CHINA V. CHINA: THE PARADOX IN REGULATING FOOD AND PRODUCT SAFETY

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To my family & teachers
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FOOD AND PRODUCT SAFETY

BY
Nga Kit Tang

ABSTRACT

Since 2007, melamine-dairy products, lead-paint toys, clenbuterol-pork, and a long list of other defective products have raised concerns about the Chinese food and product safety regulatory system. This dissertation examines the conflicting ideologies of uniformity and flexibility within this regulatory system and its relationship to Chinese philosophical tradition.

The discussion is divided into six chapters. Chapter 1 provides an overview of the study. Chapter 2 details the flexibility derived from Confucianism, Daoism, and Buddhism, and the uniformity based in Legalism of the Chinese legal culture. Chapter 3 then explores the law and rule-making powers which embraces both centralization of uniformity and decentralization of flexibility within the current Chinese legal structure. Chapter 4 reviews the Chinese food and product safety law on paper, which reflects a conflict between market economic policy relying on self-regulated forces and supervisory control relying on administrative forces. Chapter 5 examines Chinese food and product safety law in action regarding the battle between the administrative and economic roles of government officials under the political dictatorship of uniformity and laissez-faire administration of flexibility. Chapter 6 reviews the paradox and concludes.

This study finds that although the Chinese legal system emphasizes communist dictatorship on paper, the Chinese food and product safety regulatory system relies on a laissez-faire administrative structure that embraces flexibility combining Confucian self-regulation,
Daoist non-interference, Buddhist unwritten tradition, Legalist negation of morality, and capitalist self-interest-driven ideologies.

Flexibility is a form of freedom. These flexibility settings allow China to achieve rapid economic growth with diversity, but these settings also limit the food and product supervision to rely on an internal management system of the Party. Under this self-regulatory structure, economic activities are not subject to the constraints by written rules of law, unwritten rules of ethics, independent checks and balances, and public supervision by freedom of expression. Corporations may do whatever they want. The problem, therefore, cannot be solved by more law and more regulation, rather depends on self-transformation of the Party to adopt the fundamental concepts of the rule of law, such as reasonableness and justice, which were also promoted by Confucius.
ACKNOWLEDGMENTS

I champion hearts.

This dissertation would not have been possible without Professor Padideh Ala’i. I am deeply indebted to her for her trust in being my advisor, getting on the boat that is my studies, giving me guidance, and providing me an opportunity to operate the boat towards the sea of Chinese culture and law.

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I would like to thank American University Washington College of Law, the SJD Program, the Pence Law Library, and everyone who has shared with me their knowledge, experience, and information.

Lastly, I would like to thank my family who embrace the self-regulatory, non-interference, and laissez-faire approaches to support my adventure away from home.

My family champions freedom.
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<tbody>
<tr>
<td>ALL</td>
<td>Administrative Litigation Law or Administrative Procedure Law</td>
</tr>
<tr>
<td>APL</td>
<td>Administrative Penalty Law</td>
</tr>
<tr>
<td>APQL</td>
<td>Entry and Exist Animal and Plant Quarantine Law</td>
</tr>
<tr>
<td>APQSL</td>
<td>Agricultural Product Quality and Safety Law</td>
</tr>
<tr>
<td>ARL</td>
<td>Administrative Reconsideration Law</td>
</tr>
<tr>
<td>CCDI</td>
<td>Central Commission for Discipline Inspection</td>
</tr>
<tr>
<td>CCTV</td>
<td>China Central Television</td>
</tr>
<tr>
<td>CDIA</td>
<td>China Dairy Industry Association</td>
</tr>
<tr>
<td>CFDA</td>
<td>China Food and Drug Administration</td>
</tr>
<tr>
<td>CFSRA</td>
<td>China National Center for Food Safety Risk Assessment</td>
</tr>
<tr>
<td>CGAS</td>
<td>Chinese General Administration of Sport</td>
</tr>
<tr>
<td>CMC</td>
<td>Central Military Commission</td>
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<tr>
<td>CPC</td>
<td>Communist Party of China</td>
</tr>
<tr>
<td>CPL</td>
<td>Consumer Rights and Interests Protection Law (Consumer Protection Law)</td>
</tr>
<tr>
<td>CPPCC</td>
<td>Chinese People’s Political Consultative Committee</td>
</tr>
<tr>
<td>CPSC</td>
<td>U.S. Consumer Product Safety Commission</td>
</tr>
<tr>
<td>CYL</td>
<td>Communist Youth League</td>
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<tr>
<td>DAL</td>
<td>Drug Administration Law</td>
</tr>
<tr>
<td>DLI</td>
<td>Development and Life Index</td>
</tr>
<tr>
<td>DM</td>
<td>Municipalities Directly under the Central Government (Direct-municipalities)</td>
</tr>
<tr>
<td>EEIQ</td>
<td>Entry-Exit Inspection and Quarantine</td>
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<tr>
<td>FDA</td>
<td>U.S. Food and Drug Administration</td>
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<tr>
<td>FSC</td>
<td>Food Safety Committee</td>
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<tr>
<td>FSL</td>
<td>Food Safety Law</td>
</tr>
<tr>
<td>GAC</td>
<td>General Administration of Customs</td>
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<tr>
<td>GAQSIQ</td>
<td>General Administration of Quality Supervision, Inspection and Quarantine</td>
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<tr>
<td>GCP</td>
<td>Good Clinical Practice</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GLP</td>
<td>Good Laboratory Practice</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>GMP</td>
<td>Good Manufacturing Practice</td>
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<tr>
<td>GPCL</td>
<td>General Principles of Civil Law</td>
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<tr>
<td>GSP</td>
<td>Good Supply Practice</td>
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<tr>
<td>IEC</td>
<td>International Electrotechnical Commission</td>
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<tr>
<td>IECIL</td>
<td>Import and Export Commodity Inspection Law</td>
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<tr>
<td>IS</td>
<td>International System of Units</td>
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<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
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<tr>
<td>LAC</td>
<td>Legislative Affairs Commission</td>
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<tr>
<td>ML</td>
<td>Metrology Law</td>
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<tr>
<td>MOA</td>
<td>Ministry of Agriculture</td>
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<tr>
<td>MOFCOM</td>
<td>Ministry of Commerce</td>
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<tr>
<td>MOH</td>
<td>Ministry of Health</td>
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<tr>
<td>MPS</td>
<td>Ministry of Public Security</td>
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<tr>
<td>NAA</td>
<td>National Autonomous Areas</td>
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<tr>
<td>NHFPC</td>
<td>National Health and Family Planning Commission</td>
</tr>
<tr>
<td>NPC</td>
<td>National People’s Congress</td>
</tr>
<tr>
<td>NPCSC</td>
<td>Standing Committee of the National People’s Congress</td>
</tr>
<tr>
<td>OGI</td>
<td>Regulations of Open Government Information</td>
</tr>
<tr>
<td>PBSC</td>
<td>Political Bureau Standing Committee</td>
</tr>
<tr>
<td>PLA</td>
<td>People’s Liberation Army</td>
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<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
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<tr>
<td>RLCL</td>
<td>Rural Land Contract Law</td>
</tr>
<tr>
<td>SAIC</td>
<td>State Administration for Industry and Commerce</td>
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<tr>
<td>SBLV</td>
<td>State Bureau for Letters and Visits</td>
</tr>
<tr>
<td>SCL</td>
<td>State Compensation Law</td>
</tr>
<tr>
<td>SCOPSR</td>
<td>State Commission Office for Public Sector Reform</td>
</tr>
<tr>
<td>SEZ</td>
<td>Special Economic Zones</td>
</tr>
<tr>
<td>SFDA</td>
<td>State Food and Drug Administration</td>
</tr>
<tr>
<td>SOE</td>
<td>State-Owned Enterprises</td>
</tr>
<tr>
<td>SPC</td>
<td>Supreme People’s Court</td>
</tr>
<tr>
<td>SPP</td>
<td>Supreme People’s Procuratorate</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>TRA</td>
<td>Temporary Regulation on Accountability of the Leading Party Cadres</td>
</tr>
<tr>
<td>TVE</td>
<td>Township-Village Enterprises</td>
</tr>
<tr>
<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
</tr>
<tr>
<td>VAT</td>
<td>Value-Added tax</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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GLOSSARY

Civil Law Rights. “Civil law rights” refer to the rights that are granted by Chinese statutes that allow people to file civil law suits for remedies. Those rights are laid down particularly in the General Principles of Civil Law (GPCL), specifically, the rights regarding “property ownership” and other “property rights” laid down in Chapter V of the GPCL. The term “civil law right” is often translated as “civil rights,” but “civil law right” does not grant Chinese people “individual rights” similar to the Western legal system.

Legalism. The Legalism and Legalists mentioned in this paper refers to Chinese Legalism as established by Xunzi and Han Feizi, not Legalism in the West.

Major Cities. “Major Cities” refer to “comparatively larger cities” that are defined as “where a provincial or autonomous regional people’s government is located or where a special economic zone is located, or a city approved as such by the State Council.” Law on Legislation, art. 63. This paper will use “Major Cities” instead of “comparatively larger city.”

Ministry of Health (MOH). The Ministry of Health merged with the National Population and Family Planning, and a new commission, National Health and Family Planning (NPFPC), was formed in March 2013.

Modern China. The People’s Republic of China (PRC) established in 1949.

Municipalities Directly under the Central Government (DM). The “municipalities directly under the central government” (DMs) include Beijing, Shanghai, Tianjin, and Chongqing.

National Autonomous Areas (NAA). There are five national autonomous areas (NAAs) in China: 1) Xinjiang Uygur Autonomous Area; 2) Tibet Autonomous Area; 3) Inner-Mongolia Autonomous Area; 4) Guangxi Zhuang Autonomous Area; and 5) Ningxia Hui Autonomous Area.

Spillover Effect. The spillover effect refers to the economic opportunities manufacturing enterprises would bring to the locality such as services, real estates, and taxes. Services include banking, catering, and entertainment industries. All these service industries can be sources of income for local governments. Other than people, the spillover effect can also be technology, knowledge, connection, and so forth.

State Administration for Industry and Commerce (SAIC). The SAIC is also translated as “Industrial and Commercial Administration.”

State Food and Drug Administration (SFDA). The name of SFDA was changed to China Food and Drug Administration (CFDA) in March 2013.

Upper-laws & lower-laws. The terms “upper-laws” and “lower-laws” refer to the legal rules at higher or lower levels in the Hierarchy of Chinese Legal Rules illustrated by Table 5.
RELEVANT CHINESE LAWS

Administrative Licensing Law or Administrative Permission Law (2003)
Administrative Litigation Law or Administrative Procedure Law (1989)
Administrative Penalty Law (1996)
Administrative Reconsideration Law (1999)
Advertisement Law (1994)
Civil Procedure Law (1991)
Constitution of the People’s Republic of China (1982)
Contract Law (1999)
Criminal Law (1979)
Criminal Procedure Law (1979)
Enter and Exit Animal and Plant Quarantine Law (1991)
Food Hygiene Law (1995)
Food Safety Law (2009)
General Principles of Civil Law (1986)
Import and Export Commodity Inspection Law (1989)
Labor Contract Law (2007)
Land Administration Law (1986)
Metrology Law (1985)
Product Quality Law (1993)
Rural Land Contract Law (2002)
Standardization Law (1988)
State Compensation Law (1994)
Tort Law (2009)
CHAPTER 1
THE PROBLEM

Americans wonder: “Chinese low-priced products are everywhere in the United States, why can’t the Chinese government ensure products on the shelves are safe as our government does?” “Why can China’s companies earn profits by providing us poisonous products?”

Conversely, a Chinese manufacturer posed the following question to a panel of American lawyers and business organization representatives at a Hong Kong toy trade seminar in 2008: “If American consumers have so many qualitative requirements and complaints about our products, why don’t they simply produce the goods in the United States?”

Poorly-Made Chinese Products

Since the beginning of its open-door policy in 1979, China has become an open, industrialized, and export-oriented country, moving away from a comparatively closed, rural, and isolated society. The change has been enormous in terms of economic growth, exportation rates, and industrial development. Since 1979, China has developed from a place that might not be able to even produce a calculator, to becoming a “world-factory” that is exporting thousands of daily consumer goods, food, and even the fastest train in the world.

This change, at the same time, has been recognized as a crisis by many developed countries. Criticisms are wide-ranging pointing to unfair competition, a manipulated currency rate, unreasonably low labor wages, poor environmental standards, non-justified subsidies—all by a government not respecting human rights, without a democratic system, lacking separation of powers; with pervasive corruption, without rule of law; and more importantly, exporting low-priced, poisonous, and defective Chinese products that damage consumers’ health.
“Made in China” has become a brand name of doubt, or more extremely, of shame, particularly after 2007. Various products were found to be defective and dangerous to human health. Lists of dangerous items could be found on the U.S. Consumer Product Safety Commission (CPSC) website and reports in Chinese local newspapers, which included poisonous products such as dairy products with melamine, medicine with industrial-grade syrup, anti-biotic laced seafood, contaminated pet food, faked food, toys with lead paint, toxic dry-wall, among others.

Millions of defective products have been recalled and new unsafe items are discovered constantly. Besides the endless lists of harmful products, there are other lists of criticisms, suggestions, and questions regarding the Chinese food and product safety problems and the legal system.

Criticisms focus on dishonest, unethical, and profit-oriented Chinese manufacturers, inefficient and corrupt administration of the Chinese government, and ineffective Chinese regulations. Some writers conclude that the product safety problem is caused by the under-pricing tactics of Chinese manufacturers,\(^1\) and the United States’ open trade policy, in fact, permits importing Chinese products that are poorly made.\(^2\)

Suggestions include a complete ban of certain imported Chinese products\(^3\) and campaigns to “Buy American” products.\(^4\) Several new pieces of legislation have been proposed such as the

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2. Id.


Protecting Americans from Unsafe Foreign Products Act to establish personal jurisdiction of foreign manufacturers, the Foreign Manufacturers Legal Accountability Act to hold foreign manufacturers accountable under the United States’ legal system, and the Consumer Product Safety Improvement Act of 2008 to develop further safety requirements. Likewise, the CPSC and the U.S. Food and Drug Administration (FDA) have proposed a number of administrative working plans.

Many questions, however, remain unanswered. For instance, how can bad quality Chinese products be placed on the markets continuously, even after crises in both domestic and foreign markets? What is the relationship between the food and product safety problem, the current Chinese administrative structure, and the legal system? Is the safety issue a reflection of Chinese attitudes towards rule of law and the role of government? What are the ideologies behind the Chinese food and product safety regulatory system? What are the legal obligations imposed on manufacturers and administrations by Chinese food and product safety statutes? How are the laws implemented? What are the problems of the regulatory structure? Is there any possible solutions?

Literature Review

The current literature has two main categories: primary and secondary authorities.

The first category contains primary authorities of national legislation. In China, food and

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General Principles of Civil Law, Criminal Law, Contract Law, and Tort Law.

Secondary authorities include news, magazine, and administrative reports, organizational newsletters, academic articles, books, and any other literature relating to the Chinese food and product safety crisis.


**References**


literature focuses on the facts and comments of different, affected parties touching on what happened, and what the public views are in a particular country or region.

Administrative reports include reports and testimony from the General Accounting Office, for instance, “Consumer Safety: Better Information and Planning Would Strengthen CPSC’s Oversight of Imported Products”26 and CPSC’s “Consumer Product Safety Summit Closing Statement.”27 These reports focus on the proposed and current administrative plans responding to the Chinese food and product crisis in the United States.


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32 JIANSHENG LI, LAW ON PRODUCT QUALITY CONTROL AND PRODUCT LIABILITY IN CHINA passim (2006).


38 Midler, supra note 1.


40 BASIC CONCEPTS OF CHINESE LAW (Tahirih V. Lee ed., 1997).

41 ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 104 (3d ed. 2009) [hereinafter Chen].

42 CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 261-266 (2008) [hereinafter Chen J.]


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\(^{44}\) *China’s Legal System: New Developments, New Challenges* (Donald C. Clarke ed., 2008).

\(^{45}\) *Kenneth Lieberthal, Governing China: From Revolution Through Reform* 71 (2d ed. 2004) [hereinafter Lieberthal].

\(^{46}\) *Stanley B. Lubman, Bird in a Cage: Legal Reform in China After Mao* (1999).

\(^{47}\) *Zou Keyuan, China’s Legal Reform: Towards the Rule of Law* (2006).


\(^{50}\) *The Development of the Chinese Legal System: Change and Challenges* (Guanghua Yu ed., 2011).


\(^{53}\) *John W. Head, China’s Legal Soul: The Modern Chinese Legal Identity in Historical Context* (2009).
China: Lessons for Global Rule of Law Promotion;\textsuperscript{54} Chinese Justice: Civil Dispute Resolution in Contemporary China;\textsuperscript{55} and In the Name of Justice: Striving for the Rule of Law in China.\textsuperscript{56}

Some studies concern Chinese consumer protection: Consumer Protection in China: Translation, Developments and Recommendations;\textsuperscript{57} Chinese political development: the China Reader: The Reform Era;\textsuperscript{58} From Deng Xiaoping to Jiang Zemin: Two Decades of Political Reform in the People’s Republic of China;\textsuperscript{59} From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China;\textsuperscript{60} and Chinese economic development: Will China Go ‘Capitalist’?;\textsuperscript{61} the Economic System of China;\textsuperscript{62} Chinese Capitalisms: Historical Emergence and Political Implications;\textsuperscript{63} How China Became Capitalist;\textsuperscript{64} and local administration: China’s Local Administration: Traditions and Changes in the Sub-national Hierarchy.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{54} Judicial Independence in China: Lessons for Global Rule of Law Promotion (Randall Peerenboom ed., 2010).
\item \textsuperscript{55} Chinese Justice: Civil Dispute Resolution in Contemporary China (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011).
\item \textsuperscript{56} He Weifang, In the Name of Justice: Striving for the Rule of Law in China (2012).
\item \textsuperscript{57} Donald B. King & Gao Tong, Consumer Protection in China: Translations, Developments, and Recommendations (1991).
\item \textsuperscript{58} The China Reader: The Reform Era (Orville Schell & David Shambaugh eds., 1999).
\item \textsuperscript{59} Yiu-Chung Wong, From Deng Xiaoping to Jiang Zemin: Two Decades of Political Reform in the People’s Republic of China (2005).
\item \textsuperscript{60} Andrew H. Wedeman, From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China (2003).
\item \textsuperscript{61} Steven N. S. Cheung, Will China Go “Capitalist”? (1982).
\item \textsuperscript{62} Steven N. S. Cheung (張五常), The Economic System of China (中國的經濟制度) (2008) [hereinafter Cheung].
\item \textsuperscript{63} Yin-Wah Chu, Chinese Capitalisms: Historical Emergence and Political Implications (2010).
\item \textsuperscript{64} Ronald Coase & Ning Wang, How China Became Capitalist (2012) [hereinafter Coase].
\item \textsuperscript{65} China’s Local Administration: Traditions and Changes in the Sub-national Hierarchy (Jae Ho Chung & Tao-Chiu Lam eds., 2010).
\end{itemize}
Other studies about Chinese legal tradition and philosophical theories such as: *Chinese Thought and Institutions*; *Origins of Chinese Law: Penal and Administrative Law in its Early Development*; *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*; *Confucius: The Analects*; *Confucian Ethics*; *Laozi Daodejing: A New Translation by Edmund Ryden*; *Lao-Tzu’s Taoteching: With Selected Commentaries from the Past 2,000 Years*; *Chuang Tzu: Basic Writings*; *Xunzi: Basic Writings*; *Han Feizi: Basic Writings*; and *The Heart Sutra: The Womb of Buddhas*.

There are also studies about the governance of Modern China: *Governance of Life in Chinese Moral Experience: The Quest for an Adequate Life*; *Legalism and Anti-Confucianism*.

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72 *Lao-Tzu’s Taoteching: With Selected Commentaries from the Past 2,000 Years* (Red Pine trans., Copper Canyon Press Rev. 3d ed. 2009) [hereinafter Taoteching, Red Pine].


74 *Xunzi: Basic Writings* (Burton Watson trans., 2003) [hereinafter Xunzi].


in Maoist Politics;\textsuperscript{78} Mao’s China: A History of the People’s Republic;\textsuperscript{79} and Mao Zedong: A Political and Intellectual Portrait.\textsuperscript{80}

**Literature Gap**

Since there is no legal study examining the Chinese food and product safety problem through Chinese legal, political, philosophical, administrative, and economical approaches at the same time, this dissertation integrates these various perspectives in order to draw an overall picture of the current Chinese regulatory system with the possible underlying ideologies.

**Thesis Statement**

This dissertation finds that the Chinese food and product safety regulatory system contains a paradox between administrative control of uniformity and self-regulation of flexibility. Although Modern China has adopted a communist, socialist, and legalist unified, uniform, and dictated political and administrative system negating independent thought, separation of powers, Confucian morality, its regulatory system is based on a de facto laissez-faire administrative structure of flexibility embracing Confucian self-regulation, Daoist non-interference, and Buddhist unwritten tradition, merging with self-interest-driven market economic policy of capitalism.

This laissez-faire governance relates to the food and product safety problem, and this problem cannot be solved by more law and more regulation on paper. Under the current self-regulatory system, written rules are not effective because government officials are rule-makers,

\textsuperscript{78} WANG HSUEH-WEN, LEGALISM AND ANTI-CONFUCIANISM IN MAOIST POLITICS (1975) [hereinafter Wang].


\textsuperscript{80} MAURICE MEISNER, MAO ZEDONG: A POLITICAL AND INTELLECTUAL PORTRAIT (2007).
rule-interpreters, rule-implementers, and business developers. Likewise, unwritten rules of ethics are not effective because morality is considered as unrealistic and impractical, and independent inspection mechanisms are not effective because independency against uniformity and unification. Public supervision relating to freedom of expression is not effective because it is a threat to Legalist stable governance.

Under this list of ideological constraints, the only solution to the food and product safety problem is self-transformation and self-improvement by the Communist Party. No law, regulation, or code of ethics can be implemented without the action of government officials. Ironically, the direction of these self-transformation and self-improvement, involves the fundamental concepts of the rule of law, such as reasonableness and justice, which are unwritten and were also promoted by Confucius.

Overview

In order to address the Chinese food and product safety issues above, this paper examines: 1) Chinese legal culture that contains conflicting views in terms of the roles of self, law, and government, and its relationships with the CPC Constitution 2012; 2) Chinese legal structure that simultaneously centralized lawmaking power and decentralized rulemaking power; 3) Chinese food and product safety law on paper and its evolution that directs the role of governments from relying on market forces of flexibility to administrative forces of uniformity; and 4) Chinese food and product safety law in action and the conflicting roles of government officials under the CPC political dictatorship and a laissez-faire market economic system.

This project encompasses six chapters described below.
Chapter 2: Written Versus Unwritten Rules

The second chapter focuses on the roles of self, law, and government in the major Chinese philosophical theories affecting rule of law development in China. The philosophical theories discussed include Confucianism, Daoism, and Buddhism—which relate to a tradition of unwritten rules of flexibility based on morality, change, and uncertainty; and Legalism—that relates to a written rule tradition of uniformity and unification based on control.

Confucianism, Daoism, and Buddhism are seen as the main streams of Chinese philosophy for more than two thousand years—after the Qin dynasty (221 to 206 B.C.) and before Modern China (1949-present). These theories established an unwritten culture embracing change, diversity, uncertainty, which can oppose the rule of law that embraces certainty, consistency, and predictability.

Confucianism, particularly, considers that humans are kind and able to pursue morality that cannot be fully described by words on paper. Benevolence and justice are inherent. People are trusted to be able to be self-regulated. Law and punishments are not encouraged. Virtue administration leading by ethics should be established.

In contrast, Chinese Legalism considers that humans are evil and driven by self-interest. Morality, such as benevolence, reasonableness, and justice, are unrealistic and impractical. No one should be trusted; ruling power should be centralized. A stable society relies on unification, uniformity, and strict control by harsh laws and punishments. An obedient administration should be established.

In Chinese tradition, Legalism was commonly considered an unorthodox theory which was adopted by the Qin dynasty for only about twenty years. Modern China, however, rewrote Chinese history to embrace Legalism and negate Confucianism.
Under the Mao Administration, Confucian morality was viewed as a tool to protect ruling power, encourage slavery, devalue working class, and a common enemy of people. Legalism, conversely, was praised as a philosophy that adopted equality, unification, and uniformity. During the Cultural Revolution in the 1960s, Confucianism and morality was suppressed and replaced by extreme violent measures. Right or wrong was in the hands of the rulers.

Although Chinese tradition was negated, Confucian and Daoist-like unwritten elements remain under the Legalist ideology in Modern China. In the CPC Constitution 2012, Legalism exists as a leading theme that establishes a political and legal structure of centralism and unification that embraces control, obedient hierarchical system, and socialist “rule of law” by the will of rulers.

Nevertheless, the CPC Constitution 2012 also borrows traditional elements such as requiring “socialist virtue,” “moral integrity,” and Confucian-like “exemplary conduct,” by “self-regulation,” “self-correction,” “self-governance,” “self-respect,” “self-examine,” and “self-caution”; as well as Daoist-like reversionary ideologies of opposite directions such as “democratic centralism” and “democratic dictatorship,” and non-interference approach that relates to change and flexibility. This flexibility set out a foundation of a laissez-faire administrative structure relying on self-regulation, which affects the food and product safety supervision.

Chapter 3: Centralization Versus Open Rulemaking Power

The third chapter turns to the Chinese lawmaking framework that adopts both the centralization of uniformity and the decentralization of flexibility. Centralization of uniformity refers to the lawmaking hierarchy and a dependent judicial system. Under the centralized lawmaking framework, the central authority has the greatest and highest legislative power to
override all regulations at lower levels, and judges do not have the interpretative power to make law as the common law system does.

Lawmaking decentralization of flexibility signifies an open rulemaking power where local authorities may formulate legal rules that are different from laws at the central and higher levels, based on the principles of “actual-need,” “local affairs,” “formulating-first,” and “specific administration.” Moreover, in light of a fragmented administrative structure, the rulemaking and legal interpretation power can be distributed to and shared by different institutions at legislative, executive, judicial functions in accordance with subject matter and regional equities. Local regulations, therefore, can be different from time to time and place to place.

In addition, this decentralized rulemaking system of flexibility is enhanced by an ineffective supervisory system. By law, the authorities at the central and higher levels have the power to inspect, alter, and annul inconsistent and contradicted regulations, but this power is fragmented to different bodies, and no single institution can oversee all regulations at one place. Moreover, the rule-inspection system adopts a non-interference approach—no inspection will be carried out if no complaint. Inconsistent, overlap, contradicted regulations commonly exist.

Yet, this open rulemaking system allows regulations to be formulated in a way to better serve local, specific, and actual circumstances, and provides local administrations great discretionary power as rule-makers, rule-interpreters, and rule-implementers at the same time in pursuit of economic development. Local administrations can also set out their own rules to better enhance food and product safety. The authorities at the central level do not intervene if no major incident occurs.
Chapter 4: Market Economy Versus Administrative Control: Law as Written

The fourth chapter examines the food and product safety law on paper, and the legislative trend that is moving away from the market economic policy of flexibility towards increasing administrative control of uniformity. The study reviews four different areas of the Chinese food and product safety law: 1) civil liabilities and criminal responsibilities, 2) economic development, 3) consumer protection, and 4) specific products. These statutes set out the roles of consumers, business operators, administrative agencies, and the judiciary.

Under the Chinese food and product safety law, the flexibility approach is emphasized by the “general-direction” principle, the fragmentation of power, the freedom of contract under private law, and the reliance on self-regulation under the market economic policy and Confucian tradition. Likewise, the uniformity approach is emphasized by the supervisory role of administration such as the collective and unified supervision, protective actions to ensure health and safety, the public law approach to govern business operators, and the administrative law approach to govern agencies and officials.

Nevertheless, in order to strengthen administrative control of uniformity, the food and product safety statutes often require county-level governments to implement actual supervisory measures such as establishing safety plans, issuing licenses, conducting on-site inspection, keeping credit records, among others. By delegating actual supervisory responsibilities to more than 2,800 local governments, which may interpret and implement the law in accordance with their local, specific, and actual circumstances, the law on paper, therefore, can be implemented in a way of flexibility under the label of increasing supervision of uniformity.
Chapter 5: Political Dictatorship Versus Laissez-Faire Administration: Law as Unwritten Action

The fifth chapter reviews the Chinese food and product safety law in action regarding the roles of government officials in terms of a dictated political leadership of uniformity and a laissez-faire economic leadership of flexibility.

The discussion details three major food safety incidents: (1) melamine dairy products; (2) recycling oil; and (3) clenbuterol pork. It reviews the legal and administrative actions taken, and new preventive and protective measures related to each incident. Since the implementation of food and product safety law relies on administrative actions, the study then examines the conflicting roles of government officials within the political structure of communism and the market economic system of capitalism.

Under a dictated, hierarchical, and centralized political structure, leading officials are CPC members required to be subordinate and obedient to their leaders at upper levels, and are subject to disciplinary inspection of the Party management system of uniformity. Yet this centralized management system is considered to be ineffective. Although local officials are at the lower level in terms of the political hierarchy, these officials often are able to interpret upper instructions in the ways they prefer. The central authorities, in reality, can be blocked from sufficient and actual local information, and even local information can be directly petitioned to the central level, the central level do not have sufficient resources to investigate and handle every single local matter in practice.

Under the market economic system, government officials, particularly at the county level, have economic roles as landowners and actual business developers, who are subject to a competitive GDP-oriented performance evaluation system. These officials compete with each other and have great discretionary powers of financial flexibility concerning land use rights and
the assessment of value-added taxes (VAT). Through land use rights and VAT, the income of
governments and officials associates with the interests of corporations.

In order to combat the conflict of interest between the administrative and economic roles
of government officials, the Party requires officials to disclose their annual income, adjusts
official evaluation by adding food and product safety issue, considers the inspector general
mechanism, establishes whistleblower system and the code of ethics. Yet these mechanisms are
internal, which are within the self-regulatory management system of the Party.

This Confucian-like self-regulatory system—under a label of Deng Xiaoping’s
pragmatism of “black and white cats” theory not focusing on left or right, right or wrong, but
economic results—merges with Daoist non-interference, capitalist self-interest-driven and free
competition approaches. Government officials should not intervene unless it is necessary.

These internal, self-regulatory, and non-interference settings establish a laissez-faire
administration under the flags of political dictatorship, communism, and socialism of uniformity.
This de facto laissez-faire system is free from the constraints of written law, unwritten rules of
ethics, the scrutiny of independent agencies, and public supervision. The solution of the food and
product safety problem, therefore, relies on CPC’s self-transformation and self-improvement to
pursue reasonableness and justice, within its “socialist” self-regulatory structure of Confucian
tradition.

Chapter 6: The Paradox

Reviewing the Chinese food and product safety regulatory system, it involves a battle
between the ideologies supporting flexibility on the one hand and the creation of uniformity on
the other. This battle is sourced from the different perspectives regarding human nature, law, and
government, which affect the current Chinese rulemaking structure, food and product safety law as written on paper, and unwritten in action.

This paradox of the Chinese food and product safety regulatory system contains five levels of rules. The highest level at the center is the written general-directions of basic principles laid down in the Constitution. The second level is written statutes enacted to encounter specific problems of different areas. The third level is written regulations formulated by agencies with implementation plans and legal interpretation in the Chinese law context. The fourth level is written case law as reference under the Chinese civil law system, but binding precedence under the common law system, which is set out by judges or the judiciary with specific interpretation applying to actual circumstances in the past. These four levels of written rules can be the basis of the rule of law providing certainty, consistency, and predictability, which can also be a form of uniformity to ensure equal treatment to people.

The fifth level is unwritten rules of flexibility applied by agencies day to day and in the future at the local level, which cover unforeseeable future circumstances and actual applications by agencies that are not on written record. These unwritten rules can be uncertain, inconsistent, but serving justice and reasonableness at the same time.

Both written rules of certainty, consistency, and predictability in pursuit of equality and uniformity, and unwritten rules of uncertainty, particularity, and flexibility in pursuit of change and future development, can be subject to the same constraint of morality, such as the fundamental concepts of the rule of law and Confucianism—reasonableness and justice. These ethical concepts, however, are unwritten. What is “justice”?

Further Studies

This study is a starting point of learning. Many questions remain unanswered.
The Chinese food and product safety regulatory development will be affected by international law, particularly the fact that China has been a World Trade Organization (WTO) member since 2001. The next study, therefore, will examine the relationship between the Chinese regulatory system and WTO Agreements concerning the protection of life and health. The goal will be to answer: To what extent will China be affected by the international trade agreements in terms of food and product safety? What are the possible conflicts between the Chinese and international food and product safety systems?

There are also further questions about the relationship between the Chinese regulatory system and administrative cost. What are the possible relationship between Confucianism and administrative cost? How can morality be governed by unwritten rules in Chinese legal tradition? Besides morality and administrative control, what are other possible mechanisms that may contribute to the Chinese regulatory system?

Another study involves Chinese “general-direction” principle at the central level. This study questions: What are the “general-directions” in terms of food and product safety law? To what extent these general-directions may affect the role of law and the legal system? Should legal obligations present in a form of normative guidance?

A common view is that China does not have enough laws to govern the entire country, and Chinese judges are not competent as compared to judges under the common law system. A study, therefore, will focus on the possible conflicting roles of judges under the Chinese civil law system. Should Chinese judges be expected to make law as the common law judges do? If Chinese judges should not interpret laws, what are their roles under the “socialist legal system”? What is the new development in terms of their roles?
Some other questions include: If the judiciary in China is within the administrative function, what are the roles and basis of Chinese administrative law? If freedom of expression is a threat to stable governance, would public supervision be possible? Would China be transformed towards more centralization and uniformity?
CHAPTER 2
WRITTEN VERSUS UNWRITTEN RULES

Introduction

Western legal culture considers China to have a “tradition of persuasion.”81 This tradition of persuasion seems not to maintain an “explicit reliance on religion or revelation as an immediate source of law.”82 It is “not present positivism and not revealed truth,” “primarily to persuade and not oblige,” with “something of the chthonic in it,” and has “no transcendent existence.”83 This system is often viewed to be contrary to the rule of law.

This lack of traditional rule of law, together with lack of morality and self-interest-driven capitalism, is considered to be the fundamental causes of the current Chinese food and product safety problem. Why does China not rely on law? If China does not rely on law, is the country governed by any rules for maintaining its order? Why does Chinese society negate morality? What is the relationship between morality, self-interest, and the rule of law in terms of Chinese legal culture? How do the cultural elements that exist in the 2012 CPC Constitution affect the regulatory system of the food and product safety problem?

The discussion covers three “main streams” of Chinese philosophy: 1) Confucianism, 2) Buddhism, 3) Daoism, as well as a “side stream,” namely, Legalism. Concerning these four theories, Confucianism is considered to be the core adopted by the majority of administrations for more than two thousand years, from the Han dynasty (beginning from 206 B.C.) to the Qing dynasty (ending in 1911).


82 Id.

83 Id.
Confucianism refers to a philosophical theory that suggests “virtue administration,” which was founded by Confucius (551-479 B.C.) and further established by Mencius (372-289 B.C.). Daoism refers to a theory that suggests “inaction,” founded by Laozi (604 or 571 B.C.), and further established by Zhuangzi (145?-89? B.C.). Buddhism refers to Chinese Buddhism that considers the truth as “emptiness,” which was imported from India during the Han dynasty (206 B.C.-220 A.D.). Legalism refers to a theory that suggests administrative control, founded by Xunzi (289-238 B.C.) and established by Han Feizi (around 280?-233 B.C.).

During these two millennia, different philosophical theories often were merged together. Moreover, Confucians of different dynasties adopted views that were explicitly disagreed on between Confucius and Mencius. This paper does not cover the development of philosophy in different dynasties but will focus on the original theories that may establish an

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84 Confucius, Lau, supra note 69, at 1.


86 Taoteching, Red Pine, supra note 72, at xiv. Laozi is also translated as “Lao-tzu.” The life of Laozi is unclear, and in accordance with the limited historical information, Laozi probably lived during the sixth century B.C.

87 Chuang Tzu, supra note 73, at 1. (Zhuang, is also translated as “Chuangzi,” “Chuang Tzu,” or “Chuang-tzu”).

88 This paper focuses on how Chinese Buddhism views the world and humans and not the religious aspects. For more about Chinese Buddhism development, see LAO SIGUANG (勞思光), ZHONGGUO ZHEXUESHI VOLUME II (中國哲學史第二券) [History of Chinese Philosophy Volume II] 247-366 (4th ed. 1986) [hereinafter Lao, Vol. II].

89 Lao, Vol. I, supra note 85, at 278. A common view is that Xunzi was a Confucian. His theory, however, considers human nature as evil, which is opposed to Confucianism, which sees human nature as benevolence.

90 Han Feizi, supra note 75, at 12. (The exact date of birth of Han Feizi is unknown).

91 For instance, Daoism, Buddhism, and Legalism were often combined with Confucianism by Chinese administrations.

92 For instance, Confucians in the Han dynasty adopted the religious views of Daoism. This “Confucianism,” therefore, deviated from the original Confucianism of Confucius and Mencius.
unwritten legal culture. This unwritten legal culture may relate to the open-market policy adopted by Modern China and contribute to a laissez-faire implementation of laws regarding the food and product safety regulatory system.

Contrasting with this unwritten legal culture established by Confucianism, Daoism, and Buddhism, Legalism and its suggested written rules was not considered to be an orthodox theory in traditional China. Legalism was only adopted as the main political ideology by the Qin dynasty (221-206 B.C.) and Modern China (1949-present). Both the first Qin Emperor and President Mao Zedong suppressed Confucianism.

In order to examine the relationship among different philosophical theories and Chinese legal culture, this chapter has five sections. The first section examines the roles of self as related to the role of individual in a legal context. The second section reviews the roles of law, and the third considers the roles of government. The fourth examines the philosophical elements present in the Constitution of the Communist Party of China (CPC). The fifth reviews the paradox between written and unwritten rules and offers concluding remarks.

While the rule of law encourages written rules in order to achieve certainty, consistency, and predictability, the Chinese unwritten legal tradition focuses on uncertainty, flexibility, and actual circumstances. By examining the views regarding the roles of self, law, and government of different Chinese philosophical theories, this chapter finds that the Chinese food and product safety problem relates to the abuse of legal and administrative flexibility settings based on a

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93 The term “traditional China” generally refers to the China before Mao Zedong’s administration in 1949. China after 1949 is generally known as “Modern China.” Traditional China and Modern China embrace different philosophical theories. For instance, traditional China mainly adopted Confucianism and negated Legalism. Modern China, however, adopts legalism, communism, and capitalism (arguably in practice after 1979) but negates Confucianism.

94 Merle Goldman, *China’s Anti-Confucian Campaign, 1973-74*, 1975 CHINA Q. 435, 441-42 (1975). During the time of the Qin and Mao administrations, Confucian scholars were suppressed and killed, and Confucian books were destroyed. But except for Qin’s and Mao’s administrations, Confucianism was adopted. Legalism was generally minimized to a limited role as a supplement in traditional China.
tradition of unwritten rules and the Confucian self-regulatory culture; the Daoist non-interference approach; and the Legalist negation of morality adopted and demonstrated by Modern China since the Cultural Revolution in the 1960s.

**Self**

Different approaches of regulatory systems source from different assumptions of self, which are the foundation of the relationship between the Chinese people, law, and governments. Confucianism assumes that the human essence is kindness while Chinese Buddhism sees self as emptiness, and Daoism sees it as a form subject to changes. Legalism sees human essence as evil due to selfishness.

Due Confucians believe in kindness, they maintain that the most effective means to regulate human behavior is by self-regulation based on internal virtue and not by external forces such as written law and administrative force. Because of selfishness, Legalists believe that internal virtue is unrealistic and impractical, and human behavior must be regulated by external virtue determined by rulers, which are imposed on people by written rules and administrative control with punishments and rewards.

These two approaches reflect the paradox in the Chinese regulatory system regarding food and product safety. Due to Legalism adopted by the Mao Administration beginning in the 1960s, Modern China has emphasized administrative control of uniformity and unification that insists one-party dictatorship and considers independent thought and the freedom of speech as a threat to stable social order. Due to the self-regulatory tradition, Modern China also adopted decentralization of flexibility that allows local administrations to formulate their own rules, industries to set their own food and product standards, and the Party to regulate itself through
internal mechanisms. Different views to self, therefore, are the source of the paradox in the Chinese regulatory system which embraces uniformity and flexibility at the same time.

Kindness

To Confucianism, the essence of humans is kindness. The self is considered to tend to prefer benevolence and righteousness. But whether the self is able be virtuous depends on self-determination, self-cultivation, and self-regulation. Instead of relying on external forces such as religions and administrations, Confucians shifted the responsibility of virtue to internal forces, relying instead on individuals. It is up to humans to determine and establish social order. This order does not start with the behavior of others, but the behavior of ourselves.

Confucianism was found by Confucius (551-479 B.C.), and during the time of Confucius, China was not a unified state.95 Confucius traveled to different states within the Chinese territory to offer his governing philosophy of “virtue administration,” but his theory was not adopted by any ruler at the time.96 After his unsuccessful traveling, Confucius returned to his home state, Lu, to be a teacher.97 Mencius (372-289 B.C.) further elaborated and interpreted Confucius’ ideas.98 His book, Mencius, and the Analects that records Confucius’ conversations, are two of the “Four Books” of Chinese classics.99

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95 During the Spring and Autumn Period (approximately 771-476 B.C.), China was governed by different independent states such as Qin, Jin, Chu, Wu, Lu, Song, Wei, and others.

96 Confucius, Lau, supra note 69, at 10.

97 Id.


99 Id. at x. The “Four Books” include the Great Learning, the Doctrine of Mean, the Analects of Confucius, and Mencius.
Confucius did not directly state that the human essence is kindness (善, shan), but it was Mencius instead. Confucianism begins from benevolence (仁, ren), which refers to the love for others.\textsuperscript{100} This “love” relates to the manner of treating others as ourselves and with an attitude of helpfulness towards others.\textsuperscript{101} Benevolence is also the ability to put ourselves in others’ shoes and be considerate\textsuperscript{102} as well as be respectful by not imposing on others something we do not like.\textsuperscript{103} Benevolence, therefore, is about the respect and treatment to others using how we ourselves want to be treated as the standard. This respect and treatment can also be considered a link between self and others as a single equal being.\textsuperscript{104} This equality may be based on the extension from the self, the physical of one person, to humans as a whole.

To Confucians, benevolence is an internal ability of humans;\textsuperscript{105} anyone can be benevolent and righteous, as long as one wants to be.\textsuperscript{106} Although humans may put their self-interest in front of others, Confucius considered that humans tend to prefer and strive to be benevolent.\textsuperscript{107} In


\textsuperscript{101} Id. at 41 (Confucius stated, “Now the man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others.”)

\textsuperscript{102} Id. (Confucius considered that humans are “able to judge of others by what is [near to] ourselves.”)

\textsuperscript{103} Id. at 30, 82 (“[T]o behave to everyone as if you were receiving a great guest; to employ people as if you were assisting at a great sacrifice; not to do others as you would not wish done to yourself.”)

\textsuperscript{104} Id. at 56. Confucius was free from four things: foregone conclusions, arbitrary predeterminations, obstinacy, and egoism.

\textsuperscript{105} Id. at 46 (“[The nature] produced the virtue that is in me.”)

\textsuperscript{106} Id. at 47 (“Is virtue a thing remote? I wish to be virtuous…virtue is at hand.”)

\textsuperscript{107} Id. at 26 (“Virtue is not left to stand alone. He who practices it will have neighbors.”)
addition, Confucius often used the “way of Heaven” (天道, tian dao) to describe virtue, which is considered to be more important than survival.\textsuperscript{108}

Mencius adopted Confucius’ views and also considered the essence of humans to be kindness. This kindness does not mean that everyone necessarily behaves benevolently, but everyone is capable to be kind.\textsuperscript{109} To Mencius, the feelings of compassion, shame, courtesy, and righteousness reflect the existence of benevolence in humans.\textsuperscript{110}

Similar to benevolence, humans are considered to be able to see and prefer justice. Justice (義, yi) relates to righteousness, rationality, and reasonableness. To Confucius, humans have the internal ability to see justice and reasonableness.\textsuperscript{111} This inherent ability does not rely on external conditions such as education, administrative instructions, or legal authorities, because any ordinary persons are capable of determining justice, righteousness, and reasonableness.\textsuperscript{112} This view is similar to the principles behind the jury system in the West, which relies on lay persons to judge what is reasonable, which is outside the written words on the book.

Justice, however, may contradict with self-interest. To Confucians, people may not be able to see justice or righteousness if they adhere to their self-interest. Confucians believe that

\textsuperscript{108} Lao, Vol. I, supra note 85, at 62; see also Legge, Analects, supra note 100, at 120 (“The object of superior man is truth. Food is not his object...The superior man is anxious lest he should get [the] truth; he is not anxious lest poverty should come upon him.”)

\textsuperscript{109} Mencius, Lau, supra note 98, at 72-73 (“No man is devoid of a heart sensitive to the suffering of others.”) In the words of Mencius, people have hearts of kindness. This “kindness” is present in the instinctual feelings of compassion (恻隐, ce yin), shame (羞恶, xiu e), courtesy and modesty (辞让, ci rang), right and wrong (是非, shi fei), which are not related to self-interest but are a natural connection with others.

\textsuperscript{110} Id.

\textsuperscript{111} Lao, Vol. I, supra note 85, at 42.

\textsuperscript{112} Id. at 108.
conflicts and chaos begin from placing self-interest in front of others.\textsuperscript{113} A stable social order relies on people who are able to place self-interest aside and, ideally, be virtuous and righteous.

To be benevolent and righteous is considered to be a matter of self-cultivation and depended on the free will of humans.\textsuperscript{114} To Confucians, self-cultivation involves the effort to separate perception from thought,\textsuperscript{115} to persist in seeking virtue,\textsuperscript{116} to learn goodness,\textsuperscript{117} to self-evaluate through questioning,\textsuperscript{118} and to act in accordance with our own words.\textsuperscript{119} Trust is considered to be a key factor of virtue, as well as a foundation of human relationships leading to a harmonious social order.\textsuperscript{120}

Self-cultivation also relates to self-regulation. Professor Lao Siguang considers that Confucians has four selves: 1) physical-self, 2) cognitive-self, 3) aesthetic-self, and 4) moral-

\textsuperscript{113} Mencius, Lau, \textit{supra} note 98, at 2-3 (“What is the point of mentioning the word ‘profit’? All that matters is that there should be benevolence and rightness. If [the Emperor] says ‘How can I profit my state?’ and the [Counselors] say, ‘How can I profit my family?’ and the Gentleman and Commoners say, ‘How can I profit my person?’ then those above and those below will be vying with each other for profit and the state will be [imperiled].”)

\textsuperscript{114} Lao, Vol. I, \textit{supra} note 85, at 90, 103. To Confucius, people may choose to treat the self and others equally or put oneself in front of others. Those who choose to behave with virtue, by willing to treat others the same way as to oneself, would be eligible to be leaders. In light of Confucianism, humans have the free will to determine our directions, such as personal gains or virtue.

\textsuperscript{115} Lao, Vol. I, \textit{supra} note 85, at 102. Perception refers to the profit and personal gain that humans perceive immediately. Thought refers to benevolence and righteousness humans can see and imagine as normative values.

\textsuperscript{116} \textit{Id}. Although human tends to prefer a virtuous society, benevolence, and rightness will not be upheld if people do not persist; \textit{see also} Mencius, Lau, \textit{supra} note 98, at 250-51 (“Hold on to it and it will remain; let go of it and it will disappear. One never knows the time it comes or goes, neither does one know the direction.” “It is perhaps to the hearts this refers.”)

\textsuperscript{117} Legge, Analects, \textit{supra} note 112, at 31, 147. To Confucius, learning is about willing to ask, think, and be sincere. Thinking includes examining and improving one’s own behavior; and \textit{id}. at 25 (“When we see men of worth, we should think of equaling them; when we see of a contrary character, we should turn inwards and examine ourselves.”)

\textsuperscript{118} \textit{Id}. at 5 (“[W]hether, in transacting business for others, I may have been not faithful; whether, in intercourse with friends, I may have been not sincere; whether I may have not mastered and [practiced] the instructions of my teacher.”)

\textsuperscript{119} \textit{Id}. at 30 (“[M]y way is to hear their words, and look at their conduct.”) Self-cultivation concerns words and conduct.

\textsuperscript{120} \textit{Id}. at 85. The translation is “hold faithfulness and sincerity as first principle” for the original Chinese text: “主忠信.” “信” can mean trust instead of “sincerity.”
Confucians consider that the physical-self is the least important because this self may be driven by self-interest and personal gains, possibly sacrificing benevolence and reasonableness in the meantime.¹²²

Cognitive-self refers to knowledge.¹²³ To Confucius, knowledge should be based on virtue because knowledge may not be used in a right way if not based on benevolence and righteousness.¹²⁴ Knowledge, therefore, should not be merely what people know, but how people should be.¹²⁵

Aesthetic-self refers to the “feeling of lives,” which involves courage, persistence, artistic senses, and others.¹²⁶ To Confucius, the aesthetic-self should be regulated and guided by the moral-self.¹²⁷ For instance, whether a piece of music is beautiful depends on the messages and the virtue of players.¹²⁸ A similar principle applies to courage, because courage can be harmful without the guidance of benevolence and righteousness.¹²⁹

To Professor Lao, benevolence and reasonableness derive from the moral-self. A self-cultivating process, therefore, can also be an internal and self-regulatory process. This process

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¹²¹ Lao, Vol. I, supra note 85, at 82.
¹²² Legge, Analects, supra note 112, at 115 (“The man of virtue will not seek to live at the expense of injuring their virtue.”)
¹²³ Lao, Vol. I, supra note 85, at 82-83.
¹²⁴ Legge, Analects, supra note 112, at 120 (“When a man’s knowledge is sufficient to attain, and his virtue is not sufficient to enable him to hold, whatever he may have gained, he will lose again.”)
¹²⁶ Id. at 84.
¹²⁷ Id., and Legge, Analects, supra note 112, at 22 (“Shao [music] that it was perfectly beautiful and also perfectly good.”) Moral-self is a self that is able to see benevolence and justice.
¹²⁸ Lao, Vol. I, supra note 85, at 84.
¹²⁹ Legge, Analects, supra note 112, at 128-29 (“The superior man holds righteousness to be of highest importance. A man in a superior situation, having [valor] without righteousness, will be guilty of insubordination; one of the lower power having [valor] without righteousness, will commit robbery.”)
involves recognizing and conducting virtue through questioning, examining, adjusting, and improving self-behavior.\textsuperscript{130}

In the history of Chinese philosophy, this focus on self-regulation is viewed to be a humanization and civilization process.\textsuperscript{131} During the time of Confucius, people commonly relied on different Gods for guidance, directions, and regulations. Confucius, however, focused on humans by recognizing free will, affirming virtuous capabilities, and imposing ethical and social responsibilities on individuals. Confucius believed that what matters was self-effort. Guidance for morality, therefore, was pulled from the sky—from the Gods—to the ground.

Confucian humanization, however, does not mean that humans are perfect. By viewing the weaknesses of humans and their fight against uncontrollable or unknown external conditions, Confucians affirm the ultimate directions of virtue and freewill. Confucianism emphasizes the importance of the spirit in becoming better human beings, which is considered to be the best humans can do within their limitations.\textsuperscript{132}

\textbf{Change}

Instead of affirming the value of self as Confucianism does, Daoism\textsuperscript{133} considers humans as merely a form that is subject to change.\textsuperscript{134} Laozi\textsuperscript{135} (604-571 B.C.?), the founder of Daoism,

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\begin{enumerate}
\item \textit{Id.} at 77 (“What is called a great minister, is one who serves his prince according to what is right, and when he finds he cannot do so, retires.”) Confucius considered that government officials should resign if they are ordered to do something against virtue. Considering the roles of the different selves, self-regulation relies on the moral-self to guide the aesthetic-self of feeling, the cognitive-self of knowledge, and the physical-self of self-interest. Moreover, even obedience to authorities should be subject to the moral-self of virtue.
\item Lao, Vol. I, \textit{supra} note 85, at 32.
\item \textit{Lao Siguang} (勞思光), \textit{Zhongguo Wenhua Yaoyi} (中國文化要義) [The Main Elements of Chinese Culture] 63 (1998).
\item Daoism is also translated as Taoism.
\item This paper is not able to cover the history of Daoism, but will examine the main elements that are suggested by Daoists, such as Laozi and Zhuangzhi (also translated as Chuang-tzu).
\end{enumerate}
\end{footnotesize}
focused on changes in lives and in the world and considered change is, in fact, an unchangeable order.\textsuperscript{136} To Laozi, everything in the empirical world changes, but the changing order outside the empirical world lasts.\textsuperscript{137} This changing order has no official name, but Daoism calls it the “Way” (道, dao), which created the empirical world and exists beyond it.\textsuperscript{138} This changing order is also considered to be a cyclic movement between beings and their oppositions.\textsuperscript{139} Thus, objects exist together with their negations.\textsuperscript{140}

Due to this combination of positivity and negativity, Daoism considers it is not meaningful to insist on anything. Laozi suggested “doing nothing” (無為, wuwei).\textsuperscript{141} Daoism,

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\textsuperscript{135} Taoteching, Red Pine, supra note 72, at xiv. Laozi is also translated as Lao-tsz.

\textsuperscript{136} Lao, Vol. I, supra note 85, at 179; and Ryden, Daodejing supra note 71, at 49. (“[A] typhoon does not last all morning; pounding rain does not last all day. Who makes them? Heaven and earth. Yet if heaven and earth cannot make them last, [t]hen how much less can men do so?”). The word “heaven” is translated from a Chinese word “sky” (天, tian). “Heaven and earth” in Chinese often refers to anything between the sky and the ground, which means things in the empirical world.

\textsuperscript{137} Lao, Vol. I, supra note 85, at 179; and Ryden, Daodejing, supra note 71, at 53 (“A thing was formed murky; she was generated [outside] heaven and earth. Silent and vast, unique she stands and does not change; she turns full circle and is not used up. She can be the mother of the world.”)

\textsuperscript{138} Taoteching, Red Pine, supra note 72, at 2 (“Of ways you may speak, but not the Perennial Way; [b]y names you may name, but not the Perennial Name.”); and Lao, Vol. I, supra note 85, at 179.

\textsuperscript{139} Ryden, Daodejing, supra note 71, at 7 (“Being and beingless generate each other; difficult and easy form each other; long and short shape each other; high and low complete each other.”)

\textsuperscript{140} Lao, Vol. I, supra note 85, at 181.

\textsuperscript{141} Ryden, Daodejing, supra note 71, at 91 (“Wordless teaching, the benefit of not acting: there are few in the world who attain to it.”); and LAO-TSE, THE TAO TEH KING, OR THE TAO AND ITS CHARACTERISTICS 29 (James Legge trans., Produced by Gregory Walker, and David Walker E-book 2008) (sourcing from iTunes, available at http://www.gutenberg.org/files/216/216-h/216-h.htm) (“The softest thing in the world dashes against and overcomes the hardest; that which has no existence enters where there is no crevice. I know hereby what advantage belongs to doing nothing.”)
therefore, negates the **cognitive-self** of knowledge,\(^{142}\) the value of the **physical-self** of self-interest and personal gains,\(^{143}\) and the **moral-self** of right and wrong.\(^{144}\)

In Daoism, virtue is not about moral standards such as benevolence, justice, or rites, but about nature of beings.\(^{145}\) The role of the self is to observe nature and its changing order.\(^{146}\) Professor Lao considered that Laozi emphasized the **aesthetic-self** of sentiment or feeling, which observes but is distant from the changing empirical world.\(^{147}\) Zhuangzi\(^{148}\) (about 369-286 B.C.), also named as Master Zhuang of Daoism, further developed this distance by seeing the **physical-self** as merely an object that is subject to life and death.\(^{149}\) Only the **aesthetic-self** is a real being that is free from life, death, and external limitations.\(^{150}\) To Zhuangzi, the **aesthetic-self** of sentiment or feeling can go beyond being an object and maximize the freedom of self.\(^{151}\)

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\(^{142}\) Lao, Vol. I, *supra* note 85, at 38, 182, 208. Cognitive-self that embraces wisdom and knowledge is seen as adopting deception.

\(^{143}\) Taoteaching, Red Pine, *supra* note 72, at 24-25 (“[F]avors the stomach over the eyes.” Li Yueh explains that “the eyes are never satisfied.” “The stomach knows when it is full.”) Laozi negates the physical-self that embraces colors, tones, and flavors, which are viewed to be distracting what is real.

\(^{144}\) Lao, Vol. I, *supra* note 85, at 39. To Laozi, the moral-self that embraces kindness and justice adopts artificiality. Since right and wrong may exist at the same time, merely focusing on kindness and justice can be a bias and artificial. More details will be discussed in the Roles of Law section. *Id.* at 38. (“Get rid of wisdom and reason, and people will live a hundred times better; get rid of kindness and justice, and people once more will love and obey…display the undyed and preserve the uncraved, reduce self-interest and limit desires.”)

\(^{145}\) *Id.* at 193-94.

\(^{146}\) *Id.*

\(^{147}\) *Id.* at 193.

\(^{148}\) *Id.* at 195-96. Zhuangzi is also translated as Chuang-tzu; *and* Chuang Tzu, *supra* note 73, at 1-2.

\(^{149}\) Lao, Vol. I, *supra* note 85, at 200-01. The physical-self is established from nothingness or a set of conditions that happen in the empirical world. Since the physical-self is an object, and objects are subject to change towards reversion, this physical-self is established and will be destroyed by the natural order.

\(^{150}\) *Id.* at 198-99, 203, 206. To Zhuangzi, people should separate physical-self of self-interest from aesthetic-self of sentiment, and protect aesthetic-self from falling into the empirical world.

\(^{151}\) *Id.* at 204, 206.
Zhuangzi considered the physical-self and other beings in the empirical world as one, inseparable object.\textsuperscript{152} The existence of this object relies on the aesthetic-self’s perception and sentiment.\textsuperscript{153} The aesthetic-self, therefore, is separate from the physical object that is changing towards its negation. Thus, only the aesthetic-self is considered real and lasting. The role of self, therefore, is to maintain distance from the empirical world and the physical-self, observe nature, and achieve the maximized freedom.

In addition, since objects are changing towards their opposes, humans should attain emptiness and maintain stillness, forms of inaction.\textsuperscript{154} Daoism considers that the world will settle on its own.\textsuperscript{155} Inaction, therefore, brings active effect; inaction is action.

Daoism also suggests “being-soft” (守柔, shourou) and to “not-contend” (不争, buzheng). “Being-soft” is considered to be a way to oppose the strong. Laozi stated, “Nothing in the world is weaker than water, but against the hard and the strong, nothing outdoes it, for nothing can change it, the soft overcomes the hard, the weak overcomes the strong, this is something everyone knows.” Water is also used to describe the “not-contend” principle. Laozi provided, “The best are like water, bringing help to all without competing, choosing what others avoid.

\begin{small}
\begin{itemize}
\item \textsuperscript{152} Id. at 206-07. Zhuangzi is used as a metaphor of a dream being a butterfly. This metaphor discussed the relationships among the dreamed butterfly, the physical-self, and the aesthetic-self that had the dream. Zhuangzi considered the physical-self, the dreamed butterfly, and other objects in the empirical world are to be one object.
\item \textsuperscript{153} Id. The physical-self and others are inseparable and refers to the Chinese term “通人我” (tong ren wo), getting through the differences between others and self.
\item \textsuperscript{154} Ryden, Daodejing, supra note 71, at 27 (“Attain complete emptiness! Maintain perfect stillness! While all things spring up side by side, I shall watch their return. Things grow and flourish, then go back to their roots alike. To return to the root is called ‘peace.’ Peace... is called ‘fulfilling one’s destiny.’ To fulfill one’s destiny is to be eternal. To know the eternal is wise.”) Lao, Vol. I, supra note 85, at 184. “Root” refers to the changing order of the nature, which is considered to be eternal.
\item \textsuperscript{155} Ryden, Daodejing, supra note 71, at 60 (“Without desires and with tranquility, the world will settle on its own.”)
\item \textsuperscript{156} Taoteching, Red Pine, supra note 72, at 152, 156 (“When people are born, they are soft and weak[,] when they perish, they are hard and stiff [,]. . . the hard and stiff are followers of death, the soft and weak are followers of life[,] when an army becomes stiff it suffers defeat; when a plant becomes stiff it snaps.”)
\end{itemize}
\end{small}
They thus approach the [Dao].”\textsuperscript{157} In other words, if one does not contend, one has no enemy. Help, therefore, can be gained from others.\textsuperscript{158}

Emptiness and Illusion

Buddhism considers self to be an illusion. This view of illusion is established by the perception that regards lives as uncertain, inconsistent, painful, and empty.\textsuperscript{159} The existence of beings and phenomena relies on a combination of different and unknown conditions.\textsuperscript{160} For instance, a person today seems to be established by a combination of known and unknown conditions, such as family background, education, experience, past events, surrounding people, among others. The existence of each condition may rely on another set of known and unknown conditions, which cannot be controlled by humans. Due to these layers of uncontrollable and unpredictable conditions, the existence of humans and phenomena is subject to uncertainty.\textsuperscript{161}

Pain is caused by this uncertainty and humans’ endless desires.\textsuperscript{162} This view of endless desires of Buddhism is similar to the views of Adam Smith’s economic theory that sees human desires as unsatisfied and endless.\textsuperscript{163} Instead of supply and demand, and economic growth,

\begin{footnotesize}
\begin{enumerate}
\item Id. at 16.
\item Lao, Vol. I, supra note 85, at 188.
\item Lao, Vol. II, supra note 88, at 191.
\item Id. at 194.
\item Id. at 193.
\item Id. at 192.
\end{enumerate}
\end{footnotesize}
Buddhism focuses on pain. Moreover, instead of affirming self-interest, Buddhism negates the physical self of self-interest (無我, *wuwo*) to avoid pain.

