but also in the course of the so-called interpretation of laws.

¹¹ On other obstacles in the area of law-making see Hsia & Johnson, (Jan 1987), *supra*, note 7 at 6, they also report about a screening process to make the statutory body more consistent, (June 1987) at 11; too optimistic in that effect is S. Finder, "Like Throwing an Egg Against a Stone - Administrative Litigation in the PRC" (1989) 3 *Journal of Chinese Law* 1 at 5, who speaks of a hierarchy of legal norms set forth by the constitution; this uncertainty is, however, not specific for China, on the situation in Great Britain see H. W. R. Wade, *Administrative Law*, Sixth edition (Oxford: Clarendon Press, 1988) at 855 (Legal Forms and Characteristics); E. C. S. Wade & A. Bradley, *Constitutional and Administrative Law*, Tenth edition (London: Longman, 1985) at 615 on nomenclature.

¹² In great detail on the history and the organisation of the NPC, 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).

¹³ The Standing Committee is a legislature within a legislature; on how this was achieved see O'Brien, *supra*, note 12 at 148ff.

(1) Law - Making

The NPC has the power to enact basic laws (*jiben fa*,¹⁴ Article 62 Section 3 of the Constitution), which is taken to mean statutes, other than the Constitution, which have a fundamental effect on the whole of society; in practice it has come to mean any law enacted by the full NPC, regardless of the nature of its content.¹⁵ Problematic in the contents of this thesis is that both institutions, the NPC and the Standing Committee, have enacted statutes which are entitled "*tiaoli*" or "*guiding*" (regulations).¹⁶

(2) Interpretation

Moreover, according to Art. 67 Section 2 and Section 4 of the Constitution, the Standing Committee is not only empowered to enact laws, but is also allowed to interpret the national law (as opposed to local law). The NPC Standing Committee adopted a resolution in 1981 to divide the right of interpretation up between the Supreme People's

¹⁴ In detail on "*fa*" and its meanings Liang, Zhiping, "Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture" (1989) 3 *Journal of Chinese Law* 56; the doctrine, that would require Congress to enact all "quintessential legislation" has not found support on the Supreme Court in the U.S.A., K. C. Davis, *Administrative Law of the Eighties - Supplement to Administrative Law Treatise* (San Diego, Ca.: K.C. Davis Pub. Co., 1989) at 61.

¹⁵ Keller, *supra*, note 10 at 661 with further references; Hsia & Johnson (Jan 1987), *supra*, note 7 at 6.

¹⁶ According to O'Brien, *supra*, note 12 at 158, the NPC and its Standing Committee from 1979 to 1989 passed 88 laws, revised 20 laws and made 54 legal decisions. Examples of these legal decisions can be found in nearly every issue of the Gazette of the NPC Standing Committee; a recent Taiwanese compilation of PRC law therefore divides laws and regulation into

1. law (*falü*), promulgated by the NPC and its Standing Committee according to legislative procedures;
2. decrees (*faling*), also issued by NPC and its Standing Committee, but not a law; as examples they cite: *tiaoli*, *yueding*, *yueyi*, *guiding*, *banfa*, *fangan*;
3. administrative regulation (*fagui*), issued by the State Council and its departments. In that category they include regulations issued by autonomous regions, self-governing city councils and other local or special regulations.

This structure provides an interesting idea in so far as the legislative procedure is used to distinguish norms, but category three would have to be split up even further. Figures for an systematic overview in *Lifa*, *supra*, note 5 at 101, 103 and 109.

Court, the Supreme People's Procuracy, the Standing Committee of the NPC and the State Council and its departments.¹⁷

Interpretation is provided by means of decree. The power of interpretation is important in the context of sources, because the so-called "legislative interpretation" is presumed by some scholars to include the right to amend or supplement legislation¹⁸ and is thus one of the aspects of the NPC's legislative power. Some regulations emerge out of this activity of the Standing Committee, although most of the time these organs use informal methods to give interpretations.¹⁹

This overview about the legislative activity of the NPC and its Standing Committee illustrates that in China a differentiation between law and regulations cannot be made solely on the basis of the source of origin of the rule. The differentiation between law and regulations is important, because this differentiation decides which kind of review is available.²⁰

b) State Council

Art. 85 of the Constitution sets up the State Council as the executive branch of the state; it is the highest organ of state administration. Most business regulations are issued

¹⁷ Highly critical of this Resolution is Kong, *supra*, note 1 at 497f.

¹⁸ Keller, *supra*, note 10 at 666; in detail Kong, *supra*, note 1 at 495; on interpretation see also Hsia & Johnson, (Aug 1987), *supra*, note 7 at 9.

¹⁹ These decisions can substantially change law, examples in Note, "Concepts of Law in the Chinese Anti-Crime Campaign" (1985) 98 *Harvard Law Review* 1891 at 1897 note 33 concerning criminal law.

²⁰ See Brewer-Cariás, *supra*, note 7 at 25.

by it, because in 1985 the NPC²¹ authorized the State Council to enact temporary regulations and provisions dealing with the economy. The State Council can also issue other legal documents.²² The range of substantive issues the State Council can address by regulations is laid out in Art. 89 Sections 1 to 18 of the Constitution.

The only procedural requirement while issuing new regulations is provided in the "Provisional Regulations concerning Procedures for the Formulation of Administrative Regulations" of the State Council of 21 April, 1987,²³ prescribing that implementing regulations have to accompany the legislation or are to follow shortly afterwards.²⁴

c) Departments of the State Council (Ministries)

The multiple departments of the State Council (about 60 Ministries)²⁵ issue regulations either independently or together with the State Council.

These departments have the authority to issue orders, directives and rules concerning matters within their jurisdiction (Art. 90 of the Constitution).²⁶ Despite Art. 4 of *Order*

²¹ Decision of April 1985, 3rd Session of the 6th NPC; more details Keller, *supra*, note 10 at 671, note 80. See also Lifa, *supra*, note 5 at 96.

²² On those see Hsia & Johnson, (Aug 1987), *supra*, note 7 at 9. Especially confusing is that State Council enactments sometimes have the same titles as NPC enactments, on this in the area of economic crime see P. L. Herb, "Economic Crime in the People's Republic of China" (1988) 12 *ILSA Journal of International Law* 55 at 71. The State Council also drafts laws for the NPC and its Standing Committee, O'Brien, *supra*, note 12 at 163.

²³ *Procedures, supra*, note 3 at 454.

²⁴ On legislative procedures generally see Keller, *supra*, note 10 at 675; for a description of the legislative process in the case of the bankruptcy law see Chang, Ta-kuang, "The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process" (1987) 28 *Harvard International Law Journal* 333 at 336.

²⁵ Chart showing all ministries in *Zhonghua Renmin Gongheguo Fagui Huibian* (1988) at 17.

²⁶ For more details see Keller, *supra*, note 10 at 673.

Nr. 48²⁷ which requires *guizhang* to be filed with the State Council Legal Bureau at least three days after promulgation, up to now no requirement exists to publish these enacted regulations, so that finding the law is still very difficult. Some are, however included in the Gazette of the State Council.

3. Forms and Levels

What forms do Chinese regulations take? According to Chinese administrative law treatises,²⁸ 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*.²⁹

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.³⁰ The division into these different categories is not strictly adhered

²⁷ *Supra*, note 3.

²⁸ 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 5 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 4.

²⁹ I will use the chinese terms throughout the thesis because this will help to avoid confusion; the term regulations will include both categories. Translating *fagui* as "Verwaltungsvorschriften" and *guizhang* as "Verwaltungsverordnungen" is R. Heuser, "Das Verwaltungsprozeßgesetz der Volksrepublik China" (1989) *Verwaltungsarchiv* 437 at 444.

³⁰ K. Lieberthal & M. Oksenberg, *Policy Making in China, Leaders, Structures, and Processes* (Princeton, N.J.: Princeton University Press, 1988) at 393.

to. One author,³¹ for example does not recognize local *guizhang* as *guizhang* at all but then further distinguishes into governmental *guizhang* and those of departments or commissions.³²

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:³³

tiaoli = regulations shall mean regulations that are "comparatively comprehensive and systematic in their effect on a particular aspect of administrative work";

³¹ Zhang, Chunfa, "Zhengfu guizhang de ruogan wenti" (Some questions concerning governmental regulations) (1/1991) *Faxue yanjiu* (Legal Research) 15 at 17 and 18.

³² Their status has not yet sufficiently clarified, see e.g. Wang, Zhengli, "Xingzheng susong fa shishi zhong de ruogan wenti - 1990 nian zhongguo faxue hui xingzheng faxue yanjiu huinian hui consu" (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 123.

³³ *Procedures, supra*, note 3. Translation provided by Keller, *supra*, note 10 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 Hsia & Johnson (Sept 1987), *supra*, note 7 at 12 with concrete suggestions.

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,³⁴ and even now the application of this regulation is far from strict.³⁵

A further confusion of names arises on a different level: the "*tiaoli*" enacted by the Standing Committee generally have the same format as "*fa*" (= laws, national laws), and the same validity. Scholars have suggested to call enactments of the Standing Committee "*tiaoli*", when firstly there is some uncertainty as to how its provisions will work in actual practice, but the need to enact a piece of legislation is urgent, after a few years experience, the "*tiaoli*" could reach "*fa*" status and secondly, regulated items are relatively small in scope.³⁶ But these suggestions have not yet been implemented.

³⁴ Hsia & Johnson (Jan 1987), *supra*, note 7 at 6 with further references. A flavour of this situation is given from page 81 to 112 in the *Xingzheng fa cidian*, *supra*, note 28 where under the heading of administrative actions (*xingzheng xingwei*) different forms are listed, defined and explained.

³⁵ 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 3, Art. 2, Section 2, *guiding* and *banfa* are quoted as examples for *guizhang* !

³⁶ Hsia & Johnson (Jan 1987), *supra*, note 7 at 10 with further references.

b) Guizhang

The second category of administrative regulations are called *guizhang*. Most concrete administrative acts are based on them.³⁷ Which forms of regulations belong to it is less clear.³⁸

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*).³⁹ 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.⁴⁰ But this is not the prevailing opinion. Another author⁴¹ 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.⁴²

³⁷ 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*.

³⁸ 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.

³⁹ *Procedures*, *supra*, note 3. One textbook, Bian, Fuxue & Zhao, Zaicun, *supra*, note 38 lists *banfa* among the forms that are *guizhang*, at 257. Also *Order No. 48*, *supra*, note 3, Art. 2, Section 2. Song, Quanzhong, *supra*, note at 11 suggests only to allow *guize*, *yueding*, *shixing* ... *xize* or *shixing* ... *banfa* as names for *guizhang*.

⁴⁰ Luo, Xiaodang & Bao Shiqing, *supra*, note 5 at 234.

⁴¹ Bian, Fuxue & Zhao, Zaicun, *supra*, note 38 at 260.

⁴² Liu, Han, *supra*, note 4 at 26.

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, 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*.⁴³

III. The Problems of Working in the "Regulations Jungle"⁴⁴

Apart from the inherent vagueness of words used in laws and regulations,⁴⁵ the main problem of regulations in China is the regular occurrence of conflicts between them. That means that when administrative organs implement a concrete administrative act it can produce different judgments and results if they apply different standards, and eventually this leads to actions that infringe on citizens' rights.⁴⁶

The problems of applicability might not occur in all these dimensions when dealing with the regulations coming out of just one ministry. But as soon as different departments are involved it is hardly possible to bring existing regulations into a hierarchy and reconcile the frequent conflicting or even contradicting notions.

⁴³ Bian, Fuxue & Zhao, Zaicun, *supra*, note 38 at 264.

⁴⁴ Luo, Xiaodang & Bao, Shiqing speak of a forest, *supra*, note 5 at 236.

⁴⁵ A systematic study on this problem has been undertaken by C. Ross & L. Ross, "Language and Law: Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Construction", paper presented at the 50th Annual Meeting of the Association for Asian Studies in New Orleans, 11 - 14 April, 1990 [unpublished]. 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 Publisher, 1990) 110 at 114/115 recommends to pay attention to the choice of words and the use of characters in order to improve the quality of administrative regulations; similar *Lifa*, *supra*, note 5 at 128/129.

⁴⁶ Bian, Fuxue & Zhao, Zaicun, *supra*, note 38 at 233.

To give the reader an idea what is meant by "Regulations Jungle", I will provide an excerpt of a Chinese textbook that list all the possible contradictions between regulations:⁴⁷

1. *Conflicts between legal standards of different rank and legal effect:*

- (1) *conflicts between law (falü) and fagui*
- (2) *conflicts of law and fagui of a local nature*
- (3) *conflicts between law and regulations (tiaoli) of autonomous regions or special regulations*
- (4) *conflicts between fagui of a local nature and fagui*
- (5) *conflicts between guizhang and fagui*
- (6) *conflicts between guizhang and fagui of local nature*
- (7) *conflicts between low level fagui of local nature and relatively high level fagui of a local nature*
- (8) *conflicts between lower level guizhang and higher level guizhang issued by local people's governments.*

2. *Conflicts of legal standards between legal documents of different departments or localities*

- (1) *conflicts between guizhang of various departments or commissions*
- (2) *conflicts of fagui of a local nature issued by different local authorized state organs*
- (3) *conflicts between guizhang of different local people's governments*
- (4) *conflicts between regulations (tiaoli) of various autonomous regions or special regulations*

3. *Conflicts among legal standards that were promulgated at different times*

- (1) *conflicts between old and new law*
- (2) *conflicts between special law and general law*
- (3) *conflicts between special law and statutory law*

4. *Conflicts among legal standards of departments and local legal documents*

- (1) *conflicts between guizhang of departments and fagui of a local nature*
- (2) *conflicts between departmental guizhang and local guizhang*

Apart from those, there are also conflicts between treaties and law, conflicts between law and the explanations of the administration of the Supreme Court and conflicts between fagui, reaching all kinds of legal standards.

⁴⁷ Luo, Haocai & Ying, Songnian, *supra*, note 5 at 238/239. Speaking of possible contradictions and conflicts is also *Order No. 48, supra*, note 3. It gives the State Council the right to correct these problems, Art. 8 Nr. 3.

This rather abstract list of possible conflicts is augmented in another textbook with concrete examples of laws and descriptions.⁴⁸ Punishment clauses, possible means or general scope are reduced or altered, the sanctioning powers of the authorities are broadened or narrowed; the definitions and fixed content of technical terms are broadened or narrowed and so different legal consequences are possible.

The reason for the conflicts is seen by Chinese authors in the administrative system with its different levels and grades of administration.⁴⁹ In administrative litigation, it is up to the court to decide about the applicable law and they have to carry out an examination of the standards involved.⁵⁰ In what way this is done in China is the topic of Chapter Five.

IV. Origin of Regulations: Why do the Chinese regulate by Regulations ?

In the traditional Soviet model, a pervasive state regulates industry and agriculture by means of centralized directive plans, enforced by a network of political and administrative agencies.⁵¹ Most key-industries are owned by the state and regulation is direct. The motivation in Marxist philosophy to plan the economy is to avoid crises caused by the cycles of the market as the system of distributing goods. It is thought that by carefully incorporating the knowledge of all objective factors, economic development

⁴⁸ Bian, Fuxue & Zhao, Zaicun, *supra*, note 38 at 238ff.

