JURISPRUDENTIAL AND CULTURAL PERSPECTIVES
ON THE IMPLEMENTATION OF PROCEDURAL JUSTICE
IN ADMINISTRATIVE LAW
IN THE PEOPLE’S REPUBLIC OF CHINA

By

YANG YIN

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For the research carried out in the Melbourne Law School
(July 1994 – August 1999)
&
For the birth of Murray Hanzhang Yang in Melbourne

I declare that this thesis does not exceed 100,000 words in length,
exclusive of footnotes, tables and bibliographies.

Except where otherwise indicated, the thesis is my own original work.

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(Yang)
(signature)
It has been a rewarding and unforgettable experience for me to carry out my research in the Melbourne Law School from July 1994 to August 1999. I would like to express my sincere thanks to Professor Cheryl Saunders, my supervisor, Ms Kaye Nankervis and other Law Faculty staff for their encouragement and help at every stage of my studies in Melbourne. Special thanks are due to Professor Luo Haocai, Vice-President of the People's Supreme Court of the People's Republic of China, and other Chinese administrative lawyers, whose guidance and minds were indispensable both to my overseas fieldwork in 1995 and 1997, and to the discussion concerning the Chinese administrative procedure system in my thesis. Nevertheless any inadequacies and errors remain my own. I also thank my wife, K. C. Zhang, for her patience and assistance. Finally I need to extend my thanks to the Australian Agency of International Development (AusAID), whose financial support made my research possible.

Yin Yang
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ABSTRACT

Initially, this thesis represents a theoretical argument about the values of procedure in different social settings. In particular, it explores the implications of such concepts as democracy, justice, efficiency and social stability from a procedural perspective. The argument shows that the role of procedure is indispensable to the concepts. Then the thesis specifically examines the role of procedure in ensuring justice and legality in the administrative state through a comparison between the Civil and Anglo-American legal traditions.

In the context of China, the thesis shows that the underdevelopment of fair legal procedures in ancient China relates to the intention of ancient Chinese law, fa, and its tradition of li and ‘non-litigation’ (wu song). From the transformation period of Chinese law, dating back to the middle of the nineteenth century, the concerns about independent procedural laws in China increased. This was evidenced by the corresponding legislation drawing on the ideas and experiences of Western countries in both the late Qing dynasty and Republican China.

In the People’s Republic of China, the modernisation and Westernisation of Chinese law encountered a setback for decades. Legal instrumentalism prevailed. Procedural law was seriously underestimated. From the late 1970s, Chinese lawyers began to rebuild the legal system following a series of economic and ideological changes caused by a social reform. However, law cannot be implemented without the means to do so. Thus the lawyers began to highlight the role of procedural laws in overcoming the impact of legal instrumentalism.

The thesis applies the initial theoretical argument to a discussion of the role of procedure in ensuring administrative legality in the People’s Republic of China in view of Chinese tradition, its modern situations and contemporary experiences. The
focus in this context is the necessity and possibility of enacting a comprehensive administrative procedure Act. Looking at the experiences of Western countries and the existing features of Chinese legislation, it suggests that the best way to provide a procedural framework for administrative activities in China is to selectively and separately codify the procedures. Finally, a conclusion is drawn on the whole.
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ABBREVIATIONS

The AAT ...... The Commonwealth Administrative Appeals Tribunal of Australia
The ALL ...... The Administrative Litigation Law of China of 1989
The APA ...... The Federal Administrative Procedure Act of the United States of 1946
The CCP ...... The Chinese Communist Party
The CPLA ...... The Chinese People’s Liberation Army
The CPPCC ...... The Chinese Political Consultative Conference
The KMT ...... The Chinese Nationalist Party
The NPC ...... The National People’s Congress of the People’s Republic of China
The PRC ...... The People’s Republic of China
CHAPTER ONE

INTRODUCTORY REMARKS ON THE RESEARCH

1. AIMS, HYPOTHESES AND STRUCTURE

In the People’s Republic of China (hereafter the PRC or the People’s Republic), the conventional approach to administrative law, at least until recently, ‘emphasized a positivist effort to structure and empower bureaucratic organs, and to allocate authority among them; the focus was state-centric, emphasizing substantive authority, rather than procedural protections for subjects of that authority’. As the PRC gradually reforms its legal system, administrative procedure increasingly is being regarded as the key to overcoming problems encountered in practice in administrative law, and to ensuring administrative justice. In this respect, the question of the need for a comprehensive administrative procedure law has assumed major importance for Chinese administrative lawyers. This is a huge and in many ways unsettling task which has already led to a series of discussions in recent years. The relevant questions mainly are as follows. What is the role of legal procedure in theory? Does it have an independent value in ensuring the quality and integrity of the administration? If it does, what particular requirements and principles must be taken into account? Should an administrative procedure law be enacted in the PRC? And, if so, how should the law be designed?

As in earlier times, Chinese administrative lawyers have turned to the West for foreign experience. The doctrine of natural justice in English law, the Fifth and Fourteenth

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Amendments to the United States Constitution and the legislation based on them, and the United States Federal Administrative Procedure Act of 1946 represent principles and techniques from the common law. Because these principles and techniques emphasize the significance of fair procedures in ensuring administrative justice, they may be relevant to China. In addition to these, however, the experience of civilian countries is relevant as well, given the civilian influence on Chinese law at earlier periods. The aims of this thesis are to analyze comparatively the approaches taken in different legal traditions or in different countries in the same tradition by reference to the issues that Chinese lawyers are facing in relation to administrative procedure. The central question is the action to be taken in China in the light of this experience. In answering it, the cultural and structural features of the Chinese legal system that might affect the potential applicability of other systems must to be taken into account.

There are a number of hypotheses being generated in this thesis. First, it is assumed that procedure is valuable in different social settings. In particular, the argument shows that procedure has a role to play in securing democracy, justice, efficiency and social stability, each of which now has become prominent in Chinese jurisprudence and domestic politics. Second, and more specifically, the dissertation examines the role of procedure in ensuring justice and legality in the administrative state through a comparison between the Civil and Anglo-American legal traditions. It concludes that procedure is significant for these purposes in both traditions and potentially in China as well.

Thirdly, in applying the results of these analyses to China, the thesis argues that the underdevelopment of fair legal procedures in ancient China was due to ancient Chinese law, fa, and its tradition of li and 'non-litigation' (wu song). It was not until the middle of the nineteenth century, which is the transformation period of Chinese law, that the concerns about independent procedural laws in China emerged. Even so in both Republican China and the PRC, procedural law continued to be underestimated because legal instrumentalism prevailed. When applying the initial hypotheses to a discussion of the role of procedure in ensuring administrative justice in the PRC, a question emerges about the necessity and possibility of enacting a comprehensive administrative procedure
Act in China. In this context, the fourth hypothesis is that looking at the existing features of Chinese tradition and the experiences of its own, the best way to provide a procedural framework for administrative activities in China is to selectively and separately codify the procedures.

The structure of the argument is as follows. Part One constitutes a general introduction to the issues and to Chinese administrative law. In Part Two, I endeavor to set up a persuasive theoretical premise of procedural justice, which is generally applicable in all legal spheres. This is because the search for answers to the issues raised by the thesis has driven me deeper into political and legal philosophy. Although there are some scattered articles in Chinese regarding the general theory of legal procedure, they are far from systematic. Thus the search for theoretical answers is useful to the Chinese debate and to any decisions which might be made in developing new legislation. The first Chapter in this Part deals with basic concepts of legal procedure and its fundamental values, including fair legal treatment, restriction of the abuse of powers, resolution of disputes, realisation of the authority of law, and the achievement of social consensus, efficiency and stability. The second argues for the role of procedure in contributing to different social purposes in different social circumstances. They conclude that procedure has a valuable role to play in each case. If Part Two seems overly ambitious, I would defend it by arguing that the Part is exploratory rather than definitive.

Part Three comprises three chapters. The first explains the role of procedure in achieving administrative legality. On the basis of a comparative approach, the second sets out the systematic options suggested by administrative procedure in both the Anglo-American and civilian European legal traditions. The third Chapter focuses on the doctrine of ‘natural justice’, which represents a fundamental procedural requirement of administrative justice under the common law. The outline of the doctrine included here is intended to assist Chinese administrative lawyers, who are paying increasing attention to it. This Part concludes by suggesting some values and models of the West that might be used in the enactment of an administrative procedure law in the PRC.
The purpose of Part Four is to analyze some features of Chinese legal procedure in ancient times or in other words, before 1840. It includes a discussion of a number of relevant Chinese concepts, such as *fa, li, xing* and *li*, the tradition of non-litigation (*wu song*) and the continuing misconception of a fair legal procedure system in China in modern times. In reliance upon the theories and practical alternatives identified in the earlier parts, the Fifth or the last Part is concerned with the use of a procedure in structuring administrative legality in the PRC in light of its traditions and social conditioning, and of the setbacks and experiences of socialist legal construction. In particular, this Part considers the necessity and feasibility of enacting a comprehensive administrative procedure law in China. It accepts that procedure is of major importance in ensuring administrative justice in the PRC. It concludes, however, that it would be more expedient and equally satisfactory to separately codify the procedures of selected administrative actions rather than to enact a comprehensive or single procedure Act.

2. PREMISES

There is a figure of speech in China, which translated, says: ‘the stones from other hills may be good for working jade’ (*ta shan zhi shi ke yi gong yu*). It means that other people have virtues or good ideas that may assist with one’s own problem. Under the slogan of ‘with Chinese learning as substance (*ti*) and Western learning as function (*yong*)’ or ‘Westernisation (*xi hua*)’, from the mid nineteenth century, Chinese intellectuals drew on modern science, technology, social ideas, and political systems from the West, illustrating the saying. As China’s political and ideological structures collapsed with the Qing dynasty, and as the nation’s fabric became increasingly threadbare in the first part of the twentieth century, the Chinese political elite and the intelligentsia attempted to identify potential foreign models from which they could choose and which they could adapt to their own circumstances.

