

Chinese Administrative Law in the Northeast Asian Mirror

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I. INTRODUCTION

Historical research consists essentially in application to empirical material of various sets of empirically derived

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hypothetical generalizations and in testing the closeness of the resulting fit, in the hope that in this way certain uniformities, certain typical situations, and certain typical relationships among individual factors in these situations can be ascertained.¹

Alexander Gerschenkron, the author of this quote, was an economic historian concerned with national development trajectories.² For those interested in comparative legal history, there is great wisdom in his words. Societies are enormously complex and constantly changing. If we are interested in comparing bodies of national law as they actually exist, embedded in these complex societies, then we need to begin empirically, studying how bodies of law actually function in one or more societies. From that empirical base, tenuous though it will often be, we can draw generalizations and tentative conclusions, which we can then subject to further empirical verification. Perhaps most importantly, what we can legitimately take away from this process are Gerschenkron's "uniformities," "typical situations," and "typical relationships," more like the heuristics we use to navigate everyday life than the laws of mathematics or the natural sciences.³

China's system of administrative law is very much a work in progress, closely related to both China's evolving political system, and to the changing role of the Chinese State in economic governance.⁴ And while scholarship on China's administrative law is large and growing,⁵ some fundamental issues

¹ ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE* 5-6 (1962).

² Gerschenkron's work focused primarily on European economic development, and he is noted for the idea that relative "backwardness" affected the role of the state in a given country's development path. *See id.*; ALEXANDER GERSCHENKRON, *EUROPE IN THE RUSSIAN MIRROR: FOUR LECTURES IN ECONOMIC HISTORY* (1970).

³ GERSCHENKRON, *supra* note 1.

⁴ *See* STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 204 (1999) ("Chinese legal reformers have been groping toward using legal institutions to control the exercise of power by government agencies, a different function from using law to define economic actors and transactions but no less critical to the development of a marketized economy.")

⁵ Useful sources include Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, in *ENGAGING THE LAW IN CHINA* 31 (Neil J. Diamant et al. eds., 2005); Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on*

remain problematic. For example, we usually think of administrative law as being related to a political system of checks and balances, as courts apply administrative law to constrain executive action. Yet we know that China's official political ideology rejects separation of powers and checks and balances.⁶ We also think of administrative law as protecting individuals or private entities against government action;⁷ yet the Chinese government's commitment to individual rights and a legally protected private sphere is doubtful.⁸ We often think of administrative law as related to transparency, to

Legal and Political Reform, 52 AM. J. COMP. L. 77 (2004); Randall Peerenboom, *A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC*, 12 J. CONTEMP. CHINA 45 (2003); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001); LUBMAN, *supra* note 4, at 204-16; Conita S.C. Leung, *Chinese Administrative Law Package: Limitations and Prospects*, 28 HONG KONG L.J. 104 (1998); Jianfu Chen, *The Development and Conception of Administrative Law in the PRC*, 16(2) LAW IN CONTEXT 72 (1998); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1997); Minxin Pei, *Citizens vs. Mandarins*, 152 CHINA Q. 832 (1997); Yong Zhang, *An Overview of the Sources of Chinese Administrative Law*, 21(6) REV. CENTRAL & E. EUR. L. 597 (1995); Robert Heuser, *Die Bemühungen um Verwaltungsrecht und Verwaltungsrechtswissenschaft in der Volksrepublik China*, DÖV 22 (1988). English translations of many of China's administrative law statutes, along with useful analysis, can be found on the Web site of the Congressional-Executive Commission on China, <http://www.cecc.gov/pages/selectLaws/administrativeLaw/administrativeLaw.php> (last visited Oct. 16, 2006).

⁶ See Tian Yu, *Zui Gao fayuan fandui jiang renmin fayuan gai wei fayuanbu gao san quan fen li* [The Supreme People's Court Opposes Changing the Name "People's Court" to "Court," Not Allowed to Carry Out Separation of Three Powers], XINHUA NET, Dec. 7, 2004, http://news.xinhuanet.com/legal/2004-12/07/content_2306404.htm.

China is a socialist country with [a] people's Congress system, in which the nature of the state, polity, and judiciary all have substantial differences. . . . Therefore, China must consider its particular conditions when learning from other countries' experiences, and must never be allowed to copy them without any change, and must carry out 'separation of three powers.'

Id.

⁷ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669-70 (1975) (describing the "traditional" model of administrative law, which focused on protecting private rights against government agency action). See also Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982) (discussing the private rights focus of the "traditional" model). For an updated overview of Professor Stewart's typology, see Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

⁸ See, e.g., Congressional-Executive Commission on China, Virtual Academy, Human Rights and Rule of Law, News and Analysis, Guangdong Public Security Bureau Blames Mass Incidents on Rights Defender Activities, <http://www.cecc.gov/pages/virtualAcad/index.php?showsingel=42751>

a vibrant, informed civil society, and to political pluralism;⁹ yet we know that the Chinese government's approach to information¹⁰ and to the role of non-governmental organizations¹¹ can be very restrictive. Finally, commentators often say that economic development demands the "rule of law" to constrain government administration.¹² China, however, has enjoyed outstanding

(last visited Oct. 16, 2006) (reporting increasing government suppression of "rights defenders"); Maureen Fan, *China Postpones Trial of Family Rights Activist*, WASH. POST, July 21, 2006, at A14 (describing official harassment of "rights activist" Chen Guangcheng).

⁹ This is especially true of administrative law as it has functioned in the United States since the late 1960s, when statutory and case-law developments allowed citizens' groups and other private actors to engage in the regulatory process in greatly expanded ways. This style of administrative law, referred to here as the "pluralist" model, has been described by Richard Stewart and others as the "interest representation" model. See Stewart, *The Reformation of American Administrative Law*, *supra* note 4, at 1711-90; Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 7.

¹⁰ See, e.g., *China's Censors Shine Spotlight on Karaoke*, SIDNEY MORNING HERALD, Aug. 7, 2006 (reporting on new Ministry of Culture controls on play lists at karaoke parlors); Kristine Kwok, *Intellectuals Campaign Against Shutdown of Website*, SOUTH CHINA MORNING POST, Aug. 3, 2006 (describing closure of China Century Web site by the Beijing Communications Administration); Joseph Kahn, *Beijing Official Says Curbs Apply to Foreign Journalists*, N.Y. TIMES, July 4, 2006 (discussing the Chinese government's draft law under which news organizations could be fined for reporting without permission on sudden incidents "such as outbreaks of disease, natural disasters, [or] social disturbances."); Howard W. French, *Chinese Discuss Plan to Tighten Restrictions on Cyberspace*, N.Y. TIMES, July 4, 2006 (discussing the Chinese government's stated intention to increase its already extensive efforts to monitor and control online communications). But see Jamie P. Horsley, *Introduction on Open Government Information Implementation*, 23 GOV. INFO. Q. 5 (2006) (discussing recently created information disclosure systems in Guangzhou and elsewhere); Ruoying Chen, *Information Mechanisms and the Future of Chinese Pollution Regulation*, 7 CHI. J. INT'L. L. 51 (2006) (discussing the introduction of environmental impact statements and public participation in Chinese environmental law). See also *infra* notes 221-27 and accompanying text (discussing public comment mechanisms).

¹¹ See, e.g., Paul Mooney, *How to Deal with NGOs: Part I, China*, YALE GLOBAL, Aug. 1, 2006, <http://yaleglobal.yale.edu/display.article?id=7902> ("Domestic and foreign NGOs in China are under close scrutiny over the past year, with the Communist leadership worried that Central Asia's color revolutions were the work of civil organizations that could spread."); *Investigation Sends Chill Through Activist Groups*, S. CHINA MORNING POST, Aug. 31, 2006 (reporting a hardening of the Chinese government's attitude toward non-governmental organizations); Paul Mooney, *Rare Article Reveals Party Views on NGOs*, S. CHINA MORNING POST, Sept. 1, 2006 (reporting on Chinese Communist Party debates concerning foreign NGOs in China).

¹² WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET 87-97 (1996); John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA (Christoph Antons ed., 2003). For a careful study questioning whether China's economic development experience supports this claim, see Donald Clarke et al., *The Role of Law in China's Economic Development* (Geo. Wash. U. School of Law, Public Law and Legal Theory Working Paper No. 187, 2006),

economic growth for the past two decades and is now said to be growing *too* quickly,¹³ all the while employing a rudimentary system of administrative law. Characteristic of its approach to economic governance, China now resorts to administrative control measures, as well as to more typical measures such as raising central bank interest rates¹⁴ in an attempt to slow investment growth.¹⁵

This Article seeks to apply a “Gershenkronian” approach to China’s developing administrative law by considering what we see in China today in light of how administrative law developed in China’s Northeast Asian neighbors. Current research and commentary on China’s administrative law is largely China-centered.¹⁶ Though such work is indispensable, the premise of this Article is that much can be learned from considering China’s administrative law in light of the “uniformities,” “typical situations,” and “typical relationships” that can be derived from studying how administrative law developed in China’s Northeast Asian neighbors.

II. ADMINISTRATIVE LAW IN NORTHEAST ASIA

Administrative law in Northeast Asia has been undergoing substantial change since the 1990s; these changes suggest that administrative law in the region is becoming more similar to the “pluralist” administrative law model

available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878672.

¹³ Geoff Dyer, *Furnaces Burn as Beijing Tries to Cool the Economy*, FIN. TIMES, Aug. 2, 2006, at 11.

¹⁴ Richard McGregor, *China Lifts Rates in Bid to Control Investment*, FIN. TIMES, Aug. 19 & 20, 2006, at 1.

¹⁵ Wu Zhong, *Beijing Cracks the Whip on Rogue Projects*, ASIA TIMES, Aug. 22, 2006 (reporting on central government measures targeting specific projects and provincial officials); Murie Dickie, *Inspectors to Impose Beijing’s Economic Will*, FIN. TIMES, Aug. 10, 2006, at 4.

¹⁶ For example, scholars addressing China’s administrative law reforms often emphasize the fact that China is reforming a socialist command economy and a Soviet-influenced legal system, which could lead one to discount the usefulness of studying the experiences of China’s anti-communist, capitalist neighbors for clues to China’s likely future path. See, e.g., HOWARD, *supra* note 5 at 42 (1997) (“To understand the role of law as perceived by China’s rulers, law must always be assessed in the context of the Marxist conception of societal transformation. Chinese Marxist orthodoxy insists that law is a mere extension of the economic system a system of ownership that determines the mode of production.”).

we are familiar with in the United States.¹⁷ While these recent changes help to predict where China may be headed, to understand China's current situation it is also crucial to look at Northeast Asian administrative law prior to the current Chinese reforms. Section A, below, addresses administrative law in Northeast Asia during the "developmental state" era, the period from approximately 1950 to 1990. Section B then introduces the wave of statutory changes occurring in Northeast Asian administrative law since the early 1990s, identifying specific statutory innovations and discussing the social and political context in which those changes have taken place.

A. Administrative Law and the Northeast Asian "Developmental State"

In the history of modern economic development, Japan, South Korea, and Taiwan stand out as the paradigmatic examples of the East Asian economic miracle.¹⁸ However, during the 1960s, 1970s, and 1980s, when these countries achieved miracle status, foreigners interested in trade and investment complained of "Japan, Inc.," and "Korea, Inc." The complaints were based on the perception that what they encountered in nominally capitalist Northeast Asia were not free-market economies, where commercial, trade, and investment decisions are left largely to market forces and private decision making. Instead, observers felt they were encountering Northeast Asian "industrial policy," which manifested itself through regulatory frameworks designed to allow national bureaucracies to control virtually all aspects of cross-border economic activity, whether in goods, technology, investment, services, or currency.

The statutory basis of Northeast Asian industrial policy included foreign exchange controls and statutes requiring approval of foreign investments, technology licenses, and of licensing systems for domestic industry and foreign trade.¹⁹ Foreign investments could be channeled by this approval

¹⁷ See John K.M. Ohnesorge, *Politics, Ideology and Legal System Reform in Northeast Asia*, in GLOBALISATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS (Christoph Antons & Volkmar Gessner eds., forthcoming 2007); Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585 (2001); John K.M. Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist's History*, (unpublished S.J.D. thesis, Harvard Law School, June 2002, on file at Harvard Law School Library).

¹⁸ See, e.g., WORLD BANK, *THE EAST ASIAN MIRACLE* (1993) (discussing Japan, South Korea, and Taiwan, among others) [hereinafter *THE EAST ASIAN MIRACLE*].

¹⁹ For overviews, see Carl J. Bradshaw, *Selected Aspects of Business in Japan*, 14 STAN. L. REV.

system into manufacturing for export, not for local sale. Sectors such as import-export trade, distribution, and retailing were long closed to foreign participation. In those sectors in which foreign investment was allowed, the regulatory framework often skewed investments toward minority shares in joint ventures with local partners. Portfolio investment by foreigners was generally limited to equity stakes far too small to gain control of local companies, so foreign investment through mergers or acquisitions was rare. Manufacturing investments were often subject to “local content” requirements conditioning approval on commitments to source inputs locally, thus supporting local suppliers, and/or subject to export performance requirements, to earn foreign exchange.

Combined with protectionist controls on imports and sometimes weak enforcement of foreign-owned intellectual property rights, these restrictions on incoming foreign investment left many foreign manufacturers with the Hobson’s choice of sharing their technologies with local manufacturers or not participating at all in Northeast Asia’s growing economies. But even stand-alone technology import licenses went through a bureaucratic screening process which could be used to improve the terms available to the local licensee, thus maximizing the inflow of useful, up-to-date technology, and minimizing the outflow of hard currency royalty payments. Local companies had to deal with the same system, meaning that they could not get access to raw materials, equipment, technology, capital, or business licenses without navigating the industrial policy bureaucracy. Local entrepreneurs could not access foreign capital markets without government approval, particularly in South Korea and Taiwan. In these countries, where the nationalizing of the banking sectors had been one of the first steps toward industrial policy, raising capital from domestic sources meant dealing with the government. The governments then used their authority over the financial systems to influence the allocation of credit, often favoring those companies engaged in manufacturing for export.

That Northeast Asian governments adopted such industrial policies is beyond dispute.²⁰ What came to be a matter of dispute, popularized in

639 (1962); F.L. Hartman, *Japanese Foreign Investment Regulation*, 18 N.Y. L. FORUM 355 (1972-73); Russell Mardon, *The State and the Effective Control of Foreign Capital*, 43 WORLD POL. 111 (1990); Kung-Chung Liu, *Legal Environment for Technology Transfer in Taiwan*, 36 INT’L LAW. 1145 (2002); CHING-YUAN HUANG, *MULTINATIONALS IN THE REPUBLIC OF CHINA: LAWS AND POLICIES* (1978).

²⁰ “There is consensus on one point: governments intervened extensively in most East Asian economies . . .” Zenaida Hernandez, *Industrial Policy in East Asia: In Search for Lessons*, 3 (Sept. 24, 2004) (background paper prepared for the World Development Report 2005: A Better

Chalmers Johnson's seminal 1982 work *MITI and the Japanese Miracle*,²¹ was the extent to which Northeast Asian industrial policy presented a challenge to liberal, free-market orthodoxy concerning the optimal role of the state in a market economy.²² In addition to this fundamental economic question, discussion also focused on the bureaucracies charged with administering Northeast Asia's industrial policies. Were they in fact, as Johnson and other "revisionists" suggested, highly insulated from politics, exercising their discretionary authority in light of their expertise and in pursuit of the national interest? Or were they better understood as examples of bureaucracies captured by the forces they were supposed to regulate, potentially shirking "agents" of political authorities mainly interested in feathering their own nests, and certainly not able to out-think the wisdom of the market to "pick winners" worthy of government support?²³

Investment Climate for Everyone), http://siteresources.worldbank.org/INTWDR2005/Resources/477407-1096581040435/wdr2005_industrial_policy_eastasia2.pdf#search=%22zenaida%20Hernandez%20industrial%20policy%20world%20bank%22.

²¹ MITI was the Ministry of International Trade and Industry, which together with the Ministry of Finance administered much of Japan's industrial policy system.