⁴⁹ *Ibid.*, at 233.

⁵⁰ *Ibid.*, at 243.

⁵¹ G. White, "Evolving Relations between State and Markets in the Reform of China's Urban Industrial Economy" in S. Feuchtwang, A. Hussain & T. Pairault, eds., *Transforming China's Economy in the Eighties*, Vol. II (London: Zed Books, 1988) 7.

will be smooth and exploitation of the proletariat by the capitalist class will be eliminated. But over the years, communist leaders realized that this theory cannot work when the world market is determined by industrialised capitalist states.

As Mao once adjusted Marxist doctrine to the realities of a peasant society, so today's theorists are responding to international realities that provide China with incentives to accelerate development by acquiring advanced technology through trade and foreign investment.⁵² The opening policies meant a rejection of domestic and international class struggle, the essential principle of Marxism.⁵³

Since 1978, China has been moving from a fully planned economy to a market economy/commodity economy. The term "socialist commodity economy" describes an economic system where production and sales decisions are increasingly made by the enterprise in response to the market forces of supply and demand, rather than in response to directives from the government planning bureaucracy. The planning bureaucracy plays a reduced role in allocating inputs to production, setting prices for finished goods and marketing output.⁵⁴ This kind of economy is characterised by a greater autonomy for

⁵² R. Kleinberg, *China's "Opening" to the Outside World - The Experiment with Foreign Capitalism* (Boulder: Westview Press, 1990) at 40. In detail R. D. Robinson, "Foreign Business: A View from China's Side of the Open Door" (March 1987) *East Asian Executive Reports* at 13ff.

⁵³ Kleinberg, *supra*, note 52 at 247; O'Brien, *supra*, note 12 at 158.

⁵⁴ Definition/description taken from H. Josephs, "Labour Reform in the Worker's State: The Chinese Experience" (1988) 2 *Journal of Chinese Law* 200 at 205, note 18 with further references. The term "commodity economy" can loosely be equated with market economy, but as the term 'commodity' has a special significance in Marxist ideology, commodity economy is preferred to market economy which is loaded with capitalist reminiscence.

economic actors starting from agriculture but moving into most branches of industry or services sectors.

Like in North America, justification and causes for the regulations situation in China can be distinguished. As regulation in China is mainly carried out by regulations,⁵⁵ no distinction will be made between justifications and causes of regulation and regulations.

1. Justifications

After 1978, the Chinese moved from regulation by mandatory state plans to a mixed system of some mandatory and some additional plans, substituted by contracts.⁵⁶ The Chinese government's opening up to foreign trade maintained the role of the state as an intervening participant for example in import and export activity. The state acts as a trusted guarantor of efficiency; as planner and manager; as habitual source of authoritative direction; as provider of necessary or comfortable protection for infant

⁵⁵ New economic regulation is too daring at this stage of development and to consider direct state intervention is beyond the scope of this thesis.

⁵⁶ See J. Feinerman, "Economic and Legal Reform in China, 1978 - 1991" (Sept-Oct 1991) *Problems of Communism* 62 at 63. There is a broad discussion ongoing in the Chinese media about what the right balance is between market and planned economy; e.g. see Zhang, Sai, "A Study on Problems of Operation and Regulation of China's Macroeconomy" (11/1990) *Jingji Yanjiu* 14 translated in FBIS CHI 91-022, 1 February 1991, 31; Gao, Shanquan, "On the Organic Combination of a Planned Economy and Market Regulation" *Renmin Ribao* (8 February 1991) translated in FBIS CHI 91-038, 26 February 1991, 22; Hu, Naiwu & Wu, Xiaoqiu, "Theory of Combination in Varying Degrees: Discussion on Ways to Combine Planned Economy with Market Regulation" *Renmin Ribao* (9 August 1991) translated in FBIS CHI 91-164, 23 August 1991, 40; Yue, Guangzhao, "Employment, wages and social security in China" (1985) 124 *International Labour Review* 411 at 421.

industries -- and therefore sometimes as unintentional upholder of existing work practices.⁵⁷

Regulations have the function of a hinge between a fully planned economy and a real market economy. Laws and regulations are seen in China as a tool to uphold social and economic order. They aim to reduce the need for central planning and direct control, to institutionalise reform, to prevent misunderstandings, and to enliven the economy.⁵⁸ But it is state protectionism that ensures that development includes a broad base of key industries as a guarantee of autonomy from external market conditions. It is also easier to reconcile with politically necessary lip service to Marxism than would be profit-oriented, competitive enterprise capitalism, and there is a broad protectionist constituency that would lose wealth or comfort as a result of introducing foreign competition into the domestic economy.⁵⁹

So over the past decade, the Chinese have maintained their faith in the capacity of government interventionism.⁶⁰ But the emerging new economic system, for example in the (labour) contract area further reduced the direct role of the state in labour allocation, it also requires the government to take on new functions (along welfare state lines) for which it is as yet ill prepared.⁶¹

⁵⁷ Kleinberg, *supra*, note 52 at 159.

⁵⁸ O'Brien, *supra*, note 12 at 158.

⁵⁹ Kleinberg, *supra*, note 52 at 159.

⁶⁰ *Ibid.*, at 39.

⁶¹ White, *supra*, note 51 at 16. Welfare state tasks in China are up to now fulfilled in a way that has been described as Neo Traditionalist, where especially employment plays a welfare role and is a value in

2. Causes

North American Regulation Theory provides the tools to differentiate various schools of thought that offer explanations for the existence of regulations. They have to be seen together and are by no means mutually exclusive.

a) Symbolic Politics

Regulation by regulations is used because generally the Chinese leaders after the Cultural Revolution used legal forms and the legal system as the basis for their legitimacy. So regulations are the instrument for legitimizing changes in the economic field. This kind of rationalisation is linked very closely to that of "symbolic politics".⁶² By enacting regulations leaders make a symbolic commitment to the solution of problems. Law is also in part public relations for foreigners, and is used to distract from potentially awkward issues; it is a signal of government intentions.⁶³ Regulations as forms of the legal system are chosen to show symbolic commitment to solve problems, as current policy stresses the need to use legal forms. Just a decade earlier, a mass campaign would have been the most probable reaction.

To understand the interplay between law and policy, especially regarding foreign investment, one must study both, recognizing that they are distinct. The laws have a

itself, see A. G. Walder, *Communist Neo Traditionalism - Work and Authority in Chinese Industry* (Berkeley: University of California Press, 1986).

⁶² Kleinberg, *supra*, note 52 at 195. On the transformation of *zhengce* into regulations see Lieberthal & Oksenberg, *supra*, note 30 at 26.

⁶³ Kleinberg, *supra*, note 52 at 196.

built in flexibility that leaves room for policy adjustments and experiments. Also the conspicuousness and seeming clarity of law give it great public relations value that can distract from important qualifications.⁶⁴ It can be observed in China that whenever a problem is perceived, a regulation is issued.

*In the typical pattern of Chinese law-making, a problem is first addressed by promulgation of a law that is at best general and often skeletal; this is eventually followed, sometimes years later, by relatively more detailed interpretive regulations.*⁶⁵

Chinese leaders embrace the idea of resolving problems they have identified through the creation and/or tasking organisations to deal with these problems.⁶⁶ Issuing regulations does not necessarily mean that the problem is actually addressed in practice, let alone solved. Unfortunately, gaps between written rules and actual practice yawn wider in China than in the West.⁶⁷ The fact that, for example, national policy on the contract employment system has been expressed in the form of administrative regulations issued by the State Council or the Ministry of Labour and Personnel, is significant. It may reflect the central government's lack of confidence about its authority in the area of labour reform vis à vis local interest. A much stronger statement would have been made

⁶⁴ *Ibid.* at 197/198.

⁶⁵ S. Lubman, "Studying Contemporary Chinese Law: Limits, Possibilities and Strategies" (1991) 39 *American Journal of Comparative Law* 293 at 309. The State Council and the departments would rather issue new regulations than interpret old ones, Kong, Xiaohong, *supra*, note 1 at 505.

⁶⁶ Lieberthal & Oksenberg, *supra*, note 30 at 400. Also recognizing this is A. E. W. Conner, "Child Protection Legislation in China" (1990) 64 *Law Institute Journal* 518 at 520. So to learn more about China's problems it is actually possible to do this by reversing the process and examine regulations; especially regulations concerning regulations like the *Procedures* and *Order No. 48*, *supra*, note 3.

⁶⁷ Lubman, *supra*, note 65 at 311.

if a labour code, incorporating provisions on the contract employment, had been promulgated by the NPC.⁶⁸

b) Interest Groups

Something like a "Capture Theory" has not yet been advanced concerning Chinese policy making and this is understandable as capture theories presuppose strong, highly organized interest groups. So the first question to be addressed is whether one can talk of the existence of interest groups in China without thereby simultaneously talking of pluralism.⁶⁹

Underlying the concept of interest groups is the assumption of a diversity of views and their expression.⁷⁰ The diversity of views can easily be found in China, but no formal channels exist for their expression. The basic problem then is not whether groups are active in Chinese politics, but rather what sort of groups there are and how they might be categorized, in what ways they are active and with what success.⁷¹ In short, the study of groups becomes a study of the relation between organisation and power, in which organisation does not always confer power, and immense power can reside in unstructured groups.⁷²

⁶⁸ H. Josephs, *Labour Law in China: Choice and Responsibility* (Salem, NH: Butterworths, 1990) at 64.

⁶⁹ M. Waller, "Communist Politics and the Group Process: Some Comparative Conclusions" in D. S. G. Goodman, ed., *Groups and Politics in the People's Republic of China* (Cardiff: University College Cardiff Press, 1984) 196 at 201. The literature cited provides multiple examples for studies of specific interest groups.

⁷⁰ P. Ferdinand, "Interest Groups and Chinese Politics" in D. S. G. Goodman, ed., *Groups and Politics in the People's Republic of China* (Cardiff: University College Cardiff Press, 1984) 10.

⁷¹ Ferdinand, *supra*, note 70 at 13.

⁷² Waller, *supra*, note 69 at 203.

No communist regime accepts that it contains interest groups or that it should accord legitimacy to such groups.⁷³ Research undertaken generally concludes that where communist parties rule, there is so little sub-system autonomy as to be insignificant and that the ruling party is able, through its control of communications and of political recruitment, to dominate the abundant organisations which it has itself spawned.⁷⁴ But groups, individuals and organisations must care about policy because their fates are wrapped up with it.⁷⁵

So the Chinese state's reaction cannot be analyzed merely as a rational response to problems arising from reform policies; it reflects the conflicting interests and operational legacies of state and non-state political economies, planning and market processes.⁷⁶ The wide opening to the outside world and the partial de-collectivization of the economy have created new fracture lines which also run through the ruling teams of the central state administration whose appointment is the result of a trade off between the leaders of the main opinion groups.⁷⁷ Also in China as elsewhere individual government agencies

⁷³ Ferdinand, *supra*, note 70 at 19. This is exactly the difference between the existence of interest groups and pluralism. Local agencies have from time to time expressed their opposition to the contract employment system either by using contrary regulations or by exploiting loopholes or ambiguities in the national regulations, Josephs, *supra*, note 68 at 65.

⁷⁴ Waller, *supra*, note 69 at 197; O'Brien, *supra*, note 12 at 171.

⁷⁵ D. Lampton, *Paths to Power: Elite Mobility in Contemporary China* (Ann Arbor: Centre for Chinese Studies, University of Michigan, 1986) at 6.

⁷⁶ White, *supra*, note 51 at 22. Critique of the "rationality model" that believes Chinese politics result from an effort of the leaders to match national resources to national objectives also in Lieberthal & Oksenberg, *supra*, note 30 at 13.

⁷⁷ 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 at 67 and 86.

often do not decide merely on public policy but also serve as the main source of inputs for policy, too. It is true that by identifying agencies of government as interest groups, the centre of Chinese politics becomes conceptually more fuzzy.⁷⁸

Standard key words used to describe Chinese bureaucracy are: economic feudalism and departmentalism (*benwei zhuyi*).⁷⁹ Departmentalism represents the search for both autonomy and power. In economic terms this means that each vertical sector, and even each large production unit, will have a tendency to form itself into an all-purpose economic entity, with very little need to fall back on exchanges with the outside.⁸⁰ This phenomenon gives rise to economic 'corridors', which start off in the ministries, and cover all activities subsidiary to their primary ones; a large number of departments refuse to grant the small amount of autonomy permitted to their enterprises and would even resort to take retaliation measures.⁸¹ Ministries tend to enact regulations in order to gain full authority or jurisdiction over the respective field.⁸² The

⁷⁸ Ferdinand, *supra*, note 70 at 21.

⁷⁹ 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 38 at 237. According to Guo Daohui, translated in Tanner, *supra*, note 3 at 24, common manifestation of the phenomenon of *benwei zhuyi* are

1. using the law to expand a department's rights beyond its own sphere;
2. using law to push one department's 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.

⁸⁰ Zafanalli, *supra*, note 79 at 146.

⁸¹ Zafanalli, *supra*, note 79 at 147; see also V. Falkenheim, "Citizen and Group Politics in China: An Introduction" in V. C. Falkenheim, ed., *Citizen and Group in Contemporary China*, (Ann Arbor: Center for Chinese Studies, University of Michigan, 1987) at 4.

⁸² Zhang, Chunfa, *supra*, note 6 at 19.

enactments resemble the flags explorers used to plant once they landed on a newly discovered country.

Localism is based on a fragmentation of the administrative apparatus and is the exact counterpart of departmentalism, the only difference being that it develops horizontally and not vertically.⁸³ With this background information, it might be more understandable what made the Chinese "Regulations Jungle" grow.

IV. Another Vicious Cycle ?

China has her own vicious cycle of regulations, but it starts at a different level than the one described in the North American context.

A Hon Kong commentator speaks of a vicious circle in economic policy-making in the PRC: "*unification leads to stifling, stifling calls forth crying out, crying out promotes liberalisation, liberalisation produces chaos, and chaos directs back again to unification.*"⁸⁴ In other words, bureaucratic approaches have repeatedly been followed by marketeer policies, which were then succeeded by radical initiatives. These in turn have been righted (in a double sense) by a return to bureaucratic modes which constitutes the dominant strategy at which the system repeatedly comes to rest, at a bureaucratic one.⁸⁵

⁸³ Zafanalli, *supra*, note 79 at 148.

⁸⁴ Quoted in D. Solinger, *Chinese Business under Socialism - The Politics of Domestic Commerce 1949 - 1980* (Berkeley: University of California Press, 1984) at 297.

⁸⁵ Solinger, *supra*, note 84 at 298. On the chinese approaches to bureaucratic dilemma see figure in H. Harding, *Organizing China - The Problem of Bureaucracy 1949 - 1976* (Stanford, Calif., Stanford University Press, 1981) at 334.

The bureaucratic mode in China expresses itself through regulations: *fagui* and *guizhang*. But now these tools for modernization have reached a state of complexity and confusion that they themselves become obstacles to modernisation.⁸⁶

Nothing is more frustrating for foreign investors to be caught in the middle of a fight over jurisdiction between two ministries or agencies in which the "weapons" used are divergent regulations. This kind of legal system is not able to achieve the results the Chinese developed it for: modernizing the economy.⁸⁷

Review of regulations could prove an important device to escape this vicious circle. In Chapter Five of the thesis administrative review mechanisms that have been enacted in China will be examined with the question in mind whether they are useful for the review of regulations.