In Buddhism, humans should release themselves from empirical limitations and sufferings by negating desires, realizing emptiness and the “real-self” (真我, *zhenwo*). Similar to Daoism’s aesthetic self of sentiment, the real self is a subject that perceives, but is not affected by, the empirical world with its maximized freedom.

In Buddhism, emptiness is the ultimate nature. The empirical world is considered to be merely a form, and its existence is based on perception. This perception, however, is seen as merely an illusion. Buddhism, therefore, considers that the empirical world is based on a perception that is, in fact, an illusion. When the empirical world is merely an illusion, self-interest and personal gains do not actually exist. Negating the physical self and self-interest may also negate individual rights and relate to a laissez-faire approach in terms of legal culture.

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165 *Id.* at 196.
167 *Id.*
168 *Id.* (“Form is no different from empty, empty [is] no different from form…sensation, perception, volition and consciousness are also like this.”)
169 *Id.* at 5 (“[W]ithin emptiness there is no form, sensation, perception, volition or consciousness; no eye, ear, nose, tongue, body or mind; no sight, sound, scent, taste, touch or thought; no seeing…even no thinking; no ignorance nor end of ignorance…no aging and death, nor end of aging and death; no suffering, origin, cessation or path; no wisdom and no attainment.”) *Id.* at 13.
Selfishness

Legalism considers that the essence of humans is evil and selfish.\textsuperscript{170} Xunzi (289-238 B.C.), also named as Master Xun, negated the virtue in humans.\textsuperscript{171} Han Feizi (280?-233 B.C.)\textsuperscript{172} followed Xunzi and also focused on humans’ selfishness.\textsuperscript{173} Xunzi stated, “Man’s nature is evil...He is born with feelings of envy and hate.”\textsuperscript{174} Xunzi did not believe humans have an ability to realize or cultivate virtue, but only self-interest.\textsuperscript{175}

Perfecting Legalism, Han Feizi developed this view further by seeing humans as not having particular essence of virtue or evil, but simply being driven by benefit and harm (利害, li hai).\textsuperscript{176} To Han Feizi, a peaceful social order is not caused by moral guidance but by self-interest.\textsuperscript{177} Rights or wrongs are not inherent in humans but depend on external rewards and punishments.\textsuperscript{178}

\textsuperscript{170} Lao, Vol. I, supra note 85, at 305.

\textsuperscript{171} Id. Xunzi (298-238 B.C.), also known as Master Xun, Xung Qing, and Xun Kuang, is a teacher of Han Feizi; and id. at 304, and A. S. Cua, Xunzi (Hsün Tzu), in ENCYCLOPEDIA OF CHINESE PHILOSOPHY 821, 821 (Antonia S. Cua ed., 2003) [hereinafter Encyclopedia]. The view of Legalists that negates virtue in humans is contrary to the view of Confucianism. A confusing view is that Xunzi is a Confucian scholar. Since the views of Xunzi are fundamentally different from Confucius and Mencius, some scholars argue that Xunzi is not a Confucian. In fact, the views of Xunzi led to the development of Legalism.

\textsuperscript{172} Han Feizi, supra note 75, at 11-14. Han Fei (around 280?-233 B.C.), or Master Han Fei, was a prince of the royal family of a small state of Han. He was a student of Xunzi and further developed his views to perfect Legalism. Han Feizi’s fellow student, Li Si, was the prime minister and chief aid to the First Emperor of the Qin dynasty. The First Emperor fully adopted Legalist principles. It is unclear if it was due to Li Si’s jealousy, but Li sent poisoned Han Feizi when he was detained in prison for investigation.

\textsuperscript{173} Id. Han Fei (281-233 B.C.) is also known as Han Fei Tzu and Han Feizi.

\textsuperscript{174} Xunzi, supra note 74, at 161. (“Man is born with the desires of the eyes and ears, with a fondness for beautiful sights and sounds.”)

\textsuperscript{175} Id. at 305.

\textsuperscript{176} Id., and WIEBE DE NECKE, THE DYNAMICS OF MASTERS LITERATURE: EARLY CHINESE THOUGHT FROM CONFUCIUS TO HAN FEIZI 318 (2010).

\textsuperscript{177} Han Feizi, supra note 75, at 22.

\textsuperscript{178} Id.
Han Feizi also considered self-cultivation and exemplary learning regarding benevolence and justice as superfluous.\textsuperscript{179} To Han Feizi, wisdom is a matter of nature and fate, which is not teachable.\textsuperscript{180} All attempts of education are viewed to be futile.\textsuperscript{181} Moreover, charity is a sin that drives the “industrious to pamper prodigals and idlers.”\textsuperscript{182}

Han Feizi believes human relationships between rulers and ministers, husbands and wives, parents and children, are based on profit.\textsuperscript{183} People should not trust each other because trust links with control and threat.\textsuperscript{184} In Legalism, the role of self, therefore, is to protect one’s own self-interest.

Internal and External Virtues

To review, there are two general directions extrapolated from the different perspectives of self in Chinese philosophical theories affecting the roles of law and government. One direction focuses on the non-physical-self (such as moral-self, aesthetic-self, or real-self) under Confucianism, Daoism, and Buddhism. Another direction focuses on the physical-self of self-interest under Legalism. Table 1 on the following page illustrates different roles of selves by theories.

\begin{footnotesize}
179 Encyclopedia, supra note 171, at 287, and Han Feizi, supra note 75, at 146 (“To try to teach people to be benevolent and righteous is the same as saying you can make them wise and long-lived.”)

180 Han Feizi, supra note 75, at 146. To Han Feizi, admiring the beauty of a person will not improve our own looks; likewise, merely talking about benevolence and righteousness will not improve the order of the state.

181 Id. at 22.

182 Id.

183 Encyclopedia, supra note 171, at 286.

184 Han Feizi, supra note 75, at 22, and Xunzi, supra note 74, at 85 (“It is hazardous for the ruler of men to trust others, for he who trusts other will be controlled by others. Ministers have no bonds of flesh and blood which tie them to their ruler; it is only the force of circumstance which compels them to serve him.”)
\end{footnotesize}
Table 1. The Roles of Selves in Chinese Culture

<table>
<thead>
<tr>
<th>Theories</th>
<th>Leading Self</th>
<th>Roles of other Selves</th>
<th>Physical-self of Self-interest</th>
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<tr>
<td>Confucianism</td>
<td>Moral-self of Benevolence and Justice</td>
<td>Cognitive-self and Aesthetic-self shall be guided by Moral-self</td>
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<tr>
<td>Daoism</td>
<td>Aesthetic-self of Sentiments</td>
<td>Moral-self and Cognitive-self are meaningless</td>
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<tr>
<td>Buddhism</td>
<td>Real-self of Freedom (instead of Aesthetic-self)¹⁸⁵</td>
<td>Moral-self and Cognitive-self are illusion</td>
<td>Illusion</td>
<td>Internal</td>
</tr>
<tr>
<td>Legalism</td>
<td>Physical-self of Self-interest</td>
<td>Moral-self, Cognitive-self, and Aesthetic-self may not exist</td>
<td>Driving Force</td>
<td>External</td>
</tr>
</tbody>
</table>

Internal Virtue

The non-physical-self approach under Confucianism, Daoism, and Buddhism sees humans as having an inherent ability to realize virtue and act virtuously by distancing themselves from self-interest. Actualizing virtue, therefore, relies on self-cultivation, self-determination, and self-effort, not the authorities. Under this view, humans can be trusted, and the roles of written rules and government should be minimized.

This non-physical-self approach may also be considered as an anti-self-interest approach. For instance, Confucianism, Daoism, Buddhism consider the physical-self of self-interest as an obstacle of benevolence and justice, an object that is subject to change and meaningless, and a source of pain and illusion. These three philosophical theories, which are considered as the foundation of the Chinese tradition, share a common view that negates self-interest.

¹⁸⁵ The differences between the aesthetic-self of sentiment and the real-self of freedom seem to be that the aesthetic-self observes the empirical world and sees the changing order while the real-self of freedom does not require observation because what people see is considered to be merely an illusion.
With respect to this negation, the conflict-of-interest principle in the West may share similarities, particularly with Confucianism. For instance, judges are trusted to provide fair judgments by putting their own interests aside. This trust even extends to jurors as lay persons. The conflict-of-interest principle, therefore, trusts humans as having an inherent ability to conduct justice as long as self-interest does not present.\footnote{This doctrine also applies to other personnel such as lawyers, prosecutors, witnesses as well as members in different sectors such as politicians, government officials, company directors, and others.}

Concerning self-cultivation or self-regulation, Plato has similar views as Confucius. Plato considered that humans are able to see both justice and injustice, as well as to self-regulate.\footnote{P\text{LA\the} T\text{YPE R\text{EPUBLIC} 42 (Benjamin Jowett trans., E-book 2008) (sourcing from iTunes, available at https://itunes.apple.com/us/book/the-republic/id395535342?mt=11, and Gutenberg, http://www.gutenberg.org/files/1497/1497-h/1497-h.htm) [hereinafter Plato] (“Had we been taught in early youth the power of justice and injustice inherent in the soul, and unseen by any human or divine eye, we should not have needed others to be our guardians, but [everyone] would have been the guardian of himself.”) \textit{Id.} at 43. With respect to benevolence, similar to Confucians, Plato understands that humans are imperfect, but “we do not therefore attribute them to the worst rather than to the better motive or principle.”}

To Plato, human nature swings back and forth between good and evil.\footnote{\textit{Id.} at 43-44. Plato also views people may become cynical due to bad experiences, but costs a great deal to adopt a “truer and kindlier view of the mixed nature of himself and his fellow men.”} Moreover, it is foolish and false to assume humans are completely evil.\footnote{\textit{Id.} at 43.} Thus, both Confucius and Plato emphasize a positive view of human nature.\footnote{Plato is considered to be “the founder of idealism,” and Confucius is considered to be “the forever teacher.”}

Although it might be easier for humans to be cynical, Confucians believe humans tend to prefer a virtuous and reasonable society. This preference may also be shared in the West. For instance, Plato stated that “he only praises justice who is incapable of injustice.”\footnote{Plato, \textit{supra} note 187, at 42.}

John Stuart
Mill embraced reasonableness. The Federalist Papers also mentions the confidence of people is established by “patriotism, virtue, and wisdom.” These theories imply the inherent human preference of virtue.

**External Virtue**

The physical-self approach, however, considers that humans cannot genuinely realize virtue and act virtuously but are driven by self-interest. Instead, humans should be guided or controlled by the authorities. The roles of law and government, as a result, should be maximized. To Chinese Legalists, virtue is primarily external.

In this external approach, education encouraging self-cultivation and self-regulation is deemed to be ineffective. Some Western theories seem to share this view. For instance, Adam Smith mentioned “self-love,” which is contrasted with benevolence. To Smith, help comes not from benevolence but from self-interest; people address themselves not to their humanity but to their self-advantages.

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194 Smith, supra note 163, at 25 (“Nobody but a beggar chooses to depend chiefly upon benevolence of his fellow-citizens.”)
Thomas Hobbes also considered the human essence to be evil, and thus, humans should not be trusted.\textsuperscript{195} Hobbes believed virtue and reasonableness are not natural to humans.\textsuperscript{196} Humans are merely “subjects” that should be governed and ruled by the authorities, such as the religious power.\textsuperscript{197} Virtue is not inherent in humans, but is sourced from external authorities.\textsuperscript{198} Similarly, the Federalist Papers seem to adopt this view regarding the necessity of governance.\textsuperscript{199} Due to “not-angel-like” human nature, the Federalist Papers maintained that not only do humans need to be governed, but the government also needs to be controlled.\textsuperscript{200} In light of these views, civilization, trust, and virtue, therefore, is external.

\textbf{Law}

This section reviews the possible roles of law in Chinese philosophical theories. The main questions include: how do Confucianism, Daoism, Buddhism, and Legalism view the roles of law? How do the different perspectives of self affect Chinese legal tradition? What is the relationship among different roles of law and the development of rule of law?

\textsuperscript{195} \textsc{Thomas Hobbes, De Cive: Containing the Elements of Civill . . . Subjection} 23-4 (E-book 1651) (sourcing from iTunes, \textit{available at} https://itunes.apple.com/au/book/cive-containing-elements-civill/id481674131?mt=11, \textit{and} Oxford Text Archive: http://ota.ahds.ac.uk/desc/3118). (“[Not only] all men were wicked but also wicked by nature.”) To Hobbes, even some people are righteous, it is necessary for people to be “suspecting, heeding, anticipating, subjugating, [self-defending], even incident to the most honest, and fairest conditioned.” \textit{Id.} (“[Even] in well-governed States, where there are [laws] and punishments . . ., yet particular men [traveled] not without their [sword] by their sides, for their [defense], neither sleep they without shutting not only their [doors] against their [trunks] and [coffers] for fear of [domestics].”)

\textsuperscript{196} \textit{Id.} at 24.

\textsuperscript{197} \textit{Id.} at 26 (“God overrules all rulers by nature.”)

\textsuperscript{198} \textit{Id.} at 25. Without external authorities, Hobbes considered the state of human is “nothing else but a [mere war] of all against all; and in that [war] all men have [equal] right unto all things.”

\textsuperscript{199} \textsc{The Federalist} No. 51, at 451 (James Madison) (E-book 1788) (sourcing from iTunes, \textit{available at} https://itunes.apple.com/us/book/the-federalist-papers/id395535144) (“If men were angels, no government would be necessary.”)

\textsuperscript{200} \textit{Id.}
The discussion will have two focuses. One focus concerns unwritten rules based on internal virtue of Confucianism, Daoism, and Buddhism. The other focus concerns written rules based on external virtue of Legalism. The aim of the discussion is to examine the possible differences between the Chinese legal tradition and the Western rule of law expectation in China, which affect the food and product safety regulatory system.

Due to the view of internal virtue, Confucianism considers the code of propriety is based on unwritten justice, reasonableness, and benevolence in humans by self-regulation and not written law with punishments by external force. The goal is to minimize litigation and disputes to establish a harmonious society. Due to the view of change, Daoism considers that rights and wrongs do not exist and exist at the same time, written rules are meaningless. Due to the view of emptiness and illusion, Buddhism considers that right and wrong is subject to perception. No written rule is meaningful and necessary. These theories established the Chinese legal culture that does not rely on written rules with punishments but unwritten ethics as a foundation of the self-regulatory structure of freedom and flexibility. The expectation of morality, non-interference, the “lack of the rule of law” tradition, and the self-regulatory administrative structure exist nowadays in the food and product safety regulatory system.

In contrast, due to the view of external virtue, Legalism considers that decisions between right and wrong must be controlled by punishments in accordance with the will of rulers. Written rules are a means to ensure uniformity and unification of thought and behavior, which is considered as an essential condition to maintain a stable social order by force. Since the Mao Administration, Legalism has been adopted and demonstrated by Modern China. This uniformity requirement constitutes another foundation of the political and administrative structure that
embraces dictatorship led by the Party as the only authority, negation of morality, rule-by-will, and strict media control of the current regulatory system.

Unwritten Rules

The unwritten culture will be examined in three parts. The first part reviews the Confucian guidance of conduct, *li* (禮, propriety). The second part discusses the inaction (無為, *wuwei*) in Daoism. The third part studies the guidance of hearts in Buddhism. Rites, inaction, and hearts can be considered as three different behavioral directions in the Chinese tradition. These different directions, however, share a common characteristic that does not encourage unifying thought or conduct with written rules with punishments.

*Li* (禮, Propriety) in Confucianism

*Li* may be translated as “propriety,” “rites,” “rituals,” “customs,” “etiquette,” “morals,” “rules of proper behavior,” “codes of propriety,” among others.201 Although there are different meanings of the word *li*, the main emphasis is about a behavioral system leading to a harmonious social order.202 To Confucius, the foundation of this harmonious order should be based on justice and benevolence in humans.203 This view contrasts with the religious view at the time relying on Heaven.204

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203 *Id.* at 41.

204 *Id.*
Religious power in Confucianism is beyond the knowledge of humans. In front of spiritual power, humans are ignorant. Confucius believed humans should focus on “human-matters” and be respectful to, and maintain a distance from, spiritual and religious beings. Without religious power, a harmonious social order relies merely on humans. Justice and benevolence in humans are considered to be the foundation of li. The meaning of li, as propriety, should therefore be interpreted under the norms of these virtues.

Justice in Li

Propiety implies justice to Confucians, which relates to trustworthiness, courage, wisdom, learning, thinking, reasonableness, and harmony. Some of these terms may also relate to benevolence. The Analects do not provide a unified definition or a boundary of justice, but general guidance.

Confucius considered that trustworthiness is closed to justice. Trust requires consistency between words and conduct. Justice also relates to courage: “To see what is right and not to do it is [a lack] of courage.” Courage also relates to benevolence: “Men of [virtuous] principle are sure to be bold.” Propiety, as such, implies trustworthiness and courage. Do what we say; do what is right. Knowing what is right requires wisdom. Wisdom needs learning (学, xue) and thinking (思, shi).

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205 Legge, Analects, supra note 112, at 73-74 (“While you are not able to serve men, how can you serve their spirits?” “While you do not know life, how can you know about death?”). Id. at 39.

206 Id. at 73-74.

207 Id. at 7-8.

208 Id. at 29-30.

209 Id. at 15.

210 Id. at 101.
Confucianism did not encourage law with punishments. Confucius believed that if people are led by virtue with the guidance of propriety, people will have the sense of shame and develop goodness.

Among given directions regarding justice, reasonableness is the core and the inherent quality of *li*. Confucius considered good behavior without reasonableness could be disastrous. As the main motivation of proper behavior, reasonableness is considered not to be in events or facts, but a norm in humans. Humans perceive what is right in accordance with different circumstances. Reasonableness, therefore, might not be written with fixed formula.

This unwritten characteristic may also present in the Western legal culture. For instance, the “reasonable man” standard in torts, as well as similar terms such as “reasonable time,” “fair manner,” and others, are often used to illustrate generally acceptable standards. However, legal texts do not provide who the “reasonable man” is and what “reasonable” exactly means.

Moreover, appropriateness may not necessarily be controlled by tradition or custom. “In [practicing] the rules of propriety, a natural ease is to be prized.” “Natural ease” refers to harmony (和, *he*). Harmony is also a direction of reasonableness. This direction focuses on the common-interest, rather than self-interest.

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211 *Id.* at 10 (“If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame.”)

212 *Id.*

213 Lao, Vol. I, *supra* note 85, at 44–45; and Legge, Analects, *supra* note 112, at 138 (“The superior man holds righteousness to be of highest importance. A man in a superior situation, having [valor] without righteousness, will be guilty of insubordination; one of the lower people having [valor] without righteousness, will commit robbery.”)


Benevolence in *Li*

Besides justice, propriety also implies benevolence. Benevolence relates to equality, self-control, respect, and the minimization of litigation. Similar to propriety in justice, there is no definition or a boundary of benevolence, simply general guidance.

Benevolence starts from the basic principle of treating others the same way as ourselves.\(^{216}\) In light of this “Golden Rule” principle, people are equal.\(^{217}\) Confucius believed that if people know how they want to be treated, they know how to treat others. Confucian equality extends the self-treatment of people by combining self-interest and common interest; humans can be considered as one.

Confucius saw conflicts and harmful conduct as commonly based on self-interest. By emphasizing equal treatment between self and others, harmful conduct against others for one’s own self-interest can be minimized. *Li*, propriety, therefore, relates to self-control by eliminating or minimizing self-interest at the expense of others.\(^{218}\) Self-control also involves how people may look, listen, speak, and move.\(^{219}\) Similar to justice, this rule of propriety regarding self-control may not be written.

Concerning our daily lives today, unwritten rules apply to how we should talk to others, how we should dress, what we should say, how we should stand, how we should look at others, and so forth. These unwritten rules may not come with official punishments but govern our daily conduct in a social context. Socially, people are expected to behave in a way to respect others.


\(^{217}\) *Id.*

\(^{218}\) Legge, Analects, *supra* note 112, at 81 (“To subdue one’s self and return to propriety…is perfect virtue.”)

\(^{219}\) *Id.* (“Look not at what is contrary to propriety; listen not to what is contrary to propriety; speak not what is contrary to propriety; make no movement which is contrary to propriety.”)
Confucius saw respect as close to proper conduct, and respect relates to self-cultivation in carefulness.

Confucius does not encourage litigation. This anti-litigation view is linked with the self-regulatory requirements such as self-control, self-evaluation, and self-cultivation. Confucius stressed inward accusation. The rationale focuses on a harmonious social order by minimizing disputes.

This view contributed to the establishment of the Chinese tradition of relying on mediation and private settlements rather than litigation. Instead of judicial courts, traditional settlements involved compromises between parties with the assistance of unofficial institutions, such as family clans, local formal and informal leaders. This traditional practice can be more flexible, accessible, cost effective, and more private.

Inaction in Daoism

In Daoism, the empirical world constantly changes. Other than this changing order, nothing is considered to be eternal and definite. Knowledge is viewed to be meaningless because

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220 *Id.* at 7-8.

221 *Id.* at 112.

222 *Id.* at 86 (“What is necessary…is to cause the people to have no litigations.”)

223 *Id.* at 34.

rights and wrongs do not exist.\textsuperscript{225} Daoism negates the Confucian view that virtue is inherent in humans, but focuses on the incompleteness of knowledge.\textsuperscript{226}

Zhuangzi believed that what people see is merely a tiny portion of the empirical world. Knowledge that is based on this little aspect does not necessarily reveal the truth. This incomplete knowledge limits and misleads our thoughts.\textsuperscript{227} The words regarding the empirical world are considered to be meaningless, so do the debates about rights and wrongs.\textsuperscript{228}

The truth may not be absolute in Daoism.\textsuperscript{229} Right and wrong may exist at the same time, and knowledge may also be prejudice.\textsuperscript{230} In order to avoid prejudice, people should not insist on any norms and be involved in any debates.\textsuperscript{231} People should observe the world in silence with emptiness.\textsuperscript{232} Through silence and emptiness, the truth can be revealed with clarity.\textsuperscript{233} Clarity, therefore, is distant from cognitive knowledge, debates, and words.

When words, knowledge, and debates are considered to be incomplete, indefinite, not absolute, and even prejudicial, laws and regulations formed by written words, which are based

\textsuperscript{225} Lao, Vol. I, \textit{supra} note 85, at 208. Chuang Tzu, \textit{supra} note 73, at 34 (“Words are not just wind. Words have something to say. But if what they have to say is not fixed, then do they really say something? Or do they say nothing?” “What does the Way rely upon, that we have true or false? What do words rely upon, that we have right and wrong?”)


\textsuperscript{227} \textit{Id.}

\textsuperscript{228} Id.

\textsuperscript{229} Id. at 35 (“Where there is acceptability there must be unacceptability; where there is unacceptability there must be acceptability. Where there is recognition of right there must be recognition of wrong; where there is recognition of wrong there must be recognition of right.”)


\textsuperscript{231} \textit{Id.} at 211.

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} \textit{Id.}
on norms and knowledge, therefore are also meaningless. Rules may not have definite meanings. Every term, definition, and provision may contain both positive and negative sides, which are always arguable. Due to the view regarding indefinite, incomplete, and imperfect knowledge, laws may not necessarily be able to reflect truth or justice, but an artificial prejudice. Daoism, therefore, emphasizes silence and inaction.

Silence and inaction may be contrary to the rule of law, which embraces certainty, consistency, and predictability by written rules. In Western civilization, written rules established by a democratic system are considered to be the source of fairness and justice. Daoism, however, considers written rules may not necessarily reflect impartial and absolute truth. The perspectives of Daoism and the rule of law, therefore, seem to be very different.

Hearts in Buddhism

In Buddhism, the pain of humans is caused by the gap between endless desires and the reality of emptiness. Buddhism suggests people realize that emptiness. By not insisting on anything, human can release the pain and achieve absolute freedom.

Zen, a branch of Buddhism, does not focus on the guidance of virtue in words, but hearts. In accordance with the Heart Sutra, people should not seek to attain anything. If nothing is attained, hearts are without hindrance and fear. Based on this emptiness, right and wrong are

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235 Chuang Tzu, supra note 73, at 35 (“Everything has its ‘that,’ everything has it ‘this.’ From the point of view of ‘that’ you cannot see it, but through understanding you can know it… ‘that’ comes out of ‘this’ and ‘this’ depends on ‘that’ — which is to say that ‘this’ and ‘that’ give birth to each other.”)
236 Id. at 203.
237 Id at 200.
238 Heart Sutra, supra note 166, at 7.
considered to be an illusion. Law that is established by norms and words, right and wrong, is meaningless. In Buddhism, unwritten hearts are the guidance.

In addition, Buddhism emphasizes uncertainty, emptiness, and absolute freedom, which may be contrary to the certainty, consistency, and predictability required by written rules. “No words, but hearts” suggests silence. The rationale of “no words” may refer to the limitation of language, which is viewed to be insufficient to express the truth. This view is similar to the view of Ludwig Wittgenstein regarding the limit to thought. To Wittgenstein, the limit to thought is considered to be drawn by language: “What can be said at all can be said clearly, and what we cannot talk about we must pass over in silence.”

Unwritten Rules in the Rule of Law

To review the roles of law in Confucianism, Daoism, and Buddhism, these theories commonly rely on unwritten virtue of freedom and flexibility. Confucians consider that propriety about goodness should not be written as law and forced by punishments, but general directions. Daoism considers that written knowledge can be prejudiced. Buddhism considers the guidance is from hearts, not words. Comparing these unwritten characteristics with the rule of law’s reliance on written rules, these different approaches appear to be coming from opposite directions.

Nevertheless, unwritten rules also seem to present in the rule of law system. Although a presumption of the rule of law is that all rules shall be written clearly and accurately to ensure


240 Id. at 4.

241 Id. at 3-4.
certainty, consistency, and predictability, a question is raised as how written rules may cover all possible circumstances in advance.

One way that has been adopted is the use of general terms and principles in legislation for a broader coverage. But if the scope is too broad, a constitutional question may be raised as the law can be over-inclusive, providing too much discretionary power to executive and judiciary branches. But if the scope is too narrow, the function of law may be reduced.

In reality, legislation may not be able to provide answers for all specific circumstances. The specification of law often relies on the rulemaking process at the executive branch and judge-made law at the judiciary. Whether the extent of rulemaking and judge-made law is acceptable may depend on procedural impartiality and substantive reasonableness and virtue.

Procedural impartiality refers to the independence of agencies and judicial institutions, as well as the uniformity regarding the procedures applied. Substantive reasonableness and virtue may refer to the content of administrative regulations, rules, and guidelines, as well as the rulings provided by judges at different levels and institutions. These substantive norms of reasonableness and virtue may not always be written.

Unwritten Reasonableness

The scope of legislation often relies on “reasonableness.” The term “reasonable” is commonly used in administrative procedure, substantive rules, and rulings. For instance, the U.S. Administrative Procedure Act (APA)—Title 5 of the United States Code—mentions “reasonable prior notice,” “reasonable attorney fees,” “reasonable efforts,” “reasonably be

243 Id. § 552(4)(E).
244 Id. § 552(3)(B).
expected,“”245 among others. The APA, however, does not provide what “reasonable” means or any further standards and guidelines for interpreting “reasonableness.””246

Considering substantive rules by executives and rulings by judges, the “reasonable standard” is applied particularly in torts, contract, as well as other areas. “Reasonableness” may be defined by judges, but this term may be determined by juries as well.247 This jury-determined reasonableness is not required to have an explanation. Rulings by judges may mention different balancing tests or analyses, but does not necessarily explain why certain decisions are considered to be reasonable. Where is the reasonable man?

Although reasonableness may not be written, this term fills in the gap between law on paper, such as statutes enacted by legislators, regulations, and rules formulated by executives, and law in action implemented by administrations and the judiciary. When flexibility is necessary, the meaning of “reasonableness” may be subject to the discretion of judges, administrators, or even public opinion.248

In addition, reasonableness may determine whether the scope of specific rules and actual implementation are acceptable. For instance, the Constitution of the United States provides general principles and directions. The rulemaking process then provides more specific statutes, regulations, rules, and guidelines within a reasonable scope from the U.S. Constitution. When disputes occur, the adjudicative and judicial branches may provide more specific rulings in accordance with actual circumstances, but the scope of these rulings should be reasonable as well.

245 Id. § 552(3).

246 David Zaring, Reasonable Agencies, 96 Va. L. Rev. 135, passim (2010) (discussing how “reasonableness” has been turned into a common standard of judicial review of administrative action).

247 For instance, a “reasonable” amount of damages may be determined by the jury under tort law.

248 Public opinions may affect the amendment of legislation if shortcomings are found within statutes.
“Reasonableness,” therefore, provides a boundary regarding the extent of law, but not necessarily be written on paper in advance.

Unwritten reasonableness may raise a question regarding the certainty, consistency, and predictability of the rule of law. If “reasonableness” is an essential element that may determine the extent of law, and this extent may not be provided on paper in advance, would this non-disclosure-in-advance characteristic affect the certainty, consistency, and predictability? And if the law is certain, consistent, and predictable, what would the role of lawyers be?

Unwritten Virtue

Another unwritten area is virtue. Virtue may relate to general directions concerning moral goodness, such as “good faith,” “fairness,” “justice,” “equity,” “equality,” “liberty,” “public interest,” among others. These terms may reflect ethical expectations of people, as well as general directions towards a better society. These virtue-related terms, however, may have different meanings depending on the extent and circumstances.

For instance, the Chinese Food Safety Law requires food producers and traders to be “responsible to the public,” “ensure the food safety,” and “bear the social responsibility.” Yet, the law may not provide the extent and details of the related responsibilities, such as what food producers and traders should do in different circumstances, the extent of administrative responsibilities and powers. How extensive is the discretionary power of Chinese agencies?

Unwritten virtue presents in the rule of law system as well. Professor Kenneth Culp Davis investigated the discretionary power implemented by administrations for pursuing justice. This discretionary justice, however, can be illegal, implemented without guidelines or

249 FSL, supra note 17.

250 KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (2d ed. 1980) [hereinafter Davis].
even standards from statutes. Similar to unwritten virtue, discretionary justice is not mentioned in the rules on paper.

To Davis, “every governmental and legal system in world history has involved rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power.”

Administrative actions are dominated by unwritten discretion.

Why does unwritten discretionary justice dominate administrative actions? Davis provides three reasons. First, much discretion not governed or guided by rules should be. Second, much discretion has no rules because no one knows how to formulate rules. Lastly, individualized justice is often better. In addition, Davis provided that the source of equity is the suffering of people caused by rigid and technical rules resulting injustice. Equity, therefore, is viewed by introducing life and flexibility, which is necessary.

Davis considered the common presumption that arbitrary power should be completely eliminated; this presumption, however, falsifies “the extent that all modern government tolerate[s] a good deal of arbitrary power.” This falsification stems from the “extravagant version of rule of law” that opposes discretionary power outside courts and judicial control.

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251 Davis, supra note 250, at 17.

252 Id.

253 Id. at 15.

254 Id.

255 Id.

256 Id. at 18.

257 Id. at 19-20.

258 Id. at 30.

259 Id.
In practice, this extravagant version of the rule of law is rejected, and violations appear every day. This reality seems to be in line with Chinese unwritten culture. The question, therefore, is how to ensure unwritten discretionary power is truly for virtue and justice.

Written Rules

Chinese Legalism does not consider that humans have the tendency to prefer benevolence and reasonableness, but self-interest. As mentioned, to Xunzi, human nature is evil. In order to establish a stable social order, humans should be shaped, controlled, and governed by fa (法, law). Fa may refer to laws, orders, methodologies, and other external means. This section focuses on three essential elements of fa, which relates to the role of law. These elements are: (1) punishments; (2) publication; and (3) unification and uniformity.

Punishments

Legalists emphasize strict control by harsh laws. In order to preserve and strengthen a country, law codes under Legalism are an effective means to govern internal affairs. The basis of law codes, however, does not necessarily relate to any moral values or customs, but the

260 Id.

261 The legalism and legalists mentioned in this paper refers to Chinese Legalism as established by Xunzi and Han Feizi, not Legalism in the West.

262 Han Feizi, supra note 75, at 21.


264 Han Feizi, supra note 75, at 14.

265 Id. at 17.
interests of the ruling class. In the view of Han Feizi, the aim of law is to strengthen the central government and establish more effective control over land and people.

Legalism maintains that laws with strict penalties can ensure a “tough, alert, and well-disciplined population.” Since human nature is evil, people should not be trusted. Instead of relying on people and intellectuals, written rules are considered to be a more reliable instrument to govern a society.

The enforcement of law is based on penalties. Laws are considered to be a means for “prohibiting error and ruling out selfish motives; strict penalties are the means of enforcing orders and disciplining inferiors.” To Han Feizi, the authority of law enforcement should not be shared with others, and penalties must be enforced.

Legal codes should be simple but are inviolable. The aim is to exercise control over everyone within the state. Han Feizi considered officials as tigers who may assassinate their master. Laws, however, can make the greatest tigers tremble. By applying punishments, “the greatest tigers will grow docile.”

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266 Id.
267 Id. at 17-18.
268 Id. at 18.
269 Id. (“[A]ll life of nation was to be ordered, so that nothing would be left to chance, private judgment, or appeal to privilege.”)
270 Id. at 38.
271 Id. at 38-39.
272 Id. at 39.
273 Id. at 38.
274 Id. (“Even the cleverest men could find no opening for their falsehoods, the glibbest talkers no audience for their sophistries, and evil and deceit were left without a foothold.”)
275 Id. at 51-52.
Han Feizi did not consider morality, such as benevolence and righteousness, as effective means to maintain an order of a state.  

Benevolence can even be an obstacle of laws that “may make one shed tears and be reluctant to apply penalties.” Justice does not work either because only few people truly admire righteousness. Han Feizi considered the policy suggesting rulers to be benevolent and righteous will fail. People with a bad character will not be changed by the love of parents, the efforts of neighbors, the wisdom of teachers, but by the force of government soldiers and strict penalties of local officials. Terror and the authorities can make people behave.

Publication

Laws shall be available to public. Legalism sees weaknesses, chaos, and disorders of a fallen state are caused by ignoring laws and regulations and pursuing private gains of ministers and officials. In order to end the pursuit of private gains and block selfish pursuits, rulers shall force people to uphold the laws and hire officials who understand the system of laws and

276 *Id.* at 52.

277 *Id.*

278 *Id.* at 118.

279 *Id.* at 119.

280 *Id.* (“To honor benevolence is a rare thing, and to adhere to righteousness is hard.”)

281 *Id.* at 120.

282 *Id.*

283 *Id.*

284 *Id.* at 33.
regulations. Moreover, the law should be clearly defined to honor superiors so that their rights can be protected.

By making the law with punishments public, fear can be instilled in officials and people far away. Rulers, therefore, can extend the ruling area. This fear is considered to be a tool to wipe out wantonness and sloth, prevent lies and deception. Heavy penalties under Legalism can keep officials humble. This fear will make officials and people behave in a desirable way.

Unification and Uniformity

Legalism emphasizes unification and uniformity. The role of laws is to provide unifying standards for people. This unifying standard is considered to be a means to maintain stable social order. Under this view, if people act in a unifying way, differences and conflicts can be minimized and resolved. Moreover, since people rarely have integrity and good faith, it would be wise for rulers to have unifying laws with firm policies.

Uniformity in Legalism should focus on “don’t-rules,” rather than “do-rules.” Don’t-rules detail what is bad and not allowed to do. Do-rules outline what is good and encouraged to do.

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285 Id.
286 Id.
287 Id. at 39 (“Men did not dare [to] say anything different…though courtiers in the palace, [people] did not dare to conceal good or gloss over evil.”)
288 Id.
289 Id. at 40.
290 Id.
291 Id. at 39.
292 Id. at 126.
293 Id. at 144-45.
Han Feizi believed that a uniform level of don’t-rules is more effective. Positive directions are considered to be unrealistic and merely empty assertions. These assertions tell people to do what they cannot do, which is against human nature. Moral value, therefore, shall be rejected.

In addition, Legalism considers that the best law shall be uniform and inflexible, so that people can understand what the law is. In order to achieve unification and uniformity, rulers shall suppress all different ideas and ways of life. People shall be “kept in a state of ignorance and awe.”

To Han Feizi, rulers are at the highest authority of a society. The interest of rulers should be the first priority. The thoughts of a society shall be unified in a way to achieve the interest of rulers. Officials and people shall be “guided and kept in line by laws.” Rulers, however, must be guided by a different set of principles which focuses on wielding authority and

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294 Id. at 145. This view differs from Confucianism because Confucianism focuses on positive directions, such as benevolence and justice.

295 Id. at 146.

296 Id. at 146-47.

297 Id. at 121.

298 Id. at 18 (Vagabonds and draft-dodgers, merchants and artisans who deal in nonessential goods, scholars who spread doctrines at variance with Legalist teaching, cavaliers who take the law into their own hands” shall be “unmercifully quashed.”)

299 Id.

300 Lao, Vol. I, supra note 85, at 308.

301 Id.

302 Id.

303 Han Feizi, supra note 75, at 18-19.
controlling people. Any constraints imposed on rulers are viewed to be a threat against the highest authority.

To review the roles of law in Chinese culture, there are two general theories. Confucianism, Daoism, and Buddhism rely on unwritten rules with general directions. Legalism, however, relies on written rules with specific requirements and punishments. Despite these differences, all these theories negate self-interest. Table 2 below illustrates the roles of law in these different theories.

The unwritten and written directions of law stem from inherent and external virtues. Inherent virtue that trusts humans may lead to the unwritten guidance of Confucianism, Daoism, and Buddhism. External virtue that distrusts humans leads to written rules and punishments of Legalism. These different approaches contribute to different roles of government.

Table 2. The Roles of Law in Chinese Culture

<table>
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<th>Theories</th>
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<th>Roles of Law</th>
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304 Id. at 19.

305 Lao, Vol. I, supra note 85, at 308.
Except Buddhism that embraces emptiness, Confucianism, Daoism, and Legalism provided different roles of people, rulers, administrations, and the foundations of desirable social order. These different roles relate to the current food and product safety regulatory structure and people’s expectation in the Chinese society.

For instance, although Confucianism has been suppressed and negated by Modern China, today’s Chinese society is still expecting a virtuous administration of morality, self-regulation, and flexibility to pursue a harmonious order with trust. Daoist principles of inactive administration and no-harm exist and merge with the non-interference approach of market economic policy that embraces laissez-faire administration. In contrast with Confucian virtuous administration, Modern China adopts and establishes Legalist obedience administration that relies on the secrecy of rulers, administrative control, and unification of thought and speech. Despite the differences, the Chinese food and product safety regulatory system combines different ideological elements from these theories concurrently, which creates a paradox of uniformity and flexibility.  

Confucian Administration

During his life time (about 551-479 B.C.), Confucius traveled around to different states to persuade rulers to adopt benevolence and justice, which was considered to be the foundation of successful governments. No rulers at the time adopted this suggestion. Confucian scholars were

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306 For instance, although Confucianism was mainly adopted in the period between the Han dynasty (from 206 B.C.) and the Qing dynasty (ended in 1911), the “Confucianism” merged with Legalism, Daoism, and Buddhism regarding human nature, religious belief, and law application. Thus, the same label of “Confucianism” may not necessarily imply the original ideology of Confucius and Mencius.

Moreover, since there was no constitutional tradition in China that might legally limit the power of the government (the structure of Chinese administrations might be still subject to political, economic, and social limitations), rulers are generally free to establish their administrations in a shape with any theories they think fit. This freedom seems to survive even though the People’s Republic of China (PRC) has a Constitution.
even buried alive, and their books were burnt after China was unified by the Qin dynasty in 213-210 B.C. This section examines the governing theory Confucius promoted at the time. Confucius saw people as the authority, rulers can be replaced, virtuous administration as a necessary establishment, and a harmonious order should be based on trust.

People

To Confucius, governments have three basic obligations: economic development, defense, and establishment of the trust of people. Within these three obligations, defense is the least important. The next important is economic development. The most important is the trust of people, which is considered to be the most essential foundation of rulers and the state.

Confucians consider that state authorities are established by people’s hearts and submission, which, in turn, are established by benevolence and justice conducted by rulers. Rulers have authority by gaining the confidence of people, as if a feudal lord gains the confidence of rulers. All rulers, feudal lords, and officials should be replaced if the people do not trust them. Mencius considers that losing people is equivalent to losing authorities.

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307 Legge, Analects, supra note 112, at 84 (“The requisites of governments are that…sufficiency of food, sufficiency of military equipment, and the confidence of the people in their ruler.”)

308 Id.

309 Id. at 154 (“Advance the upright and set aside the crooked, then people will submit. Advanced the crooked and set aside the upright, then the people will not submit.”)


311 Id.

312 Mencius, Lau, supra note 98, at 159 (“[W]in the people and you will win the Empire.” Mencius also stated, “There is a way to win the people; win their hearts and you will win the people. There is a way to win their hearts; amass what they want for them; do not impose what they dislike on them.”) Id. at 153 (“The Three Dynasties won the Empire through benevolence and lost it through cruelty. This is true of the rise and fall, survival and collapse, of states as well.”) Similar to Confucius, Mencius considers benevolence to be a necessary condition of governing authorities.
Mencius views people’s hearts as having an equal status of the Mandate of Heaven, which is the highest authority.³¹³ People are the most important assets.³¹⁴ Accordingly, Confucians does not require absolute obedience to rulers. Officials should resign when they are ordered to do something they do not wish or able to do.³¹⁵ Resignation is considered to be a form of loyalty to a government.³¹⁶

**Rulers**

Governance should not rely on force and killing.³¹⁷ Confucius argued that if rulers’ actions were conducted with virtue, people will follow. Governance does not necessarily mean imposing written obligations and harsh punishments on people. Rulers are obliged to be the first ones to demonstrate benevolence, reasonableness, and justice, which is considered to be a necessary condition for being a leader.³¹⁸ Mencius shared the same view.³¹⁹

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³¹³ Lao, Vol. I, supra note 85, at 113. When Mencius was asked how a ruler was accepted by Heaven, Mencius stated, “When he was put in charge of sacrifices, the hundred gods enjoyed them. This showed the Heaven accepted him. When he was put in charge of affairs, they were kept in order and the people were content. This showed that the people accepted him.” *Id.* at 205-06 (“Heaven sees with the eyes of its people; Heaven hears with the ears of its people.”)

³¹⁴ *Id.*, and Mencius, Lau, *supra* note 98, at 315 (“[T]he people are…supreme importance; the altars to the gods of earth and grain come next; last comes the ruler.”)

³¹⁵ Legge, Analects, *supra* note 112, at 123 (“When he can put forth his ability, he takes his place in the ranks of office; when he finds himself unable to do so, he retires from it.”) *Id.* at 77 (“[A] great minister…is one who serves his prince according to what is right, and when he finds he cannot do so, retires.”)

³¹⁶ *Id.* at 31-32.

³¹⁷ *Id.* at 87. When Confucius was asked whether a government may kill unprincipled individuals for the good of principled people, Confucius stated, “[I]n carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good.”

³¹⁸ *Id.* at 90 (“Go before the people with your example, and be laborious in their affairs.”) *Id.* at 93 (“If a superior love[s] propriety, the people will not dare not to be reverent. If he love[s] righteousness, the people will not dare not to be submit to his example. If he love[s] good faith, the people will not dare not to be sincere.”) Lao, Vol. I, *supra* note 85, at 115.

³¹⁹ Legge, Analects, *supra* note 112, at 38 (“What proceeds from you, will return to you again.”)
Confucians also require rulers to treat people with respect. To Mencius, in order to attain to royal dignity, rulers should love and protect their people, rejoice the joy and grieve the sorrow of their people. Rulers should also consult their people. Thus, rulers are not exempted from the code of propriety.

To Confucius, the state is an extension of self. A good state needs to have good rulers, and a good ruler needs to be a good person. The principle of benevolence and justice as applied to self extends to rulers and states. Although individuals and rulers have different roles and positions in society, all are subject to the same propriety guidance regarding virtue and reasonableness.

**Virtue Administration**

Similar to self and rulers, administrations are obliged to conduct actions with benevolence and justice. Virtue is considered to be the major principle for pursuing stable governance and successful leadership, and the governance of justice is interpreted as

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320 *Id.* at 82 (“[To] employ the people as if you were assisting at a great sacrifice.”) *Id.* at 19. Confucius stated, “[Rulers] should employ his minister according to the rules of propriety.”


322 *Id.* at 28.

323 *Id.* at 37. When a ruler went to Mencius for advice about governance after punishing a ruler who tyrannized his people in another state, Mencius said, “The people supposed that you were going to deliver them out of the water and the fire, and brought baskets of rice and vessels of congee…But you have slain their fathers and elders brothers, and put their sons and younger brothers in confinement…[W]ith a doubled territory you do not put in practice a benevolent government; it is this which sets the arms of the kingdom in [a] motion.” “[C]onsulting with the people…you will appoint them a ruler, and withdraw from the country; in this way you may still be able to stop the threatened attack.”

324 Legge, Analects, supra note 112, at 9 (“[Rulers] who exercise government by means of his virtue may be compared to the north polar star, which keep its place and all the stars turn towards it.”)
correctness. To Confucius, correctness refers to “rectifying names” (正名, zhenmin). “Names” refer to titles, which imply particular roles and positions. “Rectifying names” requires consistency among titles and related conducts. Stable governance depends on the conduct of officials, and officials, therefore, should understand their titles and responsibilities and behave accordingly.

Mencius emphasized the right personnel. To Confucians, a condition of establishing successful governments is to hire benevolent and righteous officials who are willing to improve the living standard of people. Confucius suggested paying reverent attention to business and minimizing administrative expenditure. Mencius also suggested reducing taxes on goods or other articles if a government has levied the rent of land. The aim is to please traders, travelers, farmers, and the people in a state by establishing market-places with different goods and

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325 Id. at 87 (“To govern means [rectification]. If you lead…people with correctness, who will dare not to be correct?”)

326 Id. at 91.

327 Id. at 91-92; and id. at 85-86 (“There is government, when [ruler] is [ruler], and the minister is minister, when the father is father, and the son is son.”) Every title represents a position with different responsibilities, duties, and authorities. For instance, in general, rulers are expected to be leaders of states. Ministers are expected to assist leaders and implement orders. Each position has its particular roles that shall be fulfilled.

328 Id. at 95 (“If a minister makes his own conduct [correctly], what difficulty will he have in assisting in government? If he cannot rectify himself, what has he to do with rectifying others?”) Some scholars consider these rectifying-name-requirements reflect a classification in traditional Chinese society, which imply discrimination between classes. A question, however, is raised by this view because the same person can be ruler, minister, father, and son at the same time or at different times. Discriminative classification usually refers to the limitations imposed on a person from moving one class to another, and rectifying-name-requirements refer to different roles of a person at different circumstances. These do not exclude the opportunity for a person to move from a class to another, it might be difficult to establish discrimination merely by different roles and responsibilities in a social context.

329 Mencius, Legge, supra note 321, at 55. Rulers should “give [honor] to men of talents and virtue and employ the [capable], so that offices shall all be filled by individuals of distinction…then all the scholars…will be pleased and wish to stand in his [office].” The original translation is “court.” Since the word “court” may be confused with judicial courts, the word “office” is used because the Chinese word in the context refers to the offices of rulers.

330 Legge, Analects, supra note 100, at 6.

331 Id. at 55-56. For instance, no taxes should be required from farmers if those farmers are helping to cultivate public fields, and others.
stimulating economic activities.\textsuperscript{332}

In addition, Confucius suggested persistency and consistency.\textsuperscript{333} Stable governance depends on persistent and extensive learning.\textsuperscript{334} People are considered to be able to see wrongs and corrections of administrations and officials.\textsuperscript{335} Confucians see admitting mistakes and self-corrections as helping to establish trust and legitimacy, which leads to stable governance.\textsuperscript{336}

\textbf{Trust}

Trust is the foundation of the Confucian administration. Rulers and administrations without trust can be replaced. Comparing this view with the Western democratic system, Confucianism does not provide a mechanism or particular timeline as to how often a government shall be elected and replaced, but shares the common principle of deriving governing authority from the people.

Since a state is viewed to be an extension of self. The general guidance of self, therefore, also applies to rulers and governments. With respect to trust, administrations shall act in accordance with their words. Moreover, such conduct shall be based on benevolence and justice.

Besides establishing trust from the people, Confucius suggested that administrations trust their people as well. By negating laws and punishments, Confucian social order mainly relies on self-cultivation and self-regulation of people. Moreover, instead of focusing on bad behavior by

\textsuperscript{332} \textit{Id.}

\textsuperscript{333} \textit{Id.} at 96 (“The art of governing is to keep its affairs before the mind without weariness, and to [practice] them undeviating consistency.”)

\textsuperscript{334} \textit{Id.}

\textsuperscript{335} \textit{Id.} at 150 (“The faults of the superior man are like the eclipses of the sun and moon. He has his faults, and all men see them; he changes… and all men look up to him.”)

\textsuperscript{336} This view may reflect current Asian apologizing-culture. Apologies are considered a reflection of the willingness to take responsibility and sincerely consider corrections. Apologies in the West are considered unwise because it may induce legal responsibilities. Sincerity and corrections in the West are replaced by advertisements for adjusting images and shifting focuses to something else afterwards.
enacting written rules with punishments, positive directions are emphasized with a belief that people prefer and are capable to see virtue and reasonableness. Confucian administrations, therefore, depend on a mutual trust relationship between administrations and people.

This mutual trust relationship may minimize law enforcement cost.\(^{337}\) In light of Confucianism, people, rulers, and administrations should act virtuously. Virtuous behavior, however, may not rely on external means such as laws, enforcement, and administrative control, but social means such as family and communities. Administrative cost is therefore minimized.

Daoism Administration

Laozi argued that in order to pursue a stable society, governments should minimize the desires of people.\(^{338}\) By eliminating honors, prizes, and attractions, people do not have to achieve any goals. Moreover, people who do not receive any honors or prizes will not be embarrassed.\(^{339}\) A major role of Daoism in government, therefore, is to make people have nothing to fight for and nobody to fight against.\(^{340}\)

Laozi suggested that administrations seek to empty people’s minds.\(^{341}\) To Daoism, stomach and bones can easily be satisfied by food. Knowledge and the will of people, however, may not be easily satisfied. Knowledge and minds, therefore, are considered to be the sources of trouble and disorder.\(^{342}\)

\(^{337}\) Edwards, supra note 224, passim.

\(^{338}\) Taoteching, Red Pine, supra note 72, at 6 (“Bestowing no honors, keeps people from fighting; prizing no treasures, keeps people from stealing; displaying no attractions, keeps people from making trouble.”)

\(^{339}\) Id.

\(^{340}\) Id.

\(^{341}\) Id. at 6 (“[T]he rule of the sage, empties the mind, but fills the stomach, weakens the will, but strengthens the bones; by keeping people from knowing and wanting, and those who know from daring to act, the sage governs them all.”)

\(^{342}\) Id.
Similarly, wisdom is considered not to be beneficial to governance.\textsuperscript{343} Wisdom, reasonableness, kindness, justice, and profit are all viewed to be related to desires and self-interest, which should be eliminated.\textsuperscript{344} To Laozi, people should seem deficient, simple, dim, and confused.\textsuperscript{345} If people have no wisdom and knowledge, “problems will vanish.”\textsuperscript{346}

Inactive Administration

In line with the views about change and knowledge, Daoism proposes administrations to do nothing. To Laozi, governments should serve and love their people through inaction.\textsuperscript{347} The best way to serve is by not serving.\textsuperscript{348} The best way to govern is by not governing.\textsuperscript{349} Laozi saw failure is caused by action, loss is caused by control.\textsuperscript{350} In order to avoid the trouble of administrative supervision and sanction, people may tend not to disclose information. Good, therefore, becomes evil.

Laozi viewed people as able to find the best way for themselves. Administrative directions, however, may lead to more undesirable, distorted, and unintended outcomes.\textsuperscript{351} A

\begin{flushright}
\textsuperscript{343} Id. at 38 (“Get rid of wisdom and reason, and people will live a hundred times better; get rid of kindness and justice, and people…will love and obey; get rid of cleverness and profit, and thieves will cease to exist.”)
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\begin{flushright}
\textsuperscript{344} Id.
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\begin{flushright}
\textsuperscript{345} Id. at 40.
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\begin{flushright}
\textsuperscript{346} Id.
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\begin{flushright}
\textsuperscript{347} Id. at 20 (“Can you serve and govern without effort [?]…can you light the world without knowledge [?]”)
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\textsuperscript{348} Id. at 21.
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\textsuperscript{349} Id.
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\textsuperscript{350} Id. (“[T]o act is to fail…to control is to lose.”) The way to avoid failure is to maintain things in their natural status. Id. at 116. Laozi stated, “Where the government stands aloof, the people open up; where the government steps in, the people slip away…directness becomes deception, and good becomes evil.”
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\textsuperscript{351} Id. at 114 (“[T]he greater the prohibitions, the poorer the people; the sharper their tools, the more chaotic the realm; the cleverer their schemes, the more common the bizarre; the better their possessions, the more numerous the thieves.”)
\end{flushright}
successful administration, therefore, does not insist and intervene but allow people to transform, correct, enrich, and simplify themselves.\textsuperscript{352}

**No-Harm Principle**

Laozi also suggested the “no-harm” principle.\textsuperscript{353} Administrations may possess the power but should not harm people. The no-harm principle relates to the no-contend principle. The virtue in Daoism is not about doing anything positive, such as being benevolent, reasonable, or knowledgeable, but avoiding negative impact, such as harm. Similar to self, administrations have two ways to avoid harm: one is “being soft,” the other is “no-contend.”\textsuperscript{354}

“Being soft” suggests to administrations to remain soft and weak.\textsuperscript{355} The rationale of “being soft” is based on the changing order that everything is moving towards its reversion.\textsuperscript{356} A metaphor of the sea is used to illustrate the ideal of “no-contend.” “The reason the sea can govern a hundred rivers is because it has mastered being lower.”\textsuperscript{357} Being low, weak, not motivated to contend and compete are guides under the no-harm principle.\textsuperscript{358} Daoism argues that if a state keeps engaging in competition and warfare, this state will collapse no matter how

\textsuperscript{352} \textit{Id.}

\textsuperscript{353} \textit{Id.} at 120 (“Ruling a great state is like cooking a small fish, when you govern the world with the [D]ao, spirits display no powers, not that they have no powers, their powers don’t harm the people…the sages keep them from harming.”)

\textsuperscript{354} Lao, Vol. I, \textit{supra} note 85, at 185-86.

\textsuperscript{355} Taoteching, Red Pine, \textit{supra} note 72, at 104. To Laozi, “remaining weak is being strong.” The original text in Chinese is “守柔曰强” (sou rou yue jiang).

\textsuperscript{356} \textit{Id.} at 80 (“The [D]ao moves the other way, the [D]ao works through weakness.”)

\textsuperscript{357} \textit{Id.} at 132.

\textsuperscript{358} \textit{Id.} at 162 (“[T]he Way of Heaven is to help without harming; the Way of the Sage is to act without [competing].”) The original text in Chinese: “天之道，利而不害。圣人之道，为而不争。” (tian zhi dao, li er bu hai; shengren zhi dao, wei er bu zheng)
strong it was.\textsuperscript{359} Not contending can avoid harm and attack. In line with these views, Daoism does not suggest development.\textsuperscript{360}

Legalist Administration

Contrasted with Confucians’ trust and Daoist inaction, Legalist administration is based on distrust. In order to establish a stable and prosperous state, rulers should observe, be still, and creating fear to ensure uniformity and unification through written laws, rewards, and punishments. Legalist administration, therefore, may come with higher administrative cost.

Rulers

Rulers are the Way.\textsuperscript{361} Legalists consider that people rely on their rulers to lead and represent the state.\textsuperscript{362} People, therefore, should follow authorities as the highest guidance.\textsuperscript{363} Moreover, this guidance should be the only authority for maintaining a unified and stable social order.\textsuperscript{364}

In order to effectively govern a state and its administration, Legalists believed that rulers should be empty and still.\textsuperscript{365} “Emptiness” requires rulers not to reveal their desires, will, and thoughts.\textsuperscript{366} In accordance with Han Feizi, “evil” officials spy into rulers’ secrets,\textsuperscript{367} enjoy safety

\textsuperscript{359} Lao, Vol. I, \textit{supra} note 85, at 187.

\textsuperscript{360} \textit{Id.} at 189.

\textsuperscript{361} Lao, Vol. I, \textit{supra} note 85, at 290.

\textsuperscript{362} \textit{Id.}

\textsuperscript{363} \textit{Id.}

\textsuperscript{364} \textit{Id.} at 313.

\textsuperscript{365} Han Feizi, \textit{supra} note 75, at 27.

\textsuperscript{366} \textit{Id.}

\textsuperscript{367} \textit{Id.} at 29.
and profit that they do not deserve, find ways to fulfill private schemes, and show different faces in accordance with rulers’ preferences. To avoid being deceived, wise rulers should appear to be empty, so that “no one can seek him out.” Rulers should let officials and ministers “show their true form” and allow subordinates to “display their valor to the full.”

Learning from Daoism, Han Feizi suggested that rulers should repose inaction but observe the motives and defects of their officials. This observation borrows partly from Confucianism emphasizing the conduct of people. To Legalists, rulers should not merely listen to what people say, but try them out “in government office and examines their achievements, then even a man of mediocre judgment can tell whether he is stupid or wise.” Legalist observation, however, should be hidden and focus on defects. Rulers should see but not appear to see, listen but not seem to listen, know but as if not know. In order to be empty, Han Feizi suggested rulers not to correct anything for others, but merely compare the words with the results.

Being empty by showing nothing is described as the darkness of the rulers’ mind, which aims to create “tremble fear” of the being governed. Together with punishments, fear is

368 Id. at 34.
369 Id. at 101.
370 Id. at 27.
371 Id. at 28.
372 Id. at 27-28.
373 Id.
374 Id. at 143.
375 Id. at 28.
376 Id.
377 Id., and id. at 29 (“Hide your tracks, conceal your sources, so that your subordinates cannot trace the springs of your action.”)
378 Id.
considered to be an effective governing tool to make officials “awing the people, wiping out wantonness and sloth, and preventing lies and deception.”

Fear should be established by conviction as well. Conviction requires rulers to be certain as if there is no other option at all. To Legalists, rulers should stick to objectives, “take hold of the handles of government carefully and grip them tightly.” In addition, rulers should “destroy all hope, smash all intention” of wresting from those objectives. Officials are considered to be tigers, rulers should guard the door, fast the gate, smash their cliques, arrest their backers, “deprive them of all hope of support, and the nation will be free of tigers.”

Rewards and Punishments

Legalist administration emphasizes on both rewards and punishments. Han Feizi believed that governing a state begins with governing officials. In order to control evil officials, rulers should have “two handles.” One is rewards, and the other is punishments. The rationale of the two handles is to presume that people, in general, fear of penalties that inflict mutilation and death, but hope to have profits.

When rulers are empty and reserved, administrative affairs are handled by officials. Rulers assign responsibilities in accordance with officials’ own proposals and assess their accomplishments. When accomplishments match with responsibilities, rulers reward the
Likewise, when accomplishments do not match with responsibilities, rulers punish the officials. The aim is not to allow officials to promise something they cannot accomplish.

To Han Feizi, in offering rewards and imposing punishments, rewards should be “as benign as the seasonable rain” that profits all men; punishments should be “as terrible as the thunder” that cannot be assuaged. Moreover, rewards and punishments should be correctly apportioned. Rewards should not be over-liberal, and punishments should not be over-lenient. Both rewards and punishments should be strictly enforced.

**Obedient Administration**

To Legalists, rulers are the ultimate virtue, which should be the only direction of a state. A well-ordered society is viewed to be established by rulers, who uphold the law, abandon private schemes, focus on one goal, and act upon one object. This authority is considered to be the sovereign.

A threat to this sovereign is evil officials. Han Feizi maintained that officials may invade the ultimate authority gradually by shifting directions rulers may not know. These officials,  

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386 *Id.*  
387 *Id.*  
388 *Id.*  
389 *Id.* at 31.  
390 *Id.* at 38.  
391 *Id.* at 31. To Han Feizi, over-liberal rewards will encourage officials to grow lax in their duties while over-lenient rewards will make it easy for evil officials to do wrong.  
392 *Id.*  
393 *Id.* at 38.  
394 *Id.*
therefore, should be governed and limited by law.\textsuperscript{395} Moreover, the authority should be centralized in the hands of rulers.\textsuperscript{396} Legalists require officials to be obedient.\textsuperscript{397} Administrative speech should be unified. Conduct should be controlled.\textsuperscript{398}

Intellectuals with independent thoughts are considered to be an obstacle of governance.\textsuperscript{399} To Legalists, benevolence cannot prevent people from bad behavior,\textsuperscript{400} justice is hard to follow,\textsuperscript{401} and wisdom and wile destruct consistency.\textsuperscript{402} Thus, intellectuals are considered to be a threat to a stable society.