²² It was one thing to point out that Japan's industrial policy had been instrumental in obtaining American technology at bargain rates, or that it benefited particular Japanese companies at the expense of their foreign competitors. It was something else, however, to argue with Johnson and other "revisionists" that properly implemented industrial policy allowed a country to achieve better-than-market performance, and that rather than cheating, industrial policy was a good thing, and that maybe the United States should have one too. On the shift in U.S. perceptions, see Kozo Yamamura, *Success that Soured: Administrative Guidance and Cartels in Japan*, in POLICY AND TRADE ISSUES OF THE JAPANESE ECONOMY 77 (1982) (arguing that the "stagflation" of the 1970s triggered the West's interest in Japanese industrial policy). See also Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 136 (Frederic C. Deyo ed., 1987). Another leading "revisionist" economist, Alice Amsden, wrote first on Statist economic development in Taiwan. See Alice H. Amsden, *Taiwan's Economic History*, 5 MODERN CHINA 341 (1979). Amsden then turned to South Korea. See ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989). A leading "revisionist" work focusing on Taiwan is ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990). Other major works in the genre include THE DEVELOPMENTAL STATE (Meredith Woo-Cumings ed., 2001); JUNG-EN WOO, RACE TO THE SWIFT (1991); THE ROLE OF THE STATE IN TAIWAN'S DEVELOPMENT (Joel D. Aberbach et al. eds., 1994); CONTENTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN (Edwin A. Winckler and Susan Greenhalgh eds., 1988); THOMAS B. GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE (1986); THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM (Frederic C. Deyo ed., 1987); and Bruce Cumings, *The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles, and Political Consequences*, 38 INT'L ORG. 1 (1984).

²³ J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 99-141 (1993).

Whatever the outcome of these political economy debates, what was generally missing from the literature was serious discussion of administrative law. Yet, it is important to have these broader debates in mind when studying Northeast Asian—and now Chinese—administrative law, since they provide a context which can render the functioning of the formal legal structure more understandable. Of primary importance for administrative law is the fact that the statutory and institutional structures of industrial policy often vested enormous discretion in the government actors charged with implementing the regulatory schemes.²⁴ Furthermore, administrative law provided private actors with comparatively limited recourse to the courts to challenge regulatory decisions.

1. Developmental-State Administrative Law “On the Books”

In addition to the broad similarities in industrial policy outlined above,

²⁴ See, e.g., HUANG, *supra* note 19, at 82-83.

One of the important features of the investment laws of the Republic of China is the delegation of broad power of discretion to the executive branch. The basic law governing foreign investment . . . contains only some 20 short articles. The implementation of this basic statute is provided in numerous administrative regulations which are subject to constant change. This delegation of authority enables government agencies in charge of foreign investment approval to adopt flexible measures to meet the changing needs and circumstances of the country. In this connection, legal stability is not necessarily the rule of the game. MNEs should recognize this key point and should not, for instance, attack a reasonable repeal of previous tax incentives or other legal privileges which have been found no longer beneficial to the economic and social development of the country.

Id. Huang went on to note,

A national or international standard treatment of foreign nationals is often advocated by scholars and practitioners in the developed world. In principle, the Republic of China follows this school of thought. In the writer’s opinion, however, it is questionable whether national treatment must be accorded to foreign-controlled corporations in such areas as exchange control, local content requirements, import control and demand for exports. . . . [I]t is submitted that a foreign invested enterprise may not claim equal treatment in every government regulatory measure, no matter whether it is classified as a domestic or foreign corporation in its legal sense. In other words, MNEs should also recognize that *equal treatment is not necessarily the rule of the game, especially in the area of administrative law.*

Id. (emphasis added).

Japan, Taiwan, and South Korea possessed administrative-law systems that were quite similar throughout the developmental-state era.²⁵ What follows is a brief outline of the formal law, followed by an analysis of how the law fit within the governance structures.

By the 1960s, each of the countries discussed here had a basic statute governing internal administrative review when requested by an affected citizen. In Japan, this was the 1962 Administrative Complaint Investigation Law,²⁶ which provided the general framework for internal review of administrative acts. The basic sequence called for two levels of review: one by the body that made the initial decision, and one by that body's immediate superior in the bureaucratic hierarchy.²⁷ Generally, a request for administrative review was filed with the nearest superior administrative organ, which had broad power to quash or alter the act of the lower body, or to order that body to take specific action.²⁸ In South Korea, the applicable statute was the Administrative Appeals Law.²⁹ In Taiwan, the basic statute governing internal agency review is the Complaint Appeal Law,³⁰ which was enacted in 1930 but substantially reformed in 1998.

Each of these countries also had in operation a system for compensating citizens injured by state action. The fact that Japan's pre-World War II administrative law had not included such a provision had been a point of criticism for some time. To guarantee that this would be remedied, Japan's 1947 Constitution provides that "every person may sue for redress as provided by law from the State or a public entity, in case he has suffered

²⁵ Ohnesorge, *Politics, Ideology and Legal System Reform in Northeast Asia*, *supra* note 17; Ginsburg, *supra* note 17; Ohnesorge, *Western Administrative Law in Northeast Asia*, *supra* note 17.

²⁶ Gyosei fufuku shinsa ho [Administrative Appeals Inquiries Law], Law no. 160 of 1962. *See generally* Toshiro Fuke, *Judicial Review of Administrative Action in England and Japan: A Comparative Perspective*, in *COMPARATIVE STUDIES ON THE JUDICIAL REVIEW SYSTEM IN EAST AND SOUTHEAST ASIA* 15 (Yong Zhang ed., 1997).

²⁷ Toshiro Fuke, *Remedies in Japanese Administrative Law*, 8 *CIV. JUST. Q.* 226, 228-30 (1989).

²⁸ *Id.* at 229.

²⁹ Joon-Hyung Hong, *Administrative Law in the Institutionalized Administrative State*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 47, 56-57 (Dae-Kyu Yoon ed., 2000).

³⁰ Suyuan Fa, 1930 (as Amended June 14, 2000), *translated in* <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=2279&msgType=en>.

damage through illegal act of any public official.³¹ This constitutional provision is given life by Japan's State Compensation Law,³² which together with the Civil Code constitute the core of Japan's governmental liability system.

This compensation system was especially important in Japan because Japanese courts hear administrative litigation under the Administrative Litigation Law,³³ the State Compensation Law, and the Civil Code. Furthermore, the Japanese courts interpret standing more strictly under the Administrative Litigation Law, and are hesitant to revoke administrative acts, based on a broad deference to administrative discretion.³⁴ In addition, the limitations period under the Administrative Litigation Law is shorter than in government compensation litigation, and Japanese courts take a less passive attitude in compensation cases than in cases arising under the Administrative Litigation Law.³⁵ According to one commentator, the courts' tradition of awarding damages in compensation actions may well have been based on a recognition by the courts that they were dealing with administrative action that properly should have been enjoined or otherwise prevented from occurring had the law given citizens effective remedial tools.³⁶

As in Japan, South Korea's constitution provides that:

In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the state or public organization under the conditions as prescribed by law. In

³¹ KENPŌ (1947), art. 17 (Japan).

³² Kokka baisho ho, Law no. 120 of 1947. This reform came at the initiative of the Japanese and was initially rejected by the U.S. Occupation authorities. John O. Haley, *Japan's Postwar Civil Service: The Legal Framework*, in *THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT* 77, 81 (Hyung-Ki Kim et al. eds., 1995).

³³ See *infra* notes 135-147 and accompanying text.

³⁴ K. Kamino, *Government Compensations in Japan*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 95, 105 (Yong Zhang ed., 1999).

³⁵ *Id.*

³⁶ Fuke, *supra* note 27, at 233. Professor Fuke suggested in 1989 that Supreme Court decisions over the previous five to six years had sought to restrict the scope of governmental liability under the Government Liability Act in order to help reign in government expenditures. *Id.*

this case, the public official concerned are [sic] not immune from liabilities.³⁷

Article 29(1) has been interpreted by courts as functioning analogously to respondeat superior, creating government liability based on acts of State officials, while also allowing the State to seek reimbursement from the official whose actions gave rise to such liability.³⁸ Korea's State Compensation Act³⁹ gives concrete form to this constitutional mandate, creating causes of action against both central and local governments, while not preempting ordinary causes of action existing under the tort provisions of the Civil Code.⁴⁰ Taiwan provides for state compensation under both the State Compensation Law⁴¹ and the Civil Code.⁴² Unlike other aspects of Taiwan's administrative law, the State Compensation Law does not date from the Republican period on the Mainland, but was enacted in 1980.⁴³

During the developmental state era, Japan, South Korea, and Taiwan also had in force administrative litigation statutes creating causes of action under which citizens could challenge administrative decisions. In Japan, the postwar reform efforts which led to the reform of government compensation law had also focused on reforming the administrative litigation system. In contrast to their counterparts in occupied Germany, U.S. Occupation law reformers in Japan insisted upon the abolition of the Meiji Administrative Court and on the transfer of jurisdiction over administrative litigation to the

³⁷ S. KOREAN CONST. art. 29, §1 (1948).

³⁸ Won Woo Suh, *Governmental Liability in Korea*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 9, 9-11 (Yong Zhang ed., 1999).

³⁹ KukkaPaesangbob, Law No. 231 of 1951, *translated in* *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 12, 12-13 (Yong Zhang, ed., 1999).

⁴⁰ Won Woo Suh, *supra* note 38, at 10-13.

⁴¹ Guojia Peichang Fa [State Compensation Law], 1980 *translated in* *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 240, 240-42 (Yong Zhang ed., 1999).

⁴² *See generally* Ching-Hsiou Chen, *Governmental Liability in Taiwan*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 29 (Yong Zhang ed., 1999).

⁴³ *See* Guojia Peichang Fa [State Compensation Law], 1980 *translated in* *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 240, 240-42 (Yong Zhang ed., 1999).

ordinary courts.⁴⁴ Toward that end, the 1947 Constitution stipulated that “[t]he whole judicial power is vested in the Supreme Court and in such inferior courts as established by law,”⁴⁵ and that “[n]o extraordinary tribunal shall be established, nor shall any organ or agency of the executive be given final judicial power.”⁴⁶ Although this language would seem to allow for a system of administrative courts so long as it remained within the judicial branch and inferior to the Supreme Court, the prevailing interpretation has been that administrative courts are precluded.⁴⁷ The Court Organization Law, which entered into force simultaneously with the 1947 Constitution, reinforces this interpretation by omitting administrative courts from its exclusive catalogue of courts, and by its repeal of the Administrative Court Law of 1889.⁴⁸

As of 1948, Japan had abolished the Meiji Administrative Court without creating an effective replacement forum for administrative litigation. The ordinary courts were to be the appropriate forum, but with one minor exception; no statute existed that defined the causes of action available to challenge administrative action, or that regulated the course of administrative litigation.⁴⁹ The enactment of the Administrative Case Litigation Special Regulations Law (ACLSRL) in 1948 remedied this situation.⁵⁰ In 1962, the Administrative Case Litigation Law (ACLL) replaced the ACLSRL, and remains in effect today.⁵¹ South Korea used Japan’s 1962 ACLL as its model when revising its Administrative Litigation Law, first

⁴⁴ Haley, *supra* note 32, at 97.

⁴⁵ KENPŌ (1947), art. 76, para. 1 (Japan).

⁴⁶ *Id.* at para. 2.

⁴⁷ Ichiro Ogawa, *Administrative and Judicial Remedies Against Administrative Actions*, in PUBLIC ADMINISTRATION IN JAPAN 217 (Kiyooki Tsuji ed., 1984).

⁴⁸ Administrative Court Law, Law No. 59 of 1947.

⁴⁹ Katsumi Takabayashi, *Einführung in das japanische Verwaltungsprozeßrecht*, 55 VERWALTUNGSARCHIV 359, 360 (1964).

⁵⁰ Gyosei jiken soshō tokurei hō [Administrative Case Litigation Special Regulations Law], Law No. 87 of 1948.

⁵¹ Gyosei jiken soshō hō [Administrative Case Litigation Law], Law No. 139 of 1962.

enacted in 1951, in 1984.⁵² In Taiwan, the corresponding statute was the Administrative Litigation Law (ALL),⁵³ enacted in 1932 when the Nationalist government ruled China, and which then underwent substantial amendment in 1974.⁵⁴

2. Understanding Administrative Law in the Developmental State

Having outlined the basic formal structure of administrative law in the Northeast Asian developmental states, those areas where the laws differ importantly from the “pluralist” administrative law model become more clearly identifiable. After identifying these areas, a logic emerges connecting developmental-state administrative law to the national politics and political economies of the time, legitimate criticisms notwithstanding.

One of the main targets of criticism has been the limited function of the administrative litigation statutes. In Japan, the system that the ACLL established has been the subject of a great deal of criticism, both Japanese⁵⁵ and foreign.⁵⁶ The main theme of the criticism is that the ACLL is applicable to only a very narrow range of “concrete administrative acts” by state actors, and that even with respect to such acts, the ACLL discourages litigation through strict standing requirements by placing the burden of proof on plaintiffs with few means to access government documents, and finally, by limiting remedies to the quashing of particular administrative acts.⁵⁷

The Korean ALL has been criticized on many of the same grounds as its

⁵² Hong, *supra* note 29, at 55-56.

⁵³ Xingzheng Susong Fa [Administrative Litigation Law], 1932.

⁵⁴ These amendments are discussed at length in Florence Man-ling Li, *The Administrative Litigation System in Taiwan* (1980) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard Law School Library). *See also*, Chin-Hsiou Chen, *supra* note 42, at 36-39 (discussing the relationship between ALL and State Compensation Law).

⁵⁵ *See, e.g.*, Fuke, *supra* note 26; Fuke, *supra* note 27.

⁵⁶ *See, e.g.*, Haley, *supra* note 32, at 96-98; FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 169-76(1987); Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37 (1985).

⁵⁷ Haley, *supra* note 32; UPHAM, *supra* note 56; Dziubla, *supra* note 56.

counterpart in Japan.⁵⁸ For purposes of understanding administrative law in the developmental state, it is particularly noteworthy that the ALL in South Korea lacked a mechanism through which a court could issue an injunction against agency action, and restricted standing so that collective interests could not be easily vindicated through the statute.⁵⁹ In addition, the ALL required erstwhile plaintiffs to exhaust administrative remedies before filing suit under the ALL, and the courts carved out few exceptions to the rule.⁶⁰ Taiwan's administrative litigation system has been subject to the same general criticisms as those in Japan and South Korea.⁶¹

Criticism of Northeast Asian administrative law also centers on the laws' restrained treatment of the phenomenon known as "administrative guidance." Administrative guidance refers to the practice of government officials issuing informal instructions to private parties, sometimes written sometimes oral, that seem to fall between the cracks of the legal system.⁶² Administrative guidance fell through the cracks partly because, as noted above, judicial review under the administrative litigation statutes was restricted to review of "concrete administrative acts," which did not include informal guidance.⁶³ Also, a common view has been that government bodies in Northeast Asia were poorly constrained by administrative law if they decided to use their regulatory powers to retaliate against a private party who failed to follow administrative guidance that in a formal legal sense was non-binding.⁶⁴ Thus, even if in theory a private party might have sued under

⁵⁸ See James M. West, *Administrative Procedure in Korea*, AMCHAM-KOREA J. (1992); Joon-Hyung Hong, *supra* note 29.

⁵⁹ Hong, *supra* note 29.

⁶⁰ *Id.*

⁶¹ Dennis Te-Cheng Tang, *The Environmental Laws and Policies of Taiwan: A Comparative Law Perspective*, 26 VAND. J. TRANSNAT'L L. 521 (1993); Jiunn-Rong Yeh, *Changing Forces of Constitutional and Regulatory Reform in Taiwan*, 4 J. CHINESE L. 83, 98-99 (1990).

⁶² The literature on administrative guidance is voluminous and is one area of Northeast Asian administrative law that did draw some attention from Western scholars. See, e.g., UPHAM, *supra* note 56, at 166-204; JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 160-68 (1991); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

⁶³ Haley, *supra* note 32, at 98; UPHAM, *supra* note 56, at 170-71.

⁶⁴ See, e.g., UPHAM, *supra* note 56, at 174 ("Even when MITI does not have direct statutory power

an administrative litigation statute to challenge government action, such litigation was constrained by a practical fear of retaliation the next time that party had to deal with the same government body. Given that the industrial policy regimes discussed above created highly approval-centered economies, this weakness of administrative law allowed government bodies great practical authority, lightly constrained by enforcement by the judicial branch.⁶⁵

Another major target of criticism was the lack of generally applicable administrative procedure statutes along the lines of either the U.S. Administrative Procedure Law of 1946, or the German Administrative Procedure Law of 1976. Constitutional due process requirements that existed were weakly enforced with respect to executive action, and administrative procedure requirements, if any, existed only in individual regulatory regimes.⁶⁶ At least some administrative law scholars found this approach inadequate, and had been calling for general administrative procedure statutes for decades.⁶⁷ General open-meeting laws along the lines of the U.S. government's in the Sunshine Act were also absent, as were information disclosure laws such as the U.S. Freedom of Information Act.⁶⁸ With only very limited pre-trial discovery in any civil litigation, not only litigation against the State, the public lacked what have become the modern legal tools

over the relevant industry, a recalcitrant company can be reminded of indirect sanctions such as the denial of government benefits or retaliation against allied companies in industries over which MITI has direct control."); ERNEST GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES 377 (1966) ("In its most acute form the [Japanese] citizen's disinclination to challenge public administrators is marked by a positive fear of reprisals or other untoward consequences.").