⁸⁶ According to the summary of Wang, Zhengli, *supra*, note 32 at 121, a common abuse of abstract administrative actions by governments occurs by using them instead of concrete administrative actions because in this way they can avoid litigation.

⁸⁷ Interestingly the approach taken by the Chinese legislator is to regulate by regulations the use of regulations.

CHAPTER FOUR: A SOLUTION: JUDICIAL REVIEW - POSSIBILITIES IN NORTH AMERICA (CANADA)

Regulations are a highly complex tool for regulation. Multiple levels and divisions of governmental agencies regulating all areas of modern life lead to a multiplication of regulations. This seems to be a common feature of bureaucratic government, regardless whether in western-democratic states or a Leninist state.¹ To counterbalance the tendency of technocrats to create regulations *en masse* and with provisions that are unconstitutional or contradict other laws, checking is necessary. This part of the thesis will explore the possibilities of review of regulations in North America using the example of Canadian federal institutions.

I. Preconditions

The first step towards achieving adequate control of delegated legislation is to mandate its filing and publication.² If nobody knows that certain regulations exist, there is no perceivable way to review them systematically. Inattention of other actors or participants in policy making is seen as the main source of bureaucratic dominance.³ Secrecy, of course, helps to maintain inattention. Administrative regulations in

¹ This term is explained and analyzed in B. L. McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990).

² D. C. Holland & J. P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 59.

³ F. E. Rourke, *Bureaucracy, Politics and Public Policy*, Third edition (Glenview, Ill.: Scott, Foresna, Little Brown Higher Education, 1984) at 210.

particular are not required to be registered and publicised (except in California) and this failure is heavily criticised.⁴

1. Registration

A registration requirement forces the agency to submit the regulations issued to a central office, where they are collected, examined and numbered.⁵ Section 3 of the *Statutory Instruments Act* requires that proposed regulations be examined by the Clerk of the Privy Council. In practice however, the approval only concerns phraseology and form. A regulation must be registered before it can come into force, as per Sec. 9 *Statutory Instruments Act*, although exceptions are possible.

2. Publication

Canada has required since 1950 that delegated legislation be published. The *Regulation Act* provided for the systematic publication of regulations bringing them into some orderly arrangement, thus enabling a systematic access to regulations.⁶ Section 11 of the *Statutory Instruments Act* provides that a new regulation must be published in the *Canada Gazette* within 23 days of its registration.

⁴ M. Asimov, "California Underground Regulations" (1992) 44 *Administrative Law Review* 43 at 46 note 15: *The problem with underground rules is that they are often hidden underground.*

⁵ More on the filing and registration of regulations see D. P. Jones & A. S. DeVillars, *Principles of Administrative Law* (Toronto: Carswell Legal Publications, 1985) at 68 - 71.

⁶ J. R. Mallory, "Can Parliament Control the Regulatory Process" in *Second Commonwealth Conference on Delegated Legislation*, Vol. 3 (Ottawa: Supply and Services Canada, 1983) 13 at 17; see also Jones & DeVillars, *supra*, note 5 at 72 - 75; Holland & McGowan, *supra*, note 2 at 161ff.

There is no general statutory or institutional mechanism by which statutory instruments other than regulations (as defined in the *Statutory Instruments Act*) are brought to the attention of the public.⁷ Reasons for secrecy advanced by administrators are that they are the only ones who use the guidelines; they would only be for internal guidance; and it is well recognized that publishing of regulations "will cause trouble."⁸ Agencies responsible for formulating and developing behavioural standards have more incentives to publicize each new behavioural requirement because people cannot follow such standards unless they know of their existence and content.⁹ When plans, policies and rules are kept secret, private parties are prevented from checking arbitrary or unintended departures from them.¹⁰ Secret law, whether in the form of precedents or in the form of rules, has no place in a system of justice.¹¹

⁷ R. D. Anderson, "The Federal Regulation Making Process and Regulatory Reform, 1969 - 1979" in W. T. Stanbury, ed., *Government Regulation - Scope, Growth, Process* (Montreal: Institute for Research on Public Policy, 1980) 151 at 166 and 169; see also study by D. Teeple, "Canada's Secret Laws: A Survey of the Publication of Subordinate Legislation in the Provinces" (1976), submitted to Prof. Land. For Britain see A. I. L. Campbell, "The Publication of Delegated Legislation" (1982) *Public Law* 569 at 573; R. Baldwin & J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1986) *Public Law* 239 at 275.

⁸ See K. C. Davis, *Discretionary Justice - A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 110, ones the rules are public, officials will be faced with more numerous challenges about how they apply the rules.

⁹ D. J. Gifford, "Discretionary Decisionmaking in Regulatory Agencies: A Conceptual Framework" in K. Hawkins & J. M. Thomas, eds., *Making Regulatory Policy* (Pittsburgh, Pa.: University of Pittsburgh Press, 1989) 233 at 255. For an overview on the literature on the different assumptions concerning the motives of regulatory officials (self-interest, public interest etc.) and their respective consequences see F. E. Rourke, *Bureaucracy, Politics and Public Policy*, Third edition (Glenview, Ill.: Scott, Foresna, Little Brown Higher Education, 1984).

¹⁰ Davis, *supra*, note 8 at 98.

¹¹ Davis, *supra*, note 8 at 110; whether the extent of administrative secrecy in Canada is unique among western democracies, as is stated by Anderson, *supra*, note 7 at 180, cannot be proved without further research which is beyond the scope of this thesis.

II. Who Can Review ?

The question that has to be discussed further is what form the supervision of regulations should take and whether it will have the result that is hoped for.

The types of review available for regulations can be distinguished either according to the persons or institutions carrying it out, or according to the possible remedies or authority the different bodies have to alter them. Possible remedies are either recommendatory (suggest alternatives; remand to bureaucracy to draft again),¹² or consist of the authority to make alterations themselves.¹³ The differences are created to comply with the separation of powers doctrine. A mixed remedy is the power to disallow regulations.¹⁴ This thesis will differentiate according to institutions because that will provide greater structural clarity, although especially concerning inner-administrative review, several different forms can be distinguished (see 2. c)).

1. Administration

Some statutes or regulations provide for review or appeal mechanisms that allow for supervision of the regulations by the agencies themselves.¹⁵ Inner-administrative review is not a necessary precondition for a suit in court, as there is no general doctrine of exhaustion of remedies in Canada. The rule is that in every challenge to jurisdiction,

¹² Most common for review by a parliamentary committee.

¹³ This remedy is sometimes available to the administration itself, but participatory procedures might have to be complied with.

¹⁴ This is the ultimate power of a parliamentary committee for regulatory scrutiny or of a court.

¹⁵ In the case of challenges to the validity of regulations, this form of review is rarely ever used in Canada. But notice-and-comment rule-making procedures can be regarded as an inner-administrative method to have the rule issuing agency take a second look at the regulations.

either for want or excess of jurisdiction, the judicial review remedies are available despite the presence of an internal recourse.¹⁶ But in the presence of internal remedies the Superior Courts use their discretion to refuse to exercise judicial review if the claim alleges procedural irregularity committed in the exercise of jurisdiction, and alleges that it could have been righted through internal review mechanisms.¹⁷

There are inherent problems with inner-administrative review. The expression "birds of a feather stick together" is a validly describes the situation that no real distance exists between supervisees and supervisors. In practice there is the systematic effort of officers to discourage aggrieved parties from taking their cases to superior officers. A superior officer has a continuing relationship with each subordinate and often has official, psychological, or personal reasons for protecting that relation so that his or her review of a subordinate's decision is often affected by and even controlled by considerations other than its merits.¹⁸ Complaints advanced against regulations will most certainly need an outside arbiter to judge the validity of the claim. This is not only because the issuing agency appears biased because it made the rules in the first place, but also because most appeal mechanisms are meant for review of decisions, and not for rules. All that remains for aggrieved parties is an informal complaint about the rules to the agency.

¹⁶ R. Dussault & L. Borgeat, *Administrative Law - A Treatise*, Vol. 4 (Toronto: Carswell, 1990) at 463; also recommending that reconsideration should not be treated as an exhaustion of administrative remedies device is P. R. Verkuil, "Congressional Limitations on Judicial Review of Rules" (1983) 57 *Tulane Law Review* 733 at 770.

¹⁷ Dussault & Borgeat, *supra*, note 16 at 468.

¹⁸ Davis, *supra*, note 8 at 143-145.

The advantages of inner-administrative review include: administrators possess technical expertise and are uniquely equipped to judge whether the complaints advanced are valid; as administrative appeals are also less expensive than judicial review, a party need not be represented by counsel, and usually the panel reaches the merits of the case without becoming enmeshed in legal technicalities (like standing, ripeness, sovereign immunity etc.).¹⁹ Theoretically, inner-administrative review should be the easiest way to review and maybe alter delegated legislation. Because the agency made the regulations, it can also alter them. In practice, however, alterations rarely seem to occur. Once the agency has determined its cause of action, it needs some substantial outside intervention to change delegated legislation.²⁰

2. Independent Review Mechanisms

The constituent feature of independent review mechanisms is that the reviewing institutions have no connection with the administration they are supervising. The above mentioned flaws of inner-administrative review are therefore not likely to be present. Moreover, a decision by some kind of outside, independent body more often than not

¹⁹ Davis, *supra*, note 8 at 145; stating that the opportunities for an agency to reconsider its rule can be of substantial utility so long as the court's expectations of an agency's response to reconsideration requests are not too demanding is Verkuil, *supra*, note 16 at 775. These advantages of inner-administrative review are especially prevalent when the application of regulations is reviewed.

²⁰ Therefore it is suggested to judicially review the decision of the agency to deny a requested amendment of a rule, F. Davis, "Judicial Review of Rule-making: New Patterns and New Problems" (1981) *Duke Law Journal* 279 at 294. One other major responsibility of every agency, too often neglected, is to watch for deficiencies in the legislation it administers, and to make systematic recommendations for changes, based upon understanding of the details of administration. Many agencies systematically report to legislative committees results which are deemed unjust or otherwise unsatisfactory, Davis, *supra*, note 8 at 53.

increases the level of satisfaction for the plaintiff who seeks the decision, and the public at large.

a) Parliamentary Committee

Parliamentary rules review is usually part of an *Administrative Procedure Act*²¹ requiring agencies to submit all their proposed regulations to a specially designated committee for prior review or prior approval before the regulations are formally adopted and implemented by the issuing agency.²² Another model is to increase consultation between agencies and a special parliamentary committee in the making of subordinate legislation.²³ In the United States in 1990, forty-two state legislatures relied upon rules review by principally advisory committees to make administrative rule-making more accountable.²⁴

The federal Canadian *Joint Committee for Regulatory Scrutiny* was mandated in 1972 through the *Statutory Instruments Act* and first met in 1974 (then under the name of *Standing Committee on Regulations and other Statutory Instruments*).²⁵

²¹ In Canada the Statutory Instruments Act Sec. 19 is the statutory basis for review by parliamentary committee.

²² J. R. Bowers, *Regulating the Regulators - An Introduction to the Legislative Oversight of Administrative Rulemaking* (New York: Praeger, 1990) at 24.

²³ This approach is taken in Victoria, Australia, see G. Craven, "Consultation and the Making of Subordinate Legislation - A Victorian Initiative" (1989) 15 *Monash University Law Review* 95; on the check by legislators and by legislative committees generally see Davis, *supra*, note 8 at 146 - 150.

²⁴ Bowers, *supra*, note 22 at 25.

²⁵ Manitoba was one of the first jurisdictions in Canada to provide for some legislative scrutiny of regulations via the creation of a Legislative Standing Committee in 1960, on that see D. J. Miller, "Regulating Reform in Manitoba: A Blueprint for Change" (1986) 15 *Manitoba Law Journal* 219.

It is composed of eleven members of the House of Commons and seven members of the Senate. The *Joint Committee for Regulatory Scrutiny* has a fairly broad mandate which was further specified in its second report.²⁶ Administrative regulations are not included in the definition of the *Statutory Instruments Act* and consequently cannot be reviewed by the *Committee*. This has been regretted by several authors and commissions.²⁷

The difficult question a parliamentary committee has to struggle with is: how much parliamentary control is needed, desirable or warranted? Too little control, and the bureaucracy is given opportunity to overstep its authority; too much control, and the value of delegating the legislative authority is lost.²⁸

The advantages of review through a parliamentary committee are that the legislature oversees the regulatory process and that this is done by persons who might have been involved in drafting the enabling legislation. It seems that in this way legislative intent is better preserved. Parliament retains ultimate responsibility even for delegated legislation.

Problematic is that now parliamentarians become involved in discussing technical details which were meant to be solved by the administration. The effect of delegation could get lost if the committee does not solely concentrate on general issues of drafting

²⁶ Extensive discussion of the mandate see Holland & McGowan, *supra*, note 2.

²⁷ Anderson, *supra*, note 7 at 181.

²⁸ Holland & McGowan, *supra*, note 2 at 49.

and precision. The oversight effect can also get distorted if one of the issues before the committee becomes salient to a legislator because of its potential impact on his or her constituency.²⁹ Moreover, it has been noticed that the involvement of committee staff further complicates issues, because committee members tend to rely on their staff's expertise.³⁰ Besides, the committee's power is essentially to persuade.³¹ It can ask the responsible department or agency for an explanation. If the answer is unsatisfactory it informs the agency of the remedial action which, in the committees view, ought to be taken.

The practical view as well as the legal view that is advanced is that it is dangerous to give committees too much power, but that committees should have the capacity to move Parliament to exercise power.³² If necessary, the *Committee* may report objectionable instruments directly to Parliament and ultimately revoke the enabling legislation, making regulations issued under them *ultra vires*. The existing *Committee* has no mandate to consider the political or policy implications of regulations.³³ The mechanism which has been suggested to have review on the merits take place is to refer

²⁹ Bowers, *supra*, note 22 at 51.

³⁰ P. L. Strauss, "Legislative Theory and the Rule of Law: Some Comments on Rubin" (1989) 89 *Columbia Law Review* 427 at 431: *Use of staff marginalizes debate and discussion among elected representatives and introduces serious problems in information management and assessment*; similar Bowers, *supra*, note 22 at 104.

According to P. J. Monahan, *The Impact of the Charter on Governmental Policy-Making*, paper presented on the Conference The Charter: Ten Years After, May 15/16, 1992, Vancouver, it also creates a monopoly of the Ministry of Justice and/or the Attorney General inside government, because their advice on constitutional issues is sought, and they start to resemble a central supervising agency.

³¹ Mallory, *supra*, note 6 at 21.

³² *Ibid.* at 32.