These developments were interrupted by the founding of the communist regime. The confrontation between capitalism and socialism or communism from the end of World

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War II to the 1980s greatly hindered positive interaction throughout the world. In China, due to the ideological differences between the capitalist and communist spheres, the doctrines of Soviet socialism represented the dominant influence upon every aspect of social ideology and the political system for decades, although it was particularly marked in the 1950s. Nevertheless this did not mean that the course of Chinese learning from the West disappeared forever. From the end of the Cold War in the early 1990s, the ideological confrontation was gradually replaced by pragmatism, not only in China but elsewhere as well. In this circumstance, in place of reliance on the Soviet model, Chinese people gradually began to turn their attention more to Western countries. More recently, however, culture has gathered momentum as a barrier to systematic and ideological transplantation from the West to non-Western countries. This phenomenon is not confined to the PRC: many underdeveloped and developing countries increasingly stress cultural independence and dignity. In place of the infatuation with the West of the early 1990s, its consequence in the PRC has been a new spontaneous conservatism, focusing on the consciousness and independence of Chinese indigenous culture, which has sprung up among Chinese literati in recent years.

Being a set of patterned and enduring ways of acting, the term 'culture' is to a group or nation what personality is to an individual, a disposition that leads people in different nations to respond differently to the same or similar stimuli. In this sense, the credibility and appropriateness of Western law as an influence upon the evolution of Chinese law may be questioned from a cultural perspective today. It could be asked to what extent the spirit and essential features of the Western legal tradition can be accommodated within Chinese culture and be made congruent with the Chinese official doctrine of 'socialism'.

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4 In this vein, S. P. Huntington’s view deserves to be mentioned. He raised his hypothesis that after the Cold War the fundamental source of conflict in the world will not be primarily ideological or economic. Rather, it will be cultural. ‘A cultural identity’ is the most significant criterion by which to group countries. See Samuel P. Huntington, ‘The Clash of Civilizations’, (1993) 72 Foreign Affairs 22, at 22-3.
As the model of a nation's life, culture mirrors the historical experiences and habits of a nation passed from one generation to the next. The distinctions in character between different cultures do not deny that there may be similarities in other respects, however. Compatibility may flow from common national reactions to similar natural and societal problems, even though differences are created by political arguments between developed and underdeveloped countries and nations.

Generalisations about a subject as complex as culture must be made with care. Nevertheless, it cannot be denied that the similarities of the political, social and economic problems of different nations in the world today has placed similar theoretical and systematic demands on different legal traditions. Law can be regarded as a cultural epiphenomenon, because law and the legal system do not stand outside the society which brings them into being. But law is also intrinsically related to many super-cultural features of human beings of either natural or psychological origin. Most obviously, notably, the spirit of law as envisaged by the school of natural law was essentially universal and immutable. The generality of law contained either in the reason of human beings or drawn from comparative studies can be distinguished from its image in international politics or in the anti-monolithic attitude towards cultural entities.

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6 Burnett Tylor informs us that the term 'culture', 'taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society'. See E. B. Tylor, Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art and Custom, (1958), p1; and A. L. Kroeber and C. Kluckholn, Culture: A Critical Review of Concepts and Definitions, (1963), p181.


11 It is generally agreed that in the history of Western legal thought, the Stoic school held a typical view that natural law is based upon reason and of universal application, unchanging and everlasting. The view was dramatically enriched during the period of the classical era of natural law; principally the seventeenth and the eighteenth centuries. See Edgar Bodenheimer, Jurisprudence - the Philosophy and Method of the Law, (1981), pp13-4, pp31-5.
In this context, I am not suggesting that law has nothing to do with culture, politics, class, religion and ideology. In many ways it is closely linked with all of them. Yet, law may also embrace some inherent values independent and distinct from these elements in modern times, such as the principles of ‘everyone has the right to life, liberty and security of person’ and ‘no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’. For values of this kind, no country constitutes an exception. The consideration of cultural entities should not lead us to suppose that transcultural studies and judgements cannot be made. This is a premise of my research. As another premise of my study, I hold that technical processes and general means of dealing with similar social problems, because they are less sensitive, may more readily be transplantable between different nations.

In my view, the most crucial aspects of the Chinese legal tradition were the Confucianisation or moralisation of law, and the absolute political authority of the Emperor. The role of law used to be inferior to both, in a homogeneous and agricultural society with a history of more than two thousand years. In addition to this, previously, the key feature of socialism was public ownership of social property. In reality, of course, the traditional Chinese economic structure and the model of social productivity have been greatly changed since last century. The word ‘socialism’ per se has become a highly flexible concept in the China of today compared to that of two decades ago. Obviously new social conditions need new mechanisms. Arguably, cultural and ideological elements should not be seen any longer as exclusive pretexts against drawing some legal techniques from the West for contributing to Chinese modernisation, particularly when China is opening up, with greater reliance on law. Nevertheless it is necessary to take into

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12 This point is related to the discussion about the independence and autonomy of law. On the one hand, an attempt to keep the law completely insulated from the external social forces and to protect its internal structure is often misguided. On the other, the law should have relatively indigenous rationales and values by which to resist political, ideological or other external pressures in order consistently and generally to safeguard justice. See Judith N. Shklar, *Legalism*, (1964), pp143-4; and E. Bodenheimer, ibid, pp192-4.

13 The Universal Declaration of Human Rights of 1948, Article 3 and Article 5.
account aspects of Chinese culture and ideology in research of this kind, which is one of the major tasks of this thesis.

Some other preliminary remarks are necessary.

Firstly, when using phrases such as ‘Chinese law’, ‘Chinese political system’, ‘the law of the People’s Republic of China’, without specific explanation or attributive words, I refer to the law or system existing in mainland China today. I exclude those of Hong Kong, a special administrative region of the People’s Republic, where the British legal tradition still remains, and that of Tai Wan as well. Both are different from mainland China.

Secondly, although I myself undertook a survey to collect data about Chinese administrative law practice, during the period of my research from July 1994 to the end of 1997, I also made use of empirical results and data acquired in surveys by other people, including The Report on the Investigation and Studies on the Current Situation of the Implementation and the Direction of Chinese Administrative Litigation Law of 1993. In addition, I interviewed reputable Chinese administrative lawyers and academics, both in China and Australia.

Thirdly, the expired month for collecting reference materials is March 1999. Fourthly, unless where otherwise noted, all the translated works in this thesis, from Chinese into English, are my own. Finally, as opposed to the old Wade-Giles system of romanization, Chinese personal and geographic names and terms are spelled in this paper according to the new transliteration system introduced in the People’s Republic of China, called pin yin; e.g. ‘Beijing’ and ‘Deng Xiaoping’. Nevertheless, the cited names of authors, originally spelled in the manner of the Wade-Giles system, are continued.

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14 The Report (Fa Zhi De Li Xiang Yu Xian Shi) was edited by Professor Gong Qiangru at Beijing University and published by the China University of Political Science and Law Press in 1993.
See ‘The List of Interviews’ in Bibliography for detail.
CHAPTER TWO

AN OUTLINE OF CHINESE ADMINISTRATIVE LAW

If administrative law is understood as the conception of protecting individual rights and restraining the abuse of administrative powers, it is a relatively recent phenomenon in the PRC. Conceived more widely, however, it has a longer history. This Chapter of the introduction briefly outlines Chinese administrative law in three sections, dealing respectively with its origin and development, its framework and terminologies and, barriers to be overcome. This will provide an understanding of the necessary background to the discussion of administrative procedure in the PRC in the later parts of the thesis.

1. ORIGIN AND DEVELOPMENT

According to Karl Marx, 'the administration refers to state organisational and managerial acts.¹ This definition of 'the administration', or the executive branch (in Chinese, xing zheng), used to be extremely influential in social studies of the PRC. In this sense, administrative law in China, being all the laws and regulations in respect of the administration, has existed since the communist regime was created. That is to say, if this definition is accepted, the establishment of the PRC in 1949 was also the onset of its administrative law system. As with the legal system in general, the development of administrative law in the PR usually is divided into three stages. These are the primary

In the 1950s, the Chinese theory of administrative law was taken entirely from the Soviet Union\(^3\) rather than from the European-influenced theory of Republican China, the former regime.\(^4\) While there were lawyers and legal officials who had been trained under the former regime (\textit{jiu fa ren yuan}), they were often ignored in the new. Some of them either became jobless or worked in the areas that had nothing to do with their expertise. Such was the case of Fan Yang, a famous administrative lawyer.\(^5\) During this period, a number of administrative law books from the Soviet Union also were translated into Chinese and published. Meanwhile, Soviet ideas of administrative law were taught at some universities.\(^6\) Administrative law and constitutional law were put in the category of

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\(^3\) Here I give emphasis to the socialist characteristics of the Soviet legal system which somewhat differs from the European legal tradition, although the Russian legal system also was influenced by the civilian system before 1917.

\(^4\) In modern times, before the founding of the PRC in 1949, more particularly, prior to World War Two, the Chinese legal system was mainly influenced by European countries. For instance, 'on the whole, the courts (Chinese) are organised on the French mode...; the Civil Code has made use of the Swiss Civil Code of 1907...; and the Code of Civil Procedure follows largely the Austrian procedure'. See \textit{The Law in China as Seen by Roscoe Pound}, edited by Tso Wen-Yen, (1953), p1, pp7-9. Also the development of Chinese administrative law prior to 1949 generally followed the European model. This was technically because, as some Chinese academics contend today, the European legal tradition is superior to the Anglo-American system in terms of conceptualisation and generalisation, and thus more easily to be learnt than the common law counterpart. Nevertheless from the end of World War II to 1949, the Chinese legal system began to be affected to a degree by American law due to the pro-American standpoint of the Chinese Nationalist Party (the KMT) during this period. See Jügen Schwarze, \textit{European Administrative Law}, (1992), p17.

'state law', which was a Russian-created term. Under this influence, administrative law was explained as merely an instrument of state administration and class dictatorship. In other words, the value of administrative law at that time lay in the extent to which it assisted the proletariat to control other classes through state administration.