**Distrust**

Legalism may establish a social order with distrust based on a negative assumption that the only concern of humans is self-interest. In order to establish a strong state, a unified order must be enforced by laws and strict punishments.\textsuperscript{403} People and officials should be obedient, shaped, and controlled. A stable order is considered to rely on certainty, consistency, and inflexibility. Legalist administration, therefore, shall possess the centralized power and conduct

\textsuperscript{395} Id. (“They are permitted to make no move that is not in accord with law.”)

\textsuperscript{396} Id. at 39 (“Authority should never reside in two places; the power of decree should never be open to joint use.”)

\textsuperscript{397} Id. at 36 (“He follows the lead of his superiors and obeys the law of his sovereign; with [an] empty mind he awaits orders and does not question whether they are right or wrong.” A truly worthy official should completely follow the authority and “[banish] from his mind the thought of all other loyalties.”)

\textsuperscript{398} Id. (“[T]hough he [official] has a mouth, he never uses it to speak for private advantage; though he has eyes, he never employs them to spy private gain; in all things he is under the control of his superior.”)

\textsuperscript{399} Id. at 117 (“[B]enevolence, righteousness, eloquence, and wisdom are not the means by which to maintain the state.”)

\textsuperscript{400} Id. at 118.

\textsuperscript{401} Id. at 119.

\textsuperscript{402} Id. at 48 (“When the people use wisdom and wile, they bring grave danger to themselves; when the ruler uses them (wisdom and wile), his state faces peril and destruction.”)

\textsuperscript{403} Id. at 18.
unification and uniformity. Thoughts and behaviors should comply with standards. People and society should be merely an extension of rulers. Private interests and local preferences should be eliminated.404

In order to combat self-interest and enforce law and unification, Legalism administration may involve a higher operation cost. The Qin dynasty, in its adoption of Legalism, faced a number of challenges, such as the loss of control of local loyalties, high administrative cost, and people’s resistance against the control by force.405 In Chinese traditional history,406 the harsh and ruthless treatment of people and the aloofness of rulers are mostly blamed.

Although written rules survived to a certain extent in the dynasties after Qin, Legalism was considered to be an extremely dark theory. Confucianism, focusing on benevolence and reasonableness with a goal of establishing virtue administration, was mainly adopted. Although the Confucianism applied by different administrations might not be the same as the original theory,407 the major Confucian guidance remained in terms of administrative directions, education systems, and within Chinese language for more than two thousand years.408 This Confucian culture, however, was negated by Modern China.

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404 Id. at 33 (“In our present age he who can put an end to private scheming and make men uphold the public law will see his people secure and his state well ordered; he who can block selfish pursuits and enforce the public law will see his armies growing stronger and his enemies weakening.”)

405 Id. at 23.

406 This “Chinese traditional history” contrasts with the “modern Chinese history,” which has been rewritten by the Party. This issue will be discussed in the following section “Modern China.”

407 Some scholars consider that “Confucianism” merged with religious beliefs should not be considered “Confucianism” anymore because the core of value should focus on humans.

408 Professor R. Randle Edwards considers that Confucianism merged with Chinese language.
To review the roles of government, below is a table that summarizes different theories.

Table 3. The Roles of Government in Chinese Culture

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Modern China

After the losses of the Opium Wars (1839-1842 and 1856-1860), the collapse of the Qing dynasty of the Manchu Administration (1644-1912), the eight-year Japanese invasion (1937-1945), and Chinese civil wars between the Party and the Kuomintang (KMT) (1927-1950), Mao Zedong established a new China in 1949. Considering the series of ordeals the country
experienced, Confucianism and the Chinese tradition were blamed to be the cause of state weaknesses.

The Cultural Revolution

In order to establish a strong Modern China, Mao launched a campaign of “Revolution in Historical Studies” in 1966.\(^{409}\) This revolution re-examined the whole of Chinese history and publicized a series of “revolutionary opinions.”\(^{410}\) These opinions conclude that the Chinese “history must be re-written,” and “history must be written with Mao [Zedong]’s thought.”\(^{411}\)

Two groups of enemies were labeled: feudalists and the bourgeois. The bourgeois were alleged to have conducted historical studies that distorted the Chinese history. To Mao, “[the bourgeois] cast leading players as supporting players in order to beautify the emperors, kings, generals, and ministers and to vilify the laboring masses of people.”\(^{412}\) “In this great proletarian cultural revolution, we must completely destroy the reactionary bourgeois positions in historical studies and smash the counterrevolutionary idealist system…which reserves the restoration of capitalism.”\(^{413}\)

Anti-Confucians

In light of this campaign, new Chinese history books are written such as *Reversal of Verdicts in Chinese History* by Hua Kang.\(^{414}\) Articles with the Marxist viewpoint, such as “Confucius: A Thinker WhoStubbornly Defended the Slavery System,” linked Confucianism

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\(^{409}\) Wang, *supra* note 78, at 31.

\(^{410}\) *Id.*

\(^{411}\) *Id.*

\(^{412}\) *Id.* at 33.

\(^{413}\) *Id.* at 32.

\(^{414}\) *Id.*
with capitalism and slavery. In 1973, the official Anti-Confucian Campaign was launched. More official media criticized Confucius and his followers, branded Confucians as “retrogrades,” “counter-revolutionary,” which are enemies of the revolution. Communist scholars, such as Professor Yang Jung-kuo, alleged further that Confucianism led to a feudal society, and Confucius was “personally an immoral elitist.”

The campaign also portrayed Confucius as having a demeaning attitude to ordinary people and manual labor, discouraging his disciples from learning farming techniques, categorizing people into higher and lower classes, and demeaning the lower class as stupid and who cannot be changed. The opinion was developed that the ancient sage of Confucianism was the most evil.

All types of media such as newspapers, editorials, articles, party documents, textbooks, children’s books, academic journals, and others condemned Confucius. Mass rallies, study groups, and assemblies were held in schools, factories, and villages by party cadres. Denunciations of Confucius were encouraged and could be politically mandatory.

During the Anti-Confucian Campaign, Deng Xiaoping was removed from the authority;

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416 Ryan Y. Voon, Anti-Confucian Campaign, 23 Concord Rev. 1, 7-8 (2013) [hereinafter Voon].

417 Id. at 8.

418 Id.

419 Id. at 9.

420 Wang, supra note 78, at 172.

421 Voon, supra note 416, at 9.

422 Id. at 9-10.
among others, he was charged with “Confucian educational thinking,” “respect for discipline and severe teachers,” and “knowledge above all else.”423 Although Deng Xiaoping returned to authority in 1977, media and speech censorship continued, and Mao’s anti-Confucian view remains.424 Although Confucius Institutes have been established by the Communist administration since 2004, it is unclear if a real Confucianism will be adopted in practice.

In the 1960s, the Anti-Confucian Campaign was coupled with anti-intellectualism. To Mao, intellectuals embraced outdated values and practices.425 The Mao Administration also portrayed intellectuals as people who put themselves in a higher class and committed sins such as not learning from people in real conditions, merely saying but not doing, and reinforcing social inequality.426 Intellectuals, therefore, were suppressed during the Cultural Revolution (1966-1976).427

Praising Legalists

Following the First Emperor of the Qin dynasty, Mao adopted Legalism. “Criticizing Confucius and venerating Legalism.”428 To Mao, Legalists are brave in reformation,429 and the First Emperor was the first administration to unify China who correctly burned the books and

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423 James A. Gregor & Maria Hsia Chang, Mao’s Last Campaign, 19 ASIAN SURVEY 1073, 1074 (1979).

424 In 2013, Chinese scholars and foreign Chinese experts who studied books or articles from the mainland China under the Communist administration still commonly consider that Confucianism relates to slavery, feudalism, classification, and capitalism.

425 Lieberthal, supra note 45, at 71.

426 Id.

427 Id. Mao compared himself with the First Emperor of the Qin dynasty. “He buried only 460 scholars alive; we have buried forty-six thousand scholars alive...You [intellectuals] revile us for being Qin Shi [Huang]. You are wrong. We have suppressed Qin Shi Huang a hundredfold.”

428 Wang, supra note 78, at 173.

429 Id. at 174.
buried scholars alive. Similar to Han Feizi, Mao considered that the words of different thoughts must be banned.

Instead of social rules of propriety directed by teachers and officials, written laws with strict and harsh punishments are adopted. Mao saw Legalists correctly punished those had the evil intention to use history attack the Communist Party, socialist system, dictatorship of proletariat, and the Great Proletarian Cultural Revolution.

Legalism is considered to positively recognize the class struggle that supported centralization, institutionalization, economic production, and scientific modernization. The First Emperor was praised for his contribution of national unity. With respect to the rule of law, Legalism was praised for its equal treatment of people, which is in contrast with Confucianism that “benefited the old aristocracy” by believing benevolence and righteousness.

To Maoists, Legalism and Confucianism are two irreconcilable schools of thoughts that represent different class interests. Confucianism was labeled as idealism which advocates “restoring antiquity” and is against the historical tide. Legalism was labeled as materialism which “manifests the law,” follows the historical tide, and advocates “emulating the present.”

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430 Id.
431 Id.
432 Id.
433 Id. at 175.
434 Voon, supra note 416, at 12.
435 Id.
436 Id.
437 Wang, supra note 78, at 177.
438 Id.
439 Id.
In order to establish a modern China, “four old” elements—old customs, old habits, old culture, and old thinking must be attacked. Class struggle through violence and extreme measures must be continued.

Rule by Will

At the same time as praising Legalism in 1966, Mao established the Red Guard formed by millions of students and youths, relying on his personality cult to continue class struggles against all “counter-revolutionaries,” “revisionists,” “capitalist roaders in the Party,” and “bureaucrats.” During that time, cruelty towards “class enemies” was glorified and praised as a virtue. Confucian values of benevolence, justice, and reasonableness were replaced by violence, hostility, and “class hatred.”

In 1967, a leading newspaper published an article, “In Praise of Lawlessness,” to criticize law and the legal system as a “shackle” and a “strait-jacket” to restrict the revolution. Chinese people should be ruled by Mao’s thoughts instead of by written law and unwritten traditional moral code. Chinese people were urged to “smash the Public Security, the Procuratorates, and the Courts,” and to create “the more chaos, the better.” The thought of rulers is the only guidance, and people’s thoughts must be unified.

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440 Voon, supra note 416, at 6.

441 Id. at 11, 15-16.

442 Chen, supra note 41, at 30-31.

443 Id. at 31.

444 Id. at 32.

445 Id.

446 Id.

447 Id.
CPC Constitution 2012

Under the Mao Administration, a new social order was established. Intellectuals, entrepreneurs, and landlords were replaced by peasants, workers, and state institutions; families, communities, and administrations were controlled by teenagers through the Red Guards, then Mao’s military, and the CPC.

Violent and extreme measures replaced propriety codes of benevolence and justice. Class struggle replaced harmony. Planned, political, and public interests are substituted for individual and private interests. New simplified Chinese characters, a writing format, and the pinyin system preempted traditional Chinese characters. Legalism emphasizing law and punishments was adopted, then abolished, and re-established. Media and schools were controlled. Behavior, speech, dresses, and thoughts were unified. Modern China had been set up under European ideologies that embrace people equality and uniformity—communism and socialism.

These European ideologies are still the “highest ideal and ultimate goal” of China today. The CPC Constitution, however, mentions “Chinese characteristics” which might be viewed to be mysterious. This section examines the possible Chinese traditional elements in the CPC Constitution of 2012. The discussion will focus on the traditional elements that relate to the Chinese food and product safety regulatory system such as the “socialist rule by law” inherited from the Legalist centralization and unification of uniformity and “socialist virtue” with self-regulatory and non-interference requirements inherited from the unwritten culture of

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448 As mentioned, there was a period of lawless as well.


450 Since China seems to not be moving towards a legal system based on an enforceable Constitution, a study of the CPC Constitution is valuable, particularly considering the leading role of the Party in governments, state-owned enterprises, and social institutions.
flexibility.

**Socialist Rule by Law**

Legalism and the Party emphasize centralization. The CPC Constitution requires members to uphold “democratic centralism,” and “CPC-democracy,” which refers to intra-Party democratic right and under centralized guidance. In light of this system, the Party must safeguard members’ democratic rights for initiative and creativity, but respect members at higher positions, and ensure the Party solidarity and unity. Centralism is considered to be the “fundamental organizational principle” of the Party. Moreover, “the whole Party must achieve unity in thinking and action.”

The CPC Constitution proposed the rule by law, and the “socialist legal system” consolidated the “people’s democratic dictatorship” and “socialist political civilization.” Thus, the Party should remain a dictatorship but extend democracy in scope and practice at the same

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451 CPC Constitution, supra note 449, General Program.

452 Id.

453 Id.

454 Id., and id. art. 34(6). Besides the centralization principle, the CPC Constitution requires Party cadres to “maintain a democratic style of work,” which means taking “the overall situation into consideration, and be good at uniting and working with other comrades, including those who hold differing opinions.” The ideal scenario is that members are free to express their ideas with creativity but subject to the approval from members at the higher positions.

455 Id. General Program. Legalism and the Party require unification. Modern China’s unification stems from the guidance within the ideologies of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, Three Represents, and the Scientific Outlook of Development. In light of these ideologies, the Party shall “keep to the socialist road [to] uphold the people’s democratic dictatorship,” and to “combat bourgeois liberalization.”

456 Id. General Program (requiring Party members to promote “socialist democracy” and establish a socialist country under the rule of law).

457 Id.
People shall have a protected right to manage state and social affairs, as well as economic and cultural matters. Free views shall be encouraged, and human rights shall be respected and safeguarded.

Instead of considering law merely as a governing tool of rulers in Legalism, the CPC Constitution inserts democratic elements into law-making and administrative oversight functions. The aim appears to be governing administrative officials through increasing public participation and surveillance. Nevertheless, it is unclear to what extent these “democratic elements” will be implemented in practice. Due to the destruction of unwritten benevolence and reasonableness, interpretation of rules may very likely rely on political and economic interests of ruling Party members.

Similar to the view of Legalists, the Xi Jinping Administration states that the first step to govern the state is to strictly govern the Party. Xi proposed a “Chinese dream” of improving the “Constitutional governance” and the “rule by law” and pursuing a society where no one “will, can, and dare to violate the law.” The Xi Administration considered that governing power shall be put in a cage and imposes constraints on Party members by preventive and punishment

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458 *Id.* This “socialist legal system” shall be established through improving the system of people’s congresses, multiparty cooperation, political consultation, regional ethnic autonomy, and self-governance at the primary level.

459 *Id.*

460 *Id.*

461 *Id.* The Party shall also develop sound systems regarding the procedures of democratic election, administrative decision-making and oversight. The goal is to strengthen the law enforcement system for governing the state by the rule of law.

462 Ren Huiwen (任慧文), *Xi Jinping Zhiguo Lizheng “Shier” Xinguandian* (習近平治國理政「十二」新觀點) [Xi Jinping’s Twelve New Governing and Management Perspectives], H.K. ECON. J., July 15, 2013, http://www.hkej.com/template/dailynews/jsp/detail.jsp?dnews_id=3757&title_id=612568. To Xi, the goal is rule by law. In order to achieve this goal, Xi administration requires “scientific legislation, strict implementation, just judiciary, complete conformity.”

463 *Id.*
mechanisms.

“Socialist Virtue”

Other than Legalism-related elements, the CPC Constitution borrows several Confucian elements relating to the role of people, exemplary conduct, self-regulation, and harmony, but without moral guidance such as benevolence, righteousness, and trust of Confucianism. Since Legalism is the dominate ideology, the meanings of these “Confucian” elements have been distorted and adjusted.

The CPC Constitution proclaims that people are the masters of the nation, but these masters are under the leadership of rulers, the Party. In the CPC Constitution, the first priority of the Party is to increase productive forces, enhance the strength of the country, and improve people’s living standards. All development should be established “for the people, by the people and with the people.”

In the Party’s rhetoric, people are considered to be the “masses.” The CPC Constitution requires Party members to maintain “the closest possible ties,” exercise power, show concern for the masses, and place themselves into and not above the masses. Nevertheless, Party members

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465 Id. As a leader, the Party shall “put people first and [call] for comprehensive, balanced[,] and sustainable development.”

466 Id. In accordance with the Party Constitution, the Party shall lead people to develop a “socialist market economy,” which establishes both public and private sectors with the market force. The Party shall also balance the development between urban and rural regions, economic and social directions, human and nature, domestic and international structures.

467 CPC Constitution, supra note 449, art. 3.

468 Id. General Program. The CPC Constitution considers “the biggest potential danger” is the distance between the Party and the masses. The Party, therefore, shall follow the “mass line,” “[do] everything for the masses,” and “[rely] on the masses in every task. The connection with the masses is “a matter of vital importance” for the Party. Party members are required to connect with, serve for, get into, and listen to the masses under the principle of “from the masses, to the masses.”
themselves seem to not be the masses. Party members are the leaders, the masses are not. These leaders have administrative and political rights that the masses do not have.\footnote{Considering individuals under Confucianism, Confucius and Mencius did not place limits on anyone from possessing administrative, political, or property rights. The “classification” between “superior men” and “small people” is subject to the conduct of people. People are free to determine what kind of people they want to be.} This distinction between Party leaders and the people (the masses) is contrary to Confucianism.\footnote{In Confucianism, everyone is capable of being a leader as long as that person is benevolent and righteous.}

The Party Constitution requires the “rule of virtue.” In light of this requirement, the Party shall promote “socialist cultural and ethical progress” and combine “the rule of law and the rule of virtue.”\footnote{CPC Constitution, \textit{supra} note 449, General Program.} On its face, this virtue seems to relate to Confucian moral guidance. But to the Party, the “rule of virtue” is a part of “socialist culture” and “socialist value,” which adheres to Marxism.\footnote{\textit{Id.}}

Under the 2012 CPC Constitution, the “socialist virtue and value” relates to “the lofty ideal of communism,” “patriotism-centered national spirit,” “national dignity, self-confidence and self-reliance, resistance to corrosion by decadent capitalist and feudal ideas,” “ideological guarantee, motivation and intellectual support for reform, opening up and socialist modernization,” “centering on reform and innovation,” and other values.\footnote{\textit{Id.}} In other words, this ideological virtue requires Party members to adopt communism, combat against capitalism and feudalism, and emphasize national modernization through reform and open-policy for unity.

The CPC Constitution also requires Party cadres to be selected on the basis of “moral integrity” and professional competence.\footnote{\textit{Id.} art. 33.} No specific moral standards, however, are provided in
the CPC Constitution, but can be guided by some related terms and phrases such as: “honesty,” “equity and justice,” “upholding truth and rectifying mistakes,” and “tell the truth.” This may raise questions about the priority of moral standards. If conflicts exist among moral integrity, such as honesty, and Party interests, what should Party members do?

The CPC Constitution requires a good education involving general knowledge and Party discipline. General knowledge, however, focuses on the central task of achieving economic development. Party discipline refers to the support of socialist ideologies, values, and culture, which must be practiced under the Party’s leadership. Thus, although the term of “rule of virtue” is adopted, this “rule of virtue” does not relate to Confucian benevolence or justice but political direction and ideologies.

Another Confucian-like requirement is exemplary conduct. The CPC Constitution requires members to play an exemplary role in production, work, study, and social activities. The former Vice President, Wen Jiabao, took a phrase emphasizing conduct that can be sourced from Confucianism: “conduct as guiding principles” (以身作则, yishen zuoze).

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475 Id. art. 34(3).
476 CPC Constitution, supra note 449, General Program.
477 Id., and id. art. 9. Party institutions have a duty to “educate the Party member who lacks revolutionary will, fails to fulfill the duties…or is not qualified for membership[,] and require [members] to correct…mistakes within a prescribed time.” Id. art. 3. Party members have a right to benefit from education and training. Id. art. 34. “The commissions for discipline inspection at all level shall frequently provide education for Party members” regarding their duties to comply with Party discipline.
478 Id. art. 3(2), General Program. As a leader, “All Party members [shall] play an exemplary and vanguard role.”
Applying this view to Modern China, written rules on paper are often ignored by administrations.\(^\text{480}\) The Xi Administration required Party members “to be solid for shaping iron” (打铁还需自身硬, *datie haixu zishenying*).\(^\text{481}\) Being “solid” required members to allow and accept criticisms and to conduct self-corrections.\(^\text{482}\) In order to “shape iron” (which may refer to being leaders), Party members should be the first one to implement Party discipline, instructions, principles, policies, resolutions, laws and regulations.\(^\text{483}\)

Self-Regulation

In order to develop Chinese socialism, the Party Constitution requires to promote “self-improvement,” lead all ethnic groups to pursue “self-reliance,” establish a system of “self-governance” at the primary level, enhance people’s “self-confidence,” and conduct “self-criticism.”\(^\text{484}\) Leaders at all levels, Party cadres, shall “exercise self-respect, self-examination, self-caution and self-motivation, combat bureaucratism, and fight against malpractices such as abuse of power for personal gain.”\(^\text{485}\)

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480 China has common sayings such as “the central has policies, the local has strategies” (上有政策, 下有对策), which means local administrations always have strategies not to implement the central rules on paper and “policies remain at Zhong Nan Hai” (政不出中南海),” which means written rules on paper are not implemented outside President’s home.


482 *Id.*, and CPC Constitution, supra note 449, art. 3(6).

483 CPC Constitution, supra note 449, art. 3, 31(1), 34(5). As leaders, Party cadres shall “set an example by their own actions, work hard and live simply…play and an exemplary role.”

484 *Id*. General Program, art. 34(5).

485 *Id*.
This self-regulation doctrine seems to extend to Party organizations as well. The CPC Constitution requires the Party to “strengthen itself ideologically and organizationally” and “improve its conduct.” The Party is also required to “build itself for public interests, exercise governance for the people, practice self-discipline, [and] be strict with its members.” Thus, CPC Constitution and Party members are subject to the self-regulatory requirement, which may be sourced from Confucianism.

Harmony by Force

Another Confucian terms adopted by CPC Constitution is “harmony.” Under the Party Constitution, the CPC Constitution shall establish a “harmonious” socialist society. To the Party, the focuses of harmony shall be “people’s wellbeing” and wealth distribution in order to “shar[e] fruits in a more equitable way.”

CPC Constitution harmony also relates to “social management,” which refers to two contradictions: 1) between the Party and its enemy; and 2) among people in society. In order to resolve these contradictions, the Party strengthens measures to ensure law enforcement, combat criminal activities, enhance social stability and economic development, and ensure national security and interests. Social management, therefore, is directly tied to economic interests, force, and control, which is different from Confucian harmony emphasizing an open and

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486 In fact, the Party does not have legally organizational status in China. Some scholars question the “illegal” status of the Party.

487 CPC Constitution, supra note 449, General Program.

488 Id.

489 Id.

490 Id. The General Program provided that the Party shall “enable all the people to share in more fruits of development in a more equitable way” and “create a situation in which all people do their best, find their best places in society[,] and live together in harmony.”

491 Id.
Benevolence, Justice, and Trust

Despite the Confucian elements presented in the CPC Constitution, the foundation of morality regarding benevolence, reasonableness, and justice does not exist. The socialist virtue articulates political and economic interests for unification and economic growth.

Although the CPC Constitution mentions “honesty and fraternity” (诚信友爱, chengxin youai) and “equity and justice,” the application of “justice” focuses on criminal matters, which refers to law enforcement and punishments.

The Party is also required to select and promote cadres who “have won the trust of the masses in reform, opening up and the modernization drive.”492 The socialist trust, therefore, relates to achievements in public service and modernization.493

Self-Interest

A possible common view among Chinese philosophical theories and the CPC Constitution is the minimized role of self. To Legalists, self-interest must be eliminated by unification and uniformity. In Confucianism, self-interest is considered to be an obstacle of benevolence and reasonableness. Daoism believes self-interest should also be minimized, and

492 CPC Constitution, supra note 449, General Program.

493 With respect to the impact on implementation of law, independent moral standards, such as benevolence and reasonableness, seem to be replaced by political and economic interests. In other words, if Chinese administrations and judges find provisions that do not provide clear definitions on paper, the subsequent interpretations of these provisions may very likely incorporate political and economic policies approved by higher or related authorities.

This tendency of interpretation may be caused by and create distrust. Assuming the adjudicative and judicial function is to pursue justice, the term “justice” may be expected to refer to an independent and objective value, which should not be tied with any institutions or authorities. If “justice” is subject to Party’s political and economic interests under the names of “state interests,” “public interests,” or “national security,” this “justice” may not reflect the expectation of society.
Buddhism sees self-interest is an illusion. As a result, Chinese culture generally tends to minimize the role of self or individual. The CPC Constitution adopts this approach to require Party members to work “selflessly,” which relates to the self-regulatory structure.  

Reversionary and Inactive Daoism

The CPC Constitution reflects the philosophy of Daoism in terms of its reversionary and contradictory views existing together and the inaction of the authorities, which may facilitate flexibility.

Reversionary or contradictory views include the terms such as: “democratic centralism,” “democratic dictatorship,” unification and innovation, and state-directed open market policies. These contradictory concepts may lead to confusion, but the aim is to create boundaries that cover broader administrative power.

For instance, the CPC Constitution considers “democratic centralism” as “a combination of centralism on the basis of democracy[,] and democracy under centralized guidance.”

Although the Party Constitution requires expanding intra-Party democracy, encouraging creativity, and safeguarding member’s democratic rights, the democracy “must be practiced…to ensure the solidarity, unity and concerted action in the whole Party and…implementation of [Party’s] decisions.” Thus, the socialist democratic right may be safeguarded but always

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494 CPC Constitution, supra note 449, art. 3(3). This view may be different from that held in the West. Western constitutions often start with individual rights, which establish a boundary of governmental power. Capitalism also begins from the selfishness of human nature, which is considered to be an incentive to economic development. In the West, self-interest and individual rights can be the foundation of the economic, political, and legal systems. Moreover, based on the right to vote, people may also have a right to expect and require governments to protect and assist their wellbeing. The Western culture, therefore, may tend to enlarge the role of self and individuals, and government can be a tool to achieve greater self-interest. This view can be at the different direction from the Chinese food and product regulatory system.

495 Id. General Program.

496 Id.
within the boundaries of the Party’s unity principle. In other words, democracy exists within centralism, but centralism is required to safeguard democratic rights. Each direction contains a condition to embrace the opposite.

Similar reversionary and contradictory concepts also present in the role of “leaders” and “masters” under the “democratic dictatorship,” as well as the unification and innovation requirements, and the “state-directed open market policy.” These reversionary and contradictory terms contribute to the paradox of uniformity and flexibility in the Chinese regulatory system.

Another Daoism element centers on non-interference. The CPC Constitution prohibits leading bodies at higher levels to interfere with the matters of lower organizations. Moreover, the leading bodies at all levels are obliged to solicit opinions from lower organizations when

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497 Since the U.S. Congress may enact certain laws for the whole country, federal law has this centralism characteristic as well. However, China’s centralism is much more concentrated than the system in the United States in terms of the legal structure on paper. If considering the China Protocol, centralism is required under the WTO law.

498 In accordance with the CPC Constitution, the Party is the leader, and the people are the masters of the country. This mastership and leadership was formed by the revolution in 1949. CPC Constitution, supra note 449, General Program. Chinese “democracy” in the CPC Constitution includes, among others, the encouragement of “the free airing of views,” “democratic procedure” of Party cadre election, a “democratic style of work” that takes “the overall situation into consideration,” a collective leadership with individual responsibilities, and “the Party’s leading bodies at all levels are elected.” XIANFA Pmbl. (1982) (China) [The Constitution of the People’s Republic of China] available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm, and CPC Constitution, supra note 449, General Program. Id. art. 36.

499 The CPC Constitution emphasizes unification and innovation at the same time. Unification may be based on unifying thoughts and ideologies and the subordination to the higher authorities. Innovation, however, may emphasize new methodologies and creativity that are different from the authorities and unifying views. These two concepts can be contradictory. Similar to centralism and dictatorship, unified ideology is considered to be a foundation. Within the boundary of this foundation, Party members, however, are encouraged to be innovative. CPC Constitution, supra note 449, General Program.

500 With respect to economic development, the Party adopts an open policy within Chinese socialism. In Chinese socialism, public ownership plays the dominant role. Different economic sectors shall be developed under the open policy. To the Party, the main question is how the economic system may benefit from productive forces, enhance overall strength, and improve people’s living standards. A “realistic and pragmatic” approach, therefore, is emphasized, which embraces a state-directed model and the open policy at the same time. The state-directed model can be a closed system with limited participants, which can be at tension with the open policy. CPC Constitution, supra note 449, General Program.

501 Id. art. 14.
making important decisions.\textsuperscript{502} Daoism culture encourages inaction, which contributes to the laissez-faire approach in regulating food and product safety.\textsuperscript{503}

In addition, after the economic disaster caused by planned policy before 1979, a liberal approach, with minimum administrative interference, has been adopted under the label of market economic policy, which is considered a form of capitalism.\textsuperscript{504} This market’s invisible hand can turn out to be “king” in practice, particularly when it comes with economic and political interests, and this invisible hand generally does not provide written rules in advance.

Table 3 below illustrates the different ideological elements presented in the CPC Constitution.

Table 4. Chinese Culture in the CPC Constitution

<table>
<thead>
<tr>
<th>Elements in the CPC Constitution 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legalism</strong></td>
</tr>
<tr>
<td>✷ Centralism, unification, uniformity</td>
</tr>
<tr>
<td>✷ Selfless</td>
</tr>
<tr>
<td>✷ Rule of Law: “Socialist legal system” that consolidates the “democratic dictatorship” and “socialist political civilization”</td>
</tr>
<tr>
<td><strong>Reversionary and Inactive Daoism</strong></td>
</tr>
<tr>
<td>✷ Contradicted concepts: “Democratic Centralism,” “Democratic Dictatorship,” unification and innovation, and state-directed open market policy</td>
</tr>
<tr>
<td>✷ Inaction and flexibility: non-interference administration, laissez-faire capitalism (driven by invisible hand)</td>
</tr>
<tr>
<td><strong>Adjusted Confucianism</strong></td>
</tr>
<tr>
<td>✷ People are the masters (the masses) under the CPC’s leadership</td>
</tr>
<tr>
<td>✷ Socialist virtues: socialist ideologies, moral integrity, scientific methodology, education (general knowledge and party discipline)</td>
</tr>
<tr>
<td>✷ Exemplary conduct of Party members</td>
</tr>
<tr>
<td>✷ Self-regulation of CPC</td>
</tr>
<tr>
<td>✷ Socialist Harmony: wealth distribution and law enforcement by CPC</td>
</tr>
</tbody>
</table>

\textsuperscript{502} Id.

\textsuperscript{503} This laissez-faire approach will be discussed in Chapter 5.

\textsuperscript{504} Coase, supra note 64, passim (2012).
Conclusion

Reviewing the Chinese legal tradition, two opposing themes were examined in this chapter. One is the “main stream” of unwritten tradition of flexibility, which is based mainly on Confucianism, Daoism, and Buddhism. Another is the “side but modern stream” of written tradition of uniformity is mainly sourced from Legalism. Although these two themes can be viewed to be at the opposite ends regarding regulatory structure, Chinese administrations, as shown in the 2012 CPC Constitution, often combine the written and unwritten approaches, which create a paradox between flexibility of freedom and uniformity of control.

Unwritten legal tradition of flexibility was established by Confucianism focusing on the goodness of human nature with the belief that humans tend to prefer benevolence, reasonableness, and righteousness and this goodness is considered to be innate and inherent.

Based on this belief, Confucianism suggests virtue administration relying on education and exemplary administrative conduct rather than written rules with punishments in the pursuit of a stable social order. This unwritten virtue can be pursued in various forms from time to time, from place to place with flexibility. Moreover, written rules and administrations are considered to be effective only if the conduct of these rules and administrative match the inherent virtue. People themselves, therefore, are the guidance. Desirable behavior relies on education, self-cultivation, and self-regulation.

To Confucians, self-cultivation does not mean that people are perfect. Performing goodness is considered to be a continued cultivating process, which depends on people’s abilities. Some may do better, and some may do worse. Everyone is entrusted to have a sense of shame and the ability to improve their behavior. Instead of punishments, shame in the social and informal context, therefore, can be a means of governance.
This social or informal governance may contribute to low-cost administrations. Instead of relying on written rules enforced by police, courts, and officials, the Chinese unwritten tradition depends on individuals and social structure.\textsuperscript{505} Influential individuals in society, such as families, communities, and others, may provide moral codes, corrective directions, and informally enforce moral expectations.\textsuperscript{506}

Although these informal moral codes may be varied, their implementation commonly relies on the self-governance of the social structure.\textsuperscript{507} This self-governing approach may be, in fact, an ideal preventive approach for regulating food and product safety. Considering the preventive approach as required by food and product safety laws, the ultimate goal is no one produces harmful food and products. If people are self-regulated not to commit wrongdoing or self-governed by members of related communities in an early stage, food and product safety problems can be prevented. This preventive approach, however, may not be possible if people merely focus on self-interest.

Legalism believes that written rules can combat self-interest. In contrast to Confucianism, Legalism focuses on the evilness of human nature and relies on administrative control. To Legalists, benevolence, reasonableness, and righteousness are unrealistic and impractical. Humans are concerned only with self-interest, and a stable social order depends on written rules of uniformity, strict punishments, and rewards.

\textsuperscript{505} Edwards, \textit{supra} note 224, at 122-23.

\textsuperscript{506} \textit{Id.} Some social groups may provide informal written moral rules, codes, and guidance. The forms of these moral codes, however, may not be fixed and unified, but subject to the determination of related communities. For instance, moral rules may be based on Confucian ethical norms, the goal of social stability, and economic prosperity determined by business organizations, clan rules, and other informal institutions.

\textsuperscript{507} \textit{Id.}
Goodness is considered not to be found in internal but in external conditions. Law and governments, therefore, work in order to shape human behavior. Virtue is in the hands of authorities, which is subject to the interests of rulers and states. Authorities, therefore, provide guidance. People should not be trusted to regulate or govern themselves, only with unified rules of uniformity with force by government officials. This view established a regulatory structure from another direction that embraces written rules by rulers’ will, obedience administration, strict media control, and unifying thought and behavior of uniformity.

Beyond the views of human nature, the differences between written and unwritten approaches of uniformity and flexibility also stem from the view regarding knowledge and language. Daoism and Buddhism see change as the ultimate truth. Daoism considers the physical world as moving toward its reversion; things contain both positivity and negativity at the same time. Buddhism considers the physical world as an illusion. The physical world is merely a combination of different forms subject to perception. As such, right and wrong do not exist.

To Confucians, words can be meaningless as well because what people say may not come with actual conduct. Conduct as a whole, in accordance with unwritten benevolence, reasonableness, and justice, not merely words, should be counted. When these views of Confucianism, Daoism, and Buddhism are combined, Chinese tradition can be skeptical of words, certainty, and written rules. This view, on its face, opposes the rule of law embracing certainty, consistency, and predictability.

In light of this skeptical tradition about words and written rules, Chinese tradition tends to focus on conduct led by inherent virtue relying on unwritten morality, which may be based on the general guidance of benevolence, reasonableness, and justice. These general principles do not provide fixed formula for all situations. Appropriateness may be based on open factors such as
custom and the specific facts of actual circumstances. This tradition relates to the Chinese open rulemaking system, decentralization, and the food and product safety regulatory system, which will be detailed in later chapters.

This unwritten tradition, however, may share the same foundation with the rule of law in the Western legal culture relying on reasonableness and justice. Although the rule of law requires certainty, consistency, and predictability, written rules are not able to cover all actual circumstances in advance and rely on the analyses of judges, the jury, and even public opinion that are based on specific facts and the perception of terms such as “reasonableness” and “fairness.” Yet, written rules may not be able to specify what these crucial terms mean. Where is the “reasonable man”? What is “justice”? What is “fairness”? The foundation of the rule of law, therefore, can be governed by unwritten virtue as well.

Since 1949, Modern China, particularly during the time of the Cultural Revolution in the 1960s, has adopted and utilized Legalism with communism and socialism by negating benevolence and justice in humans and embraced struggles and violence, centralization, and administrative control of uniformity.\(^{508}\) Today, Legalist written rules by the will of rulers have merged with the self-interest-driven market economic policy of capitalism, but the unwritten self-regulatory tradition has remained. The CPC Constitution reflects the ideologies to serve people, pursue exemplary conduct, self-regulation, and even contradiction and inaction of flexibility, but with a foundation built on self-interest and distrust.

The paradox of written uniformity and unwritten flexibility, therefore, exists concurrently in the Chinese regulatory system, which contains opposite tendencies sourced from different views of human nature and different roles of people, law, and government. The problem,

\(^{508}\) Id.
however, cannot be solved by more laws, more regulation, and more administrative control, but by restoring the foundation of written and unwritten rules relating to the rule of law and flexibility—reasonableness and justice, which were also promoted by Confucius.
CHAPTER 3
CENTRALIZATION VERSUS OPEN RULEMAKING POWER

Introduction

This chapter reviews the paradox in the Chinese law-making system between centralization of uniformity and open rulemaking powers of flexibility, which affects the food and product safety regulatory structure. This chapter finds that although the Chinese law-making system adopts centralization on its face, this system embraces flexibility through opening rulemaking power in terms of scope, rule-makers, and administrative system. This open system as a whole allows local rules to go beyond statutory, judicial, and centralized constraints, which is considered a bottom-up system in practice.

This bottom-up rulemaking system delegates a high level of discretionary power to local administrations to formulate their own food and product safety regulations, which can be varied from “upper-laws” such as statutes at the central level and other local rules at the same level.\(^{509}\) Moreover, due to the ineffective central supervision, local rules at different regions may overlap and contradict with each other. Thus, the local food and safety rulemaking system reflects a self-regulatory and non-interference tradition of flexibility. This flexibility may combine with the self-interest-driven market economic policy and the Legalist negation of morality, which relates to the food and product safety problem.

The aim of this chapter is to answer the questions such as: how is legislative power centralized? How does regulatory power stay open? How does centralized power become fragmented? What are the relationships among these different powers? How extensive is open rulemaking power?

\(^{509}\) The “upper-laws” refer to the legal rules that are positioned at higher levels in “the Hierarchy of Chinese Legal Rules” illustrated at Table 5.
With respect to centralization, China adopts a system that combines powers. Three “branches” of legal rules—the legislature, administrative regulations, and legal interpretation—are ordered into one hierarchy.\(^{510}\) All legal powers, therefore, are centralized in the National People’s Congress (NPC) and its Standing Committee (NPCSC).\(^{511}\)

The open rulemaking power, however, may provide a leeway for laws to reflect reality and actual circumstances. Open rulemaking principles, administrative fragmentation, and ineffective central supervision create this space for latitude. These open rulemaking principles allow the “lower-laws” to be different from the “upper-laws” in accordance with actual need, specific administration, local affairs, and even to “formulating-first” without the basis of statutes.\(^{512}\) Moreover, due the dependency of the Chinese judiciary, the PRC Constitution may not be enforceable in practice.\(^{513}\) Regulations and rules, therefore, may not subject to the constraints of constitutionality.

This chapter is broken into two sections. The first section focuses on centralization, which discusses: 1) the hierarchy of legal rules, and 2) the dependent role of judiciary. Two tables will be presented to illustrate the hierarchy of legal rules: one about the hierarchy regarding legal rules by functions and the other about the hierarchy of legal rules by powers.

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\(^{511}\) Id.

\(^{512}\) The meanings of “lower-laws” and “upper-laws” refer to the hierarchy of Chinese legal rules, as illustrated by Table 5.

\(^{513}\) Since the Chinese judiciary is administered by the executive which has rulemaking power and the responsibility to people’s congresses with law-making function, people’s courts would not be able to challenge the laws enacted or the rules formulated by governments and the state power in practice. Chen J., supra note 42, at 136-37.
With respect to the judiciary, a subsection reviews its dependent role in terms of personnel, executive supervision, and limited interpretative power.

The second section examines open rulemaking power. The discussion includes three subsections: 1) open rulemaking principles; 2) rulemaking fragmentation; and 3) ineffective central supervision. Open rulemaking includes the principles of “actual-need,” “specific administration,” “local affairs,” and “formulating-first.” Rulemaking fragmentation reviews the fragmented rulemaking in accordance with subject matters, geographical regions, administrative levels, and legal interpretation. Ineffective central supervision studies the central alteration and annulment power, divided reporting and recording system, passive inspection system, and the compromises between uniformity and flexibility.

Centralization

The NPC has the supreme authority with respect to the combination of law-making powers. This central legislative body enacts the Constitution and statutes for the nation. Moreover, by leading the State Council, the Supreme People’s Court (SPC),\(^{514}\) the Supreme People’s Procuratorates (SPP),\(^{515}\) and others, the rulemaking and judicial interpretative powers are also centralized in the legislative branch in the NPC. In addition, while the NPC meets only once a year, a significant portion of the NPC’s legislative power has been delegated to its Standing Committee (NPCSC).\(^{516}\) This delegation transfers power from the NPC with 2,986

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\(^{514}\) For more information about the SPC, see *The Supreme People’s Court*, GOV.CN, Mar. 15, 2013, http://english.gov.cn/2013-03/15/content_2354803.htm, and Appendix A.

\(^{515}\) For more information about the SPP, see *The Supreme People’s Procuratorate*, GOV.CN, Mar. 15, 2013, http://english.gov.cn/2013-03/15/content_2354804.htm, and Appendix A.

deputies of different regions to the NPCSC with 161 centralized members.\footnote{Referring to the members of the NPC, see NPC, supra note 509. The members of the Standing Committee of the NPC, see NPCSC, supra note 509. Appendix A.}

With respect to executive power, the State Council, as the central government, exercises unified leadership over all administrative departments at the central level, as well as state administrative organs at the local level.\footnote{\textit{XIANFA} art. 89 (1982) (China).} In addition, the State Council formulates administrative regulations that supersede local regulations created by local people’s congresses and local rules by local people’s governments. Hence, the State Council has centralized rulemaking and executive power over all central agencies, local congresses, and local agencies.

Considering judicial power, due to the dependent characteristic of the judiciary, judges may not make law through interpretation. Under the “law-makers-as-interpreters” principle, legal interpretative power is centralized to the executive and legislative organs. Likewise, under the hierarchy of the judicial function, interpretative power also centralized to the central SPC and SPP. In general, the judiciary may have the least, if any at all, rulemaking power in the Chinese legal system.

Based on this combination of powers, this section examines how legislative, executive, and judicial functions combine into one centralized hierarchy. This section has two subsections: 1) the hierarchy of legal rules; and 2) dependent judiciary.

The Hierarchy of Legal Rules

In accordance with the Law on Legislation,\footnote{Law on Legislation, \textit{supra} note 515.} a statute to “standardize legislation and establish a sound legislative system,”\footnote{\textit{Id.} art. 1.} statutes must be made “in accordance with the statutory
limits of power and procedures,” to “safeguard uniformity and dignity of the socialist legal system.”521 This principle of uniformity also applies to local regulations and rules.522

This subsection is divided into two parts. The first part reviews legal rules by functions. The second part combines all legal rules into a national hierarchy that embraces the “socialist legal uniformity.” The aim is to examine the legal priority among those rules and different functions.

Legal Rules by Functions

Table 4 on the following page lists the major legal rules with titles by categories. As the table shows, there are three law-making branches in China: 1) congresses and their standing committees; 2) governments at central and local levels; and 3) courts and procuratorates at the highest level of the judiciary. These branches are not independent. Congresses and their standing committees determine the legal directions of statutes or local regulations. The central and local governments523 follow those legal directions by enacting administrative regulations or rules.

Where application gaps occur between legal rules and specific circumstances, the NPCSC and governments at all levels may provide legal and administrative interpretations to explain and supplement the legal rules enacted. In addition, the highest court and procuratorate may interpret legal points relating to concrete application, but within the scope of judicial or procuratorial works only.524 The function of legal titles, therefore, generally reflects the enacted organs, levels,

521 Id. art. 4.

522 Id. art. 92.

523 Under the Chinese legal system, all governments are subordinate to congresses. The central government, the State Council, is subordinate to the NPC, and local governments are subordinate to the congresses at the same level.

524 XIANFA art. 127 & 132.
Table 5. Categories of Chinese Legal Rules

<table>
<thead>
<tr>
<th>Legislative Rules by People’s Congresses</th>
<th>Administrative Regulations by Governments</th>
<th>Legal Interpretation by law-makers</th>
</tr>
</thead>
</table>
| **Law (Statutes)**  
By the NPC | **Administrative Regulations**  
(Xingzheng Fagui)  
Regulations (Tiaoli),  
Provisions (Guiding),  
Measures (Banfa);  
Provisional Regulations;  
Provisional Provisions;  
By the State Council | **Decrees (Faling),**  
As “legislative interpretation” (Lifa Jieshi)  
By the NPCSC |
| **Law (Statutes),**  
Regulations (Tiaoli),  
Decision (Jueding),  
Resolutions (Jueyi)  
By NPCSC | **Administrative Rules,**  
Department Rules  
(Bumen Guizhang)  
By ministries, commissions,  
and other organs directly under  
the State Council | **Administrative**  
or Executive Interpretation  
(Xingzheng Jieshi)  
By the State Council and  
its relevant departments  
(Central Executive) |
| **Local Regulations**  
(Defang Fagui)  
By People’s Congresses and  
their Standing Committees of  
Provinces, DMs, and  
Major Cities | **Local Rules**  
(Defang Guizhang)  
By local governments  
of Provinces,  
National Autonomous Areas,  
Municipalities directly under  
the central government,  
and Major Cities | **Local Regulatory Interpretation**  
(Defang Fagui Jieshi)  
by Local People’s Congresses  
and their Standing Committees |
| **Autonomous Regulations**  
(Zizhi Tiaoli)  
Separate Regulations  
(Danxing Tiaoli)  
By people’s Congresses and  
their standing committees  
of NAAs | | **Local Administrative**  
Interpretation  
(Defang Xingzheng Jieshi)  
By local people’s governments |
| | | **Judicial Interpretation**  
(sifa jieshi)  
Interpretation (Jieshi),  
Provisions (Guiding),  
Replies (pifu),  
Decisions (Jueding)  
by the SPC and SPP |

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regions, and jurisdictions. Despite the various titles of legal rules, all of them are legally effective.\(^{525}\)

Legislative rules by congresses include “law” (*fa*), which refers to statutes enacted by the NPC; “regulations” (*tiaoli*), “decisions” (*jueding*), and “resolutions” (*jueji*) by the NPCSC;\(^{526}\) “local regulations” (*difangxing fagui*), “autonomous regulations” (*zizhi tiaoli*), and “separate regulations” (*danxing tiaoli*) by the people’s congresses and their standing committees at provincial level;\(^{527}\) and “local regulations” by the people’s congresses of the cities where special economic zones (SEZ) are located.\(^{528}\) These rulemaking powers are limited to their respective geographical regions.

Administrative rules by governments include “administrative regulations” (*xingzheng fagui*),\(^{529}\) “provisional regulations,” “provisional provisions” by the State Council;\(^{530}\) “administrative rules” or translated as “department rules” (*bumen guizhang*) by ministries,

\(^{525}\) Zhou Wangsheng (周旺生), *Lun Lifafa Yu Lishi Huanjing—Guanyu Lifafa Yanjiu De Yige Fangfalun Wenti* (论立法法与其历史环境——关于立法法的一个方法论问题) [Discussing Law on Legislation and its historical background—About a Methodological Question Regarding Law on Legislation], 5 LEGAL F. 5, 6-7 (2001) [hereinafter Zhou].

\(^{526}\) Chen, *supra* note 41, at 104.

\(^{527}\) Law on Legislation, *supra* note 515, art. 65. The people’s congresses at the provincial level refer to those congresses in regions such as provinces, national autonomous areas (NAAs), and municipalities directly under the central government (DM).

\(^{528}\) *Id.*

\(^{529}\) Chen, *supra* note 41, at 105. Administrative regulations may be titled as “regulations” (*tiaoli*), “provisions” (*guiding*), “measures” (*banfa*). “Regulations” (*tiaoli*) refers to the regulations that cover a wider and systematic scope. “Provisions” (*guiding*) refers to the regulations that cover a part of administrative work. “Measures” (*banfa*) refers to the regulations that provide concrete requirements.

\(^{530}\) *Id.* “Regulations” cover the widest subject matter, “provisions” in between, and “measures” the narrowest. “Provisional regulations” and “provisional provisions” are made within the rulemaking power delegated by the NPC or NPCSC.
commissions and other organs directly under the State Council; and “local rules” (defang guizhang) by local governments at the provincial level and in Major Cities. The power of these rules is limited to their respective geographical regions and subject matters.

Legal interpretation involves four categories: 1) legislative interpretation; 2) administrative interpretation; 3) local interpretation; and 4) judicial interpretation. “Legislative interpretation” (lifa jieshi) by the NPC refers to the interpretation clarifying or supplementing statutes. This category of interpretation would be titled as “decrees” (faling). “Administrative interpretation” or “executive interpretation” (xingzheng jieshi) interprets administrative regulations and is performed by the State Council and its relevant departments. This interpretation covers the “concrete application of law,” which does not relate to judicial and procuratorial works that are implemented by courts and procuratorates.

“Local interpretation” (defang jieshi), carried out by the standing committees of local people’s congresses or local people’s governments, interprets local regulations and rules.

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531 Id. For more information about ministries, commissions, and “organizations directly under the State Council, see The Organizational Structure of the State Council, Gov.CN, http://english.gov.cn/links.htm#1 (last visited Sept. 15, 2013) [hereinafter State Council].

532 Law on Legislation, supra note 515, art. 63. “Major Cities” refer to “comparatively larger cities” that are defined as “where a provincial or autonomous regional people’s government is located or where a special economic zone is located, or a city approved as such by the State Council.” This paper will use “Major Cities” instead of “comparatively larger city.” China’s Political System, CHINA ORG., http://www.china.org.cn/english/Political/28842.htm (last visited Aug. 27, 2013) [hereinafter China’s Political System].

533 Law on Legislation, supra note 515, art. 42. Chen, supra note 41, at 119.

534 Id.

535 Id.


537 Chen, supra note 41, at 119. Local regulations are interpreted by local congresses, and local rules are interpreted by local governments.
People’s congresses may further clarify or supplement enacted local regulations, and local governments may interpret local rules regarding concrete application.538

“Judicial interpretation” (sifa jieshi) interprets concrete application of law related to judicial and procuratorial works. The SPC is responsible for “adjudicative interpretation,” and the SPP is responsible for “procuratorial interpretation.”539 There are four forms of judicial interpretation. Those forms include: “interpretation” (jieshi), “provision” (guiding), “replies” (pifu), and “decision” (jueding).540

The Hierarchy

The Law on Legislation provides a hierarchy among laws, regulations, and rules. The order of those legal rules from the highest to the lowest is: Constitution, statutes (titled as “law”), administrative regulations, local regulations, and department rules at the same level.541 Local rules formulated by local governments are under local regulations formulated by local people’s congresses, but share the same level with department rules.542

Table 5 on the following page illustrates the hierarchy mentioned above. The Constitution has the supreme legal authority with the goal to turn China into a “prosperous,

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538 Id.

539 Resolution on Interpretation of Law, supra note 536.

540 Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo De Guiding No. 12 (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by the Supreme People’s Court, Mar. 23, 2007, effective Apr. 1, 2007), art. 6, available at http://news.xinhuanet.com/legal/2007-03/23/content_5885460.htm (China). “Interpretation” explains the application of statutes and cases; “provisions” addresses norms and opinions relating to legislative intention; “replies” responses to requests for direction from higher people’s courts or military courts; “decision” refers to judicial interpretation amendments or annulments.

541 Id. art. 82.

542 Id. art. 80, 82.
powerful, democratic and culturally advanced country.”

The next level consists of statutes enacted by the NPC and its Standing Committee with the main task to enhance economic development. Below statutes (“laws”) are administrative regulations created by the State Council.

Table 6. The Hierarchy of the Chinese Legal Rules

<table>
<thead>
<tr>
<th><strong>Constitution</strong></th>
<th>by the NPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>The goal is to turn China into a “prosperous, powerful, democratic, and cultural advanced country.”</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Statutes</strong></th>
<th>(with the title of “Law”)</th>
<th>by the NPC and NPCSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>The main task is to enhance economic development and uphold “socialist democratic” dictatorship.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Administrative Regulations</strong></th>
<th>Formulated by the State Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>In accordance with the Constitution and Statutes; “Implementation” of administrative functions.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Local Regulations</strong></th>
<th>By the Local People’s Congresses at (1) provinces; (2) NAAs; (3) DMs; (4) Major Cities</th>
</tr>
</thead>
<tbody>
<tr>
<td>In accordance with the Constitution, Statutes, and Administrative Regulations.</td>
<td></td>
</tr>
<tr>
<td>“Specific conditions” and “actual need” of respective areas.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Local Rules</strong></th>
<th>By the Local People’s Governments at (1) provinces; (2) NAAs; (3) DMs; (4) Major Cities</th>
</tr>
</thead>
<tbody>
<tr>
<td>In accordance with the Constitution, Statutes, Administrative Regulations, and Local Regulations.</td>
<td></td>
</tr>
<tr>
<td>“Implementation” of specific administrative matter within respective areas.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Department Rules</strong></th>
<th>By State Council’s ministries, commissions, and other “organizations directly under the State Council”</th>
</tr>
</thead>
<tbody>
<tr>
<td>In accordance with the Constitution, Statutes, and Administrative Regulations.</td>
<td></td>
</tr>
<tr>
<td>“Implementation” of Statutes and Administrative Regulations.</td>
<td></td>
</tr>
</tbody>
</table>

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to implement the Constitution and statutes. At the bottom of the hierarchy are local regulations, department rules, and local rules.\footnote{Those rules formulated by executive functions are in blue.}

A general principle in the Chinese legal system is that the legal rules at lower levels (lower-laws) shall not “contradict” the legal rules at higher levels (upper-laws).\footnote{Id. art. 63.} For instance, local regulations formulated by people’s congresses and their standing committees shall not “contradict” upper-laws such as Constitution, statutes, and administrative regulations.\footnote{Law on Legislation, supra note 515, art. 63.}

Administrative rules, however, should be formulated “in accordance with” their “upper-laws” and relevant regulations as well. For instance, department rules of central agencies should be formulated “in accordance with” the “upper-laws,” such as statutes and administrative regulations, decisions, orders of the State Council.\footnote{Id. art. 71.} Similarly, local rules of local governments should be formulated “in accordance with” their “upper-laws,” which include the local regulations of their respective regions.\footnote{Id. art. 73.}

Some scholars consider that the rulemaking power subject to the “not-contradicting” principle is broader than the rulemaking power subject to the “in-accordance-with condition” principle demonstrating that the people’s congresses have a greater power than their respective governments.\footnote{Ying Songnian (应松年), \textit{Yibu Tuijin Yifazhiguo De Chongyao Falü —Guanyu “Lifafa” Zhong De Jige Chongyao Wenti} (一部推进依法治国的重要法律—关于《立法法》中的几个重要问题) [An Important Law in Pushing forward the “Rule of Law”—Some Key Questions About the “Law on Legislation”], 4 \textit{ZHONGGUO FAXUE} 3, 6 (2000) [hereinafter Ying S.].}
Local Regulations and Department Rules

Local regulations formulated by local people’s congresses or their standing committees by provinces, national autonomous areas (NAAs), municipalities directly under the central government (DMs), and Major Cities have the equal effect with the department rules formulated by the ministries, commissions, and other agencies directly under the State Council.

These regulations and rules, however, should be applied within the limits of the respective authorities. Department rules govern the matters for “enforcing” statutes and administrative regulations. Local regulations, however, govern matters regarding “specific conditions” and “actual need” for respective areas. If inconsistencies occur between local regulations and department rules, the State Council determines which one prevails. If local regulations prevail, such regulations are applied within the respective area. If department rules prevail, the case is submitted to the NPCSC for a ruling.

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553 Id.

554 Id. art. 71.

555 Id. art. 63.

556 Id. art. 86(2).

557 Id.
Local Regulations and Local Rules

Local regulations formulated by local people’s congresses have a higher status than local rules formulated by respective local governments. Local rules formulated by provincial governments or NAA governments have a higher status than those rules formulated by Major Cities within the respective administrative areas. In terms of authorities, local regulations focus on “specific conditions” and “actual need” of respective areas while local rules detail the “implementation” of statutes, administrative regulations, and local regulations regarding specific administrative matters.

Local Rules and Department Rules

Local rules formulated by local governments have equal status as department rules formulated by agencies under the State Council. Local rules focus on the “implementation” of statutes, administrative regulations, and local regulations of specific subject matters in their respective areas. Department rules focus on the “enforcement” of statutes and administrative regulations of respective subject matters. If an inconsistency occurs between local and department rules, a ruling from the State Council is required. Thus, the ultimate discretionary power is theoretically in the hands of the central power.

558 Id. art. 80.
559 Id.
560 Id. art. 73.
561 Id. art. 82.
562 Id. art. 71.
Dependent Judiciary

Although the PRC Constitution requires the people’s court and people’s procuratorates to exercise judicial power “independently,” the Chinese judiciary is under the supervision of the people’s congresses. Moreover, the judiciary is not a branch of government but contains two separate functions—courts and procuratorates.

The NPC has the appointment and removal powers of the highest judicial personnel. For instance, the NPC may remove the Presidents of the SPC and the SPP. The NPCSC may appoint or remove the members of Trial Committee, the President of the Military Court, the members of Procuratorial Committee, and the Chief Procurator of the Military Procuratorate. Additionally, the NPCSC can approve the appointment and removal of the chief procuratorates of the local people’s procuratorates at provincial level, as well as grant special pardons.

563 XIANFA art. 126, 131 (1982) (China). Art. 126 states, “[T]he people’s courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization and individual.” Art. 131 states, “[T]he people’s procuratorates exercise procuratorial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization and individual.”

564 In accordance with the official definition, people’s procuratorates are “state organs of legal supervision.” These organs “have the right to exercise procuratorial authority,” “authority over cases endangering state and public security, damaging economic order and infringing citizen’s personal and democratic rights, and other criminal cases; examine cases scheduled for investigation by the public security agencies, and decide on whether a suspect should be arrested or not, and whether a case should be prosecuted or exempt from prosecution; oversee the activities of public security agencies, people’s court, prisons, houses of detention and reform-through-labor institutions.” People’s Procuratorates, CHINA ORG., http://www.china.org.cn/english/features/Brief/192298.htm (last visited Sept. 15, 2013).


568 Id.

569 Id. art. 67(12).

570 Id. art. 67(17).
Moreover, the SPC and the SPP are responsible to the NPC and its Standing Committee. NPC deputies are granted certain privileges including the ability to not be arrested or placed on criminal trial without the consent of the Presidium of the NPC or its Standing Committee. Likewise, local courts and procuratorates are responsible to and supervised by local people’s congresses which create them, as well as their standing committees.

The Chinese judiciary is also supervised by the executive function. The State Council has the power to direct judicial administration. Local governments at the county level or above also supervise judicial administration within their regions. This administrative power includes appointing and removing administrative personnel, providing training, conducting appraisals, and imposing sanctions. In addition, the people’s courts and procuratorates coordinate with public security organs in handling criminal cases, to ensure the enforcement of law is correct and effective.

Chinese judges do not interpret the Constitution or statutes—this is done by the NPCSC. What courts or procuratorates may do is to request legislative interpretation from the

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571 Id. art. 74.
572 Id. art. 3, 128, 133. For instance, Article 101 of the Constitution provides that local congresses at the county level or above may elect and recall presidents of people’s courts and chief procuratorates at the corresponding level. Id. art. 101. Id. art. 104.
573 Id. art. 89(8).
574 Id. art. 107.
575 Id.
576 Id. art. 135.
577 Id. art. 67(1), (4).
NPCSC through the SPC or the SPP.\textsuperscript{578} The Chinese judiciary has no power to annul administrative regulations or local regulations, even if those regulations contravene the Constitution or statutes.\textsuperscript{579}

Courts may merely submit written suggestions to the NPCSC for “legal-rule-inspection.”\textsuperscript{580} The working offices\textsuperscript{581} of the NPCSC may then refer the suggestion to the Law Committee\textsuperscript{582} or relevant special committees of the NPC for further consideration.\textsuperscript{583} Those committees may request an explanation from the respective rulemaking organs or propose a motion for annulment of the regulation to the Council of Chairmen\textsuperscript{584} if a contradiction is found.

\textsuperscript{578} Law on Legislation, \textit{supra} note 515, art. 43. While Chinese “legal interpretation” refers only to statutory or constitutional interpretation, the judiciary branch has no such power but a right to request for guidance only. Bing Changce (邴长策), \textit{Xingzheng Jieshi De Gainian Tanjiu} (行政解释的概念探究) [Conceptual Exploration of Administrative Interpretation], 3 \textit{FAXUE ZAZHI} 149, 150 (2008).

\textsuperscript{579} XIANFA art. 67(7)-(8) (1982) (China).