⁶⁵ Put in comparative terms, judicial review was weak in the area that in French administrative law is termed *détournement de pouvoir*, which can be used to invalidate an administrative act in which "an administrative agent has accomplished an act within the scope of his powers; he has observed all the forms prescribed by law; but he has performed the act from motives other than those for which the power was conferred." William Rohkam, Jr. & Orville C. Pratt, IV, *The Annulment of Administrative Acts for Excess of Power*, in *STUDIES IN FRENCH ADMINISTRATIVE LAW* 83 (with Orville C. Pratt, IV, 1947).

⁶⁶ On Japan, see generally Nathaniel L. Nathanson & Yasuhiro Fujita, *The Right to Fair Hearing in Japanese Administrative Law*, 45 WASH. L. REV. 273 (1971).

⁶⁷ On Japan, see Fuke, *supra* note 26, at 32-33. On Taiwan, see Jiunn-Rong Yeh, *supra* note 61; Tang, *supra* note 61.

⁶⁸ See *infra* notes 109-10, 119-20, and 125 and accompanying text (discussing adoption of information disclosure laws).

for getting information out of government bodies.⁶⁹

Also noteworthy was the scarcity of independent regulatory bodies in Northeast Asia during the decades of the developmental state. No theory of administrative law requires independent agencies, which arguably do violence to separation of powers principles in the interest of expertise and of insulating regulatory decisions from partisan politics. Still, the question here is how administrative law in the developmental state differed from what has become the pluralist administrative law model, to which independent regulatory bodies arguably belong. At the very least, the principle of horizontal differentiation has become the norm, so that even if units exercising regulatory authority remain within a single bureaucratic organization, they perform their functions in isolation of one another. They therefore enforce only those norms and perform only those functions appropriate to them under the law.

It is well known that the U.S. occupation government in Japan attempted to impose U.S.-style independent regulatory commissions, and that this initiative was substantially undone by the Japanese once the Occupation ended.⁷⁰ More specifically, in important cases these independent administrative commissions were turned into Administrative Councils once Japan regained its sovereignty in 1952. The distinction between the two forms is that while the independent commissions had enjoyed final decision making powers, the post-1952 Administrative Councils are merely advisory bodies, with which the relevant Minister merely had to consult and whose recommendations had to receive “due respect.”⁷¹

With respect to institutional design, such rejection of independent regulatory commissions means in many cases at best de facto, not de jure, pluralism and competition among regulatory authorities. This is not a question of constitutional principle, but of whether regulatory authority is divided in such a way as to encourage regulatory bodies to act solely in

⁶⁹ Although this is merely the Author’s personal observation, it has often seemed that only the prosecutors have been able to get documents from the other ministries, and that they exercised this prerogative only when a scandal had grown so large that it had serious political implications.

⁷⁰ Haley, *supra* note 32; HALEY, *supra* note 62, at 156 (describing Japan’s Fair Trade Commission as one of the few independent regulatory agencies that remained independent once sovereignty was returned to Japan).

⁷¹ Nathanson & Fujita, *supra* note 66.

pursuit of their own regulatory mandates, or is combined to encourage them to coordinate and act in concert. Haley, for example, presents a compelling case for Japan's rejection of the independent regulatory commissions mandated by the U.S. occupation government, arguing that the American solution is ill-suited to parliamentary systems, and sacrifices overall policy coherence in the interests of narrow regulatory agendas.⁷² Rather than seeking to let a hundred regulatory flowers bloom, Northeast Asia's developmental states opted instead for comparatively unified executive branches with at most a degree of de facto pluralism and non-transparent, non-legalized bureaucratic rivalry within. For example, when South Korea under Park Chung-Hee finally began to take action to protect the environment it chose, over the objections of environmental experts, to place the new environmental agency within the Ministry of Health and Social Affairs, rather than make it a cabinet-level agency.⁷³

Another place to draw comparisons is with respect to the role of Northeast Asia's judiciaries in administrative law. Even accepting the exceptional nature of the remedial and other powers possessed by common law judges, Northeast Asia's judiciaries were remarkably restrained during the developmental state period. South Korea and Taiwan were military dictatorships during much of this period,⁷⁴ and while their courts were left largely free to perform basic judicial functions, particularly in private law, they were not independent of the executive, which is crucial for administrative law. Thus it is not surprising that the South Korean and Taiwanese judiciaries did not interpret administrative law doctrines broadly, or identify new restraints on administrative action based on constitutional norms or natural justice. This would have been disappointing, especially for administrative law specialists trained in European law, since in both France and Germany many central doctrines are developed judicially, not statutorily.⁷⁵

⁷² HALEY, *supra* note 32, at 83-87. The fact that the United States has created avenues for White House and Congressional review of agency rulemaking suggests that the country is not comfortable with the level of incoherence produced by the system. *See infra* notes 136-147 and accompanying text.

⁷³ Yeon-Chang Koo, *Environmental Law and Policy in Korea*, in *SELECTED PROBLEMS IN CONTEMPORARY COMPARATIVE LAW* 315, 337 (1987).

⁷⁴ *See* DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* (1990); *CONSTITUTIONAL REFORM AND THE FUTURE OF THE REPUBLIC OF CHINA* (Harvey J. Feldman ed., 1991).

⁷⁵ L. Neville Brown & John Bell, *Recent Reforms of French Administrative Justice*, 8 *CIV. JUSTICE*

Less easily explained is the restraint of the Japanese judiciary in expanding the reach of administrative law in that country, which was democratic throughout the developmental-state era. This restraint has disappointed those who hoped for an American-style supreme court in Japan, and constitutes one of the major contrasts between Japan and post-World War II Germany.⁷⁶

How did the restraint of Northeast Asia's courts manifest itself in administrative law? First, as has been noted, they interpreted standing and justiciability requirements under the administrative litigation statutes narrowly, defining reviewable administrative acts narrowly, as well as direct injury requirements.⁷⁷ Even in democratic Japan, where knowledge of U.S. law was widespread, administrative rulemaking processes were not closely regulated by statute, and courts did not intervene to create extra-statutory public participation requirements such as had been created by courts in the United States.⁷⁸ Thus during the 1960s and 1970s, while courts in the United States and other Western democracies were actively "concretizing" procedural due process protections from constitutional law, enforcing natural justice, judicializing quasi-judicial administrative processes, or trying to enforce political pluralism and democratic legitimacy by broadening public

Q. 71 (1989); MAHENDRA P. SINGH, *GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE* (2001).

⁷⁶ KIYOSHI IGARASHI, *EINFÜHRUNG IN DAS JAPANISCHE RECHT* 41 (1990). Though the existence of Japan's judicial restraint is not disputed, there are different explanations for it. Haley argues that the restraint is imposed by the judiciary itself, and is not the result of political control from outside the judiciary. John O. Haley, *Judicial Independence in Japan Revisited*, 25 *LAW IN JAPAN* 1 (1995). In contrast, both Setsuo Miyazawa and Ramseyer and Rosenbluth offer explanations that center on the political role of the Secretariat of the Supreme Court in controlling the career paths of individual judges. See Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW & TECHNOLOGY IN THE PACIFIC COMMUNITY* 263 (Philip S.C. Lewis ed., 1991); J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* (1993). See also Mark J. Ramseyer, *The Puzzling (In)dependence of Courts*, 23 *J. LEGAL STUD.* 721 (1994). Kiyoshi Igarashi appears to adopt a straightforward political explanation based on the Liberal Democratic Party's political monopoly, though he discusses only the Supreme Court. IGARASHI, *supra*, at 41. For a recent review of this debate, see Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 *LAW & SOC. INQUIRY* 421 (2005).

⁷⁷ On Japan, see Haley, *supra* note 32; UPHAM, *supra* note 56; Dziubla, *supra* note 56. On Taiwan, see Jiunn-Rong Yeh, *supra* note 61. On Korea, see West, *supra* note 58; Joon-Hyung Hong, *supra* note 29.

⁷⁸ Stewart, *supra* note 7 (discussing judiciary's role in enshrining the "interest representation," or "pluralist" model in American administrative law).

participation in the administrative process,⁷⁹ the courts of the developmental states were doing little of the sort.

The Japanese judiciary, for example, relying on an extreme version of separation of powers, denied that courts in administrative litigation may legitimately do more than act as a passive check on administrative organs.⁸⁰ The judicial role in litigation under Japan's Administrative Case Litigation Law was thus limited to declaring void particular administrative acts, with the courts not even empowered to declare that an administrative organ has a duty to take a specific action, or to refrain from acting in a specific way.⁸¹ In 1992, leading scholars of South Korean law could still write, "in practice administrative dispositions—including executive decisions affecting industrial organization and labor relations—were seldom subjected to legal challenge until quite recently."⁸²

3. Lessons from Administrative Law in the Developmental States

During the developmental-state period, associated with invasive industrial policy and high-speed growth, administrative law displayed few attributes of the pluralist administrative law to which the United States is accustomed today. Comprehensive legal orders were generally in place and functioning on most levels, and constitutions and codes contained all necessary formal elements of a liberal legal order.⁸³ Administration was largely legalized, but this arguably served the interests of the state as much as civil society. The state, whether autonomous or controlled by private interests, still needs to make sure its functionaries perform their designated roles. In each country, the exact combination of forces that determined policy outcomes—an essential question for political scientists—was difficult to define, but, unlike in the pluralist model, was relatively unmediated by

⁷⁹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁸⁰ Fuke, *supra* note 27, at 231-32.

⁸¹ *Id.* at 232.

⁸² James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 83 (1992).

⁸³ For general overviews, see DAE-KYU YOON, *supra* note 74 (on Korea); HALEY, *supra* note 62 (on Japan); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century*, 11 PAC. RIM L. & POLY J. 531 (2002) (on Taiwan).

administrative law. Thus, the question that so preoccupied the political economy “revisionists” and their critics, whether the industrial policy bureaucrats were *really* in charge during Northeast Asia’s economic miracle, was hard to answer because the limited nature of administrative law left the relationship particularly non-transparent. If industry or other elements of civil society had had easy resort to judicial review of administrative action, but had chosen not to make use of it, then one could be more sure that the regulators had in fact been captured. It remains unclear whether private interests would have preferred the more arm’s-length relationship with the state that we expect administrative law to provide in modern market democracies. All we know is that they did not push the political systems hard enough to get such pluralist administrative law, even in democratic Japan.

Another lesson derives from the fact that Northeast Asia in the developmental state era provides the single most successful period of modern economic development known. Not only did Northeast Asia achieve high rates of growth over sustained periods, but these gains were distributed relatively evenly.⁸⁴ Thus, it is probably fair to rule out pluralist, or even fully functioning liberal, administrative law as a necessary condition of successful economic development. The virtues, then, of pluralist administrative law should be seen primarily as political, as inhering in the value on the ability of citizens to meaningfully participate in government and to be treated justly in their dealings with the state. The idea that pluralist administrative law is necessary to prevent governments from making consistently bad decisions is not supported by the Northeast Asian experience, at least not while economies were geared toward catching up to defined targets, when criteria were relatively clear.⁸⁵ Authority exercised through knowable channels—applying knowable criteria—provided sufficient clarity and regularity, even if the applications of authority were often what Max Weber would have called “substantively,” rather than “formally” rational.⁸⁶

Moreover, although recent thinking on law and economic development

⁸⁴ THE EAST ASIAN MIRACLE, *supra* note 18, at 72-74 (reproducing the Gini coefficient scores for Northeast Asia).

⁸⁵ On the reduced complexity of “picking winners” for a developing country, see Joseph E. Stiglitz, *Some Lessons from the East Asian Miracle*, 11(2) WORLD BANK RES. OBSERVER 151, 161-62 (Aug. 1996).

⁸⁶ On Weber and his distinction between formal and substantive rationality in legal systems, see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WISC. L. REV. 721 (1972).

tends to call for a more limited and legally constrained state apparatus, administrative law in the developmental state had important contemporary supporters. Researchers from Harvard's Institute for International Development,⁸⁷ and later the East Asian Miracle report of the World Bank,⁸⁸ both celebrated the insulation of the economic planning bureaucracies, which allowed them flexibility to quickly adjust their policies with little interference from economic interests.⁸⁹

A third lesson is that the interests of a pro-growth polity align naturally with those of business, particularly where the state historically preceded the rise of industry and participated in its creation, as occurred in Northeast Asia. Thus, business interests did not need to press for pluralist administrative law innovations such as notice-and-comment rulemaking, public hearing rights, participation-enhancing judicial review doctrines, information disclosure laws, etc., and it was mainly political progressives that advocated for such institutions during the developmental-state era. Thus, the hope of some that the economic interests that arise in and dominate a market economy can be trusted to lead a drive toward pluralist administrative law, and liberal legality generally, seems misplaced.

Given that China's political tradition shares important commonalities with the political traditions of Japan, South Korea, and Taiwan, it is worth considering how the limited administrative law of the developmental state related to political culture in the region. By the time the developmental states took shape—in the 1950s in Japan and roughly a decade later in Taiwan and South Korea—political cultures in Northeast Asia were already displaying strong commitments to values directly at odds with the limited role of administrative law in controlling state action and legalizing state-society relations. Democratic ideals were widespread in Northeast Asia well

⁸⁷ See, e.g., LEROY P. JONES & IL SAKONG, GOVERNMENT, BUSINESS AND ENTREPRENEURSHIP IN ECONOMIC DEVELOPMENT: THE KOREAN CASE (1980) (especially Chapter 4: "Implementation of Government Policy"); EDWARD S. MASON ET AL., THE ECONOMIC AND SOCIAL MODERNIZATION OF THE REPUBLIC OF KOREA 250-94 (1980).

⁸⁸ THE EAST ASIAN MIRACLE, *supra* note 18.

⁸⁹ This perhaps reflects the fantasy of economists of the freedom to set economic policy via expertise, but neglects Hayek's caution that planners will always lack sufficient knowledge to out-think markets. Hayek's epistemological argument is discussed in Ryszard Legutko, *Was Hayek an Instrumentalist?*, 11 CRITICAL REV. 145 (1997).

before World War II,⁹⁰ so the limited opportunities that administrative law created for public participation must be seen as lagging behind changes in political culture. The limited function of administrative law in the developmental states would not have been altogether problematic, however. Traditional Northeast Asian political culture was relatively weakly committed to governance by rule, as opposed to expert discretion, and traditional Northeast Asian political culture was unencumbered by separation of powers ideology and tolerant of blurring the public and private spheres.

Developmental-state administrative law did not result from traditional Northeast Asian political culture, but neither did it threaten traditional views. Thus, traditional political culture did not provide ammunition for opponents of developmental-state administrative law, so those advocating pluralist administrative law had to base their arguments on foreign political theory as well. A legally organized state apparatus, with clear lines of authority and avenues for internal review of lower level actions, was consistent with traditional political ideals, but so were unified bureaucratic government and a non-legalized state-society boundary. In addition, the idea that the public authority should be able to intervene in the economy to enforce the public will in a discretionary, yet rational, manner required no abrogation of widely held political ideals and provided no effective rallying cry for economic or other private interests resisting the state.

B. Slouching Towards Pluralism?: Reforms to Northeast Asian Administrative Law in the 1990s

Social structural changes, even if partially put in motion by the state itself, supersede the organizations and policies that created them, forcing changes in the state itself. . . . [T]he social structural bases of the developmental state have been at least partially undercut by the new industrial society it helped create.⁹¹

Since the 1990s, developmental-state administrative law has been

⁹⁰ Taiwan and Korea were both colonies of Japan during Japan's democratization in the 1910s and 1920s, which provided one avenue for the flow of democratic ideals, if not practices, throughout the region. On democracy in Japan during the 1910s and 1920s, see PETER DUUS, *THE RISE OF MODERN JAPAN* 162-72 (1976).

⁹¹ PETER EVANS, *EMBEDDED AUTONOMY* 250 (1995).

amended and supplemented throughout Northeast Asia, so that statutory frameworks have begun to resemble the pluralist administrative law model.⁹² Moreover, the changes have not all been statutory: judiciaries have begun to assert themselves, going beyond positivist restraint in cases with broad implications for administrative law.⁹³

The overwhelming doctrinal development in Northeast Asia in the 1990s has been the trend towards the adoption of general administrative procedure statutes, similar to the U.S. Administrative Procedure Act of 1946. Another important statutory trend has been toward adoption of information disclosure statutes, for which the U.S. Freedom of Information Act serves as an important point of reference internationally. Along with these statutory developments has come increased activism among the judiciaries. The progress of these changes to date, the reasons for their enactment, and their likely long-term implications for state-private relations are the focus of this section.