In practice, most laws and administrative regulations (xing zheng fa gui) that were laid down during the first period were concerned with the constitution of administrative agencies. The 1954 Constitution provided that individuals had the right to complain about unlawful action and dereliction of duty by state organs and their functionaries, and had the right to state compensation. Yet in reality, the constitutional and other statutory rights of citizens prescribed by administrative laws and regulations with respect to the relationship between individuals and the government could not be realised. This is because legal instrumentalism and even in some cases nihilism infused the ideas of the CCP's leadership at that time. The CCP leadership was not necessarily unified in its perspectives on law. But the use of law only for the CCP's policy ends represented the dominant attitude toward the role of law in the 1950s.

In this first phase, therefore, administrative law was limited in the PRC. And in the second phase, it was virtually non-existent: notably during the Cultural Revolution from

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8 The hierarchy of legislation in the PRC at present consists of 'the constitution, basic laws and laws', all of which are enacted by the National People's Congress (the NPC) and its Standing Committee, 'administrative regulations', enacted by the State Council, 'local regulations' (di fang fa gui), enacted by local people's Congresses and governments at provincial level, 'departmental rules' (bu men gui zhang) and 'local rules' (di fang gui zhang), enacted respectively by subordinate departments of the State Council, and local people's Congresses and governments at the level of larger cities.


10 Article 97.

11 See Guo Daohui, Li Buyun et al, supra note 5, pp92-101. Also see Section 2 in Chapter ten.
1968 to 1978.\textsuperscript{12} Administrative law understood in the sense described in the opening of this Chapter,\textsuperscript{13} can hardly be dated back to the 1950s. The theory and practice of administrative law in the PRC in a form which had potential beneficial effects for individuals and for control of abuse of powers only started from the early 1980s. Nevertheless even today there are still some obstacles to the implementation of the rule of law in the administrative state in China.\textsuperscript{14}

Following legal reconstruction in 1978, administrative law in China made a new beginning.\textsuperscript{15} The new focus on socialist legality in the late 1970s was the political precondition for the development of Chinese administrative law. A report of the Chinese Communist Party in 1987 was an indication of the CCP’s new positive attitude towards administrative law. It pointed out:

\begin{quote}
The administration shall be under the law, and constituent laws of administrative agencies should be enhanced; the law in respect of authorised size of administrative agencies, the regulation of the public servant system and administrative litigation law should be enacted as early as possible. Meanwhile the laws relating to media, publication, assembly and demonstration, and administrative supervision system should be enhanced as well.\textsuperscript{16}
\end{quote}

Specifically, the achievements in the administrative law field in the third phase from 1978 to now include the following. Firstly, a large quantity of administrative laws, administrative regulations and departmental rules, promulgated by different state organs and subordinate departments of the State Council before the Fifth National People’s

\textsuperscript{12} See Section 2 in Chapter ten.
\textsuperscript{13} See the discussion about the intention of administrative law in China in terms of guan li lun, kong quan lun and ping heng lun in Section three of this Chapter.
\textsuperscript{15} See Section 2 in Chapter ten.
Congress of 1978, were checked, and either repromulgated to maintain their legal continuity or replaced by new laws, regulations and rules.\footnote{For example, in 1980 the NPC republished the Security Administration Sanction Regulation that was originally promulgated in 1957, and the Preservation of Antiques Law, made by the NPC in 1982, replaced the Interim Regulation on the Administration of Antiques Preservation, promulgated by the State Council in 1963. Also see Cheng Sixi and Liu Nanping, 'The Development of Modern Chinese Administrative Law and Its Impact on the Constitution', (1998) 1 Administrative Law Studies, Chinese ed., at 22.}

Secondly, a number of new administrative organs and departments, responsible for environmental protection, food sanitation, finance, audit, land administration and the like, were set up to deal with social reforms, and to ensure the correct and effective implementation of administrative laws and regulations. In the meantime, some existing administrative departments were restructured.

Thirdly, in addition to some new administrative laws and regulations that were enacted to deal with the needs of specific administrative spheres,\footnote{E.g. the Law on Land Administration of the People’s Republic of China of 1986.} from the late 1980s a number of fundamental administrative laws were promulgated. These laws, based on relevant principles of the 1982 Constitution and influenced by the models of Western countries, symbolise the latest development of Chinese administrative law. They include the Administrative Litigation Law of 1989 (ALL), the Administrative Supervision Regulation and the Administrative Review Regulation, both of 1990, the State Compensation Law of 1994, and the Administrative Sanction Law of 1996.

The enactment and implementation of the 1989 Administrative Litigation Law, in particular, was a landmark in the development of administrative law in China. It was the first time in the history of the PRC that the legitimacy of administrative decisions could be challenged by individuals and be scrutinised on specified grounds by the People’s Court under an independent law.\footnote{In the PRC, the origin of the jurisdiction of the People’s Court to hear administrative cases, in the terms of Chinese administrative law, ‘administrative litigation’ (xing zheng su song), went back to 1979. In that} Hence the ALL can be regarded not only as...
crystallising the new direction of administrative law, but also as the cornerstone of administrative legality and as a meaningful step towards establishing the constitutional principle that citizens supervise state executive power.\textsuperscript{20} The ALL provided that,

where citizens and legal persons or other organisations consider that specific acts of administrative authorities or their personnel have infringed their lawful rights and interests, they shall have the right to institute proceedings in the People's Court (Article 2). Having heard a case, the People's Courts can uphold a specific administrative act where the evidence in respect of it is conclusive, the correct law and regulations were applied and statutory procedures were followed (Article 54 i). The People's Court can also quash or partially quash the act, and order the respondent to perform another specific act (Article 54 ii).\textsuperscript{21}

20 year, the Law on the Election of the National People's Congress and the Congresses at Various Local Levels was enacted. Article 25 of the Law provided that, 'the applicant, who is dissatisfied with the decision of the 'Elective Committee', may make a challenge to the People's Court'. Then it was stipulated in about forty laws and administrative regulations, promulgated by the NPC and the State Council, that citizens may challenge administrative decisions in the court. In 1982, Article 3 (a) of the Civil Procedure Law of the People's Republic of China (for trial implementation) became the first procedural basis in law to deal with administrative cases. From the stipulation of the Civil Procedure Law in 1982 to the promulgation of the Administrative Litigation Law in 1989, it was calculated that there were about 130 laws and administrative regulations, setting out citizens' rights to challenge administrative authorities on different bases. It was notable that the implementation of the Regulation on the Sanction of Security Administration and the Law on Land Administration of the People's Republic of China, both of 1987, directly resulted in the enactment of the ALL. This was because after 1987, administrative cases, in the two fields and based on the two acts, whose number represented over thirty percent of the whole of court-filed administrative cases each year, dramatically increased. In 1987, the number of court-filed administrative cases in the whole country was about six thousand, whilst it reached over eight thousand five hundred in 1988 and about ten thousand in 1989. In consequence, the ALL came into being.


21 Under the ALL, in hearing administrative cases, People's Courts only review the lawfulness of specific administrative acts, not covering the merits and 'abstract' administrative or rule-making actions (Article 5).
In the early 1980s, administrative law studies in China assumed different characteristics from those of the 1950s. The first administrative law textbook, *The Compendia of Administrative Law*, was published in 1983. In place of Soviet influence, the book obviously drew on some features of European administrative law. This is due to the fact that, for the purposes of economic prosperity, social stability and democracy, the theories relating to the rule of law and the welfare state appeared more attractive to Chinese administrative lawyers than the Soviet conception of administrative law in terms of statism, legal instrumentalism and class dictatorship. The studies of administrative law then became more and more extensive in order to deal with a series of issues that emerged from state administration and social reform. And a large number of textbooks, teaching materials and theses were published, which not only analysed domestic issues, but also introduced the ideas of administrative law from other countries. Although the influence of Japanese and European ideas upon China’s administrative law remains salient, since the 1980s, some concepts from Anglo-American administrative law have increasingly received attention in China. These mainly include the notion of judicial review as the core of administrative law, and the role of procedure in ensuring administrative justice. The current Chinese administrative law system, therefore, combines both continental and Anglo-American features. Some Soviet ideas still remain. Progressively, however, the system has taken on a distinctly Chinese character.

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22 Taken from the note of the interview with Professor Wang Minyang, who is one of the most reputable creators of China's administrative law in the 1980s, and who chiefly decided the framework of the textbook. Beijing, March 28, 1995.

2. FRAMEWORK AND TERMINOLOGIES

Even though there are still many different views about the definition of administrative law in China today, it is generally understood to include all the norms with respect to administrative organisations, their actions and the supervision of both. The definition precisely reflects the framework of administrative law studies in the People’s Republic. In general terms, the framework includes the theoretical bases for administrative law, administrative organisations, administrative actions and the supervision of the administration.

1). Basic Theory and Principles

The real meaning of the notion of ‘the administration’ is a controversial issue in Chinese administrative law studies. The doctrine of the separation of powers previously was criticised by the CCP as a capitalist political theory. Even today scholars still avoid talking about its correctness in public. So the concept of ‘the administration’ cannot be interpreted by distinguishing state functions in terms of the legislature, judicature and executive. Instead, in most circumstances, people use Marx’s definition to explain it. In fact, however, many theoretical and practical issues cannot be explained well by Marx alone. The contradiction lies in the fact that the current Chinese administrative law system in many respects relies on the idea of separation of powers, but at the same time the doctrine is not officially acceptable. For instance, the principle of cooperation

24 The definitions of Chinese administrative law have been summarised in English. See Lin Feng, Administrative Law - Procedures and Remedies in China, (1996), pp4-6.

25 The term ‘norms’ here includes the specific prescriptions of the constitution, basic laws and laws, administrative regulations, local regulations, departmental rules and local rules, which govern administrative organizations and activities. It excludes the normative documents made by other administrative agencies that are inferior in the hierarchy to subordinate departments of the State Council and to local people’s governments of larger cities. Also see supra note 8 and infra note 26.
between state organs is in essence inconsistent with the requirement of China’s judicial review system that the People’s Court safeguard individual rights and interests from the infringement of administrative agencies through the scrutiny of their decisions.