\textsuperscript{580} Law on Legislation, \textit{supra} note 515, art. 90. After receiving suggestions from courts or other organs, the working offices of the NPCSC “shall study the suggestions and shall, when necessary, refer them to the relevant special committee for examination and suggestions.” Article 91 also states that the suggestions may be submitted to respective rulemaking organs for review and explanation. If the regulation does contradict the Constitution and statutes and a revision is refused, the Law Committee and relevant committees under the NPC may propose a motion for annulment to the Council of Chairmen, which shall decide whether to submit the motion to a meeting of the NPCSC for inspection and decision. \textit{Id.} art. 91.

\textsuperscript{581} The “working offices” refer to the General Office of the NPCSC, which is a general administrative body. This office contains the “First Bureau of Secretaries, the Second Bureau of Secretaries, the Liaison Bureau, the Letters and Visits Reception Bureau, the Administrative Bureau of the Department Affairs and so on.” \textit{General Office, NPC.GOV.CN}, http://www.npc.gov.cn/englishnpc/Organization/2007-11/20/content_1373186.htm (last visited Sept. 15, 2013).


\textsuperscript{583} Law on Legislation, \textit{supra} note 515, art. 90-91.

\textsuperscript{584} The Council of Chairmen is also named as “Chairmen’s Council,” which is an organization under the NPC. This council has a Chairman, thirteen Vice-Chairmen, and a Secretary-General. The current Chairman is Zhang Dejiang. \textit{Chairmen’s Council, NPC.GOV.CN}, http://www.npc.gov.cn/englishnpc/Organization/node_2848.htm (last visited Sept. 15, 2013).
and the revision is refused.\textsuperscript{585} It is up to the Council of Chairmen to decide whether to submit the motion to a meeting of the NPCSC for final examination and decision.\textsuperscript{586}

In sum, Chinese judiciary is not independent under the principle of uniformity. This dependency is mainly generated by personnel control, executive supervision, and limited interpretative power. In light of this uniform system, Chinese judges may be considered to be legal staff members subject to administrative management.\textsuperscript{587} Those staff members have no incentives, nor official power, to seek independent justice.\textsuperscript{588}

**Open Rulemaking Power**

The centralized Chinese legal system of uniformity, however, contains several decentralized characteristics of flexibility such as: 1) open rulemaking principles; 2) rulemaking fragmentation; and 3) ineffective central supervision. Open rulemaking principles are the principles that allow local congresses and administrations to customize their rules in terms of context that may go beyond the boundary of the “upper-laws,” such as statutes and administrative regulations. Rulemaking fragmentation reviews the structural setting that fragments rulemaking power into pieces and distributes those pieces to different institutions. The ineffective central supervision considers the challenges of rule-centralization in practice. These decentralized characteristics of open rulemaking power establish a food and product self-

\textsuperscript{585} Law on Legislation, supra note 515, art. 90-91.

\textsuperscript{586} Id. art 91.

\textsuperscript{587} This administrative management refers to the executive leadership and directions from courts, local governments, and the courts at higher levels. Those directions could be administrative through a number of internal documents. Wang Qingting (王庆廷), \textit{Yinxing de “Fa lü”—Xingzheng Susong Zhong Qita Guifanxing Wenjian De Yihua Ji Qi Jiaozheng} (隐形的法律—行政诉讼中其他规范性文件的异化及其矫正) [Invisible Laws—The Deviation and Correction of Regulatory Documents in Administrative Litigation], 1 RENDA FALÛ PINGLUN 93 (2011) [hereinafter Wang Q.].

\textsuperscript{588} Wang Q., supra note 587, at 96.
regulatory system with diversity and flexibility, which is at the opposite direction of the “socialist uniform legal system.”

Open Principles

The Chinese law-making system allows local congresses and administrations to formulate customized regulations and rules in a way different from the centralized system. Four major principles apply: 1) actual-need principle; 2) specific-administrative principle; 3) local affairs principle; and 4) formulating-first principle.

Under these principles, the function of the Constitution and statutes at the highest, central level is to provide general directions with limited substantial and specific requirements. This “providing-general-direction” function is similar to the general moral code under Confucian tradition. Specific application of the code of propriety depends on actual circumstances under a different label—the market economic policy—in accordance with economic and self-interest. The application of food and product safety rules, therefore, varies from time to time and from place to place and may not be written and uniform on paper and in practice.

Actual-Need Principle

Although the aim of the Law on Legislation is to standardize legal rules for better unification and to impose uniform statutory limitations on rulemaking power, the statute also emphasizes the central task of achieving economic development, “persevering in reform,” embodying the people’s will, and guarantying the people’s participation in legislative activities.\(^{589}\)

\(^{589}\) Law on Legislation, supra note 515, art. 1, 3-5.
In line with these instructions, the Law on Legislation enables the congresses and their standing committees at provinces, NAAs, DMs, Major Cities, autonomous prefectures, and autonomous counties to establish local regulations in accordance with their “specific conditions,” “local conditions,” and “actual needs” in order to implement statutes and administrative regulations as long as these local regulations do not contradict with the “upper-laws.”

“Specific conditions” and “actual needs” refer to the differences between national-general directions and local-actual circumstances. Since China is commonly considered to be at an early stage of legal development, it does not have enough rules to cover every actual circumstance. Moreover, due to the differences among regions, it might not be beneficial to impose a set of unified and specific rules for the entire country. The central “upper-laws,” therefore, apply a general-direction principle, which allows statutes and administrative regulations at the central level to focus on general directions of the entire country instead of specific rules.

The function of local regulations, therefore, is to fill in gaps. Those regulations may supplement the “upper-laws” making them more complete by adding specific elements for

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590 Law on Legislation, supra note 515, art. 63, 64(1), 67. Article 63 states that the people congresses and their standing committees in provinces, NAAs, and DMs may formulate local regulations “in light of the specific conditions and actual needs of their respective administrative areas.” The “upper-laws” of Major Cities, autonomous prefectures, and autonomous counties refer to statutes, administrative regulations, and the local regulations of respective provinces and NAAs.

591 Li Yuan, Main Provisions of Legislative Law Concerning Laws and Local Regulations, CHINA L. 65, 67 (2000) [hereinafter Li Y.]. Regarding the view that there are “not enough laws,” a question is raised as to whether laws can be made to cover all circumstances. If written rules are not able to cover all circumstances, laws may never be enough.

592 Id.

593 Shi Jiansan (史建三) & Wu Tianhao (吴天昊). Difang Lifazhiliang: Xianzhuang, Wenti Yu Duice — Yi Shanghai Renda Difang Lifana Wei Li (地方立法质量：现状、问题与对策——以上海人大地方立法为例) [The Quality of Local Rulemaking: Current Status, Problems and Solutions—The Rulemaking of Shanghai People’s Congress], 6 FAXUE 94, 103 (2009) [hereinafter Shi & Wu].

594 Id.
operational purposes. The Law on Legislation requires that those additional elements be based on “actual needs” of local circumstances. The actual-need principle, therefore, could be considered another process of regulatory concretization. This process transforms national, general, and vague directions to local concrete requirements. At the same time, this transformation opens the door for decentralizing rulemaking power to local players.

Although some local regulations are required to have approval from the central authority, many of them are merely subject to approval at the local level only. For instance, provinces and Major Cities may formulate local regulations for their SEZs but subject to the authorization by the NPC. Autonomous regulations or separate regulations of NAAs are subject to the approval of the NPCSC. Nevertheless, the local regulations of Major cities, autonomous prefectures, and autonomous counties are subject to approval of the local congresses at provincial level only. Thus, despite the necessary approval from the NPC or the NPCSC of SEZs and NAAs, most of the rule-making power is decentralized to local congresses and their standing committees at provincial level.

Specific Administration Principle

In addition to local congresses and their standing committees, local governments also contribute to the decentralization of rulemaking power. Local governments of provinces, NAAs, DMs, and Major Cities formulate local rules regarding “specific administrative matters” for

595 Id.
597 Law on Legislation, supra note 515, art. 65.
598 Id. art. 66.
599 Id. art. 63, 67.
implementation purposes. These local rules have the same legal effect as the central administrative rules. In accordance with officials of the State Council, this rulemaking power allows local governments to create “specific rights and obligations” for the people within their respective regions. This local administrative rulemaking power, however, extends to Major Cities only, not SEZs.

Local administrative rules do not need approval from the central authority. Those rules are required to be decided at local executive or plenary meetings, signed by governors at the provincial level, published in local gazettes and newspapers of the respective regions only. This specific administrative principle, therefore, is another door decentralizing the rulemaking power in pursuit of flexibility.

Local Affairs Principle

Local regulations may also be formulated to govern the “matters of local character necessary.” This principle applies to any particular geographic, cultural, or ethnic condition in a region. For instance, regulations may concern specific rivers, roads, industries, economic, or an ethnic tradition which may not exist in other administrative areas. Local regulations, hence, fill in gaps created by those unique characteristics.

600 Id. art. 73.
601 Id. art. 82.
603 Id.
604 Law on Legislation, supra note 515, art. 75-77.
605 Id. art. 64(2).
606 Li Y., supra note 591.
The local affairs principle focused on the legal area outside the scope of the central rules. While the actual-need principle emphasizes particular areas covered by general rules, the local affairs principle concentrates on particular areas that are not covered by the general at all.\textsuperscript{607} Some Chinese scholars suggest that local regulations should be innovative, independent, and unique to local characteristics.\textsuperscript{608} Local regulations should not merely copy the central “upper-laws.”\textsuperscript{609}

In light of this local affairs principle, local rulemaking power is expanded further. Local regulations not only cover the transformation from the general to the particular, but also from the general to outside the general. In other words, local congresses may apply general directions to local subject matters that are not covered by the “upper-laws,” as long as no contradiction exists. This principle provides local authorities another leeway from the “dictatorship” towards diversity and flexibility.

Formulating-First Principle

The Law on Legislation even allows local regulations to decide which matters without general direction from statutes or administrative regulations.\textsuperscript{610} Local authorities are free to regulate any matter other than core or national matters as provided in Article 8 of the PRC

\textsuperscript{607} Xu & Liu, supra note 596, at 126; and Li Y., supra note 591, at 67.

\textsuperscript{608} Xu & Liu, supra note 596, at 125-126.

\textsuperscript{609} Id.

\textsuperscript{610} Law on Legislation, supra note 515, art. 64.
Constitution. For instance, local regulations may not regulate matters involving state sovereignty, foreign trade, criminal offenses, formation of congresses, private property requisition, citizens’ political rights, or personal freedom deprivation, among others.

Although the scope of Article 8 is not entirely clear and can be broad, particularly under the general-direction doctrine, local authorities are encouraged to try something new and observe the results. This local formulating-first principle, therefore, is considered to stimulate experimentation for accumulating experience in order to solve the “lack-of-law” problem. This principle also reflects a trial-and-error approach; let local regulations go first and the central statutes and administrative regulations may follow if outcome is satisfactory.

Once statutes or administrative regulations settle a matter, the local provisions contradicting that matter shall be void. Moreover, local authorities must promptly amend or annul that provision accordingly. Thus, the central may unify those formulating-first regulations through enacting statutes or formulating administrative regulations if it is necessary.

But the unifying process is not without challenges. For instance, the Law on Legislation does not

\[611\] Id. art. 8. Certain affairs shall only be governed by statutes: 1) state sovereignty; 2) formation, functions and powers of people’s congresses, governments, courts and procuratorates; 3) systems of regional autonomy and special administrative regions; 4) criminal offenses and punishment; 5) mandatory measures involving deprivation of citizens’ political rights or personal freedom; 6) requisition of private property; 7) basic civil system; 8) basic economic system; 9) systems of litigation and arbitration; and 10) other affairs which must be enacted by the NPC or its Standing Committee.

\[612\] The scope of Article 8 reflects a “remain-principle” that imposes limitations on local and administrative rulemaking power. Ying S., supra note 549, at 6.

\[613\] Shi & Wu, supra note 593, at 103, and Xu & Liu, supra note 596, at 129.


\[615\] Law on Legislation, supra note 515, art. 64.

\[616\] Id. art. 64.
require a fixed time period of the amendment or annulment at local levels. Moreover, no administrative sanctions may be imposed on violations. Thus, contradicting regulations are usually not timely revised or annulled.\textsuperscript{617}

Beyond local regulations, this formulating-first principle also applies to administrative regulations. The central government could be authorized to formulate administrative regulations before statutes, as long as those regulations do not involve criminal offenses, judicial system, and deprivation of political rights or personal freedom.\textsuperscript{618} This authorization, however, is required to be clearly defined.\textsuperscript{619}

The Law on Legislation also emphasizes the experimental characteristic of administrative regulations.\textsuperscript{620} The NPC and NPCSC are required to enact statutes timely if the respective administrative regulations have been “tested in practice” and when the “conditions are ripe.”\textsuperscript{621} Although the authorization is terminated when respective statutes are enacted, administrative regulations may govern a matter without central direction before such statutes exist. Moreover, the meaning of “timely” is undefined, and it is unclear what factors may be considered regarding the “ripe conditions.” But it is quite clear that local and administrative regulations have the rulemaking power to formulate matters in pursuit of flexibility without the basis of statutes.

\textsuperscript{617} Yu Z., supra note 614, at 23.

\textsuperscript{618} Law on Legislation, supra note 515, art. 9.

\textsuperscript{619} Id. art. 10.

\textsuperscript{620} Id. art. 11.

\textsuperscript{621} Id. (“After the administrative regulations on an affair formulated under authorization have been tested in practice and when the conditions are ripe for making a law on the affair, the NPC and its Standing Committee shall [enact] a [statute] on it in a timely manner. As soon as the [statute] is enacted, the authorization with regard to that matter shall be terminated accordingly.”)
Fragmentation of Rulemaking Power

This section concerns the rulemaking powers below the State Council. Although the NPC and its Standing Committee may enact or amend the Constitution and statutes, implementation relies on the State Council. Under the State Council, the rulemaking power may be delegated in accordance with three directions: 1) administrative function subject matters; 2) administrative area regions; and 3) administrative status levels. Each rulemaking organ shares a portion of its power with a particular jurisdiction. Rulemaking power, therefore, is fragmented and distributed in three dimensions: horizontally, there are different regions; vertically, there are two divisions—one by the subject matters of the central administrative departments, another by the subject matters of local governments at different administrative levels.

Subject Matters

The State Council may distribute its rulemaking power to its departments. These departments could be ministries, commissions, as well as “organizations directly under the central government.” Concerning food and product safety issues, related ministries can be the Ministry of Agriculture (MOA), the Ministry of Health (MOH), and the Ministry of Commerce (MOFCOM); related “organizations directly under the State Council” can be the General Administration of Customs (GAC), General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ), and State Administration for Industry and Commerce.

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622 Id. art. 56.
623 Id. art. 71.
(SAIC).\textsuperscript{625}

All of these departments formulate administrative rules, namely department rules or administrative rules, for the purpose to “enforce” statutes regarding their functions by subject matters.\textsuperscript{626} The rulemaking power, therefore, is fragmented and distributed to a number of related agencies and departments, which may have overlapping functions and authorities.\textsuperscript{627} For instance, a pig can be governed by MOA, MOH, MOFCOM, GAQSIQ, and SAIC.

**Geographic Regions**

Local people’s congresses and their governments may formulate local regulations and rules. Local people’s congresses and their committees at the provincial level may formulate local regulations concerning “specific conditions” and “actual needs” of their respective regions.\textsuperscript{628} Likewise, local governments at the same level may formulate local rules concerning the “implementation” of statutes, administrative regulations, and local regulations within their administrative subject matters and geographic areas.\textsuperscript{629} Thus, the rulemaking power is separated and distributed by administrative regions.

**Administrative Levels**

In accordance with the Constitution and the Law on Legislation, there are eight types of local congresses and governments located in their respective administrative regions. These

\begin{itemize}
  \item \textsuperscript{625} State Council, supra note 531.
  \item \textsuperscript{626} Id. art. 71.
  \item \textsuperscript{627} Id. art. 71-72.
  \item \textsuperscript{628} Id. art. 63.
  \item \textsuperscript{629} Id. art. 73.
\end{itemize}
administrative regions include: provinces, DMs, counties, cities, municipal districts, townships, ethnic townships, and towns.\textsuperscript{630}

As shown in the legal hierarchy, the rulemaking power depends on the level of the rulemaking body. For instance, only the local congresses and their standing committees at provinces, NAAs, DMs, and Major Cities may formulate local regulations in accordance with “specific conditions” and “actual needs.”\textsuperscript{631} Only the local governments at the same level may formulate local rules of “specific administrative matters” in order to “implement” statutes, administrative regulations, and local regulations.\textsuperscript{632} This rulemaking power, therefore, is also fragmented by administrative levels.

**Legal Interpretation**

Under the “law-makers-as-legal-interpreters” principle,\textsuperscript{633} the Chinese legal interpretative power is generally centralized and distributed in the same way as the rulemaking power: by subject matter; geographic regions; and administrative level. In addition, judicial bodies share a part of this power as well. For instance, the SPC may provide interpretation that directs judicial work,\textsuperscript{634} and the SPP may provide interpretation that supervises procuratorial work.\textsuperscript{635}

This fragmentation of rulemaking and legal interpretation power challenges the “socialist uniform legal system.” Each congress and agency may interpret and formulate a set of rules in

\textsuperscript{630} XIANFA art. 95 (1982) (China).

\textsuperscript{631} Law on Legislation, supra note 515, art. 63.

\textsuperscript{632} Id. art. 73. The “municipalities directly under the central government” (DMs) include Beijing, Shanghai, Tianjian, and Chongqing. Questions and Answers, CHINA ORG., http://www.china.org.cn/english/features/Q&A/161686.htm (last visited Sept. 19, 2013).

\textsuperscript{633} Zhang Hong (张宏) & Wang Qiong (王琼), Lun Xingzheng Jieshi De Guocheng (论行政解释的过程) [Discussing the Administrative Interpretation Process], 2 XIANFAXUE YU XINGZHENG FAXUE 101 (2010).

\textsuperscript{634} XIANFA art. 127 (1982) (China).

\textsuperscript{635} Id. art. 132.
accordance with its region and expertise under the open rulemaking power. Food and product safety rules, therefore, can be varied under different contexts. Ineffective central supervision contributes further to the diversity and flexibility of rules.

**Ineffective Central Supervision**

Theoretically, the open rulemaking power may be controlled by the central authority. The Law on Legislation imposes limitations on the rulemaking power including not contradicting the “upper-laws,” violating legal procedure, and inconsistency with other rules. In practice, these supervisory measures encounter challenges such as: 1) fragmented alteration and annulment power; 2) divided reporting and recording system; and 3) passive inspection system.

Regulations are altered or annulled if a violation of rulemaking power occurs. However, this alteration and annulment power is dispersed among governing organs. For instance, although the NPCSC may annul any administrative, local, autonomous, and separate regulations, the State Council may alter or annul department rules and local rules; local congresses at the provincial level may alter and annul local regulations formulated by their standing committees; standing committees of local congresses may annul local rules formulated by local governments at the same level; and so forth. Thus, no single institution

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637 *Id.* art. 88.
638 *Id.* art. 88(2).
639 *Id.* art. 88(3).
640 *Id.* art. 88(4).
641 *Id.* art. 88(5).
may oversee all legal rules at the same time and place. The result is that local authorities may remain their powers over their local regulations and rules in practice.

With respect to the divided reporting and recording system, regulations and rules are required to be reported within 30 days from the date of promulgation.\(^{643}\) For instance, administrative regulations shall be reported to the NPCSC;\(^ {644}\) local regulations at provincial level and Major Cities shall be reported to both the NPCSC and the State Council;\(^ {645}\) department rules shall be reported to the State Council;\(^ {646}\) local rules shall be reported to both the State Council and the standing committee of people’s congresses at the same level, and so forth.\(^ {647}\) Thus, different regulations are reported to and recorded with different organs. The NPCSC has the record of administrative and local regulations while the State Council has the record of department rules and local rules. Similar to the alteration and annulment power, no single central authority has a record of all regulations and rules.

Certain institutions or entities are empowered to submit written requests or suggestions to the NPCSC for “inspection”\(^ {648}\) if any administrative or local regulations are considered to be

\(^{643}\) Law on Legislation, supra note 515, art. 89.

\(^{644}\) Id. art. 89(1).

\(^{645}\) Id. art. 89(2).

\(^{646}\) Id. art. 89(3).

\(^{647}\) Id. art. 89(4).

\(^{648}\) Id. art. 90. “Inspection” is also translated as “examination.” The original text in Chinese is “审查” (shen cha) which can refer “inspection,” “investigation,” and “examination.”
“contradicting” to the Constitution and related statutes.\textsuperscript{649} This inspection system, however, is passive.\textsuperscript{650} For instance, although the NPCSC has inspection and annulment power over local regulations, such inspections are conducted only after receiving a request or suggestion.\textsuperscript{651}

Moreover, the request and suggestion rights for inspections are distributed to different organs and sectors—from the State Council, the SPC, the SPP to enterprises and citizens. No single authority is responsible to check contradictions or inconsistencies between statutes, regulations, and rules at different levels and regions as a whole. In addition, even if contradictions or inconsistencies are found, sanctions are not imposed but merely alteration or annulment of the respective regulations or provisions are required.\textsuperscript{652} Thus, inconsistent rules commonly exist.

**Conclusion**

The Chinese law-making system may appear to embrace centralization of uniformity by combining legislative, executive, and judicial powers into one hierarchy, but there is tremendous decentralization of flexibility in practice, and even on paper, in terms of rulemaking power. This legal decentralization may be considered as a bottom-up system that allows governing bodies at local levels to lead the path of economic development, as well as food and product safety supervision. Local bodies are encouraged to be innovative and formulate more regulations and

\textsuperscript{649} Id. No official definition regarding the term “contradiction” is provided in the Law on Legislation. Unofficial views consider that the meaning “contradiction” may refer to “inconsistency” and “conflict” as well. *Zhonghua Renmin Gongheguo Lifafa Shiyi (Di 90 Tiao)* (中华人民共和国立法法释义 (第 90 条)) [The Explanation of the People’s Republic of China’s Law on Legislation (Article 90)], 34LAW, http://www.34law.com/lawfg/twsy/5/print_4371.shtml (last visited Sept. 17, 2013). Article 90 empowers the State Council, the CMC, the SPC, the SPP, the standing committees of local congresses at provincial level to submit written requests to the NPCSC. State organs, public organizations, enterprises or citizens may also submit written suggestions to the NPCSC if a contradiction is found.

\textsuperscript{650} Li Y., *supra* note 591, at 69.

\textsuperscript{651} Law on Legislation, *supra* note 515, art. 90.

\textsuperscript{652} Id. art. 91.
rules to address specific, concrete, and actual circumstances that may be outside the statutory boundary or judicial scrutiny.

With respect to the centralization of uniformity, the Law on Legislation begins on the premise to standardize legislation to promote the “socialist uniform legal system.” This standardization and uniformity is considered as a goal necessary for “building a socialist country under the rule of law,” which is considered as having sufficient laws and rules to cover all possible circumstances.653

This law-making process, however, is not without challenges particularly when the system started from a stage of lawless and negation of morality, the differences between regions are enormous, and judges do not, and should not, make law under a civil law and “socialist uniform” system. Moreover, the Law of Legislation, at the same time, highlights economic development as the central task.654 The contrast between the two, therefore, is that while standardization requires unification, uniformity, and consistency, economic development requires adjustment and flexibility. These two facets create a paradox in the Chinese law-making system. One side employs centralization and hierarchy settings of uniformity while the other needs decentralization and open rulemaking power of flexibility.

Decentralized and open rulemaking power of flexibility helps fill in gaps by adding local and specific elements, theoretically in light of the general principles of upper-laws. This power, however, also extends to those areas without central direction under the local affairs and formulating-first principles. Local authorities are empowered to take a highly active role for

653 Id. art. 1.

654 Law on Legislation, supra note 515, art. 1, 3.
developing their own economic and social order with rule-making flexibilities. It is not a surprise that flexibility comes with inconsistency in terms of food and product regulations.

Flexibility, however, can be an effective, efficient, and necessary as a means to ensure food and product safety in a large territory as China, if the power is used to pursue morality, such as reasonableness and justice, and the protection of people. Nevertheless, under the capitalist market economic policy that embraces self-interest, economic growth, and non-interference governance, this legal and administrative discretionary power of flexibility can be abused and lead to a laissez-faire administration, which is not governed by any law and moral code.

In terms of quantity, the combination of centralization of uniformity and open rulemaking power of flexibility might prove to be successful. The number of local regulations has grown enormously together with economic growth. By the end of August 2011, there were “240 statutes, 706 administrative regulations, and over 8,600 local regulations” in China. The next question is how this quantitative growth can be transformed into a growth of quality. This leads to the discussion in the following chapters about Chinese product safety law on paper regarding administrative control and law in action under a laissez-faire and self-regulatory system.

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655 Zhang S., supra note 666, at 25.

656 CPC, Socialist System, supra note 642.
CHAPTER 4
MARKET ECONOMY VERSUS ADMINISTRATIVE CONTROL:
FOOD AND PRODUCT SAFETY LAWS AS WRITTEN

Introduction

Chapter 3 reviewed the centralized and decentralized characteristics of the Chinese lawmaking system that reflects the paradox of simultaneous uniformity and flexibility. This chapter examines the statutes related to food and product safety, which contain the same paradox regarding the different approaches provided by the laws as written.

This study finds that Chinese food and product safety laws have evolved from the current flexible approach that relies on the open market policy, “general-direction” principle, and a private law approach towards a higher level of uniformity that manifests with more administrative control and public law’s more protective approach. These developments can be considered an attempt to solve the food and product safety problem by increasing uniformity and centralization.

The increase of administrative control in order to achieve more uniformity and centralization also comes with the increase of administrative law in the forms of provisions within food and product safety statutes and administrative law statutes focusing on different administrative functions such as the Administrative Licensing Law,\(^\text{657}\) Administrative Penalty Law,\(^\text{658}\) and State Compensation Law\(^\text{659}\) to balance the high discretionary power of governments.


Nevertheless, the uniformity, centralization, and balancing requirements can be offset by the decentralized and self-regulatory settings laid down in the food and product laws and administrative laws that rely on the implementation by county-level governments, which have the administrative power to supervise people’s courts to enhance flexibility in practice and on paper.

The discussion is divided into four sections.

The first section reviews related statutes. There are fourteenth statutes enacted between 1984 and 2009 that are closely related to product safety issues. These statutes can be organized into four categories: 1) civil liabilities and criminal responsibilities; 2) economic development of foreign trade; 3) consumer protection; and 4) specific products. These categories provide a basic structure for the Chinese food and product safety laws.

The second section examines the roles of consumers, business operators, administrative agencies, and the judiciary under the statutes. Those roles take on different forms, namely, consumer rights, business obligations, administrative supervision, and legal liabilities. Regarding food and product safety laws, consumers are granted personal, property, and compensation rights; different obligations, such as ensuring product safety and truthful information, are imposed on business operators; agencies are empowered to supervise and impose administrative sanctions; courts are authorized to determine civil liabilities and criminal responsibilities.

The third section addresses the tension between different roles of laws and agencies under food and product safety laws. This conflict stems from ideological differences between the “socialist market economic order” that embraces flexibility and administrative supervision that

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embraces uniformity. These conflicts include: 1) the “general-direction” principle and uniform safety administration; 2) collective and fragmented supervision; 3) market economy and administrative control; 4) administrative roles under private and public laws; and 5) central and county supervision.

The fourth section concludes that Chinese food and product statutes seem to have been developed from general principles in the 1980s regarding civil law rights and consumer protection, to more specific rules and requirements concerning particular products such as pharmaceutical, agricultural products, and food, with more administrative control of uniformity. This development leads to a greater administrative role in private production activities under the label of “health protection.” Food and product safety laws on paper, therefore, present a paradox between the market economy of flexibility and administrative control of uniformity.

**Relevant Food and Product Safety Statutes**

The Chinese food and product safety laws have been formulated over time in four different phases: 1) civil liabilities and criminal responsibilities from 1986 to 2009; 2) economic development through standardization and import and export supervision in the 1980s; 3) consumer protection by establishing consumer rights, product quality, and advertisement supervision in the 1990s; and 4) specific product supervisions such as pharmaceuticals, agricultural products, and food safety in the 2000s.

**Civil Liabilities and Criminal Responsibilities**

There are four categories in terms of Chinese food and product safety liabilities and responsibilities: 1) civil liabilities under the General Principles of Civil Law (GPCL) in 1986, 2) criminal responsibilities considering product safety problems as crimes endangering public life
under the Criminal Law in 1997, 3) contractual liabilities based on private agreements under the Contract Law in 1999, and 4) tort liabilities under the Tort Law in 2009.

The GPCL provides general directions for both private and public law approaches. The Contract Law focuses on a private law approach of flexibility based on the rights of agreements. The Criminal Law and Tort Law focus on a public law approach of uniformity based on the obligations imposed by the country.

The General Principle of Civil Law

The General Principles of Civil Law (GPCL) was enacted in 1986. At the time, both Contract Law and Criminal Law did not exist. The GPCL was the first statute to grant “civil law rights” to, as well as impose civil liabilities on, the Chinese people and legal persons. The aim was to adjust civil relations and protect those rights for further “socialist modernization” development. This statute laid down fundamental and general directions such as the equal status of people and legal persons, the voluntariness, fairness, and honesty principles regarding civil activities, and the boundaries of those activities to not be against the social ethical value, public interest, national economic plan, and social economic order.

660 GPCL, supra note 11.
661 The Criminal Law was enacted in 1979 and has been, revised eight times between since 1997 and through 2011. The Contract Law was enacted in 1999.
662 “Civil law rights” refer to the rights that are granted by Chinese statutes that allow people to file civil law suits for remedies. Those rights are laid down particularly in the General Principles of Civil Law (GPCL), specifically, the rights regarding “property ownership” and other “property rights” laid down in Chapter V. GPCL, supra note 11, ch. V. The term “civil law right” is often translated as “civil rights,” but “civil law right” does not grant Chinese people “individual rights” similar to the Western legal system.
663 GPCL, supra note 18, art. 1.
664 Id. art. 3.
665 Id. art. 4.
666 Id. art. 7
The GPCL grants civil law rights to people including the right to property,\textsuperscript{667} intellectual property,\textsuperscript{668} compensation,\textsuperscript{669} contract for managing land, and establishing legal enforceable relations.\textsuperscript{670} The statute also grants personal rights such as right to life and health,\textsuperscript{671} reputation, and many others.\textsuperscript{672} This statute is considered to be the cornerstone of Chinese private law, especially under Chinese communist governance that negated private property.\textsuperscript{673} By granting these rights, private contractual relations and individual protection become possible.

In order to enhance economic development through foreign investment, the GPCL also grants foreigners and stateless persons equal status regarding civil activities.\textsuperscript{674} No organization or individual may infringe upon the civil law rights mentioned in the statute.\textsuperscript{675}

With respect to product safety, Article 122 of GPCL provides:

[I]f a substandard product causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability…If the transporter or storekeeper is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.\textsuperscript{676}

Three civil law rights are affirmed by this article. The first is the right to remedy property damages and physical injuries caused by substandard products. The second is the right to

\textsuperscript{667} Id. art. 71.
\textsuperscript{668} Id. art. 94-97.
\textsuperscript{669} Id. art. 115.
\textsuperscript{670} Id. art. 80, 84.
\textsuperscript{671} Id. art. 98.
\textsuperscript{672} Id. art. 98, 101-02.
\textsuperscript{673} KENNETH A. CUTSHAW, MICHAEL E. BURKE & CHRISTOPHER A. WAGNER, CORPORATE COUNSEL’S GUIDE TO DOING BUSINESS IN CHINA 170 (2009).
\textsuperscript{674} GPCL, supra note 18, art. 8
\textsuperscript{675} Id. art. 4.
\textsuperscript{676} Id. art. 122.
indemnity for manufacturers and sellers against wrongdoing by transporters and storekeepers.

The third is the right to compensation.

Although Article 122 of GPCL provides the basic principles, many questions remain. For instance, the statute does not mention whether “substandard” refers to national or other standards, whether “products” includes real estate, whether the liabilities are limited to the four parties mentioned, and many others. These questions led to other statutes such as Standardization Law in 1988 and Tort Law in 2009.

But besides those questions, the GPCL separates civil liabilities between breach of contract and infringement of civil law rights. While the substandard product provision, Article 122, is found in the section “civil liabilities for infringement of rights,” the civil liabilities for breach of contract are mentioned in a separate section. Concerning contractual rights, Article 111 provides:

If a party fails to fulfill its contractual obligations or violates the terms of contract while fulfilling the obligations, the other party shall have the right to demand fulfillment or the taking of remedial measures and claim compensation for its losses.

Although there are debates between scholars regarding the border between contractual liabilities and product liabilities, what is clear is that substandard product liability may be applied by any persons who suffer property damage or physical injuries regardless of contractual relations.\(^{677}\) Thus, the scope of the right to remedy damages from substandard products could be much wider than contractual rights in terms of the possible complainants, even if the damage was caused by the same piece of substandard product.

Criminal Law

The Criminal Law\textsuperscript{678} came into effect in 1979 and was extensively revised.\textsuperscript{679} In accordance with the statute, there are three types of harmful conduct against society that constitute crimes: 1) conduct endangering state security; 2) conduct endangering public security; and 3) conduct undermining the “socialist market economic order.” The crimes particularly related to product and food safety are detailed in Chapter III as conduct undermining the “social market economic order.”

Chapter III, Section 1 covers the production and sale of misbranded or substandard commodities.\textsuperscript{680} Related conduct includes: producing or selling misbranded and defective products as genuine; producing or selling specific types of commodities such as misbranded medicine or medicine of inferior quality, misbranded pesticides, misbranded animal pharmaceuticals, misbranded chemical fertilizers, or specific types of commodities below standards such as food below hygiene standards, toxic food with harmful non-food materials, and medical or electrical appliances below national or trade standards.\textsuperscript{681}

The statute also states specific criminal responsibilities. Penalties can be principal and supplemental.\textsuperscript{682} Principal penalties include surveillance, criminal detention, fixed-term

\textsuperscript{678} Criminal Law, supra note 19.

\textsuperscript{679} There are some regulations related to criminal punishments that existed before the enactment of the 1979 Criminal Law. Those regulations include: the Regulations on the Punishment of Counter-revolutionaries (1951), the Regulations on Punishment for Corruption (1952), and the Provisional Regulations on Punishment for Damage to the State Currency (1951). Chen, supra note 41, at 233, and Chen J., supra note 42, at 261-66.

\textsuperscript{680} Criminal Law, supra note 19, ch. III, § 1. The word “misbranded” is also translated as “fake,” which may also be accurate concerning the original text in Chinese is “伪” (wei).

\textsuperscript{681} Id., and id. art 140-148. Chapter III Section 1 is about the “Crimes of Production and Sale of Fake or Substandard Commodities.”

\textsuperscript{682} Id. art. 32.
imprisonment, life imprisonment, or the death penalty. Supplementary penalties can be fines, deprivation of political rights, or confiscation of property. The amount of fines and the period of imprisonment used to be determined by the sales amount of the misbranded or substandard product in question. Due to the food safety crisis, the Amendment VIII to the Criminal Law adopted in 2011 imposed more stringent penalties by removing the limits of the amount that could be fined that beforehand had to be proportionate with “the amount of earnings from sales.” In other words, people’s courts can impose higher fine amounts now.

The Criminal Law relies on other statutes for definitions. For instance, when the statute considers the definition of “misbranded medicine,” it refers to the Drug Administration Law. It would be very likely that terms such as “food,” “cosmetic,” “medical appliance” and others may refer to the definitions in the Food Safety Law and other specific product statutes. In order to have consistent definitions, some scholars or judges even consider the principles provided in case law despite China’s civil law system.

683 *Id.* art. 33.

684 *Id.* art. 34.

685 *Id.* art. 140. For example, Article 140 of the Criminal Law states, “Where a producer or seller mixes impurities or imitations into a product, or passes a fake product off as a genuine one, or passes a defective product off as a high-quality one, or passes a substandard product off as a standard one, if the sum obtained through sale amounts to not less than 50,000 yuan but less than 200,000 yuan, the offender shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention, and concurrently or independently be sentenced to a fine of not less than half of the sum obtained through sale and not more than twice of that. If the sum obtained through sale amounts to not less than 200,000 yuan but less than 500,000 yuan, the offender shall be sentenced to fixed-term imprisonment of not less than two years and not more than seven years, and concurrently be sentenced to a fine of not less than half of the sum obtained through sale and not more than twice of that . . . .”

686 For instance, Amendment VIII to the Criminal Law adopted in 2011 removed the limits of fine amount from Article 141. Previously, the fine could not be “less than half but not more than two times the amount of earnings from sales” if the misbranded medicines “are harmful enough to seriously endanger human health.” Similar limits were also removed from Article 142 and 143.

687 *Id.* art. 141-42. The Drug Administration Law may also be translated as “Medical Products Control Law.”
The Contract Law came into effect in 1999. Its aim is to protect the rights and interests of contractual parties, maintain social and economic order, and promote socialist modernization. Following the basic directions provided by the GPCL, this statute provides more freedom and flexibility to contractual relations in accordance with China’s desire to join the WTO in 2001. In light of this statute, people have a right to form legally enforceable agreements provided that those agreements do not violate existing laws.

There are twenty three chapters of the Contract Law. Chapter 1 provides general provisions with basic principles. Chapters 2 through Chapter 7 address formation rules and requirements. Chapter 8 considers supplementary principles. Chapters 9 through Chapter 23 list specific rules concerning different subject matters such as contracts for sales, leases, services, transportation, and commission.

The supplementary principles in Chapter 8 provide instructions about dispute resolution, the role of administrative agencies, and the international sale of goods. Administrative agencies are responsible for supervising, resolving, and investigating situations when abuse of

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688 Contract Law, supra note 20. Prior to the enactment of the Contract Law, “property relationships” was governed by the 1986 General Principles of Civil Law (GPCL), which recognized the equal status between citizens and legal persons. Chen, supra note 41, at 241. Prior to the GPCL, there was the 1981 Economic Contract Law (ECL), which strongly favored the planned economy; and the 1985 Foreign Economic Contract Law (FECL) which only applied to foreign-related economic transactions. Chen J., supra note 42, at 444-46.

689 Id. art. 1.


691 Contract Law, supra note 20, art. 8.

692 Id. art. 3-5, 7. The basic principles provided include the rights of equal status, fairness, and freedom of contract. Other basic principles placed boundaries on those rights, particularly the freedom of contract, such as the compliance of laws, administrative regulations, social ethics, economic order, and public interests.

693 Id. art. 125. Settlement, mediation, and arbitration are encouraged when disputes occur. Id. art. 128. When considering the meaning of contractual terms, the statute requires consideration of the language, the purpose of the contract, common practices, and the principle of good faith.
contract rights injure the public interest.\textsuperscript{694} With respect to international sale of goods or a contract involved import or export, the statute sets the time limit of four years for filing a complaint or applying for arbitration.\textsuperscript{695}

The Contract Law allows complainants who have suffered personal or property damages to choose between different remedies provided in contract law and other statutes.\textsuperscript{696} For instance, under the Standardization Law, exported products are not governed by domestic standards but contractual provisions.\textsuperscript{697} Thus, if exported products are concerned, private agreements between foreign buyers and local enterprises are the basis of product quality required, and the contract law principles would be applied.

**Tort Law**

The Tort Law\textsuperscript{698} was enacted in 2009 and became effective in 2010. The aim is to protect civil law rights and interests, clarify tort liabilities, prevent and punish tortuous conduct, and promote social harmony and stability.\textsuperscript{699} Some scholars maintain that this statute provides remedies as well.\textsuperscript{700}

\textsuperscript{694} Id. art. 127. (“The administrative departments for industry and commerce and other relevant competent administrative departments shall, within the scope of their respective duties and powers and in accordance with the law, be responsible for the supervision and treatment of the illegal activities endangering the State’s interests and the social and public interests by making use of contracts; if a crime is constituted, criminal responsibility shall be investigated pursuant to law.”) The “public interests” may refer to “State’s interests” and the “social and public interests,” which does not have a definition in the Contract Law.

\textsuperscript{695} Id. art. 129.

\textsuperscript{696} Id. art. 122. The Contract Law does not state which “other statutes” may be used for seeking compensation. The “other statutes,” therefore, may refer to any statute enacted by the NPC or NPCSC.

\textsuperscript{697} Standardization Law, \textit{supra} note 9, art. 16.

\textsuperscript{698} Tort Law, \textit{supra} note 21.

\textsuperscript{699} Id. art. 1.

\textsuperscript{700} Wang L., \textit{supra} note 677, at 109.
In accordance with the Tort Law, strict liability is imposed for injuries caused by defective products, environmental pollution, ultra-hazardous activities, domestic animals, and others.\textsuperscript{701} The term “injury” is not limited to personal injuries but incorporates broader civil legal rights and interests. Conduct that infringes civil law rights can be seen as “at fault” or “without fault.”\textsuperscript{702} “At fault” conducts refers to infringing acts with intention, recklessness, or negligence.\textsuperscript{703} Infringing conducts “without fault” is similar to the Western legal term “strict liability,” which refers to wrongdoings by conduct itself.\textsuperscript{704}

The Tort Law defines “civil rights and interests” to include a number of basic rights such as the right to life, health, privacy and security; personal rights such as name, reputation, honor, marital autonomy, guardianship and succession; and property and intellectual property rights such as self-image, copyright, patent, trademark and others.\textsuperscript{705} The Tort Law affirms that these rights are legally protected.\textsuperscript{706} In addition, tort liabilities co-exist with administrative liabilities and criminal responsibilities.\textsuperscript{707}

The Tort Law provides liability and compensation if product defects “cause any harm to another person.”\textsuperscript{708} This liability also extends to a threat of endangering “the personal or property

\textsuperscript{701} Id. art. 17.

\textsuperscript{702} Id.

\textsuperscript{703} WANG ZHU (王竹), ZHONGHUA REMIN GONGHEGUO QINQUAN ZERENFA PEITAO GUIDING (中华人民共和国侵权责任法配套规定) [Chinese Tort Law and Related Regulations] 15 (2010) [hereinafter Wang Z.].

\textsuperscript{704} Id. at 16.

\textsuperscript{705} Tort Law, supra note 21, art. 2.

\textsuperscript{706} Id. art. 6-7. Any conduct infringing those rights shall be subject to tort liabilities.

\textsuperscript{707} Id. art. 4. Article 4 states that wrongdoers shall compensate complainants first if wrongdoers do not have sufficient resources to be responsible to all liabilities.

\textsuperscript{708} Id. art. 41.
safety of another person.” 709 It provides right to an injunction as to the conduct or elimination of the danger. 710 If defective products are in the market, manufacturers or sellers are required to warn and recall the products in a timely manner. 711 Punitive damages are imposed if manufacturers or sellers knowingly continue the sale of defective products and such defects cause death or serious injuries. 712

Standardization and Trade Product Inspection

Standardization and trade product inspection statutes were enacted predominately in the 1980s. The aim was to develop a socialist economy by establishing unifying standards and conducting import and export inspection. There are two standardization statutes: the Metrology Law and the Standardization Law. Concerning trade product inspection, there are another two statutes: the Import and Export Commodity Inspection Law (IECIL) and the Entry and Exit Animal and Plant Quarantine Law (APQL).

Standardization

The Metrology Law and Standardization Law both contribute to the unification of standards nationally and internationally. The Metrology Law focuses on measuring units and instruments while the Standardization Law emphasizes standard creation and implementation.

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709 Id. art. 45.
710 Id.
711 Id. art. 46.
712 Id. art. 47.
The Metrology Law was enacted in 1985 with the aim is to strengthen metrological supervision and management, guarantee the uniformity of national system of measuring units, and develop production, trade and scientific technology for furthering socialist modernization and safeguarding the state and people interests. The Metrology Law confirms that China adopted the International System of Units (IS) for measurements for national primary standards, metrological verification, manufacturing and marketing measuring instruments.

The Metrology Law also places the metrological department under the State Council to supervise and manage metrological development for the nation. The metrological departments of the governments at or above provincial level are responsible to implement the supervision and management within their administrative regions.

Metrological supervision is mainly accomplished through the licensing management of measuring instruments such as the License for Manufacturer of Measuring Instruments and the License for Repairs of Measuring Instruments. Confiscation of illegal gains, fines, or criminal sanctions could be imposed on violators. If any losses to the nation and consumers are caused by the inaccuracy of measuring instruments, manufacturers could also be subject to civil sanctions.

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713 Metrology Law, supra note 8.
714 Id. art. 1.
715 Id. art. 2-3.
716 Id. art. 4.
717 Id.
718 Id. art. 23.
719 Id.
liabilities. In short, the Metrology Law unifies the measuring system in China, which is also linked to international standard.

Standardization Law

The Standardization Law was enacted in 1988 in order to develop the “socialist commodity economy” and “economic relationships with foreign countries,” “improve product quality,” enhance technological development, and protect people and national interests. It requires unified standards for a number of industrial and agricultural products regarding design, production, packaging, storage, transportation, testing methods, inspection, and others.

The Standardization Law focuses on three tasks regarding the process of standardization including creation, implementation, and supervision. With respect to the creation of standards, the Standardization Law encourages the adoption of international standards and incorporation with national economic and social development. International standards adopted could be the standards of the International Organization for Standardization (ISO), electrical and electronic standards of the International Electrotechnical Commission (IEC), or others.

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720 Id. art. 27.
721 Standardization Law, supra note 9.
722 Id. art. 1.
723 Id. art. 2.
724 Id. art. 3.
725 Id. art. 4.
In accordance with the Standardization Law, several institutions may create standards in China. The first is the State Council, which can establish national standards.\textsuperscript{727} The second are the relevant departments within the State Council, which can develop industrial standards if the national standard is silent and a standard is necessary.\textsuperscript{728} The third is the standardization departments of the governments at provincial level, which can establish local standards. These local standards may be created only when the national and industrial standards are silent. Similar to the local standards, the fourth category, enterprise standards, can be created as well when national and industrial standards are silent.\textsuperscript{729}

Standards can be mandatory or voluntary. National and industrial standards concerning human health, personal and property safety are mandatory.\textsuperscript{730} The same principle applies to the local standards regarding industrial products that pursue safety and hygiene requirements.\textsuperscript{731} Other standards outside those categories listed are voluntary.\textsuperscript{732}

The Standardization Law states that all domestic technical standards are not applied to exported products but rather standards contained in the private contractual agreements of the transactions are applied.\textsuperscript{733} Thus, Chinese manufacturers and foreign buyers are free to negotiate the standards that apply to particular production. This rule adopts a flexible approach to

\textsuperscript{727} Standardization Law, supra note 9, art. 6.

\textsuperscript{728} Id. If a new national standard covers the subject matter of the industrial standard, the industrial standard shall be annulled.

\textsuperscript{729} Id.

\textsuperscript{730} Id. art. 7.

\textsuperscript{731} Id.

\textsuperscript{732} Id.

\textsuperscript{733} Id. art. 16. Article 16 states, “Technical standards for export products shall comply with contractual provisions.” This requirement divides Chinese products into two categories: one is the products for domestic market and the other is the export products for foreign markets. This provision may be based on an assumption that the standards of foreign markets are higher than the domestic market.
international trade. Since different countries very likely have different technical requirements, Chinese manufacturers, therefore, are encouraged to follow the required standards of foreign buyers or distributors.

In terms of supervision, the Standardization Law empowers the standardization department under the State Council to provide certifications to enterprises complying with required standards. This certifying power can also be delegated to other agencies. At the local level, the standardization departments under the governments at or above the provincial level are enabled to establish inspection organizations for supervisory inspections.

Legal liabilities can be imposed on any person who fails to conform to mandatory standards, statutory, or regulatory requirements. The possible sanctions and liabilities include confiscation, termination of sale, revocations of standard certificates, fines, and criminal responsibilities. The statute also provides an administrative reconsideration right where the imposed sanction is not acceptable.

Trading Products Inspection

The main trading products inspection statutes are the Import and Export Commodity Inspection Law (IECIL) and the Entry and Exit Animal and Plant Quarantine Law (APQL). These statutes focus on the safety of exported Chinese products and imported foreign products. Thus, these statutes relate directly to product safety issues and their effect extends beyond the

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734 Id. art. 15. Article 15 also states that certification marks shall be permitted on products or packaging if the products are certified.

735 Id.

736 Id. art. 19.

737 Id. art. 20-22.

738 Id. art. 23.
Chinese border. The differences between these two statutes, however, are their subject matters and scopes.

Import and Export Commodity Inspection Law

The Import and Export Commodity Inspection Law\(^{739}\) (IECIL) was enacted in 1989 with the aim to strengthen the inspection of import and export commodities to ensure qualities, protect trading rights and interests, and promote economic development and foreign trade relation.\(^{740}\) The subject matters concerned include all kinds of commodities, as long as those commodities involve foreign trade. The inspection principles adopted are to protect human and animal health and life, as well as the environment.\(^{741}\)

The IECIL requires the State Council to establish the State Administration Commodity Inspection (SACI) as the national department in charge of import and export commodity inspection.\(^{742}\) Moreover, the SACI establishes local authorities to implement inspections within their jurisdictions.\(^{743}\)

Other than establishing local authorities, the SACI is also responsible to develop a List of Import and Export Commodities Subject to Inspection (the “Commodity List”) in accordance

\(^{739}\) IECIL, *supra* note 10.

\(^{740}\) *Id.* art. 1.

\(^{741}\) *Id.* art. 4.

\(^{742}\) *Id.* art. 2. The State Administration for Commodity Inspection (SACI) is also named the “State Administration for Import and Export Commodity Inspection.” This agency has been merged with the General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ) and became a department named as Department of Supervision on Inspection. *Department of Supervision on Inspection: Functions, AQSIQ.GOV.CN*, http://english.aqsiq.gov.cn/AboutAQSIQ/MajorDepartments/DepartmentofSupervisiononInspection/ (last visited Sept. 20, 2013).

\(^{743}\) IECIL, *supra* note 10, art. 2.
with the needs of foreign trade. The listed items are subject to mandatory inspection; however, this inspection requirement may be exempted with approval of the SACI.

The IECIL institutionalizes requirements regarding imported and exported commodities. Consignees of imported commodities are required to fulfill obligations include registration, inspection at certain time and place, certification, and supervision over manufacturing before shipment at exporting countries. Similar responsibilities are also imposed on consignors with exported commodities.

The IECIL emphasizes the role of agencies as well. The IECIL allows authorities to publicize the result of random inspections, assign personnel to inspect manufacturing sites when it is necessary, and permit qualified inspection bodies to undertake inspection. The statute also requires the SACI to supervise inspection bodies through random inspections and adhere to a unified certification system. When disagreement over inspection results occurs, re-inspections can be applied for at the next higher level of the authorities or to the SACI. Thus, administrative authorities take a key role for ensuring import and export commodity safety in a uniform manner.

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744 Id. art. 4.
745 Id. art. 5.
746 Id. ch. II., art. 11-14.
747 Id. ch. III., art. 15-18.
748 Id. art. 19-21.
749 Id. art. 23, 24, 26.
750 Id. art. 28.
Entry and Exit Animal and Plant Quarantine Law

The Entry and Exit Animal and Plant Quarantine Law\(^{751}\) (APQL) was enacted in 1991 in order to prevent infectious and parasitic diseases of animals and plants from spreading into or out of China, protect agricultural production and human health, and promote the economic development of foreign trade.\(^{752}\) It concerns animals and plants and their related products, as well as packaging materials and means of transport used.\(^{753}\)

The APQL empowers the Ministry of Agriculture (MOA) under the State Council as the department in charge of the entry and exit of animal and plant quarantine.\(^{754}\) In addition, the State Council establishes an animal and plant quarantine department to unify national administration.\(^{755}\) This department, the Department of Supervision on Animal and Plant Quarantine, is currently under the General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ).\(^{756}\)

Other than MOA and GAQSIQ, the APQL also requires local governments to report to higher level governments and the Department of Supervision on Animal and Plant Quarantine where epidemic threats occur\(^{757}\) as well as on the coordination between different agencies such as the customs, department of communications, civil aviation, railways, postal services, and

\(^{751}\) APQL, supra note 11.

\(^{752}\) Id. art. 1.

\(^{753}\) Id. art. 2.

\(^{754}\) Id. art. 3.

\(^{755}\) Id. Under the GAQSIQ, there is a department, the Department of Supervision on Animal and Plant Quarantine, which is responsible for “entry-exit animal and plant matters.” Department of Supervision on Animal and Plant Quarantine: Functions, AQSIQ.GOV.CN, http://english.aqsiq.gov.cn/AboutAQSIQ/MajorDepartments/DepartmentofSupervisiononAnimalandPlantQuarantine/ (last visited Sept. 20, 2013).

\(^{756}\) The GAQSIQ is an organization directly under the State Council. State Council, supra note 531.

\(^{757}\) APQL, supra note 11, art. 6.
transportation. The animal and plant quarantine authorities have the power to exercise quarantine inspections on any vehicles, ports, post offices, production or storage sites, and require copies of certain documents.

The APQL covers five quarantine points: 1) entry; 2) exit; 3) transit; 4) materials carried by passengers or by post; and 5) means of transportation. Owners are required to submit quarantine inspection applications for Chinese animals and plants exported to foreign countries. No exportation is permitted without passing inspection or conforming to the respective standard. Legal responsibilities can be imposed on violators such as fines and criminal liabilities, and administrative reconsideration is available when sanction is disputed.

Consumer Protection

After enacting the statutes regarding standards and trading products in the 1980s, statutes concerning domestic consumer protection were enacted in the 1990s. These consumer protection-oriented statutes do not focus on any specific product, but on more general concepts such as consumer rights, product quality, and the supervision of advertisement. The related statutes are the Consumer Rights and Interests Protection Law, Product Quality Law, and the Advertisement Law.

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758 Id. art. 8.
759 Id. art. 4.
760 Id. art. 20.
761 Id. art. 20-21.
762 Id. art. 42-43.
763 Id. art. 44.
Consumer Rights and Interests Protection Law

The Consumer Rights and Interests Protection Law\(^{764}\) (CPL) was enacted in 1993 to protect consumer rights and interests, maintain socioeconomic order, and promote “socialist market economy.”\(^{765}\) The CPL defines consumer rights and imposes obligations and responsibilities on business operators and government supervisors respectively. It also clarifies the role of consumer organizations,\(^ {766}\) suggests different approaches to dispute resolution,\(^ {767}\) and establishes possible legal responsibilities for violators.

The CPL confirms the legal rights and interests of consumers.\(^ {768}\) Article 2 of the CPL defines “consumers” as purchasers and users of commodities and services for daily consumption.\(^ {769}\) Chapter II laid down the basic rights of consumers such as the right to demand safe products free from personal injury or property damage,\(^ {770}\) the right to true and detailed information,\(^ {771}\) the right to free choices,\(^ {772}\) the right to a fair deal,\(^ {773}\) the right to compensation,\(^ {774}\)

\(^{764}\) CPL., supra note 9.

\(^{765}\) Id. art. 1.

\(^{766}\) Id. art. 31-33.

\(^{767}\) Id. art. 34.

\(^{768}\) Id. art. 2.

\(^{769}\) Id.

\(^{770}\) Id. art. 7.

\(^{771}\) Id. art. 8.

\(^{772}\) Id. art. 9.

\(^{773}\) Id. art. 10.

\(^{774}\) Id. art. 11.
the right to form public consumer organizations, the right to dignity, and the right to file complaints.

In addition to consumer rights, the CPL imposes obligations on business operators. For instance, business operators must listen to consumers’ opinion, guarantee safety standards, be responsible for repair, replacement, and return, provide truthful information, shall not impose unfair and unreasonable rules on consumers, or insult, defame, or violate the personal freedom of consumers.

Other than the obligations listed above, the CPL also requires business operators to adopt the obligations mentioned in the Product Quality Law. Moreover, if agreement is reached between business operators and consumers, agreed obligations must be fulfilled, as long as those obligations do not violate existing laws and regulations.

Mandatory responsibilities are also imposed on the nation, administrative and other organs. The “nation” must formulate laws, regulations, and policies considering consumers’

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775 Id. art. 12.
776 Id. art. 14-15.
777 Id. art. 17.
778 Id. art. 18.
779 Id. art. 23.
780 Id. art. 19-20.
781 Id. art. 24.
782 Id. art. 25.
783 Id. art. 16.
784 Id.
opinions and demands while national and local governments at all levels must strengthen their leadership, organization, coordination, and supervision to prevent harms to consumers. Agencies shall adopt measures to protect consumers’ rights and interests and consider their opinions, and relevant state organs must enforce statutes and regulations. Lastly, courts shall take measures that provide relief to consumers.

Consumer organizations have legal duties and functions to supervise product and service providers and protect consumers’ rights. Specific duties and functions include providing information for consumers; joining administrative supervision by conducting reports; investigating, mediating and submitting complaints; exposing and criticizing infringements through media. Moreover, agencies are required to support consumer organizations, but those organizations may not engage in product and service businesses.

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785 Id. art. 26. The “nation” is usually translated as “state.” No statute provision directly clarifies who the “nation” is. But Article 2 of the PRC Constitution provides, “all power in the People’s Republic of China belongs to the people. The organs through which the people exercise state power are the National People’s Congress and the local people’s congresses at different levels. The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law.” Thus, the “nation” may refer to “the people” at the national and local people’s congresses.

786 Id. art. 27.
787 Id. art. 28.
788 Id. art. 29.
789 Id. art. 26-30.
790 Id. art. 32.
791 Id. art. 32(1).
792 Id. art. 32(3)-(4).
793 Id. art. 32(4).
794 Id. art. 31-32.
795 Id. art. 32.
796 Id. art. 33.
The CPL provides channels for dispute resolution. Consumers may mediate with business operators directly, request consumer organizations to mediate, file complaints with administrative departments, apply for arbitration, and file suits in people’s courts.\textsuperscript{797} It reconfirms the consumer rights of compensation\textsuperscript{798} and the right of indemnity for business operators.\textsuperscript{799}

With respect to legal responsibilities, the CPL incorporates the Product Quality Law and other relevant statutes and regulations when commodities have defects, false descriptions, ineffective quality, insufficient weight, or when business operators “deliberately” delay or “unreasonably” refuse to repair, replace, or return the commodity in question.\textsuperscript{800} Wrongdoing business operators are responsible for medical expenses, nursing costs, loss of income, living expenses, and other costs depending on the actual circumstances.\textsuperscript{801} In cases when a consumer’s right of freedom, dignity, or reputation is infringed, business operators are required to cease the infringement, restore the reputation, apologize, and compensate for losses.\textsuperscript{802}

\textsuperscript{797}Id. art. 34.

\textsuperscript{798}Id. art. 35.

\textsuperscript{799}Id. Article 35 allows consumers to seek compensation from manufacturers or sellers who supply the commodities. Sellers have a right to seek the paid compensation from manufacturers if the liability is on manufacturers. The same right is granted to manufacturers as well. Other than sellers and manufacturers, consumers may also seek compensation from other parties, such as business license holders whose licenses were unlawfully used by third parties, business fair organizers who organized trade fairs that supplied harmful commodities or services, and advertising agents who provided fraudulent information. \textit{Id.} art. 36-38.

\textsuperscript{800}Id. art. 40.

\textsuperscript{801}Id. art. 41.

\textsuperscript{802}Id. art. 43.
In April 2013, a draft amendment to the CPL was proposed by the NPCSC.\textsuperscript{803} The draft amendment clarified consumers’ privacy rights, granted a new right to seek repair, replacement, and return, imposed on business operators a duty to recall and on advertising agencies collective responsibilities not to provide fraudulent information, and extended consumers’ right to know, right to choose, and right to seek compensation.\textsuperscript{804}

**Product Quality Law**

The Product Quality Law\textsuperscript{805} (PQL) was enacted in 1993 and amended in 2000. Instead of focusing on consumer rights, the PQL emphasizes administrative supervision and liabilities. The purpose is to protect consumer rights and the social economic order.\textsuperscript{806} The term “product” refers to any items processed or manufactured for selling purpose.\textsuperscript{807}

The PQL has four main chapters. Chapter II is about administrative supervision. Chapter III is about the obligations of manufacturers and sellers. Chapter IV concerns compensation, and Chapter V imposes penalties.

Four layers of agencies are responsible for product quality. The first layer is the quality supervision and administration departments of the State Council, which supervise these matters for the entire nation.\textsuperscript{808} The second layer is the relevant departments of the State Council which


\textsuperscript{804} Id.

\textsuperscript{805} PQL, supra note 10.

\textsuperscript{806} Id. art. 1.

\textsuperscript{807} Id. art. 2.

\textsuperscript{808} Id. art. 8.
take on the responsibilities within their functions. 809 The third layer is the governments at or above county level, which supervise these matters within their regions. 810 The fourth layer includes the governments at all levels ensuring the implementation by guiding, urging, and supervising manufacturers and sellers. 811

The product quality supervisory power involves certification, inspection, investigation, and sanction. Certification refers to a voluntary standard system governed by the State Council. 812 Inspection incorporates the random testing power of both the central and county governments. 813 Investigation indicates the on-site inspections by county governments based on product quality complaints and evidence. 814 Sanction signifies the administrative requirements or punishments that may be imposed on manufacturers and sellers. 815

With respect to inspection, three types of products are listed in the PQL: 1) products that may injure human health and property; 2) important industrial products in terms of national economy; and 3) products that are reported defective by consumers or relevant organizations. 816 The PQL prohibits overlapping inspection; governments at the lower levels do not inspect products that have been inspected by upper level governments. 817

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809 Id.
810 Id.
811 Id. art. 7.
812 Id. art. 14.
813 Id. art. 15.
814 Id. art. 18.
815 Id. art. 17, ch. V.
816 Id. art. 15.
817 Id.
The PQL also imposes obligations on government officials. It requires that agencies and national organs at all levels shall not abuse their power, neglect their duties, and participate in business operations for private interests. Any entity or individual may inform the central agencies of violations. Moreover, informers are entitled to awards and to remain confidential. Administrative sanctions and criminal liabilities can be imposed on government officials.