³³ G. Levy, "Delegated Legislation and the Standing Joint Committee on Regulations and other Statutory Instruments" (1979) 22 *Canadian Public Administration* 349 at 362.

the regulations in question to the parliamentary committee which is most knowledgeable.³⁴

According to one author the real worth of the *Joint Committee's* work since 1974 has been its educational function on the bureaucracies.³⁵ Another study on the impact of parliamentary review found in Illinois³⁶ that sanctions are necessary in order for the process to be successful. In Australia, where the enforcement of review is purely parliamentary, but with extensive recommendatory powers of the *Legal and Constitutional Committee*,³⁷ a steady growth of compliance rates is observable.³⁸

b) Ombudsperson³⁹

An ombudsperson is a high-level official whose main function is to receive complaints from citizens who are aggrieved by official action or inaction, to investigate them, to criticise, and to publicise the findings. As rule-making belongs to the field of administrative action, he or she can also accept complaints concerning regulations. There is no ombudsperson for general administrative problems on the federal level in Canada; but some commissioners exist for specific issues, for example language rights.⁴⁰ Most

³⁴ S. Robinson, "Review of Delegated Legislation on the Merits" in *Second Commonwealth Conference on Delegated Legislation*, Vol. 3 (Ottawa: Supply and Services Canada, 1983) 123 at 124; Levy, *supra*, note 33 at 362.

³⁵ Levy, *supra*, note 33 at 364.

³⁶ Bowers, *supra*, note 22 at 69.

³⁷ Craven, *supra*, note 23 at 107.

³⁸ *Ibid.* at 113.

³⁹ Extensive publication on all aspects of this institution by the International Ombudsman Institute at the Faculty of Law at the University of Alberta, Edmonton.

⁴⁰ An Act respecting the Status and Use of the Official Languages of Canada (*Official Languages Act*), Sections 49 to 75 [R.S. 1985 c. 31 (4th Supp.)].

provinces have created an ombudsperson office to oversee their provincial administration.⁴¹

An ombudsperson has no power to correct injustice or maladministration, except by criticizing and persuading. But the mere existence of an ombudsperson gives administrators added incentives to avoid injustice and to correct maladministration.⁴² As an ombudsperson has no stake in the results of a case through helping constituents or otherwise, he or she usually can be a better critic of administration than a legislator.⁴³

c) Technical Experts

In order to preserve the advantages of administrative expertise, but without the bonds inside an agency, suggestions have been made to form either special courts⁴⁴ or another body with technical expertise to review cases. The technical expertise would ensure rules that reflect the current state and possibility of technique. It is felt that the problems posed by specialisation in government can only be controlled by specialisation in the judiciary.⁴⁵ A review panel of technical experts can be imagined with every

⁴¹ Except for Prince Edward Island and the territories, Jones & DeVillars, *supra*, note 5 at 345.

⁴² Davis, *supra*, note 8 at 150.

⁴³ *Ibid.* at 229.

⁴⁴ N. J. Vig, "The Courts: Judicial Review and Risk Assessment" in S. G. Hadden, ed., *Risk Analysis, Institutions and Public Policy* (Port Washington, N.Y.: Associated Faculty Press, 1984) 60 at 65 on "science courts". Generally, H. H. Bruff, "Specialized Courts in Administrative Law" (1991) 43 *Administrative Law Review* 329.

⁴⁵ Expressing this feeling for Great Britain and the United States: B. Schwartz & H. W. R. Wade, *Legal Control of Government - Administrative Law in Britain and in the United States* (Oxford: Clarendon Press, 1972) at 318.

power of review.⁴⁶ Independent tribunals could be created to review the validity of regulations, but for that matter reliance is mainly placed on the court system. But in a great variety of areas (e.g. immigration, labour relations, worker's compensation) independent tribunals review challenges to the application of regulations. In these cases it really boils down to a question of names, whether one wants to call them a "court" in a functional sense, because they are meant as a substitute and share multiple characteristics with them (security of tenure, appointment process).

Most of these forms are but suggestions, however, and there is no indication that they will be transformed into practice. It should be considered, moreover, that if one already experiences 'captured' agencies, capture has to be feared, too, with technical experts, as their connections with the industries might even be stronger.

3. The Courts

Judicial review is the power of a court to determine the legality and constitutionality of an action of a government official, agency, or legislative body.⁴⁷ It is mainly discussed as the power of the courts to decide upon the constitutionality of legislative acts but also extends to the review of delegated legislation.

⁴⁶ D. Mullan, "Review of Delegated Legislation on the Merits" in *Second Commonwealth Conference on Delegated Legislation*, Vol. 3 (Ottawa: Supply and Services Canada, 1983) 118 at 122. In Germany, some regulations themselves are made by technical experts (DIN Normen) and then incorporated into regulations by the administrative agencies in charge.

⁴⁷ Blacks Law Dictionary, Sixth edition (St. Paul, Minn.: West Pub. Co., 1990); F. Heffron & N. McFeeley, *The Administrative Regulatory Process* (New York: Longman, 1983) at 293; according to S. A. de Smith, *Judicial Review of Administrative Action*, Fourth edition (London: Stevens, 1980) at 28, it is not a term of art and is used to mean judicial scrutiny and determination of the legal validity of instruments, acts, decisions and transactions.

To make judicial review a viable option in the checking of regulations, the legal process has to be part of the cultural values of the society in which the court operates.⁴⁸ Governments are especially suspicious of courts' powers primarily concerning review of legislation proper and thus question the democratic legitimacy⁴⁹ of judicial review. But it seems that this debate about the legitimacy of judicial review is not really on point concerning the topic of this thesis: regulations are not made by elected representatives of the people but by technocrats or bureaucrats. They are commissioned by Parliament, sometimes in very vague terms, allowing for ample discretion.⁵⁰ Moreover, the decision making process undergone to arrive at regulations is very different in legislatures and agencies; agency rules are institutional decisions and come with all the flaws described in Chapter Two of the thesis.

Not only are Parliament's abilities to check delegated legislation institutionally impeded because of the reasons mentioned above, but courts in contrast have institutional qualities making them an institution that can provide a valuable "second look" at government regulations which integrates public concern, scientific information and

⁴⁸ For China see 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 4, calling it the ideological form of law when submission to it is secured by legitimated autonomous institutions.

⁴⁹ See A. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) at 116ff.

⁵⁰ See W. Funk, "Rationality Review of State Administrative Rulemaking" (1991) 43 *Administrative Law Review* 147 at 161/162.

weighing distributive consequences, clarifies the bases of decision-making, and ensures reasoned application to specific circumstances.⁵¹

They stand outside the relationship between legislature and administration in two ways: they are not concerned directly with the formulation and implementation of social programmes and objectives, nor are they accountable directly or through the legislature to the political process.⁵² To justify their intervention courts must claim either special competence in some aspects of policy making or special attentiveness to the public interest.⁵³ Generally, the latter is presumed because of the special characteristics of the judicial process. Characteristics of judicial review include the life-time tenure of judges, the highly structured, adversarial process, and the fact that adjudication focuses on what has happened in the past.

Judges are said to have a generalist's rather than a specialist's perspective.⁵⁴ Because of their status, judges can take action which is painful in the short run but might be beneficial and popular in the long run.⁵⁵ The status of judges might actually be the

⁵¹ Vig, *supra*, note 44 at 62.

⁵² D. J. Galligan, *Discretionary Powers - A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 233.

⁵³ R. S. Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington D. C.: Brookings Institution, 1983) at 13; for Canada see D. M. Beatty, *Talking Heads and the Supremes - The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) at 99ff with case references.

⁵⁴ T. Greenwood, *Knowledge and Discretion in Government Regulation* (New York: Praeger, 1984) at 10 with further references.

⁵⁵ Melnick, *supra*, note 53 at 14. M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971) at 83 even states that *the courts effectiveness rests on the esteem in which they are held by the electorate and they must always keep in mind the attitude of that electorate.*

single most important factor that makes society agree to judicial review. The professional ethos of judges, created by a lengthy education, and a selection process that ensures that only practitioners sit on the bench, gives clout to the institution. While faith in something called government has declined, there is still a great deal of faith in the courts and in the idea of law. Indeed, judicial review presupposes this faith⁵⁶ and creates legitimacy for the regulations so examined.

III. What is the Scope of Judicial Review ?

Scope of review refers to the extent to which the court will inquire into the administrative determination.⁵⁷ Its range is not yet fully settled. On the one hand, it is argued that if the agency has done something wrong, the court should be able to specify what exactly that wrong is and how the agency should correct it.⁵⁸ But on the other hand the prevalent opinion is that reviewing judges are without power to substitute their judgment as to how the discretion should be exercised⁵⁹ because that is against the separation of powers doctrine. Proponents of the latter view would, for example, propose that judicial review should not take place when it interferes with the governmental budget, i.e. has an impact on it. But every kind of judicial activity (e.g. criminal law) has an impact on the governmental budget. So the question of scope really is one of degree. At this point, the opinions and beliefs of the judges regarding

⁵⁶ L. M. Friedman, "On Regulation and Legal Process" in R. G. Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985) 111 at 119.

⁵⁷ Heffron & McFeeley, *supra*, note 47 at 309.

⁵⁸ Melnick, *supra*, note 53 at 388.

⁵⁹ Davis, *supra*, note 8 at 36; Funck, *supra*, note 50 at 156 and 170.

regulation and regulations, their causes and justifications become important and depending on them judges will favour one scope of review over another.⁶⁰

1. Delegated Legislation

Most challenges to subordinate legislation occur *incidenter* or collaterally, in the defense of a prosecution for violation of a regulation,⁶¹ but *principaliter* review is also possible. In that case, in order to get standing rights, an applicant needs to show an interest in the subject matter of the litigation which is greater than that of the public at large.⁶² Challenges to regulations in Canada have, however, been somewhat infrequent,⁶³ thais direct challenges to the validity of regulations (as in *ultra vires* review). Far more frequent are interpretive challenges related to the application of regulations. These cases also tend to be more successful for the plaintiffs, because they appear to be less dramatic in their consequences. Judges do not like to completely strike down regulations once enacted. But these interpretative challenges can contain hidden challenges to the validity of the regulations.

⁶⁰ Looking into this phenomenon in a predictive mode for a then newly appointed judge to the US Supreme Court is P. L. Scatena, (Note) "Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in the Era of Deregulation" (1987) 38 *Hastings Law Journal* 1223.

It should come as no surprise that the statutory interpretation adopted by a judge who felt compelled to interpret a meaningless standard almost inevitably coincided with the judge's political philosophy,

R. J. Pierce, "The Role of Constitutional and Political Theory in Administrative Law" (1985) 64 *Texas Law Review* 469 at 485.

⁶¹ Holland & McGowan, *supra*, note 2 at 254. In the US after a period of pre-enforcement review, congress now limits judicial review considerably, see F. Davis, *supra*, note 20 at 279. On the distinction generally see Cappelletti, *supra*, note 55 at 69f.

⁶² Holland & McGowan, *supra*, note 2 at 254 with further references.

⁶³ *Ibid.* at 169.

The distinction between procedural and substantive review used here loosely follows those identified by Vig.⁶⁴ It is debatable whether they in fact can be distinguished; *ultra vires* review especially is right on the edge between procedure and substance.⁶⁵

a) Procedural Review

Judicial review is most justifiable not when it is directed at substantive policy choices that occur in exercising discretion, but rather when it draws on values which form part of the constitutional framework within which discretion occurs resulting in procedural requirements.⁶⁶ That means that judges will very often restrict themselves to examine the process by which the regulations have been promulgated. If they find that the process did not comply with all provisions, the agency has not properly exercised its authority in making the regulations in quest, or the process was not fair,⁶⁷ the regulations will not be upheld. The question is whether a purely technical shortcoming in the process of promulgation should be the basis for setting aside an otherwise legitimate regulatory program authorized by Parliament.⁶⁸ Most of the time it boils down to a question of how much deference the court is willing to pay to agency discretion.⁶⁹ Process and procedure are presumed to guard constitutional rights by their mere

⁶⁴ Vig, *supra*, note 44 at 68f.

⁶⁵ Funk, *supra*, note 50 at 181.

⁶⁶ Galligan, *supra*, note 52 at 233.

⁶⁷ Although the requirement to act fairly is not really applicable to situations of rule-making; see Holland & McGowan, *supra*, note 2 at 143.

⁶⁸ Arguing that it should not is F. Davis, *supra*, note 20 at 284.

⁶⁹ Vig, *supra*, note 44 at 69.

existence, they are a necessary precondition to good (that is responsive) government and should not be treated light-heartedly.

It is a well established doctrine that the courts can question the validity of subordinate legislation on the ground that the authority conferred by the Act was exceeded (that the making of the regulations was *ultra vires*).⁷⁰ A regulation that in any way conflicts with the substantive statutory provisions cannot "carry out the purpose and provision of the Act", and will not be upheld.⁷¹

b) Substantive Review

Substantive review is also called review on the merits. It concerns the content of regulations and occurs when the court examines the underlying scientific and technical evidence and the substantive rationality of the regulations.⁷² Only when the agency is adequately supported by scientific and technical evidence⁷³ are the regulations upheld. Regulations can also be challenged on ground of vagueness or uncertainty. Successful challenges to delegated legislation on the basis of uncertainty are admittedly rare.⁷⁴

⁷⁰ E. Driedger, "Subordinate Legislation" (1960) 38 *Canadian Bar Review* 1 at 5.

⁷¹ Holland & McGowan, *supra*, note 2 at 182.

⁷² Funk, *supra*, note 50 at 158 distinguishes three types of rationality review methods.

⁷³ Vig, *supra*, note 44 at 70; Holland & McGowan, *supra*, note 2 at 205; Funk, *supra*, note 50 at 167: *A system of judicial review without any requirement to assess the information actually considered by the agency is the equivalent of affirmatively approving irrational rulemaking.*

⁷⁴ Holland & McGowan, *supra*, note 2 at 232.

Most of the times the courts are not concerned with whether the regulation will in fact implement the objects of the statute, the issue is whether the regulation deals with the subject mentioned in the statute.⁷⁵ The wisdom of government policy is not an issue to which the courts feel they are entitled to address themselves.⁷⁶ But a forceful argument in favour of rationality review is advanced by Funk:⁷⁷ no rationality review for rules would mean that the agency can escape it on a group basis, but not when it acts on an individual basis, because concrete administrative acts are reviewable for rationality. Furthermore, every judicial decision on regulations makes regulatory policy, whether the court decides to strike them down or whether the court forces the agency to comply with them.

It is this kind of regulatory policy making by legitimizing or de-legitimizing programs already in existence which should be the responsibility of the courts, not policy making by drawing up plans or programmes. Program design is a task courts are institutionally not adequately equipped for and also then we really reach the bottom line of the separation of powers doctrine.

⁷⁵ *Ibid.* at 203 with further references.

⁷⁶ Holland & McGowan, *supra*, note 2 at 214; also R. Beal, "Ad Hoc Rule-making in Texas: The Scope of Judicial Review" (1990) 42 *Baylor Law Review* 459 at 480. In the US the courts are limited to the "arbitrary and capricious" test.

⁷⁷ *Supra*, note 50 at 169.

2. Administrative Regulations

Concerning review of administrative regulations an argument *a maiore ad minus* can be made: if delegated legislation proper can be reviewed, then even more so administrative regulations, because these regulations are definitely lower in the hierarchy of statutory instruments.⁷⁸ But they are created by agencies solely to facilitate their work and so it could be hold that review of these regulations should be limited and not interfere with the purely administrative sphere. Administrative expertise is a strong argument for judicial deference.

a) Procedural Review

Procedural review does not seem to occur in great detail. It is established both that agencies have the right to issue regulations and that there are no established procedures that have to be followed in their making. It would seem feasible that regulations are struck down because of the failure to make them known, that is publish them.⁷⁹ Occasionally it is warned that courts must be more careful when examining the characteristics of directives (administrative regulations), firstly because they are so varied, but also because to categorize them too quickly, or simply might paralyse the administrations activity or infringe the rights of citizen.⁸⁰ Administrative law should

⁷⁸ Similar Beal, *supra*, note 76 at 459, 467.