In this Part, I define some terms and concepts that are central to Chinese administrative law. Two may be dealt with quickly: ‘administrative law norms’, and ‘administrative legal relationships’. The theory of administrative law norms deals with the sources and validity of administrative law. Correspondingly, ‘administrative legal relationships’ refers to the rights and obligations, acknowledged and imposed by administrative law norms between administrative authorities and individuals; between administrative agencies and other state organs; between administrative agencies themselves; and between those agencies and their civil servants.

The Western idea of the rule of law is at present attracting attention in China, at least at the level of theory. In an administrative law context, it is expressed as ‘administrative legitimacy’ (xing zheng he fa), which is one of the two basic administrative law principles. The other principle is ‘administrative reasonableness’ (xing zheng he li),

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26 In China, the sources of administrative law in the hierarchy of validity basically include: a). constitution; b). laws; c). administrative regulations and department rules; d). local regulations, rules and ordinances; e). interpretations of laws by legislatures, courts and administrative organs; and f). international treaties.

27 It usually comprises three elements, namely, ‘subjects’, ‘objects’ and ‘contents’. ‘Subjects’ refers to the participants in an administrative legal relationship, who enjoy respective rights and bear respective obligations. ‘Objects’ refers to the target of the relevant rights and obligations of the parties to the legal relationship, including tangible goods, intangible property, action and inaction. Finally, ‘contents’ embraces all the rights and obligations of the subjects of the relationship, and the facts and causes inducing the variation of both. For example, if an administrative authority fined an individual for her violation of an administrative regulation, ‘the imposition of sanction’ is the ‘right’ of the authority to punish her failure to satisfy the ‘obligation’ to comply with the regulation that is, the ‘cause’ and the ‘fact’ of this legal relationship; conversely, the adversely affected person may have the ‘right’ to appeal the imposition of a fine, if she thinks that the authority did not fulfill its statutory ‘obligations’.

28 Chinese academics sometimes try to distinguish two Western concepts, the rule of law and the rule by law, in terms of their Chinese equivalents, fa zhi and fa lü zhi du. The latter concept can be dated back to the thought of ancient Chinese Legalists.
which relates to discretionary administrative actions. There are also other scholars who try to describe the theory of people's government as the theoretical basis of administrative law, which means a government should derive from the people, be controlled by the people and be responsible to the people.29

2). Administrative Organisations

In Chinese administrative law, the terms ‘administrative organisation’ (xing zheng zu zhi), ‘administrative authority’ (xing zheng zhu ti), and ‘administrative organ’ or ‘administrative agency’ are often used without distinction. Yet, sometimes the meaning that is implied by each of these words is different. ‘Administrative organisation’, which is a concept with static characteristics, refers particularly to the structure and form of the executive branch. An ‘administrative authority’ is the carrier of the state executive power and is a legal person who can enjoy rights and bear obligations in administrative law. Finally ‘administrative organ’, which is almost the same as ‘administrative agency’ in meaning, is a sub-concept of ‘administrative organisation’. From time to time the term ‘administrative organ’ or ‘administrative agency’ has the same meaning as ‘government’ (zheng fu), referring to the public authority in administrative law rather than to the sovereign state in an international law context.

Previously, the study of administrative organisation law was mainly concerned with administrative organs including their relationships to the legislature (the People's Congress) and judiciary, their classification and size, and their relationships inter se, both vertically and horizontally. This model does not provide a satisfactory analytical framework for other kinds of administrative organisations, such as public hospitals,

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public libraries and public enterprises, all of which increasingly need to be regulated by administrative law.\textsuperscript{39}

3). Administrative Actions

The term ‘administrative action’, learnt from European administrative law theory, was firstly used and explained in The Compendia of Administrative Law (1983) in the PRC. The theory of administrative action is related to a number of basic administrative law terminologies, such as ‘administrative legislation’ (xing zheng li fa),\textsuperscript{31} administrative implementation of law (xing zheng zhi fa),\textsuperscript{32} ‘administrative judiciary’ (quasi-judiciary), ‘discretion’, ‘administrative contract’, ‘administrative breach of law’ and so on. The term ‘administrative action’ commonly refers to actions, conducted by not only administrative organs but also other administrative authorities, which can create direct or indirect legal consequences. At present the classification of administrative actions in Chinese administrative law studies is, in most cases, as the table below indicates.\textsuperscript{33}

\textsuperscript{39} Under the conditions of the highly centrally-planned economy prior to the 1980s, everything in the economic sphere was administered by the government in the PRC. Thus, the social relations were relatively simple, and as a consequence, the types of social organisations lacked diversity during this time.

\textsuperscript{31} Roughly speaking, the action of administrative legislation in Chinese administrative law is similar to the rule-making action of British or American administrative law. Specifically, however, in China, the State Council, as the executive, has in principle, not only delegated legislative power, conferred by specific enabled laws of the National People’s Congress, but also statutory legislative power under the Constitution, which is called ‘administrative legislative power’ (xing zheng li fa quan).

\textsuperscript{32} The implications of xing zheng zhi fa are akin to those of regulatory actions of administrative authorities in Anglo-American administrative law.

\textsuperscript{33} See Ying Songnian, supra note 29, pp192-4.
Table 1: The Classification of Administrative Actions in Chinese Administrative Law Studies

According to the table, administrative actions comprise four types of actions, namely, administrative legislation, regulatory actions (administrative implementation of law), quasi-judicial actions and administrative contract. Among the four, regulatory actions represents the main branch of administrative action. In turn, it can be subdivided into three categories. The first category is the supervision and inspection of the administered; the second is administrative enforcement; and the third is administrative determination, including administrative award, licensing, adverse determination and administrative sanction. Quasi-judicial actions mainly refer to the action of administrative review through which administrative authorities reconsider specific determinations made by themselves or their inferior agencies. The definition of and the distinction between the remaining three types of quasi-judicial actions are less clear. Moreover in Chinese administrative law, the studies on the action of administrative contract, a concept taken from European administrative law, is still unsophisticated.

34 Also see Zhang Shangzhuo and Zhang Shuyi, supra note 6, p140
4). Supervision

This is the last part in Chinese administrative law studies. Supervision has two different implications in the Chinese administrative law context. One, which is broader, is termed 'administrative legality supervision' (xing zheng fa zhi jian du). It refers to the supervision of administrative authorities, especially administrative organs and their functionaries, by reference to the lawfulness of their organisations and the actions of authorised state organs, social organisations and individuals. The objective of administrative legality supervision is to protect the interests of both the state and individuals, and to maintain the efficiency and legitimacy of state administration.

Alternatively, supervision may be understood more narrowly, to refer to 'administrative supervision' (xing zheng jian du). This is a concept subordinate to 'administrative legality supervision'. 'Administrative supervision' means that the supervising bodies are administrative authorities, especially administrative organs, including administrative organs at higher levels and special supervising agencies horizontally. Those who are supervised are also administrative authorities. Thus administrative supervision is called 'internal supervision', in contrast with 'external supervision', which is included in administrative legality supervision, broadly defined. External supervision means that the supervising bodies are non-administrative, such as the Court, the People’s Congress, the Procuratorate, other social organizations and media. The following table on the next page describes the system of 'administrative legality supervision' in the PRC.35

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State compensation also falls within this part. In administrative law theory, state compensation, including administrative compensation and judicial compensation, is distinguished from state indemnity (guo jia bu chang). The concept of indemnity refers to the situation where a state action is lawful, while compensation applies where a state action is unlawful. The study of administrative litigation previously belonged to this part as well, because in theory administrative litigation is a kind of supervision of the administration by the People’s Court. Since the Administrative Litigation Law came into effect in 1990, administrative litigation has gradually become an independent area of administrative law studies.

3. BARRIERS TO BE OVERCOME

As the earlier outline shows, the potential impact of Chinese administrative law on the administration has grown in recent years. Some new legislation, in the administrative law
context, and in particular the ALL, is noteworthy.\textsuperscript{36} And administrative law studies have contributed to the enactment of a series of administrative laws and regulations, thereby helping to raise the consciousness of the Chinese populace to the role of law in the administrative arena. These laws and regulations provide a starting point for the further use of law to restrain governmental action. According to a 1992 poll, a majority of Chinese citizens knew of the existence of the ALL.\textsuperscript{37} The poll also found that 74 per cent of the government officials surveyed said that they had begun to exercise greater caution in their work because of the ALL.\textsuperscript{38}

In the judicial area, both the number and type of administrative cases filed in the People's Court dramatically increased after the ALL came into effect in 1990. Within the first year, the number of cases reached thirty thousand, covering over thirty different administrative spheres, including security, land, forest, tax, energy, statistics, and water conservancy.\textsuperscript{39} Under these circumstances, there has been a tendency among some academics and practitioners to identify the notion of 'judicial review' as the equivalent of 'administrative litigation', the concept of European administrative law,\textsuperscript{40} reflecting the

\textsuperscript{36} For example, Article 32 of the ALL stipulates that the administrative authority that performed a specific administrative action must bear the burden of proof relating to the legitimacy of the action in administrative cases. The stipulation is obviously different from the requirements of the burden of proof both in criminal and civil cases, where the plaintiff and the defendant bear the evidential burden equally. In administrative proceedings, it can indeed give the plaintiff an advantage to challenge administrative decisions.

\textsuperscript{37} See Gong Qiangrui, supra note 19, p10.

\textsuperscript{38} Ibid, p14.

\textsuperscript{39} See Luo Haocai, China's Judicial Review System, supra note 19, p567.

\textsuperscript{40} Ibid, chapters 2 and 26, 'Constitutional Grounds and Theoretical Bases' and 'The Current Situation and Expectation' of China's Judicial Review System. In my view, there are two major points of distinction between the Anglo-American tradition and the current Chinese judicial review system, based on the 1982 Constitution and the 1989 ALL. The first is that the People's Court in China has not been entitled to review abstract or generalised administrative action (rule-making or delegated legislation in Anglo-American terms). The other is that the power of 'judicial review' of Chinese People's Courts is not related to constitutional cases. So far constitutional litigation does not exist in practice in the PRC.
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effort to strengthen the independent powers of the judiciary to ensure administrative justice. From nothing to something, from particularity to generality, from limited spheres to a large variety, these developments clearly suggest that Chinese administrative litigation, or its judicial review system, is placing more and more pressure on administrative authorities to be accountable for their activities.\textsuperscript{41} It is indisputable that the relations between the executive power and the subject have, in a certain degree, been restructured in China in terms of setting limits on the power and establishing procedures for citizens to defend themselves against administrative intrusion or infringement.\textsuperscript{42} Nevertheless, of course, unsatisfactory aspects of the administrative law system remain.