Concerning the legal responsibilities of manufacturers, the PQL adopts the principle of unreasonable danger, ordinary functions, and truthful information. In other words, products should not be unreasonably dangerous, but provide ordinary function with truthful description. Sellers are responsible to examine product quality including the truthfulness of certificates and quality marks on packages.

Civil liabilities and administrative sanctions can be imposed on manufacturers and sellers such as repair, replacement, and return by sellers and compensation for personal and property damage caused by sellers or manufacturers. Administrative sanctions include termination orders of production and sale, confiscation of defective products and illegal income, fines, and

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818 Id. art. 9, 25.
819 Id. art. 10.
820 Id.
821 Id. art. 65-68.
822 Id. art. 26.
823 Id. art. 40.
824 Id. art. 33, 38.
825 Id. art. 40.
826 Id. art. 41.
revocation of business licenses.\textsuperscript{827} Criminal responsibilities can be imposed if the violation constitutes a criminal offense.\textsuperscript{828} If criminal offenses are involved, the range of the possible sanctions could be life imprisonment and even the death penalty.

Other than producers and sellers, inspection institutions, product quality certification institutions, and social groups such as unofficial intermediary organizations can be jointly and severally liable if warranties or certificates are wrongly provided.\textsuperscript{829} Thus, the Product Quality Law imposes collective obligations on different sectors including administrative agencies, producers, sellers, quality institutions, and unofficial organizations.

\textbf{The Advertisement Law}

The Advertisement Law\textsuperscript{830} was enacted in 1994 in order to protect consumer rights and maintain social economic order.\textsuperscript{831} It adopts the general principles of fairness, honesty and creditability.\textsuperscript{832} Advertisements are obliged to provide truthful and non-misleading information,\textsuperscript{833} and if the advertising subject is food, alcohol, or cosmetics, the content must comply with license requirements.\textsuperscript{834}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{827} \textit{Id.} art. 49.
\item \textsuperscript{828} \textit{Id.}
\item \textsuperscript{829} \textit{Id.} art. 57-58.
\item \textsuperscript{830} Advertisement Law, \textit{supra} note 14.
\item \textsuperscript{831} \textit{Id.} art. 1.
\item \textsuperscript{832} \textit{Id.} art. 5.
\item \textsuperscript{833} \textit{Id.} art. 57-58.
\item \textsuperscript{834} \textit{Id.} art. 19.
\end{itemize}
\end{footnotesize}
The State Administration for Industry and Commerce (SAIC) departments at or above county level are empowered to administer and supervise advertising activities.\textsuperscript{835} Administrative sanctions imposed on advertisers could be termination orders, correction announcements, fines, and the suspension of businesses.\textsuperscript{836} Criminal responsibilities apply if violations constitute criminal offenses.\textsuperscript{837} Civil liabilities are imposed on advertisers if damages are caused by fraudulent or misleading advertisements. These liabilities also extend to the advertising agents and publishers who knew or should have known the fraud\textsuperscript{838} and to organizations that conducted recommendations in those advertisements.\textsuperscript{839}

**Specific Products**

This category of statutes concerns specific products. Three statutes will be discussed: Drug Administration Law (DAL); Agricultural Product Quality and Safety Law (APQSL); and Food Safety Law (FSL). The discussion will focus on the aims, subjects, subject matters, and the basic supervisory structures. “Subjects” refer to the persons who shall be governed by the statutes, and “subject matters” refer to the items or articles which shall be governed.

**Drug Administration Law**

The Drug Administration Law\textsuperscript{840} (DAL) is also translated as the “Drug Control Law” and “Pharmaceutical Administration Law.” It was enacted in 1984 and amended in 2001. The aim is to strengthen pharmaceutical administration, ensure quality and safety, and protect human health

\begin{itemize}
  \item \textsuperscript{835} Id. art. 6.
  \item \textsuperscript{836} Id. art. 37.
  \item \textsuperscript{837} Id. art. 39.
  \item \textsuperscript{838} Id. art. 38.
  \item \textsuperscript{839} Id.
  \item \textsuperscript{840} DAL, supra note 15.
\end{itemize}
Any persons, units, and institutions who engaged in research, production, trade, use, or administration of pharmaceutical products in China is governed by the DAL. Under the DAL, “pharmaceutical” is defined as “the articles intended for use in prevention, treatment or diagnosis of human diseases, or intended to effect the purposive regulation of human physiological functions, for which indications or major functions, usage and dosage are prescribed…” This term includes raw traditional Chinese medicinal materials, traditional medicines in ready-to-use forms, chemicals, radioactive drugs, blood products, and many others.

In general, the administrative supervision has four layers. The first layer is the pharmaceutical supervisory and administrative departments under the State Council, which supervise the entire nation. The second layer is the other relevant departments under the State Council and their functions. The third layer is the implementing pharmaceutical supervisory and administrative departments at the provincial level. The fourth layer is the relevant departments at the provincial level assisting within their region.

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841 Id. art. 1.
842 Id. art. 2.
843 Id. art. 102.
844 Id.
845 Id. art. 5.
846 Id.
847 Id.
848 Id.
849 Id.
Despite these four layers, pharmaceutical distributors are also subject to local supervision at or above county level.\(^{850}\) Agencies at these levels are responsible to issue the Pharmaceutical Trade License.\(^{851}\) Without this license, no distributors can engage in any pharmaceutical business.\(^{852}\)

Different licenses apply to different types of business activities. For instance, manufacturers are required to have a Pharmaceutical Production License while medical organizations are required to have a Dispensing Permit.\(^{853}\) Both are issued by agencies at the provincial level.\(^{854}\)

Other than licenses, the DAL imposes mandatory standards. For instance, the Good Manufacturing Practice for Pharmaceutical Products (GMP) of manufacturers;\(^{855}\) the Good Supply Practice for Pharmaceutical Products (GSP) of distributors;\(^{856}\) the Good Clinical Practice (GCP) of clinical institutions;\(^{857}\) and the Good Laboratory Practice (GLP) of non-clinical institutions.\(^{858}\) All standards listed above as well as other national standards are formulated by the departments under the State Council.\(^{859}\)

\(^{850}\) Id. art. 14.  
\(^{851}\) Id.  
\(^{852}\) Id.  
\(^{853}\) Id. art. 7.  
\(^{854}\) Id. art. 23.  
\(^{855}\) Id. art. 9.  
\(^{856}\) Id. art. 16.  
\(^{857}\) Id. art. 30.  
\(^{858}\) Id.  
\(^{859}\) Id. art. 10, 30.
Concerning legal liabilities, pharmaceutical manufacturers, distributors, and institutions could be subjected to fines, illegal income confiscation, certificate revocations, suspension of business operation, and criminal responsibilities. Possible liabilities extend to transporters and storage providers who know, or should have known, about the related violation.

Agricultural Product Quality and Safety Law

The Agricultural Product Quality and Safety Law (APQSL) was enacted in 2006 to ensure the quality and safety of agricultural products, maintain human health, and promote agricultural economy development. “Agricultural products” refer to primary products obtained from agricultural activities, which include plants, animals, microorganisms, and other related items.

The APQSL governs five areas: 1) safety standards; 2) land; 3) production; 4) labeling; and 5) supervision and inspection.

Safety standards focus on the establishing process. The APQSL requires the consideration of risk assessment, scientific and technological basis, and industrial and public

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860 Id. art. 73-75.
861 Id. art. 77.
862 APQSL, supra note 16.
863 Id. art. 1.
864 Id. art. 2.
865 Id. ch. II.
866 Id. ch. III.
867 Id. ch. IV.
868 Id. ch. V.
869 Id. ch. VI.
opinions. Land concerns local environmental conditions such as possible toxic or harmful substances in the air, soil, and water. Production focuses on technical and operational supervision of the use of pesticides, veterinary drugs, feeds, fertilizers, and many others. Labeling requires detailed information such as product name, place of origin, producer, production date, genetic modification, quarantining status, and safety standards.

With respect to supervision and inspection, the APQSL empowers departments of agriculture at or above county level to monitor agriculture product quality and safety, exercise unified leadership, and establish measures. The local governments authorize capable testing institutions to inspect product samples directly from production sites or markets. Moreover, no inspection fee is charged.

Besides the local governments, the Ministry of Agriculture (MOA) of the State Council is responsible to establish a risk assessment committee for conducting risk analysis and evaluation. The assessment result is given to relevant departments of the State Council and published by the central and provincial governments.

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870 Id. art. 12-13.
871 Id. art. 15.
872 Id. art. 20-21.
873 Id. art. 28-32.
874 Id. art. 3, 5.
875 Id. art. 34.
876 Id.
877 Id. art. 6.
878 Id. art. 6-7.
The APQSL also imposes obligations on the nation. The nation directs and promotes standardized production and encourages and supports high quality production and scientific research. Governments at all levels strengthen public awareness and direct producers and sellers to better management and guarantee agricultural product safety.

Possible legal liabilities include administrative sanctions such as fines, correction orders, sale termination orders, confiscation of illegal gains, civil liabilities such as compensation, and criminal responsibilities if the violation constitutes a crime.

Food Safety Law

The Food Safety Law (FSL) was enacted in 2009 replacing the 1995 Food Hygiene Law. The aim is to ensure food safety and protect human life and health. The term “food” is defined as “the finished products and raw materials for people to eat and drink, and articles

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879 No definition of the term “nation” is provided in the statute.

880 Id. art. 8-9.

881 Id. art. 10.

882 Id. art. 44, 47-50.

883 Id. art. 45.

884 Id. art. 53.

885 FSL, supra note 17.


887 FSL, supra note 17, art. 1.
which are traditionally food and medicine, excluding articles that used for the purpose of medical treatment.\footnote{Id. art. 99. This definition is not very satisfactory. For instance, “food” includes “article which are traditionally food and medicine” but excludes “articles that used for the purpose of medical treatment.” Thus, “traditional medicine” seems to be “food,” but “medicine” is not. This may raise question such as: what does “tradition” means? What is the “purpose” of articles?}

Although this definition covers primary agricultural food products such as animals and plants, the Food Safety Law specifies that those products are governed by the APQSL in general.\footnote{Id. art. 5.} The safety standards and information announcements regarding agricultural food products, however, are governed by the Food Safety Law.\footnote{Id.} Thus, the Food Safety Law governs all food safety standards and information.

The Food Safety Law governs food-related activities such as production, processing, distribution, and catering services, as well as the production, business operation and the use of food additives, and food related products such as packing materials, utensils, and equipment.\footnote{Id. art. 2.}

Intending to unify supervision, the Food Safety Law empowers the State Council to establish a Food Safety Committee (FSC).\footnote{Id. art. 4.} Since the statute does not detail the responsibility of this committee, the relationship of this committee with other ministries is unclear currently.\footnote{Chenglin Liu, \textit{The Obstacles of Outsourcing Imported Food Safety to China}, 43 CORNELL INT’L L.J. 285 (2010).}

The Food Safety Law also assigned the Ministry of Health (MOH) to be in charge of agency coordination, risk assessment, safety standards, information announcement, food inspection institutions, and investigation of important incidents at the national level.\footnote{FSL, \textit{supra} note 17, art. 4.}
Agency coordination refers to the relationship between the MOH and other departments at the central level. While the MOH is the primary department in charge, the food safety supervisory power is shared by different agencies in accordance with their functions. The quality supervision department known as General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ) supervises food production, the State Administration for Industry and Commerce (SAIC)\textsuperscript{895} supervises food distribution, and the China Food and Drug Administration (CFDA) supervises catering services.\textsuperscript{896}

At the local level, the Food Safety Law empowers the governments at or above the county level to unify and direct food safety supervision within their regions.\textsuperscript{897} Even the institutions established by governments at higher levels remain under the supervision of local governments in each particular region.\textsuperscript{898}

The Food Safety Law is concerned with six areas of food safety supervision. These areas include risk assessment, standard establishment, food production and operation, food inspection, import and export, and incident management.\textsuperscript{899} Each area has its own supervisory system within central and local agencies.

The MOH is the agency in charge of risk assessment, standard establishment, and inspection institution management. Other central departments inform and report to the MOH if

\textsuperscript{895} The “State Administration for Industry and Commerce” (SAIC) is also translated as “Industrial and Commercial Administration.”

\textsuperscript{896} Id.

\textsuperscript{897} Id. art. 5.

\textsuperscript{898} Id.

\textsuperscript{899} Id. ch. II-VII.
any risk related information is found within their jurisdiction.\footnote{At the local level, the Food Safety Law empowers the departments of health of the provincial governments to establish risk supervisory proposals regarding their regions.}

The MOH also formulates and announces national food standards.\footnote{A unified national standard is established by consolidating different standards such as the agricultural product safety standard, food hygiene standard, and industrial standard.} In line with the Standardization Law, local standards at the provincial level are formulated only when the national standard is silent.\footnote{If both national and local standards are silent, enterprise standards are formulated and reported to provincial governments.} If related national or local standards exist, enterprises are encouraged to formulate a more stringent standard.\footnote{Thus, no food production is conducted without a standard.}

The MOH also regulates food inspection institutions.\footnote{The Food Safety Law empowers the MOH to establish qualification requirements accrediting inspection institutions.} Only

\footnote{For instance, Article 12 requires the MOA, GAQSIQ, SAIC, and CFDA to report to the MOH regarding risk assessment information of their functions.}

\footnote{\textit{Id.} art. 11.}

\footnote{\textit{Id.} art. 21. The FSL moves the national food standardization power from the Standardization Department to the MOH. The Standardization Department, however, remains the power to provide standard serial number.}

\footnote{\textit{Id.} art. 22.}

\footnote{\textit{Id.} art. 24}

\footnote{\textit{Id.} art. 25, and \textit{Xin Chunyin (信春鹰). Zhonghua Renmin Gongheguo Shipin Anquanfa Shiye (中华人民共和国食品安全法释义) [Explanation of the Chinese Food Safety Law] 63 (2009) [hereinafter Xin].}}

\footnote{FSL, \textit{supra} note 17, art. 25.}

\footnote{Xin, \textit{supra} note 905, at 63.}

\footnote{FSL, \textit{supra} note 17, art. 57.}

\footnote{\textit{Id.}.}
accredited institutions may conduct food inspection,\textsuperscript{910} and no exemption shall be granted.\textsuperscript{911} At the local level, departments at or above the provincial level authorize accredited inspection institutions to conduct regular or irregular food sampling inspections.\textsuperscript{912} No inspection fee is charged.\textsuperscript{913}

Food production, distribution, and catering services are supervised by a license system.\textsuperscript{914} Under this system, duplicate licenses are avoided if the different processes involved are performed at the same place. For instance, food production licensees may not need food distribution licenses if food producers sell their products at their production site.\textsuperscript{915} Instead of a central supervision by the MOH, this license system is formulated at or above the provincial level and implemented at or above the county level.\textsuperscript{916} The licensing process is governed by the Administrative Licensing Law,\textsuperscript{917} and on-site inspection is conducted when necessary.\textsuperscript{918}

Imported and exported food is supervised by the GAQSIQ.\textsuperscript{919} All imported food must comply with the national standard or be subject to the approval of the MOH if no available standards are applicable.\textsuperscript{920} Enterprises exporting food to China register with the GAQSIQ.\textsuperscript{921}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{910}] Id.
\item[\textsuperscript{911}] Id. art. 60.
\item[\textsuperscript{912}] Id.
\item[\textsuperscript{913}] Id.
\item[\textsuperscript{914}] Id. art. 29.
\item[\textsuperscript{915}] Id.
\item[\textsuperscript{916}] Id.
\item[\textsuperscript{917}] Administrative Licensing Law, supra note 657.
\item[\textsuperscript{918}] FSL, supra note 17, art. 31.
\item[\textsuperscript{919}] Id. art. 62.
\item[\textsuperscript{920}] Id. art. 63.
\end{enumerate}
\end{footnotesize}
Exported food products, however, do not have to register, but must submit information to the GAQSIQ to be recorded and are subject to supervision and inspection by the Entry-Exit Inspection and Quarantine (EEIQ) at the local level.\textsuperscript{922} There are thirty five EEIQ bureaus with around 300 front branches located in thirty one provinces.\textsuperscript{923}

The Food Safety Law requires governments at or above the provincial level to formulate crisis management proposals.\textsuperscript{924} If the incident is serious, the health department reports to governments at the upper level.\textsuperscript{925} No specific instruction regarding this crisis management is required.

Food supervision relies mainly on local governments. The Food Safety Law empowers local governments at or above the provincial level to coordinate among different departments, such as the departments of Health, Agriculture, Quality Supervision, Industrial and Commerce, and Food and Drug, to organize food supervisory plans.\textsuperscript{926} The departments at this level may also conduct on-site sampling and documentary inspection.\textsuperscript{927} If sufficient evidence is presented, \hfill 

\textsuperscript{921} Id., and Xin, supra note 905, at 158-59. The FSL requires all imported food to have Chinese labels with country of origin, name and address of importing agent, and product description. FSL, supra note 17, art. 66. Importers are also required to keep detailed transactional record such as quantities, product names, foreign producer contact information and others for at least two years. Id. art. 67.

\textsuperscript{922} Id. art. 65, 68. Xin Chunyin, a Vice-Chairperson of the Legislative Affairs Commission of the NPC, considers that the differences between “registration” and “filing-for-record” are that: “registration” requires approval in advance, “filing-for-record” does not. Xin, supra note 905, at 159, 164. There are thirty-five EEIQ bureaus at the provincial level. Under these bureaus, there are around 300 branches locate at different ports of sea, land and air; and around 200 offices with more than 30,000 officials.

\textsuperscript{923} Xin, supra note 905, at 164.

\textsuperscript{924} FSL, supra note 17, art. 70-71. Different departments such as agricultural, quality supervision, and others report to the health department regarding food safety incidents and complaints.

\textsuperscript{925} Id. art 70-72. The FSL requires agencies to take timely action for minimizing damages by providing medical treatments and releasing information.

\textsuperscript{926} Id. art. 76.

\textsuperscript{927} Id. art. 77.
officials may seize substandard food products, related items, and the site itself if illegal production is involved.\footnote{Id.}

The Food Safety Law also imposes criteria on administrative sanctions. Fines can be up to ten times the total commodity value.\footnote{Id. art. 84.} Other sanctions include orders of immediate correction, warnings, suspensions of business operations, revocations of business licenses, and suspension of personal management and trading activities.\footnote{Id. art. 85-88, 91-92.} This personal suspension is imposed on the person-in-charge of any organization whose licenses are revoked\footnote{Id. art. 92.} and lasts for five years.\footnote{Id.}

Administrative sanctions are not limited to the persons who commit direct food-related activities. Fines are imposed on indirect participants such as food market founders, fair organizers, and food counter owners if businesses without licenses are conducted at their sites.\footnote{Id. art. 90.} Food inspectors are subject to administrative sanctions for false inspection reports.\footnote{Id. art. 93.} Possible sanctions include: revocation of inspection qualification, removal from institutions, and suspension from inspection duties for ten years.\footnote{Id.} Local government officials at or above the
county level who are directly responsible for “major” food safety incidents are also subject to demerit, demotion, dismissal, or resignation.936

Rights, Obligations, Supervision, and Liabilities

This section examines the roles of different actors under the Chinese food and product safety law. There are four main actors: 1) consumers who are granted personal, property, and compensation rights; 2) business operators who are obligated to ensure product safety and provide truthful information; 3) administrative agencies who are required to supervise through a long list of measures such as registrations, certifications, inspections, standards, risk assessment, recalls and administrative sanctions such as confiscation and fines; and 4) courts which are responsible for granting remedies and imposing legal liabilities.

During the development of Chinese food and product safety law, more administrative and discretionary power was granted to agencies at various levels and functions. This development, therefore, may reflect a shift from the “market policy” that relies on “invisible hands” of flexibility to an administrative leading policy with “visible hands” that relies on supervision, sanctions, and control of uniformity.

Consumers Rights

Under Chinese law, consumers have three types of rights: personal rights, property rights, and compensation rights. Most of these rights are established in the GPCL in accordance with the PRC Constitution and are developed further in other statutes.

In 1986, the GPCL at first guaranteed the rights to life, health, and contract.937 In 1993, the GPCL further established other personal rights such as right to fairness, supervision, free

936 Id. art. 95. No official definition of “major” is provided by the FSL, but a “major food safety [incident]” may be related to “severe social consequences.” The definition of “severe,” however, is not provided.
choices, human dignity, personal safety, true product information, and establishment of consumer protection organizations. These rights are further developed and detailed in later statutes. For instance, right to true information has been extended by the Advertisement Law and the Food Safety Law in terms of true information in advertisements and on food labels. The right to contract has been furthered by the Contract Law regarding the freedom to form legal enforceable private rights and obligations.

The GPCL also provides the foundation of the right to property. The right to property refers to a right to possess, utilize, and profit from one’s property. The scope of property covers lawful income, housing, savings, daily items, arts, books, production equipment, and other items. All property is protected by law, and no organization or individual can appropriate, encroach, destroy, or confiscate citizens’ property. The CPL also provides consumers a right to property safety regarding products and services.

The GPCL establishes a right to compensation by imposing on infringers an obligation to return or restore the property or reimburse the price of the property. With respect to substandard products that cause personal injuries or property damages, the GPCL also imposes the liability to compensate the loss on manufacturers, sellers, transporters, and storekeepers.

937 GPCL, supra note 18, art. 98.
938 CPL, supra note 12, art. 7-15.
939 GPCL, supra note 18, art. 71.
940 Id. art. 75.
941 Id.
942 Id.
943 CPL, supra note 12, art. 7.
944 GPCL, supra note 18, art. 117.
945 Id. art. 122.
The CPL develops the right to demand compensation for consumers or users who suffer personal injuries or property damages. This right may also be applied against the third parties such as the enterprises succeeding the wrongdoers, business license holders whose licenses were used by tortfeasors, and trade fair organizers. The scope of this right covers the right of indemnity among producers and other tortfeasors. This right to compensation has been further developed in the Tort Law in order to provide more details regarding possible remedies.

**Business Operators’ Obligations**

Product safety statutes impose two types of obligations on “business operators” who are defined as manufacturers, wholesalers, retailers and others supplying commodities or services: product safety and truthful information.

The CPL considers business operators as the object of supervision who are obligated to listen and accept consumer supervision and guarantee product and service safety and quality. This guarantee includes the obligation to repair, replace, return, and compensate losses. The PQL is in line with the CPL by requiring that products shall not be unreasonably dangerous and requires sellers to establish internal inspection system for verifying certificates and quality marks on products they sell. The PQL also affirms three guarantee obligations on business

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946 CPL, *supra* note 12, art. 11, 35.
947 *Id.* art. 36-38.
948 *Id.*
949 *Id.* art. 3.
950 *Id.* art. 17-18.
951 *Id.* art. 23.
953 *Id.* art. 33.
operators including repair, replace, and return of defective products. Business operators are required to compensate personal injuries and property damages caused by defective products. The FSL further extends these obligations to recall unsafe food products, keep tracking record of food production and materials, and to comply with mandatory standards without exemption.

Business operators are also obligated to provide truthful information. The CPL requires truthful information regarding product price, description, functions, instructions, and warnings; truthful information must not be misleading. The PQL requires truthful information on product packages such as labels, marks, grades, place of origin, among others.

Similar truthful information requirements are also the foundation of the Advertisement Law and the FSL. The Advertisement Law requires that the content of advertisement to be true, and the FSL requires specific details on food product labels such as product names, ingredients, and manufacturer names and addresses.

**Administrative Agencies**

Chinese product safety laws emphasize the supervisory role of administration. In order to ensure product safety, agencies are obliged to formulate different supervisory systems and

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954 Id. art. 40.
955 Id. art. 43.
956 The “tracking record” of food products includes the information regarding their sources such as: country of origin, suppliers, manufacturers, retailers, and other related information.
957 FSL, supra note 17, art. 19, 53, 60, 67.
958 CPL, supra note 12, art. 18-22.
959 Id. art. 19.
960 PQL, supra note 13, art. 26(3), 27, 30-31.
961 Advertisement Law, supra note 14, art. 3.
962 FSL, supra note 17, art. 42.
impose administrative sanctions in accordance with the law. The administrative supervision of business operators is accomplished through the imposition of requirements for licensing, registration, inspection, certification, standardization, risk assessment, and publication.

**Administrative Measures**

The license system allows only those operators who satisfy particular requirements to participate in business activities.\(^{963}\) For instance, pharmaceutical manufacturers and distributors must have related licenses under the DAL.\(^{964}\) Food producers, distributors, and catering service providers are required to obtain related licenses from different agencies under the FSL.\(^{965}\)

Another form of the license system is registration.\(^{966}\) Registration systems allow only operators who have registered with relevant agencies to participate in particular business activities. An example is foreign food exporters.\(^{967}\) Under the FSL, only those foreign food exporters that have been investigated by the GAQSIQ may export food to China.\(^{968}\) In accordance with the explanation of the Legislative Affairs Commission (LAC) of the NPCSC,

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\(^{963}\) Kong Fanhua (孔繁华), *Lun Yu Fang Yuan Ze Zai Shi Pin An Quan Fa Zhong De Shi Yong* (论预防原则在食品安全法中的使用) [The Application of the Preventive Approach in the FSL], 4 DANGDAI FAXUE 27, 32 (2011).

\(^{964}\) DAL, *supra* note 851, art. 7 & 14.

\(^{965}\) FSL, *supra* note 17, art. 29.

\(^{966}\) Xin, *supra* note 905, at 158.

\(^{967}\) FSL, *supra* note 17, art. 65.

\(^{968}\) *Id.*
the aim is to ensure those exporters have a good reputation regarding their production and product quality.\footnote{Xin, supra note 905, at 159. The Legislative Affairs Commission (LAC) in Chinese is \textit{Fazhi Gongzuo Weiyuanhui} (法制工作委员会 or “法工委”), which is under the NPCSC. The function is to assist concrete legislative work of the NPCSC. \textit{Legislative Affairs Commission, NPC.GOV.CN}, Nov. 20, 2007, http://www.npc.gov.cn/englishnpc/Organization/2007-11/20/content_1373187.htm, \textit{and Fazhi Gongzuo Weiyuanhui} (法制工作委员会) [Legislative Affairs Commission], NPC.GOV.CN, http://www.npc.gov.cn/npc/fzgzwyh/node_5854.htm (last visited Oct. 2, 2013). People’s congresses at provincial level may establish their LACs if it is necessary.}

Inspection is another major supervisory means for ensuring product safety. The Standardization Law empowers local governments at or above the county level to establish their own or authorize inspection institutions of other units to conduct quality inspections.\footnote{Standardization Law, supra note 9, art. 19.} For instance, agricultural products, food, and pharmaceuticals are all subject to random inspections. The APQSL requires the local governments at or above county level to inspect agricultural products at production sites and markets.\footnote{APQSL, supra note 16, art. 34.} The FSL empowers the local EEIQs to inspect all imported and exported food before being released from customs.\footnote{FSL, supra note 17, art. 62 & 68.} The DAL allows the CFDA to appoint qualified institutions to inspect pharmaceutical products before entering the market.\footnote{DAL, supra note 851, art. 41.}

As far as standards are concerned, there are five layers: international, national, industrial, local, and enterprise.

The new FSL requires consolidation of national and industrial standards. The statute empowers the MOH to review industrial standards such as agricultural product standards by the MOA, food hygiene standards by the CFDA, and food quality standards by the GAQSIQ and
consolidate them into a unified national standard.\textsuperscript{974} Other rules regarding local and enterprise standards remain the same.\textsuperscript{975}

The Standardization Law provides that enterprises may apply for product quality certifications through relevant departments of the State Council.\textsuperscript{976} This voluntary certification mechanism is also adopted by the PQL. The PQL empowers the GAQSIQ to establish a certification system.\textsuperscript{977} Enterprises may voluntarily apply for product quality certifications from institutions under the GAQSIQ or any other institutions that are so authorized.\textsuperscript{978} Enterprises approved under the Standardization Law are entitled to have certification labels on their products.\textsuperscript{979}

Besides voluntary certifications, the FSL requires mandatory inspection certificates before products can be distributed to the market.\textsuperscript{980} Food processors or other related operators are required to verify the related licenses and certificates of their suppliers and supplying products.\textsuperscript{981} A mandatory certification system is also applied to inspection institutions. Only those institutions certified by the MOH or other relevant departments are qualified to conduct food or food related product inspection.\textsuperscript{982} Certification systems, therefore, constitute a major part of administrative supervision.

\textsuperscript{974} \textit{Id.} art. 22
\textsuperscript{975} \textit{Id.} art. 23-25
\textsuperscript{976} Standardization Law, \textit{supra} note 9, art. 15.
\textsuperscript{977} PQL, \textit{supra} note 13, art. 14.
\textsuperscript{978} \textit{Id.}
\textsuperscript{979} Standardization Law, \textit{supra} note 9, art. 15.
\textsuperscript{980} FSL, \textit{supra} note 17, art. 38.
\textsuperscript{981} \textit{Id.} art. 39.
\textsuperscript{982} \textit{Id.} art. 57.
Administrative supervision also requires risk assessment. For instance, the APQSL requires the MOA to establish an expert committee to conduct risk analysis and evaluation regarding agricultural product quality and safety. The FSL requires the MOH to establish an expert committee to conduct risk assessment and a national risk supervisory plan with other relevant departments at the central level. The aim is to reveal risks in a timely manner for better protection. The local departments of health at or above the provincial level are also supposed to formulate supervisory proposals.

Agencies are responsible for disclosing product safety information. The PQL requires the GAQSIQ and the local governments at or above provincial level to publish quality inspection reports. The APQSL requires the MOA and the provincial governments to publish safety information regarding agricultural products. This publication requirement also applies to food and food related products. Under the FSL, the MOH must provide risk warnings, related announcements in a timely manner, and publish food related standards.

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983 APQSL, supra note 16, art. 6.


985 Xin, supra note 905, at 29.

986 FSL, supra note 17, art. 11.

987 PQL, supra note 13, art. 24.

988 APQSL, supra note 16, art. 7.

989 FSL, supra note 17, art. 17.
Administrative Sanctions

Chinese agencies may impose administrative sanctions on business operators. Those sanctions can be divided into three categories. The first category focuses on correction and termination of business operations such as warnings, correction orders, suspensions of business operation, and revocations of licenses. The second category concerns elimination of financial gain such as confiscation of unlawful earnings and by fines. The third adopts preventive approaches such as product recalls for minimizing harm.

The PQL empowers administrative agencies to give warnings, correction or suspension orders, or revoke business licenses to “any person who refuses lawful quality supervisory inspection.” Correction orders are commonly used before imposing fines for fraudulent inspection certifications and misleading labels. Suspension orders are a temporary sanction for minimizing potential harm. For instance, a suspension may be levied for the sale of substandard products. Revocation of business licenses, however, usually applies to severe violations. This category does not involve pecuniary sanctions but such sanctions may be imposed at the same time if statutes so provide.

Confiscation of illegal earnings and fines may be imposed together with non-pecuniary sanctions. For instance, a correction order and a fine can be imposed on inspection institutions

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990 *Id.* art. 21, 24, and Xin, *supra* note 905, at 67. These standards include national, local, and enterprise that have been filed and recorded. This publication requirement follows the Regulations of the PRC on Open Government Information (OGI), which came into effect on May 1, 2008. OGI, *infra* note 1588.

991 PQL, *supra* note 13, art. 56.

992 *Id.* art. 53-54.

993 *Id.* art. 52.

994 *Id.* art. 52-53, 56.
producing fraudulent certificates.\textsuperscript{995} The fines may also be imposed on wrongdoing inspectors personally.\textsuperscript{996} Pecuniary and non-pecuniary sanctions can be imposed at the same time on business operators who produce or sell substandard products.\textsuperscript{997} Those possible sanctions include suspension order of production, confiscation of illegal earning, fines up to three times of the product value, and revocation of licenses.\textsuperscript{998}

Similar sanctions are applied by other product safety related statutes. For instance, correction orders, fines, and revocation of inspection qualification can be imposed on institutions and persons-in-charge who provide fraudulent inspection certificates for agricultural products.\textsuperscript{999} Confiscation orders of illegal gain with equipment and materials at the site, fines, suspension of production, and revocation of licenses can be imposed on food business operators without licenses depending on the severity of circumstances.\textsuperscript{1000}

A product recall system is another administrative sanction that adopts a preventive approach and provides further protection to society. The FSL requires food producers to terminate production and recall distributed defective products in the market with an announcement to business operators and consumers.\textsuperscript{1001} The Tort Law reaffirms this approach and imposes civil liabilities on those business operators who fail to adopt remedial measures, such as warnings and recalls, in a timely manner.\textsuperscript{1002} Similar approaches are also adopted by the

\begin{footnotesize}
\footnotesuperscript{995} \textit{Id.} art. 57.
\footnotesuperscript{996} \textit{Id.}
\footnotesuperscript{997} \textit{Id.} art. 49.
\footnotesuperscript{998} \textit{Id.}
\footnotesuperscript{999} APQSL, supra note 16, art. 44.
\footnotesuperscript{1000} FSL, supra note 17, art. 84-86.
\footnotesuperscript{1001} \textit{Id.} art. 53.
\footnotesuperscript{1002} Tort Law, supra note 21, art. 46.
\end{footnotesize}
CPL amendment draft for furthering consumer protection\textsuperscript{1003} and for pharmaceuticals through the Chinese Administrative Measures for Drug Recalls.\textsuperscript{1004} In light of these protective and preventive administrative sanctions, agencies have greater discretionary power to supervise and control food and product production in a more unified manner.

**Damages, Civil Liabilities, and Criminal Responsibilities**

In addition to above administrative sanctions, liabilities and responsibilities can be imposed by courts. Different liabilities may be imposed concurrently.\textsuperscript{1005} Chinese law provides damages from personal injuries, infringement of personal freedom, property damages with the possibility of punitive damages.

Personal injuries can be physical or mental. The CPL states that business operators who produce defective products and cause personal injuries are responsible for medical expenses including nursing costs, loss of income, and other expenses.\textsuperscript{1006} Personal injuries include disability and death.\textsuperscript{1007} The PQL reaffirms these damages including medical, nursing, funeral, and other expenses.\textsuperscript{1008}


\textsuperscript{1004} Wang Liming (王利明), Guanyu Wanshan Zhongguo Quexian Chanpin Zhaohui Zhidude Ruogan Wenti (关于完善中国缺陷产品召回制度的若干问题) [Some Issues on Perfecting the System for Recalling Defective Products in China], 4 FRONT L. CHINA 325, 334 (2009).

\textsuperscript{1005} Tort Law, supra note 21, art. 15. See also Wang Liming (王利明), Qinquan Zerenfa De Zhongguo Tese (侵权责任法的中国特色) [The Chinese Characteristics of the Tort Law], 2 FAXUEJIA 85, 93 (2010).

\textsuperscript{1006} CPL, supra note 12, art. 41.

\textsuperscript{1007} Id. art. 41-42.

\textsuperscript{1008} PQL, supra note 13, art. 44.
The damage of “mental distress” is established by the GPCL, although no specific
definition for the term is given.1009 Mental distress damage was officially mentioned by the
SPC’s Legal Interpretation Concerning Emotional Distress under Civil Rights Infringement in
2001.1010 The SPC interprets the “disability” and “death” compensation in the PQL as covering
mental distress.1011 The 2009 Tort Law has reaffirmed this interpretation by imposing liabilities
on right infringers who are responsible for serious mental distress.1012

Property damages are recognized by all product safety laws. The PQL provides that
property damages caused by defective products should be restored or compensated.1013 Like the
PQL, the CPL covers property damages caused by both defective products and services.1014
Under the CPL, business operators are required to repair, reproduce, replace, and allow return of
goods, as well as for payment of, compensation for losses caused, unless their agreement stated
otherwise.1015

In general, punitive damages are available for fraudulent conduct, and compensation
amounts for consumers can be increased depending on the type of fraud. The CPL provides that

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1009 Liang Huixing (梁慧星), *Zhongguo Chanpin Zerenfa: Jianlun Jiamao Weilie Zhi Genyun He Duice* (中国产品责任法: 兼论假冒伪劣之根源和对策) [Chinese Product Liability Law: The Fundamental Causes and Solutions of Fraudulent and Substandard Products] 6 FAXUE 38, 43 (2001). Liang suggests that Article 120 of the GPCL, which lays down the rights of “personal names, portraits, reputation and honor,” are relevant to the concept of “mental distress.” Under this article, complainants have a right to seek for injunctions, rehabilitation of reputation, eliminations of ill-effects, apologies, and compensation for losses.

1010 *Id.*

1011 *Id.*

1012 Tort Law, *supra* note 21, art. 22.

1013 PQL, *supra* note 13, art. 44.

1014 CPL, *supra* note 12, art. 44.

1015 *Id.*
if defective products or services involve “fraudulent activity,” the compensation amount is double the actual cost paid by consumers. Similarly, the Tort Law imposes punitive damages on manufacturers and sellers who “knowingly” sell defective products that cause serious personal injuries. The FSL allows this punitive damage to be ten times the sale price if food producers “knowingly” sell substandard food.

As mentioned, Chinese law recognizes two types of civil liabilities: contractual liabilities based on voluntary agreements and civil liabilities imposed by law.

Contractual liability is determined by the terms of the contract between the parties and based on the principles such as “free will,” “equal status,” “equity,” and “good faith.” Such liability is based on private law and the principle of self-determination that assumes individuals in a transaction are the best persons to determine their own rights and obligations. Thus, the parties are free to negotiate and determine their contractual rights and duties.

Civil liabilities are imposed by law. In the context of Chinese product safety, there are different types of liabilities, such as fault liability, strict liability, balanced liability, vicarious liability, endorsement liability, and joint and several liability, that may be imposed by product safety laws.

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1016 The CPL does not provide a definition of “fraudulent activity.”
1017 CPL, supra note 12, art. 49.
1018 Tort Law, supra note 21, art. 47.
1019 FSL, supra note 17, art. 96.
1020 Contract Law, supra note 20, art. 2-7. Those principles are not defined in the Contract Law, but are subject to the obligations to “respect social ethics,” not to “disrupt the socio-economic order” and “impair social and public interests.” Id. art. 7. “Free will,” however, may be that “no unit or person may unlawfully interfere” the “right to enter into a contract.” Id. art. 4.
1022 Id., and GPCL, supra note 18, art. 111-12, and Contract Law, supra note 20, art. 101.
Fault liability begins with negligence. This liability was first established by GPCL. Article 106 states that any persons at fault encroach on the property of the state or other persons shall be civilly liable. The Tort Law extends the scope to the infringement of any civil law rights and interests of another person. Such infringements can be established by facts, illegal conduct, and causation shown by consequences. There are two types of fault liability: one refers to fault by intentional conduct; another refers to fault by negligence. Fault liability as a whole is treated as a basic principle for protecting free competition. Only those who are at fault may be civilly liable.

Strict liability refers to no-fault liability provided by statutes and is solely based on conduct infringing civil law rights and interests. Under the Tort Law, defective product manufacturers are subject to strict liability. Complainants do not have to prove the fault element such as intention or negligence, and judges do not have to determine whether the

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1024 GPCL, *supra* note 18, art. 106.

1025 *Tort Law*, *supra* note, art. 6.


1027 *Id.* at 15.


1029 Wang L., *supra* note 677, at 5, *and* *Tort Law*, *supra* note 21, art. 7.

1030 *Tort Law*, *supra* note 21, art. 41, 65.

related conduct is a fault or not.\textsuperscript{1032} Strict liability provides a higher level of protection to victims.

Fair liability is also called “balanced liability” and applies to damages caused by no party’s fault.\textsuperscript{1033} Under the GPCL, the related parties share the responsibility in accordance with actual circumstances.\textsuperscript{1034} This liability is restated in the Tort Law.\textsuperscript{1035} Fair liability allows judges to consider all relevant factors such as the financial resources of the parties and other relevant factors to determine liabilities.\textsuperscript{1036} Thus, judges have a high level of discretionary power under this provision,\textsuperscript{1037} which is supplemental and applied only to the cases when fault and strict liabilities are not applicable.\textsuperscript{1038}

Vicarious liability was established by the GPCL. The statute imposes civil liabilities on guardians if damages are caused by legally incapable persons.\textsuperscript{1039} Guardians can be parents, spouse, grandparents, elder siblings, close relatives or friends who voluntarily take guardianships of minors or mentally ill persons.\textsuperscript{1040} The Tort Law extends the scope from guardians to

\textsuperscript{1032} \textit{Id.}

\textsuperscript{1033} \textit{Id. at 6, and GPCL, supra note 18, art. 132.}

\textsuperscript{1034} GPCL, supra note 18, art. 132.

\textsuperscript{1035} Tort Law, supra note 21, art. 33.

\textsuperscript{1036} Wang L., Tort Liabilities, supra note 1023, at 6.

\textsuperscript{1037} \textit{Id.}

\textsuperscript{1038} \textit{Id.} The “balanced liability” is established by the 1986 GPCL. Article 132 states that “if none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances.” The “balanced liability” allow judges to consider the financial statuses of the parties and order the party who is more financially capable to be responsible for damages under the principle of “social liability.”

\textsuperscript{1039} GPCL, supra note 18, art. 133.

\textsuperscript{1040} \textit{Id. art. 16-17.}
employing units, employers, and internet service providers.\textsuperscript{1041} For instance, employing units are responsible for the damages caused by employees during their work performance.\textsuperscript{1042}

Endorsement liability concerns food product recommendation by groups, organizations, or individuals. The FSL imposes civil liabilities on the persons who falsely recommend food products.\textsuperscript{1043} The statute particularly focuses on celebrities who recommend food products for profit in false advertisements.\textsuperscript{1044} This liability is also considered as a type of joint and several liability by viewing recommenders-for-profit as joint tortfeasors.\textsuperscript{1045} This liability, however, is seen as a fault liability, not a strict liability.\textsuperscript{1046}

Joint and several liability involves two or more tortfeasors. The GPCL states that joint liability applies when two or more persons jointly infringe the rights and interests of another person.\textsuperscript{1047} When complainants are also at fault, defendant liability can be reduced accordingly.\textsuperscript{1048} This joint and several liability is adopted by different statutes such as the PQL and the Tort Law. For instance, the PQL grants manufacturers and sellers indemnity rights against each other if their conduct is jointly or severally at fault.\textsuperscript{1049} 

\begin{thebibliography}{99}
\bibitem{1041}Tort Law, supra note 21, 34-36.
\bibitem{1042}Id. art. 34. \emph{See also} Wang Z., supra note 703, at 70-71. If labor works are involved, employers are responsible to the damages caused that are related to their fault only. The relevant fault could be the negligence regarding staff selection, supervision, and management.
\bibitem{1043}FSL, supra note 17, art. 55.
\bibitem{1044}Xin, supra note 905, 136-37.
\bibitem{1045}Id., and FSL, supra note 17, art. 55.
\bibitem{1046}Meng Xiaoyang (蒙晓阳) & Li Hua (李华), \textit{Mingren Daiyan Xujia Guanggao De Falüzeren: Jianping Sanlu Naifen Shijian Yu “Shipin Anquanfa” Zi 55 Tiao} (名人代言虚假广告的法律责任: 兼评三鹿奶粉事件与《食品安全法》第55条) [Legal Liability of Celebrities Engaging in False Advertising: Commenting on the Sanlu Milk Powder Incident and Article 55 of the Food Safety Law], 27 HEBEI FAXUE 2, 4 (2009).
\bibitem{1047}GPCL, supra note 18, art. 130.
\bibitem{1048}Id. art. 131.
\bibitem{1049}PQL, supra note 13, art. 43.
\end{thebibliography}
liability mitigation when complainants are at fault.\textsuperscript{1050} Thus, liability is joined and several based on different fault circumstances.

Criminal responsibilities are imposed by the Criminal Law and product safety-related statutes. The Criminal Law concerns the manufacturing and distribution of misbranded and substandard products such as medicine, food, cosmetics, pesticides, animal pharmaceuticals, and medical and electronic appliances.\textsuperscript{1051} With respect to other product safety statutes, the PQL imposes criminal responsibilities on severe cases involving production or distribution of substandard, misbranded, or deteriorated products\textsuperscript{1052} and inspection institutions issuing fraudulent certificates;\textsuperscript{1053} the CPL imposes criminal responsibilities on business operators supplying defective products that caused death\textsuperscript{1054} and government officials neglecting their duties for covering the guilt of business operators.\textsuperscript{1055}

To review the roles of consumers, business operators, administrative agencies, and courts under Chinese food and product safety laws on paper, different, similar, and even overlap obligations, administrative measures, civil liabilities, and criminal responsibilities have been established in and extended to different food and product safety statutes.

Beginning with the consumer rights established by the 1986 GPCL and the product safety obligations imposed on business operators by the 1993 PQL and CPL, administrative agencies have an increasing supervisory power of uniformity over business activities through different

\textsuperscript{1050} Tort Law, \textit{supra} note 21, art. 26.

\textsuperscript{1051} Criminal Law, \textit{supra} note 19, art. 140-48.

\textsuperscript{1052} PQL, \textit{supra} note 13, art. 49-50, 52.

\textsuperscript{1053} \textit{Id.} art. 57.

\textsuperscript{1054} CPL, \textit{supra} note 12, art. 42.

\textsuperscript{1055} \textit{Id.} art. 53.
measures and sanctions, and various legal liabilities may also be imposed on wrongdoers through the judicial function. Due to the dependent role of the Chinese judicial function, food and product safety is, therefore, driven by administrative agencies. This socialist leading role of uniformity may contradict the market economic policy of flexibility.

From Market Economic Policy to Administrative Control

This section reviews Chinese food and product safety law development and its contradictions between the market economic policy of flexibility and increasing administrative supervision of uniformity. The discussion covers five areas: 1) the “general-direction” principle and uniform safety administration; 2) the collective and fragmented supervision; 3) market economy and health protection; 4) the mixture of private and public law; and 5) the unified central and flexible county administrations.

From the “General-Direction” Principle to Uniform Safety Administration

The general-direction principle applies to statutes issued by the NPC and the NPCSC and results in laws that are fundamental, broad, and vague. The statute, however, does not define the meaning of these principles.

1056 Wang L., Tort Liabilities, supra note 1023, at 5. This characteristic may refer to the abstract, vagueness, and simplicity of the legislation.

1057 GPCL, supra note 18, art. 4.
unpredictable. The rationale behind the general-direction principle looks at the imbalanced development among the different regions in China, the impossibility of covering all concrete and specific circumstances, and the necessary flexibility for new developments.

The imbalance between different economic regions is reflected in the vastly different conditions of each region. After adopting the open-door policy in 1979, economic developed in most advanced in the Guangdong and the East coast areas. The differences between the East and the West in terms of economic activities, disputes and legal concerns are enormous. This means that central laws have to be adjusted to address the economic conditions of each region. For instance, it would be unfair to unify compensation amounts in the Tort Law for the entire nation by ignoring the different economic conditions among cities and rural areas.\textsuperscript{1058} The NPC is generally willing to allow local regions to determine what application of the law would be the best for them.

Another reason that statutes adopt the general-direction principle is that it is impossible for statutes to cover all concrete circumstances. Even if it would be possible to set out all concrete circumstances, statutes may become too complicated, lengthy, and overextended.\textsuperscript{1059}

In addition, the general-principle provides a higher level of flexibility. The more general the statutes, the more space there is to adjust to and address new circumstances. This general-direction principle is, therefore, considered to be the open characteristic of rules.\textsuperscript{1060} The aim is to adopt changes with fewer costs and with less time.\textsuperscript{1061} This general-direction principle can be

\begin{itemize}
\item \textsuperscript{1058} Wang L., Remedial Mechanism, supra note 1028, at 150.
\item \textsuperscript{1059} Wang L., Tort Liabilities, supra note 1023, at 5.
\item \textsuperscript{1060} Id.
\item \textsuperscript{1061} This view regarding the flexibility could be considered as unconstitutional in the Western cultural, particularly when the rule of law may pursue certainty, consistency, and predictability. This question will be discussed at Chapter 5.
\end{itemize}
considered to be parallel with the Confucian unwritten legal tradition that relies on general moral directions.

In the 1990s, this general-direction principle incorporated more specific requirements regarding certain subject matters and administrative supervision. For instance, the substandard product provision in the GPCL was transformed in the PQL concerning specific relations among product quality supervision, liabilities, and economic order. Under the PQL, administrative agencies are required to supervise, inspect, investigate, and impose administrative sanctions.  

In the 2000s, the DAL, the APQSL, and the FSL were enacted with a focus on specific products such as pharmaceuticals, agricultural products, and food. Under the 2009 FSL, administrative agencies are required to extend their supervision to monitor risks, verify information, formulate national standards, issue certifications, and establish license and recall systems.  

The FSL also requires greater uniformity. County governments are required to “uniformly lead” the food safety administration with their regions. Other governments lower than the country level are also required to be “under uniform coordination.” Food standards are required to be “uniformly” published. The State is required to establish a “uniform system” for releasing food safety information. This uniformity, therefore, may contradict the general-direction principle that embraces diversity and flexibility.

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1062 PQL, supra note 13, art. 63, 65-66.
1063 FSL, supra note 17, art. 11-12, 21, 33, 43, 53.
1064 Id. art. 5.
1065 Id.
1066 Id. art. 22.
1067 Id. art. 82.
Collective and Fragmented Supervision

The approach of Chinese food and product safety laws is twofold. On one hand is the view that product safety laws should be collectively applicable across different sectors of uniformity. On other hand, this collective approach is also fragmented. By distributing legal responsibilities to various sectors such as the state, agencies, industries, enterprises, institutions, social groups, and media at the central and local levels, the Chinese food and product safety is governed by everyone and no one at the same time.

The food and product safety supervision can be collective. For instance, as mentioned in earlier sections, the Standardization Law sets out four layers of product standards: national, industrial, local, and enterprise. The national standard has the highest status, then the industrial, local, and enterprise. The standards with a higher status trump standards with a lower status. Despite this hierarchical effect, lower level standards can be established freely as long as no higher level standards concerning the same subject matter exist. Chinese product standards, therefore, are collectively established by different sectors at various levels such as the standardization department and all other relevant departments under the State Council, local governments at or above provincial level, and all enterprises in the nation. All participants share a portion of the fragmented power to create their own standards of flexibility under the national standard of uniformity.

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1068 Standardization Law, supra note 9, art. 6.
1069 Id.
1070 Id.
1071 Id.
1072 Id.
Supervisory agencies may not be identified in statutes. The supervision of standards are sometimes delegated specifically to a authority that is identified, while at other times, there is no specific authority, and statutes merely mention the “state” and “relevant departments.” For instance, a provision of the PQL provides, “the State shall establish an enterprise quality certification system based on international standards that are commonly accepted.”\(^{1073}\) Another provision requires that “a supervision and inspection system…shall be implemented by the State…\(^{1074}\) With respect to product quality at the local level, local governments are responsible to organize with “relevant departments” to establish measures.\(^{1075}\) Since specific departments might not be provided by statutes, the supervision, therefore, could be construed as a collective responsibility.

The supervision is also fragmented. Considering the provisions with specific supervisory agencies, supervisory power is shared by different departments at the central and local levels. For instance, in light of the related statutes discussed, Chinese food and product safety involves the departments of health, agriculture, advertisement, standardization, quality supervision, commerce and industry, food and drug, and others at the central and various local levels. Each department has its own subject matter and position in terms of functions, regions, and administrative levels. This collective responsibility, therefore, is fragmented without a defined scope for each authority. Without a clear definition, authorities may determine to or not to act in accordance with their wills and interests.

Other than administrative supervision, food and product safety responsibility is also distributed to institutions, social groups, and media. The CPL states that “consumer protection is

\(^{1073}\) PQL, supra note 13, art. 14.

\(^{1074}\) Id. art. 15.

\(^{1075}\) Id. art. 7.
a social collective responsibility." All organizations, individuals, media should be encouraged to conduct “social supervision.”

Organizations include testing institutions and social groups. There are three types of testing institutions: 1) established by provincial governments; 2) authorized by provincial governments, and 3) intermediary institutions that are independent from but authorized by governments. All these institutions are liable for the damages caused by their inspection or certification. Inspection responsibilities, therefore, are distributed to different sectors depending on actual circumstances and administrative discretion of flexibility.

Social groups include public or public intermediary organizations, which guarantee product quality, and consumer associations or organizations that are formed by law to exercise social supervision. Legal responsibilities and functions to participate in administrative supervision and inspection are imposed on these institutions.

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1076 CPL, supra note 12, art. 6.
1077 Id.
1078 Id. This type of inspection agencies can be established by industrial or enterprise supervisory departments, scientific research units, or universities. XIAOFEIZE QuANYI BAOHUA CHANPIN ZHILIANGFA XIN JIEDU (消费者权益保护法,产品质量法新解读) [New Explanation of Consumer Protection Law and Product Quality Law] 81 (2010).
1079 Id., and PQL, supra note 13, art. 20.
1080 Id. art. 57.
1081 Id. art. 58.
1082 CPL, supra note 12, art. 31. These social groups can function as mediators between the public and business operators when product safety disputes arise. Id. art. 34.
1083 Id. art. 32, and PQL, supra note 13, art. 23. These institutions are required to fulfill certain legal responsibilities and functions to provide information and consulting services, report inquiries and suggestions, investigate and mediate complaints, provide assistance to complainants, and others.
The Chinese media is responsible to expose and criticize civil law right infringers as well.\textsuperscript{1084} For instance, the FSL requires the mass media to promote legal knowledge and supervise food safety through public opinion.\textsuperscript{1085} The Chinese food and product safety regulatory system, therefore, is collective and fragmented at the same time. Different sectors have a unified goal of uniformity, but each determines its scope of action of flexibility. This setting contributes to a laissez-faire administrative system with a high discretionary power of agencies, which can be easily abused and causes food and product safety problems.

\textbf{From Free Competition to Health Protection}

There are two main directions of the Chinese product safety laws: the market economy emphasizing free competition of flexibility and administrative control emphasizing health protection of uniformity.

Under the principle of free competition, the goal of food and product safety statutes is to maintain a “socialist market economic order,” administrative supervision may step in only when civil law rights are infringed or adjustment is necessary.\textsuperscript{1086} For instance, when the PQL was enacted, many poor quality products existed in the market.\textsuperscript{1087} The aim of the PQL, therefore, is to strengthen product quality supervision, clarify liabilities, protect civil law rights, and safeguard social and economic order.\textsuperscript{1088} In other words, the statute is a way to allow administrative supervision to step in to protect civil law rights and free competition by imposing liabilities on damaging and interfering activities.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1084} \textit{CPL}, supra note 12, art. 32(7).
\item \textsuperscript{1085} \textit{FSL}, supra note 17, art. 8.
\item \textsuperscript{1086} Huang J., \textit{Chanpin Zhiliangfa}, supra note 23, at 1.
\item \textsuperscript{1087} \textit{Id}.
\item \textsuperscript{1088} \textit{PQL}, supra note 13, art. 1.
\end{itemize}
\end{footnotesize}
This market economic order is also emphasized by the PRC Constitution and different food and product safety statutes. For instance, the PRC Constitution requires “Chinese people of all ethnic groups” to “persevere in reform and opening to the outside world” and “develop the socialist market economy.” The Criminal Law views producing misbranded and substandard commodities as crimes interfering with the “socialist market economic order.” The Advertisement Law aims to “maintain the socio-economic order” by imposing liabilities on fraudulent advertisements. So, as in the CPL and the Contract Law, civil law rights and interests are protected in order to maintain and promote market economy development. Thus, these statutes consider granting rights, strengthening supervision, and imposing liabilities as different means to ensure market economic order regarding free competition of flexibility.

Flexibility is a form of freedom, and freedom relies on self-discipline. This explains the self-regulatory provisions in product safety statutes. For instance, the PQL requires manufacturers and sellers to establish internal management systems for self-regulation. The APQSL requires agricultural enterprises and organizations to conduct inspections by themselves or by self-authorized institutions. This statute also requires agricultural organizations to strengthen self-discipline management. With respect to food, the FSL requires food-related

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1090 Id.
1091 Criminal Law, supra note 19, art. 140-49.
1092 Advertisement Law, supra note 14, art. 1., and Contract Law, supra note 20, art. 1.
1093 CPL, supra note 12, art. 1.
1094 PQL, supra note 13, art. 3.
1095 APQSL, supra note 16, art. 26.
1096 Id. art. 27.
industrial associations to strengthen self-discipline as well.\textsuperscript{1097} In line with these self-regulatory provisions, inspections might be exempted.\textsuperscript{1098} For instance, food inspections can be exempted until the FSL abolished the exemption.\textsuperscript{1099} This self-regulatory requirement relates to the Confucian tradition relying on unwritten morality and flexibility.

Another focus of Chinese product safety laws is administrative control regarding health protection of uniformity. For instance, although the PRC Constitution emphasizes the “socialist market economy,” it also requires the state to “encourage, support, guide,” “exercise supervision and control” over non-public sectors\textsuperscript{1100} and “strengthen economic legislation, improves macro-regulation and control” for prohibiting “any organization or individual from disturbing the socio-economic order.”\textsuperscript{1101} This protection involves a higher level of administrative supervision over free competition.

Some statutes, particularly those enacted in the 2000s, show a shift from focusing on the market economic order regarding free competition of flexibility to the administrative protection of life and health through uniformity and centralization. For instance, the DAL aims to “strengthen supervision” and “control over drug manufacturers, distributors, medical institutions, drugs, packaging, pricing and advertising” in order to ensure the quality of pharmaceuticals to protect people’s health, rights, and interests.\textsuperscript{1102} The APQSL also aims to guarantee public health

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1097} FSL, \textit{supra} note 17, art. 7.
\item \textsuperscript{1098} IECIL, \textit{supra} note 10, art. 6.
\item \textsuperscript{1099} FSL, \textit{supra} note 17, art. 60. \textit{See also} Liu Junhai (刘俊海), \textit{Lun Shipin Anquan Jianguan De Zhidu Chuangxin} (论食品安全监管的制度创新) [Institutional Innovations of Food Security Regulation], 3 LEGAL F. 5, 8 (2009) [hereinafter Liu J.].
\item \textsuperscript{1100} XIANFA art. 11 (1982) (China).
\item \textsuperscript{1101} \textit{Id.} art. 15.
\item \textsuperscript{1102} DAL, \textit{supra} note 15, art. 1, ch. II-VII.
\end{itemize}
\end{footnotesize}
and agricultural economic development through “supervision and control” of product quality and safety.\textsuperscript{1103}

In order to further enhance protection,\textsuperscript{1104} the 2009 FSL emphasizes uniformity and centralization by requiring “unified coordination,”\textsuperscript{1105} a “unified national food safety standard,”\textsuperscript{1106} a “unified food safety information system,”\textsuperscript{1107} central national implementation plans,\textsuperscript{1108} “centralized market,”\textsuperscript{1109} “central trading market operations,” “direct control of the central government” when “significant food safety accident involves” more than one province,\textsuperscript{1110} “central disclosure” of information,\textsuperscript{1111} among others. The “market economic order” is no longer mentioned as a goal in the FSL, but rather protection of public health and the development of administrative control of uniformity and centralization.

This administrative protection approach reflects the idea that merely granting rights, requiring self-discipline, and imposing administrative sanctions and civil liabilities are not sufficient to ensure food and product safety. Agencies are required to establish a preventive approach with more stringent administrative supervision of uniformity and centralization, which involves greater discretionary power to intervene food and product production activities. Thus, a conflict is created regarding product safety law development between market economic order of

\textsuperscript{1103} APQSL, \textit{supra} note 16, art. 1, 3, 4, 22, 26, 30, 40-41.

\textsuperscript{1104} FSL, \textit{supra} note 17, art. 1.

\textsuperscript{1105} \textit{Id.} art. 5.

\textsuperscript{1106} \textit{Id.} art. 22.

\textsuperscript{1107} \textit{Id.} art. 82.

\textsuperscript{1108} \textit{Id.} art. 11.

\textsuperscript{1109} \textit{Id.} art. 30.

\textsuperscript{1110} \textit{Id.} art. 73.

\textsuperscript{1111} \textit{Id.} art. 82-83.
flexibility and administrative control of uniformity and between of free competition and supervisory administration.

From Private to Public Laws

Another food and product safety law development trend relates to the tension between private and public laws. Product safety applies a multiple liability approach, which involves civil liabilities of private law and administrative sanctions and criminal responsibilities of public law. This approach is considered to be an extension of the relationship of individuals with the state and governments.1112 A greater role of governments is a consequence of administrative law, which imposes legal obligations and liabilities on the state, agencies, relevant institutions, and even government officials.

In light of this extension, individual consumers are viewed as the public at large who are recognized to be in a weaker position in terms of resources and information.1113 In order to protect the public, governments take a more active role for achieving justice.1114 This active role turns government from a market observer to a market intruder, from seeing everyone as equal to not equal. In addition, government itself should be governed by law.