In Korea, the long-anticipated Administrative Procedure Law (APL)⁹⁴ took effect January 1, 1998.⁹⁵ Voices within Korea had been calling for an administrative procedure law since at least the 1960s, to no avail. In 1981, the Korean Bar Association proposed such a statute⁹⁶ at a time when developmental state authoritarianism was firmly in place under Chun Do-Hwan, but when the Thatcher-Reagan revolutions were well underway and

⁹² Ohnesorge, *Politics, Ideology and Legal System Reform in Northeast Asia*, *supra* note 17; Ginsburg, *supra* note 17; Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist's History*, *supra* note 17.

⁹³ See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 206-46 (2003); Sean Cooney, *A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform*, in *LAW, CAPITALISM AND POWER IN ASIA* 253, 261-62 (Kanishka Jayasuriya ed., 1999).

⁹⁴ Administrative Procedure Law, Law No. 5241 of 1996 (Korea).

⁹⁵ On the APL generally see Ha Myoung Jeong, *The Delegation Doctrine and Administrative Procedure Acts in the United States and Korea* (2001) (unpublished S.J.D. dissertation, University of Wisconsin Law School) (on file with the University of Wisconsin Law School Library); Min-Gyu Park, *Public Participation in Korean Administrative Decision-Making and Enforcement* (2001) (unpublished S.J.D. dissertation, University of Wisconsin Law School) (on file with the University of Wisconsin Law School Library); Hong, *supra* note 29; Sang-Kyu Rhi, *Furtherance of the Korean Administrative Law*, 6 *INTER-PACIFIC BAR ASS'N J.* 23 (Dec. 1997).

⁹⁶ West, *supra* note 58, at 9.

international pressure for neo-Liberal economic reforms had begun. The Bar Association's proposal did not result in legislation, and the initiative passed to the Ministry of Government Administration, which in 1986 established an Administrative Procedure Law Research Committee.⁹⁷ That committee published a draft Korean APL in 1987, which also languished.

With respect to non-legislative, "concrete" administrative acts, Korea's APL endeavors to legalize agency decisionmaking with respect to applications by requiring agencies to promulgate decision criteria in advance, including time periods within which the agency must act.⁹⁸ In addition, the APL requires notice and an opportunity for at least an informal hearing prior to administrative action affecting private rights.⁹⁹ It also requires that agencies provide grounds for decisions they take.¹⁰⁰ Like Japan's corresponding statute, the APL includes provisions directly addressing "administrative guidance."¹⁰¹ These provisions require, first, that a recipient of administrative guidance may request that it be put in writing, which in theory will keep agency instructions within the bounds of what could pass public scrutiny and could help facilitate later judicial review. In addition, the APL seeks to address the enforceability of administrative guidance by restricting the ability of agencies to use their powers to retaliate against those not complying with administrative guidance.¹⁰²

The fact that these provisions, and the APL in general, were enacted at all reflects an important shift in Korean politics away from the executive dominance associated with developmental-state authoritarianism. Once enacted, however, these provisions become not only a reflection of a changed political dynamic, but represent a new mechanism through which politics may be further reformed. Assuming that even in democratic Korea the president maintains great power over the ministries, if these provisions of the

⁹⁷ *Id.*

⁹⁸ Administrative Procedure Law, Law No. 5241 of 1996, at art. 19, para. 1 and art. 20, para. 1 (Korea).

⁹⁹ *Id.* at art. 21, para. 1.

¹⁰⁰ *Id.* at art. 23.

¹⁰¹ *Id.* at arts. 48-51.

¹⁰² Jeong, *supra* note 95, at 194-96.

APL are implemented aggressively, they will contribute to the further shift of power away from the executive branch and the State, toward the private sector.

In addition to the statutory reforms placing new requirements on agencies, Korean courts have risen to an unprecedented level of importance in Korean public law.¹⁰³ Part of this is the result of statutory changes placing new requirements on agencies, and statutory changes elevating the role of courts. Another part has to do with political changes that facilitated statutory change, while also allowing courts more freedom to innovate.

Despite the German origins of its administrative law system,¹⁰⁴ Korea had never employed the device of the administrative court. Since gaining independence from Japan, the ordinary courts of appeals were the courts of first instance for litigation under the Administrative Litigation Law.¹⁰⁵ As part of the 1997 reforms, Korea took the interesting step of creating a specialized administrative court as a division of the Seoul District Court, as well as administrative divisions in each of the local courts.¹⁰⁶ This innovation does not draw exactly on any foreign model. Decisions of the Seoul District Court can be appealed to the ordinary Appeals Court and the Supreme Court, while the Constitutional Court presumably reviews constitutional decisions. Although it has already made important decisions, the ability of this new court to innovate or act out of step with the rest of the judiciary will likely remain limited.

Based upon a brief examination of its work to date, it is clear that the Administrative Court has been thrust into a number of areas of governance, which even five years ago seemed beyond the scope of legal resolution. Although no in-depth discussion of these cases will be attempted here, the fact that they are even being brought reflects the extent of the change that has occurred in Korea. Furthermore, although the Korean judiciary may well

¹⁰³ For a discussion of the assertiveness of Korea's Constitutional Court, created in the 1987 Constitution, see GINSBURG, *supra* note 93.

¹⁰⁴ See generally JONG HYUN SEOK, *DIE REZEPTION DES DEUTSCHEN VERWALTUNGSRECHTS IN KOREA* (1991).

¹⁰⁵ Rhi, *supra* note 95.

¹⁰⁶ For an overview of the administrative branch, see Young Dae Lee, *Special Jurisdiction Courts in Korea: Case of the Administrative Court*, 27 *KOREAN J. INT'L AND COMP. L.* 1 (1999).

develop a relatively conservative or restrained jurisprudence with respect to its role in reviewing agency decisions, at least these cases suggest no general unwillingness on the part of the Administrative Court to provide a forum for, and to decide, highly charged political-economic cases. In addition, given the more general assertion of independence on the part of the Korean judiciary since democratization, and the fact that there is no dominant ruling political party analogous to Japan's Liberal Democratic Party that might be able to reassert dominance over the judiciary, there is no reason to think that this new role for the courts in adjudicating administrative law disputes will be temporary. This conclusion is buttressed by the fact that Korea's Constitutional Court, created under the 1987 Constitution, has also weighed in on crucial administrative law matters.¹⁰⁷

In 1996, toward the end of the Kim Young Sam administration, Korea enacted its first comprehensive information disclosure law, the Information Disclosure Act (IDA).¹⁰⁸ The IDA is a statute that stipulates administrative review prior to judicial review, which will be conducted by the Administrative Court, discussed below. The IDA is criticized for the limited scope of its application, the broad and vague grounds justifying non-disclosure, and the insufficiency of the arrangements it makes for administrative and judicial review.¹⁰⁹ Yet there is no doubt that the law constitutes a step forward.

In Japan, too, changes to the administrative law system occurred in the 1990s that could signal development toward the pluralist model. These changes occurred along the statutory and case law fronts. First, and most widely discussed, Japan enacted its Administrative Procedure Law in 1993 to take effect October 1, 1994.¹¹⁰ Any claim that the Japanese have been satisfied with minimalist administrative law must account for the fact that forces in Japan long have been calling for a unified law on administrative

¹⁰⁷ For a general discussion of the Constitutional Court, see West & Yoon, *supra* note 82. For more recent appraisals of the Court's work, see GINSBURG, *supra* note 93; *Symposium: Constitutional Adjudication in Korea*, 1(2) J. KOREAN L. 1 (2001).

¹⁰⁸ JeongboKongkaebob [Information Disclosure Act], Law No. 5242 of 1996. For a brief overview of the statute, see Rhi, *supra* note 95.

¹⁰⁹ Hong, *supra* note 29, at 55.

¹¹⁰ For a translation of the APA, see Mark A Levin, *Annotation and Translation, Administrative Procedure Act*, 25 LAW IN JAPAN 141 (1995). For early discussions of Japan's APL, see Ken Duck, *Now that the Fog has Lifted*, 19 FORDHAM INT'L L. J. 1686 (1996); Lorenz Ködderitzsch, *Japan's New Administrative Procedure Law*, 24 LAW IN JAPAN 105 (1994).

procedure. For example, in 1964, the Special Investigation Committee on Administration recommended a unified law on administrative procedure and put forth a proposed APL.¹¹¹ Interest in such a statute was revived in the late 1970s, in the aftermath of a conference on countermeasures for the prevention of airplane scandals.¹¹² In 1983, the Second Special Investigation Committee on Administration issued a report that included a chapter on the APL, as well as a chapter on an information disclosure statute.¹¹³ Meanwhile, an APL study group had been established by the Administrative Management Agency, and in 1983, this body also issued a report on the APL.¹¹⁴ In 1985, a second APL study group was established by the Management and Coordination Agency, the successor to the Administrative Management Agency, and in 1989, this study group issued an interim report favoring a general APL.¹¹⁵

Meanwhile, the Third Special Council on the Promotion of Administrative Reform had been established, and in 1990, Prime Minister Toshiki Kaifu submitted a proposal on “fair and transparent” administrative procedure to this body.¹¹⁶ The Third Special Council submitted its report to the government in 1991, in 1992, the government promised the United States that it would submit an APL bill to the next ordinary Diet, and in 1993, the APL bill was submitted to and enacted by the Diet.¹¹⁷ In addition, after decades of discussion, Japan enacted a national information disclosure law in 1999, the Law Concerning Access to Information Held by Administrative Organs,¹¹⁸ following the enactment of information disclosure statutes by

¹¹¹ Kenji Urata & Satoshi Kotake, *Major Developments in 1993: Administrative Law: Administrative Procedure Act*, 14 WASEDA BULL. COMP. L. 27 (1993).

¹¹² *Id.* at 28.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Urata & Kotake, *supra* note 111, at 28.

¹¹⁷ *Id.*

¹¹⁸ An English translation of the Law Concerning Access to Information Held by Administrative Organs is available from the Japanese Administrative Management Bureau, <http://www.soumu.go.jp/gyoukan/kanri/translation.htm> (last visited Dec. 15, 2006). For a discussion of the law

many local governments.¹¹⁹

Finally, the Japanese judiciary has produced decisions that suggest that the courts now take a more aggressive attitude towards at least certain kinds of abuse of discretion by administrative authorities,¹²⁰ and if the courts extend this trend to other areas of governance, including national government agencies, it could herald a real change in Japanese administrative law. For while recipients of administrative guidance perhaps always could have obtained judicial review by simply ignoring the guidance and forcing the agency to bring a formal enforcement action,¹²¹ the Japanese courts were not effective in preventing agencies from “cross-enforcement” retaliation.¹²² Faced with non-reviewable retaliation that might have serious financial implications, the “right” to force judicial review of administrative guidance would have been effectively meaningless to the courts.

Taiwan was the last of the three to begin serious statutory reforms to its administrative law system, with major enactments in the late 1990s. Administrative litigation in Taiwan had been conducted under the Administrative Litigation Act of 1932, as revised in 1975. In 1998, late in the presidency of Lee Teng-Hui, Taiwan’s first democratically elected president, Taiwan enacted a thorough amendment of the law, providing a substantially new basis for administrative litigation. The Administrative Appeal Act was also substantially reformed in 1998, adding court-like elements and stressing procedural protections, and the Administrative Court Organization Act was revised in 1999 to strengthen the judicial review apparatus. Another important initiative concerned the creation of an information disclosure law, which culminated in the enactment in 2005 of the Freedom of Government

and a comparison of its provisions with the U.S. Freedom of Information Act, see Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access*, <http://www.freedominfo.org/features/20020705.htm> (last visited Dec. 15, 2006).

¹¹⁹ See generally David Boling, *Access to Government-Held Information in Japan: Citizens’ “Right to Know” Bows to the Bureaucracy*, 34 STAN. J. INT’L L. 1 (1998).

¹²⁰ For example, Nakazato and Ramseyer make much of cases that appear to have restricted the ability of local governments to place extra-statutory requirements on real estate developers. J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999) (Chapter Eight: Administrative Law). For an interesting comparative discussion of these cases in light of U.S. law, see Takehisa Nakagawa, *Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 ADMIN. L. REV. 175 (2000).

¹²¹ RAMSEYER & NAKAZATO, *supra* note 120, at 205-06.

¹²² See *supra* notes 65 and 66 and accompanying text.

Information Law.¹²³ Finally, probably the most important reform of the late 1990s was the preparation of a general law on administrative procedure, which culminated in the 1999 enactment of Taiwan's Administrative Procedure Law.¹²⁴

It seems clear that Taiwan's statutory reforms will be meaningful because, as has been the case in South Korea, the end of authoritarian rule in Taiwan has led to an assertion of independence and authority by the judiciary.¹²⁵ In 1990, in the context of Taiwan's environmental disputes—a key area for activist administrative law elsewhere—it could be said that “[i]n the case of social transformation, courts in Taiwan have not played a significant role in initiating reform. Rather, they have been limited to a punitive role in social conflicts.”¹²⁶ Taiwan's judiciary now plays a radically different role than it did even a decade ago, and given the new statutory structure, it will certainly play a leading role in expanding the scope and importance of Taiwan's administrative law.

1. Lessons from the Transformation

What lessons can a student of Chinese administrative law draw from this story of administrative law in Northeast Asia? First, it seems clear from the speed with which administrative law reforms took place post-democratization that Northeast Asian societies were ready for such reform, and that there

¹²³ Zhengfu Zixun Gongkai Fa [Freedom of Government Information Act] (2005), *translated in* <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=2636&msgType=en>.

¹²⁴ Xingzheng Chengxu Fa [Administrative Procedure Law] (1999) (Taiwan), *translated in* <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=2096&msgType=en>. For a brief English discussion of the Administrative Procedure Act, see Dennis T.C. Tang, Overview of the Administrative Procedure Act of Taiwan, paper presented at the Colloquium of the Alexander von Humboldt-Stiftung in Taipei, Taiwan (Sept. 2001), (transcript available at http://www.avh.de/en/netzwerk/veranstalt/hoersaal/2001_taiwan_01.htm).

¹²⁵ See generally Cooney, *supra* note 93; Tsung-fu Chen, The Rule of Law in Taiwan, http://www.mansfieldfdn.org/programs/program_pdfs/09chen.pdf (last visited Dec. 15, 2006); Dennis Te-Chung Tang, Constitutional Reforms on Taiwan in the 1990s, paper presented to the Fifth World Congress of the International Association of Constitutional Law, Rotterdam, The Netherlands (July 1999) (transcript available at <http://www.eur.nl/frg/iacl/papers/tang.html>); Tzong-li Hsu, The Rule of Law in Taiwan, paper presented to the Fifth World Congress of the International Association of Constitutional Law, Rotterdam, The Netherlands (July 1999) (transcript available at <http://www.eur.nl/frg/iacl/papers/hsu.html>).

¹²⁶ Jiunn-Rong Yeh, *supra* note 61, at 95.

was pent-up societal demand. In Taiwan and South Korea, once democratization was seen as inevitable, the instrumental calculations of those holding political power might have led toward liberalizing legal reforms, even before full democratization.¹²⁷ The realization of competitive electoral democracy has made law reform a political issue in these societies, subject to all the complex political machinations that make up politics in a democracy. Democratization has also freed the courts to take a much more central role in shaping the path of legal doctrine. Legally sophisticated non-governmental organizations have blossomed as well.¹²⁸ When these developments are added together, suddenly it becomes much more difficult to constrain administrative law.

It is clear, also, that people in the region are using the opportunities created by the new administrative law statutes. In Japan, for example, a citizens' organization used information disclosure law to obtain records from Japanese embassies and consulates showing that development assistance funds were being used to cover diplomats' personal expenses.¹²⁹ It seems unlikely that the commitments of traditional political culture are going to play any obvious role from this point forward, with future developments depending more on political agendas and the specific cultures of Northeast Asia's judiciaries. Japan's experiences suggest the importance of judicial culture and organization in administrative law even in a developed democracy, and this will become more significant in South Korea and Taiwan with democratization. On the surface, at least, South Korea and Taiwan must count as potential members of the pluralist administrative law world. There is great pressure for this, but it may well mean the end of the industrial policies that seem to have helped bring these countries up from poverty, and

¹²⁷ Creating administrative procedure requirements can be seen as a rational response of sitting politicians who anticipate that they may be voted out of office, and who wish to constrain the ability of their successors to undo their regulatory initiatives. See Mathew D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON., & ORG. 243 (1987); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L., ECON. & ORG. 180 (1999).