First of all, the current Chinese administrative law is a system ‘transplanted’ from Western models rather than one that has emerged naturally from Chinese culture. As a consequence, in many ways the system, irrespective of its excellence in technical design, does not work as well as Chinese legal academics expected. There is some resonance here with Watson’s observation, ‘a successful legal transplant - like that of a human organ - will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system’.\textsuperscript{43} A particular challenge to successful transplantation is that, in Chinese tradition, there was no distinction between the administration and judiciary.\textsuperscript{44} In ancient China the function of the judiciary existed in

\textsuperscript{41} It was estimated that from 1990 to the end of 1994 the number of successful plaintiffs in administrative cases was 46,808, representing 36.89\% of the total administrative cases resolved by the People’s Courts. It was said that this rate was much higher than that of other countries and regions. During the same period, in 23,876 administrative cases, specific administrative actions were quashed or partially quashed by the People’s Court, representing 18.8\% of the total administrative lawsuits dealt by the court. Furthermore, administrative decisions in 2269 administrative cases were altered by the court, representing a percentage of 1.79 of the total. See Gao Xingzheng, ‘Comments on The Relationships among Reform, Development and Stability’, (1995) 5 Chinese Legal Sciences, Chinese ed., at 62.


essence only under the auspices of the administration. Unlike the West, a significant revolution or lesser political struggle focusing on the impartiality and independence of the judiciary never happened in modern China. Hence it is difficult for the People’s Court to effectively scrutinise the executive power in China today. As indicated in a survey, about one third of Chinese judges in a sample group contended that the notion that “the People’s Court should avoid ‘upsetting’ administrative authorities” was the chief reason affecting the neutrality and fairness of the court in hearing administrative cases.

The characteristic of ‘non-litigation’ (wu song) in Chinese legal tradition has also hindered the development of the judicial review system. The tradition remains in Chinese society today. As a popular saying goes, don’t be a thief even if being starved to death; don’t accuse even if being upset to death’. The saying is related to civil disputes. It would be even harder for the Chinese populace to consider challenging administrative decisions (min gao guan) or accusing officials via a judicial avenue. The result of a survey of 502 respondents showed that only 19.7% of the whole sample would institute proceedings in the People’s Court were their rights and interests to be infringed by unlawful administrative actions. The survey found that a large proportion of people would prefer to endure the actions. These people also believed that even if they were to complain, they could not win the suit because official agencies were related to each other in many ways.

In this context, we can understand an official statistic, indicating that on average the number of administrative cases filed in each local People’s Court annually was less than ten in China in 1991, even if the total number of such cases filed in the whole country might be high. In some outlying regions, the People’s Courts scarcely had any

45 See ‘systematic features’ of ‘Non-Litigation Tradition’ in Chapter eight.
46 See Gong Qianrui, supra note 19, pp234-5.
47 See ‘Non-Litigation Tradition’ in Chapter eight.
48 See Gong Qiangrui, supra note 19, p79, p 93.
49 Ibid.
administrative cases to hear at all in the years immediately after the ALL came into effect in 1989. For example, there were only four administrative cases filed in the People's Courts at all levels in the Tibet Autonomous Region in 1991. In the same year, the number of administrative cases resolved by the court in the whole country represented only 0.85% of total cases, the remaining cases being civil, criminal and economic in nature. 50

Secondly, although the support of the CCP for reconstruction of socialist democracy and legality started as early as the late 1970s, the continuing impact of the Party upon the judiciary still exists. The CCP's decisions are not covered by from the ALL (Articles 2, 5 and 11). In reality, however, to the extent that the activities of any particular administrative agency are likely to be subject to Party control, the judicial decisions in ALL cases challenging such activities might reflect on the relevant Party organ, albeit indirectly. 51 Thus the People's Courts often find it hard to accept and adjudicate administrative disputes relating to the CCP's decisions. For instance, if a dispute resulted from a decision that was made jointly by a local government and a local CCP committee for punishing a peasant, who does not comply with the birth control policy, the Court might attempt to avoid being involved in dealing with the dispute.

To be sure, the functions of the Party and state organs previously had not been separated for a long time. In particular, there was no functional distinction between the Party and the administration (dang zheng bu fen). The will of the CCP was the same as the will of the executive, the legislature, the judiciary and the army. That is to say, the Party was the state. From the early 1980s, the leadership of the CCP realised that, if a single party administered all the spheres of social life in its own name, but not those of state organs, eventually, the party would also be directly accountable for all social complaints and conflicts. In consequence, the CCP put forward a fundamental aim of Chinese political reform, namely, 'to separate the Party and the administration in function' (dang zheng fen kai). However, the objective of the reform has not been

50 Taken from Luo Haocai, supra note 19, p750.
achieved successfully so far. In practice, many principles, policies, directions and even 
regulations regarding the administration are still jointly issued and made by 
administrative authorities and CCP organisations.

No law enables the People’s Court to review CCP decisions. In this regard, the 
operation of China’s judicial review system largely depends on the functional division 
between the Party and the administration.52 It suggests that, apart from the superior 
position of the administration and the disbelief of the populace in the judiciary, the role of 
the People’s Court in adjudicating administrative cases, conferred by the ALL, is 
somehow also restricted by the interference of the Party, directly or indirectly.53

Third, the competence of Chinese judges to adjudicate administrative cases also limits 
the quality of judicial review. The Party previously ignored the professional skills of 
judges. The overwhelming majority of judges used to be veterans or retired military 
officials, called ‘judicial cadres’ (sifa gan bu), with little academic knowledge or specific training.54 This situation was no doubt encouraged by the underdeveloped technicality

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51 See P. B. Potter, supra note 20, p278.
52 Of course the issue is more profoundly related to the defect of the Chinese polity in terms of single party 
leadership, and the fundamental concept of state functions, regardless of the doctrine of the separation of 
powers. In fact, the sovereignty of the legislature or the People’s Congress does not exist in reality either. 
Instead the basic elements of the political system in the People’s Republic are: first, the cooperation and 
political consultation among multi-parties under the leadership of the Chinese Communist Party; second, 
the constitutional principle of the combination of the legislature and executive led by the Party, including 
all state organs and the army. As such, Chinese administrative law has been criticised as ‘a system in 
laboratory’, which means it cannot operate independently from politics.
53 For the impact of the CCP upon the People’s Court also see Sections 2 and 3 in Chapter ten.
54 Also see Victor H. Li, Law without Lawyers: A Comparative View of Law in China and the United 
and politicising of the whole Chinese legal system. Emphasis on the legal qualifications of judges in the PRC began only in 1995, when the Law of Judges came into effect.\footnote{Under the Law, the ‘qualification of judges’ specifically embraces a law degree of high education and practical experience for one or two years, otherwise a course of special training must be undertaken. See Article 9 (6), Chapter 4.}

Hence, many issues raised in the course of judicial review could not satisfactorily be resolved because of the incompetence of judges. On the contrary, inadequacy and error in judicial decisions often contributed to resentment of administrative authorities and dissatisfaction with the other parties involved.\footnote{See Luo Haocai, supra note 19, p571.} It will unquestionably take some time to improve the techniques and authority of the People’s Court to take charge of the scrutiny of administrative actions of every kind.

The final problem is the continuing influence of legal instrumentalism upon Chinese administrative law. During almost the whole period of the development of administrative law in the PRC, from the 1980s to the present, the question of the role of administrative law has been controversial and has not yet been resolved. According to Soviet jurisprudence, law first of all is the means for the ruler to dominate the ruled.\footnote{See Andrei Y. Vyshinsky, The Law of the Soviet State, (1961), p13, p50, Hugh W. Babb trans..} Likewise, administrative law is the instrument of the state to achieve individual obedience and efficiency in the administration. In other words, the rights and interests of individuals concerning state administration are considered less than the will of the state. This idea is termed ‘the theory of domination’ (guan li lun). By contrast, there are others who contend that the essence of administrative law is to control the arbitrary powers of government and to increase individual liberty and democracy. That is termed ‘the theory of controlling powers’ (kong quan lun). In the eyes of legal instrumentalism, the phrase ‘to control government’ is a form of dissent. It is also objectionable to conservatives within
the CCP. A recent view suggests that the cardinal goal of administrative law is to balance the interests of government and individuals: ‘the theory of balance’ (*ping heng lun*).\(^{58}\)

The debate reflects different understandings of the role of administrative law in China. Despite such slogans as ‘all the people should be equal before the law’ and ‘the Party shall perform within the stipulation of state constitution and laws’, and more recently, ‘to exercise administrative power according to the law’ (*yi fa xing zheng*), ‘the theory of domination’ remains influential at present, particularly within administrative authorities and CCP organisations. It can be summarised by saying that the Party has not explicitly accepted the ideas of the supremacy of law or the rule of law, and the separation and balancing of state powers so far. To see administrative law only as a vehicle for dominating individuals is bound to diminish its ability to counter injustice in the administration.

In conclusion, Chinese administrative law today is still in the process of evolution. It has many civilised and democratic characteristics, represented both by increasingly systematic theory, and by some typical statutes reflecting the experience of Western countries. At the same time, the practice of Chinese government and the ideas of legal instrumentalism to a large extent hinder the achievement of democratic aims, envisaged in the legislation, for constructing the Chinese administrative law system. So the question arises: how to overcome these and to convert China into a real modern constitutional country with administrative justice, given its tradition, modern situation and current social reform? One answer to this question has been considered increasingly to be a fair and effective administrative procedure system in the PRC, which the last Part of the thesis specifically deals with.