Administrative Law Provisions

Concerning the relationship between agencies and individuals, some food and product safety statutes include administrative law provisions. These provisions are about reconsideration,
judicial review, or internal sanctions. For instance, the CPL allows business operators who do not agree with the administrative sanction imposed to apply for administrative reconsideration at the agency of the next higher level.\footnote{CPL, supra note 12, art. 51.} If reconsideration results are not acceptable, lawsuits can be filed in people’s courts.\footnote{Id.} The PQL also has similar provision regarding re-inspection but without judicial review.\footnote{PQL, supra note 13, art. 15.} In addition, the FSL imposes internal sanctions such as demerit, demotion, or dismissal of officials who recommend unsafe food products to consumers.\footnote{FSL, supra note 17, art. 94.} Thus, administrative law provisions integrate with food and product safety laws, which is a major factor to ensure safety.

Chinese food and product safety involves private and public compensation. Private compensation refers to the civil liabilities of individuals or legal persons. Public compensation refers to the administrative liabilities of agencies, officials, agency-established institutions, and public organizations.\footnote{The “agency-established institutions” mainly refers to the testing and inspection institutions that are established by governments. The liabilities of public organizations are considered to be “public” if these organizations are funded by governments.} This liability is imposed on the state, governments, or officials as civil servants.

Since the earlier sections have discussed different liabilities of private compensation, this section focuses on public compensation, which is also considered an administrative liability. Administrative liabilities are imposed by food and product safety laws and administrative law. Food and product safety laws usually do not directly impose liabilities on tortfeasor officials or agencies but rather on inspection institutions and public organizations.
Administrative Liabilities under Food and Product Safety Laws

With respect to tortfeasor officials or agencies, the PQL states that officials who violate the statute, such as interfering with quality supervision, improperly collecting inspection fees, recommending unsafe products or abusing their power, must be subject to administrative sanctions or criminal responsibilities. Similar provisions are also found in the APQSL and the FSL. Those administrative sanctions, however, are limited to demerit, demotion, dismissal, taking blame, and resignation, but not compensation.

Nevertheless, tortfeasor inspection institutions and public organizations are subject to compensation under the product safety laws. The PQL states that inspection institutions issuing fraudulent test results shall be liable for the damages caused; this applies to public organizations issuing fraudulent guarantees as well. Similar provisions are also provided by the APQSL.

This compensation approach, however, is not adopted by the FSL. The FSL does not require food inspection institutions, inspectors, public organizations, and their managing staffs to be liable for damages, but for administrative sanctions only, although those sanctions can be more stringent than the PQL and APQSL.

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1120 PQL, supra note 13, art. 65-68.
1121 APQSL, supra note 16, art. 43. See also FSL, supra note 17, art. 95.
1122 FSL, supra note 17, art. 95.
1123 PQL, supra note 13, art. 57.
1124 Id. art. 58.
1125 APQSL, supra note 16, art. 44.
1126 FSL, supra note 17, art. 93-94.
1127 FSL, supra note 17, art. 93. For example, Article 93 states that wrongdoing-inspectors shall not engage in food inspection work for 10 years from the date of a criminal conviction or administrative sanction.
Reviewing the different approaches adopted by the PQL, APQSL and FSL, food and product safety laws impose both administrative liabilities and sanctions on agencies. In other words, Chinese governments can be liable for food and product safety damages.

**Administrative Liabilities under the State Compensation Law**

This administrative liability was established primarily by the State Compensation Law (SCL).\(^{1128}\) This statute was enacted in 1994 and amended in 2010. Article 7 of the SCL provides that agencies are liable for the damages caused by administrative implementation.\(^{1129}\) The damages refer particularly to the infringement of legal rights and interests of individuals, legal persons, organizations, and also foreigners and foreign enterprises.\(^{1130}\) The term “agencies” covers authorized institutions and even people’s courts.\(^{1131}\) Thus, product safety-related agencies, authorized inspection institutions, and public organizations are within the scope of the SCL.

With respect to food and product safety administrative implementation, possible infringement can relate to the rights of property, life, and health. Property rights cover fines, licenses, permits, suspension business order, confiscation of properties, and others.\(^{1132}\) Right to life and health covers physical injuries, disabilities, death, and mentally distress.\(^{1133}\) The SCL

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\(^{1129}\) Id. art. 7.

\(^{1130}\) Id. art. 7, 40.

\(^{1131}\) Id. art. 7, 38.

\(^{1132}\) Id. art. 4. The SCL seems to be treating licenses as a property right instead of privilege.

\(^{1133}\) Id. art. 34-35.
grants the right of compensation to any persons who suffer damages through the process of application, reconsideration, or litigation.\footnote{Id. art. 22-30.}

\underline{Other Relevant Administrative Law Statutes}

Administrative supervision is also governed by separate statutes such as the Administrative Litigation Law (ALL), and Administrative Penalty Law (APL), Administrative Reconsideration Law (ARL), and Administrative Licensing Law. These statutes set out the criteria of specific administrative action, which affects the extent of the administrative power in terms of Chinese food and product safety supervision.

The Administrative Litigation Law\footnote{Xingzheng Susongfa (行政诉讼法) [Administrative Procedure Law or Administrative Litigation Law] (promulgated by Nat'l People Cong. Apr. 4, 1989, effective Oct. 1, 1990) [hereinafter ALL] available at http://www.gov.cn/flfg/2006-10/29/content_1499268.htm (China). (An English version is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm).} (ALL) was enacted in 1989 to ensure “the correct and prompt handling of administrative cases by the people’s courts, protecting the lawful rights and interests of citizens, legal persons and other organizations, and safeguarding and supervising the exercise of administrative powers by administrative organs in accordance with the law.”\footnote{Id. art. 1.} This statute laid down the “right to file a case in people’s courts,”\footnote{Id. art. 2.} and people’s courts must set up administrative divisions to handle administrative cases.\footnote{Id. art. 3.}

Administrative Penalty Law\footnote{APL, supra note 658.} (APL) was enacted in 1996 to standardize the establishment and imposition of “administrative sanctions” such as disciplinary warning, fines,
confiscation of illegal gains, suspension order of production and licenses, and others.\textsuperscript{1140} The APL laid down the principles, such as fairness and openness, requiring that all regulations of administrative sanction must be published and complied with unified procedure.\textsuperscript{1141} Under this statute, officials who are “directly in charge and other persons who are directly responsible” are subject to administrative sanctions.\textsuperscript{1142}

Administrative Reconsideration Law\textsuperscript{1143} was enacted (ARL) in 1999 to prevent “illegal or inappropriate specific administrative acts,” to protect “the lawful rights and interests of citizens, legal persons and other organizations,” and to ensure and supervise “the performance of function and powers by administrative organs.”\textsuperscript{1144} Under the ARL, agencies must “conduct investigation,” “collect evidence” from relevant organizations and persons to “examine” “specific administrative act.”\textsuperscript{1145}

Administrative Licensing Law\textsuperscript{1146} is also translated as “Administrative Permission Law,” which was enacted in 2003 to “standardize institutional procedure for granting licenses.”\textsuperscript{1147} In light of the principles of “simplification, uniformity, and efficiency,” provincial level governments may designate an administrative department to grant licenses on behalf of relevant

\textsuperscript{1140} Id. art. 8.

\textsuperscript{1141} Id. art. 4, 33-42.

\textsuperscript{1142} Id. art. 55.


\textsuperscript{1144} Id. art. 1.

\textsuperscript{1145} Id. art. 3.

\textsuperscript{1146} Administrative Licensing Law, supra note 657.

\textsuperscript{1147} Id. art. 1
administrative departments.\textsuperscript{148} Administrative Licensing Law also requires “unified manner”\textsuperscript{149} in terms of processing procedure.

To review, the focuses of Chinese food and product safety have been evolving from private to public laws, which involve possible contradictions between equal to unequal statuses between consumers and business operators, combinations of administrative law and food and product safety laws, the right to private and administrative compensation, and the roles of agencies in terms of administrative obligations. This mixture also reflects the development trend of increasing reliance on administrative control as Legalism. People are considered to be driven by self-interest and should not be trusted. A stable social order relies on supervision of uniformity and centralization. Administrations and government officials should also be controlled by administrative law and the judiciary. Yet, due to the dependency of the Chinese judiciary, it is unclear if administrations can really be limited by the administrative law or any statute on paper.

From Central to County Administrative Supervision

The development of Chinese food and product safety laws also involves a tension between the central and local governments, particularly at the county level, regarding food and product supervisory responsibilities. There are 1,464 counties in China, and many cities and districts are entitled to form county-level governments.\textsuperscript{150} In total, China has around 2,853 local governments at this level.\textsuperscript{151}

\textsuperscript{148} Id. art. 24.
\textsuperscript{149} Id. art. 42.
\textsuperscript{150} These cities and districts are named as county-level cities and districts.
In general, the departments under the central government are responsible to establish the national system, the provincial governments are responsible to authorize inspection institutions, and the county-level governments implement the major supervisory responsibilities.\textsuperscript{1152} For instance, the PQL empowers the county-level governments to implement random supervisory inspections, investigate quality complaints, examine product document, publish inspection reports, and determine administrative sanctions such as suspension business orders and revocation of licenses.\textsuperscript{1153}

Similar provisions are also provided by the APQSL.\textsuperscript{1154} Other than on-site inspection, complaint investigation and administrative sanction, the agricultural departments at or above county level are also empowered to establish implementation plans.\textsuperscript{1155}

This decentralization setting is retained by the FSL. Although the central government is responsible to the national system of uniformity and centralization, and the provincial level governments are responsible to unify and coordinate food safety supervision within their regions, agencies at the county level are empowered to implement actual supervision.\textsuperscript{1156} For instance, local agencies issue licenses,\textsuperscript{1157} establish annual supervisory plans, and credit records of food operators,\textsuperscript{1158} conduct inspections and investigation,\textsuperscript{1159} and determine administrative

\textsuperscript{1152} PQL, \textit{supra} note 13, art. 8, 18-19.
\textsuperscript{1153} Id. art. 15, 17-18.
\textsuperscript{1154} APQSL, \textit{supra} note 16, art. 39-41.
\textsuperscript{1155} Id. art. 34.
\textsuperscript{1156} FSL, \textit{supra} note 17, art. 5.
\textsuperscript{1157} Id. art. 30-31.
\textsuperscript{1158} Id. art. 70, 76, 78-79.
\textsuperscript{1159} Id. art. 60, 80, 83.
sanctions. The food and product safety supervisory power is centralized at the central government and concurrently decentralized to the county level governments. This reflects a tension between central uniformity and local administrative supervision of flexibility.

Conclusion

To review food and product safety statutes, there are four categories concerning civil liabilities and criminal responsibilities, standardization and trade development, consumer protection, and specific products. These categories have different focuses and reflect an evolution of the development of Chinese food and product safety law from emphasizing market economic policy of flexibility towards more administrative control of uniformity.

In the 1980s, the DAL, the IECIL, and the Standardization Law established the national standards and inspection systems for foreign trade. These statutes at this stage generally minimize the administrative and legal intrusion on business activities. In the 1990s, statutes concerning consumer protection, product quality, and advertisement were established. These statutes still consider the market economic order of free competition as the main policy and allow product quality supervision to interfere only when necessary.

In the 2000s, this liberal approach was adjusted after the food and product safety crisis. Food and product safety statutes focusing on specific products with more stringent administrative supervision were promulgated. These statutes adopt a more protective approach and international management concepts such as administrative prevention, supervision “from farm to fork,” good management practices, and others. The aim was to protect life and health by more uniformity and centralization.

1160 Id. art. 85-87.
With respect to legal consequences, food and product safety laws have also been developed to adopt a multiple liabilities approach on top of administrative supervision. This approach includes criminal responsibilities, civil, contractual, and tort liabilities, which were established from 1986 to 2009.

As such, the Chinese food and product safety law development leads to a more complete regulatory framework, which is established by rights and duties of four different sectors: consumer rights, business operator obligations, administrative supervision, and legal liabilities. By establishing these rights, obligations, and liabilities, Chinese administration takes a greater role with increasing power to protect public health and safety.

This framework, however, contains a tension between the market economic policy of flexibility and administrative supervision of uniformity. This tension relates to the contradicting roles of laws and agencies such as: the “general-direction” of laws and uniform safety administration; collective and fragmented administrative supervision; the free competition of market economic order and the protection of health of administrative control; different administrative roles under private and public laws; and the central and local administrative supervision.

The “general-direction” principle focuses on the imbalanced development, impossibility, and flexibility. Imbalanced development refers to the differences among the regions at the city and rural areas. Impossibility concerns the infinite specific circumstances, which might not be coverable by specific laws. Flexibility focuses on unforeseeable changes of new situations. Uniform safety administration, however, focuses on unified standards regarding supervision, management, and control. This uniform safety approach, therefore, conflicts with the general-direction principle.
The food and product safety laws require collective and fragmented supervision. Collectiveness refers to the supervision and responsibilities of all different sectors as a whole of uniformity. Fragmentation, however, refers to the distribution of the supervisory power and responsibilities from the central government to different agencies by subject matter and regions of flexibility. The food and product safety supervision, therefore, is collectively conducted by different sectors and also concurrently fragmented to different sectors without clear boundaries. Everyone seems to be responsible for ensuring food and product safety, but no one is clearly accountable for taking supervisory action.

Another conflict presents between the ideologies concerns free competition of flexibility and health protection of uniformity. The free competition approach believes that the market is able to solve product safety problems through rational competition. Law comes in only when fraudulent acts distort competition. After product safety problems persisted and foreign trade grew, the protection approach was adopted. This approach requires a higher level of administrative supervision and sanctions with more specific rules. Thus, the Chinese food and product safety law has two main approaches in opposing directions. One is led by economic freedom and the other by administrative constraints.

Administrative constraints are found in public law. The food and product safety law starts by seeing individuals as equal under private law. This view of equal, however, is combined the view of seeing individuals as unequal under public law. The principle of individuals as equal refers to forming private contractual obligations. The principle of individuals as unequal refers to the imbalanced power between business operators and consumers. This imbalance allows for administrative supervision, sanctions, and criminal responsibilities that are added on top of contractual obligations by seeing individuals as the weaker party needing extra protection.
This administrative role also highlights the relationship between individual and agencies in the context of administrative law. The protective role of agencies comes with administrative liabilities that lead to state compensation and administrative law obligations requiring unified procedure and obligations regarding administrative reconsideration, litigation, licensing, and penalties. This mixture of private and public law, which regards individuals are both equal and unequal, is another possible contradiction within the food and product regulatory system.

The next conflict focuses on the central and local county supervision. Product safety statutes distribute most supervisory and implementation functions to the local governments at the county level. These supervisory functions include inspection, investigation, planning, publishing reports, imposing administrative sanctions, among others. County governments, therefore, have great discretionary power in practice of flexibility, under the supervision and requirements of the central government on paper of uniformity.

The paradox of flexibility and uniformity, therefore, exists concurrently within the Chinese food and product safety regulatory system, in the form of written laws with two conflicting directions that embrace market economy and administrative control. Because of flexibility, Chinese food and product safety could be caused by the high discretionary power of officials and the collective responsibility that delegates safety obligations to everyone and no one. This leads to a question of the next chapter: how are Chinese food and product safety laws implemented?
CHAPTER 5

POLITICAL DICTATORSHIP VERSUS LAISSEZ-FAIRE ADMINISTRATION:
LAW AS UNWRITTEN ACTION

Introduction

This chapter looks at the implementation and application of food and product safety laws. It first examines major incidents, then the broader political and economic frameworks and how those frameworks impose conflicting roles on Chinese government officials, then leads to a paradox of the food and product safety law implementation. This study finds that although government officials are subject to a dictated, internal, and hierarchical management system under the political framework of uniformity, government officials are concurrently empowered to establish a laissez-faire administration of flexibility, which embraces an open, market-oriented, and self-regulatory structure free from constraints of written law and unwritten moral code.

By reviewing the major product safety incidents, such as melamine tainted milk, recycling cooking oil, and clenbuterol-pork, the first section finds that the law in action relies mainly on administrative institutions. Although strict criminal responsibilities including the death penalty and life imprisonment are imposed on a few major offenders by the courts, most food and product safety offenders are given supervision or penalized under administrative measures.

In order to further understand administrative actions, the second section examines the Chinese political system of uniformity, which affects the role of Chinese government officials. The discussion includes: 1) the Party’s organization and its nonmenklatura system that controls the leading personnel in the Chinese administration; 2) the Party’s “democratic centralism” that establishes a hierarchical structure and subordinating relationships between members and
organizations; and 3) the Party’s disciplinary management system that may impose sanctions on members. As individual members and Party cadres, the leading personnel of Chinese administration are subject to approvals, inspections, and sanctions by the Party.

The third section turns to the economic framework that pursues “rapid economic development” under the CPC Constitution of flexibility, which leads to another role of Chinese government officials. This framework begins with a socialist system embracing public ownership and the principle of “responsibility-contract” that allow for private production and oblige county-level administrative officials to become landlords and economic planners and pursue economic growth. This economic role requires government officials to compete with each other and associate the income of governments with the output of corporations by land use rights and value-added tax (VAT), which conflicts with the administrative role as food and product safety regulators.

These conflicting roles of government officials exist in the political, economic, and administrative systems and impact law in action. Under the political system, government officials are subordinate to the Party of uniformity. Under the self-interest-driven market economic system, or more accurately—capitalism, government officials are landlords and economic developers of flexibility. Under the administrative system, government officials are food and product safety regulators between uniformity and flexibility. Due to the concentration of power, county-level officials have a high discretionary freedom, which leads to a de facto laissez-faire administrative system, which is merely subject to self-interest-driven market economic policy and an ineffective central management of the Party, rather than written law or unwritten moral code.
In order to combat the laissez-faire administration, some possible solutions and new management mechanisms are discussed, such as requiring officials to disclose their annual income, establish whistleblower system, add food and product safety as essential factors in officials’ performance evaluation, and consider inserting an Inspector General in Chinese governments. These mechanisms, however, encounter challenges due to the constraints of the dictated one-party system that does not allow any genuine independent institutions. All “independent” inspection institutions are administered or subject to the approval by the Party, which is still within a self-regulatory structure and tradition.

Despite the suppression and negation, Confucian self-regulation and the Chinese tradition of flexibility are still expected to be the most effective means to ensure food and product safety. Other than officials that are self-regulated by the Party in reality, industries and citizens are expected to be ethical and self-regulated by internal virtue in the Chinese society. In Confucianism, the foundation of self-regulation is morality, which is unwritten benevolence, justice, and reasonableness, that has been suppressed by the Mao Administration focused on Legalism during the Cultural Revolution in the 1960s. Since then, morality has been demonstrated by administrative action as unrealistic and impractical. A stable and fair society must be established by administrative control of uniformity and unification by violent means. No one shall be trusted, media must be controlled, and written rules must follow the will of rulers.

When rulers are businessmen and pursue economic growth, food and product production is, therefore, not subject to any written rules of law due to the flexible tradition, unwritten rules of morality due to the ideological negation, independent inspection due to the uniformity setting, and public supervision relying on the freedom of speech and independent thought that is considered as a threat to unification. The Chinese food and product safety regulatory system,
therefore, is under a laissez-faire administration of flexibility, which is free from any constraint and protected by the political dictatorship of uniformity.

Although this ideological and systematic problem may be solved by establishing the Confucius Institute in 2004, the code of ethics of the Party in 2010, and the Party Constitution in 2012 that emphasized “socialist rule of virtue,” “exemplary conduct,” “self-corrections,” “integrity,” “honesty,” and “self-motivation,” this morality establishment is still at the stage of verbal confirmation with limited supporting administrative action. Without internal virtue, flexibility can be abused continuously and the food and product safety problem will remain.

**Major Domestic Incidents**

There are two categories of cases: one concerning domestic products and the other exported products. Under Chinese law, these categories are governed by two separate supervisory systems. For instance, exported products are mainly governed by the Import and Export Commodity Inspection Law (IECIL) and the Entry and Exit Animal and Plant Quarantine Law (APQL); domestic products, however, are mainly governed by the Consumer Protection Law (CPL) and the Product Quality Law (PQL).

This chapter focuses on three major domestic food safety incidents: 1) melamine-tainted dairy products; 2) recycling cooking oil (“gutter oil”); and 3) clenbuterol-pork (“lean-meat powder”). The aim is to examine how the Chinese administration and courts reacted to those product safety incidents.

Those responsible for these incidents either faced court or administrative actions. Court actions refer to legal sanctions based on civil liabilities or criminal responsibilities. Under the Chinese civil law system, cases generally do not establish precedence for future similar cases.
because civil law judges do not make law through precedence as the common law judges do.

Moreover, only a few product safety cases are available for the public.

Administrative actions refer to the requirements and sanctions based on agencies’ supervisory power in light of statutes or political policies.\footnote{1161} Although administrative sanctions may be based on law, those sanctions are very often directly imposed by agencies themselves without formal adjudication in advance.\footnote{1162} The information about administrative sanctions, therefore, is not based on court cases but by agencies’ official reports. Such reports may not disclose the statutes or provisions applied or the specific reasoning behind the sanctions imposed. Administrative actions are also not binding, although they might have a potential directing-effect in light of the hierarchical management system.\footnote{1163}

The scope of administrative actions is wide and includes inspections, investigations, license issuances, fines, and other requirements imposed on businesses or individual operators. In addition, administrative actions may cover disciplinary sanctions imposed on government officials who failed to supervise effectively or abused their power.

Administrative disciplinary sanctions operate in light of different political systems. These systems include the internal political rules of the Party, administrative regulations of the State

\footnote{1161} Since China may not be considered a rule-of-law country, administrative supervision may be based on political policy instead of law. This political supervisory power will be discussed in later sections.

\footnote{1162} In accordance with the Administrative Penalty Law (APL), a hearing can be requested by a party who penalties are imposed upon that involve “suspension of production or business, rescission of business permit or license, or a comparatively large amount of fine.” APL, supra note 658, art. 42. Under the APL, such hearing “shall be presided over by a person other than the investigator of the case designated by the administrative organ,” but private parties involved have a “right to apply for the person’s withdrawal.” Those “persons” do not have a title of “administrative law judge.” Id. art. 42(4).

\footnote{1163} A “directing-effect” refers to the duty of agencies at lower levels to follow the instructions of agencies at higher levels.
Council under the executive branch, administrative laws under the judiciary, and administrative accountabilities which exists between political and administrative systems.\textsuperscript{1164}

Similar to court cases and administrative actions, the administrative disciplinary sanctions imposed may not be open to the public, and the rules applied are not necessarily disclosed. Thus, the food and product safety cases reviewed in the following sections may not be able to provide a clear link between law implementation and statutes applied.

Incident 1: Melamine-tainted Milk Products

Milk products contaminated with melamine killed six infants and led to around 300,000 kidney disease cases nationwide in 2008. Melamine is a toxic industrial chemical which can increase the protein level in milk and animal feed that has less nutrition value. Melamine is added in food products to falsify quality tests based on protein level.\textsuperscript{1165} Melamine, however, was not on inspection lists, and subsequently not tested for, because it was not expected to be used in food at all.

Criminal Responsibilities

Twenty two dairy firms were found producing tainted milk products. The Sanlu Company was identified as the most serious offender.\textsuperscript{1166} This company produced 904 tons of melamine-tainted baby formula and sold 813 tons of it for 47.5 million yuan.\textsuperscript{1167}

\textsuperscript{1164} Liu Zongrang (刘宗让), \textit{Guanyuan Wenze Ji Xu Zhidu Anpai} (官员问责亟需制度安排) [The Necessity of an Administrative Accountability System] 1 FAZHI YANJIIU 60, 60 (2009).


Sixty suspects related to Sanlu baby formula were arrested in 2008.\footnote{Xinhuanet, 60 Arrested, supra note 1199.} Twenty-one of them went on trial and were convicted.\footnote{Id., and Milk Scandal Resurfaces in China, BBC NEWS, Jan. 25, 2010, http://news.bbc.co.uk/2/hi/asia-pacific/8478195.stm [hereinafter BBC, Milk Scandal].} Seventeen defendants were charged with adding melamine-laced “protein powder” to the milk sold to Sanlu and other dairy companies.\footnote{Id.} Six of them were accused of endangering public security. Eleven were accused of manufacturing and selling toxic food.\footnote{Id.}

Two defendants were given the death penalty.\footnote{Zhu Zhe, 2 Executed over Milk Powder Scandal, CHINA DAILY, Nov. 25, 2009, http://www.chinadaily.com.cn/china/2009-11/25/content_9040176.htm. In accordance with the statement of Shijiazhuang Intermediate People’s Court, Zhang Yujun was convicted of endangering public safety by producing 776 tons of melamine-laced “protein powder and selling 600 tons of it to middlemen for 6.83 million yuan”; Geng Jinping was convicted of producing and selling toxic food by adding 434 kg of melamine-laced powder into about 900 tons fresh milk to increase “protein” level for quality test.} Zhang Yujun was convicted of endangering public safety by dangerous means for selling more than 770 tons of tainted milk powder.\footnote{Id.} Geng Jinping, a manager of a milk production center, was convicted of supplying tainted milk to the Sanlu Group and other dairies.\footnote{Id.} The Supreme People’s Court (SPC)
approved the sentences under Article 199 of the Criminal Procedure Law\textsuperscript{1175} and Article 2(1) of the judicial interpretation of the SPC.\textsuperscript{1176}

Nineteen other people were sentenced to prison terms. Four of the defendants were senior executives of the Sanlu Group. Tian Wenhua, the former Chairwoman, pleaded guilty for producing and selling substandard milk\textsuperscript{1177} and failure to terminate the sale after knowing about the contamination.\textsuperscript{1178} Tian was sentenced to life in prison and fined about 25 million yuan (US$3.7 million). Three other former executives were sentenced to five and fifteen years in prison.\textsuperscript{1179}

Other crimes charged include frauds, tax evasion, illegal fund-raising, production and sales of counterfeit goods, and commercial bribes.\textsuperscript{1180} Within the province Hebei, 1,173 suspects

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\footnote{China Executes Two over Tainted Milk Powder Scandal, BBC NEWS, Nov. 24, 2009, http://news.bbc.co.uk/2/hi/8375638.stm.}
\footnote{Id. Xinhuanet, 60 Arrested, supra note 1199.}
\end{footnotesize}
were arrested on those charges; and 1,244 government officials were investigated for corruption related violations. Within the Hebei province, a total of 42,300 people were arrested.

**Fines and Bankruptcy**

The Sanlu Group was fined nearly 50 million yuan ($7.31 million). In February 2009, the Intermediate People’s Court of Shijiazhuang, issued a bankruptcy order to the company at the first meeting of creditors in February 2009. Sanlu Group had 274 creditors including banks, distributors, and suppliers. The Sanlu Group borrowed 902 million yuan ($130.43 million) to pay the medical fees of victims in December 2008, which increased its debt to 1.1 billion yuan.

Altogether, twenty-two dairy firms selling contaminated milk had been supplied by a chain of middlemen and dealers. Those dealers added melamine to falsify the protein content of watered-down milk. The dairy firms, however, failed to test for purity and nutritional value. Those dairy firms apologized to the public via text messages stating, “We are deeply

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1181 Id.
1182 Id.
1185 Id.
1188 Id.
1189 Id.
Compensation Fund by Governments

With the 902 million yuan ($130.43 million) from the Sanlu Group and 200 million yuan from the twenty-two dairy firms, a compensation fund was set up by the China Dairy Industry Association (CDIA) and managed by the China Life Insurance Co., Ltd. This fund was responsible for one-time cash compensation and medical expenses of infant victims until eighteen years of age. The one-time cash compensation amount was standardized as 200,000 yuan ($29,262) to the families of deceased infants, 30,000 yuan ($4,389) for severe illnesses, and 2,000 yuan ($293) for other victims.

In March 2009, Chen Xiaohong, the Vice Health Minister of the MOH, announced that the Health Department officials in the nation would continue to provide free medical assistance for child victims.

After this incident, the 2009 Food Safety Law requires the “health authorities at or above the county level” to “conduct investigation,” take “emergency measures,” “properly conduct the

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1192 China Daily, Compensation Fund, supra note 1224.


news release” immediately. The Food Safety Law, however, does not require any particular emergency or remedial measures that county-level governments must follow. This lack of specific instruction can be construed as an approach of flexibility.

Class Action and Inciting Social Disorder

Some parents refused to accept the standardized compensation offers in order to pursue the right to file class action lawsuits. Those parents considered the government-led compensation to be unfair. Courts started accepting lawsuit filings in March 2009. Since plaintiffs must be domiciled or habitual residents of the location of the filing courts, parents filed lawsuits in different locations. 152 people filed at the Hebei courts. The total number of lawsuits filed in the country, however, is unclear.

In November 2009, the first trial was held in a public hearing. The plaintiff, Ma Xuexin, father of twenty-month-old victim of kidney disease, requested compensation of 55,184 yuan ($8,080) and medical costs to be covered by the compensation fund. The defendants, the bankrupted Sanlu Group and Longhua supermarket argued that they should not be responsible

1195 FSL, supra note 17, art. 72-5.
1196 China Daily, Appeals, supra note 1226.
1197 Id.
1200 Id.
1201 Id.
for these expenses because a fund had been established by the government. Moreover, no official medical report showed the causal relationship between melamine-tainted baby formula and child’s kidney problems. The judge, Zhang Nan, required both the plaintiff and defendants to provide more evidence. The case was then postponed, and no further report was found regarding the scheduled re-opening of the trial.

A leader of a parents’ group, Zhao Lianhai, requested exemptions of their litigation fees and negotiated with the government of Hebei province. Zhao also established a website, Kidney Stone Babies, to gather parents in different regions and encourage civil lawsuits against dairy companies that had escaped punishment.

In November 2009, the website was blocked. Zhao’s computers, cameras, and other electronic equipment were seized. Zhao was detained at his home by police at first and then was sentenced to two and a half years in prison on the charge of “inciting social disorder” by speaking to foreign reporters, displaying protest signs, and organizing the group of aggrieved parents.

Internal Disciplinary Sanctions

Due to the melamine-tainted milk incident, Li Changjiang, the chief quality supervisor of

1203 Id.
1204 Id.
1208 Id.
1209 Id.
the General Administrative Quality Supervision, Inspection and Quarantine (GAQSIQ), resigned in December 2008. A number of local officials were also dismissed from their official positions. Those officials include: Wu Xianguo, the secretary of the Shijiazhuang City Committee of the CPC and a member of the Standing Committee of CPC Shijiazhuang City Committee; the mayor and vice mayor of Shijiazhuang; and Ai Wenli, a party chief of Chengde City in Hebei. A total of 191 officials were given administrative disciplinary punishments for failing to fulfill their duties. Twenty-six of them were dismissed.

A year later, in December 2009, the resigned minister of the GAQSIQ, Li Changjiang, was appointed to be the Vice-Director of the National Office Against Pornographic and Illegal Publications. Another disgraced official, Bao Junkai, was promoted at the Anhui Entry-Exit Inspection and Quarantine Bureau. The former mayor of Shijiazhuang was also appointed as the Vice-Director of Hebei Industry and Information Department. Those appointments are viewed to be compliance with the official accountability regulations of the Party, but criticisms

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1213 Id.


were raised as well.\textsuperscript{1217}

**CPC Accountabilities**

The CPC Central Committee Political Bureau adopted new disciplinary regulations, such as the *Temporary Regulation Concerning the Implementation of Political and Administrative Leaders’ Accountability* (TRA), in May 2009.\textsuperscript{1218} The TRA imposed disciplinary sanctions on leading officials and party leaders at county and above levels, administrative agencies, and state owned enterprises.\textsuperscript{1219}

In accordance with the TRA, leading officials who are also party leaders should be subject to disciplinary sanctions if their supervision or inaction constitutes severe mistakes, damages, or lead to major incidents.\textsuperscript{1220} These sanctions could be an order to apologize openly, suspensions from positions, voluntary or mandatory resignations, and termination of official positions.\textsuperscript{1221}

The TRA also states that resigned and terminated officials shall not be reappointed to their previous positions or any positions at the same level for a year.\textsuperscript{1222} In other words, officials

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\textsuperscript{1217} China Daily, Promotions, *supra* note 1246, and *Hebei Shuji: Sanlu Shijian Yishi Guoqiu Wenti Guanyuan Fuchu Zhengchang* (河北书记: 三鹿事件已是过去 问题官员复出正常) [Hebei Officials: Sanlu Incident Had Been Passed, Related Officials Should Return], News QQ, Mar. 8, 2012, http://news.qq.com/a/20120308/000113.htm. Wang Yukai, a professor at the Chinese Academy of Governance, believes that Li’s appointment is in line with the official accountability regulations. A father of victim children however stated, “[T]he government should have asked the victims’ families about Li’s comeback first.”


\textsuperscript{1219} TRA, *supra* note 1249, art. 24.

\textsuperscript{1220} *Id.* art. 5.

\textsuperscript{1221} *Id.* art. 7

\textsuperscript{1222} *Id.* art. 10.
\end{flushleft}
involved in misconduct could still be promoted after this one-year period although reappointments would be subject to the decisions of the party committee at the upper level.\textsuperscript{1223} Zhao Jie, an expert on government at the Party School of the Central Committee of the CPC, considers that these regulations warn officials to be cautious as if “they are walking across a bed of coals.”\textsuperscript{1224} Wang Yukai, a professor of China National School of Administration, views the reappointment mechanism as a loophole in the current accountability system.\textsuperscript{1225} Some scholars, however, consider that permanent dismissals could be unfair and ineffective.\textsuperscript{1226}

Aside from this debate, disciplinary sanctions are also considered to be political “vacations.” Due to the reappointment mechanism, the expected effect of the punishment has vanished or been distorted.\textsuperscript{1227} Some scholars even view the accountability system is merely a tool to avoid political blame for protecting officials.\textsuperscript{1228} This approach negating punishments, however, conforms with Confucian tradition.

\textsuperscript{1223} Id.
\textsuperscript{1224} Id.
\textsuperscript{1225} Id.

\textsuperscript{1227} Id. Some scholars suggest enacting a statute that incorporates administrative accountability regulations of the CPC and State Council. The aim is to provide clear instructions and procedures for establishing a fair and rule of law accountability system. Nevertheless, debates regarding the extent of accountability sanctions remain. For instance, who should resign and who should not resign, particularly those officials who have top positions and have managing roles but not executive roles.

\textsuperscript{1228} CAO LIU (曹鎏), XINGZHENG GUANYUAN WENZE DE FAZIHUA YANJIU (行政官员问责的法制化研究) [Research on Accountability by Law of Administrative Officials] 32-33 (2011).
Administrative Supervision

Although administrative officials are subject to criminal responsibilities or disciplinary sanctions, those officials have a high level of discretionary power to supervise industries. With respect to dairy products, administration may require licenses, inspections, recalls, registrations and establish standards and traceable systems of different subject matters, at various levels, and regions.

Concerning production licenses, the GAQSIQ conducted a nationwide audit of the dairy industry after the melamine milk incident. As a result, 426 of 1,176 dairy product manufacturers had their licenses revoked in 2011. Another 107 companies were required to fulfill improvement requests within a fixed period of time.

A re-examination of production qualification has also been required. Until February 2011, over seventy dairy production enterprises had passed the examination. Those did not pass the examination were not allowed to produce infant dairy products for the market. Inspections were conducted by local agencies. The aim was to solve the problems regarding unqualified dairies, small-scale producers, and shoddy management. In many regions,

1230 Id.
1232 Id.
1233 Id.
1234 Id. With respect to regional inspections, comprehensive checks were conducted and unqualified dairies were closed in Guangzhou city. Tianjian municipal inspection agency introduced a melamine test procedure in 2011, which prevented at least eight tons of suspicious raw milk from manufacturing process. Sixty-two food manufacturers including dairies were closed, and 16 unlicensed workshops were shut down in Beichen district.
residential mills run by individual farmers are no longer acceptable.\textsuperscript{1235} Specific requirements regarding warehouse size and distance from polluted sources have been imposed.\textsuperscript{1236}

Moreover, since 2009, the GAQSIQ has put melamine and leather hydrolyzed protein on the banned additives and must-check lists for fresh milk products.\textsuperscript{1237} The number of criminal cases transferred from the GAQSIQ to police departments in 2011 doubled compared to 2010.\textsuperscript{1238}

Besides the GAQSIQ, agriculture authorities inspected milk collection stations around the country. About 4,000 of 20,393 of these stations were shut down between November 2008 and April 2009.\textsuperscript{1239} Most of the shuddered stations lacked testing equipment or were not up to the required sanitary standard.\textsuperscript{1240} Rotating inspections are also being conducted by provincial and regional agricultural departments.\textsuperscript{1241}

In March 2011, the State Administrative for Industry & Commerce (SAIC) started requiring dairy operators to be examined and verified before entering into business.\textsuperscript{1242} This verification requirement is in line with the production license requirement of the GAQSIQ. The

\begin{flushright}
\textsuperscript{1235} \textit{Id.}
\textsuperscript{1236} \textit{Id.}
\textsuperscript{1237} Xinhua, Gov’t Efforts, \textit{supra} note 1262.
\textsuperscript{1238} China Daily, Food Safety Campaign, \textit{supra} note 1229.
\textsuperscript{1240} \textit{Id.}
\textsuperscript{1241} \textit{Id.}
\textsuperscript{1242} Xinhua, Gov’t Efforts, \textit{supra} note 1262.
\end{flushright}
aim is to ensure dairy operators are subject to supervision. The SAIC arranged 7.59 million visits to examine milk product dealers in 2008.

Since September 2008, the State Council has abolished the regulations which allow for the exemption of inspection of the food industry. Thus, all food companies are subject to administrative supervision.

A NPC report conducted by legislators mentioned the shortage of instruments, supervisory loopholes, inadequate publicity of laws and regulations among other problems regarding inspection implementation. Supervisory loopholes refer to the coordination between different agencies and administrative bodies regarding their possible overlapping duties. These overlapping duties may lead to confusion that causes over-inspection, under-inspection, or a complete lack of inspection.

The implementation report also emphasized support needed in terms of personnel, equipment, and financial resources for local food inspection agencies. The central

1243 Id.
1245 Regulation on Inspection Exemptions for Food Abolished, CHINA DAILY, Sept. 19, 2008, http://www.chinadaily.com.cn/business/2008-09/19/content_7040393.htm. The exemption regulation was issued on December 5, 1999, which allowed officials to grant inspection exemptions to certain verified companies. Sanlu group is one of those exempted companies.
1247 Id.
1248 Liu J., supra note 1099. While the duties of agencies and administrative bodies are not clearly defined, supervisory implementation tend to be driven by political and economic interests.
1249 China, Inspection, supra note 1246.
government also suggests targeting initial production, risk assessment, and fundamental research in order to modernize food production.\textsuperscript{1250}

Self-Regulated Standards

The Health Minister, Chen Zhu, stated that there are more than 5,000 food safety standards in total at the national, local, and industrial levels.\textsuperscript{1251} These standards may overlap or contradict each other and are not being updated.\textsuperscript{1252} The MOH, therefore, organizes and establishes an updated food standard list.\textsuperscript{1253} A draft of revised food standards was issued for public opinion in 2012.\textsuperscript{1254}

Problems regarding the establishment of food standard are the slow-and-behind research development and the lack of professional technical management organs in China.\textsuperscript{1255} These problems affect the establishment of the risk evaluation system.\textsuperscript{1256} Chen, the Health Minister, has introduced a transparent process to encourage people at all levels to participate in the establishment of food safety standards.\textsuperscript{1257} The updated standards will be reported to the World Health Organization (WHO).\textsuperscript{1258}

\begin{flushleft}
\textsuperscript{1250} Id.
\textsuperscript{1252} Id.
\textsuperscript{1253} Id.
\textsuperscript{1254} Id.
\textsuperscript{1255} Id.
\textsuperscript{1256} Id.
\textsuperscript{1257} Id.
\textsuperscript{1258} Id.
\end{flushleft}
Dairy producers adopted stricter regulations in 2011 to replace regulations issued by the MOA in 1986.\textsuperscript{1259} However, since most of the cow owners in China cannot afford high quality feedstuff, the standard for dairy products, such as the level of bacteria clusters and protein, is weaker than international standards.\textsuperscript{1260} Some dairy experts even view the current Chinese bacteria standard as the weakest in the world.\textsuperscript{1261}

Another problem is the new standard establishment. Most standards are drafted by the major dairy enterprises who were involved in melamine-tainted products incident in 2008.\textsuperscript{1262} Some experts see the Chinese dairy industry as having been kidnapped by leading enterprises.\textsuperscript{1263} The effectiveness of the new standard, therefore, is in doubt. The reliance of industries themselves reflects the self-regulatory characteristic of the Chinese food and product safety system of flexibility. This flexible approach allows industries to establish standards based on actual circumstances and reality, but it can be abused and cause problems at the same time.

Self-Regulated Recalls

Around 8,300 tons of tainted milk products were recalled from the market by SAIC in October 2008.\textsuperscript{1264} Although no survey provides detailed recall numbers for every county, this

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\item[1260] Id. For instance, the maximum level of bacteria clusters of international standards is 100,000 units per milliliter. China, however, is two million units per milliliter. Another example is the protein-content standards—new dairy regulations accept 2.8 grams of protein per 100 grams of raw milk instead of the previous 2.95 grams.


\item[1262] Id.

\item[1263] Id.

\end{footnotes}
system seems to be conducted in different regions in China. For instance, melamine-tainted milk products were found and recalled from supermarkets in Guizhou province in 2009.\textsuperscript{1265} Some other recalls in different regions have also been reported on local government websites, although the reliability of the data shown is unclear.

In addition, it is uncertain if all recalled products were destroyed. Some reports show that recalled melamine-tainted milk products were resold and reused in the industry.\textsuperscript{1266} For instance, dairy industry experts estimated around 100,000 tons of melamine-tainted products still had not been destroyed in 2010.\textsuperscript{1267} Those products with different brands were still found in different regions in 2011.\textsuperscript{1268}

In accordance with the Guangzhou Dairy Industry Association, government officials focused primarily on handling industrial problems and rewarding compensation to victims in 2008.\textsuperscript{1269} No administrative supervision of recalls had been conducted with the government, instead, relying on the industry itself.\textsuperscript{1270} Thus, some “new” melamine-tainted dairy problems were caused by the ineffective and self-regulated recall system.

Although shortcomings of the new recall system exist, more recalls were conducted in different regions with more different dairy companies involved. In July 2012, Hunan Ava Dairy

\textsuperscript{1265} BBC, Milk Scandal, supra note 1169.

\textsuperscript{1266} Id.


\textsuperscript{1268} People Daily, China Arrests, supra note 1212. Relating to the incidents, ninety-six people were detained in police custody or prison. Seventeen among them had been convicted. Two were sentenced to life in prison. Thirty-eight people were awaiting trial. Forty-one others were under investigation. Between July 2010 and January 2011, about 2,132 tons of melamine-tainted baby formula were seized.

\textsuperscript{1269} CE, Qian Guize, supra note 1261.

\textsuperscript{1270} Id.
Co. Ltd recalled baby formula under its brand Nanshan Bywise.\textsuperscript{1271} A cancer-causing material was found in test samples between July and December in 2011.\textsuperscript{1272} Similar to other recalled dairy product cases, the aflatoxin contamination was probably caused by moldy feed.\textsuperscript{1273}

The recall system also comes with a question about compensation. In June 2012, an unusual level of mercury was found in the milk powder produced by China’s biggest milk producer, Inner Mongolia Yili Industrial Group Co.\textsuperscript{1274} Recalls were conducted but limited to replacement, not return or refund.\textsuperscript{1275} Moreover, no compensation was provided for used products.\textsuperscript{1276} These limitations appear to ignore provisions in existing statutes such as the Contract Law and Food Safety Law; no administrative or civil actions were found—only complaints regarding the unfairness by “netizens,” citizens who utilize the internet frequently, for example, to post their complaints about food products without providing their real names.\textsuperscript{1277}


\textsuperscript{1272} Id.

\textsuperscript{1273} Id.


\textsuperscript{1276} Id.

\textsuperscript{1277} Id. “Netizens” is a group of people who post their complaints on websites usually without providing their real names.
Registration and Traceable System on Melamine

The central government has institutionalized stringent regulations on melamine to avoid its use in the food and feed industry. In 2010, the State Council issued a notice requiring a real-name registration system of melamine wholesalers and retailers. The aim is to ensure traceability. This notice also imposed a duty to conduct melamine tests on dairy products on dairy enterprises. Moreover, local government officials should be present at dairy enterprises for supervision.

Public Participation and the Freedom of Speech

In December 2011, another major dairy producer, Mengniu, recalled their dairy products tainted with aflatoxin. Large batches of milk were reported to have been destroyed. The company blamed the poor quality of cows and feed from farmers. Some experts consider that the aflatoxin is typically formed by moldy feed stored without proper ventilation.

In June 2012, a blogger who interned at Mengniu unveiled that a contractor of the

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1279 Id.
1280 Id.
1281 Id.
1282 Id.
1284 Id.
1285 Id.
1286 Id.
company used recalled materials and trash for milk production in a poor environment.\textsuperscript{1287} Mengniu admitted to their regulatory violations and apologized to the public.\textsuperscript{1288} The company also emphasized that they have re-examined the hygiene status of their contractors, and their product quality complies with the national standard.\textsuperscript{1289}

Concerning the freedom of speech and social supervision issue, the dairy industry went to the school of the intern blogger who reported the incident.\textsuperscript{1290} The industry organized a seminar and required an explanation from the blogger.\textsuperscript{1291} Since the blog did not contain any false information with malice, the company openly gave thanks for the social supervision.\textsuperscript{1292} But this visit may nonetheless create a chilling effect. Indeed, the blogger then refused to speak further to news reporters.\textsuperscript{1293} The silence of the blogger, therefore, reflects the difficulty of social supervision and public participation, particularly when the wrongdoers involved are large or state-owned enterprises (SOE) associated with governments.

Incident 2: Used Cooking Oil (“Gutter Oil”)

Another major domestic food safety scandal in China concerned recycled cooking oil, also named “gutter oil” because it can be made from waste oil or swill from gutters. This


\textsuperscript{1288} Wang Pu Yinmi Daigongdian Zong Luan Chai Mengniu Ditou Reocuo Zeling Zhenggai (网曝隐秘代工点脏乱差 蒙牛“低头认错”责令整改) [Internet Disclosure of Mengniu Sub-contractors Dirty Disorganized and Bad Mengniu Apologizes and Promises to Corrections], PEOPLE, June 21, 2012, http://ccnews.people.com.cn/GB/18257998.html#.

\textsuperscript{1289} Fujian Hesun, supra note 1287.

\textsuperscript{1290} Id.

\textsuperscript{1291} Id.

\textsuperscript{1292} Id.

\textsuperscript{1293} Id.
recycled oil can contain carcinogens and aflatoxin that can cause food poisoning and cancer.\textsuperscript{1294} The use of such oil is illegal for human food, but legal for biodiesel fuel or animal feed.\textsuperscript{1295}

In June 2011, the police started a crackdown campaign after finding a factory that processed used cooking oil and swill into food oil in Zhejiang province.\textsuperscript{1296} The police then tracked down a company in Shandong province which was buying the oil for further processing, refining, and reselling for wholesale food markets and restaurants.\textsuperscript{1297}

In September 2011, the Ministry of Public Security (MPS) detained thirty-two people with unknown charges.\textsuperscript{1298} During the investigation, an operating network including production, distribution, and sales in fourteen provinces was uncovered.\textsuperscript{1299} Six underground factories were closed.\textsuperscript{1300} More than a hundred tons of swill oil was confiscated.\textsuperscript{1301} By November 2011, over 700 suspects in 128 cases had been detained in twenty-eight provinces and municipalities.\textsuperscript{1302} Sixty major operating networks had been shut down\textsuperscript{1303} and 60,000 tons of gutter oil was

\begin{thebibliography}{999}
\item[1296] People Daily, Swill Oil, supra note 1294.
\item[1298] People Daily, Swill Oil, supra note 1294.
\item[1299] Id.
\item[1300] Id.
\item[1301] Id.
\item[1303] Id.
\end{thebibliography}
seized. It is unclear how much used cooking oil has been consumed and how many illnesses have been directly caused by this consumption. A professor, He Dongpin, claimed that China consumes two to three million tons of gutter oil each year, and everyone in China could have consumed such oil without knowing. This claim, however, was denied immediately by Professor He. No official report about the total number of victims is found.

Since used cooking oil can be legally used for biodiesel and animal feed, the defense of processing companies was that they did not know how the oil would be used by their clients. This argument is valid particularly when their clients are the one who resell the oil to wholesale food markets and restaurants.

For instance, a major client, Yuan Yi, of a processing company, Jinan Gelin, admitted that she bought the oil, repacked it with famous brand labels, marked it up 500 yuan per ton, and sold it to towns and villages nearby. Yuan stated that she did not realize the severe

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1307 People Daily, Swill Oil, supra note 1294. For instance, the owner of the Jinan Gelin Biology Company, Liu Liguo, denied that he was doing illegal business because his clients would not tell him how the swill oil would be used. Liu also claimed that if the powerful administrative supervision had not found out how the oil would be used, it would be impossible for him to know how such oil would be used.

1308 Id.

1309 Id.
consequences. It was unclear if processing companies should be responsible for the resale of their wrongdoing clients. Some officials even considered that the tests of gutter oil used in restaurants have no legal standing because there is no standard regarding what items should be tested by law.

Another challenge is that gutter oil production may be processed and marketed by licensed cooking oil enterprises. Some wholesalers mix qualified products with gutter oil for extra profits and to avoid detection. Waste oil processors are considered to be able to fool inspection devices by illegal means.

In addition, waste oil businesses were developed further with new sources. In April 2012, a new type of gutter oil was found made from dumped animal fat, rotten meat, and internal organs. Slaughter houses, therefore, have become a new supplying source. The MPS shut down thirteen underground workshops and seized 3,200 tons of this new gutter oil. In accordance with a MPS report, a criminal gang arrested in Zhejiang had earned profits of over

\[1310\] Id.
\[1311\] Id.
\[1312\] Zhang X., supra note 1304.
\[1316\] Cao & Luo, supra note 1315.
\[1317\] Id.
ten million yuan (US$1.6 million) in 2011 from the sale of gutter oil.  

Restaurants play an important role as well. Due to the low price of gutter oil, restaurants purchase the oil through wholesale markets and also supply their waste oil to “swill merchants” for profits. After getting waste oil from restaurants, “swill merchants” refine the oil by adding chemicals, repacking, and selling it back to the same restaurants. Through this supply and demand process, restaurants are both the major suppliers of raw materials and also the major users of finished products.

Actions Taken to Address “Gutter Oil” Use

In June 2012, the State Food and Drug Administration (SFDA), now the China Food and Drug Administration (CFDA), stated that government authorities had communicated with high risk restaurants, inspected blacklisted entities more often, revealed more information to the public, issued about thirty regulations, and selected 1,116 model restaurants in the country.

With respect to the difficulty of identifying ordinary cooking oil from waste oil, the MOH, SFDA, and other authorities formed an expert panel to conducting further research in September 2011. The aim was to improve the coordination among agencies.

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1320 Id.

1321 Id.


The China National Center for Food Safety Risk Assessment (CFSRA) was established in 2011, which is viewed as a major step towards the prevention of incidents. This center is a government-funded institution with the goal to provide technical support in monitoring risk, issuing early warnings, and establishing food standards. The center has established more than 300 sites nationwide at locations including grocery stores and farm markets.

As of January 2012, the center acquired around 800,000 sets of statistical data and released six blacklists including illegal food additives. The risk monitoring network covers 244 municipal and 716 county level regions. Nearly 20,000 drinking water monitoring sites have also been established.

In April 2012, the MOH announced that it had been looking at different types of equipment and on-site testing methods. The CFSRA admitted that it is difficult to perfectly screen out potential gutter oil. The center also encouraged public proposals and ideas.

By December 2011, 762 proposals, including 315 testing methods submitted by 281 organizations and individuals, had been received. These proposals suggested that merely


1325 Id.
1326 Id.
1327 Id. The blacklists include sixty-four illegal food additives and twenty-two abuse-prone food additives.
1328 Id. This monitoring network targets at food contaminants and food-related diseases.
1329 Id.
1331 Id.
1332 Id.
1333 Id.
improving testing methods may not be sufficient to solve the problem, but it was also necessary
to have effective supervision and management over the food supply chain.\textsuperscript{1334}

A draft of the national standard also proposed a tracking system for all kitchen waste of
the catering industry.\textsuperscript{1335} The draft requires all kitchen waste dealers to obtain authorized
certificates.\textsuperscript{1336} Moreover, certified dealers shall keep detailed records of each waste disposal,
and such records shall be reported to administrative authorities.\textsuperscript{1337}

Moreover, in order to resolve the legal challenges mentioned above, the SPC and SPP
issued a judicial interpretation, \textit{An Interpretation Regarding the Application of the Criminal Law
on Food Safety Cases}, in May 2013.\textsuperscript{1338} This interpretation applied a general provision in the
Criminal Law to cover all production and sale of food with harmful ingredients.\textsuperscript{1339}

Government officials are also subject to stringent administrative supervision. In February
2012, the SPC, the SPP, and the MPS jointly issued a notice announcing that harsh punishments
would be imposed on government officials who fail to fulfill their duties to ensure food oil
safety.\textsuperscript{1340} Moreover, the death penalty would be given in serious cases.\textsuperscript{1341}

\begin{enumerate}
\item \textsuperscript{1334} Id.
\item \textsuperscript{1335} \textit{China Proposes “Tracking Mechanism” for Kitchen Waste}, XINHUANET, Dec. 13, 2011,
\item \textsuperscript{1336} Id.
\item \textsuperscript{1337} Id.
\item \textsuperscript{1340} \textit{Death Penalties Considered for Serious “Gutter Oil” Crimes}, XINHUANET, Feb. 24, 2012,
\end{enumerate}
Local Administrative Actions

Concerning supervisory measures at the local level, different regions adopt different measures to resolve the gutter oil problem under the flexible approach and the self-regulatory administrative structure.

Beijing city is considering to establish a real-time surveillance network with more than 60,000 electronic cameras installed at oil-water separators or oil separation tanks.\textsuperscript{1342} It is believed that with this system, it will then be difficult for restaurants to sell their waste oil to illegal dealers.\textsuperscript{1343} Since there are more than 62,000 restaurants in the city that discharge around 240 tons of waste oil a day, the surveillance system cost is estimated to be around thirty million yuan.\textsuperscript{1344}

Instead of installing surveillance network, the Shanghai local government has required all licensed restaurants to install a device that separates waste oil and grease from water, by the end of 2012.\textsuperscript{1345} The aim is to prevent waste oil and grease from entering into sewage systems.\textsuperscript{1346} This device also prevents pollution.\textsuperscript{1347}

The enforcement will be jointly conducted by the Shanghai Food and Drug

\textsuperscript{1341} Id., and Adam Minter, supra note 1319.


\textsuperscript{1343} Id.

\textsuperscript{1344} Id.


\textsuperscript{1346} Id. There are around 40,000 restaurants that discharge a hundred tons of waste oil in the city a day.

\textsuperscript{1347} Id. Theoretically, the waste oil can be used to produce biodiesel, but the converting process cost in China is still considered to be too high.
administration, the Public Security bureau, and other departments of the city. The cost of the device ranges from 20,000 yuan (US$3,120) to 40,000 yuan (US$6,240). Since small restaurants may not be able to afford the cost, the Shanghai Restaurants Association suggested that the government provide subsidies to those restaurants with less financial resources. In order to avoid this cost issue, Shanghai agencies require landlords and only those restaurants that occupy an entire building to pay for the oil and grease separation machines.

Shanghai also introduced a waste oil rewarding system in February 2013. In the past, restaurants had to pay handling fees to agencies to collect their waste oil. Restaurants, therefore, had less of an incentive to give oil to agencies instead of selling to illegal swill oil dealers for profit. In order to increase the incentive to give oil to agencies, the Shanghai government currently purchases waste oil from restaurants. In order to ensure the purchase price is fair, the price is guided by different associations, such as the Shanghai Restaurants Cuisine Association, Shanghai Food Association, and Shanghai City Appearance and Environmental Sanitation Association.

Furthermore, in line with the tracking mechanism, Shanghai is regulating waste oil dealers. Since waste oil from restaurants could worth between 4,500 yuan to 5,000 yuan a ton

1348 Id.
1349 Id.
1352 People Daily, Regulation, supra note 1350.
1353 Id.
1354 Id.

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as raw material to produce biodiesel and chemicals, it might not be possible to terminate all illegal oil collection businesses due to the potential profit.\footnote{1355} In order to pursue better regulation and management, Shanghai requires that only those appointed district dealers may conduct collection.\footnote{1356} Moreover, restaurants are subject to fines and criminal charges if their waste oil is offered to non-appointed dealers.\footnote{1357} This strategy aims to turn illegal and unregulated collection of waste oil to a legal, regulated, and profitable activity.\footnote{1358}

A framework agreement between a Dutch biofuel company, SkyNRG, and a Chinese firm, Shanghai Luming Environmental Technology, was signed in July 2012.\footnote{1359} Although no official deal has been announced, SkyNRG stated that the company intends to purchase waste cooking oil from China to produce refined aviation fuel supplied to commercial airlines.\footnote{1360} SkyNRG has provided biofuel to fifteen airlines in the world, and 90 percent of the fuel for commercial airlines is refined from waste oil.\footnote{1361}

Chinese companies are also developing aviation fuel from gutter oil.\footnote{1362} In February 2012, the Civil Aviation Authority started to accept applications for petrochemical research.\footnote{1363} Considering that 4.5 million tons of gutter oil are produced annually and the consumption of

\footnote{1355} Id. (discussing the waste oil business in Shanghai could worth more than billion yuan a year).
\footnote{1356} People Daily, Regulation, supra note 1350.
\footnote{1357} Id.
\footnote{1358} Id.
\footnote{1360} Id.
\footnote{1361} Id.
\footnote{1362} Id.
\footnote{1363} Id.
aviation fuel is approximately twenty million tons a year, biofuel may account for 30 percent of total consumption. As such, China’s biofuel market could be worth US$120 billion by 2020. Some experts believe that China is capable of refining waste oil into biofuel, but major problems exist with waste oil collection and management.

Incident #3: Clenbuterol Pork

Another major Chinese food incident concerns clenbuterol-tainted pork. Clenbuterol is a chemical that prevents pigs from accumulating fat, thereby producing leaner meat. Clenbuterol, therefore, is commonly named as “lean meat powder” in China. This chemical is a banned addictive in pig feed because it is poisonous to humans.

No official report indicates the total number of victims, but a few news reports are available. For instance, in 2006, more than 300 people seemed to be poisoned by clenbuterol pork in Shanghai. In February 2009, fourteen people suffered food poisoning after having

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Id.

Id.

Id.


It is unclear if the total number of victims at the national level is a state secret that may affect social stability. For instance, Zhao Lianhai in the melamine milk case established a website for gathering the parents of victims in the entire nation, but Zhao was convicted of the crime “disturbing social order.” Another example may be Ai Weiwei. Ai collected student victim names from the Sichuan earthquake, and he was arrested and detained without trial for eighty-one days. Tania Branigan & Jonathan Watts, Ai Weiwei Detained by Chinese Police, GUARDIAN, Apr. 11, 2011, http://www.theguardian.com/artanddesign/2011/apr/03/ai-weiwei-detained-chinese-police, and Tania Branigan, Ai Weiwei Released from Detention, GUARDIAN, June 22, 2011, http://www.theguardian.com/artanddesign/2011/jun/22/ai-weiwei-released-from-detention.

stir-fried pig’s liver in Guangzhou.\textsuperscript{1371} Other reports showed that seventy people were ill with similar poisoning symptoms after eating pig organs.\textsuperscript{1372}

In 2011, clenbuterol was found in pigs and pork products across the country including Henan, Jiangsu, Beijing, Guangzhou, Shaanxi, and other provinces.\textsuperscript{1373} Some reports show that the Shuanghui Group, the largest meat processor in China, had a policy to accept only lean pigs containing more than 70 percent of meat content.\textsuperscript{1374} Other reports disclose that some livestock brokers sold clenbuterol to pig farmers for at least 5,000 yuan (US$762) a kilogram and promised to purchase their pigs in return.\textsuperscript{1375}

In October 2010, the Committee of the State Commission Office for Public Sector Reform (SCOPSR) issued an Opinion of Enhancing Supervision of Clenbuterol (the “Opinion”).\textsuperscript{1376} This Opinion imposes supervisory responsibilities on different departments such as the Ministry of Agriculture (MOA), Ministry of Commerce (MOFCOM), Ministry of Health (MOH), State Administration of Industry and Commerce (SAIC), General Administration of Quality Safety, Inspection and Quarantine (GAQSIQ) and China Food and Drug Administration

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\textsuperscript{1374} Tainted Pork Was “An Isolated Case,” CHINA DAILY, Mar. 31, 2011, http://topic.chinadaily.com.cn/index/cache?collection=cbsweb2&source=China+Daily&title=Tainted+pork+was+’an+isolated+case’&aid=12252772 [hereinafter China Daily, Isolated Case]. The company stated that they had never required farmers to supply only lean pigs.
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\textsuperscript{1375} Id.
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In light of the Opinion, the MOA is the department in charge of clenbuterol supervision and agency coordination regulating pig farming and pork distribution. With respect to other departments, the MOH sets safety standards, SAIC supervises distributions, CFDA inspects catering operations, MOFCOM manages the butchery industry, and GAQSIQ oversees import and export of pork products.