¹²⁸ In South Korea, for example, the People's Solidarity for Participatory Democracy (PSPD) has become active in public interest litigation, especially in shareholder litigation against management of the Korean Chaebol. See Jooyoung Kim & Joongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1(1) J. KOREAN L. 51 (2001).

¹²⁹ See *Honolulu Consulate Queried Over ODA*, YOMIURI SHIMBUN, Feb. 13, 2002, available at 2002 WL 1625443.

there are local voices questioning this.¹³⁰

International pressure certainly played a role in the move toward pluralist administrative law in Northeast Asia. The George H.W. Bush and Clinton administrations pressured Japan to enact its Administrative Procedure Law,¹³¹ and the Clinton administration lobbied Japan for an information disclosure law,¹³² clearly hoping that creating these statutes would help disable bureaucratic influence over the Japanese economy, rendering coherent industrial policy impossible, and opening up opportunities for American investors. This was particularly true of the U.S. insurance industry. The 1994 Insurance Agreement between the United States and Japan contains explicit promises by Japan to bring its insurance regulatory regime within the sphere of the Administrative Case Litigation Law and the Administrative Review Law and to “not delegate any authority” to private sector industry groups.¹³³ The Web page of the Asia Pacific Economic Conference (APEC) now contains lists of administrative litigation in APEC member countries, and South Korea goes to the trouble of translating case summaries into English to satisfy foreign demands for active administrative law.¹³⁴

While it seems likely that Northeast Asian administrative law will become much more understandable to Americans, there is reason to doubt that there will be a fundamental convergence to the “pluralist” or any other model. Administrative law systems seem to fluctuate between emphasizing expertise, politics, and law. In competitive democratic polities, these

¹³⁰ See, e.g., Yun-han Chu, *Re-engineering the Developmental State in an Age of Globalization: Taiwan in Defiance of Neo-liberalism*, 2(1) CHINA REV. (2002); Ku-hyun Jung & Inchoon Kim, *Republic of Korea*, in GOVERNANCE AND CIVIL SOCIETY IN A GLOBAL AGE 33, 60 (2002).

¹³¹ See *Asia: Open for Business*, INSURANCE INDUSTRY INTERNATIONAL, November 1994, available in LEXIS, News Group File (with prediction by International Insurance Council that the U.S.-Japan Framework Agreement would eliminate secretive administrative guidance, and ensure that Japan’s administrative procedure law will apply immediately to the insurance industry.). Some Japanese scholars are willing to attribute the enactment of the APL primarily to U.S. pressure. See, e.g., Fuke, *supra* note 26, at 37 n.36.

¹³² Boling, *supra* note 119, at 4.

¹³³ Measures by the Government of the United States and the Government of Japan Regarding Insurance, U.S.-Japan, Oct. 11, 1994.

¹³⁴ APEC Competition Policy & Law Database, <http://www.apeccp.org.tw/doc/Korea/Judicial/krjud01.html> (last visited Dec. 15, 2006).

competing visions of administrative law ebb and flow over time, suggesting that convergence to a common, stable end-state is a mirage. Actors with interests in administrative law, whether judges, politicians, or NGOs, are likely to favor procedural rights and judicial review, while also valuing democratic control and the efficiency that results from agencies being able to act quickly and authoritatively. While Northeast Asia's administrative law systems certainly resemble the systems of the West more than they did ten years ago, the West is also changing. In recent decades, the United States has adopted administrative law innovations, such as negotiated rulemaking,¹³⁵ Executive¹³⁶ and Congressional¹³⁷ oversight of agency rules, and cost-benefit and "flexibility" analyses.¹³⁸ One might see this as evidence of U.S. convergence toward the more managed, less legalistic, and less pluralistic regulatory style of the developmental state.¹³⁹ Even the much maligned administrative guidance seems to have its uses in U.S. practice and is hard to stamp out with traditional legal tools.¹⁴⁰ One important U.S. reform proposal sounded Northeast-Asian in calling for the creation of a "small, centralized administrative group, charged with a rationalizing mission, whose members would embark on a career path."¹⁴¹ The group would be characterized by five features: "a specific mission, interagency jurisdiction, political insulation, prestige, and authority."¹⁴² Its authority to arise "in part out of a legal power to impose its decisions . . .," but also "in part thru informal contacts with line agency staffs, out of its perceived knowledge and expertise, out of

¹³⁵ See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, codified at 5 U.S.C. 561 et. seq. (1998). For a critical review, see William Funk, *When Smoke Gets in Your Eyes*, 18 ENV'T L. 55 (1987).

¹³⁶ See Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

¹³⁷ See 5 U.S.C. 801 et. seq. (2006).

¹³⁸ See Regulatory Flexibility Act, 5 U.S.C. 601 et. seq. (2006).

¹³⁹ Stewart, *Administrative Law for the Twenty-First Century*, *supra* note 7, at 448-55 (summarizing current debates on what might be termed "post-pluralist" administrative law reforms in the United States).

¹⁴⁰ See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

¹⁴¹ STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 60-61 (1993).

¹⁴² *Id.* at 61.

‘rationalizing’ successes that indicate effectiveness, and out of the public’s increased confidence that such successes may build.”¹⁴³ Even in America, Justice Breyer believes, “trust in institutions arises not simply as a result of openness in government responses to local interest groups, or priorities emphasized in the press—though these attitudes and actions play an important role—but also from those institutions’ doing a difficult job well.”¹⁴⁴ A more recent proposal by scholars Jody Freeman and Dan Farber calls for a “modular” approach to environmental regulation.¹⁴⁵ As part of this proposal, the enforcement efforts of the relevant agencies would be coordinated, replacing the current situation of “regulatory fracture,” which allows agencies to regulate independently, and at cross purposes.¹⁴⁶

III. CHINA IN THE NORTHEAST ASIAN MIRROR

Against this background of administrative law in Northeast Asia, consider China’s developing system of administrative law. As will be seen, China is creating a system that in many ways mirrors the administrative law of the developmental states, but also contains elements that were only introduced in Northeast Asia more recently.

People often think of China’s Cultural Revolution, ending in the mid-1970s, as standing for the rejection of governance through law, and instead for governance through mass movements, campaigns, and charismatic appeals. It is then common to contrast China’s post-1978 legal reforms to the Cultural Revolution period that immediately preceded them. While that is an understandable approach, when considering administrative law it is important to keep in mind that law has played a central role in Chinese governance for at least two thousand years. In imperial China, law was used to govern the common people,¹⁴⁷ and law was certainly used to govern China’s noted bureaucracy. Scholars of traditional China have long studied the

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 81.

¹⁴⁵ Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005).

¹⁴⁶ *Id.* at 795.

¹⁴⁷ See, e.g., Edward L. Farmer, *Social Order in the Early Ming China*, in *LAW AND THE STATE IN TRADITIONAL EAST ASIA I* (Brian E. McKnight ed., 1987).

elaborate system of internal legal controls within which government officials worked,¹⁴⁸ and historians now believe that law probably played a greater role in private life than was previously thought.¹⁴⁹ Some of China's current administrative law reforms fit very well within the dominant Chinese governance tradition, while others do not, but to the extent that the Cultural Revolution or other episodes during the People's Republic represent an idea of governance without law, they should be seen as departures from the main stream of Chinese history. Now that China has consciously set about developing a modern system of administrative law to at least partially re-legalize state action and state-society relations, what are the components of this system?

A. *Chinese Administrative Law "On the Books"*

A fundamental task for any legal system, but one often taken for granted in countries with effective administrative law, is to establish a hierarchy of legal norms. That is, what are the legal effects of all the law-like statements, written or unwritten, that emanate from the government, and what is the order of precedence among those statements? As in the United States, the "government" of China is actually a massive complex of different institutions, some national, some provincial, and some local. Bodies at all of these levels produce "normative" documents in the form of laws or administrative regulations, but legalized governance requires clear jurisdiction and hierarchical mandates regarding which matters each law-making body may legislate and which laws prevail when there is a conflict. These kinds of questions arise in any legal system, but they have been endemic in China as it transitions from its socialist legal tradition.¹⁵⁰

The Law on Legislation,¹⁵¹ enacted in 2000, was designed to help bring order to this normative chaos, and it appears that the trend is largely

¹⁴⁸ See, e.g., Jonathan Ocko, *I'll Take it All the Way to Beijing: Capital Appeals in the Qing*, 47 J. ASIAN STUD. 291 (1988); HUANG LIU-HUNG, A COMPLETE BOOK CONCERNING HAPPINESS AND BENEVOLENCE (Djang Chu trans. & ed., 1984); THOMAS A. METZGER, THE INTERNAL ORGANIZATION OF THE CH'ING BUREAUCRACY (1973); JOHN R. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA (1972).

¹⁴⁹ See, e.g., PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA (1996).

¹⁵⁰ Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994).

¹⁵¹ Li Fa Fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. (P.R.C.).

positive. In 2001, two State Council regulations concerning the enactment of administrative rules and regulations followed the Law on Legislation,¹⁵² and the government appears serious about establishing a hierarchy to clarify the jurisdictions of the various rulemaking authorities and to standardize the procedures for enacting rules.¹⁵³

Another central concern of administrative governance is the civil service. China recently enacted a national Civil Service Act, which took effect January 2006. At the time the law was being drafted, China had over five million civil servants, and the new Act continues a trend of reforming the system for recruiting, ranking, promoting, and disciplining this group.¹⁵⁴ A key issue for understanding governance in China is the enormous overlap between the Communist Party, with its own internal disciplinary system,¹⁵⁵ and the state bureaucracy.¹⁵⁶ Although the Civil Service Act is very new, it may be evidence of further separation between the civil service and the party, though the likelihood or real importance of this should not be overstated.

Turning now to areas closer to traditional administrative law, China, like

¹⁵² Xingzheng fagui zhiding chengxu tiaoli [Regulations on the Enactment of Admin. Rules and Regulations], available at http://www.law-lib.com/law/law_view.asp?id=16619; Guizhang zhiding chengxu tiaoli [Regulations on the Procedures of Enactment of Regulation], available at http://www.law-lib.com/law/law_view.asp?id=16618.

¹⁵³ Two recent enactments suggesting that this trend will continue are the Xingzheng fagui, difang xing fagui, zizhi tiaoli he danxing tiaoli, jingji tequ fagui beian shencha gongzuo chengxu [Working Procedures for Filing and Reviewing Administrative Rules and Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Special Economic Zone Regulations] (2005), available at <http://legal.people.com.cn/GB/42735/3956345.html>, and the Supervision Law, enacted in 2006, which, among other things, stipulates that standing committees of People's Congresses have the right to abolish inappropriate decisions and directives issued by the government at the same level.

¹⁵⁴ *China Embarks on Civil Service Reforms*, CHINA DAILY, Sept. 23, 2003, http://www.chinadaily.com/en/doc/2003-09/23/content_266501.htm; *New Law to Improve Civil Servant System*, CHINA DAILY, Dec. 18, 2004, http://www.chinadaily.com/en/english/doc/2004-12/18/content_401238.htm. For an overview of China's civil service system, see Ruhai Li, *Reflections on the Developing Civil Service System in China*, 1 CHINESE PUB. ADMIN. REV. 128 (2002).

¹⁵⁵ At the moment the Party is taking measures to bolster the effectiveness of its internal controls. See *CPC Requires Leading Cadres to Report Their Personal Affairs*, PLA DAILY, XINHUA, Aug. 30, 2006, <http://www.china-embassy.org/eng/gyzg/t269442.htm>.

¹⁵⁶ Yasheng Huang, *Administrative Monitoring in China*, 143 CHINA Q. 828 (1995).

Japan and South Korea, has enshrined in its successive constitutions an explicit promise of compensation for injuries incurred as a result of wrongful state action.¹⁵⁷ The guarantee first appeared in the 1954 Constitution in the following formulation: “Those who suffer from damages caused by the tortious act of State organ functionaries are entitled to compensation.”¹⁵⁸ The language was revised slightly in the 1982 Constitution to read, “citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law.”¹⁵⁹ Given China’s commitment to unitary rather than divided political authority, China’s courts were not going to be delegated the task of transforming such potentially explosive provisions into justiciable individual rights in the absence of specific legislation, and no such legislation was enacted until the mid-1980s. It is interesting, nonetheless, that even in 1954, the Chinese leadership was willing to acknowledge that the State, despite representing the institutionalized victory of the proletariat, could, through its functionaries, cause harm to an innocent individual, and that the State should compensate such an individual. This suggests that at some level the P.R.C. leadership has always conceded that a mechanism for compensating citizens injured by wrongful state action is an element of the legal system of a modern nation-state—that administrative law not only furthers the interests of the state in policing the behavior of its lower-level functionaries, but also protects the lawful interests of the citizenry. This concession obviously pales in comparison to the enormous harms that the Chinese State has inflicted upon its citizens over the last five decades, yet it is nonetheless interesting in light of ideological rhetoric that the socialist state, representing the victory of the proletariat, could do no wrong.¹⁶⁰

As the law reform efforts of the 1980s and 1990s proceeded, a series of statutory enactments contained provisions potentially giving life to these constitutional norms. As in the Northeast Asian systems examined above, China’s initial step toward a Civil Code, the 1987 General Principles of the

¹⁵⁷ X. Liu, *The Administrative Compensation System in China*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 81 (Yong Zhang ed., 1999); Y. Zhang, *Government Liability in China*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 49, 52-53 (Yong Zhang ed., 1999).

¹⁵⁸ Xian Fa art. 97 (1954) (P.R.C.).

¹⁵⁹ Xian Fa art. 41 (1982) (P.R.C.), *translated in* CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA, Foreign Language Press (1954).

¹⁶⁰ For further discussion of this point, see Zhang, *supra* note 157, at 51-54.

Civil Law,¹⁶¹ provides a fundamental civil law basis for State liability. Article 121 of the General Principles provides, "If a state organ or its personnel, while executing its duties, encroaches upon the lawful interests of a citizen or legal person and causes damage, it shall bear civil liability."¹⁶² As litigation becomes more common in China, the relationship between state liability under the Civil Code and the more specific administrative law statutes discussed below will become increasingly clear.

In 1989, China took another step toward formal conformity with its Northeast Asian neighbors when it adopted its own Administrative Litigation Law (ALL).¹⁶³ In addition to creating rights to obtain judicial review of certain administrative actions, discussed below, Articles 67-69 of China's ALL also address state liability. Under the basic statutory scheme, a court reviewing the legality of an administrative action under ALL may find the agency liable for damages arising out of that action, if the action is found to be illegal.¹⁶⁴ The State will be liable to the injured party, but then may claim indemnification from the particular body and under certain circumstances from the specific personnel.¹⁶⁵ Commentary suggests that the ALL will be of very limited use in government compensation cases; as by its terms, it would not apply to many government wrongs.¹⁶⁶ Finally, in 1994, China enacted the State Compensation Act.¹⁶⁷ The Compensation Act has been criticized for the inadequacy of the amounts awarded to injured parties and the complexity of

¹⁶¹ For a historical overview of the General Principles, see Tong Rou, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, 52 LAW & CONTEMP. PROBS. 151 (1989). The same issue contains several articles on the General Principles. See also William C. Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China*, 28 HARV. INT'L. L.J. 309 (1987).

¹⁶² General Principles of the Civil Law, Art. 121 (P.R.C.).

¹⁶³ Xingzheng Susong Fa [Administrative Litigation Law] (promulgated Apr. 4, 1989) (P.R.C.).

¹⁶⁴ Liu, *supra* note 157, at 82.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Guojia Peichang Fa [State Compensation Act] (adopted 1995) (P.R.C.). See generally COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA *supra* note 34; Liu, *supra* note 157; Jiang Bixin, *Of China's Present State Compensation System*, 1 CHINA LAW 80 (1995). For an English translation of the State Compensation Law see Kamino, *supra* note 34, at 229-37.

its procedure, and it is now under reform.

China added a third familiar element with the 1999 enactment of the Administrative Review Law (ARL).¹⁶⁸ The ARL, enacted by the National People's Congress to replace an existing State Council regulation,¹⁶⁹ governs intra-agency hierarchical review of administrative actions affecting citizens, again paralleling statutes of China's Northeast-Asian neighbors. For some time, individual statutes and regulations provided for internal agency review, like administrative litigation, so the 1991 regulation and the 1999 ARL reflect efforts to standardize and bring order to a set of practices that were already part of the legal landscape.¹⁷⁰ As suggested in the White Paper on Labor and Social Security, administrative review is envisioned as functioning in tandem with judicial review under the ALL.