⁷⁹ Holland & McGowan, *supra*, note 2 at 60.

⁸⁰ R. Dussault & L. Borgeat, *Administrative Law - A Treatise*, Second edition, Vol. 1 (Toronto: Carswell, 1985) at 339.

require agencies to observe procedures that facilitate effective and efficient government.⁸¹

But the courts constitute the only institution which might actually oversee the making of these regulations and as a result should be more concerned about making them subject to legal doctrine.

b) Substantive Review

At this point, short of very few exceptions, the courts will say that administrative regulations are not legal documents to which they can address themselves.⁸² They purport that they cannot review them freely but must uphold them unless they are contrary to statute or are unreasonable.⁸³

Courts regularly refuse to enforce that agencies follow their own procedures.⁸⁴ In Martineau et al. v. Matsqui Institution Disciplinary Board⁸⁵ Mr. Justice Pigeon for the majority of the Supreme Court of Canada refused the prisoners the right to require

⁸¹ Asimov, *supra*, note 4 at 77.

⁸² R. Dussault, "Quasi-Law: Directives and Guidelines" in *Second Commonwealth Conference on Delegated Legislation*, Vol. 3 (Ottawa: Supply and Services Canada, 1983) 35 at 46.

⁸³ R. A. Anthony, "Agency Efforts to Make Nonlegislative Documents Bind the Public" (1992) 44 *Administrative Law Review* at 31 with further references. This one sentence clarifies a situation for Canada which is hotly debated in China.

⁸⁴ That is the case in Canada and the United States, P. Raven-Hansen, "Regulatory Estoppel: When Agencies Break Their Own "Law"" (1985) 64 *Texas Law Review* 1.

⁸⁵ (1978) 1 S.C.R. at 118. Mr. Martineau was sentenced to 15 days in solitary confinement for a "flagrant or serious" disciplinary offence. His application for judicial review under sec. 28 of the *Federal Court Act* was rejected by the Supreme Court of Canada, because the "directive" governing the procedure for dealing with disciplinary offenses were executive rather than "law", and therefore could not be quasi-judicial in nature, Jones & DeVillars, *supra*, note 5 at 172.

that the directive of the prison board be followed because there was no provision for a penalty and although the regulations were authorized by statute, they would be clearly of an administrative, not a legislative nature.⁸⁶ Also in Maple Lodge Farms v.

Government of Canada⁸⁷ it was stated that

*to give the guidelines the effect contented for by the appellant would be to elevate ministerial directions to the level of law and fetter the minister in the exercise of his discretion.*⁸⁸

This seems to be too blunt a statement to be appropriate for all cases of administrative regulations, as there are clearly regulations of different kind of legal effect. Moreover, if agencies went through the process of drawing up these regulations why should they have the benefit of using or not using them at will? As of the writing of this thesis, Martineau and Maple Lodge are good law in Canada.

IV. Impact of Judicial Review

If one wants to obtain responsive rules, that is regulations which have the effects of compensating for market failures, with the help of judicial review, it is important to find out what impact judicial review has on regulations. It is certain that a regulatory agency's output will depend on characteristics of the legal system, such as the specificity with which a regulated firm's behaviour is defined in legislation administered by the

⁸⁶ *Ibid.* at 129.

⁸⁷ (1982) 2 S.C.R. at 2. The Ministry of Industry, Trade and Commerce refused to issue appellant a permit as required by s. 8 of the *Export and Import Act*, to import a product included on an import control list, notwithstanding the ministerial guidelines dealing with the matter. Appellant questioned whether not the Minister had any discretion to refuse to issue such a permit, and argued that if he did, that discretion had been unlawfully exercised.

⁸⁸ *Ibid.* at 7.

regulatory agency, or the methods used by the courts to deal with cases brought before them by the agency.⁸⁹ Unfortunately, it must be acknowledged that law impact studies are still far from common.⁹⁰ As well, the effectiveness of judicial review is difficult to access; clearly it cannot simply be measured by reference to the number of laws struck down.⁹¹

Courts normally have their greatest impact in the early stages of a policy cycle. When the laws are implemented and litigated for the first time, courts have to construe the intent of the legislation and the boundaries of delegated authority. As the meaning of the law is clarified and administration becomes routinized, the judicial impact normally declines.⁹² I will first summarize the theoretical expectations concerning impact of judicial review and then examine the few studies that have been undertaken in the field.

1. Theoretically

The availability of judicial review is seen to provide a vital and essential check on the exercise of administrative power. Its very existence ensures that agencies must constantly maintain vigilance in following legally and constitutionally required procedures.⁹³ It can be compared to a continuous threat over the agency. Review

⁸⁹ D. Needham, *The Economics and Politics of Regulation - A Behavioural Approach* (Boston, Little Brown, 1983), 117; similar Pierce, *supra*, note 60 at 480.

⁹⁰ I. Bernier & A. Lajoie, "Law, Society, and the Economy: An Overview" in I. Bernier & A. Lajoie, eds., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 1 at 58.

⁹¹ G. Jolowicz in M. A. Glendon, M. W. Gordon & C. Osakwe, eds., *Comparative Legal Traditions* (St. Paul, Minn.: West Pub. Co., 1985) at 72.

⁹² Vig, *supra*, note 44 at 64.

⁹³ Heffron & McFeeley, *supra*, note 47 at 313; Rourke, *supra*, note 3 at 200.

cannot only achieve correction of mistakes but can also further consistency in agency decisions.

But judicial scrutiny of subordinate legislation, whether on the merits or for ultra vires reasons, tends to be haphazard.⁹⁴ Problems with it include the fact that third parties have no possible influence in court proceedings, the cost of the process is very high, and only negatively affected parties complain, leaving many regulations (e. g. subsidies or other conferred benefits) without review. Moreover, judicial review is time consuming, sometimes taking years,⁹⁵ and judges are frequently uninformed about the policy issues that come before them.⁹⁶ Courts also act only when litigants bring cases before them. This prevents courts from planning or setting their own priorities and often presents them with highly atypical cases.⁹⁷ At best, judicial review is a sporadic check on administrative power, at worst, it is a check that works best for the wealthy and powerful.⁹⁸

2. Empirically

New regulatory statutes (especially in the U.S.) have provided for greater opportunity for judicial review.⁹⁹ It was thought that this would promote effective, aggressive regulation, because it was combined with the effort to open the courts to new

⁹⁴ Mullan, *supra*, note 46 at 120.

⁹⁵ S. G. Breyer, *Regulation and its Reform* (Cambridge, Mass.: Harvard University Press, 1982) at 118.

⁹⁶ Melnick, *supra*, note 53 at 387.

⁹⁷ *Ibid.* at 15.

⁹⁸ Cf. Heffron & McFeeley, *supra*, note 47 at 314.

⁹⁹ Melnick, *supra*, note 53 at 8.

public interest groups to help to reduce or eliminate bias in regulation.¹⁰⁰ But the practice following these enactments gives a somewhat mixed picture; in a study concerning the American *Clean Air Act*, it was found that in several instances judges failed to understand issues of central importance to the case before them; whereas in others, the courts' disciplined analysis of evidence helped educate the Environmental Protection Agency as well as the bench.¹⁰¹ The judges' preconceptions of environmental issues and the regulatory process were very important.¹⁰² Another study offers evidence that judicial review of agency rulemaking is leading to policy paralysis in many contexts.¹⁰³ Intensive court intervention increases the time and money it takes to reach a decision.¹⁰⁴

In Canada it can be observed that judicial control acts as prerequisite for intergovernmental cooperation¹⁰⁵ and also that judges generally follow a policy of restraint¹⁰⁶ when it comes to interfering with regulatory policy.¹⁰⁷ Generally, two

¹⁰⁰ *Ibid.* at 9.

¹⁰¹ *Ibid.* at 367.

¹⁰² *Ibid.* at 371.

¹⁰³ R. J. Pierce, "The Unintended Effects of Review of Agency Rules: How Federal Courts have contributed to the Electricity Crisis in the 1990s" (1991) 43 *Administrative Law Review* 7 at 8.

¹⁰⁴ J. Q. Wilson, *Bureaucracy - What Government Agencies Do And Why They Do It* (New York: Basic Books, 1989) at 282; only one of the 24 health standards issued by the Occupational Safety and Health Administration (OSHA) was not challenged in the courts as of 1985; over 80 % of the three-hundred or so regulations EPA issues each year wind up in the courts, at 284.

¹⁰⁵ Cf. G. Tremblay, "The Supreme Court of Canada: Final Arbiter of Political Disputes" in I. Bernier & A. Lajoie, eds., *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986) 179 at 199.

¹⁰⁶ On judicial activism in Canada C. Baar, "Judicial Activism in Canada" in K. M. Holland, ed., *Judicial Activism in Comparative Perspective* (Basingstoke: Macmillan, 1991) 53.

¹⁰⁷ A number of years ago, fears of a "de-regulation" ethic pervading the Supreme Court's constitutional jurisprudence were raised:

"Corporate interests appeared to be enjoying considerable success in utilizing litigation as a weapon in the continuing fight against government"

lines of argument can be distinguished justifying this restraint. The first one is based on agency expertise; because of technical knowledge on the side of the administrators, judges do not get involved and defer to the administrators. The second rationale is democratic legitimacy. Judges defer to politics because elected politicians are more legitimate decision makers for certain questions than appointed judges.

But the decisive question is what the net effect of review is, whether the occasional judicial abuse outweighs the benefits.¹⁰⁸ The prospect of judicial review does exert strong influence on how agencies collect and use knowledge and how they exercise discretion.¹⁰⁹ The possibility - indeed, often the expectation that agency promulgation of a regulation will be followed by judicial review provides an incentive for thorough collection and analysis of scientific and engineering information by regulatory agencies.¹¹⁰ According to a former government adviser, being struck down in court for unconstitutionality creates a feeling of crisis in government and governments establish an "early warning system" to avoid this from happening.¹¹¹

regulation. There is no doubt that corporate interests have been the main beneficiaries in instances where the courts have struck down legislation. But to suggest that the jurisprudence as a whole exemplifies any de-regulation ethic is to ignore the contradictory character of the material",

P. J. Monahan, "The Supreme Court and the Economy" in I. Bernier & A. Lajoie, eds., *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986). 105 at 162.

¹⁰⁸ Funk, *supra*, note 50 at 171; he writes that posing the question answers it.

¹⁰⁹ Greenwood, *supra*, note 54 at 36.

¹¹⁰ Greenwood, *supra*, note 54 at 40; similar Strauss, *supra*, note 30 at 443.

¹¹¹ P. J. Monahan, *The Impact of the Charter on Governmental Policy-Making*, paper presented on the Conference The Charter: Ten Years After, May 15/16, 1992, Vancouver. Also S. Sedley, "Hidden Agendas: The Growth of Public Law in Britain and Canada" in Institute of Comparative Law Waseda University, ed., *Law in East and West* (Tokyo: Waseda University, 1988) at 417, *The Minister lies awake worrying that judicial review will come like a thief in the night and steal his political initiative.*

V. Conclusions

Are the courts the only institution that can lead us out of the vicious cycle of regulations ? I think that they are. They are the only institution to potentially get all types of regulations before them and are uniquely qualified to bring a systematic order into them.

To talk of judicial capacity concerning review of regulations implies a comparison: more capable than whom? Inner-administrative review is possible but its flaws outweigh its usefulness. An ombudsperson has no power to remedy regulatory injustice. Parliamentary control is not available for administrative regulations and occurs at a stage when no experience with enforcement of the regulation has been collected.¹¹² It seems also to be somewhat contrary to the justifications for regulations: if Parliament has neither time nor expertise to make regulations, how can it be expected to supervise them?

In the hierarchy of legislative responsibility among the branches of government for determining statutory meaning, the judiciary should have the essential duty for enforcing the legislative responsibilities of the other two branches.¹¹³ Allocating principal responsibility for interpreting regulatory statutes to the judiciary would significantly

¹¹² Similar D. Hartle & M. Trebilcock "Regulatory Reform and the Political Process" (1982) 20 *Osgoode Hall Law Journal* 643 at 673.

¹¹³ Cf. L. E. Gerwin, "The Deference Dilemma: Judicial Response to the Great Legislative Power Giveaway" (1987) 14 *Hastings Constitutional Law Quarterly* 289 at 392.

further separation of power by placing power where it will counterbalance, rather than contribute to the concentration of regulatory authority in the executive.¹¹⁴

The expansion of judicial power is but one facet of the general growth of government power in our epoch. The ever increasing powers of the legislative and executive branches justify indeed demand, a parallel growth of the judicial power to preserve a balanced system. This is an inevitable trend of 'checks and balances'.¹¹⁵

The insecurities produced by administrative regulations thus are a call for the formulation of principles to govern judicial action.¹¹⁶ In practice this would mean overruling Martineau to make agencies realize, as Mr. Justice Laskin formulated it in his dissent:

*that the administrative authorities should be expected to obey the prescription it promulgated, and leave it to the courts to determine whether they have done so if their application of these prescriptions is contested.*¹¹⁷

It is impossible to judge bureaucratic behaviour without some explicit or implicit notion of "correct behaviour."¹¹⁸ Judicial review requires the subjection of the ordinary law to a *lex superior* withdrawn from the vagaries of parliamentary majorities.¹¹⁹ This

¹¹⁴ C. R. Farina, "Statutory Interpretation and the Balance of Power in the Administrative State" (1989) 89 *Columbia Law Review* 432 at 526.

¹¹⁵ M. Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis" (1979) 2 *Legal Issues of European Integration* 1 at 23.

¹¹⁶ Baldwin & Houghton, *supra*, note 7 at 283; Funk, *supra*, note 50 at 176/177 with further references.
¹¹⁷ (1978) 1 S.C.R. 118 at 125.

¹¹⁸ Needham, *supra*, note 89 at 110.

¹¹⁹ Cappelletti, *supra*, note 55 at 15.

standard could well be provided in Canada by the provisions included in the *Charter of Rights and Freedoms*.¹²⁰

¹²⁰ See the study of Beatty, *supra*, note 53.

CHAPTER FIVE: REGULATION REVIEW POSSIBILITIES IN THE PRC

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.¹

Strictly speaking, there is no judicial review of regulations in China. Article 12 Section 2² of the Administrative Litigation Law (hereinafter ALL) expressly states that these cases are not to be heard in the courts:

*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).³

¹ For an excellent overview of the background of the Chinese system of judicial review see Fa, Jyh-pin, *A Comparative Study of Judicial Review under Nationalist Chinese and American Constitutional Law* (Baltimore: School of Law, University of Maryland, 1980) at 9 - 44.

² Art. 12 Section 2, translated in (5 June 1989) 5 *China Law and Practice* Vol. III at 37; another English translation in (1991) 24 *Chinese Law and Government* at 22.