In March 2011, the MOA reported that it had required Henan and Jiangsu provinces to investigate the clenbuterol pork incident. The MOA, as a central agency, also sent inspection supervisors to those provinces to enhance supervision and coordination with the Food Safety Commission of the State Council and other departments. At the provincial level, the vice-governor of Henan province announced that more than 210,000 provincial officials had been dispatched for investigation.

Besides the MOA, the MOFCOM also reported that a working team was sent to Henan
province to assist in local investigations. The Henan MOFCOM urged meat processing companies in question, such as Jiyuan Shuanghui, to suspend production and conduct in-house investigation as well.

The March 2011 MOA report also stated that Henan province had conducted sample tests on 310,000 pigs where 234 tested positive for clenbuterol. In June 2012, a MOA report shows that over 23 million pigs had been inspected nationwide in a year. The passing rate of the clenbuterol test is 99.94 percent. Local reports, including those from Shandong province, claimed that their passing rate was over 99.9 percent. A city in Guangdong province claimed that their passing rate was 100 percent. It is unclear how accurate these passing rates are. Chinese people are skeptical, and food scandals remain.

Besides the MOA, the MOFCOM reported that it had conducted on-site supervision of companies in different regions, such as Henan and Nanjing. The central MOFCOM required its local offices to conduct examinations and quality inspections of local slaughterhouses.

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1388 Id.

1389 Id., and MOA’s Supervision of Clenbuterol, supra note 1384.


1391 Id.

1392 Id.


1394 Xinhuanel, Steps to Stop Tainted Pork, supra note 1387.

1395 Id.
In August 2011, the MPS reported that the authority seized 2.5 metric tons of clenbuterol and closed six illegal laboratories, twelve production lines, nineteen processing and storage sites, and thirty-two illegal factories in sixty-three cities nationwide. In Nanjing, 264 pigs and 600 kilograms of pork were destroyed after finding that all twenty tested pigs came back positive for clenbuterol. More than 94.2 kilograms of pork ribs and 106 kilograms of shredded pork from Wal-Mart were seized in Beijing.

In March 2011, more than 2,070 tons of meat products and fresh meat were recalled by the Shuanghui Group. The recall involved grocery stores across the country including in Guangzhou and Xi’an. In April 2011, the chairman of the Shuanghui Group apologized to the public together with his management team and dealers.

In 2012, the MOA formulated a number of administrative regulations regarding clenbuterol supervision like the Notice of Supervising Clenbuterol at Slaughter-Houses (the “Notice”). This Notice requires provincial governments to purchase clenbuterol inspection


1397 Id., and Gongchang, supra note 1390. All 264 pigs were destroyed because all random samples, twenty in twenty (a hundred percent), were tainted.


1400 China Daily, Huge Recalls, supra note 1373.


equipment and deliver that equipment to official slaughterhouses in cities and counties within their regions.\textsuperscript{1403}

\textbf{Internal Disciplinary Sanctions}

A number of officials were sanctioned due to the contaminated pork incident. In Henan province, after fifty-two pigs tested positive for clenbuterol from 1,115 pigs in nine farms, thirty officials were detained in police custody or suspended from duties. Three of those suspended officials were chiefs of animal husbandry bureaus.\textsuperscript{1404}

A report of China Central Television (CCTV) shows that the scandal was partially caused by local officials who allowed pig farmers to choose test samples themselves.\textsuperscript{1405} In March 2011, 113 people, including seventy government officials, were penalized due to tainted pork incidents.\textsuperscript{1406}

\textbf{Criminal Responsibilities}

In July 2011, Jiaozuo Intermediate People’s Court opened a trial focusing on the tainted-pork scandal.\textsuperscript{1407} The key members of a clenbuterol production and distribution network in Henan were convicted. This network produced and sold the chemical to eight provinces.

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\textsuperscript{1403} \textit{Id}. art. 2.
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\textsuperscript{1404} China Daily, Officials Punished, \textit{supra} note 1367. The suspended officials include the chiefs of animal husbandry bureaus in Mengzhou City, Qinyang City, and Wenxian County.
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\textsuperscript{1405} China Daily, Meat Scandal, \textit{supra} note 1399.
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including Henan, Shandong, and Jiangsu.\footnote{\textit{Id.}}

One of the defendants, Liu Xiang, was convicted of “endangering public security using dangerous means” and sentenced to death with a two-year reprieve.\footnote{\textit{Id.}} Another defendant, Xi Zhongjie, was convicted for producing and selling over 2,700 kilograms of clenbuterol and sentenced to life in prison.\footnote{\textit{Id.}} Three others were given from nine to fifteen years in prison for “knowingly producing and distributing the dangerous drug clenbuterol for use in pig feed.”\footnote{\textit{Id.}} The illegal income of the accused was confiscated.\footnote{\textit{Id.}} Thirty farmers were also sentenced with punishments ranging from probation to imprisonment under a year.\footnote{\textit{Id.}}

Criminal responsibilities also extended to the local officials in this case. Three former food safety officials were sentenced between five and six years for being in dereliction of their duties by allowing the sale of 38,000 live pigs to other provinces without inspection.\footnote{\textit{Id.}}

In December 2011, six butchers who worked in a Nanjing slaughterhouse were given up to four years in prison for knowingly purchasing and selling clenbuterol-tainted pork.\footnote{\textit{Id.}} These butchers were also fined up to 50,000 yuan (US$7,900).\footnote{\textit{Id.}} Some government officials were
tried as well.\textsuperscript{1417} Reports in August 2011 stated that 989 people have been arrested for manufacturing and selling clenbuterol\textsuperscript{1418} with more than 113 people being sent to prison between March and December 2011.\textsuperscript{1419}

Although administrative supervision, disciplinary sanctions, and criminal responsibilities were imposed on wrongdoers, distrust remains. The Chinese General Administration of Sport (CGAS) banned Olympic athletes from eating pork products.\textsuperscript{1420} Chinese astronauts have a special food supply derived from organic farms.\textsuperscript{1421} Unofficial reports also show that government officials have their own organic food supply, although this has been denied by the government.\textsuperscript{1422}

News reports also consistently uncover tainted-meat incidents. For instance, some news reports show that Shandong farmers are commonly using clenbutoral for lamb and beef as well.\textsuperscript{1423} New types of “lean meat powder” are found, with new types of processing methods for

\begin{footnotes}
\item[1417] Id. The details regarding the trial were not found.
\item[1418] Xinhuanet, Arrests over 900, \textit{supra} note 1396.
\item[1419] Id., and Reuters, China Jails Six, \textit{supra} note 1415.
\end{footnotes}
avoiding detection.\textsuperscript{1424} Local governments are blamed for inaction and ineffective supervision.\textsuperscript{1425} Business sectors are viewed as lacking shame or ethics, and fear and distrust has spread all over the country.\textsuperscript{1426}

Court Responses

Although the major incidents above were discussed by official reports, only a few related court cases are found in Chinese law databases.

Dairy product court cases mostly concern consumer compensation. For instance, the cases \textit{Wang Qixiu}\textsuperscript{1427} and \textit{Wu Minjian}\textsuperscript{1428} in 2009 involved compensation for substandard dairy products. The courts provided a verdict which did not apply any food safety related statutes, only the Civil Procedure Law.\textsuperscript{1429} The major milk cases regarding the Sanlu Group are not found in court case databases. Thus, the link among product safety statute provisions, legal sanctions, and civil liabilities is unclear.


\textsuperscript{1426} Id.


With respect to the recycling cooking oil incident, no court cases were found directly related to food safety, only contractual disputes between companies. The only case mentioning gutter oil is *Jinan Yudong Keji Fazhan Youxian Gongsi v. Zhong Shixiang*. This case concerns an agreement about refining gutter oil to biofuel. The issue of the case is whether the conduct of the parties constitutes a breach of contract. Thus, the available case does not directly relate to product safety or consumer protection.

Some cases found address the chemical-tainted pork incident. For instance, the defendant Lu Shehui in 2011 purchased “lean meat powder” from another defendant, Xi Gaisheng. Both were convicted under the Criminal Law for producing and selling harmful food. Lu was sentenced to a year in prison with a year reprieve and was fined 3,000 yuan. Xi was sentenced to ten months with the same fine amount as Lu. Two defendants from another case with similar facts were also convicted under the Criminal Law. Specific product safety law, such as the PQL, CPL, and others, are not mentioned in those cases. Thus, it is unclear if product safety laws were applied in any of these major incidents.

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1432 *Id.*

1433 *Id.* (The Criminal Law, *supra* note 19, art. 25, 67, 72, and 144, was violated by the defendants.)

1434 *Id.*

Political Control on Law Implementation

The next question is how political control of uniformity may dictate the implementation of law within Chinese society. The discussion starts with the organization of the Party which parallels the legislative and administrative functions and extends to cover social and youth organizations; the nomenclatura system which controls the leading personnel in the Chinese administration; the principle of “democratic centralism” which establishes a hierarchical structure and subordinating relationships between members and organizations; and the Party disciplinary management system that may impose sanctions on wrong-doing members for ensuring unified implementation. Under this political system, food and product safety supervision is controlled by the Party through a centralized structure that manipulates legislative, executive, judicial, social, and youth sectors at all administrative levels.

There are more than eighty-two million of Party members in China.\textsuperscript{1436} The Preamble of the PRC Constitution states that the basic task of China is to conduct socialist modernization under the leadership of the Chinese Communist Party.\textsuperscript{1437} Socialist modernization refers to a development process following the principles of Marxism-Leninism and Mao Zedong Thought,\textsuperscript{1438} adhering to people’s democratic dictatorship, developing socialist democracy and legal system, and modernizing industry, agriculture, national defense, science, and technology.\textsuperscript{1439} Thus, developing a socialist legal system is one of the main political tasks of the country. Moreover, this task is conducted solely under the leadership of the Party.

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\item[1437] \textit{XIANFA Pmbl.} (1982) (China).
\item[1439] \textit{XIANFA Pmbl.} (1982) (China).
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The organization of the Party parallels its law-making hierarchy. The highest organ is the National Party Congress, which has 2,270 delegates, and has supreme political power. It decides the major political issues and revises the CPC Constitution. The National Party Congress also hears and examines reports of the Central Committee and the Central Commission for Discipline Inspection (CCDI). It meets once every five years.

The Central Committee, which currently has 205 members, is elected by the National Party Congress. The Central Committee leads and represents the Party when the National Party Congress is not in session. It is the only organ that may decide major national policies. The CPC Constitution requires the Central Committee to meet in plenary session at least once a year convened by its Political Bureau.

Under the Central Committee, there are the Political Bureau, the Central Military Commission (CMC), and the General Secretary. The Political Bureau and its Standing Committee exercises the functions and powers of the Central Committee when the Central

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1441 XIANFA art. 10(3) (1982) (China).


1445 CPC Constitution, supra note 449, art. 15.

1446 Id. art. 21.

Committee is not in session.\textsuperscript{1448} There are currently seven members in the Political Bureau Standing Committee (PBSC).\textsuperscript{1449} These seven members—Xi Jinping, Li Keqiang, Zhang Dejiang, Yu Zhengsheng, Liu Yunshan, Wang Qishan, and Zhang Gaoli—are considered to be the most influential figures in China. All of these members have duplicate or multiple leading positions in legislative, executive, and judicial organs.

Similar Party organizations are also formed at the local level. For instance, party congresses, committees, standing committees, secretariats, and discipline inspection commissions are established in provinces, NAAs, DMs, cities, autonomous prefectures, counties, and others.\textsuperscript{1450}

\textbf{Party Groups and Organizations}

Other than the party congresses, committees, and political bureaus with leading roles at all different levels, the CPC Constitution also creates party core groups (\textit{dangzu}), primary organizations (\textit{jiceng zuzhi}), and communist youth leagues.

Party core groups exist at departments of state administration, political-legal organs, non-party institutions, and people’s mass organizations at the central and local levels.\textsuperscript{1451} These party core groups ensure the implementation of party policy and the personnel management system at relevant levels.\textsuperscript{1452} In this system, group members occupy leading positions of the related administrative institutions and organs.

\begin{itemize}
\item \textsuperscript{1448} \textit{Id}.
\item \textsuperscript{1450} CPC Constitution, \textit{supra} note 449, art. 24, and \textit{China Daily}, CPC in Brief, \textit{supra} note 1447.
\item \textsuperscript{1451} Chen, \textit{supra} note 43, at 87. People’s mass organizations may refer to trade unions, women’s federations, scientific, literary associations, and others.
\item \textsuperscript{1452} \textit{Id.} at 88, 90.
\end{itemize}

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Party primary organizations are subject to the guidance of the party core groups. In accordance with the CPC Constitution, these primary organizations are formed at all basic levels including governmental, educational, commercial, social institutions, and companies of the People’s Liberation Army (PLA).\footnote{Id.} There are 3.5 million primary organizations in China.\footnote{China Daily, CPC in Brief, supra note 1447.}

These organizations are tasked with promoting party policies, conducting ideological education, and maintaining the connection between the Party and the masses. These organizations are under the management of different committees such as the primary committee (jiceng weiyuanhui), the general branch committee (zongzhibu weiyuanhui), and the branch committee (zhibu weiyuanhui), depending on the size of the organization.\footnote{Chen, supra note 43, at 88.}

Other than the party core groups and primary organizations, the CPC Constitution also establishes the Communist Youth League of China (CYL). CYL is a mass organization of youths between the age of 14 and 28.\footnote{Id.} Similar to other party organizations, CYL is under the Communist Party’s leadership, and its duty is to implant the Party’s ideology with the youth community.\footnote{Id. at 89.}

The Nomenklatura System

“Nomenklatura” is defined as “the system of patronage to senior positions in the bureaucracy of the Soviet Union and some other communist states, controlled by committees at
various levels of the Communist Party.”1458 This is also a historical terms from the Union of Soviet Socialist Republics (USSR) and Eastern Europe that refers to “a list of individuals drawn up by the Communist Party from where were selected candidates for vacant senior positions in the state, party, and other important organizations.”1459

In line with the European and Russian definitions above, China’s nomenklatura system requires administrative and social leading positions be filled by persons whose names are on a list approved by Party committees and core groups.1460 Positions on this list include all leading positions in administrative organs, political committees, state enterprises, social institutions, and associations of religions, academia, cultures, and others. Through this nomenklatura system, all personnel at the leading level in the country are Party members or are approved by the Party. Thus, all leaders are directly or indirectly subject to the supervision and management of the political system.1461

In addition, Party leaders have multiple roles of state functions. For instance, the top Party leaders in the PBSC include the Vice President Xi Jinping—who is also the General Secretary of the CPC Central Committee, Chairman of the CPC Central Military Commission, Vice Chairman of the PRC Central Military Commission, and the President of the Central Party School1462—the Premier Li Keqiang of the State Council,1463 the Chairman Zhang Dejiang of the


1459 Id.

1460 CPC Constitution, supra note 449, art. 11. Concerning the elections of the Party congresses and committees, “the lists of candidates shall be submitted to the Party organizations and voters for full deliberation and discussion.”

1461 Chen, supra note 43, at 90. The management is not merely governmental but also social affairs.

NPCSC,\textsuperscript{1464} and the Chairman Yu Zhengsheng of the Chinese People’s Political Consultative Committee (CPPCC).\textsuperscript{1465} Party personnel, therefore, are also the leaders of legislative, executive, and political functions. Moreover, this personnel system applies at various local levels. All leaders of different functions, sectors, and institutions at different levels and regions are members of the Party.\textsuperscript{1466}

The Party adopts the principles of “democratic centralism.”\textsuperscript{1467} In accordance with the CPC Constitution, those principles concern subordination, hierarchical management, collective leadership, and individual responsibility.\textsuperscript{1468} Based on these principles, the Party should be an obedient organization with unifying view leading by the members at the high level. This structure is comparable with Chinese Legalist obedient administration with unifying thought leading by the will of rulers.

“Democratic centralism” emphasizes subordination and obedience. Obedience refers to the relationships between individual and organization, minority and majority, lower and upper organizations, and constituent organizations and National Party Congress. Article 10(1) of the CPC Constitution provides:


\textsuperscript{1467}CPC Constitution, supra note 449, art. 10.

\textsuperscript{1468}Id. ch. II.
Individual Party members are subordinate to the Party organization, the minority is subordinate to the majority, the lower Party organizations are subordinate to the higher Party organizations, and all constituent organizations are members of the Party are subordinate to the National Congress and the Central Committee of the Party.

In light of this subordinating principle, individual members, minority, and lower organizations are required to obey Party organizations, majority, and organizations at the higher and central levels. Thus, this principle emphasizes quantities and hierarchies in terms of political power. Quantities refer to the size of the groups or the number of people linking to the concept of majority and even democracy. Hierarchies, however, refer to the ranking within the system. The higher the position, the more political power a group or a member has.

The Party’s hierarchical system determines the power and duties of individual members and organizations. Under the CPC Constitution, members and organizations at higher levels shall “attend pay constant attention to the views” of their subordinates and provide timely solutions. Since the higher level merely needs to attend the views of the lower level, the higher level remains discretionary power when formulating solutions. The views of the lower level, therefore, may not necessarily correspond to the solutions provided by the upper level members.

With respect to duties, lower level members report to and request instructions from the upper level members. Lower levels are, however, responsible for handling matters within their jurisdictions. In other words, lower levels are responsible for implementing political policies and providing updated information to higher level members.

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1469 In the Chinese version of the CPC Constitution, the word “obey” (服从, fucong) is used.
1470 CPC Constitution, supra note 449, art. 10(4).
1471 Id.
1472 Id.
The Party adopts a principle of collective leadership with individual responsibility. Collective leadership is the decision process of Party committees through discussion, meetings, and consultations. Individual responsibility refers to particular duties assigned to members that are based on those collective decisions.

In addition, the CPC Constitution requires transparency at different levels. Upper and lower Party organizations are required to exchange information, support, and “oversee each other.” The aim is to allow members to better inform the Party and also increase participating opportunities of members. However, it is unclear if lower levels would be able to oversee their respective upper levels under the subordination principle. In other words, could lower levels be obedient and oversee upper levels at the same time?

The hierarchical structure of the Party focuses on top-down relations among Party members and organizations. In light of this hierarchy, only the Party’s Central Committee has the power to decide major national policies. All lower organizations merely have the power to make suggestions, and the role of local party organizations is limited to implementing the decisions of higher bodies or submitting a demand for modification.

Moreover, lower level organizations cannot disclose their views to the public without

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1473 Id. art. 10(5).
1474 Id.
1475 Id. art. 10(4).
1476 Id.
1477 Id.
1478 Id. art. 15.
1479 Id.
1480 Id.
authorization. In other words, although transparency is encouraged within the Party, and upper levels have a duty to collect the views of lower levels, differing views must not be disclosed to the public. The public and non-members may not know the different thoughts within the Party and as a result, the Party can present a unified front to non-party members.

This unified-view requirement links with the role of individual Party members. The CPC Constitution requires individual members to: study and obtain knowledge for better serving people; maintain close tie with the masses; implement the Party’s policies for modernization and economic development; be “selfless” and “ready to make any personal sacrifices” for the Party and people; defend the interests of the country; and uphold unity for being loyal and honest to the Party. In sum, Party members have an obligation to make decisions for the Party by putting the needs of the Party in front of their own.

With respect to members’ rights, the CPC Constitution focuses on the right to participate in meetings and discussions and make suggestions and criticisms of the Party. In addition, members have a right to vote, self-defense, stand for election, reserve their views, and request,

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1481 *Id.*

1482 *Id.* art. 3(1). This article requires CPC members “to conscientiously study Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, study the Scientific Outlook on Development, study the Party’s line, principles, policies and resolutions, acquire essential knowledge concerning the Party, obtain general, scientific, legal and professional knowledge and work diligently to enhance their ability to serve the people.”

1483 *Id.* art. 3(7).

1484 *Id.* art. 3(2).

1485 *Id.* art. 2.

1486 *Id.* art. 3(3), 3(8).

1487 *Id.*, art. 3(5).
appeal, and complain to higher Party organizations.\textsuperscript{1488} If members are elected to leadership positions, they may make decisions with other leaders collectively.

Party Disciplinary Management

The next question concerns how to ensure that central and upper level decisions are implemented at lower levels. To do this, the CPC Constitution established a system of central inspection and disciplinary sanctions of uniformity.

The Central Committee for Discipline Inspection (CCDI) is established under the Central Committee of the Party.\textsuperscript{1489} The CCDI currently has 130 members.\textsuperscript{1490} Local and primary commissions for discipline inspection at all other levels are subject to a dual supervision: one is the Party committees at the corresponding levels; the other is the Party committee at the next higher level.\textsuperscript{1491} Although the supervisory power of these commissions is subject to their jurisdictions based on regions and levels, all commissions are responsible for the same tasks: upholding the CPC Constitution and inspecting the implementation and improvement of the Party’s work against corruption.\textsuperscript{1492}

In order to fulfill the tasks, these commissions educate members regarding Party discipline, oversee their exercise of power, handle violation complaints and appeal cases, and report to Party committees at the corresponding levels and higher commissions.\textsuperscript{1493}

\textsuperscript{1488} \textit{Id.}, art. 4.
\textsuperscript{1489} \textit{Id.} art. 43.
\textsuperscript{1490} CCDI Members, \textit{supra} note 1460.
\textsuperscript{1491} CPC Constitution, \textit{supra} note 449, art. 43.
\textsuperscript{1492} \textit{Id.} art. 44. Article 44 states, “The main tasks of the Party’s commissions for discipline inspection at all levels are as follows: to uphold the Constitution and other [rules] of the Party, to check up on the implementation of the line, principles, policies and resolutions of the Party and to assist the respective Party committees in improving the Party’s style of work and in organizing and coordinating the work against corruption.”
\textsuperscript{1493} \textit{Id.}
Under the CPC Constitution, all Party organizations have a duty to criticize, educate, and conduct disciplinary measures against members who violate Party’s discipline.\(^{1494}\) This discipline refers to the rules of conduct that are imposed on individual members and Party cadres.\(^{1495}\) In addition to the obligations of individual members, extra obligations are imposed on Party cadres by the CPC Constitution.\(^{1496}\) For instance, Party cadres are required to have political integrity, be professionally competent, engage in “exemplary conduct,” and implement Party’s policies firmly.\(^{1497}\) Party cadres must also “emancipate their minds for seeking the truth from facts,” integrate Party’s principles and policies with actual conditions, uphold the democratic centralism, and exercise their power properly according to law.\(^{1498}\)

Similar to Confucianism, disciplinary sanctions emphasize learning from mistakes, rather than imposing punishments. The CPC Constitution requires that disciplinary measures to be conducted in the spirit of “learning from past mistakes to avoid future ones, and curing the sickness to save the patient.”\(^{1499}\) In light of this principle, disciplinary sanctions are limited to five measures: 1) warning, 2) serious warning, 3) removal from Party positions, 4) probation within the Party, and 5) expulsion from the Party.\(^{1500}\) Only those members who have seriously

\(^{1494}\) *Id.* art. 38. Article 38 states, “Party organizations should criticize, educate or take disciplinary measures against members who violate Party discipline…”

\(^{1495}\) *Id.* ch. VI. The CPC Constitution, Chapter VI provides the rules of conduct particularly for “Party cadres.” Article 34 provides, “Party cadres are the backbone of the Party’s cause and public servants of the people.” *Id.* art. 34, 37.

\(^{1496}\) *Id.* ch. VI.

\(^{1497}\) *Id.* art. 34.

\(^{1498}\) *Id.*

\(^{1499}\) *Id.* art. 38.

\(^{1500}\) *Id.* art. 39.
violated criminal law will be expelled. In addition, Party members have a right to restore their membership, as long as wrongdoing members rectify their mistakes. This right to restore membership, therefore, parallels the accountability regulation that allows wrongdoing officials to be promoted or assigned to another position after a one-year period.

To briefly review this Party system, leading personnel of the Chinese administration are subject to approval, inspection, and sanctions by the CPC in order to ensure unification and uniformity. As individual members and Party cadres, leading officials of different agency levels have the duty to firmly implement Party policies, integrate Party principles with actual circumstances, and be obedient to the Party’s supervisory committees. Thus, the food and product safety administrative supervision is supposed to be unified, uniformed, and centralized by the Party’s policies and its personnel management system.

**Laissez-Faire Administration**

The uniformity of the political system above, however, is offset by the market economic policy of flexibility. This section examines the relationship between the socialist market economic policy and administrative action that creates tension in terms of law enforcement. The discussion includes: 1) the Party’s economic development policy; 2) the socialist and the “responsibility-contract” system; 3) the actual competitive circumstances among investors, officials, and local governments; 4) the possible conflicts between economic and administrative roles; and 5) the ineffectiveness of centralized management in practice.

This section finds that 1) the Chinese governance structure is in fact a market-oriented organization in terms of its contractual relationships with public or private entities; 2) the

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1501 *Id.* art. 38. It is unclear if this view regarding criminal law affects the implementation of law in courts.

1502 *Id.* art. 39.
management characteristics emphasize free competition and the non-interference approach allowing for market negotiation; and 3) the existence of a trial-and-error approach to administrative supervision. These approaches show that China adopts a de facto laissez-faire administration of flexibility with hidden freedom, which is a key factor leading to rapid economic growth while, at the same time, creating a food and product safety crisis.

Among the Party’s goals, development is the top priority.¹⁵⁰³ The CPC Constitution states, “[D]evelopment is the Party’s top priority in governing and rejuvenating the country.”¹⁵⁰⁴ Moreover, the primary standard for judging Party’s works should focus on benefiting productive forces, increasing the strength of the country, and improving people’s living standards.¹⁵⁰⁵

The CPC Constitution also states that the fundamental task of the Party is to “lead the people…to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task…”¹⁵⁰⁶

¹⁵⁰³ Id. General Program. The General Program provides, “Development is the Party’s top priority in governing and rejuvenating the country. The general starting point and criterion for judging all the Party’s work should be how it benefits development of the productive forces in China’s socialist society, adds to overall strength of socialist China and improves the people’s living standards.”

¹⁵⁰⁴ Id.

¹⁵⁰⁵ Id.

¹⁵⁰⁶ Id. The General Program states, “The basic line of the CPC in the primary stage of socialism is to lead the people of all ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task while upholding the Four Cardinal Principles and the reform and opening up policy.”

The Four Cardinal Principles refer to Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the thought of Three Represents. The Party’s Constitution views that the ideal communism of Marxism-Leninism is the final goal of the development; Mao Zedong Thought provides theoretical principles regarding revolution and construction; Deng Xiaoping Theory establishes principles and policies focusing on economic development; Three Represents of Jiang Zemin promotes self-improvement and further development of socialism in China.

The reform refers to the new requirements laid down in the Sixteenth National Congress. Those new requirements include formulating the Scientific Outlook on development, putting people first, and calling for comprehensive, balanced, and sustainable development.
The Party, therefore, is responsible for pursuing economic development. Moreover, the Party must persist and ensure all subordinates assist with and fulfill this central task.\textsuperscript{1507}

The CPC Constitution also requires a rapid economic development\textsuperscript{1508} stating that the Party “must lose no time in speeding up development.”\textsuperscript{1509} Moreover, the Party must use science and technology to improve the quality of workers’ lives and promote a rapid development of the national economy.\textsuperscript{1510}

This political task is also emphasized by the PRC Constitution. Article 14 requires the state to raise labor productivity, improve economic result, and develop productive force through scientific development, economic administration, and the socialist system of responsibility.\textsuperscript{1511} Thus, this political task regarding economic development is also a legal obligation through the PRC Constitution.

The Socialist Land System and Responsibility Contracts

Under Article 6 of the PRC Constitution, public ownership is the basis of the socialist economic system.\textsuperscript{1512} Production is owned by all working people collectively,\textsuperscript{1513} and the state is the leading force in the national economy.\textsuperscript{1514}

\textsuperscript{1507} Id. “In leading the cause of socialism, the Communist Party of China must persist in taking economic development as the central task, making all other work subordinate to and serve this central task.”

\textsuperscript{1508} Id. “The Party must take advantage of the advancement of science and technology to improve the quality of workers and promote sound and rapid development of the national economy.”

\textsuperscript{1509} Id.

\textsuperscript{1510} Id. The Constitution of the CPC provides “the Party must take advantage of the advancement of science and technology to improve the quality of workers and promote sound and rapid development of the national economy.”

\textsuperscript{1511} XIANFA art. 14 (1982) (China).

\textsuperscript{1512} Id. art. 6.

\textsuperscript{1513} Id.

\textsuperscript{1514} Id. art. 7.
The CPC Constitution also explains that communism is the highest ideal but “can be realized only when the socialist society is fully developed and highly advanced.”

The CPC Constitution considers China to be in the primary stage of socialism. Different economic modes and distribution systems may coexist with the public ownership. This socialist system, therefore, allows “some people to become rich first, gradually eliminate poverty, and achieve common prosperity.” The aim is to resolve the contradiction between “the ever-growing material…needs of the people and the low level of production.”

In light of this system, workers who are members of rural economic collectives have a right to farm privately, engage in household production, and raise privately owned livestock. Workers of other sectors, such as industries and commercial trades in cities and towns, may adopt different forms of co-operative economies. These forms include private enterprises owned by domestic and foreign investors.

The Chinese socialist system encourages individual and foreign economic activities. Moreover, individual economic activities are protected, assisted, and supervised by the state.

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1515 CPC Constitution, supra note 449, General Program.

1516 Id. This primary stage of socialism will “last for over a hundred years.” Moreover, “in socialist construction the Party must proceed from China’s specific conditions and take the path of socialism with Chinese characteristics.”

1517 Id. The General Program provides, “[T]he Party must uphold and improve the basic economic system, with public ownership playing a dominant role and different economic sectors developing side by side, as well as the system of distribution under which distribution according to work is dominant and a variety modes of distribution coexist, encourage some areas and some people to become rich first, gradually eliminate poverty, achieve common prosperity, continuously meet the people’s ever-growing material and cultural needs on the basis of the growth of production and social wealth and promote people’s all-round development.”

1518 Id.

1519 XIANFA art. 8 (1982) (China).

1520 Id.

1521 Id. art. 11.

1522 Id.
Foreign enterprises, economic organizations, and individuals are permitted to conduct co-operative economic activities with Chinese enterprises.\footnote{Id. art. 18.} The lawful rights and interests of foreigners are also protected.\footnote{Id. art. 32.}

The Chinese socialist economic system has three types of economies in general. The first is the state economy, which is the “leading force” in the country.\footnote{Id. art. 7.} The second type is the individual co-operative economy, which is under collective ownership.\footnote{Id. art. 8.} The third is foreign or private enterprises, which exist in various forms of “co-operative economy” such as joint ventures with Chinese enterprises or economic institutions.\footnote{Id. art. 18.}

Although these three types of economies have different ownership structures, all of them are either owned by governments or cooperate with governments. For instance, the state economy refers to state-owned enterprises (SOE) that are directly owned and run by government officials. The individual co-operative economy refers to individual farmers and workers who cooperate with rural collectives made up of local officials. Lastly, foreign or private enterprises cooperate with local administrations and/or organizations supervised by local officials. Thus, Chinese officials are also economic actors who participate in economic activities directly or indirectly through the economic relations listed above.

**Officials as Landlords and Economic Planners**

In addition, administrative officials manage all land through collectives and governments. Article 9 of the PRC Constitution states, “mineral resources, waters, forests, mountains,
grassland, un-reclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, un-reclaimed land and beaches that are owned by collectives in accordance with the law.”¹⁵²⁸ Thus, there are two types of land owners under this provision: collectives and the state. Similar division is also provided in Article 10:

Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The state may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land.¹⁵²⁹

In light of these provisions, organizations and individuals can only be land users, but never land owners. There are two types of landlords in China: collectives that own land, mainly in rural and suburban areas; or the state, which owns land, mainly in cities or other areas not owned by collectives.

Since collectives are owned by workers and peasants as a whole, and the leader of workers and peasants is the Party, the Party, therefore, owns the land on behalf of people.¹⁵³⁰ Moreover, Article 2 of the PRC Constitution also provides that the power of the state belongs to the Chinese people, and the people’s congresses at different levels exercise the state power.¹⁵³¹ Since the deputies of people’s congresses are elected under the nomenklatura system, Party

¹⁵²⁸ Id. art. 9.
¹⁵²⁹ Id. art. 10.
¹⁵³⁰ Id. Pmbl. The Preamble mentioned that Chinese people are under the leadership of the CPC and the guidance of Marxism-Leninism and Mao Zedong Thought.
¹⁵³¹ Id. art. 2, 57.
officials control state power as peoples’ leader as well.1532 Thus, both the lands owned by collectives and the state are run by government officials who are also Party members. These officials manage land as landlords.

Besides the role of economic co-operators, actors, and landlords, administrative officials at different levels are also economic planners. Article 99 of the PRC Constitution maintains that local people’s congresses “examine and decide on plans for economic and cultural development.”1533 Furthermore, congresses at or above county level should “examine and approve the plans for economic and social development and the budgets of their respective administrative areas, and examine and approve reports on their implementation.”1534 Thus, local people’s congresses, particularly at the county level, have a legal obligation to determine economic plans for their regions.1535

In addition, those economic and cultural development plans are conducted by local governments. Article 107 of the PRC Constitution provides:

> Local people’s governments at and above the county level…conduct the administrative work concerning the economy, education, science, culture, public health, physical culture, urban and rural development, finance, civil affairs, public security, nationalit[y] affairs, judicial administration, supervision and family planning in their respective administrative areas; issue decisions and orders; appoint, remove and train administrative functionaries, appraise their work and reward and punish them.1536

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1532 Id. Pmbl. The Preamble provides, “[A]fter waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the CPC with Chairman Mao Zedong as its leader ultimately.”

1533 Id. art. 99.

1534 Id.

1535 The standing committees of local people’s congresses at or above the county level have similar obligations as well. Article 104 states that these standing committees discuss and decide “on all major issues in all fields of work in its administrative area;” supervise the work of people’s governments, people’s courts and people procuratorates at the corresponding level. Id. art. 104.

1536 Id. art. 107.
Article 107, therefore, legally empowers local governments at or above the county level to conduct all kinds of administrative works including economic plans, public security, social development, and judicial administration, which obviously include food and product safety supervision. Although local governments have the obligation to report to the local people’s congress at the corresponding level, to administrative organs at the next higher level, and the State Council, local administrations have a high degree of discretionary power to determine and adjust their supervision through rewards and punishments.\(^{1537}\)

**GDP-Oriented Performance Evaluation**

A key factor for measuring officials’ performance is economic growth in terms of Gross Domestic Product (GDP) at the local level.\(^{1538}\) This evaluation affects the likelihood of promotion of local officials.\(^{1539}\) Moreover, personnel performance evaluation is based on administrative regions. For instance, the performance of administrative officials at the provincial level relates to the GDP of their governing provinces. Likewise, the performance of the administrative official at the county level relates to the GDP of their supervising counties. Thus, in order to secure their administrative positions and to achieve better career prospects, local officials compete with each other to have higher GDP growth.\(^{1540}\)

\(^{1537}\) Id. art. 110. Article 110 of the Constitution of the PRC requires local people’s governments to be responsible and report to: (1) the local people’s congress at the corresponding level; (2) its standing committee when the people congress is not in session; (3) the state administrative organs at the next higher level; and (4) the state council. In order to achieve a prosperous outcome with flexibilities, Deng Xiaoping decentralized the economic and certain political power to local governments. Local governments may decide their own economic policies and find their own solutions instead of pushing their problems to the Central. Although this decentralization policy may not necessarily cover national political and administrative control such as monetary system, local governments have a high degree of discretion if the central government does not intervene.


\(^{1539}\) Id., and Cheung, supra note 62, at 63. Cheung stated, “County officials are entitled to business expenses…depending on how much money the county makes.”

\(^{1540}\) Id.
In order to maximize the economic growth of administrative regions, local governments encourage local businesses and attract foreign investment. Moreover, China adopts a “responsibility-contract” system. This system is considered to be a shift from a system of rights in accordance with political hierarchy negating the private property right before 1979 to affirming private property rights after 1979.\footnote{Id. at 38. In the period from 1949 to 1979, China adopted the communist economic system, which denied the right to private property. All property in the country belonged to all Chinese people leading by the Party. The right to property at the time, therefore, was distributed to Party officials in accordance with their rankings and positions in the hierarchical organization, under the name of public interest. The higher the ranking and the position, the more the property right officials had. After 1979, public and private entities started to have a certain right to property due to the change of the political and economic system. The open-door market policy recognized the private property right, and this right has been used as a driving force to achieve economic development based on self-interest.}

In light of this “responsibility-contract” system, which is based on property, investors are allowed to obtain land use rights in exchange for several “responsibilities,” which can be considered as negotiable requirements via a contractual relationship with local governments.\footnote{Id. Under socialism, the state is the sole owner of all the land in China. Local governments, particularly at the county level, own the land of their regions under the name of “the state” or collectives. Investors and individuals may have a use right of land only. This right is transferable under the market economy system.} Local governments, particularly at the county level, require three types of “responsibilities”: 1) land price; 2) 17 percent value-added tax (VAT) derived from the value-added by using the land; and 3) economic performance.\footnote{Id. The economic performance can be specified in related contracts.}

There is no fixed amount or necessary correlation between sale prices and land costs. Land prices could be positive or negative.\footnote{The land price could be negative under the county competition system for attracting investors.} In other words, investors may obtain the land use right with a price lower than cost of the land.

Land cost usually includes the amount paid to peasants for their giving up their land and development and improvement cost for repurposing agricultural land to industrial use by
establishing electricity, water, gas, street lighting, road for transportation, and cables for telephones, computers, internet. These infrastructural facilities are set up by local governments before selling the land use right to investors. Investors and local governments may negotiate the land price freely under the market principle.

In general, local governments that transfer land use rights earn 75 percent of the land price if the price is positive. The remaining 25 percent will go to governments at higher levels. These percentages, however, are not fixed nor uniform nationally. If the land is in a better location, a lower percentage of the land price would go to governments at higher levels. Yet, the income from land price is not the main source of revenue for governments, rather it is the value-added tax.

By definition, value-added tax (VAT) is the added value derived from the production of enterprises or individuals that sell goods, provide processing, repairing, or assembling service, or import goods to China. Similar to the distribution of land price, the value-added tax that is obtained from investors is divided between local governments and governments at higher levels. Local governments are entitled to 25 percent of the value-added tax amount or 4.25 percent of the entire value-added tax value. The remaining 75 percent of the value-added tax amount, or 13.25 percent of the entire value-added tax value, goes to the central government. In 2006,

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1545 Cheung, supra note 1549, at 58.
1546 Id. at 57.
1547 Id.
1548 Id.
1550 Cheung, supra note 1549, at 57.
1551 Id.

Some economists consider the value-added tax as rent.\footnote{Cheung, supra note 1549, at 53.} While the central government in Beijing is the landlord of all the land in China, local governments at the county level can be seen as—shopping mall owners in different regions. In order to maximize the rent income, shopping mall owners do not rent out their shopping spaces by a fixed amount but a fixed percentage from added value of their tenants—the output of using the land.\footnote{The tenancy with a rent that is based on a percentage of the added value is named “share tenancy.” STEVEN N.S. CHEUNG, THE THEORY OF SHARE TENANCY 16-29 (1969).} By seeing the value of the output, landowners can decide which tenants may continue the lease.\footnote{Id., at 28-29.} In other words, only the strongest tenants who are able to create the highest output and rent may possess the land use right.\footnote{Cheung, supra note 1549, at 52-53.}

In order to attract strong tenants who can make greater profit, shopping mall owners provide the best support to tenants in terms of facilities, estate managements, marketing activities, and other possible beneficial assistance.\footnote{Id. at 56. The possible beneficial assistance from local governments can be the services for applying administrative documents with money-back guarantee, environmental settings such as parks and entertainments, recruiting services, and others.} Because shopping mall owners are county officials, this support provided, therefore, can consist of infrastructure improvements such as roads,
electricity and water, supply chain development, as well as administrative and legal conveniences.\footnote{Id. The possible beneficial assistance from local governments could be the services for applying administrative documents with money-back guarantee, environmental settings such as parks and entertainments, recruiting services, and others.}

In order to secure the land use right, tenants have to achieve a higher profit level than other competitors. Since the rent amount, in the form of a value-added tax, is a fixed percentage of value added from the use of land, the higher the added value of their production, the higher amount of the rent will be paid to the landlords.\footnote{Id. at 59.} The higher the rent amount paid to the landlords, the higher the chance to keep the land use right.\footnote{Id. Other than VAT, local officials also consider the image and reputation an investment would bring to the regions.}

While shopping mall owners are county officials, tenants of shopping spaces can be various kinds of investors such as individual farmers, local manufacturers, joint venture enterprises, and wholly owned foreign subsidiaries. Although these entities operate in different forms, similar responsibilities apply. All investors in the region have to increase their economic capacities by using the land or they will be replaced by other competitors.

Multiple Layers of Competition

In light of the Chinese socialist market economic policy and the “responsibility-contract” system, there are multiple layers of competition among government officials, local governments, and investors. The competition among government officials centers on career prospects based on their economic performance. The competition among local governments refers to the GDP growth of their regions. The competition among investors rests on their use right of land that based on the rent, in the form of value-added tax, they can contribute.
Economic Competition Among Officials

The competition among government officials focuses on their career prospects based on their economic performance.\textsuperscript{1561} In light of the political and administrative personnel structure, government officials at the local level are subject to the supervision and management of the Central Committee of the Party.\textsuperscript{1562} The central leadership inspects and evaluates the economic development conducted by local officials as a basis for promotion and demotion.

As mentioned, economic performance is mainly calculated based on GDP growth. In order to achieve a higher GDP, government officials compete with each other at different levels, such as provinces, counties, and townships.\textsuperscript{1563} For instance, the central leadership conducts GDP ranking by provinces annually.\textsuperscript{1564} This GDP ranking correlates with promotion opportunities of provincial officials.\textsuperscript{1565} Similar rankings of county GDP are conducted in provinces as well.\textsuperscript{1566} Thus, the role of the central is similar to the head quarter of a corporation, and the role of local officials at different levels is similar to branch managers in different regions.\textsuperscript{1567}

The head quarter of a corporation has a centralized power to set out unified directions, appoint and remove personnel of the branches, but the survival of the head quarter relies on the income contributed from branches, which are able to adjust their regional policies according to

\textsuperscript{1561} Li & Zhou, supra note 1538, at 1744.

\textsuperscript{1562} CPC’s November Meeting to Discuss Deepening of Reform, GLOBAL TIMES, Aug. 27, 2013, http://www.globaltimes.cn/content/806748.shtml#.UkumVI0jKS0.

\textsuperscript{1563} Li & Zhou, supra note 1538, at 1744.


\textsuperscript{1565} Li & Zhou, supra note 1538, at 1744.


\textsuperscript{1567} Cheung, supra note 1549, at 62-63.
the actual circumstances of flexibility. In order to stimulate the best economic performance, these front branches do not correlate with each other but compete against each other despite the fact that they are all responsible to the same headquarter. This competition particularly occurs at the county level. In light of the administrative structure, county governments conduct and determine economic plans and local administrative measures in practice. County officials, therefore, have the greatest discretionary power regarding actual economic development within their regions.

In addition, county officials are entitled to legal personal gain from investments through a rewards system. Under this rewards system, local officials are awarded in accordance with investment fund deposited in local banks.\textsuperscript{1568} For instance, officials may personally receive one percent commission of the investment fund if the source is within China, but one and a half to two percent if the source is a foreign country.\textsuperscript{1569} Moreover, this award rate is negotiable depending on factors such as the popularity of county’s locations.\textsuperscript{1570}

Besides legal personal gain, corrupt gain could also be a competitive motivator. Chinese officials may be corrupt, but the bribe amount is subject to negotiation and competition among officials, regions, and nations.\textsuperscript{1571} In order to maximize the income of the county and personal gain, the marginal social returns cannot be equal or higher than other similar sites.\textsuperscript{1572} Thus,

\begin{itemize}
  \item \textsuperscript{1568} \textit{Id.} at 60.
  \item \textsuperscript{1569} \textit{Id.}
  \item \textsuperscript{1570} \textit{Id.}
  \item \textsuperscript{1571} Steven N.S. Cheung, \textit{A Simplistic General Equilibrium Theory of Corruption}, 14 CONTEMP. ECON. POL’Y 1, 3 (1996).
  \item \textsuperscript{1572} Cheung, \textit{supra} note 1549, at 59. The marginal social returns include corruption and land cost such as “[complementarities], drawing power, transportation, electricity, water, entertainment, and so forth.”
\end{itemize}
although local officials have a high degree of discretionary power within their regions, the possible bribe amount is still subject to market competition.\textsuperscript{1573}

In addition to competition among government officials, there is competition among local governments based on the GDP growth of their regions. Two main levels of local governments are involved in this economic performance competition. The first is the provincial level, which has more than thirty local governments. The second is the county level, which averages around 2,850 local governments. Because the county is the level that conducts economic and administrative plans with land power, competition at this level is the most intense.\textsuperscript{1574}

As mentioned, county governments are “landlords” within their jurisdictions, and local administrations have a legal and political obligation to increase GDP growth from their land. The competition among local governments, therefore, involves attracting the strongest tenants who are able to create the greatest added value in their regions. These target tenants can be the most profitable business entities domestically and internationally.

In order to attract the most profitable business entities, county governments compete with each other to provide the best administrative and economic assistance. Other than infrastructural assistance, other assistance can be in the area of license application, worker hiring, entertainment, and any other service that help business operations.\textsuperscript{1575} For instance, in order to better assist

\textsuperscript{1573} \textit{Id.} It is because if the marginal social returns are equal or higher than similar sites in other regions, local officials would not be able to maximize income of the region and themselves. Corruption amount is subject to market competition, particularly at the local level; however, this competition is limited to those business areas that are not monopolized by the state.

\textsuperscript{1574} Cheung, supra note 1549, at 61, and Zhang Wuchang (张五常), \textit{Cengceng Fencheng Yu Xianji Jingzheng} (层层分成与县际竞争) [Layer-sharing and County Competition], SINA BLOG (June 3, 2013, 10:31 PM), http://blog.sina.com.cn/s/blog_47841af70102e3j4.html.

\textsuperscript{1575} Cheung, \textit{supra} note 1549, at 56.
Foxconn to produce the iPhone5, Chongqing agencies and schools are supplying “dispatch workers” and “intern students” to the factory—which, arguably, violates the labor law. 1576

With respect to business solicitation, a county with a population of 300,000 often hires 500 investment solicitors to attend business conferences all over the country. 1577 Officials may also attend seminars in foreign countries to introduce their regions and products as well. 1578 Local officials are considered to be salesmen in their regions, and counties are considered to be corporations. 1579 Thus, there are more than 2,850 corporations competing at the county level to increase GDP growth and secure regional income. 1580

The final form of competition is among investors. In order to secure the land use right, investors have to maximize their production value and make it greater than other potential land users. This competition can be among the investors of local regions and nations, among foreign and local enterprises, and peasants. 1581 For instance, because small farmers are unable to produce a higher value than other investors like land developers or agricultural enterprises, individual


1577 Cheung, supra note 1549, at 56.

1578 I attended a conference about Chinese food safety in Washington D.C., and a number of important Chinese officials from Shandong province were speakers. American food safety officials were concerned about the new laws and provisions, while Chinese officials focused on how much they export, how modern their farms are, and how safe their products are. Everybody was invited to visit their farms, counties, and province. Chinese officials did not mention anything about Chinese legislation or regulations.

1579 Cheung, supra note 1549, at 63.

1580 By 2010, there are 2,856 county-level administrations in China, which include 1,464 counties, 853 county-level districts, 370 county-level cities, and 117 autonomous counties. Shiu-Shen Chien, New Local State Power Through Administrative Restructuring—A Case Study of Post-Mao China County-level Urban Entrepreneurialism in Kunshan, 46 GEOFORUM 103, 104 (2013).

farmers often have to return their leased land to local governments on the basis of the “public interest.”

In addition, the stronger the investor, the better the bargaining power for receiving a lower leasing cost. In order to attract investment, local governments are often willing to offer low or even negative leasing prices to strong manufacturing enterprises. It is because manufacturers usually are sensitive to cost and easily move to other places. Moreover, although local governments may supply land use right for free, the regions usually can benefit from future taxes and the spillover effect, such as employment and the service industries that are brought in by the development. Through this spillover effect and future taxes, the economic performance of enterprises associates with the growth of the regions and the prospects of government officials.

Between Economic and Administrative Roles

Instead of the separation of powers, China adopts a combination of powers in the name of “democratic dictatorship” of centralization and uniformity. All legislative, administrative, judicial, and economic powers are, directly or indirectly, held in the hands of the political party.

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1583 Gongwuyuan Bei Tanpai Fushikang Zhaogong Renwu: Zhaobudao Ziji Jinchang (公务员被摊派富士康招工任务：招不到自己进厂) [Civil Servants Assigned Recruiting Missions for Foxconn, Those Fail Fulfilling the Mission Work for Foxconn Themselves], NEWS 21CN, Apr. 28, 2012, http://news.21cn.com/hot/cn/2012/04/28/11660961.shtml, and Tao, supra note 1581, at 2225-28. Mobility refers to a characteristic of non-specificity. Since manufacturing businesses are cost sensitive and their customers usually are located outside the production region, enterprises can move to other regions easily. The spillover effect refers to the economic opportunities these manufacturing enterprises would bring to the locality such as services, real estates, and taxes. Services include banking, catering, and entertainment industries.

1584 For instance, manufacturers bring in working opportunities for local people and even attract people from other regions. More workers and people lead to more restaurants, banks, entertainment facilities, housing, transportation, and so forth are necessary. All these service industries can be sources of income for local governments. Other than people, the spillover effect can also be technology, knowledge, connection, and so forth.

1585 XIANFA art. 1 (1982) (China). This provision mentions about the “democratic dictatorship.”
While the political priority is economic development that embraces the open-door and market policy, all other powers are implemented in a way to further this ultimate economic goal.\(^\text{1586}\)

This political economic-oriented power particularly exists at the level of local governments. On the one hand, local government officials are subject to economic performance evaluation, which is based on the GDP growth of their governing regions. On the other, local officials have obligations to implement legislative and administrative supervision to ensure food and product safety. While the personal gain of local officials is tied to the market competition by a legal and illegal rewards system; administrative supervisory obligations regarding food and product safety can be an obstacle for winning competitions based on low cost. A conflict of interest, therefore, exists among those different roles and powers. Under the Chinese political and economic systems, officials are also businessmen,\(^\text{1587}\) and county administrations are also business entities. Between economic interests and regulatory supervision, local governments often prefer economic development unless there are big incidents that trigger central intervention.

Income Disclosure

In order to avoid the conflict of interest, the *Regulations of the PRC on Open Government Information* (OGI)\(^\text{1588}\) was formulated by the State Council in 2008 requiring all administrative

\(^{1586}\) CPC Constitution, *supra* note 449.


organs to disclose information that “involves the vital interests of citizens,”\textsuperscript{1589} “needs to be extensively known or participated in by the general public,”\textsuperscript{1590} and “shows the structure, function and working procedures of and other matters relating to the administrative organ.”\textsuperscript{1591} Under this OGI, the county-level governments must be responsible “for promoting, guiding, coordinating and supervising open government information work”\textsuperscript{1592} and disclose the information on the “supervision and inspection of environmental protection, public health, safe production, food and drugs, and product quality,”\textsuperscript{1593} and “land requisition or appropriation.”\textsuperscript{1594} 

Based on the criteria “vital interests of citizens” laid down in the OGI, Chinese people have started to require salary information of leading officials at the ministry level beginning in 2011.\textsuperscript{1595} Some local regions, such as Guangzhou in Guangdong province, Xinjiang Urgur Autonomous Region, and Hunan province, piloted similar schemes requiring leading officials to declare their assets, which include real estate property, the employment status of spouses and children, and their investment.\textsuperscript{1596} This open information scheme is also named “public supervision,” and local governments such as Zhejiang, Sichuan, and other provinces set out similar programs as well.\textsuperscript{1597}

\textsuperscript{1589} Id. art. 9(1).
\textsuperscript{1590} Id. art. 9(2).
\textsuperscript{1591} Id. art. 9(3).
\textsuperscript{1592} Id. art. 3.
\textsuperscript{1593} Id. art. 10(11).
\textsuperscript{1594} Id. art. 11(3).
\textsuperscript{1597} China Daily, Disclose Salaries, supra note 1595.
This open information mechanism under the principles of transparency, right to know, and public supervision are verbally supported by civil servants, but its implementation relies on action. Many questions are raised such as the disclosure requirement covers only spouses and children, but not parents, siblings, and others. Officials can easily find ways and channels to cover their illegal income under the current disclosure regime.

Since 2008, more lawsuits have been filed to require disclosure of information. Governments often raise “state secrets” as a defense not to disclose the information required. Under the general-direction and lawmaker-as-legal-interpreters principles, the interpretation of “state secrets” depends on the interpretation of the State Council, the government officials themselves.

**Inspector General Mechanism**

The Inspector General mechanism is one of the regimes that Chinese scholars consider as an option. A fundamental question, however, is how to ensure the independency of the

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1598 China Daily, Disclose Salaries, *supra* note 1595. The survey of the Chinese Academy of Social Science in 2011 showed that 63.6 percent of “the sampled civil servants support disclosing civil servants’ incomes and assets for public supervision.”


1600 *Id.*


1602 *Id.*
mechanism. Under the current political ideology, the separation of powers is not an option, and no institution can be formed without the approval from the Party. Inspection mechanisms must rely on internal institutions, such as the CCDI. Although “third party” and “independent inspections” are proposed, this “independence,” however, refers to the separation the disciplinary inspection committee from local Party Committees or the integration of the disciplinary inspection committee with the judiciary and legislative functions. Since the Chinese judiciary and legislative functions associated with the Party personnel under the nonmenklatura system mentioned. The “independence” proposed is still within an internal political system.

In November 2013, the CCDI announced that the inspection system will cover “all public sectors, including local governments, ministries and commissions, state-owned enterprises (SOE), and public institutions,” which is operated with a “double-management” system. This inspection system, therefore, is internal, which is within the Party and conducted by Party members.

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1606 Id. The “double-management” system is also named as “dual-management system.”
Whistleblowers

Another measure to combat the conflict of interest is to the whistleblower mechanism. In July 2011, the State Council requires provincial governments to establish whistleblower systems to ensure food safety.\footnote{Guowuyuan Shianban Yaoqiu Gedi Jianli Shipin Anquan Youjiang Jubao Zhidu (国务院食安办要求各地建立食品安全有奖举报制度) [The State Council Requires Local Governments to Establish Food Safety Whistleblower Systems], \url{http://www.gov.cn/jrzg/2011-07/28/content_1915849.htm}.} In February 2012, twenty-one provinces had established whistleblower regimes with hotlines and rewards provided to food safety informers.\footnote{Woguo Yiyou 21 Ge Shengfen Chutai Shipin Anquan Youjiang Jubao Zhidu (我国已有 21 个省份出台食品安全有奖举报制度) [China’s Twenty-one Provinces Have Established Food Safety Whistleblower Systems], \url{http://news.xinhuanet.com/fortune/2012-02/09/c_111507063.htm}.}

News about whistleblowers and more specific rules were reported. For instance, in 2011, an unidentified whistleblower in Shangdong province reported that food safety supervisors as “turning a blind eye to local companies’ illegal operations and receiving kickbacks from punishments,” food safety fines “have actually become a kind of protection fee which give manufacturers a green light to make profits from selling poor quality or even poisonous products.”\footnote{He Dan, Profits ‘Blind’ Eyes of Food Inspectors, CHINA DAILY, Apr. 20, 2011, \url{http://usa.chinadaily.com.cn/epaper/2011-04/20/content_12361995.htm}.}

In January 2013, local governments such as Guangdong announced a whistleblower mechanism to combat “fake or substandard shark fins” by rewarding informers from 300 ($48) to 300,000 ($48,244) yuan in January 2013.\footnote{Li Wenfang, Guangdong to Reward Whistle-Blowers for Fake Shark Fin, CHINA DAILY, Jan. 16, 2013, \url{http://www.chinadaily.com.cn/china/2013-01/16/content_16127094.htm}.} In March 2013, the China Food and Drug Administration (CFDA) announced that whistleblowers “could get up to 300,000 yuan ($48,244)” rewards for reporting food and drug issues, the reward can also be “1 to 6 percent of the value of
the food or medicine involved,” and even higher than 300,000 yuan if the cases involved have “national influence.”

This mechanism, however, relies on local enforcement and whistleblower protection. In November 2012, a whistleblower, Jiang Weisuo, who disclosed illegal activities such as diluting milk by water in the dairy industry, was attacked and died. Bloggers who tried to disclose corruption were under physical and verbal attack. In August 2013, a blogger, Li Jianxin, had acid splashed on his back and stabbed on his face that blinded his right eye.

The Internet has become a forum for whistleblowing. Reports provided by informers with real-name are given priority in terms of investigation. Nevertheless, there are questions whether whistleblowers should be subject to criminal charges if the information was obtained by illegal means such as false statements. Reports also show that 23.1 percent of real-name whistle-blowers “were either detained or listed” as “suspicion of rumor-mongering or ‘causing trouble’” by police.

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1614 Id.

1615 Id.

1616 Id.


Officials Evaluation

In order to create an incentive for officials to ensure food safety, the State Council announced that provincial level governments are subject to annual evaluation in terms of product, construction, and service quality in May 2011.1619 “Product quality” includes the quality of manufacturing and agricultural products, related management and supervisory systems.1620 The evaluation is led by the GAQSIQ.1621 The evaluation process requires provincial level governments to set objectives, conduct self-evaluation, and inspection authorities to implement on-site investigation, overall evaluation, approval or criticism, and notice.1622

At the same time in 2011, local governments, such as the city governments of Beijing, Shanghai, and the provincial governments of Zhejiang and Guangdong, “incorporated the local food safety situation into the evaluation of officials’ work.”1623 This is viewed to be a right direction to increase supervision of the food safety problem, but the solution is considered as not to be relied on officials but the “awareness of residents about food safety.”1624

Self-regulatory Expectation

Self-checking process and self-discipline is still considered as one of the main solutions of the food safety problem. In the incident of antibiotics-tainted chicken provided by a United States fast-food chain KFC, a subsidiary of Yum!, Yum! apologized for the shortcomings of its


1620 Id.

1621 Id.

1622 Id.


1624 Id.
internal “self-checking process” and “lack of communication.”\textsuperscript{1625} Some scholars consider that it might not be practical for law enforcers to examine and prevent food safety violations of 450,000 food processing companies in China.\textsuperscript{1626}

A food science professor, Li Shuguang, stated, “You cannot simply place all your hopes on several officers who wear caps and uniforms to find every violation at food companies during a short inspection.”\textsuperscript{1627} To Chinese people, food safety relies more on self-discipline of companies and social supervision.\textsuperscript{1628} This view can be sourced from the Confucian self-regulatory culture, which relies on internal virtue of flexibility rather than external force of uniformity.

Confucian-like Morality Establishment

In order to combat the conflict of interest and corruption to ensure food and product safety, the State Council issued a white paper to require establishing a clean government with morality in 2010.\textsuperscript{1629} The white paper emphasizes “education,” “self-discipline,” and “training” in “integrity among state functionaries,” and “fortifying…the ideological and moral defense line against corruption.”\textsuperscript{1630} In 2010, the Party also issued the code of ethics, which specified fifty-two “unacceptable practices” of the Party leaders and cadres, those practices include “accepting


\textsuperscript{1626} \textit{Id.}

\textsuperscript{1627} \textit{Id.}

\textsuperscript{1628} \textit{Id.}


cash or financial instruments as gifts,” “using their influence to benefit their spouses, children or ‘special concerned persons’,” “establishing enterprises,” “registering companies” outside the mainland China, and so forth.1631

This morality establishment based on internal virtue of flexibility is in the opposite direction of the self-interest-driven market economic policy of capitalism and the negation of morality of Legalism that are based on external virtue and administrative control of uniformity. After the Cultural Revolution, the Chinese traditional philosophical theories had been negated and branded as outdated and harmful to the society, yet the traditional view of unwritten rules and ethical expectation exist nowadays.

Ineffective Centralized Management

Besides the new mechanisms discussed, local government officials are theoretically supervised by the governments above them. This top-down model hierarchical management of uniformity faces a variety of challenges. These challenges include local interpretation of central orders and the lack of local actual information.

The first challenge is the interpretation of orders and instruction. The central and subnational governments issue statutes, guidelines, or orders with the aim of regulating law enforcement. However, local governments may interpret such measures in different ways to lead to the consequences they prefer.1632 For instance, while the central authority issues orders to ban gambling, local governments can use those measures to impose fines and fees on people and

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1632 Zhang Qianfan (张千帆), Difang Zizhi Shi Minzhu Zhi Ben: Yi Zhongyang Jiquan de Tongzhi Chengben Wei Shijiao (地方自治是民主之本：以中央集权的统治成本为视角) [Local Self-governance as the Basis of Democracy: Considering the Cost of Centralized Governance], 1 JIAODA FAXUE 95, 110 (2010) [hereinafter Zhang Q.].
collect those revenues.\textsuperscript{1633} Family plan requirements under the one-child policy can also turn to be fines, fees, and even mandatory abortions.\textsuperscript{1634} Local governments may selectively implement the laws in a way they choose.\textsuperscript{1635} In practice, although upper governments control the rules on paper, local governments control the rules in actions.