CHAPTER THREE

THE CONCEPT OF PROCEDURE

A range of meanings can be attached to the word 'procedure'. Correct usage may vary according to the context in which it is used. This Chapter considers different usages of the concept of procedure in order to distinguish and classify its implications in different situations. It then argues for the value of legal procedure in general terms. The Chapter prepares the premise for the more detailed arguments in the next Chapter of this Part, which formulates the theoretical bases of the thesis.

1. MEANINGS OF PROCEDURE

In common sense, the term 'procedure' or 'process' is usually explained as meaning 'working steps'. Nevertheless procedure in the abstract can mark the way, step, mode, manner, course and so forth, by which a certain entity of social substance assumes a certain form to achieve a certain purpose. The dimension of procedure might sometimes be applicable to the theories of sociology and politics. Furthermore in studies of philosophy and psychology, procedure is frequently contrasted with

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1 See Ci Hai, Chinese ed., (1979), p4014. Without particular mention, in this paper, the term 'process' is used with no differentiation from 'procedure'. In my view, the only distinction between the terms process and procedure is seemingly that process is normally compared with outcome, while procedure is the counterpart of substance. In this regard, it is also difficult to distinguish substance from outcome, since any substance must be a type of outcome, and vice versa. They are different philosophical terms, but essentially referring to the same thing.

‘substantive justice’, ‘formal justice’ and ‘purposive justice’. ‘Substantive justice’, which can be traced back as far as Aristotle, is theoretically concerned with identifying the principles by which anything of value, i.e. money, goods, services, rights and so forth, can be fairly or equitably allocated among persons and groups. In contrast, ‘procedural justice’ arises when all parties cannot spontaneously agree about a distribution. In other words, people not only care about social outcomes they receive (what they obtain), but also quite often take into account how social distributions are made (how they are treated).

In this light, John Rawls tried to distinguish substantive justice from formal justice. In his view, substantive justice referred to the justice of the system itself, while formal justice meant the impartial and continuous execution of law and system (justice as rules). He also put forward a series of concepts of procedural justice, for example, ‘pure procedural justice’, ‘imperfect procedural justice’ and so on. In R. M. Unger’s analyses, ‘an ideal of justice is formal when it makes the uniform application of general rules the keystone of justice or when it establishes principles whose validity is supposedly independent of choices among conflicting values. It is procedural when it imposes conditions on the legitimacy of the processes by which social advantages are exchanged or distributed. It is substantive when it governs the actual outcome of distributive decisions or of bargains’.

When Rawls used the concept of ‘justice as fairness’, which conveyed the idea that the principles of justice were agreed to in an initial situation that was fair, he actually distinguished justice from fairness. In theory, justice can be defined as an individual’s perception that a distribution or the procedure for the distribution is impartial and

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3 Aristotle divided justice into commutative justice (equality of exchange) and distributive justice (proportionate distribution). I think that commutative justice is akin to procedural justice, and the latter refers to substantive justice. Also see Michael D. Bayles, Procedural Justice - Allocating to Individuals, (1990), p9.


5 See Roberto M. Unger, Law in Modern Society, (1976), p194. The phrase Unger used, ‘purposive legal reasoning’ may be understood as having a meaning analogous to purposive justice.

appropriate when it satisfies certain criteria.\(^7\) By contrast, the meaning of fairness refers to social equality of treatment either substantively or procedurally or both.\(^8\) In this sense, ‘procedural fairness’ can be seen as an individual’s belief in the impartiality of the procedural components of a social system that govern its allocating processes.\(^9\) However, in common sense, as E. A. Lind and T. R. Tyler affirmed, ‘the psychological consequences in practice are almost the same when people encounter such social situations labeled as unfair, inappropriate, impolite or unjust’.\(^10\) That is to say, the terms ‘procedural justice’ and ‘procedural fairness,’ can be used interchangeably, for they are largely intuitive concepts in many cases. To this extent, it seems that it is unnecessary to distinguish fairness from justice, and procedural justice from procedural fairness.\(^11\)

As indicated above, the term ‘procedure’ by and large refers to the modes and ways of social distribution of advantages or obligations. Yet, the significance of procedural justice may extend beyond the domain of the means of social distribution. This is


\(^8\) See M. D. Bayles, supra note 3, p131. In particular, he contended that ‘fairness essentially means equality of treatment in procedures’. G. S. Leventhal put forward four determinants of the importance of fairness. First, a person’s social role may affect his concern with fairness. Second, the concern with fairness is likely to be diminished if a person becomes preoccupied with other social aims, such as efficiency, productivity or social stability. Third, people might be more concerned about it when there are salient violations of distributive or procedural justice in a society. Finally, Leventhal thought that fairness was of greater importance in pluralistic societies than in monolithic social systems. See G. S. Leventhal, ibid, pp48-51.

\(^9\) Nevertheless in a narrow sense, ‘procedural fairness’, a term which is constantly used in the common law countries, and has been interchangeable with the terms of ‘natural justice’ from time to time, is a specific judicial doctrine in comparison with its broader usage in psychological and philosophic contexts. See the discussion in Section 3 Chapter 6, ‘Natural Justice and Procedural Fairness’.


\(^11\) They are used without differentiation in this thesis except where otherwise mentioned. Nevertheless Dworkin characterises justice and fairness in general terms as following. ‘Justice...is a matter of the right outcome of the political system: the right distribution of goods, opportunities and other sources. Fairness is a matter of the right structure for that system, the structure that distributes influence over political decisions in right way’. See Ronald Dworkin, \textit{Law’s Empire}, (1966), p404.
because when the parties involved in distributions cannot accept distributive outcomes, the procedures for resolving conflicts and disputes have to be generated.\(^\text{12}\) That is to say, procedural justice or fairness may exist in two circumstances. One is concerned with the means of social distribution, and the other is related to dispute-resolving processes.

‘Procedure’ is also likely to be considered as comparable to historically established social manners or modes. In this way, procedure is closely linked to social tradition and customs. The linkage appears especially obvious when a particular social procedure is designed to conform to traditional ethics and morality, such as *li*, a traditional Chinese moral mode.\(^\text{13}\) In this context, procedure is defined as ‘a particular way of accomplishing something or of acting; a step in a procedure, a series of steps followed in a regular definite order; a traditional or established way of doing something’.\(^\text{14}\) For example, even the common law conception of natural justice, which has normally been considered to have procedural significance in both legal practice and theory, can be viewed as stemming from the moral or social principles of common law societies.\(^\text{15}\) Calamandrei captured this notion of procedure in his now somewhat dated perspective, ‘in England it (the trial) is more like a religious service...English universities do not teach legal procedure. Proper court behaviour is not a subject for study; it is learned in practice. It is considered a question of etiquette rather than of knowledge’.\(^\text{16}\)

Certainly, the social significance of procedure, strictly speaking, is not equal to that of social customs. Social customs are usually derived from long-observed manners in social life. To put it in another way, social custom is generated randomly, does not necessarily have logical features, and belongs to a moral category with flexible content. Procedure on the other hand needs to be established with specific and logical


\(^\text{13}\) The comparison between *li* and procedure, see Section 2 Chapter eight.


\(^\text{15}\) See H. H. Marshall, Natural Justice, (1959), p120.

requirements by reference to an artificial criterion. Moreover, social custom in homogeneous societies is the main force for maintaining social order, whereas in modern industrialised and democratic societies, the role of specialised or legalised procedure is necessarily of greater importance. Even though the work of Calamandrei is particularly related to the characteristics of procedure in law, his description may also highlight the contrasting relationship between procedure and social custom in general terms. He identified, (legal) procedure with, ‘a method of reasoning established by the law that the parties and judges must follow step by step according to a certain prescribed and legally coordinated order, for the purpose of reaching a just decision. The rules of legal procedure are even seen to be essentially nothing but maxims of logic and common sense, findings of technical nature that have been made into binding rules’.  

In a legal sense, procedure is often understood as the steps taken in an action which has legal impact. Depending on the body bound by it, legal procedure may include legislative procedure, judicial procedure, administrative procedure and the procedure prescribed by law for the community within a state to follow. Depending on the purpose to be served, procedure can in theory be classified into discretionary procedure, directory procedure, and mandatory or prescriptive procedure. Discretionary procedure presupposes legal authorisation and must exist against the background of legal supervision. As a part of government, discretionary procedure differs from arbitrary procedure. The latter is associated with autocratic regimes without any legal control and supervision and, thus, refers to procedural irregularity and arbitrariness.

From a procedural point of view, the obligations of the government and the subject are in principle different. To the government, in the absence of procedural authorisation in law, its performance will lack authority or legitimacy in a modern sense. Non-observance or breach of a mandatory procedure may cause the nullity of

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17 Ibid p3.
18 The procedure relating to civil or private activities (commercial and trade) is normally excluded from the scope of legal procedure study.
19 See Max Weber, Economy and Society: An Outline of Interpretive Sociology, ed. by Guenther Roth
a governmental act. In contrast, in the absence of legally valid procedural restrictions, citizens are free to decide the ways and models of their behaviour. According to libertarian theory, in the public law arena, procedure above all refers to the means of exercising executive power subject to procedural certainty and constraints. This idea has typical significance in a modern administrative law sense.

2. PROCEDURAL LAW

The notion of 'procedural law' in general includes all the legal procedural constraints in statutes, legal principles, case law, legal customs and the constitution. It appears that the significance of procedure in law is more explicit than in other social settings, because the essence of law is the regularisation of social conduct, and law ought to be preoccupied with its own regulation through procedure. Without procedural rules, any legal system will not be workable. It has to be acknowledged however, that there is some resistance to a distinction in absolute terms. The difference between procedure law and substantive law is blurred at the margin, and some would argue that the two spheres are functionally inseparable. Although in principle the law regarding what to do can be considered as substantive, while the rules concerning how to do are procedural, people in practice cannot always identify which kind of law is purely substantive, and which others are absolutely procedural. For instance, a purely substantive code or procedural code can never be found even if the title of a code may be 'procedural' or 'substantive', for it is impossible to identify every article of a code in terms of substance or procedure. In fact, many substantive rules in reality in respect of what to do are likely to be contained in laws titled 'procedural'. While this criticism carries some weight, the distinction is nevertheless meaningful in many instances, not only to assert orderly consideration of problems, but also for the reasons that follow.