³ On the latest PRC Constitution see W. C. Jones, "The Constitution of the People's Republic of China" (1985) 63 *Washington University Law Quarterly* 707. This article focuses mainly on the political background of the constitution, legal evaluation is completely absent; in the same style but from the Chinese point of view, He, Huahui, "The Special Characteristics of the Constitution of the People's Republic of China" in Institute of Comparative Law Waseda University, ed., *Law in East and West* (Tokyo: Waseda University, 1988) 443.

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.⁴

I. No Preconditions ? Secret Law

Experience gained in North America not only shows that publicly available law is a necessary precondition for the control of regulations through judicial review, but also 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,⁵ and the question is whether the preconditions for review 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,⁶ but no requirement exists to publish either regulations enacted before that date, departmental regulations, regulations

⁴ This is the opinion of most Chinese scholars see 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.

⁵ T. Gelatt, "The New Chinese State Secrets Law" (1989) 22 *Cornell International Law Journal* 255.

⁶ See Art. 16 of *Xingzheng fagui zhiding chengxu zanxing 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*]; but legal practioners ascertain that the practice falls far short of this ideal.

designated as internal (*neibu*) or State Council quasi-legal official documents.⁷ 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.

Fairly recently, in January 1990, the central government issued an internal document to establish a new policy on wages in foreign investment enterprises.⁸ The use of an internal directive to regulate foreign investment enterprises affairs marks a retreat from previous moves to increase the transparency of rules and regulations. MOFERT (Ministry for Foreign Economy Trade) reportedly supports publication of the rules, while the Ministry of Labour is said to oppose such a move.⁹

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).¹⁰ 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.¹¹

⁷ Art. 17 of the *Procedures*, *supra*, note 6, only speaks of promulgation, not of publishing. Also *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*] 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*.

⁸ J. L. Greene, "FIEs Face New Labor Obstacles" (Jan-Feb 1991) *China Business Review* 8; on secret law see also J. T. Simone, "Copyright in the People's Republic of China: A Foreigners Guide" (1988) 7 *Cardozo Arts and Entertainment Law Journal* 1 at 14 note 59; Lubman, "Studying Contemporary Chinese Law: Limits, Possibilities and Strategy" (1991) 39 *American Journal of Comparative Law* 293 in note 68.

⁹ Greene, *supra*, note 8 at 12.

¹⁰ English translation by T. Gelatt, *supra*, note 5 at 262; German translation by R. Heuser, "Das Neue Chinesische Recht zum Staatsgeheimnisschutz" (1989) *WGO-MFOR* 47.

¹¹ In the context of Art. 10 Section 2 of the Administrative Reconsideration Regulations (decisions concerning

Chinese legal scholars increasingly realize that secret law is a problem and give advice, for example on how to publish *fagui/guizhang* compilations.¹² One author says that publication is necessary for regulations to become effective, but this would not apply to *neibu* regulations.¹³ 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.¹⁴

II. Who can 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 legality¹⁵ that has no procedural framework attached to it, the only requirement for the state agency being to deal with the petition in

personnel) Fang, Xin, ed., *Xingzheng fuyi zhinan* (Guide to administrative reconsideration) (Beijing: Law Publisher, 1991) at 75 speaks of the possibilities to make suggestions concerning *neibu* regulations to the supervision offices.

¹² Wang, Deyi, Long, Yifei & Sun, Maoqiang, eds., *Xingzheng susong shiwu daolun* (Practice and Theory of Administrative Litigation) (Beijing: Law Publishers, 1991) at 292/293; Liu, Han, "Lun guizhang" (On *guizhang*) (4/1991) *Faxue yanjiu* (Legal research) (4/1991) 24 at 27 and 29; critical of publication practices concerning *guizhang* is also Zhang, Chunfa, "Zhengfu guizhang de ruogan wenti" (Some questions concerning governmental regulations) (1/1991) *Faxue yanjiu* (Legal Research) 15 at 18/19.

¹³ Zhang, Shanghuo, ed. *Xingzheng fa xue* (The Study of Administrative Law) (Beijing: Beijing University Press, 1990) at 195.

¹⁴ Which might be exactly why indices are not used.

¹⁵ 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.

a responsible manner after ascertaining the facts.¹⁶ The system nevertheless seems to be a well-established practice and numerous incidents of its use are reported.¹⁷ There are no legal limits on what can be accepted as a complaint, so complaints about regulations are possible.¹⁸

These ombudsperson's offices (*xinfangchu*) are commonly attached to government departments and levels of the Party hierarchy and individuals with work-related or other complaints are able to seek assistance from them.¹⁹ 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.²⁰

¹⁶ For more details on the petition system see S. Finder, "Like Throwing an Egg Against a Stone ? - Administrative Litigation in the People's Republic of China" (1989) 3 *Journal of Chinese Law* 1 at 4 with further references; or R. Heuser, "Vorschriften über den Widerspruch gegen Verwaltungsakte" (1991) *Jahrbuch für Ostrecht* 493 at 494 note 5.

A notion of "fundamental fairness" as a requirement for the administration when dealing with citizens is not known in China. Concerning all features that follow this concept of fundamental fairness see B. Schwartz, "Fashioning an Administrative System" (1988) 40 *Administrative Law Review* 415 at 424.

¹⁷ 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.

¹⁸ Wang, Deyi et al., *supra*, note 12 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.

¹⁹ H. Josephs, "Labour Reform in the Worker's State" (1988) 2 *Journal of Chinese Law* 200 at 250.

²⁰ Josephs, *supra*, note 19 at 250 note 288 with further references; on the history of *xinfang* procedures and their scholarly discussion see also Finder, *supra*, note 16 at 4 note 16.

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.²¹ 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.²²

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.²³ 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

²¹ Regulations providing for supervision, reconsideration, or review allow a broader circle of potential claimants.

²² Oda, *supra*, note 15 at 1348; R. Heuser, "Das Verwaltungsprozeßgesetz der Volksrepublik China" (1989) *Verwaltungsarchiv* 437 at 439.

²³ 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; 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.

administrative organisations (*xingzheng jiancha tiaoli*)²⁴, thereby equipping Art. 41 of the Constitution with an enforcement machinery.²⁵ Administrative supervision has a long tradition in China.²⁶

The Administrative Supervision Regulations (ASR) seem to exist primarily for the purpose of curbing corruption.²⁷ The system of administrative supervision is collateral to the system of judicial review and the quasi-judicial administrative reconsideration procedures,²⁸ although doubts remain concerning the independence of supervision organisations.²⁹

²⁴ 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.

²⁵ Dicks, *supra*, note 23 at 569.

²⁶ 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.

²⁷ 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.

²⁸ Heuser, *supra*, note 24 at 365.

²⁹ 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 27 at 6/7. Speaking of two kinds of supervising organisations in the context of reconsideration is Wang, Deyi et al., *supra*, note 12 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 K. Lieberthal & M. Oksenberg, *Policy Making in China, Leaders, Structures, and Processes* (Princeton, N.J.: Princeton University Press, 1988) at 394.

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 orders³⁰ 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. 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.³¹

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.³²

³⁰ 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.

³¹ *Jiancha*, *supra*, note 30 at 15.

³² On this possibility see Heuser, *supra*, note 24 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.

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 as portrayed in the North American context, 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, 1991.³³

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.³⁴ It is a faster and easier method than administrative litigation.³⁵ Administrative reconsideration

³³ 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 R. Heuser, *supra*, note 16 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.

³⁴ Heuser, *supra*, note 16 at 495.

³⁵ Zhou, Weiping, *supra*, note 27 at 7.

is not a condition for trial. But if described as mandatory by other regulations, those regulations prevail (Art. 37 ALL).³⁶ Apparently, 70 % of the cases accepted by the courts have been previously reconsidered, and in public security cases the rate is 85%.³⁷

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.³⁸

³⁶ Four possibilities thus arise Wang, Deyi et al., *supra*, note 12 at 25:

- (1) reconsideration as precondition for a trial;
- (2) autonomous selection of the party whether to have the decision reconsidered or to go to court;
- (3) only reconsideration is possible, no court litigation;
- (4) only court litigation is possible; examples for laws are given.

Examples for all four possibilities also see Heuser, *supra*, note 22 at 445, note 37. About the dispute on the question if exhaustion of remedies should be required in Chinese law see Finder, *supra*, note 16 at 19. The German administrative system knows a similar kind of reconsideration as "Widerspruchsverfahren" (regulated in §§ 68 VwGO) which is a prerequisite for litigation in an administrative court if a concrete administrative act is concerned; exhaustion of remedies is also required under US law; on this see S. G. Breyer & R. B. Stewart, *Administrative Law and Regulatory Policy* Second edition (Boston: Little Brown, 1985) at 1144.

³⁷ Wang, Deyi et al., *supra*, note 12 at 30. Of administrative acts reconsidered, 60 % would be altered or rescinded, Heuser, *supra*, note 16 at 497 with further references.

³⁸ This interpretation is supported by Huang, Shuhai, ed., *Xingzheng fuyi tiaoli jiangzhuo* (Lectures on the Administrative Reconsideration Regulations) (Beijing: Public Security University Press, 1991) at 120 - 123

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.³⁹ 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.⁴⁰ 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.

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.⁴¹

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

who gives four criteria to decide whether *guizhang* were legally established or not.

³⁹ This opinion is hold by Wang, Deyi et al., *supra*, note 12 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.

⁴⁰ See Ying, Songnian & Dong, Hao, *supra*, note 39 at 49. But if it is a regulation of a lower level agency, the reconsidering agency can change the regulations themselves.

⁴¹ The notes of the editor in China Law and Practice give the necessary overview about deadlines, jurisdiction, scope of application, etc.

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.⁴² The administration is the judge in its own case and cannot be expected to be impartial. Due to the politics of recruitment in the administration⁴³ and a common interest in their work, the terms of departmentalism and local protectionism (see above) adequately describe Chinese administration.⁴⁴

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 concrete litigation when judges decide which regulations to apply. Advantages of judicial review are that it regularizes the means of dealing with disputes, permits

⁴² For the West see F. E. Rourke, *Bureaucracy, Politics and Public Policy*, Third edition (Glenview, Ill.: Scott, Foresna, Little Brown Higher Education, 1984).

⁴³ 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.

⁴⁴ W. Zafanolti, "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) at 146.

correction of clear abuses of discretion and thereby contributes to the willingness of those regulated to accept the results.⁴⁵ 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.⁴⁶

a) By the Supreme People's Court⁴⁷

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.⁴⁸

Although the Chinese Constitution nominally leaves these tasks to the 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

⁴⁵ M. Gilhooley, "Pharmaceutical Drug Regulation in China" (1989) 44 *Food Drug Cosmetic Law Journal* 21 at 39.

⁴⁶ Schwartz, *supra*, note 16 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.

⁴⁷ 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.

⁴⁸ Liu, Nanping "Judicial Review" in China: A Comparative Perspective" (1988) 14 *Review of Socialist Law* 241.

to interpret laws or regulations.⁴⁹ 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.⁵⁰

All these methods of review are dependent upon the decisions of the Supreme People's Court to be published in the Gazette⁵¹ of the Supreme People's Court. Judicial interpretation has resulted in additional stipulations to laws and definitions for terms included in the laws.⁵²

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.⁵³ 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.

⁴⁹ Liu, *supra*, note 48 at 244; the Supreme People's Court has declared some local laws invalid because they contravene the Constitution.

⁵⁰ Called "subtle" ways by the author, Liu, *supra*, note 48 at 247.

⁵¹ 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.

⁵² Kong, Xiaohong, "Legal Interpretation in China" (1991) 6 *Connecticut Journal of Law* 491 at 501 with further references.

⁵³ Liu, *supra*, note 48 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.

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.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷

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

⁵⁴ Epstein, *supra*, note 17 at 2; Kong, *supra*, note 52 at 97 speaks of 180 administrative statutes; examples for those laws are given in Finder, *supra*, note 16 at 617, note 27 and in Oda, *supra*, note 15 at 1350.

⁵⁵ Epstein, *supra*, note 17 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) out of 1988 cases 16 are under the heading of Industry and Commerce, but most of the other sections deal with economic matters in some respect (food hygiene, measuring standards).

⁵⁶ 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 17 at 5. In Germany, 130,000 cases per year are decided in the administrative courts alone, Heuser, *supra*, note 22 at 440, note 13.

⁵⁷ 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.

planning, land resumption, customs, fisheries, and postal services.⁵⁸ 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.⁵⁹

c) Administrative Litigation Law

The Administrative Litigation Law⁶⁰ came into force on October 1, 1990. The ALL provides for judicial review of administrative decisions and 4,000 cases have since been accepted by the courts.⁶¹ The Law 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.⁶²

⁵⁸ Epstein, *supra*, note 17 at 2.

⁵⁹ Ying, Songnian, ed., *Xingzheng susong zhishi shouce* (Handbook of knowledge on administrative litigation) (Beijing: China University of Politics and Law Press, 1988) at 45.

⁶⁰ 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 Heuser, *supra*, note at archive 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 Finder, *supra*, note 16 at 8.

⁶¹ FBIS China 91-019, 29 January, 1991; a third of the actions have been rectified, including those cases where the administrative organ changed the act in dispute while in litigation. FBIS China 91-064, 3 April, 1991, 27 reports an announcement by Ren Jianxin, President of the Supreme People's Court, which notes a big rise in the numbers of administrative cases since the ALL went into force. In Zhejiang Province 1,034 administrative cases were accepted in 1990 for first hearings and a sharp increase in the number and variety could be noted after October 1, 1990, FBIS China 91-067, 8 April, 1991, 63.

⁶² 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.

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.⁶³

No clear theory or definition exists in China as to what constitutes a concrete administrative act.⁶⁴ 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*".⁶⁵

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.⁶⁶ As a result, courts are not overloaded with cases and do not handle matters for which they are not qualified. Instead

⁶³ 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 12 at 26.

⁶⁴ But Chinese scholars are well aware of the criteria and devote considerable space in textbooks to elaborate, see Zhang, Shangzhuo, *supra*, note 13 at 165 - 175.

⁶⁵ Finder, *supra*, note 16 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.

⁶⁶ Luo, Haocai, *supra*, note 63 at 6.

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.⁶⁷

Although Article 12 ALL does not allow review of abstract administrative actions (regulations),⁶⁸ 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. 53.⁶⁹

Article 53 was added to the ALL as a compromise between administration authorities and political factions in favour of more review.⁷⁰ It provides that the courts shall "make reference to" (*canzhao*) *guizhang* in reaching their decisions. Epstein⁷¹ doubts whether this will lead to judicial review, because in other laws the meaning of

⁶⁷ Interestingly most cases reported in casebooks pertain to administrative fines.

⁶⁸ Luo, Haocai & Ying, Songnian, eds., *Xingzheng susong faxue* (The Study of Administrative Litigation) (Beijing: China University of Politics and Law, 1990) at 115 [hereinafter *Susong faxue*] and Fang, Xin, ed., *Xingzheng susong zhinan* (Guide to administrative litigation) (Beijing: People's Press, 1990) 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 Bundesverfassungsgerichts Gesetz.

⁶⁹ Explicitly *Susong faxue*, *supra*, note 68 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; 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, ed., *Xingzheng shenpan wenti yanjiu* (Research on issues on administrative litigation) (Beijing: Beijing University Press, 1990) 233 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.*

⁷⁰ Epstein, *supra*, note 17 at 8; dispute described by Finder, *supra*, note 16 at 23; and Heuser, *supra* note 22 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.