China's 1989 Administrative Litigation Law, discussed above in connection with state compensation law, adds another element of developmental-state administrative law—administrative litigation. Like similar statutes in Japan, South Korea, and Taiwan, the ALL creates a unified system of private causes of action to challenge government action. China had been experimenting with administrative litigation since the early 1980s, creating private causes of action in many particular statutes and regulations,¹⁷¹ but the ALL constituted a major step toward unifying and standardizing administrative litigation. Compared to the limited attention Northeast Asian administrative law received during its formative decades, this statute has received a remarkable amount of attention.¹⁷²

¹⁶⁸ Xingzheng Fuyi Fa [Administrative Review Law] (adopted 1999) (P.R.C.).

¹⁶⁹ The ARL replaced the State Council's Administrative Reconsideration Regulation Xingzheng Fuyi Tiaoli [State Council Regulation] (promulgated 1990, adopted Jan. 1, 1991) (P.R.C.).

¹⁷⁰ For a thorough overview of administrative review in P.R.C. law prior to the ARL, see Su Jian, *Immediately Enact and Promulgate Regulations on Administrative Reconsideration*, 24(3) CHINESE L. & GOV'T 78 (1991).

¹⁷¹ Draft Administrative Litigation Law Submitted to NPC, XINHUA, Mar. 28, 1999, *available at* LEXIS BBCSWB, FE/0421/C1/1.

¹⁷² The foreign language literature specifically addressing the ALL is large and growing. *See generally* O'Brien & Li, *supra* note 5; Hung, *supra* note 5; Pei, *supra* note 5; Songnian Ying, *Administrative Litigation System in China*, in *COMPARATIVE STUDIES ON THE JUDICIAL REVIEW SYSTEM IN EAST AND SOUTHEAST ASIA* 45 (Yong Zhang ed., 1997); Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 270 (1994); Song Bing, *Assessing China's System of*

In some respects, at least, the ALL must count as a very important statute. The statute is designed to harness the energy of private litigants to help police the behavior of lower-level state actors. In establishing this mechanism, China's leadership consciously opened the doors to the use of law and the courts to check state action and to a society in which the legality of state action will increasingly be a measure of its legitimacy.¹⁷³ For example, the State Council's 2002 White Paper on Labor and Social Security in China emphasizes that a person whose rights have been violated by labor or social security authorities may file suit under the ALL or request internal agency review.¹⁷⁴ Chinese society responded by actively bringing complaints under the ALL, and not surprisingly, given China's political history, this drew a good deal of interest and commentary. Now, however, as empirical evidence has mounted, numerous criticisms of the ALL have arisen, which often mirror complaints made about administrative litigation in the developmental states. For example, a major criticism of the ALL has been that it has been interpreted to apply to only a narrow range of "concrete administrative acts," which leaves a large number of government actions beyond the scope of the law.

A fourth administrative law statute that has garnered a good deal of attention in China is the Administrative Penalty Law (APL).¹⁷⁵ The purpose

Judicial Review of Administrative Actions, 8 CHINA L. REP. 1 (1994); Hon S. Chan, *Judicial Review and Control over Administrative Discretion in the People's Republic of China*, 18 REV. OF CENT. & E. EUR. L. 135 (1992); Jyh-pin Fa & Shao-chuan Leng, *Judicial Review of Administration in the People's Republic of China*, 23 CASE W. RES. J. INT'L L. 447 (1991); Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989); Robert Heuser, *Das Verwaltungsprozessgesetz der Volksrepublik China*, 80(4) VERWALTUNGS-ARCHIV 437 (1989). The 1991 volume of CHINESE LAW AND GOVERNMENT, devoted entirely to administrative law, includes several useful articles on the ALL. 24(3) CHINESE L. & GOV'T (1991).

¹⁷³ In advance of the ALL taking effect, the State Council issued a circular advising that the effect of allowing private suits via the ALL would be to place administrative activities under greater judicial supervision, thereby setting higher standards for administrative activities. See *Circular on Implementation of Administrative Procedure Law*, ZHONGGUO XINWEN SHE, Jan. 15, 1990, available at LEXIS BCSWB, FE/0666/B2/1.

¹⁷⁴ See *White Paper on Labor and Social Security in China*, XINHUA (Apr. 29, 2002), <http://www.china.org.cn/e-white/20020429/index.htm>. ("When a person concerned thinks that a labor and social security administration department has violated his or her legitimate rights in the course of supervision and execution of the laws, he or she may initiate an administrative review or bring an administrative suit.")

¹⁷⁵ Xingzheng Chufa Fa [Administrative Penalty Law] (1996) (P.R.C.). See generally Dingjian Cai, *Introduction to the Administrative Penalty Law of China*, 10 COLUM. J. ASIAN L. 259 (1996).

of the APL is to bring order to the imposition of fines and other punitive measures by government organs,¹⁷⁶ such as measures which may be imposed on employers by China's labor and social security authorities.¹⁷⁷ The fact that this statute has drawn so much attention in China, while the issues it addresses drew much less attention in China's Northeast-Asian neighbors, demonstrates the distance China would have to travel to achieve even the ordered legality achieved by the Northeast-Asian developmental states. The use of public authority to impose unauthorized fines and other punishments has been one of the major forms of corruption in China for some time,¹⁷⁸ which differs from the more typical payment of a bribe in order to obtain a favorable governance decision. This represents local government organs appropriating authority for themselves and using it to fill either local public coffers or the pockets of their members, which undermines the authority and legitimacy of the national government. The APL also provides basic procedural rights to have a hearing and to contest charges when administrative agencies impose punishments. In addition, as in the Northeast-Asian developmental states, licensing decisions are very important in China's regulated economic environment, and China has recently moved to regularize and reform practices in the area. The Administrative Licensing Act, enacted in 2003, provides a general framework to govern administrative licensing decisions.

Finally, if one considers China's system of administrative law functionally as encompassing the various legal mechanisms through which citizens can challenge executive action, then one must also include China's petition, or "letters and visits" system, the functions of which are somewhat analogous to those of administrative review and administrative litigation.¹⁷⁹

¹⁷⁶ Cai, *supra* note 175, at 259; *Government Drafts Law to Regulate Administrative Irregularities*, XINHUA, Oct. 24, 1995, available at LEXIS BCSWB, EE/D2443/G (asserting that the purpose of law is to "curb rampant illegal fines and other disorderly administrative penalties"). China's State Council has subsequently promulgated a series of regulations to implement the statute, and to bring administrative charges, fees, and fines under central control. See, e.g., *Top Ruling Body Issues Rules Governing Fees, Fines*, XINHUA, Feb. 17, 2000, available at LEXIS BCSWB, FE/D3767/G.

¹⁷⁷ See *White Paper on Labor and Social Security in China*, *supra* note 174.

¹⁷⁸ See NPC Plenum "Sees" Draft Law on Administrative Punishment, XINHUA, Mar. 14, 1996, available at LEXIS News Group File ("[F]or lack of a law regulating these practices [penalties imposed by administrative bodies] the rampant illegal fines and other disorderly penalties meted out by some localities and government departments have culminated in public grievance.").

¹⁷⁹ For an overview of the "letters and visits" system, see Carl F. Minzner, *Xinfa*: An

The petition system allows citizens to present their complaints to specially designated government offices, bypassing the bureaucracy that allegedly harmed them, as well as the courts and judicial review. This system has analogues in Chinese history and was established early in the People's Republic. The number of such petitions has been rising rapidly in recent years, straining the system. Leaders are now debating and reforming the system.¹⁸⁰

Despite China's accomplishments in establishing a system of administrative law, even the formal system that has been created so far is arguably incomplete in several important respects. There is not yet a statute equivalent to the American Administrative Procedure Act, putting in place minimum procedural requirements applicable to administrative agencies across the board. The Administrative Litigation Act is sometimes incorrectly translated as "Administrative Procedure Act;" however, this is seriously misleading. Like its counterparts in Northeast Asia, China's Administrative Litigation Act creates a cause of action allowing judicial review, but it does not itself require much in the way of procedures. The Administrative Licensing Act and the Administrative Punishments Act help provide uniformity with respect to those particular categories of administrative action, but government agencies take many actions affecting private citizens that fall outside the scope of those statutes. In particular, agencies in China have widespread rulemaking authority, and while there are some procedural regulations in place, there is as of yet no basic law on the procedures they must follow in rulemaking. Progress is being made in this direction, however, as moves are underway to amend the Administrative Litigation Law, to allow challenges to administrative rules, and to enact an Administrative Procedure Act, which would mandate procedures in rulemakings.¹⁸¹

If we pursue a comparison with the American Administrative Procedure Act (U.S. APA), we see two additional gaps in the formal structure China has created. The first is in the area of public participation in the administrative

Alternative to Formal Chinese Legal Institutions, 42 STAN. J. INT'L L. 103 (2006). See also Huang, *supra* note 156 (discussing "letters and visits" system as monitoring mechanism); Kevin J. O'Brien & Lianjiang Li, *The Politics of Lodging Complaints in Rural China*, 143 CHINA Q. 756 (1995).

¹⁸⁰ Ting Shi, *Petition System Reform Due After Party Plenum*, SOUTH CHINA MORNING POST, Oct. 6, 2006, at 4. See also, Li Li, *Life in a Struggle*, BEIJING REVIEW, Nov. 10, 2005, at 20-25 (describing the petition system, and interviewing legal scholar Weifang He, an outspoken critic).

¹⁸¹ Work is now underway within the National People's Congress on an administrative procedure law. See People's Daily Web, Feb. 3, 2006, <http://politics.people.com.cn/GB/1026/4072679.html>.

rulemaking process, which has been the primary innovation of the U.S. APA. For some time, China has been experimenting with public hearings in the context of certain regulatory decisions.¹⁸² For example, the Law on Legislation¹⁸³ provides for the use of hearings in the process of administrative rulemaking,¹⁸⁴ and the 1996 Administrative Penalty Law also provides that those subject to administrative punishment receive a hearing.¹⁸⁵ Statutory recognition of public hearings is being accompanied by the use of hearings in practice, a sign in itself that China is changing. In Hunan Province, for example, the provincial legislative affairs office and the provincial authority in charge of industry and commerce held a hearing prior to enacting a regulation relevant to business.¹⁸⁶ Under the 1997 Price Law and its implementing regulations, China's State Development Planning Commission is to hold public hearings when setting certain prices, such as prices for train tickets.¹⁸⁷ While these developments suggest that public participation is gaining ground in Chinese administrative law, this is still a long way from saying that members of the public have a right to meaningful participation in Chinese regulatory processes.

A second gap exists with respect to citizen access to government-held information, which is not now facilitated by an information disclosure law along the lines of the Freedom of Information Act.¹⁸⁸ Without access to government-held information, it is hard to say that citizens can really use the law to police government activities. China is experimenting with a loosening of restrictions on information and publicity, with information disclosure

¹⁸² *Public Hearings Required on New State Codes*, CHINA DAILY, Nov. 28, 2001, <http://www.china.org.cn/english/2002/Jan/24848.htm>.

¹⁸³ Li fa [Legislation Law] (adopted by the 3rd Session of the Nat'l People's Cong., Mar. 15, 2000) (P.R.C.), translated in http://www.novexc.com/legislat_law_00.html.

¹⁸⁴ *Id.* at art. 58.

¹⁸⁵ Dingjian Cai, *supra* note 175, at 261.

¹⁸⁶ *Henan Holds First Public Legislative Hearing on Business Law*, HENAN RIBAO, Mar. 1, 2001, available at LEXIS BBWSW file, FE/D4108/G.

¹⁸⁷ *Landmark Hearing Set in Beijing on Rail Ticket Prices*, CHINA DAILY, Jan. 7, 2002, <http://www.china.org.cn/english/2002/Jan/24848.htm>.

¹⁸⁸ An information disclosure regulation is now under consideration. See People's Daily Web, Sept. 21, 2005, <http://opinion.people.com.cn/GB/1034/3714780.html>.

systems being created at the provincial level,¹⁸⁹ and with public hearings being held prior to certain types of regulatory decisions. This may have gone furthest with respect to environmental decisions, where international norms favor extensive interaction with affected citizens.¹⁹⁰ Finally, in the United States, the due process protections of the Constitution place important constraints on the behavior of government agencies in their dealings with individuals. In China, the Constitution plays no comparable role.

B. China's Administrative Law in Action

When it comes to evaluating the impact of China's administrative law reforms, one should recognize that what has been accomplished so far has been very important. Chinese citizens, the most important audience for and consumers of these reforms, seem to approve of the overall trend towards legalized governance. One gets the impression, however, that Chinese citizens wish reform would come sooner, be more complete, and live up to its own claims. For their part, foreign investors clearly find China's administrative law regime sufficiently established to justify their investments, even if they constantly call for improvement. That said, there are still major caveats that must apply.

The most obvious caveat is that the new formal structure does not function nearly as well as it should, even if one does not consider the gaps in its coverage. For example, one major difficulty, at least from an American perspective, is that Chinese judges faced with a conflict between legal norms do not have the authority to declare either norm invalid. This is more than a matter of not allowing Chinese judges the power of constitutional review; this restraint applies even to situations in which there are no constitutional overtones. To decide a particular case, judges may have to decide which of two conflicting legal norms takes precedence over the other, but it appears that they are not authorized to do anything more than apply the proper norm and dispose of the case. This may suffice in the context of a single case, but it does not solve the underlying problem or provide clarity and predictability for the future. Recently, regulations have been enacted under the Legislation Act which designate a body within the National People's Congress to accept complaints that legal norms are in conflict with each other or with the Constitution. This is a very recent development, and it will be interesting to

¹⁸⁹ Horsley, *supra* note 10.

¹⁹⁰ Ruoying Chen, *supra* note 10.

see how it actually functions.

Furthermore, the Administrative Litigation Act (ALA) has been interpreted quite narrowly to allow challenges only to specific types of administrative action but not to administrative rules. As noted above, this problem may be addressed through amendments to the ALA. Notably, however, the ALA does not apply to the Communist Party.¹⁹¹ This would make sense if the CCP were simply a political party in the usual sense, but the CCP is no such thing; rather, it is intertwined with government organs at all levels. It is reported that local government officials have figured out that they can avoid being sued under the ALA if they make it appear that an action was taken by the Party instead of by the government.¹⁹² There is also a record of government bodies simply ignoring decisions of the courts, especially at the local level.¹⁹³ Courts in China have yet to establish the kind of authority over other government bodies that will be necessary for an effective administrative law system. If the courts do not have the institutional authority to ensure that the executive arms of government will comply with their decisions, there can be no administrative law, properly speaking.

The administrative law of the Northeast Asian developmental states depended upon judiciaries' being unwilling or unable to take the lead in expanding the realm of administrative law, and as presently constituted, the Chinese judiciary is even less inclined to apply expansive interpretations of administrative law doctrines than were its Northeast Asian counterparts. Even in their most authoritarian decades, the governments of South Korea and Taiwan paid lip service to the principles of separation of powers, checks and balances, and judicial independence. Interfering with the judiciary entailed potential costs, as seen when a group of South Korean judges publicly resigned in the 1970s in protest against the Park regime. The judiciaries themselves were staffed by judges who were elite university graduates, well trained in Western law, and, who, in some cases, enjoyed social status derived either from position or from family background. As a

¹⁹¹ O'Brien & Li, *supra* note 5, at 35.

¹⁹² *Id.*

¹⁹³ *Id.* On the institutional weakness of China's judiciary, see Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996); Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35 (1999).

result of the debates that took place concerning administrative law and the courageous acts of defiance,¹⁹⁴ one sees that in order to prevent administrative law from moving toward a more activist model, the Northeast-Asian developmental-state regimes contended with judiciaries that were not powerless. To the extent the judiciary in Japan was controlled by the other branches of government, such control took the form of subtle sanctions applied via the judicial bureaucracy's control of a judge's career path. Controls were less subtle in South Korea and Taiwan, but efforts were certainly taken to maintain the forms of a modern judiciary.

In China, the authoritarian Party-State apparatus restricts the judiciary by actively resisting the extension of judicial review beyond the narrow confines of the ALL. Not trained in Western liberal jurisprudence, there is no reason to expect the typical Chinese judge to experience the "cognitive dissonance" that one would hope a Western-trained judge would experience working in the judiciary of an authoritarian state. The judges themselves, moreover, do not appear to possess the level of independent social capital, whether in terms of education or family background, that judges enjoyed in other parts of Northeast Asia. China's judges, in fact, appear to gain much of their social capital from their association with the Communist Party and the ruling State apparatus, rendering it doubly unlikely that they will lead a challenge against executive dominance. Given this judicial constellation, it should surprise no one that China's judiciary has thus far remained limited as an independent force for more interventionist administrative law.