20 I elaborate on this point in Chapter five.
First, the root meaning of *fa* in Chinese is that of a model, pattern or standard; hence of a method or procedure to be followed. And in English, to the extent that ‘law essentially is something that is done; it is a series of steps taken, procedure is the heart of the law - without procedure there is no possibility of the existence of law’.

The expression of procedural law (*adjective law*) seemed to be created by J. Bentham in the eighteenth century. Procedural law is concerned, in the words of Lon L. Fuller, ‘not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be’. In practice, even ancient Roman jurists thought that procedural (litigation) rights should exist (be conferred) prior to (substantive) rights and interests, and accordingly, procedural law was put ahead of substantive law in the Twelve Decemviral Tables. It is defined as, ‘...bodies of principles and rules of law, other than the substantive law, those dealing not with the rights and duties of persons, but with the means whereby those rights and duties may be declared, vindicated or enforced, or remedies for their infraction secured...’. In Black’s *Law Dictionary*, it is expressed as ‘the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law....’

For example, from a constitutional viewpoint, substantive law deals with the design of state agencies and the distribution of state powers, while procedural law is

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23 See H. J. Berman and W. R. Greiner, supra note 21, p27. Strictly speaking, the Chinese term *fa* is not equivalent to the English word ‘law’ as it is understood in the European and Anglo-American context. See Section one Chapter eight for detail.

24 J. Bentham distinguished two classes of procedural rules. The first is ‘the means of coming at the truth’, i.e. all the formalities of trial and pre-trial procedure. The second includes those rules designed to ensure that the evidence brought forward and arguments presented are received and acted upon by the tribunal. See Gerald J. Postema, ‘The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication’, (1977) 11 *Georgia Law Review* 1422, at 1422.


concerned with the mode of the operation of the agencies and the exercise of their powers. Moreover, legally formulated procedural rules can be designed to deal with constitutional disputes, performing roles that cannot be resolved through substantive rules. In this context, the issue of how to impeach the head of the state is procedural in contrast with the substantive questions of what powers the head of the state is allowed to exercise.

Thus, it would seem that the purpose and function of procedural law are different from those of substantive law. The latter determines the distribution of legal rights and duties, whilst the former governs the manner of the distribution and the way by which to adjudicate competing interests in the distribution. Although procedural law may also prescribe rights and duties, these are more directly related to the treatment of the parties involved in a distribution of substantive legal rights and duties, than to the distribution per se.\textsuperscript{29} For example, if an authority determines that a property legally belongs to A not B, this means that A not B has a substantive right to the property. In other words, B has a substantive duty to comply with the determination except that B is legally given a right to challenge the determination. The right of B is procedural. Meanwhile, the procedural right of B refers to her procedural opportunity that ensures her participation in the course of the authority’s decision-making. The distinction in function between the two types of laws was characterised as, ‘substantive laws command attention, procedural rules ensure respect’.\textsuperscript{30} In this regard, the evolving history of law seems to be ‘the growing process of legal procedure, because formal and procedural rules in principle represent the element of convenience and certainty in law and in the prosecution of rights...they are often regarded as embodying an element of substantive justice’.\textsuperscript{31}


\textsuperscript{31} See Hersch Lauterpacht, \textit{The Development of International Law by International Court}, (1958), p209.
Second, unlike philosophy, the differentiation in the area of law between substance and procedure is empirical rather than logical. Hence one should not destroy the distinction as metaphysical nonsense.\[32\] In fact, from a historical point of view, no legal system in any country has ever been precisely constructed by reference to philosophical and logical distinction between substantive law and procedural law. For instance, in the area of private law, almost all the rules, regarding contract, debt, mortgage, succession and so on, are about *how* to realise commercial exchange and trade. Yet, we usually refer only to the rules about civil (private) litigation as civil procedure law rather than these rules. In other words, lots of rules of private law, which in essence ought to be seen as procedural, tend to be regarded as civil substantive rules compared to civil litigation law. In the constitutional law context, there are also some rules related to procedural requirements of the exercise of state powers concerning the relationships between the state and citizens, between different state organs, and between central and local governments, but people term them ‘constitutional’ law rather than ‘procedural constitutional’ law.\[33\]

In many cases, it is true that the law of legal procedure is essentially a technique of good reasoning self-consciously based upon custom or precedent before the court.\[34\] In this context, procedure refers to ‘the methods for bringing, presenting and adjudicating a lawsuit before a legal tribunal’ or typically ‘the manner in which litigants proceed in the adversary conduct of a lawsuit, including the various steps by which the parties go about the litigation process’.\[35\] The fact that procedural law is defined as proceedings in a court of law or litigation law further suggests that the distinction actually is derived from judicial experience and practical requirement.\[36\]

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\[33\] Also see R. M. Cover & O. M. Fiss, Ibid, ‘Foreword’, iii-iv.
\[34\] P. Calamandrei, supra n.16, p4.
\[36\] At this point, see *China Encyclopedia-Law*, Chinese ed, (1984), p88. Procedural law in China is understood conventionally as criminal proceeding law and civil proceeding law. In current Chinese legal theory, legal rights and legal obligations form the content of a ‘legal relationship’ (*fa li guan xi*). See in detail in Chapter one, ‘administrative legal relationship’. Also there is no doubt that substantive law governs legal substantive rights and substantive obligations. Yet, whether the distinction between
The distinction is a kind of judicial custom and a historical fact, which should not be denied by reference to logical analyses.

Finally, with administrative law, a new category of procedure law came into being, affecting administrative procedures. Even though the binding effect of administrative procedure law varies between different countries, it generally refers to all the rules concerning the performance of administrative activities, especially those that adversely affect the administered. The main focus of administrative procedure law is upon imposing procedural restraints upon administrators, although in passing, it may impose obligations upon the administered as well.37

In this respect, administrative procedure law differs from the law relating to judicial procedures, which creates obligations equally on the parties involved in a proceeding.38 The goal of preventing the abuse of administrative powers, thereby providing some protection for individuals, necessarily requires greater emphasis on administrators' procedural obligations. A formal administrative procedure offers citizens greater transparency, openness and impartiality in the bureaucratic decision-making process. In this sense, administrative procedure law helps to determine the legitimacy of administrative action.39 It has even been said that 'administrative law truly pivots on a fulcrum dividing procedure and substance, even if there is no watertight divide between them'.40

procedural rights and procedural obligations is meaningful or not is controversial in Chinese law studies.

37 This view can be supported by the contents of administrative procedure laws in many countries, such as Art. 35-7 of the 1955 Italian Administrative Procedure Law, Chapter 2 (Art.10-43) of the 1968 Swiss Administrative Procedure Law, Art. 54-72 of the 1994 Macao Administrative Procedure Law, and Art. 19-39 of the 1996 Korean Administrative Procedure Law.
38 Also see Section 1 Chapter five, 'The Concept of Administrative Procedure Law'.
39 Also see Section 2 Chapter five, 'The Role of Administrative Procedure'.
3. PROCEDURAL VALUE

Although M. R. Cohen said that the tendency of all modern scientific and philosophical thought is to weaken the distinction between substance and attribute and to emphasise the importance of method, process, or procedure,41 ‘expected utility’ economic models, which looked upon the individual as a personal utility maximiser, became extremely influential with the rapid economic development after the Second World War. Theories based on self-interest and outcome-oriented models came to dominate the analysis of social behaviour. Increasingly, as Lind and Tyler asserted, ‘many theorists, economists, psychologists and others, even if the approaches differ in many ways, assume that people are concerned primarily with the outcomes they receive from various social persons, groups and institutions, by which they evaluate their personal happiness and gain’.42 In other words, both the social attitudes and behaviour of the people can be explained by their outcome-oriented judgments. Consequently many officials in practice are inclined to sacrifice a procedural value not only for the sake of a desired outcome, but also to achieve it quickly. As R. S. Summers concluded, modern societies give far less emphasis to processes than to results. Both in the world of thought and in the world of action, process values fail to receive their due.43

In the legal sector, jurists have turned again to utilitarian models for understanding the law of procedure, especially when referring to the economic analysis of law.44 They take the basic Benthamite standpoint on legal procedure, namely, that, ‘adjective law’ would have no value apart from substantive law, just as an adjective can have no meaning without a noun to modify, and as a consequence, the purpose of it is to

42 See Lind and Tyler, supra note 2, p127.
44 See G. J. Postema, 'The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication', supra note 24, p1393. In an extended sense, economic models for understanding and analysing various fields of law (economic analysis of law), can be identified as utilitarian-type thoughts. The comments on the attitude of economic analysis of law, also see Section 2 Chapter four.
realise the goals of substantive law (procedural instrumentalism).

To put it another way, the dominant analysis of procedural law is also instrumentalist and positivist.

In the United States, for example, according to the Supreme Court's formulation, the constitutional judgement of the adequacy of a process includes considerations of: 1). the private interest that will be affected by the official action; 2). the governmental interest in procedural expedition; and 3). the likely contribution of various procedural ingredients to the correct resolution of disputes. The Supreme Court's analysis does not require any systematic attention to the values underlying procedural fairness. Rather its approach to evaluating (administrative) procedure is utilitarian. In other words, the Court's decision implicitly suggests that the fairness of a procedure should be determined according to whether, and to what extent, it can achieve the outcomes required by positive law and utilitarian criteria.

But, does procedure itself have any inherent values? I assert that the analyses and arguments relating to procedural values can enable us to understand more fully what social critics frequently mean - but often fail to articulate - when they invoke the maxim, 'the end does not justify the means', or when they condemn action as too 'result-oriented'. Procedure also should serve inherent values that are independent of outcomes and substantive factors. In other words, given an adequate procedure, one can act merely by conforming to it regardless of the consequences to which one's

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45 J. Bentham, '...of the adjudicative branch of law, the only defensible object, or say end in view, is the maximisation of the execution and effect given to the substantive of the law', The Principle of Judicial Procedure, p6, c.f. G. J. Postema, supra note 24.