⁷¹ Epstein, *supra*, note 17 at 8.

"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.⁷² Generally it is true to say that the ALL is an ideal that will be very difficult to enforce in practice,⁷³ and the aim is therefore to spread the knowledge about it, to increase personnel engaged in administrative adjudication, and to draw up decrees and regulations in relation to the ALL to provide further guidance to courts.⁷⁴

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.⁷⁵ China's People's Courts are of equal rank with the administrative organs and they are accountable to the organs of state power.⁷⁶ In 1985, the Supreme People's

⁷² Luo, Haocai, *supra*, note 63 at 6.

⁷³ Epstein, *supra*, note 17 at 9.

⁷⁴ FBIS China 91-064, 3 April, 1991, 27, 28.

⁷⁵ 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, *supra*, note at 463; Luo, Haocai, *supra*, note 63 at 6.

⁷⁶ 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 53 at 470.

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.⁷⁷ 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.⁷⁸ 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

⁷⁷ Finder, *supra*, note 16 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.

⁷⁸ 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 53. 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 77 at 154 with further references, the same idea has been suggested already in 1982 by other Chinese scholars.

committee.⁷⁹ But there seems to be no hope that these suggestions are going to be implemented in the near future.

III. What is the Scope of Judicial Review ?

Chinese administrative litigation textbooks⁸⁰ 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.⁸¹ Concepts like *lex superior derogat lex inferior* (higher level law takes precedent over lower level law); *lex posterior derogat lex priori*⁸² (new law over old law)⁸³ are the most obvious. Special law takes precedent

⁷⁹ Dong, Chenmei, *supra*, note 53 at 476: The functions and powers of the Constitution Committee of China should be prescribed as following:

- a) to submit reports on the constitutionality of laws to the NPC and its Standing Committee;
- b) to be entitled to make final decisions independently regarding the constitutionality of normal documents issued by and direct unconstitutional behaviours made by other state organs;
- c) to be entitled to raise a request to the NPC and its Standing Committee to organize an Investigation Committee for unconstitutionality;
- d) to be entitled to review any normal documents;
- e) to examine the enforcement of the Constitution throughout the whole country and report it to the NPC and its Standing Committee;
- f) to be entitled to submit bills and proposals to the NPC and its Standing Committee;
- g) to arbitrate disputes on limits of authority among the state organs.

⁸⁰ For example *Susong faxue*, *supra*, note 68 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.

⁸¹ 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.

⁸² On this concept see H. Kelsen, *General Theory of Norms* (Oxford, Clarendon Press, 1991) at 126.

⁸³ *Susong faxue*, *supra*, note 68 at 239.

over general law, if both are of equal rank,⁸⁴ and another rule apparently being followed by the courts is that specific local law takes precedent over departmental law.⁸⁵

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,⁸⁶ because courts can only rely on valid regulations.⁸⁷ 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.⁸⁸

This view is shared by Luo Haocai,⁸⁹ 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.

⁸⁴ *Susong faxue*, *supra*, note 68 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, D. Bodde & C. Morris, *Law in Imperial China* (Cambridge Mass.: Harvard University Press, 1967) at 67.

⁸⁵ *Susong faxue*, *supra*, note 68 at 241.

⁸⁶ *Ibid.* at 247.

⁸⁷ Luo, Xiaodang & Bao, Shiqing, *supra*, note 69 at 243.

⁸⁸ *Ibid.* at 245.

⁸⁹ Luo, Haocai, *supra*, note 63 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.⁹⁰
- 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*.⁹¹ *Guizhang* are only to be referred to because they are rather

⁹⁰ 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*.

⁹¹ Bian, Fuxue & Zhao, Zaicun, "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 260. But courts could do nothing regarding abstract administrative actions that are neither *fagui* nor *guizhang*, Yang, Haikun, "Fei xingzheng lifa de chouxiang xingzheng xingwei" (Abstract administrative actions that are not administrative rule-making) (5/ 1991) *Faxue zazhi* 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

complex and conflicts among them may occur.⁹² One author suggests to give the courts the right to accept challenges concerning standards below the rank of *guizhang*.⁹³

Due to the vagueness in the formulation of Chinese regulations, the doctrine that a government organ can only act when it is expressly empowered to do so by statute⁹⁴ 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.*

In order to arrive at a state which is governed by the rule of law, Schwartz⁹⁵ 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.⁹⁶ This doctrine of *ultra vires* - well-known in the West - is also gaining standing in China - at least in academia.⁹⁷

that the courts have to *cankao* if there is higher level law in existence and to *yizhao* if there is no law.

⁹² Fang, Xin, *supra*, note 68 at 140.

⁹³ Ma, Huaide, *supra*, note 69 at 18.

⁹⁴ H. W. R. Wade, *Administrative Law*, Sixth edition (Oxford: Clarendon Press, 1988) at 23.

⁹⁵ *Supra*, note 16 at 419.

⁹⁶ Schwartz, *supra*, note 16 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 *Basic Law*.

⁹⁷ See Bian, Fuxue & Zhao, Zaicun, *supra*, note 91 at 261. It can also be found in Art. 2 Section 2 of *Order No. 48*, *supra*, note 7.

Until very recently in China, no limits seemed to exist on the subdelegation of authority.⁹⁸ 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.⁹⁹ If one looks at concrete examples of regulations, they nearly always provide for enactments of further, more detailed regulations.¹⁰⁰

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.¹⁰¹

⁹⁸ On that see Wade, *supra*, note 94 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, P. Keller, "Legislation in the People's Republic of China" (1989) 23 *UBC Law Review* 653 at 679 with further references.

⁹⁹ D. M. Lampton, *Paths to Power: Elite Mobility in Contemporary China* (Ann Arbor: Centre for Chinese Studies, University of Michigan, 1986) at 297.

¹⁰⁰ 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 45 at 29; Art. 18 Advertisement Regulations, S. R. Austin, "Advertising Regulation in the Peoples's Republic of China" (1983) 15 *Law and Policy in International Business* 955 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.

¹⁰¹ Finder, *supra*, note 16 at 24; Zhang, Chunfa, *supra*, note 12 at 17.

IV. Conclusions

When comparing North American and Chinese institutions for the review of regulations we can observe several institutional similarities. China possesses three layers of inner-administrative review mechanisms that go from very informal (ombudspersons) to quite formal (administrative reconsideration). But as already explained in the North American context, the borderline between inner-administrative review that has multiple defects, and by tribunals that could well be called "courts" because of their characteristics, is not rigid at all. The question arising in China is whether their courts can validly be called "courts" in a functional sense because of the lack of independence.

The underlying rationale for review in North America and China is very different. China reviews administrative actions 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. In North America 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. Whereas in Canada courts are reluctant to

address administrative regulations because they fall into the realm of the administration and enforcing them would give them effect of law, administrative regulations (*guizhang*) are the area where Chinese courts are most active.

It seems something of a surrogate power, though. The courts are prohibited to review any other areas of abstract administrative actions, and so *guizhang* (especially local ones) are the only category they have the power to review. But as *guizhang* are issued in ever growing numbers, this is an important review power and the experience gained in that area might well become the core for a system of judicial review of regulations to be formed in China in the future.

CHAPTER SIX: CONCLUSIONS

The Chinese and the North American systems of regulation are somewhat similar in the fact that administrative regulations are issued in ever growing numbers in order to regulate all aspects of life. That administrative government is the most rational form of government for modern societies has already been observed by Max Weber,¹ and the use of regulations to govern has not only multiple advantages (see Chapter Two, V., 1.) but is further facilitated through institutional settings and developments. But although there is a growing amount of delegated legislation in the West, such broad and unlimited quasi-legislative powers as granted to the Chinese State Council and its departments cannot be seen in North America.²

So both systems diverge considerably to the extent that regulations actually conflict with each other. The sections about the "regulation jungle" illustrates the complexity reached by regulations in China. Conflicts can be discovered with every glance at Chinese regulations. The reason for this difference can in part be attributed to a political system that does not allow conflicting views to be battled out in the open, but forces policy makers into informal channels. Regulation-making becomes a tool to increase the power and influence of a ministry or agency. Enacting a set of regulations

¹ See M. Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954) as an introduction to Weber's thought. Also R. Bendix, *Max Weber: An Intellectual Portrait* (Berkeley: University of California Press, 1977).

² 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 1360.

then signifies a win of a certain school of thought concerning a specific issue. In addition, the party's monopoly over broad policy direction and the ideological legitimization of this control limits the inputs brought to bear on the formulation of policy. Subordinates become hesitant to speak out in the implementation process, preferring to wait until the Party itself has given clear directions.³ With the Party making an attempt to separate itself from the state, these directions are not as forthcoming as they used to be, leaving regulation making in disarray.

Whereas the extent of the regulations problem is different in China and North America, there is the shared concern of how to deal with the vicious cycle of regulations.

The hypothesis stated in the Introduction of this thesis, that a certain complexity in administrative regulations demands judicial review as an important countervailing checking device, is not easily proven. Two lines of argument emerge from the research undertaken: firstly, the review of regulations carried out by other organisations than courts does not and even cannot achieve the same results as judicial review. And secondly, the courts possess unique characteristics to solve the three legal problems that demand action in the context of regulations.

The most obvious category are conflicts between the state and an individual. A citizen or a legal person thinks that according to the fundamental rules the state laid out

³ D. M. Lampton, "The Implementation Problem in Post-Mao China" in D. M. Lampton, ed., *Policy Implementation in Post-Mao China* (Berkeley: University of California Press, 1987) 3 at 8.

for itself, (in a Constitution or an otherwise basic law) the state has no right to issue this particular set of regulations (challenge to their validity) or at least that the regulations have to be applied differently in this particular case (challenge concerning the application). These disputes are adequately resolved by the courts, bodies that although set up by the state in North America, are sufficiently independent from the state, in order to be perceived as impartial referees.

This independence of the courts which is mainly achieved through a careful process of appointment and provisions for security of tenure, enables them to also be arbitrators in the second kind of disputes. These are inter-agency disputes of jurisdictional nature. The question that has to be resolved is who has the decision - making powers to make a particular set of regulations. These disputes occur in any country that uses administrative agencies to regulate, but they are particularly prevalent in China, because there the question of jurisdiction is not sufficiently clarified.

The third and last problem judicial review of regulations helps to solve is internal agency consistency. Although the virtue of consistency can come into tension with that of individual justice, higher and lower levels of one agency or the central and local branches shall make, and use regulations in a way that is consistent with each other and therefore predictable for all persons affected by the regulations. Chinese regulations show a high level of inconsistency and an institution is needed that will help to create consistency.

Judges are trained to create consistency; in common law countries it is the doctrine of *stare decisis* which achieves this and in civil law countries it is the method to interpret disputes in such a way that the codified law forms a unified whole.

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.⁴

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

⁴ 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 16.

socialist countries or the former Soviet Union.⁵ China's system of judicial review can still be called embryonic.⁶

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 the 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.⁷ 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.⁸ Moreover, in the 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

⁵ 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.

⁶ Oda, *supra*, note 2 at 1355.

⁷ For a description see e.g. Xu, Anbiao, "Jianlun falü he xingzheng fagui de tiaozheng jiexian" (Brief essay on the limits of adjustment of law and administrative regulations) (4/1991) *Zhengzhi yu Falü* 8.

⁸ A. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) at 236.

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.⁹

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,¹⁰ by and large, the West has an independent judiciary able to fulfil its function in the system. This cannot be said about China.¹¹

In the early years of communist rule in China, political leaders distrusted the courts,¹² and even now, despite the modernization process, lawyers and courts are under tight supervision by party authorities.¹³ A system of judicial review can only be effective with judges who are genuinely independent, not only in the sense that their

⁹ M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971) at 7.

¹⁰ J. V. Feinerman, "Economic and Legal Reform in China, 1978 - 1991" (Sept-Oct 1991) *Problems of Communism* 62 at 71.

¹¹ Tao, Dehai, "China Democracy Movement and Legal Crisis" (1990) 8 *UCLA Pacific Basin Law Journal* 390 at 404.

¹² Oda, *supra*, note 2 at 1349.

¹³ On judicial independence see Epstein, *supra*, note 4 at 16ff with further references.

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.¹⁴ 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.¹⁵

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 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.¹⁶ 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.¹⁷ Generally though, for Taiwan a favourable outlook for judicial review is given.¹⁸

¹⁴ 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.

¹⁵ K. Urata, "The Judicial Review System in Japan - Legal Ideology of the Supreme Court Judges" (1983) 3 *Waseda Bulletin of Comparative Law* 16 at 36.

¹⁶ Fa, Jyh-Pin, *A Comparative Study of Judicial Review under Nationalist Chinese and American Constitutional Law* (Baltimore: School of Law, University of Maryland, 1980) at 41.

¹⁷ 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.

¹⁸ Fa, *supra*, note 16 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.

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.*¹⁹

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 bureaucrats with a specialized legal methodology.²⁰ In other words: There is a symbiosis between infra-structure and superstructure.²¹

It remains a fact that no totalitarian government has yet proven itself willing to tolerate an effective system of judicial review.²² 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.²³

¹⁹ B. Schwartz, "Fashioning an Administrative System" (1988) 40 *Administrative Law Review* 415 at 432.

²⁰ Epstein, *supra*, note 4 at 10.

²¹ *Ibid.* at 9.

²² M. Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis" (1979) 2 *Legal Issues of European Integration* 1 at 10.

²³ B. L. McCormick, *Political Reform in China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990) at 194.

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 author²⁴ 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.

²⁴ 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) 110 at 117.

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.

I also fully endorse the suggestion of Dong Chenmei.²⁵ 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*.

This problem of names and rank of administrative regulations is exactly the one discussed in the West. So China's legal scholarship is faced by a difficulty familiar to North American scholars.

²⁵ "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) 463.

The research undertaken convinces me that comparative law helps to clear the ground for constructive cooperation among scholars of different legal backgrounds with the common aim of improving the legal system they live in.

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METHODOLOGICAL APPENDIX: ADMINISTRATIVE LAW

CASES DECIDED IN THE PRC

The original plan for my thesis was to have a section in which I would give concrete examples of situations or settings in which the hierarchy of law and regulations was of importance. This was to be done by looking at cases in which the courts in some way or another reviewed regulations. As regulations (*fagui* and *guizhang*) are the basis for concrete administrative acts, the legality of the former decide the legality of the later. In this way, the practical application of legal concepts could be checked.

The plan sounded good in theory but had to be altered substantially while actually reading Chinese cases. As the research undertaken did not produce any result that would advance the argument of the thesis, this part has been made into a methodological appendix. It nevertheless forms a part of the thesis and might be of interest to readers who want to learn about the way cases are reported in China.