Local administrations usually are able to find a way to circumvent those rules on paper by following their local customs.\textsuperscript{1636} In addition, local governments, particularly at the provincial level, have rulemaking power and also a legal obligation to issue local regulations in accordance with regional circumstances.\textsuperscript{1637} Thus, local governments are considered to be a hidden and stable force that may hijack central legislation and policies despite their lower positions.\textsuperscript{1638}

The second challenge is the lack of sufficient information regarding the detailed circumstances of the different local regions by upper level officials.\textsuperscript{1639} This is mainly due to the lack of updated information, local knowledge, and human resources.\textsuperscript{1640} For instance, there are more than 44,000 local governments at the provincial, prefectural, county, and township levels.

\begin{itemize}
\item \textsuperscript{1633} Id. at 112.
\item \textsuperscript{1634} Id.
\item \textsuperscript{1635} Id. 111-12.
\item \textsuperscript{1636} Id. at 111. In accordance with Professor Zhang, there are two types of officials: (i) directing officials (\textit{guan}, 官); and (ii) implementing officials (\textit{li}, 吏). Directing officials often are those officials at the central government who determine major policies on paper. These officials usually are the top candidates recruited from national examinations. They may not have any specific expertise and management skill in practice. Implementing officials, however, are at lower ranks in terms of positions and discretionary power. But these officials are familiar with actual circumstances. Directing officials rely on implementing officials to conduct the policies.
\item \textsuperscript{1637} More information in Chapter 3, Centralization versus Open Rulemaking Power; and Appendix A.
\item \textsuperscript{1638} Zhang Q., \textit{supra} note 1592, at 111.
\item \textsuperscript{1639} Id. at 112.
\item \textsuperscript{1640} Id. at 115. Although the central requires each administrative level of governments report to their upper level governments, higher level governments may not be able to investigate all the details of their subordinate governments.
\end{itemize}
levels,\textsuperscript{1641} and the central and upper level governments mostly rely on reports written by subordinate governments for updated and actual information. However, since local officials may not want to disclose their failures, those reports usually are positive, but are doubtfully reliable.\textsuperscript{1642} Central upper governments, therefore, may not be able to receive accurate information in a timely manner to prevent wrongdoings and control local administrations.\textsuperscript{1643} In practice, the higher the level of the government, the less accurate information it will receive.

The central and upper governments have disciplinary inspection personnel responsible for conducting local investigations. However, there are no inspection mechanisms that investigate the inspectors.\textsuperscript{1644} If the leaders of disciplinary inspection teams are corrupt, no effective mechanism exists that may terminate the wrongdoings of local officials.\textsuperscript{1645} Some cases even indicate that corrupt inspectors may use their investigatory power to control local officials in order to fulfill their deals with private corporations.\textsuperscript{1646}

There are letter-and-visit-petition (\textit{xinfang}) and administrative reconsideration systems for redressing grievances at the central and upper levels, but these systems face multiple challenges.\textsuperscript{1647} For instance, as mentioned, the administrative reconsideration system is

\begin{itemize}
  \item \textsuperscript{1641} There are thirty-three local governments at the provincial-level (including the claimed province Taiwan), 333 at the prefectural-level, about 2856 at the county-level, and 40859 at the township-level.
  \item \textsuperscript{1642} Zhang Q., supra note 1592, at 126. For instance, lower level governments have administrative obligations assigned by upper governments. Some obligations, however, may not be realistic or achievable in actual circumstances; some obligations may even conflict with local peasant interests.
  \item \textsuperscript{1643} \textit{Id.} As our discussion in Chapter 2, the Chinese legal system may not intend to control local governments neither.
  \item \textsuperscript{1644} \textit{Id.} at 123.
  \item \textsuperscript{1645} \textit{Id.} at 122.
  \item \textsuperscript{1646} \textit{Id.} at 123.
  \item \textsuperscript{1647} \textit{Xinfang} (letters and calls) is a petitioning system for people to redress local grievances by the central authorities. \textit{State Bureau for Letters and Visits, GOV.CN}, Oct. 2, 2005, http://english.gov.cn/2005-10/02/content_74182.htm.
\end{itemize}
considered not to be independent and objective.  

Reviewing departments tend to affirm original administrative decisions. Because the judiciary system is considered to be affiliated with governments, local people rely on filing petitions directly at the central level with the hope of redressing their local grievances.

Millions of letter petitions are filed every year. This overwhelming volume leads to ineffective and even reverse consequences. The petition office, the State Bureau for Letters and Visits (SBLV), does not have the sufficient human resources to conduct investigations of all cases. As such, its main task becomes requiring the “defendants,” local governments, to “settle disputes, release emotion, and balance interests” with complainants. Those petition cases, therefore, are returned to local governments. Some petitioners face reprisals by economic, political, and legal means.

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1649 Id. In light of the Chinese administrative reconsideration system, if reviewing departments stay with the original administrative action, the department in question will be the defendant when the case is appealed in courts. If reviewing departments dismiss and adjust the original administrative action, the reviewing department will be the defendant. Reviewing departments therefore tend to remain the original administrative action in order to avoid being defendants in appeal cases.

1650 Zhang Q., *supra* note 1592, at 114. In the view of Professor Zhang, a large number of letter petition cases should have been settled through dispute resolutions, litigations, or administrative reconsiderations. See also He H., *supra* note 1648.


In addition, because the number of petitions is part of their performance evaluation, local officials often stop people from filing cases. In order to minimize case numbers reported to the central government, local officials may even bribe the bureaus for Letters and Visits at upper level governments. The bribe is viewed to be a fee for retaining their positions. Central leaders, therefore, are prevented from obtaining accurate information regarding local circumstances, and this lack of information leads to an ineffective centralized management.

Market Oriented Administration

This ineffective centralized management of uniformity leads to a market-oriented administration of flexibility, which involves contractual and negotiable relationships between government officials and economic sectors, as well as the non-interference and trial-and-error approaches relying on self-regulation. The Chinese food and product system, therefore, embraces political dictatorship and laissez-faire administration at the same time.

The contractual relationship between Chinese administration and economic sectors is mainly established by the “responsibility-contract” system. As mentioned, through this contractual system, the production value of economic entities, such as enterprises and rural households, is tied to the income of local administrations by taxes and the spillover effect.

This contractual relation also ties the career prospect of local officials with the GDP growth of their jurisdictions by performance evaluation. The Chinese market economic system, [1654] Zhang Q., supra note 1592, at 114-15.

[1655] Id. at 115. There are the State Bureaus for Letters and Visits (SBLV) and local bureaus for letters and visits at various levels such as provinces, districts, and cities.

[1656] Id.

[1657] Id. The information problem is improving due to the communication technologies such as blogs and group discussions. However, due to the volume of grievances and lack of investigating resources, it is difficult for the central to verify the facts mentioned. Limited investigating resources merely go to major incidents. Moreover, since the speech on internet is under political surveillance, officials can eliminate conversation on internet and media.
therefore, links the interests of individual peasants, corporations, local governments, and official personnel together through land and “responsibility-contracts.” Local discretionary power can also be a source of administrative support for economic entities.1658

These economic entities can be international investors and domestic enterprises. In exchange for the administrative support, foreign enterprises commit a certain amount of investment, number of workers the business will hire, the profit the investment will make, and so forth.1659 Through the negotiation regarding land use rights and economic responsibilities, a contractual relationship in terms of shared income is established between international corporations and local governments.

With respect to domestic entities, there are state-owned enterprises (SOE), private corporations, rural households, and others. Since the state is the legal and official owner of the urban land, SOE may obtain the land use right through allocation.1660 Private corporations may obtain the land use right through conveyance or responsibility contracts with local governments.

1658 Chongqing Municipal Government, Contract Signed for Global Printing and Imaging Device Manufacturing Base of Chongqing, CQ.GOV.CN, Apr. 19, 2012, http://en.cq.gov.cn/ChongqingToday/Headlines/3559.htm. The Chongqing government stated that the government will “lend all-out support for [Hewitt-Packard (HP)]’s development in Chongqing,” “exert full support and service to the construction” of HP’s global manufacturing base there. Todd Bradley, executive vice-president HP and president of Printing and Information Product Group also declared that “they would fulfill their commitment to increase their investments in Chongqing and open up new cooperation with mutual benefit.”


1660 Samuel P.S. Ho & George C.S. Lin, Emerging Land Markets in Rural and Urban China: Policies and Practices, 175 CHINA Q. 681, 688-89 (2003) [hereinafter Ho & Lin]. With respect to the urban land that is owned by the state, the state may allocate or convey the land use rights by paying “allocation price” or “conveyance price.” Considering the rural land owned by rural collectives, most of the agricultural land has been contracted to rural households for agricultural production under the household-responsibility system.
Rural collectives, which are run by officials, own agricultural land. Individual peasants have a claim to the income generated from the contracted land and a contractual duty to perform agricultural production. Each household, therefore, is a separate private production entity.

This household system may lead to a large number of producers of agricultural products in terms of food. These entities bear production responsibilities but may not have sufficient financial resources and technology to ensure food safety. For instance, it was a common practice of Chinese peasants to use melamine animal feed to reduce costs. This common practice is caused by the consistent financial difficulties of peasants, particularly in the less developed areas. Under the current banking system, farmers cannot obtain financial support as they lack sufficient property to provide as collateral security.

In addition, after adopting the “grasp the large, release the small” policy in 1996, many rural collectives converted their form of ownership from township-village enterprises (TVE) to

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1662 _Ho & Lin, supra_ note 1660, at 689.

1663 _Id._ at 689-91.

1664 _White Paper on Food Quality and Safety, CHINA ORG., Aug. 17, 2007, http://www.china.org.cn/english/news/221274.htm_. In accordance with this paper, China has 448,000 food production enterprises, 353,000 of them are small businesses with fewer than ten employees.


1666 Banks usually are reluctant to provide financial support to household peasants due to the lack of collateral security. Peasants may not have sufficient property to insure lending contracts.
shareholding companies, shareholding cooperatives, or private companies.\footnote{1667} This transformation turned the relationship between administrative collectives and enterprises from public responsibility into a commercial one.\footnote{1668} Shareholding companies and cooperatives pay rent or give shares to rural collectives in exchange for land use rights.\footnote{1669} Similar to the relationship between county level governments and urban corporations, agricultural enterprises split their profit with local governments in the form of tax, rent, and shares.

In light of the “responsibility-contract” system, the land use right is contracted from local governments to different entities such as households, sharing corporations, private companies, international corporations, and others. Although these entities are owned by different parties such as household peasants, private individuals, and international shareholders, these production-tenant land users directly or indirectly associate with the landlord-administrative governments by contracts that share economic value.

In addition, after the privatization process in the 1990s, most of the local SOE and TVE were privatized or became bankrupt.\footnote{1670} The role of local governments was transformed from public enterprises to tax-collecting authorities.\footnote{1671} Most of the local revenue relies on land leasing and conveyance.\footnote{1672} The financial resources to increase food and product safety supervision, therefore, come from land development, which is subject to price competition, which may sacrifice quality.

\footnote{1667} Ho & Lin, supra note 1660, at 692.
\footnote{1668} Id.
\footnote{1669} Id.
\footnote{1670} Tao, supra note 1581, at 2221.
\footnote{1671} Id. at 2222.
Food and product safety administration relates to negotiation. There are four mechanisms for leasing land to commercial entities: negotiation, auction, public tender, and listing of quotation.\textsuperscript{1673} Since the latter three mechanisms involve transparent bidding process, leasing prices are usually raised. However, concerning the long-term tax income, more than 86 percent of these transactions are done through negotiation.\textsuperscript{1674}

Through closed-door negotiation, local governments are more willing to lower land leasing prices in order to compete better for investment. As previous sections mentioned, together with low leasing prices, contractual terms usually cover administrative supports for business development. Thus, Chinese administrative supervision, in practice, can be conducted in a way through market negotiation.\textsuperscript{1675}

This negotiating approach is also adopted for handling food and product safety problems under the label of “communication.” In the food incidents discussed in previous sections, officials communicate with industries to establish new standards, ask food companies to improve their product quality,\textsuperscript{1676} invite restaurants that violate the rules for “discussion,” among other actions.\textsuperscript{1677} Thus, the law enforcement seems to be partly conducted by negotiation of flexibility, rather than directly by law and punishments of uniformity.

\textsuperscript{1673} Tao, supra note 1581, at 2224.

\textsuperscript{1674} Id. at 2225.


\textsuperscript{1676} Producers Urged to Improve Food Safety, CHINA DAILY, June 14, 2012, http://www.chinadaily.com.cn/china/2012-06/14/content_15503305.htm.

The contractual and negotiable relationship affects implementation of law. Due to the dependent judicial function, law enforcement largely depends on administration, which has contractual relationship with production entities regarding land and production value subject to negotiation. This extends the administrative function to a commercial one.

Furthermore, as discussed, in order to retain land use rights, economic actors compete with each other. This competition may have no boundaries if local administrations do not interfere. This non-interference approach can be considered as a combination of Daoist inactive administration which embraces the idea that right and wrong do not exist, self-interest-driven market economic system of capitalism, and Deng Xiaoping’s pragmatic ideology as “it doesn’t matter if a cat is black or white, so long as it catches mice” and “to get rich is glorious,” of flexibility.

By law, once local governments contract out land use rights, they shall not interfere. For instance, in accordance with the Rural Land Contract Law (RLCL), local governments have the obligation to provide services regarding production, technology, and information to land users, and shall not interfere with “normal production and operation.” The law does not define the scope of “normal,” thus the meaning of this term can be subject to interpretation by local governments in light of the market economic policy.

This non-interference principle is mentioned in the CPC Constitution as well. Article 14 states that “except in special circumstances, higher leading bodies should not interfere with

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matters that ought to be handled by lower organizations.” The functions of the higher organizations should focus on collecting opinions and making decisions on important matters. Thus, the higher political organizations may not be able to interfere unless major incidents occur.

While the first political and administrative priority is economic growth under the market policy of free competition which focuses on low costs, local governments may not have incentive to increase production costs by requiring product safety or imposing qualitative measures. This market policy approach, therefore, can also be viewed as a laissez-faire or an invisible-hand approach. This approach believes that the supply and demand of the market decides whether a product or an entity survives. Administrations only take action when a major incident or severe harm occurs. Thus, this approach may also be viewed as “punishing-the-very-bad” approach. Administrations generally do not take action to ensure good when commercial activities are involved.

This non-interference approach is commonly adopted by local governments. One reason for this “hands-off” approach is that some product safety related statutes enacted in the 1990s emphasize free competition. The second reason is the fact that the administrative responsibilities of the local and the central are not clearly defined. Administrative institutions may not have any incentive to take action particularly when such action is not profitable. The third reason for non-interference to secure good practice is that local governments may not have

\[1680\] CPC Constitution, supra note 449, art. 14. The Chinese version does not state “should not interfere” but “shall not interfere” (不要干预, buyao ganyu).

\[1681\] Id. No definition of “important matters” is provided in the Party Constitution.

\[1682\] Yu Lishen(于立深), Xingzheng Lifa Buzuowei Yanjiu (行政立法不作为研究) [Researching the Administrative Rulemaking Inaction], 2 FAZHI YU SHEHUI FAZHAN 74 (2011).

\[1683\] An example is the PQL.

\[1684\] “Profitable” in terms of GDP growth, tax, and fee income for the regional administrations and personal gain for local officials, etc.
sufficient resources and well-trained personnel to conduct food and product safety inspections even if they intend to do so.\textsuperscript{1685} The final reason is that the required standards may be viewed as unrealistic by local areas with poor facilities. As a result, local governments may not interfere if it is not necessary.

The Chinese food and product safety regulatory system, therefore, does not rely on external enforcement or independent checks and balances to ensure protection. In light of the Chinese hierarchical system, the checks are conducted by upper level governments and the balances are conducted by a fragmentation of powers. Both checks and balances are internal, within an administrative system controlled by the Party.

In addition, the legitimacy of this one-party dictatorship is based on economic growth.\textsuperscript{1686} While economic growth relies on the open-door and self-interest-driven market economic policy without independent judicial checks and effective political management system, local governments, particularly at the county level, may do anything they want. The central authorities will not interfere as long as no major incident occurs.\textsuperscript{1687}

Deng Xiaoping stated, “Give it a try, and then take a look.” The Chinese regulatory system provides local administrations a high degree of discretionary power in terms of formulating local regulations, administrative supervision, legal interpretation, and implementation of law. These administrations, however, also bear a legal and political responsibility to achieve economic growth and maintain stability within their regions.


These missions provide a goal but not a fixed method. The PRC Constitution empowers local administrations to formulate regulations in accordance with actual circumstances. As mentioned in Chapter 2, the only boundary provided is “not to contravene with” the laws at the upper levels. Due to this open rulemaking power and the dependent judiciary, local administrations have a very high degree of freedom to try different rules and adjust possible wrongs through implementation. This trial-and-error approach of law enforcement, therefore, may also be viewed as a learning process for legal and economic development.

This trial-and-error approach creates flexibility but also uncertainties. Flexibility refers to the quick adjustment if any harm occurs. Administrations may simply ignore the statutes considered to be not beneficial or interpret them in a way that favor actual circumstances. This flexibility, however, also creates uncertainties as it creates inconsistency and diversity in terms of time and region. A statute might be interpreted one way at this time in a region but it may not necessarily be implemented the same way at other times in other regions. Unifying written rules in the form of statutes or administrative regulations may inevitably function as signals that provide a general and desirable picture only.¹⁶⁸⁸

Other than law enforcement, this trial-and-error approach applies to economic development as well. Production entities may be considered to be schools. While local areas may not have sufficient skills, economic entities such as manufacturers are viewed to be production training centers—a place for low-skill workers to learn, to gain experience, and hopefully to transform their production skills to a higher value at a later stage.

¹⁶⁸⁸CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 209 (2008). The authors consider that law has an expressive function.
The entry barrier of participating in production activities in China, therefore, is low. For instance, rural households with a cow but no product safety facilities can participate in milk production of a large dairy corporation in the country, simply by supplying their raw milk to collecting stations. Workers with no experience at all may participate in assembling the most advance electronic devices in the world. Factories without designing facilities may manufacture products by following the instructions of foreign brands. These ineligible workers and entities have a chance to learn, practice, and develop their skills through participation. This trial-and-error approach may not focus on how ineligible these entities are today, but how the skills may be developed for tomorrow.

In light of this approach, the law can be implemented in a way tolerating mistakes and allowing adjustments in accordance with actual circumstances and the market development. Considering this together with the contractual relationships of land use rights that are negotiable and associate the interests between production entities and local administrations, the approaches of non-interference and trial-and-error, Chinese administration, therefore, can be considered to be a market-oriented administration. This can be, in fact, a laissez-faire administration that is not subject to written rules in terms of law and regulation due to the weak enforcement structure, as well as unwritten rules in terms of traditional moral code such as reasonableness and justice due to the Legalist approach adopted and the Cultural Revolution. The possible guidance of this laissez-faire administration seems to be self-interest and market demand.

This laissez-faire approach is different from the non-interference approach in Hong Kong. Hong Kong does not have a democratic system, but it has the rule of law with separation of

1689 An example is the workers who produce electronic devices for Foxconn and Apple Inc.

1690 For instance, the Chinese factories that produce foreign branded clothing, shoes, toys, and electronic appliances.
powers, a multi-parties system, an independent judiciary, a political neutral government, and traditional unwritten code of Confucian ethics that embraces benevolence, justice, and reasonableness, which incorporates with the Bill of Rights from the Western legal system including the freedom of expression and association.

Although the Hong Kong government adopts the non-interference and open approach in terms of minimum tax rates and duties, economic activities are, in fact, regulated by written rules of law, unwritten rules of traditional moral code, independent judiciary and agencies, and under the public supervision by media with the freedom of expression, which are mostly negated by Modern China.

Conclusion

In order to examine the Chinese food and product safety regulatory system in action, this chapter has reviewed three domestic food safety incidents, namely melamine milk products, recycled cooking oil, and clenbutoral-tainted pork. These incidents reveal that administrative institutions are the main actors in terms of the implementation of law and not the courts. Moreover, administrative actions can be taken by both the central and local administrations, although the responsibilities of the authorities are not clearly defined.

Based on the incidents, the administrative measures imposed on production entities involve a long list of requirements and sanctions. Administrative requirements include licenses, inspections, standards, recalls, registration, traceability records, risk assessments, real-time surveillance, and others. Administrative sanctions can be seizure, destroy of harmful products, and fines. These administrative actions can also be extended to disciplinary sanctions imposed on government officials as Party members by an internal personnel system, which may emphasize learning from mistakes, rather than punishments.
This study then investigates the role of government officials under the dictated political structure of uniformity and market economic system of flexibility and examines how these different roles may affect the Chinese food and product safety regulatory system.

With respect to the CPC political system, it embraces one-Party dictatorship, hierarchical supervision, socialist land ownership, and the nomenklatura personnel system that control government officials and leading personnel of all social organizations emphasizing uniformity, unification, and centralization. In light of these dictated characteristics, the Party possesses the entire range of political, land, social, and administrative powers through controlling leading personnel of different functions.

By contrast, under the market economic system, these dictated and centralized powers have been delegated to different layers of local administrations and officials. Such decentralized powers include rulemaking, law enforcement, economic planning, and contractual power regarding land use rights. Through the Chinese “responsibility-contract” system, county-level administrations and officials have taken on the roles of landlords and business developers, whose interests are fused with economic entities that embrace GDP growth, decentralization, and market competition of flexibility.

County-level administrations run their governing regions as corporations and compete for investments from enterprises, contracting out their land through negotiation, providing administrative support for economic development, and share the added value from the productions. This combination of administrative and economic roles, therefore, leads to a conflict of interest within the food and product safety regulatory system.

In order to solve the problem of the conflicting roles and interests, possible solutions can be income disclosure, establishing inspector general and whistleblower mechanisms, adjusting
official evaluation incorporating with food and product safety issues, as well as restoring Confucian-like code of ethics, which have been adopted by the Party.

These mechanisms, however, are not without challenges. Due to the dictated and one-party political structure and the nomenklatura system, all “independent” inspection, information disclosure, and accountability mechanisms are internal, which are self-regulated by the Party. The Confucian self-regulatory tradition, therefore, still exists and, more interestingly, is expected and considered as the most efficient way to ensure food and product safety by Chinese people and scholars.

Under this de facto self-regulatory system and the market-oriented administration structure that embraces contractual and negotiable relationship with economic entities, non-interference approach that administrations intervene only when necessary, and trial-and-error approach that embraces change and uncertainties, the Chinese food and product safety regulatory system attaches to a laissez-faire administrative structure of flexibility.

This laissez-faire administrative structure is not subject to the constraints of: 1) written rules of law because administrations themselves are rule-makers, rule-interpreters, rule-implementers, and business developers; 2) unwritten rules of virtue because morality is considered to be unrealistic; 3) independent agencies and judiciary because these settings conflict with unification; and 4) public supervision with the freedom of expression because different views are a threat to stable governance.

The Chinese food and product safety regulatory system in action, therefore, reflects a paradox between political dictatorship of uniformity and laissez-faire administration of flexibility. On one hand, China is governed by a centralized and unified system against independent
institutions. On the other, China is free to compete without legal and ethical limits, under the protective flags of dictatorship and socialism.
CHAPTER 6
THE PARADOX

This paper reviews two conflicting approaches within the Chinese food and product safety regulatory system. One is a flexible approach that embraces self-regulation, the other a uniformity approach that embraces administrative control. These two approaches can be found in the Chinese legal tradition and exist in the current Chinese rulemaking structure, food and product safety law on paper, and implementation of law in action.

Under the Chinese legal tradition, Confucianism, Daoism, and Buddhism established an unwritten rule and self-regulatory culture based on morality (benevolence, reasonableness, and justice) and flexibility; Legalism established an administrative control approach that negates morality and embraces written rules with punishments in accordance with the will of rulers. Modern China combines these conflicted approaches by negating morality, maintaining a legal and administrative structure based on unwritten rules and self-regulation, which relate to widespread food and product safety problems.

These conflicting approaches are derived from the different roles of people (self) under Confucianism and Legalism. Confucians consider human nature as kind. Benevolence and justice (righteousness) comprise the inherent essence of humans. In light of this view, people are able to see justice and reasonableness and tend to pursue them if their leaders are benevolent and reasonable.

Confucians do not consider written rules with punishments as an effective means to pursue a harmonious social order but instead lead to lack of shame and more disputes. This unwritten rule culture of flexibility relies on the self-realization of morality and merges with the Daoist view of change and inaction, as well as the Buddhist view of uncertainty and emptiness, which may oppose the rule of law requiring certainty, consistency, and predictability.
Chinese Legalists consider humans are driven merely by self-interest. Morality is unrealistic and impractical; no one should be trusted. A stable social order depends on written law with harsh and strict punishments enacted in accordance with the will of rulers. Officials and people should be governed by carrots and sticks—rewards and penalties. In order to avoid deception, rulers should observe, be quiet and still, and not disclose their preferences.

Before 1949, Confucianism was considered the dominant governing ideology in China for more than two thousand years. During that period, although different administrative structures and policies were adopted by various dynasties and administrations, traditional China generally considered morality and virtuous administration as the foundation of successful governance. Nevertheless, this traditional view was negated by Mao’s Administration. Since the 1960s, Modern China launched anti-Confucianism campaigns and has embraced the Legalist approach of uniformity by negating morality, embracing political and administrative control, class struggle by violent means, written rules by the will of rulers, and among other principles.

Ironically, Confucian self-regulatory structure still exists today. Although the 2012 CPC Constitution embraced centralism, Confucian-like elements were included under the “socialist virtue” relating to “moral integrity,” “exemplary conduct,” and “education,” which rely on the self-regulation of the Party as well as the flexible and pragmatic approach under the open market policy. These self-regulatory and flexible approaches were adopted particularly after 1979 and merged with the non-interference approach of the market economic policy, but the morality that should be demonstrated in administrative action has not been revived yet. Problems with Chinese food and product safety occur and remain still.

Beyond the CPC Constitution, the self-regulatory structure of flexibility exists in the Chinese rulemaking system. Although the Chinese lawmaking system establishes a centralized
hierarchy of uniformity with a dependent judiciary, local administrations have discretionary rulemaking power to formulate regulatory rules that vary from statutes enacted by the central authority. This open rulemaking power embraces flexibility by the “actual-need,” “specific administration,” local affairs,” and “formulating-first” principles laid down in the Law on Legislation.

In addition, this open rulemaking power comes with legal interpretative power, which is fragmented and distributed to different institutions by subject matter, geographic regions, and administrative levels. The Chinese food and product safety regulatory system, therefore, can be divided and subjected to different needs depending on actual, local, and specific circumstances. This structure embraces diversity and even uncertainty, which can allow for custom-made regulatory measures to ensure food and product safety, if morality, such as benevolence, reasonableness, and justice, is adopted as a foundation.

This open rulemaking system is enhanced by ineffective central supervision for uniformity. For instance, although regulations and rules may be altered and annulled, this power is fragmented throughout different institutions. Similarly, although regulations and rules are required to be reported and recorded, these reports and records are filed with different bodies; within the centralized rulemaking system, there is a divided supervisory and record system. Although the Law on Legislation establishes an inspection system to accept requests for rule-inspection, this system is passive and can be considered in line with the self-regulatory structure and the Daoist inactive approach—the central authority does not intervene if there is no complaint. Flexibility and even inaction are the major guidelines.

This flexible approach exists in Chinese food and product safety statutes, and it has been challenged after the food and product safety crisis. There are generally four areas of Chinese
food and product safety related laws: 1) civil liabilities and criminal responsibilities; 2) trade products; 3) consumer protection; and 4) specific products. These areas set out the roles of consumers, business operators, agencies as well as possible legal consequences.

These statutes reflect the development of the Chinese food and product food regulatory system evolving from relying on the market force of flexibility in the 1980s towards the more administrative force of uniformity in the 2000s. For instance, earlier statutes tend to adopt the general-direction principle, which considers the role of law is to provide general guidance due to the imbalanced development among different regions, the impossibility to impose unified and formulate specific written rules in advance, and the importance of flexibility to allow changes in accordance with actual circumstances. These earlier statutes generally rely on private law and market competition to solve product safety problems with a belief that harmful products will be discovered and screened out by the market. Similar to rulemaking supervision, administrations intervene in product safety issues only when necessary.

Later statutes from the 2000s tend to focus on specific products with more stringent supervision and stronger protection. International management concepts, such as “from farm to fork,” and good management practices are adopted. Thus, more administrative supervision is required and more supervisory responsibilities are imposed on agencies through product safety statutes and administrative law.

The public law approach that relies on external protective supervision is adopted with the general belief that the government should step in and control. The government and officials should also be governed, controlled, checked, and balanced by law, although the separation of powers is not an option in China. Corporations are assumed not to be able to regulate themselves if food and product safety concerns are against their interests.
In light of these statutes, the implementation power of food and product safety law is delegated to more than 2,800 county-level governments, which are responsible for actual supervisory activities such as issuing licenses, establishing annual supervisory plans, keeping credit records of food operators, and so forth. In short, Chinese food and product safety regulatory power is decentralized to local governments with more administrative control on paper.

Although the law on the books requires more administrative supervision, the law is often implemented in accordance with the self-interest-driven market economic policy within a self-regulatory system. In major food safety incidents, such as melamine-tainted dairy products, used cooking oil, and clenbuterol pork, the administrative supervisory actions taken included: inspections, recalls, registrations, establishment of standards, among others. Nevertheless, it is unclear if administrative actions would actually have been taken or done effectively if there is no major incident. The Chinese people are still skeptical about the safety of food available in the market, as well as the protective role of administrative officials in terms of food and product safety.

In light of the organization of the CPC, leading officials in the Chinese government are CPC members who are regulated by and responsible to an internal, hierarchical, and centralized management system that embraces unification and uniformity. CPC member-officials have a duty to firmly implement Party’s policies, integrate Party’s principles with actual circumstances, be obedient to the Party’s supervisory committees, and are subject to Party disciplinary inspection and sanctions within a dictated political system.

In contrast, under the Chinese socialist economic system, government officials at the county level, who are responsible for actual food and product safety supervision, are also...
landlords and business developers, who are subject to free competition of capitalism, under the name of market economic policy. Officials are delegated economic tasks, evaluated by regional GDP performance, and are responsible for determining local economic plans and administrative measures. County-level governments compete with each other in terms of their regional businesses, administrative measures, and policy implementation to attract investment from international and domestic enterprises.

Given the combination of these economic and administrative roles, county-level officials have great financial and administrative discretionary power of flexibility, a power which is economically associated with corporations by the “responsibility-contract system” and value-added tax (VAT). This combination of roles constitutes a conflict of interest regarding the food and product safety regulatory system. Officials have little incentive to implement safety supervision if it is not profitable. This self-interest approach also merges with the Daoist non-interference approach, as well as Confucian self-regulatory approach. Industry is self-regulated and free to pursue economic goal with officials. As Deng Xiaoping instructed, “To get rich is glorious!”

In order to combat the conflict of interest, the Party has adopted different mechanisms, such as requiring officials to disclosure their annual income, considering inspector general positions, establishing whistleblower and accountability systems, adjusting official performance evaluation, restoring Confucian-like code of ethics, among others. These mechanisms, however, encounter challenges because genuine independent inspection outside the one-party political structure and the nomenklatura system is deemed to be impossible. All inspection mechanisms must be internal and self-regulated by the Party.
This internal and self-regulated structure establishes a laissez-faire administrative system, which is not subject to the constraints of written rules of law because these administrations are rule-makers, rule-interpreters, rule-implementers, and business developers. It is also not subject to unwritten rules of morality, such as benevolence, reasonableness, and justice, because morality is considered to be unrealistic and impractical, or independent checks and balances because independency conflicts with Legalist unification and uniformity. There is no public supervision relying on freedom of expression because it is a threat to stable governance.

Subject to these ideological limits of possible constraints listed above, namely “the ideological constraints on regulatory constraints,” local discretionary power is free from external scrutiny in terms of regulating food and product safety. The solution of the problem, therefore, cannot be solved by creating more law and more regulation, rather it relies on Confucian self-improvement of the Party. It is unclear how self-regulation can be implemented without the principles of Confucian or other similar ethical directions. What is clear, however, is that no enforcement can be possible without the action of government officials.

The paradox of the Chinese regulatory system, therefore, is about the conflict between uniformity and flexibility, which is sourced by the different views regarding human nature, the role of self, law, and government. This paradox also establishes the different approaches regarding written and unwritten rules. Written rules relate to Legalist rule by law in accordance with the will of rulers, which appears to be transforming to the Western rule of law that embraces certainty, consistency, and predictability relating to unification, uniformity, and equality. Unwritten rules involve Confucian ethical directions and the fundamental concepts of the rule of law that provides general directions of flexibility such as benevolence, reasonableness, justice,
and fairness, which may not be defined clearly by words in advance, rather by the perception of
people who are able to eliminate their self-interest.

Figure 1 below illustrates the paradox of the Chinese food and product safety regulatory
system containing written and unwritten rules that embraces uniformity and flexibility at the
same time.

The center, Level 1, refers to general directions provided by written Constitution, which
covers mainly ideological and ethical concepts without specific areas, such as liberty, fairness,
equality, basic rights, among others. The next level, Level 2, is written statutes developed from
general directions provided in Constitution with different focuses and specific areas, such as
Product Quality Law, Food Safety Law, and so forth. Level 3 is written regulations and rules provided by rule-maker-administrations at different levels such as central agencies and local governments regarding implementation. Level 4 is written case law provided as reference in the Chinese civil law system and as precedence in the common law system, which links written rules with specific facts and cases in the past. Level 5 is about unwritten future, local circumstances, and actual applications of written rules, which are not on written record.

The unwritten rules at Level 5 embrace flexibility, which is about the unforeseeable future and actual applications day-to-day subject to local and specific circumstances. This level of unwritten rules may not be certain, consistent, and predictable, but can be applied the most in practice.

In order to ensure an effective regulatory system, the extent of the application of written and unwritten rules should be based on ethical principles, such as benevolence, reasonableness, and justice, which are also the fundamental concepts of the rule of law and were promoted by Confucius. These fundamental concepts, however, are unwritten. For instance, what is “reasonableness?” This “unwritten-ness” is caused by limitations to thought and language. As Ludwig Wittgenstein stated, “What can be said at all can be said clearly, and what we cannot talk about we must pass over in silence.” In the context of Chinese legal tradition, Chinese Zen emphasized, “No words, but hearts.”
APPENDIX A

CHINESE LAW-MAKING STRUCTURE

This appendix introduces the law-making branches in China, which include: 1) the legislative function of people’s congresses and their standing committees at different administrative levels; 2) the executive function of the central and local governments; 3) the judicial interpretative function implemented by the SPC, SPP, governments, congresses, and their committees.

In accordance with the PRC Constitution, people’s congresses are established at the national and local levels. Local levels include provinces, municipalities directly under the central government (direct-governed municipalities, DM), counties, cities, autonomous regions, and others.\footnote{XIANFA art. 95, 112 (1982) (China).} This section focuses on the two types of people’s congresses. One is the National People’s Congress (NPC) at the central level, which is the highest organ of state power.\footnote{Id. art. 57.} The NPC and its Standing Committee (NPCSC) may enact statutes, “law,” for the entire nation. The other type is the local people’s congresses with local rulemaking power in the provinces, national autonomous areas (NAA), direct-governed municipalities (DM),\footnote{“Direct-governed municipalities” (DM) refers to the “municipalities directly under the State Council.”} and “comparatively larger city” (Major Cities).\footnote{Law on Legislation, supra note 515, art. 64. The definition of “comparatively larger city” refers to “a city where a provincial or autonomous regional people’s government is located or where a special economic zone is located, or a city approved as such by the State Council.” This paper will use “major cities” instead of “comparatively larger city.” China’s Political System, supra note 532.}

The section of the executive function examines the central and local governments. The central government is comprised of the State Council, which formulates administrative regulations for the entire nation and has a limited scope in regards to implementation,
administrative functions, and different subject matters. Local governments formulate local rules with similar limitations but concentrate on specific enforcement.\textsuperscript{1695}

The section of legal interpretation addresses legislative, administrative, and judicial interpretation. Following the “law makers as interpreters” principle, law-makers interpret the portion of law in accordance with their functions and duties. This section reviews their scopes and limitations.

**The Legislative Branch: Laws and Local Regulations**

The Chinese Constitution\textsuperscript{1696} (the PRC Constitution) and the Law on Legislation\textsuperscript{1697} provide the framework of the Chinese legislative structure. In light of the framework provided, a number of organs at different branches and administrative levels share legislative and governing power. Those organs include: the National People’s Congress (NPC), the Standing Committee of National People’s Congress (NPCSC), local People’s Congresses, and local People’s Congress Standing Committees at certain levels.

**The National People’s Congress (NPC): Laws**

The NPC is the highest governing organ in China.\textsuperscript{1698} It has the highest state and legislative power of the country.\textsuperscript{1699} This highest organ may amend the Constitution, enact basic laws (*jiben falü*),\textsuperscript{1700} elect the President and Vice President, elect the Chairman of the Central

\textsuperscript{1695} The level of local governments concerned includes provinces, NAA, DM, and Major Cities.


\textsuperscript{1697} Law on Legislation, *supra* note 515.

\textsuperscript{1698} XIANFA art. 57 (1982) (China).

\textsuperscript{1699} *Id.* art. 57-58.

\textsuperscript{1700} *Id.* art. 62(3). Article 62(3) provides that the NPC has the power “to enact and amend basic laws governing criminal offenses, civil affairs, the State organs and other matters.”
Military Commission (CMC), approve national economic plans, decide questions on war and peace, and many others. \(^{1701}\) It has also the power to remove the highest officials such as the President, the Premier, the Chairman of the CMC, the President of the Supreme People’s Court (SPC), and the Procurator-General. \(^{1702}\) The NPC therefore has the centralized power to directly supervise or indirectly control the legislative, executive, judicial, and military branches of the nation.

The NPC currently has 2,986 deputies who are elected from 35 electoral units. \(^{1703}\) These electoral units derive from the people’s congresses in provinces, NAAs, DMs, the People’s Liberation Army (PLA), the deputy election council of the Hong Kong Special Administrative Region (HKSAR), the Taiwan compatriots’ consultation election council, and others. \(^{1704}\)

In accordance with the Preamble of the Constitution, China adopts a system of people’s “democratic dictatorship.” \(^{1705}\) This system is “led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat.” \(^{1706}\) The Preamble also states that the Communist Party of China (CPC) is the leader of the Chinese

\(^{1701}\) *Id.* art. 62.

\(^{1702}\) *Id.* art. 63.

\(^{1703}\) *Shierjie Quanguo Renda Yici Huiyi Zaijing Bimu* (十二届全国人大一次会议在京闭幕) [The 12th NPC Meeting Closed at Beijing], NPC.GOV.CN, Mar. 18, 2013, http://www.npc.gov.cn/npc/dbdhhy/12_1/2013-03/18/content_1789174.htm.


\(^{1705}\) XIANFA Pmbl. (1982) (China). More discussion about “democratic dictatorship” will be covered in Chapters 4 and 6.

\(^{1706}\) *Id.*
people.\textsuperscript{1707} Chinese democracy, therefore, seems to refer to the election by the people under the leadership of the CPC.\textsuperscript{1708} When calling the CPC a dictatorship, most are referring to the absolute power, particularly against the “enemies,” of the CPC in a one-party system.\textsuperscript{1709}

The Standing Committee of the NPC (NPCSC): Laws

Although the NPC possess the supreme power of the country, it meets only once a year.\textsuperscript{1710} Therefore, the PRC Constitution created a Standing Committee (NPCSC) with similar powers to enact, amend, supplement and interpret laws (statutes); to interpret the PRC Constitution; and to annul administrative regulations, local regulations, and decision of governments at provincial level.\textsuperscript{1711} The NPCSC consists of a Chairman, Vice Chairman, the Secretary-General, and other members.\textsuperscript{1712} The current Chairman is Zhang Dejiang,\textsuperscript{1713} and the current NPCSC has thirteen Vice-chairpersons and 161 members.\textsuperscript{1714}

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\textsuperscript{1707} Id. The Preamble of the PRC Constitution states, “After waging protracted and arduous struggles, armed and otherwise, along a zigzag course, the Chinese people of all ethnic groups led by the CPC with Chairman Mao Zedong as its leader ultimately, in 1949.”
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\textsuperscript{1708} Chen J., supra note 42, at 112.
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\textsuperscript{1709} Chen, supra note 43, at 49.
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\textsuperscript{1711} Id. art. 67(1)-(8), 68. The Chairman of the NPCSC “directs the work” and “convenes its meetings.” Moreover, the Council of Chairmen “handles the important day-to-day work” of the NPCSC. The Council of Chairmen is also translated as “Chairmen’s Council.” Organization: Chairmen’s Council, NPC.GOV.CN, http://www.npc.gov.cn/englishnpc/Organization/node_2848.htm (last visited Oct. 6, 2013).
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With respect to personnel, the NPCSC has the power to recommend, appoint, or remove officials at executive, military, judiciary, and procuratorial branches.\textsuperscript{1715} This personnel includes, among others, the President, judges, and members of the SPC Judicial Committee,\textsuperscript{1716} members of the CMC,\textsuperscript{1717} the Procurator-General, Deputy Procurators-General, procurators of the Supreme People’s Procuratorate (SPP), and members of its Procuratorial Committee.\textsuperscript{1718} The NPCSC may also grant special pardons.\textsuperscript{1719} In addition, the NPCSC may ratify or abrogate treaties and international agreements with foreign states.\textsuperscript{1720} In short, the NPCSC shares almost all of the supreme powers of the NPC.

Local People’s Congresses: Local Regulations

There are local people’s congresses in provinces, autonomous regions, municipalities directly under the central government, autonomous prefectures, counties, autonomous counties, cities, municipalities, towns, ethnic townships, and towns.\textsuperscript{1721} Some adopt local regulations in accordance with their regional economic and cultural circumstances.\textsuperscript{1722} These local people’s congresses may be divided into three groups: people’s congresses at provincial level, national autonomous areas (NAA), and those below provincial levels and NAA.

\textsuperscript{1715} XIANFA art. 67 (9)-(12) (1982) (China).
\textsuperscript{1716} Id. art. 67(11).
\textsuperscript{1717} Id. art. 67(10).
\textsuperscript{1718} Id. art. 67(12).
\textsuperscript{1719} Id. art. 67(17).
\textsuperscript{1720} Id. art. 67(14).
\textsuperscript{1722} Id. Local regulations are not known as “law” because the title “law” refers only statutes enacted by NPC or NPCSC. Thus, local congresses can never enact “law,” but merely “local regulations.”
Provincial Level

The people’s congresses at the provincial level include the congresses of provinces and DM.\textsuperscript{1723} This level of people’s congresses and their standing committees may adopt local regulations within their administrative areas.\textsuperscript{1724} However, these local regulations should not contravene the PRC Constitution, statutes enacted by the NPC and its Standing Committee, and administrative regulations by the State Council.\textsuperscript{1725} The PRC Constitution also requires that local regulations are reported to the NPCSC.\textsuperscript{1726} There are currently twenty-three provinces\textsuperscript{1727} and four DM\textsuperscript{1728} directly under the central government. Hence, there are twenty-seven sets of local regulations under this category.

National Autonomous Areas (NAA)

The people’s congresses of China’s five NAAs\textsuperscript{1729} may enact regulations with relative autonomy.\textsuperscript{1730} Separate regulations are enacted in accordance to the political, economic, and

\textsuperscript{1723} XIANFA art. 100 (1982) (China).
\textsuperscript{1724} Id.
\textsuperscript{1725} Id.
\textsuperscript{1726} Id.
\textsuperscript{1727} This number reflects official numbers from China, which includes Taiwan; the actual number might be subject to debate.
\textsuperscript{1728} Four municipalities include Beijing, Tianjin, Shanghai, and Chongqing. The Local Administrative System, CHINA ORG., http://www.china.org.cn/english/Political/28842.htm (last visited Oct. 6, 2013).


\textsuperscript{1730} XIANFA art. 116 (1982) (China).
cultural characteristics of the nationalities in the regions.\textsuperscript{1731} However, these regulations must be submitted to the NPCSC for approval.\textsuperscript{1732}

**Below Provincial and NAA Level**

Below provinces, DMs, and NAAs are lower levels of people’s congresses in counties, cities, municipal districts, townships, nationality townships, and towns.\textsuperscript{1733} Certain levels of these local people’s congresses and their standing committees may formulate local regulations as well. Those levels include Major Cities,\textsuperscript{1734} cities with special economic zones (SEZ), and autonomous prefectures (AP) or counties (AC).

Major Cities refer to the “comparatively larger cities.” The people’s congresses and their standing committees may formulate local regulations for their regions as long as these regulations do not contradict with the PRC Constitution, statutes enacted by the NPC and NPCSC, administrative regulations, and the local regulations of their respective provinces or autonomous regions.\textsuperscript{1735} These local regulations are submitted to the standing committees of the people’s congresses of the provinces or NAA for approval before implementation.\textsuperscript{1736}


\textsuperscript{1732} *Id.*

\textsuperscript{1733} XIANFA art. 95 (1982) (China).

\textsuperscript{1734} Law on Legislation, supra note 515, art 64. The definition of the “comparatively larger cities” is provided as: (1) a city where a provincial or autonomous regional people’s government is located; (2) where a special zone is located; or (3) cities approved as such by the State Council.

\textsuperscript{1735} *Id.*

\textsuperscript{1736} *Id.* art. 63.
Cities where SEZ are located may formulate local regulations for their SEZ areas as well.\textsuperscript{1737} This rulemaking power, however, is subject to the authorization of the NPC.\textsuperscript{1738} The term SEZ covers a range of special areas with different names,\textsuperscript{1739} and no official overall number of SEZs is found.\textsuperscript{1740} A World Bank report from 2011, however, indicates that there are probably more than two thousand SEZs.\textsuperscript{1741}

Inside NAAs are thirty autonomous prefectures and 120 counties that may also enact their own regulations. These prefecture and county regulations must be submitted to the standing committees of the people’s congresses of provinces, NAA, or DM for approval.\textsuperscript{1742} Moreover, these regulations must be reported to the NPCSC to be recorded.\textsuperscript{1743}

In sum, the NPC and its standing committee enact statutes for the entire country. People’s congresses of provinces, NAA, as well as certain municipalities, counties, and cities may enact regional regulations. These regional regulations may be named as local regulations, autonomous regulations, or separate regulations, which apply to specific areas upon the approval or record of the NPCSC.

\textsuperscript{1737} Id. art. 65.
\textsuperscript{1738} Id.
\textsuperscript{1740} Id.
\textsuperscript{1741} Id. at 10. The report show that there were 1,568 industrial parks by the end of 2006; sixty nine economic and technological development zones (ETDZs) by April 2010; fifty four high-tech industrial development zones (HIDZs), fifteen free trade zones (FTZs), sixty one Export-processing zones (EPZs) in 2011.
\textsuperscript{1742} XIANFA art. 89 (1982) (China).
\textsuperscript{1743} Id.
In other words, if any person or entity would like to know which related laws may apply to its conduct, that person must know the related statutes made by the NPC and all related regulations made by different levels of people’s congresses where the conduct occurs. In addition to national statutes and local regulations by congresses, there are administrative regulations and department rules. Administrative regulations are established by the central or local governments.\(^\text{1744}\) Department rules are made by agency departments under governments at different levels.\(^\text{1745}\) Similar to statutes and local regulations, administrative regulations and department rules also cover particular geographical areas under specific subject matters.\(^\text{1746}\)

**The Branch of Administration: Regulations and Rules**

Under people’s congresses, there are governments.\(^\text{1747}\) With respect to rulemaking power, there are three levels of governments: 1) the State Council that formulates administrative regulations for the entire nation; 2) the Ministries and Commissions of the State Council that formulate department rules for the entire nation by subject matter; and 3) local governments at certain levels that formulate local rules for their administrative regions by subject matter.

**The State Council: Administrative Regulations**

The State Council, as the central government under the NPC, is the highest executive body and national administration.\(^\text{1748}\) It has the power to adopt administrative policies, enact

\(^{1744}\) Law on Legislation, *supra* note 515, ch. III.

\(^{1745}\) *Id.* ch. IV, § 2.

\(^{1746}\) *Id.* ch. III-IV. “Subject matters” refer to governing functions such as agriculture, finance, water, education, and commerce. *Zhonghua Renmin Gongheguo Guowuyuan* (中华人民共和国国务院) [The State Council of the PRC], GOV.CN, Aug. 1, 2005, [http://www.gov.cn/gjjg/2005-08/01/content_18608.htm](http://www.gov.cn/gjjg/2005-08/01/content_18608.htm).

\(^{1747}\) XIANFA § 5 (1982) (China).

\(^{1748}\) *Id.* art. 85.
administrative regulations, and issue decisions and orders. These policies, regulations, decisions, and orders, however, must be in accordance with the PRC Constitution and statutes.

Implementing Statutes

The Law on Legislation lays down the scope and procedure necessary for formulating administrative regulations. As such, the State Council may formulate administrative regulations to implement provisions of statutes within its administrative functions and powers under the PRC Constitution.

Within Legal Functions and Powers

In accordance with Article 89 of the PRC Constitution, the State Council has a number of functions and powers. Those powers include: 1) submitting proposals to the NPC and the NPCSC; 2) formulating tasks and responsibilities of agencies; 3) exercising unified leadership of central and local administrations; and 4) directing state affairs of certain subject matters.

Within Certain Subject Matters

These subject matters include: education, science, culture, public health, and family planning; civil affairs; public security; judicial administration, supervision and other related matters.

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1749 Id. art. 89(1). The original translation of “policies” is “measures.”
1750 Id. art. 89(1), and Law on Legislation, supra note 515, art. 56.
1751 Law on Legislation, supra note 515.
1752 Id. art. 56.
1753 XIANFA art. 89 (1982) (China).
matters; foreign affairs; national defense; minority rights; and interests of Chinese nationals residing abroad.\textsuperscript{1754}

The central government also has the power to appoint and remove administrative officials, provide training, conduct appraisals, and impose administrative sanctions.\textsuperscript{1755}

Furthermore, the central government may alter or annul inappropriate orders, directives, and regulations issued by ministries, commissions, and local organs of national administration at various levels.\textsuperscript{1756} It may even regulate the size of administrative agencies.\textsuperscript{1757}

The Ministries and Commissions of the State Council: Department Rules

The ministries, commissions, and other administrative organs directly under the State Council may formulate administrative rules, also named department rules.\textsuperscript{1758} In accordance with the Law on Legislation, these department rules are made in accordance with statutes, administrative regulations, decisions, and orders of the State Council.\textsuperscript{1759} The subject matter of department rules shall be for the purpose of enforcing national statutes and administrative regulations.\textsuperscript{1760} If there is a subject matter divided between two departments, the State Council will formulate administration regulations or the relevant departments will regulate jointly.\textsuperscript{1761}

\textsuperscript{1754} Id. art. 89(7)-(12).
\textsuperscript{1755} Id. art. 89(17).
\textsuperscript{1756} Id. art. 89(13)-(14).
\textsuperscript{1757} Id. art. 89 (17).
\textsuperscript{1758} Law on Legislation, supra note 515, art. 71.
\textsuperscript{1759} Id. The rules formulated by local congresses are known as “local regulations.” Only the NPC and NPCSC may enact “laws” (statutes).
\textsuperscript{1760} Id. art. 71.
\textsuperscript{1761} Id. art. 72.
The Local Governments at Certain Levels: Local Rules

Local governments at certain levels may also formulate rules. These local rules may be made by the governments of provinces, NAA, DM, and Major Cities. However, the subject matter of local rules is made within the scope of implementation of statutes by the NPC, administrative regulations by the State Council and its departments, and local regulations by local congresses.

The Legal Interpretative Function

Another law-making function relates to the interpretation of laws. China adopts a civil law system without separation of powers. Under this regime of uniformity, the Chinese judicial branch does not have independent law-making power. Chinese judges are not supposed to make law as common law judges do; Chinese judges merely apply the law. Moreover, without the separation of powers, the Chinese judicial branch is not independent from the legislative function of people’s congresses and their standing committees.

In practice, Chinese courts, however, tend to rule consistently with precedents—particularly of those precedents from immediate higher courts—to avoid reverses on appeal. In some cases, Chinese courts may even consult their superiors to ensure their verdicts are “correct” to avoid conflicts with governing policies.

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1762 Id. art. 73.
1763 Id. art. 73, 80. Article 80 provides that the local government rules of provinces and autonomous regions are superior to the rules by the governments of comparatively larger cities located within those administrative areas.
1764 Id. art. 73.
1765 XIANFA art. 67(11) (1982) (China). The NPC has the power to “appoint or remove, at the recommendation of the President of the Supreme People’s Court, the Vice-Presidents and judges of the Supreme People’s Court, members of its Judicial Committee and the President of the Military Court.”
1766 Chen, supra note 43, at 129.
1767 Id. at 143.
The fact that Chinese judges do not have law interpretation power, however, does not necessarily mean there is no legal interpretation. That interpretation power, instead of solely relying on judiciary branch as the common law system, is shared with and centralized in legislative and executive organs.\(^{1768}\)

There are officially three types of legal interpretation: 1) “legislative interpretation” by the NPCSC; 2) “administrative interpretation” by the State Council and its departments; and 3) “judicial interpretation” by the SPC and SPP. In addition, the standing committees of local people’s congresses may interpret for clarification and supplement purposes for “concrete application of local regulations.”\(^{1769}\)

A general principle is that law-making organs are also responsible for the legal interpretation of their law-making scope. For instance, the NPCSC interprets statutes; the standing committees of local people’s congresses interpret local regulations; the State Council interprets administrative regulations; agencies interpret department rules. In light of this system, the judicial branch shares the least amount of legal interpretation power.\(^{1770}\)

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\(^{1768}\) Those organs include the NPCSC, the Supreme People’s Court (SPC), the Supreme People’s Procuratorate (SPP), the State Council, and standing committees of local people’s congresses. *Politics: Supreme People’s Procuratorate, CHINA ORG.*, http://www.china.org.cn/english/shuzi-en/en-shuzi/zz/htm/gj.htm (last visited Sept. 14, 2013) (“The Supreme People’s Procuratorate is the highest procuratorial organ in China and the legal supervisory organ of the State. It is mainly responsible for leading local people’s procuratorates and special people’s procuratorates at various levels to perform legal supervision according to law, and ensuring the enforcement of State laws in a unified and proper manner.”)


\(^{1770}\) In practice, the judicial branch provides most of the legal interpretations despite the fact that this branch has the least amount of power; the NPCSC provides a few legal interpretations despite the fact that it has greater power. Zhang Hua (张华), *Falü Jieshi De Yujing Fenxi Ji Woguo Falü Jieshiquan De Quíwei* (法律解释的语境分析及我国法律解释权的归位) [Legal Interpretation’s Literal Analysis and Chinese Legal Interpretation’s Restoration] 3 XIBU FAXUE PINGLUN 89, 91 (2011) [hereinafter Zhang H.]. *See also* Zhou Wangsheng (周旺生), *Zhongguo Xianxing Falü Jieshi Zhidu Yanjiu* (中国现行法律解释制度研究) [A Research on the Current Chinese Legal Interpretation System] 25 MOD. L. SCI. 3 (2003) [hereinafter Zhou W.].
In contrast, the NPCSC has the greatest and highest legal interpretation power. However, since legislative interpretation is implemented only when necessary and judicial interpretation may be annulled by the State Council,\textsuperscript{1771} the legal interpretation power can be centralized by administrative functions at the central government. The subsections below briefly review each of those law-interpreters with different types of legal interpretation.

The NPCSC: Legislative Interpretation

The statutory interpretation power is centralized in the NPCSC. The PRC Constitution empowers the NPCSC to interpret the PRC Constitution and supervise its enforcement.\textsuperscript{1772} In practice, the NPCSC interprets or enacts decrees (faling) to clarify or supplement provisions of statutes as well.\textsuperscript{1773} These interpretations are known as “legislative interpretation” (lifa jieshi), which has the same legal effect as the statute itself.\textsuperscript{1774}

This interpretative power is further affirmed by the Law on Legislation.\textsuperscript{1775} In accordance with this statute, legislative interpretation is made when a specific meaning of a provision is necessary or when new developments make further interpretation necessary in order to apply the law.\textsuperscript{1776} Moreover, legal interpretation may be requested by other organs, such as the State Council, the CMC, the SPC, the SPP, and the standing committees of the people’s congresses at

\textsuperscript{1771} ALL, supra note 1909, art. 53.
\textsuperscript{1772} XIANFA art. 67(1) (1982) (China).
\textsuperscript{1773} Chen, supra note 43, at 119.
\textsuperscript{1774} Id., and Law on Legislation, supra note 515, art. 47.
\textsuperscript{1775} Id. art. 42.
\textsuperscript{1776} Id.
provincial level. Hence, all specific and newly developed meanings of statutes are interpreted by the NPCSC when necessary.

The State Council: Administrative Interpretation

In addition to rulemaking power, the State Council and its departments may interpret their administrative regulations and rules (xingzheng jieshi). This interpretation power is limited to the issues regarding “concrete application” of administrative regulations and department rules which are not within adjudicative and procuratorial application areas. Some scholars consider these rulemaking and interpretation powers as the exclusive control of administrative implementation.

The SPC and the SPP: Judicial Interpretation

The judicial interpretation power is centralized at the SPC and the SPP. The SPC is the highest judicial organ. In accordance with the PRC Constitution, the SPC and higher courts have a supervisory task regarding the “administration of justice.” In practice, this supervisory power includes ordering lower courts to remand the case if any errors are found, determine which case shall be tried by it first, and provide legal interpretation regarding how to apply...
Thus, lower courts are supervised by higher courts in term of administration, adjudication, and application of statutes.

In accordance with the PRC Constitution, people’s procuratorates are “state organs for legal supervision.” The SPP is the “highest procuratorial organ,” which is obliged to “direct” the procuratorates at lower levels. With respect to legal interpretation, the SPP may provide judicial interpretation regarding concrete application within the scope of procuratorial work.

The legal interpretation provided by courts and procuratorates is considered to be “judicial interpretations” (sifa jieshi). The SPC interpretation focuses on the “administration of justice” regarding “concrete adjudicative matter” while the SPP interpretation focuses on “legal supervision” regarding “concrete prosecutorial matter.” Thus, instead of providing legal interpretation individually through case rulings by judges, judicial interpretations are established collectively by courts and procuratorates, particularly at the highest level. Moreover, while those interpretations may not function as binding authority, they, more likely, manage directions.

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1784 XIANFA art. 129 (1982) (China).
1785 Id. art. 132. The directions concerned include: 1) stipulating policies and guidelines regarding the work of prosecution; 2) investigating cases of embezzlement, bribery, offense against the democratic rights of citizens, negligence of public duty, and serious criminal offenses; 3) supervising law enforcement regarding civil cases, economic disputes, and administrative charges; 4) managing prosecuting clerks and prosecution bodies; 5) organizing education and training of prosecution staffs; 6) conducting financial plan of prosecuting organs; 6) administrating prosecution officials; and so on. Major Functions of the SPP, CHINA ORG., http://www.china.org.cn/english/features/state_structure/65033.htm (last visited at Sept. 13, 2013).
1786 Id.
1787 Chen, supra note 43, at 119.
1789 Chen J., supra note 42, at 198.
1790 Zhang H., supra note 2048, at 93.
front line subject to the administrative management.\textsuperscript{1791} These staff members have no incentives, nor official power, to seek for independent righteousness and justice.\textsuperscript{1792}

In addition, the SPC, the SPP, and other administrative departments may jointly provide judicial interpretations.\textsuperscript{1793} Nevertheless, if disagreement occurs between judicial interpretation and administrative interpretation, the State Council decides the final interpretation.\textsuperscript{1794} Moreover, both courts and procuratorates are responsible to people’s congresses and their standing committees at relevant levels.\textsuperscript{1795} Thus, legislative and administrative interpretation power supersedes the judicial power.

**Local Legal Interpreters**

Although the NPC and the central government have centralized power to legislate and regulate on paper, local organs have great discretionary powers. Local governments are empowered to conduct rulemaking, legal interpretation, as well as implementation within their jurisdictions. Since the judicial branch is not independent from executive directions and management, and the central government is not able to exercise its supervisory power over concrete applications of law, local governments have greater discretionary powers over central

\textsuperscript{1791} This administrative management refers to the executive leaderships from local governments and directions from courts at higher levels. Those directions can be administrative through a number of internal documents. Wang Q., supra note 587, passim.

\textsuperscript{1792} Id. at 96.

\textsuperscript{1793} Chen, supra note 43, at 124. Those administrative departments can be Ministry of Justice and the Ministry of Public Security.

\textsuperscript{1794} ALL, supra note 1909, art. 53.

\textsuperscript{1795} XIANFA art. 133 (1982) (China).
authorities in practice.\footnote{The central government may not be able to fully exercise their supervisory power due to the reasons such as distance, lack of information, legal and economic constraints.} In other words, despite the legal system that centralizes power on paper, it decentralizes power at the same time.
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