That said, cases are being brought in China which seek to interject the judiciary directly into the regulatory process; for example, legal challenges to administrative punishments meted out by China's Securities Regulatory Commission (CSRC) in response to corruption in China's fledgling financial industry.¹⁹⁵ Based on the restrained role China's judiciary has played so far, it would be surprising if such cases usher in an era of active judicial scrutiny of CSRC regulatory activities. Moreover, it is not obvious that the Chinese courts have a particularly valuable role to play in this area unless one believes that they are less corruptible and more expert than the CSRC, which cannot be assumed.

¹⁹⁴ DAE-KYU YOON, *supra* note 74, at 143-47.

¹⁹⁵ See, e.g., Bei Hu, *Brokerage Lawsuit Against Watchdog Accepted*, SOUTH CHINA MORNING POST, May 10, 2002.

Given the nature of the Chinese government, one should ask why the leadership is encouraging the development of administrative law and the implicit legalization of State-society relations. One common suggestion is that the leadership wanted government applied through law after the Cultural Revolution experiment, which saw government applied through mass movements and charismatic authority. According to this theory, legalized governance is seen as more efficient and effective, and also as a way to legitimize exercises of state power without democratization. Another possibility is that the leadership believes that a market economy requires a certain kind of legal system, so constructing a more Western-style legal system follows naturally from the policy choice to move toward a market economy. Finally, it is often pointed out that WTO membership, the leadership's desire to attract foreign investment, and international economic integration generally require a more legalized governance system. All of the above are likely important contributing factors, and there is no need here to claim that any one of them alone could adequately explain what we observe. In other words, they are all likely necessary, but not sufficient, to explain the path of China's recent administrative law reforms. In keeping with the spirit of this paper, the following passages draw on the wider Northeast Asian experience to offer a comparative discussion of the motivating forces behind China's administrative law reforms.

Looking first at the instrumental aims of those who control the direction and pace of administrative law in China, one can assume that preservation of their own positions is a preeminent concern. The important question is how those in control seek to maintain their positions. It now seems quite clear that the aims of China's leadership largely overlap with the aims of the Northeast Asian developmental state, which helped shape Northeast Asian administrative law. Rapid economic growth, with a major role for private enterprise and market mechanisms, is perhaps *the* prime objective. Economic growth depends upon foreign investment and extensive integration into the global trading system. Administrative law of the developmental state variety is important to this goal, as it provides a relatively stable and predictable business environment. In this environment, business interests have some assurance that dealings with the State will encounter a relatively organized, disciplined, rule-bound bureaucracy. In addition, if presented with a truly aberrant decision by a bureaucratic entity, a credible threat of recourse to the judicial system is available to business interests.

Moreover, the Chinese leadership not only desires growth, but there is much evidence that it prefers to pursue that growth via policies reflecting the developmental state perspective. Rather than pursuing development based on unmediated integration into global trade, investment, and financial flows, it has instead established mechanisms of the developmental state with respect to trade, finance, and economic development and has attempted to

use these mechanisms to channel foreign investment and trade.¹⁹⁶ The leadership has attempted to guide foreign direct investment into export-oriented manufacturing, preserving the local market for domestic producers. Export-oriented manufacturing limits the options of domestic consumers, yet maximizes export earnings. China has maintained foreign exchange controls and has created a bank-centered financial system dominated by State-owned banks.¹⁹⁷ It has limited the importance of the local equity markets as a source of finance and limited the ability of foreigners to invest in these local equity markets.

The leadership likewise controls the ability of Chinese firms to bypass the national financial system by borrowing directly from abroad or by accessing foreign equity markets. They have also attempted to influence the terms on which Chinese companies license foreign technology by screening technology import contracts to assist Chinese licensees in obtaining the highest level of technology at the lowest cost, both in terms of royalty obligations and in terms of restrictions on the licensees' use of the technology.¹⁹⁸ In terms of implementation, China has applied these control structures much more leniently than the developmental states, particularly South Korea, which is important for understanding Chinese economic policy. But China's relative openness to foreign trade, finance, and investment has been largely the result of discretionary policy decisions taken during implementation of the developmentalist regime. For purposes of administrative law, discretionary policy decisions are not the same as adopting the legal structures of a free-market economy and a correspondingly constrained regulatory apparatus.

As in the Northeast Asian developmental states, the Chinese system vests its industrial policy bureaucrats with a great deal of discretion. Moreover, as in the developmental states, China's leadership has an interest in seeing that system administered in a rational way, in line with the objectives for which it was designed. While much of this could be accomplished through the use of internal bureaucratic rules and policy

¹⁹⁶ Greg Linden, *China Standard Time: A Study in Strategic Industrial Policy*, 6(3) BUS. & POL. 1, 1 n.2 (2004). For an overview of the relevant legal structures, see JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES (2004)(especially Chapter 4: FIE Organizational Structure and Approval Procedures, and Chapter 5: Foreign Investment Guidelines and Industry-Specific Regulations).

¹⁹⁷ YASHENG HUANG, SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA 117-18 (2003).

¹⁹⁸ Linden, *supra* note 196, at 1-5.

directives, the leadership has an interest in administrative law as a mechanism by which private interest can be harnessed to help police the lower levels of the implementing bureaucracies. This is entirely consistent with administrative law in the developmental state, and is also consistent with the framework that China has put in place. It seems the leadership has no interest, however, in seeing the Chinese judiciary introduced into this mix as an alternative source of policy direction. This could occur if the Chinese courts were given broad authority to review administrative rulemaking, or to review substantive decisions in areas where the judiciary has no expertise, such as decisions reviewing foreign investment proposals, technology import contacts, or bank lending decisions. Moreover, as the history of developmental-state capitalism demonstrates, one cannot assume that private interests will actively demand that administrative law be invigorated to provide a regulatory rule of law, or a thoroughgoing legalization of government-business relations.

In Korea and Taiwan, it was not until after democratization that business interests finally seemed interested in a legalization of state-private relations, and even in democratic Japan it seems that such interest was lacking until the 1980s. China has actively recruited members of its new capitalist economic elite into the Communist Party for some time,¹⁹⁹ suggesting an intention to build something like the authoritarian corporatist political economy that functioned in Taiwan and South Korea prior to democratization. To the extent this project succeeds, it will at the very least postpone the rise of private economic parties as advocates for expansive administrative law.

In addition, the leadership clearly feels the need to control official corruption, and a more effective administrative-law system will aid in achieving that goal. The alternative normally offered now for controlling corruption, which calls for reigning in the jurisdictional authority of the state in order to eliminate opportunities for “rent seeking,”²⁰⁰ is clearly not a viable solution from the perspective of China’s leadership since it involves removing the strings with which they dominate Chinese society. Far preferable would

¹⁹⁹ See Gilles Guiheux, *The Political “Participation” of Entrepreneurs: Challenge or Opportunity for the Chinese Communist Party?*, 73(1) SOC. RES. 219 (2006). See also Richard McGregor, *Firms Come to the Party in China*, FIN. TIMES (London), July 15, 2006 (observing the “growing convergence of interests between China’s dynamic private sector and its communist rulers”).

²⁰⁰ See John K.M. Ohnesorge, *“RATCH”eting up the Anti-Corruption Drive*, 14 CONN. J. INT’L L. 467 (1999).

be an “internal” solution to corruption, based upon more effective top-down control of a more professionalized, better-trained bureaucracy. Thus, when the Chinese leadership speaks of “promoting law-based administration and enforcing laws strictly,”²⁰¹ it may well be displaying the essence of where it sees administrative law in the broader governance scheme: as an enabler of both central control and state power. In this view, administrative law reforms will help the central government assert its authority in a China which one observer describes as “a decentralized de facto federal state that lacks federal institutions that facilitate central control and coordination such as the federal courts system and regional offices of central government ministries. . . . Many orders and regulations from the central government are ignored from the outset or forgotten after only a few months.”²⁰²

An additional influence on China’s developing administrative law is the international economic order, in particular the World Trade Organization (WTO) system. According to one observer, “China’s WTO transition is likely to establish uniform, transparent and efficient rules that govern the relationships among workers, enterprises, central governments and local governments. . . . Reforms that China must undertake to align its system with that of the WTO will turn China into a normal market economy.”²⁰³ Likewise, a pair of European observers go so far as to claim that “the transformation of the legal and judicial system in the economic area, as required by the WTO framework, will influence and change the entire Chinese legal system. Only the change from the ‘rule of socialism’ to the ‘rule of law’ can provide a successful membership in the WTO.”²⁰⁴

While it is easy to dismiss such claims for the transformative power of WTO accession, China does face outside pressures from the international economic system that are quite different from those faced by the Northeast Asian developmental states. Japan and South Korea were brought in to the Bretton Woods system, including the General Agreement on Tariffs and Trade (GATT), when the United States was much more confident of its

²⁰¹ *White Paper on Labor and Social Security in China*, *supra* note 174.

²⁰² David Cowhig, Statement to Congressional Executive Commission on China (Apr. 15, 2002), <http://www.cecc.gov/pages/roundtables/041502/cowhig.php3>.

²⁰³ Andy Xie, *Three Pillars for a Safe Transition*, *CAI JING MAG.*, Mar. 20, 2002.

²⁰⁴ Meinhard Hilf & Christoph T. Feddersen, *GATTing China into the WTO—A European Perspective*, in *CHINA IN THE WORLD TRADING SYSTEM* 87, 115 (Frederick M. Abbott ed., 1998).

economic power than it is today, and when it was interested in supporting those important Cold War allies. In addition, neo-classical economics, with its hostility to government intervention, did not dominate economic thinking at the time, especially not in the sub-field of development economics. However, in comparison with many other developing countries of that era, the Northeast Asian economies were market-oriented and relatively open to trade and investment. China's current situation is quite different, as the international economic climate seems much less sympathetic to the notion that China or other developing countries should have space to experiment with policy measures that violate free-trade orthodoxy. This is certainly due, in part, to the fact that the balance of economic power in the United States has shifted toward the financial service industries, and that this shift is reflected in the government's trade agenda. When U.S. trade policy was dominated by the interests of U.S. manufacturers, the outward focus was on either opening foreign markets to U.S. exports, or on forcing foreign governments to allow U.S. manufacturing subsidiaries into their countries. The influence of the U.S. insurance industry on Japan's Administrative Procedure Law has been noted, and the insurance and banking industries are at the forefront of foreign efforts to police China's compliance with its WTO obligations.²⁰⁵

Under the general rubric of transparency, the WTO regime seeks to impose procedural standards on national regulatory regimes to the extent that these affect trade, as a result of which the domestic administrative law systems of WTO members are now a "key feature" of the WTO agenda.²⁰⁶ Indeed, some make the argument that WTO developments, together with possibilities under the North American Free Trade Agreement (NAFTA) for challenging decisions made by the domestic trade regulatory bodies of NAFTA Member States, may herald the development of an "international administrative law."²⁰⁷ The limited administrative law of the developmental states is not likely to satisfy the proponents of this new order, which is

²⁰⁵ See, e.g., Lester Ross, *Why China's Regulations are Stalling Foreign Banks*, 21(4) INT'L FIN. L. REV. 55 (Apr. 2002). See also Kenneth W. Dam, Deputy Treasury Secretary, *Transforming China's Financial Sector into Efficient Engine of Growth*, Address to University Students, Beijing, China (May 14, 2002), <http://www.ustreas.gov/press/releases/po3102.htm> (announcing the Bush Administration's "engines of growth" policy targeting foreign financial sectors).

²⁰⁶ Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOR. AFF. 1, 11 (1998).

²⁰⁷ Gilbert R. Winham, *NAFTA Chapter 19 and the Development of International Administrative Law: Applications in Antidumping and Competition Law*, 32(1) J. WORLD TRADE 65 (1998).

putting pressure on China to move ahead with its administrative law project. Furthermore, China is being scrutinized against the backdrop of the East Asian developmental state, which intensifies scrutiny of both its economic policies and its administrative law. This is clear from the words of former United States Trade Representative Robert Zoellick with respect to China's preferential tariff treatment for imports used in production versus imports destined for the Chinese domestic market. Zoellick warned, "[i]f China tries to subvert the free trade principles of the WTO by twisting them into elements of a *bureaucratic industrial policy*, it will both fail to derive the advantages of those principles and undercut global WTO objectives."²⁰⁸ China already had an industrial policy that mirrored many elements of developmental-state industrial policy, so the question was how that would be affected by WTO accession. Ambassador Zoellick's remarks convey a sense that the United States was wronged by the industrial policies of China's Northeast Asian neighbors, and a hope that the WTO system can prevent China from doing the same thing.²⁰⁹ Some in Washington remain quite concerned that Chinese industrial policy may shape technology transfers, in particular, in ways that benefit China at the expense of U.S. industry. In the words of a 1999 study commissioned by the U.S. Commerce Department, "rather than ease government controls and allow technology imports to be more responsive to market demand, the Chinese government seems to have decided to try to manage technology imports by formulating more specific technology import and investment policies to assist domestic Chinese industry."²¹⁰ How strongly China remains committed to such an industrial policy will become clear as the new WTO compliance statutes and regulations are implemented, though the post-WTO accession Regulations on Guiding Foreign Investment employ the same basic administrative screening and approval approach that China has employed since opening to foreign

²⁰⁸ Zoellick Sees Potential U.S. WTO Cases Against China as Last Resort, 20(5) INSIDE U.S. TRADE 33, 34 (Feb. 1, 2002) (emphasis added). See also Dam, *supra* note 205 ("Gone are the days when a national airline or heavy investments in manufacturing are the badges of economic development.").

²⁰⁹ See SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM 35-56 (1997). Canadian trade diplomat and scholar Sylvia Ostry provides a balanced look at the U.S. reaction to Japan's industrial policy, which began gathering real force in the 1970s. *Id.*

²¹⁰ OFFICE OF STRATEGIC INDUSTRIES AND ECONOMIC SECURITY, BUREAU OF EXPORT ADMINISTRATION AND DFI INTERNATIONAL, U.S. COMMERCIAL TECHNOLOGY TRANSFERS TO THE PEOPLE'S REPUBLIC OF CHINA 55 (Jan. 1999).

investment.²¹¹ Germany is reportedly now confronting China over its technology transfer policies,²¹² and if these continue to be implemented in ways that suggest active industrial policy, the pressure will be on other WTO members to decide how vigorously to confront China, either bilaterally or through the WTO,²¹³ with the latter option potentially presenting severe challenges to the WTO itself. One should remember that “the most acrimonious GATT/WTO disputes of the 1980s and early 1990s, reflecting differences in regulatory and legal systems between the United States and Japan,”²¹⁴ and the United States, in particular, may have to decide between a healthy overall relationship with China, and an aggressive stance on China’s industrial policy.

Those who hope WTO accession will bring about a transformation of Chinese administrative law often speak in terms of transparency. Ostry, for example, writes that “[h]owever imprecise the GATT/WTO definition of transparency, the core of the definition goes to the heart of a country’s legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime. Importantly, the current nature of China’s administrative legal infrastructure lacks this trait.”²¹⁵

Transparency is often presented to the world as an antidote for corruption,²¹⁶ while at the same time serving as code among foreign investors for administrative law doctrines that would allow legal challenges to the discretionary decisions involved in administering industrial policy, and to

²¹¹ Zimmerman, *supra* note 196.

²¹² Bertrand Benoit, *Merkel to Grill China on “Forced Transfers”*, FIN. TIMES (London), May 22, 2006.

²¹³ The United States and the European Union are now utilizing WTO reporting requirements to confront China over its subsidies to industrial sectors such as textiles, automobiles, and semiconductors. Daniel Pruzin, *EU Joins U.S. Criticism of China Report For ‘Incomplete’ Domestic Subsidy Data*, 23(42) INT’L TRADE REP. 1535 (Oct. 26, 2006); Daniel Pruzin, *U.S. Slams China’s Notification to WTO of Subsidies, Cites Gaps, Illegal Support*, 23(41) INT’L TRADE REP. 1486 (Oct. 19, 2006).

²¹⁴ OSTRY, *supra* note 209, at 210.

²¹⁵ Ostry, *supra* note 206, at 2.

²¹⁶ For example, the primary activity of the non-governmental organization Transparency International is to highlight government corruption. Transparency International, About Transparency International, <http://www.transparency.org> (last visited Oct. 16, 2006).

generally intervene as a matter of legal right in the regulatory process. For example, less than two weeks after its December 11, 2001 accession to the WTO, China enacted regulations on foreign investment in its domestic insurance industry, an industry included within China's market access commitments under the General Agreement on Trade in Services (GATS).²¹⁷ After surveying the areas covered by the regulations, as well as several areas that remain vague, a commentator from a leading international law firm noted,

Perhaps more disturbing than the incomplete nature of the regulations is that no opportunity to comment was provided before they were enforced, an action that was inconsistent with China's duties of transparency under the WTO. Such opportunity to comment could have helped resolve many of the ambiguities and shortcomings of the resulting regulations.²¹⁸

The writer, echoing what has become something of a mantra in the U.S. business community and the U.S. government with respect to Chinese law,²¹⁹ seems to conflate a policy argument for why China might wish to receive comments on draft regulations with a WTO obligation to engage in something like notice-and-comment rulemaking, based on "transparency" obligations grounded in the WTO. In fact, China resisted a WTO obligation to even publish regulations pre-enforcement, as is clear from the colloquy contained

²¹⁷ STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, REGULATIONS FOR THE ADMINISTRATION OF FOREIGN-INVESTED INSURANCE COMPANIES (issued Dec. 12, 2001, effective Feb. 1, 2002). China's WTO accession was December 11, 2001, one day before the regulations were issued.