The real problem in China probably is not the court decisions; they exist and form the basis for doctrinal work.¹

¹ This can be inferred from reading law review articles, e.g. Wang, Zhengli, "Xingzheng susong fa shishi zhong de ruogan wenti - 1990 nian zhongguo faxue hui xingzheng faxue yanjiu huinian hui consu" (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; or textbooks Luo, Haocai & Ying, Songnian, eds., *Xingzheng susong faxue* (The Study of Administrative Litigation) (Beijing: China University of Politics and Law, 1990) often states what the People's Courts would decide, but gives no sources for these statements. Footnotes referring to other scholarly work or cases are a method that has not yet been discovered and used by Chinese legal

The problem is the reporting practice. Seven different casebooks were available to me.² Most cases therein were decided under Art. 3 Section 2 of the *Civil Procedure Law*, as the ALL was not yet in force. To translate the cases seemed rather futile, because, as Balazs put it concerning a complete translation of the official imperial histories: "*It is enough dead weight having it all in Chinese*".³ So instead of translating cases and analyzing them, I will analyze the Chinese case reporting practice.

I. Reporting Practice

No official publications of court decisions meant for public consumption exist in China.⁴ Cases are published by individuals who have some kind of (good) relation to a

authors. Most of the time sources quoted in footnotes are either the Marxist classics (Marx, Engels, Lenin, Mao rarely) or foreign works which then indicates that the author had had the opportunity to study abroad. Exceptions, however, prove the rule and footnoting has become more frequent in recent journal editions.

² (1) Fang, Xin, ed., *Xingzheng susong zhinan* (Guide to administrative litigation) (Beijing: People's Press, 1990);

(2) Gan, Yusheng, Qiu, Shi & Yang, Kainian, eds., *Xingzheng susong anli xuanbian* (Compilation of administrative litigation cases) (Beijing: China Economy Press, 1990);

(3) Ge, Fuguang & Ji, Youpei, eds., *Xingzheng anli 40 bian* (Compilation of administrative litigation cases) (Beijing: Exhibition Press, 1990);

(4) Huang, Daqiang & Xu, Wenhui, eds., *Zhong wai xingzheng quanli anli xuan* (Collection of Chinese and Foreign administrative management cases) (1988);

(5) Jiang, Yan & Yin, Chaoying, eds., *Xingzheng susong fa gaigao yu anli pingxi* (Outline of administrative litigation law and simple analysis of cases) (Beijing: Law Publisher, 1990);

(6) Wang, Jongju, ed., *"Xingzheng susong fa" anli xijie* (Analysis and resolution of cases under the Administrative Litigation Law) (Beijing: Guangming Daily Press, 1991);

(7) Ying, Songnian & Hu, Jiansen, eds., *Zhong wai xingzheng susong anli xuanbian* (Compilation of Chinese and foreign administrative litigation cases) (Beijing: China University of Politics and Law, 1989).

³ E. Balazs, "History as a Guide to Bureaucratic Practice" in *Chinese Civilization and Bureaucracy - Variations on a Theme* (New Haven: Yale University Press, 1964) at 142.

⁴ Apparently there are neibu reports. The relative paucity of casebooks in imperial China is asserted by D. Bodde & C. Morris, *Law in Imperial China* (Cambridge, Mass.: Harvard University Press, 1967) at 144. One of the first Chinese casebooks (*Parallel Cases from under the Pear Tree*, translated by R.H. van Gulik) is rather anecdotal than juridical.

On the case reporting system in Taiwan see L. Newton & Wang, Jong, "A Research Guide to Taiwan (ROC) Law" (1989) 3 *Journal of Chinese Law* 257 at 269ff. Singapore, which is essentially a

court, so that they are able to obtain cases. They then organize the publications according to their own liking and mainly for pedagogical purposes. Other cases are published in journals or newspapers. The journals most likely to report cases are *Minzhu yu Fazhi* and the daily legal newspaper *Fazhi ribao*.

The most official case reports can get are the cases reported in the Gazette of the Supreme People's Court.⁵ Very recently, cases decided under the Administrative Reconsideration regulations are also being reported.⁶

II. Table of Contents - Accessibility

One collection is based on the decisions of the administrative chamber of the People's Court of Tianjin City.⁷ The book is divided into chapters under very broad headings (e.g. evidence, trial, compensation) which are occasionally further divided into sub-chapters (e.g. examination of legality; judgment). Under each heading, between two and twenty cases are given. The decision or the guiding principle of this case is used as a title. This ordering system is in fact one of the best used.

common law country, follows judicial precedent; case reporting and publication is therefore indispensable, for a detailed account see W. Woon, "The Doctrine of Judicial Precedent" in W. Woon, ed., *The Singapore Legal System* (Singapore: Longman, 1989) 237; the same is true for Hong Kong, see P. Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong: Oxford University Press, 1987) at 54.

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

⁶ Forty cases are included in Huang, Shuhai, ed., *Xingzheng fuyi tiaoli jiangzhuo* (Lectures on the Administrative Reconsideration Regulations) (Beijing: Public Security University Press, 1991) at 167ff and fifty-eight are included in Fang, Xin, ed., *Xingzheng fuyi zhinan* (Guide to administrative reconsideration) (Beijing: Law Publishers, 1991) at 169 - 268.

⁷ Wang, Jongju et al., *supra*, note 2 (6), Foreword.

Chinese books almost never have an index,⁸ although the Chinese language itself does not make this impossible (order according to number of strokes)⁹ or even *Hanyu Pinyin* (the official romanization used in the PRC) could be used to give an alphabetical index. As a result, a table of contents is indispensable, being the only chance to access the book without reading it completely.

One collection¹⁰ reports cases from the city Pucheng in Shanxi Province, but names and places have been altered as have occasionally even the fact patterns.¹¹ This book divides the cases under four broad headings: Personnel matters and organisations; administrative policy decisions; administrative legal system; administrative method.

Another collection¹² does not indicate where the cases reported are from; cases are assorted roughly under substantive criteria (eg. Traffic, Hygiene, Housing, Environmental Protection) without explicitly stating this. The table of contents gives (helpful ?) headings like: Administrative Litigation Arising out of Traffic; or Case in which Mr. Liu sues the District Epidemic Prevention Station; Mr. Yang sues a certain City Tax Office.

⁸ This also the case in Taiwan, Newton & Wang, *supra*, note 4 at 278, although unofficial collections there help to make up for this lack, at 280.

⁹ Used for example in Li, Guozhi, ed., *Xingzheng fa cidian* (Administrative law dictionary) (Taiyuan: Shanxi University Press, 1989).

¹⁰ Ge Fuguang & Ji, Youpei, *supra*, note 2 (3).

¹¹ *Ibid.* at 3.

¹² Jiang, Yan & Yin, Chaoying, *supra*, note 2 (5).

The substantive law division is also used in two other case collections.¹³

In one collection the subheadings given already give a hint to the outcome of the case.

Whenever very negative terms are used (illegal, contrary to law, without authorization) it is most likely that the administration won the case.¹⁴

An older collection¹⁵ which provide Chinese and foreign administrative cases is divided into sixteen areas under key-word headlines (e.g. collected cases from the area of administrative functions, organisation, supervision, methods, efficiency etc.).

Each chapter contains at least one section concerned with foreign, i.e. mainly American or Japanese administrative law. According to the preface, the material for this book was drawn from published Chinese and foreign books and journals, but no specific references to the materials used are made. Unfortunately, Chapter 10¹⁶ which promised collected cases from the area of administrative regulations did not contain documents of any use for this paper.

Another collection with foreign cases reports cases from five foreign countries: Britain, the United States, France, Japan and Canada.¹⁷ None of the foreign cases has

¹³ Fang, Xin, *supra*, note 2 (1) and Ying, Songnian & Hu, Jiansen, *supra*, note 2 (7). The selection reports the following number of cases in these areas: public security (20), traffic (1), customs (1), environment (3), building law (8), industry and commerce (5), prices (2), tax (3), hygiene (3), forestry (4), livestock (1), measures and standards (2), miscellaneous (2).

¹⁴ Fang, Xin, *supra*, note 2 (1).

¹⁵ Huang, Daqiang & Xu, Wenhui, *supra*, note 2 (4).

¹⁶ *Ibid.* at 135 -151.

¹⁷ Ying, Songnian & Hu, Jiansen, *supra*, note 2 (7), the Canadian cases included are *Smythe v. The Queen* (1971) and *Knapman v. Board of Health for Saltfleet Township*: those are the names given. The correct citation for these cases are *Saltfleet Board of Health v. Knapman* [1956] S.C.R. 877; (1957) 6 D.L.R. (2d) 81 and *Smythe v. The Queen* [1971] S.C.R. 680. *Smythe* is not really an

a full citation, just the names are given and they are full of misprints and typos; the collection provides a short booklist or bibliography at the end of the book.¹⁸

III. Case Presentation

Generally, cases are reported in two parts. The first part of the case is entitled "Brief Introduction into the Details of the Case" (*anqing jianjie*), and states who the plaintiff and defendant are. In most cases, the first names of the parties and place names are omitted, but in one book¹⁹ full names and addresses are occasionally given (even of the legal representatives of the parties). The basic facts follow as along with the decision of the court.²⁰ The ratio is given only in cases reported in the collection edited by Gan Yusheng et al. which also gives the legal arguments used by the parties.²¹

Occasionally, reference is made to laws and regulations without quoting the concrete provisions in question. This may be a standard method if it concerns publicly accessible law (like e.g. the Food Hygiene Law), but when it concerns local regulations no arguments can be made (or even won) by alluding to law nobody has access to.²²

The second part of the case presentation consists of analysis by the editor. Reasoning is provided why he or she does or does not agree with the courts decision.

administrative law case but rather belongs to the realm of constitutional law.

¹⁸ Ying, Songnian & Hu, Jiansen, *supra*, note 2 (7) at 503.

¹⁹ Fang, Xin, *supra*, note 2 (1).

²⁰ This system is also followed by Ying, Songnian & Hu, Jiansen, *supra*, note 2 (7).

²¹ *Supra*, note 2 (2).

²² An example for this is the case presented in Wang, Yongju, *supra*, note 2 (6) at 198.

The analytical evaluation by the editor often takes the form of clichés and stereotypes.²³

Cases in administrative law in China seem to fulfil the same function as historiography in imperial times: they are meant as guides to administrative practice.²⁴

Chinese casebooks are entirely educational and provide pedagogical reporting. One book²⁵ claims to be based on the American case method as developed in Harvard. Chinese co-students even suspected that the cases might not even be authentic but invented by the editors of the book. This seems unlikely however, as sometimes real place names are used, the dates given are very detailed and the ratio of the cases can be considered to be realistic.²⁶

But tampering with cases appears to occur, as one case concerning a trademark infringement which occurred by selling old film containers that still had trademarks on them, was reported with dates and details in one collection²⁷ and exactly the same fact pattern was reported without dates or place names in another collection.²⁸

²³ On these phenomena in the context of Chinese imperial historiography see Balazs, *supra*, note 3 at 131. On modern historiography see H. Herrmann, "Aspects théorétiques de l'historiographie chinoise des années 1980" (1991) Vol. X, No. 1-2 *Études chinoises* 161.

²⁴ Balazs, *supra*, note 3 at 137.

²⁵ Ge, Fuguang & Ji, Youpei, *supra*, note 2 (3).

²⁶ In Jiang, Yan & Yin, Chaoying, *supra*, note 2 (5) the ratio is 41: 19: 13. In 41 cases the administration wins, in 19 cases the suing citizen or organisation wins and in 13 cases one party withdrew the suit, the court made a bifurcated judgment or some other irregularity happened.

²⁷ Wang, Jongju, *supra*, note 2 (6) at 202. This case was under the heading of: Rely on Law, Regulations and Regulations of a Local Nature; refer to *guizhang*.

²⁸ Gan, Yusheng et al., *supra*, note 2 (2).

Casebooks are not pure collections of material but want to show and illustrate the practice of the law as it should or should not be. The casebook most obviously meant for teaching purposes is the one edited by Huang Daqiang; sections only provide a very brief overview (i.e. section on the British, French, American etc. system of separation of powers on two and a half pages);²⁹ the sections are presented without uniform structure, varying between cases and abstract essay style. Direct speech and very literary language is used in the cases, presumably to make it more interesting for the readers.³⁰ After each section questions are asked which are meant to encourage discussion, for example asking how the court should decide, or what advice the reader would offer to the client.³¹

The collection edited by Fang Xin is a combination of text and casebook: the first part gives an overview of the essential knowledge on administrative litigation, the last part reprints frequently used statutes and regulations, and the middle part³² consists of a collection of model cases.

²⁹ Huang, Daqiang, *supra*, note 2 (4) at 39 - 41.

³⁰ This purpose is expressively stated by Ge, Fuguang & Ji, Youpei, *supra*, note 2 (3) whose cases really resemble a work of fiction (direct speech and inclusions like "he thought that"). The actual court decision is of minimal importance.

³¹ Ge, Fuguang's questions after each case are answered briefly in a section at the back of the book, *supra*, note 2 (3) at 277ff.

³² Fang, Xin, *supra*, note 2 (1) at 249 to 322.

IV. Evaluation and Effects on the Thesis

Cases and academic doctrine in China seem to have a very loose connection. The connection is made by the editors of the casebooks who use a case to bring a doctrinal point across. Cases themselves can not be used to individually evaluate whether the basis of doctrine is actually applied in reality, that is to say in cases decided by the courts. So the doctrinal issues addressed in the first part of the paper seem to form the underlying background for the court decision, but are not really spelt out in decisions.

Independent legal research with the tools used in Western countries is not possible. Personal knowledge of court personnel is necessary to obtain access to authentic case decisions including the reasoning, and this possibility might be blocked entirely for researchers of other than Chinese nationality. The origin for this condition probably lies in the fact that court personnel and academic discussion are removed from each other.³³ Academic publications are not read by judges and the general educational background is not yet entirely a legal one.³⁴ In the early 1980's army officers were ordered to work as judges and they had no legal training whatsoever. It will be a while before the graduates of the re-opened faculties of Law and the Political Legal Institutes sit on the bench.

³³ *Scholars rarely become judges in China*, 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 2.

³⁴ Wang, Weiguo, "The Legal Modernization in China: A Cultural Survey" (1990-1991) 4 *Juridisk Tidskrift* 645 at 653.

Similar statements can be made concerning the staff of the courts.³⁵ Another factor is the involvement of the Communist Party in judicial decision making. Although it might not be as blatant as it once was, it is still prevalent. This interference results in an avoidance of publicity; general scrutiny of courts reasoning is nothing that is favoured.

But to be able to read these casebooks at all has to be considered a lucky development, as only in 1985 the only available sources of information for cases were newspapers and periodical reports.³⁶ Also not long ago it was stated that

*in reading the Chinese press it is always difficult to know definitely whether certain sorts of stories appear at a given juncture because there is indeed more of the type of activity they delineate occurring in society at that time, or whether such tales are brought to the surface because reporters have been instructed to ferret them out in order to represent a viewpoint then current within the central elite.*³⁷

³⁵ Writing about the necessity to raise the quality of training for supervision officials is Yang, Haikun, "Wanshan jiancha tizhi zengqiang jiancha gongneng" (Improve the system and function of supervision), (3/1991) *Zhengzhi yu falü* 26 at 27.

³⁶ L. Ross & M. A. Silk, "Post-Mao China and Environmental Protection: The Effects of Legal and Politico-Economic Reform" (1985) 4 *Pacific Basin Law Journal* 63 at 64.

³⁷ D. Solinger, "Commerce: The Petty Private Sector and the Tree Lines in the Early 1980's" in D. Solinger, ed., *Three Visions of Chinese Socialism* (Boulder, Colo.: Westview Press, 1984) 73 at 104.