²¹⁸ Jeffrey Wilson, *Insurance Regime Undermines China's WTO Credentials*, 21(2) INT'L FIN. L. REV. 35, 40 (Feb. 2002).

²¹⁹ See, e.g., Dam, *supra* note 205:

Implementation on these commitments is important. Particularly on the issue of transparency, China should continue to apply new, transparent methods of creating and applying regulations. Regulators should seek out the insights of the private sector before creating the rules of the game. We use these methods in the United States. The U.S. Federal Reserve, for example, regularly publishes proposed regulations and asks for comments from the private sector in a reasonable period of time.

Id. On global resistance to U.S. demands for notice-and-comment rulemaking, see *U.S. Seeks Transparency Annex for Financial Services Commitments*, INSIDE U.S. TRADE, July 5, 2002, at 1.

in the October 2001 report of the WTO Working Party on China's accession.²²⁰ In response to a comment by the Working Party that some WTO members had pushed China to make regulations available prior to enforcement,²²¹ China responded that it would "to the maximum extent possible . . . make . . . laws, regulations and other measures available before they were implemented or enforced, but in no case later than 90 days after they were implemented or enforced."²²² China finally relaxed this position, pledging in the Protocol on its WTO accession to "make available to WTO Members, upon request, all [relevant] laws, regulations and other measures . . . before such measures are implemented or enforced, except in emergency situations,"²²³ to publish enacted norms in a designated journal, and to "provide a reasonable period for comment to the appropriate authorities before such measures are implemented." This is a far cry from creating a U.S.-style right of private parties to intervene in the Chinese rulemaking process, however, which seems to be the goal of many critics.

First, like all such obligations, it runs to WTO member governments, not interested parties generally.²²⁴ Second, the obligation is to make such norms available prior to implementation or enforcement, rather than prior to

²²⁰ World Trade Organization, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (Oct.1, 2001).

²²¹ *Id.* at 68:

Transparency of regulations and other measures, particularly of sub-national authorities, was essential since these authorities often provided the details on how the more general laws, regulations and other measures of the central government would be implemented and often differed among various jurisdictions. . . . [M]embers emphasized the importance of such pre-publication to enhancing secure, predictable trading relations.

Id.

²²² *Id.* at 69-70.

²²³ World Trade Organization, *Protocol on the Accession of China*, Vol. 1, pt. I.2.C.1 (Nov. 10, 2001).

²²⁴ The foreign investor community, and some in China, clearly hope that China's WTO commitments will be directly enforceable, by private parties, in Chinese domestic law, rather than remaining international obligations that have to be enacted into Chinese law by specific legislation. For an explanation of why China is unlikely to accord such effect to WTO norms, see Donald C. Clarke, *Statement Before the U.S.-China Security Review Commission*, Jan. 18, 2002, <http://www.uscc.gov/tescla.htm>.

enactment, which is a prerequisite to the participatory function of notice-and-comment rulemaking. China's leadership doubtless recognizes that making enacted norms available prior to implementation or enforcement makes sense from a regulatory effectiveness perspective,²²⁵ and from a fairness perspective, because it gives affected parties warning and a better opportunity to comply, but by itself does not allow participation in norm creation. Finally, the obligation does not include an obligation to receive public comments on such enacted, yet unenforced, norms, let alone an obligation that received comments carry any weight in evaluating the legality of the enacted norm.

The insurance regulations discussed above were enacted December 22, 2001, but by their terms did not come into force until February 2, 2002. China may have violated its WTO obligation to publish the regulations, once enacted, in a designated journal and by not creating a formal process for accepting comments prior to enforcement. On the other hand, the author of the cited article, and his law firm, clearly had a copy of the enacted regulations prior to February 2, 2002, and could easily have made any objections known to the enacting authority, China's State Council. Given the limited nature of China's WTO obligation in this area, it is not obvious that its violation was substantial, rather than merely technical. To have gotten the new regulations enacted within two weeks after WTO accession might even deserve some praise, but the current international agenda seeks to maintain maximum pressure on China.

Western scrutiny of China's human rights record, which is also more intense than the external scrutiny applied to the Northeast Asian developmental states, presents another possible external force for administrative law reform. Because China lacks a complete legal system and systematically abuses human rights, human rights activists, foreign business interests, and foreign governments can agree on the general project of legal system development, including administrative law development. The Chinese government can therefore improve its international standing by enacting administrative law reforms that render the state more accountable with respect to specific government actions, yet do not present systematic challenges to the political order. For example, in a highly critical report on China's human rights situation, the U.S. State Department singled out the

²²⁵ See, e.g., *White Paper on Labor and Social Security in China*, *supra* note 174. ("[To ensure that labor standards are scientific and rational and that they are implemented smoothly, the government solicits suggestions from trade unions, enterprises, specialists and scholars while formulating, promulgating or adjusting labor standards.]").

State Compensation Law as a bright spot:

The State Compensation Law provides a legal basis for citizens to recover damages for illegal detentions. Although many citizens remain unaware of this law, there is evidence that it is having a growing, if still limited, impact. Throughout the year, the official press published numerous articles to raise public awareness of recent laws meant to enhance the protection of citizens' rights, including the Criminal Procedure Law, the State Compensation Law, the Administrative Procedure Law [sic], and others. Many citizens have used the State Compensation Law during the year to sue for damages.²²⁶

Administrative law reforms can also help the Chinese leadership maintain some level of domestic political legitimacy for policies produced by the country's undemocratic political system. With respect to the experiments with public hearings, for example, the leadership clearly believes that this innovation has value in the battle for political legitimacy. Thus, the director of the Henan legislative affairs office was quoted as saying that "[c]ompared with the past, direct mass participation in the legislative process has increased the transparency of legislation. This shows that our province has made a new breakthrough in improving democracy and the legal system."²²⁷ Exhibiting the characteristic intertwining of domestic and international concerns, the official announcement of the hearing on train ticket prices cited the hearing as proof of China's adherence to the rule of law, the official Xinhua news agency reported the announcement on its English language service,²²⁸ and the Chinese embassy in Washington posted the story on its website.²²⁹ In provisions for public hearings prior to issuing regulations, one can see an attempt by the leadership to use administrative law in the same way that it has used local elections: as a means to enhance its legitimacy

²²⁶ U.S. DEPT. STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 2001 (China), Released by the Bureau of Democracy, Human Rights, and Labor (Mar. 4, 2002).

²²⁷ *Henan Holds First Public Legislative Hearing on Business Law*, *supra* note 186.

²²⁸ *Rule of Law Affirmed Through Price Hearing*, XINHUA, (Jan. 7, 2002), <http://www.china.org.cn/english/24798.htm>.

²²⁹ Embassy of the People's Republic of China in the United States of America, Public Hearing on Ticket Prices on Track, Jan. 7, 2002, <http://www.china-embassy.org/eng/23321.html>.

through institutional innovation that responds, albeit superficially, to public demand for democracy.

The leadership may also believe that it can benefit from distributing responsibility over many areas of social life, while retaining control over those that benefit it. The economic difficulties facing China's State-owned enterprises (SOEs) are one manifestation of this broader issue. Their economic weakness, which parallels the State's failure in governing other areas of social life, undermines faith in public, as opposed to private, market-oriented governance. In this situation the leadership has little to gain from preserving State ownership, except in those industries such as steel or chemicals, those that are directly related to national defense or industrial sovereignty, or in areas crucial to the financial system. Once again, the examples of South Korea and Taiwan are relevant, as in neither society did the existence of a largely private economic structure preclude an authoritarian leadership from preserving its monopoly on political power. The key was to incorporate private interests into the governing elite—the authoritarian corporatist pattern—so that their interests were substantially aligned with those of the leadership. It was that alignment that made it so difficult to answer the question “who governs?” in Japan. But it also made the question somewhat academic if one was hoping for pluralist administrative law, since whoever was governing did not want it.

While the Chinese government is in some ways affirming its commitment to rule through rules, observers of the Chinese legal system in action find that it is failing to fulfill this ideal. Chinese regulators, for example, are said to be prone to “particularistic tendencies . . . to apply law as though it were a policy tool.”²³⁰ Such commentary generally does not present rule versus discretion as a general issue, which exists in all legal systems, but focuses on areas where exercises of discretion by Chinese state actors are seen as problematic. As China has entered the global trading system and the WTO, China's formal rule structure has come to favor foreign economic interests in ways that it did not before. This predisposes foreign investors to argue for rule application rather than discretion, so that the opposite of rule application becomes arbitrariness in much of the foreign commentary. To the extent that the Chinese leadership maintains instrumental aims that contradict the norms of the global trading order, such as aspirations to operate a Northeast Asian-style industrial policy, this “arbitrariness” will only continue.

²³⁰ CORNE, *supra* note 5, at 14.

Continuing the comparison with Northeast Asia's developmental states, the instrumental aims of China's authoritarian political elite seem quite similar to those of authoritarian governments in Taiwan and South Korea. These aims include maintaining power, guiding a growing market economy, and at the same time achieving some legitimacy from a populace that increasingly understands and demands legality in government activities, and increasing popular participation in the creation of law. A lesson one can draw from the study of China's Northeast Asian neighbors, however, is that a changing political culture in an authoritarian society is insufficient to force administrative law beyond the limited legalization of administration promised, though often not delivered, during the developmental-state era. If the Chinese State maintains its current goal of economic growth and industrialization, and can succeed in its current policy of co-opting the emerging business class into the ruling regime, there is no reason to expect Chinese business and commercial interests, one pillar of civil society in any market economy, to push for a legally governed, transparent relationship for which China's current reforms ostensibly aim. Likewise, there is no reason to expect Chinese business to push for the pluralist administrative law that seems to be the current global trend.

If the Chinese State can continue to provide a rising standard of living to the educated urban elite—another pillar of civil society—by providing them with educational opportunities, opportunities to travel, and opportunities to internationalize, there is no reason to expect them to provide a strong demand for pluralist administrative law. In the rest of Northeast Asia, pluralist administrative law was a long-standing goal of progressive public-law scholars and social activists, but it never entered the legislative agenda until there had been either fundamental political change, as in South Korea and Taiwan, or until intense U.S. pressure coincided with deregulation of a highly developed economy and financial system, as in the case of Japan. Only then did the *de jure* pluralization of Northeast Asian administrative law begin, and even now it is unclear whether these statutory initiatives will lead to radically different state-society relations. South Korea and Taiwan did not change until democratization radically altered the universe of those whose instrumental aims mattered directly. Political culture had already changed substantially, with commitments to democratic participation, to a legally protected private sphere, to rule-based government, and to separation of powers. But without democratization, the universe of those whose aims and objectives mattered was limited to a small political elite and their corporatist collaborators in the major private industries. They had no interest in even an arms-length, legalized and transparent relationship, let alone the relationship implied in the pluralist model, where administrative law becomes a battleground upon which nearly any executive branch measure can be contested by a range of actors, and where the judiciary holds the wild card of “law,” with which it can at least temporarily trump the others.

Another important lesson from the Northeast Asian developmental state is that a limited formal package of administrative law, even if enforced only by a highly restrained judiciary and characterized in practice with pervasive informality, is completely compatible with high-speed economic growth, and with admirably wide-spread distribution of the gains from that growth. Neoliberal institutions such as the World Bank will admit this when forced to, as in the East Asian Miracle Report, in contrast to the earlier generations of development economists who actively assisted in creating the relatively insulated and autonomous economic steering organs of the developmental state.

On the other hand, the Chinese leadership will likely wish to control and limit the development of pluralist administrative law, and be able to do so. First, the desire of the leadership to limit change derives from its own lack of domestic political legitimacy. As for the ability of the leadership to limit change, the fact is that China's enormous domestic market and attractiveness as a site for foreign investment give China leverage to counteract and quiet external demands for change. Although some observers believe the Chinese leadership is both willing and able to create a neo-fascist "hard" state in China,²³¹ the central government's lack of control over something as basic as the leveling of fines and punishments by government organs throughout the country suggests that at this point, comparisons with Mussolini's Italy, Nazi Germany, or, closer to home, Park's South Korea,²³² are misplaced. Neither the European fascist states, nor the Northeast Asian developmental states, were plagued by the fundamental disorder still present in Chinese governance. This is exemplified by the discussions surrounding enactment of the Administrative Punishments Law, and by the lack of certain attributes of a monopolistic legal order, such as a clear hierarchy of norms and authority.²³³ Even if the will is present, China's ruling elite appears too fractured by a no-holds-barred pursuit of private gain to unite behind a program of relatively constrained, managed corruption, as

²³¹ Michael A. Ledeen, *Black Shirts in Red China? Beijing Today is More Fascist than Communist*, WALL ST. J., Feb. 23, 2002., at A1.

²³² The Author is indebted to the late James West, scholar of South Korean law, politics and society, for the suggestion that to understand South Korea one should read A. JAMES GREGOR, *ITALIAN FASCISM AND DEVELOPMENT DICTATORSHIP* (1979), a work on Mussolini's Italy.

²³³ Stanley Lubman cites this in arguing that China still lacks a "legal system" in the modern sense. See Lubman, *supra* note 4, at 3. See also Keller, *supra* note 150.

exemplified by South Korea's Park regime.²³⁴ Arguably, China now is better compared to the South Korean government under Syngman Rhee, which was both undemocratic and highly corrupt, and which was forcibly replaced before South Korea's developmental state project began.²³⁵

IV. CONCLUSION

Compared to the present state of administrative law in China, a functioning system of developmental-state administrative law—the framework in place during Northeast Asia's high growth era—would be a substantial improvement. Such a change would also likely satisfy many of the demands of foreign and domestic economic actors, though perhaps not proponents of a new international administrative law, centered in the WTO. It could also raise the level of justice and fairness between Chinese citizens and the State, though that alone would not solve China's human rights problems. And if one believes that a more humane Chinese state could administer an effective developmental-state industrial policy, moving to a more pluralist administrative law order, with the limits that would place on the state's prerogatives vis-à-vis economic actors, might be premature.

As for the the prospects of pluralist administrative law in China, it appears impossible to imagine any of its particular elements being introduced and functioning aggressively absent fundamental political change. Specific doctrinal innovations, such as statutes on open meetings or information disclosure, are being enacted already, or likely will be enacted, to keep pace with what seems to be an evolving global administrative law culture. Even the enactment of a unified administrative procedure statute is likely soon, and such enactment may well include enhanced opportunities for public participation in the administrative rulemaking process. Such doctrinal innovations are necessary to a pluralist administrative law system, but they are not sufficient. Another necessary condition is a judiciary that is not only competent and institutionally independent, but is also organized, as the Japanese case makes clear, in such a way as to allow individual judges real freedom to aggressively enforce administrative law's statutory norms in the face of the executive branch.

²³⁴ Jim Yardley, *The Chinese Go After Corruption, Corruptly*, N. Y. TIMES, Oct. 22, 2006. See also Xiaobo Liu, *China's Robber Barons*, 2 CHINA RTS. FORUM 73, 75 (2003) (reporting that, as of 2003, of those in China with assets of over 10 million yuan, more than ninety percent were from elite Communist Party "clans").

²³⁵ On the political economy of the Rhee regime, see JUNG-EN WOO, *supra* note 22.

The fundamental constraint, then, is that pluralist administrative law would present profound challenges to China's ruling elite. Leaving aside the argument that a developmental state might have good faith reasons for wishing to limit information disclosure rights, participation rights, or judicial review in order to maintain its authority with respect to the private sector, the current Chinese regime appears to believe that its very existence can be challenged by something as simple as the collection and publication of historical information. Furthermore, envisioning a judiciary that could implement a pluralist administrative-law regime implies a separation of powers model, with the judiciary constituting an independent power based on its ability to invoke law to trump the other branches. The political change that would allow Chinese courts to act as an independent source of administrative law, expanding scrutiny of administrative actions to the point of becoming an independent source of policy, and enforcing participatory rights, will not come absent fundamental political change. No government of China today will allow the courts to take on this role of their own accord.