46 See Mathews v. Eldridge [1976] 424 U.S. 319, at 334-5. In upholding the Social Security Administrator's procedures which had been challenged by the plaintiff Eldridge following the termination of his disability insurance benefits, the Court in Eldridge decided that a full evidentiary hearing was not required prior to the deprivation of a substantial interest when some opportunity to contest had been provided and an overriding governmental interest in summary procedure was apparent.


49 See R. S. Summers, supra note 43, p5, p43.
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conduct contributes. And the independent significance of procedure also means that the legitimacy of a situation may reside in the way it was produced but not its substantive propriety. 50

The reasons in support of the independent value of procedure are as follows. Firstly, any particular social substantive goal and outcome cannot be reached without a certain procedure, because substantive elements merely determine the standard and content of social distribution and retribution. In other words, social distribution as a whole must be composed of a distributive goal, logically followed by a distributive procedure and the corresponding outcome.

Secondly, social life is so changeable and complicated that the goal of a perfect substantive system is quite often unachievable. To put it another way, substantive justice is much more difficult to achieve than procedural justice. To seek an extensive and enduring substantive standard for the purpose of justifying social behaviour, or a social system in terms of justice or injustice, that can be accepted by all the people involved, is often in vain in practice. For example, people might acknowledge that no substantive definition of 'the public interest' is possible. Yet they might be able to specify the procedures necessary to reach a decision about the public interest, attempting to ensure that the decision-makers will at least be cognizant of different interests and their intensity. 51 This is because people usually care far more about how a substantive goal is achieved and how they are really treated to achieve the goal than about what the substantive goal is, and even what the outcome is. 'Often proper procedures were more important than substantive principles for practical achievement of aims,' 52 and fair procedures do not lead to less general satisfaction than do outcomes.

The assertion that people are likely to be more interested in issues of procedure than those of outcome has been corroborated by some psychological studies. According to

52 See M. D. Bayles, supra note 3, 'Acknowledgments.'
the theory of relative deprivation, suggested by R. K. Merton and A. S. Rossi, individuals would judge their social situation not in absolute substantive terms, such as equality, but by comparing it to the situation of those around them. Those who receive poor outcomes from a fair procedure will still react more favourably than those who receive equally poor outcomes generated from a poor procedure. For the purpose of his work in 1987, T. R. Tyler interviewed a random sample of Chicago residents. Through the answers of the 652 respondents, regarding the legal system, he examined the relationship between judgements about procedural fairness and judgements about the fairness of outcomes. The results may be depicted as follows.

![Figure 1: Procedural Justice and the 'Cushion of Support'](image)

As the data in the table above indicates, when procedures are fair, the feelings about the authorities remain positive, irrespective of the favourability of the outcomes. Fair procedure does indeed provide a 'cushion' for authorities when the outcomes they have provided are unfavourable. Tyler also found that the impact of fair procedure

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54 Figure 1, cited from E. A. Lind & T. R. Tyler, supra note 2, p71.
was strong even among those respondents who said that they received favourable outcomes.

Thirdly, the characteristic of impartiality of procedure for resolving disputes, in the sense of just treatment of disputants, cannot be ignored. In dispute resolution, people usually care about not only what the final outcome is, but also whether the procedure by which it is reached is impartial. In principle, fair procedure can reduce the level of dispute and contribute to the acceptability of the final decision, because the parties concerned in the dispute are far more likely to comply with the decision, if they perceive the procedure involved in arriving at it is fair. If a trial does not look fair, or a judge appears to be partial to one side, this creates an impression that the decision itself is unreliable, and more open to doubt. In essence, procedural fairness can, to a considerable degree, lead to outcome satisfaction in the resolution of social disputes. In this regard, the value of procedural fairness for resolving disputes might be considered as a ‘condenser’ of social conflicts, in that procedural fairness can psychologically cushion the dissatisfaction that might result from an unfavourable decision. This view can also be substantiated by the results of the study of J. W. Alder, D. R. Hensler and C. E. Nelson in 1983. They examined the reactions of litigants to court-annexed arbitration procedures on the basis of whether the litigants perceived the procedure to be fair or unfair.

According to the following table, those who lost were less ‘satisfied’ when they felt that the hearing was unfair than when they thought the hearing was fair. In contrast, winners showed no differences in satisfaction with a function of their procedural judgements. This survey indicated that procedural fairness can increase satisfaction with decisions resolving disputes, particularly as regards those who lost in a case.

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56 Cite from Lind & Tyler, supra note 2, p72.
57 Here the expression ‘satisfied’ is a cited word from Lind and Tyler, which means ‘accepting of the result’.
Part Two - Theoretical Approaches - Y. Yang

Figure 2: Procedural Justice and Satisfaction with Court-Annexed Arbitration

Finally, in legal settings, any action must be bound not only by substantive legal requirements but also by procedural rules. For example, social order depends upon the citizens' compliance with substantive rules, and that compliance depends in turn upon the enforcement of sanctions by the sovereign, such as criminal penalties and administrative punishment. However, the enforcement and the application of sanctions must be governed by procedural rules. In other words, they cannot be carried out in practice without procedural regularity and predictability. Thus the ultimate test of the sovereign is largely procedural. As H. M. Hart assumed, 'procedure is the central ideal of law - an idea which can be described as the principle of institutional settlement...as binding upon the whole society'.\(^59\) That is to say, the establishment of legal procedure is actually the underlying way to achieve state authority by imposing certainty on the ways of its activities. In doing so, procedural rules need to focus on the means of state activities, while substantive rules reflect more directly the basic purpose and intention of a legal system.

As mentioned earlier, procedural rules are sometimes viewed as subsidiary to the extent that their purpose is to serve the implementation of the substantive law - to bring about the latent effect that human beings behave lawfully. The view, as A. Ross argued, 'is incorrect only when it is associated with the idea that substantive law is

\(^58\) Figure 2, cited from E. A. Lind and T. R. Tyler, supra note 2, p72.

primary and independent of the procedural law in the sense that by legislation substantive law may be created in harmony with desired social ends and without taking procedural law into consideration. This is because in creating substantive law one cannot ignore the fact that it is technically possible to implement it by procedural law.

In fact, ignorance and underestimation of procedure, or for example, too great emphasis on substantive justice, is likely to erode the generality of law to an even greater degree, and may cause social tension and disorder. In particular, in the public law arena, procedure represents an important technique for restricting arbitrary state powers. The independent role of legal procedure must be recognised throughout the whole operation of law. And its reasonableness and fairness mark the important criteria for evaluating the virtues of modern law. These will be reinforced by the theoretical arguments in the immediately succeeding Chapter and the practice of Chinese law in modern and contemporary times, discussed in the last two Parts.

After the preceding debate, another question must be asked about what procedural values in law are. Even if R. S. Summers’ idea of ‘process value efficacy’, which refers to the capacity of a process to implement or serve process values, is accepted, his definition of ‘process value’, referring to standards of value by which people may judge a legal process to be good as a process, apart from any ‘good result efficacy’ it may have, is arguable. This is because the values of a legal procedure refer to the purpose that it can serve rather than to the extent to which it does so in fact. Specifically, the values of legal procedures may include: a). fair legal treatment -

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60 See Alf Ross, supra note 22, p211.
61 In Unger’s view, this is because no matter how substantive justice is defined, it can be achieved only by treating different situations differently. See R. M. Unger, supra note 5, p198.
62 Although with some difficulties, L. L. Fuller viewed by and large, the ‘procedural version of natural law’ or the ‘ethical neutrality of those charged with the administration of law’, as ‘the internal morality of law’, while the concerns with common morality of law as ‘the external morality of law’. The very same considerations that require an attitude of neutrality with regard to the external (moral) aims of law demand a commitment by lawgivers to the law’s internal morality. See Lon L. Fuller, supra note 25, p96, pp131-2, and p157.
63 See R. S. Summers, supra note 43, p3.
treating people in law as equals through legal procedures; b). restriction of the abuse of powers - ensuring impartial exercise of powers; c). resolution of disputes - in the sense that legal procedures are indispensable for resolving social disputes; d). realisation of the authority of law - to the extent that law cannot be successfully carried out without procedural regularity and predictability; e). social consensus, efficiency and stability - legal procedures having a significant role for achieving these goals.64


Furthermore, in a narrow sense, G. S. Leventhal's six criteria for procedural justice can also be considered as the evaluating standards for procedural values. They include: 1). consistency - similarity of treatment and outcomes across people or time or both; and procedural change made carefully and with full notification to all who might be affected by it; 2). the ability to suppress bias - to prevent vested interests or favouritism of a decision maker or other external biases; 3). decision quality or accuracy of information - objectively high quality; 4). correctability - the existence of opportunities to correct unfair or inaccurate decisions; 5). representation - the degree

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64 I make a specific comment on this point in the following Chapter.
to which parties affected are allowed to be involved in the decision making process; 6). ethically - general standards of fairness and morality.68

It is true that the most important criteria to justify a procedure vary with different circumstances and different people or parties, simply because people are likely to prefer somewhat different procedures in different situations. In a word, the criteria may be variously explained in different cases. For example, the government normally cares about efficiency in contrast with the preferences of citizens in terms of transparency, participation, equality, and consistency.69 Moreover, in the studies of Thibaut and Walker, a distinction is drawn between disputes that involve conflicting beliefs about objective truth and disputes that involve the distribution of outcomes. In the former type of disputes, the most important criterion of successful dispute resolution is the accuracy or correctness of decisions generated from a procedure; in the latter, the principal criterion is fairness of decisions. The two are not necessarily consistent with each other. Thus they held that it is necessary to design different procedures for each of the two main categories of disputes. Furthermore, they suggested that inquisitorial procedures should be used in circumstances where accuracy is crucial, while adversary procedures would be more appropriate for the other type of disputes.70

As such, no single procedure can simultaneously maximise all criteria, such as accuracy, fairness, efficiency or whatever, for there may not be any single procedure that people can consider as the best way to resolve all types of problems. That is to say, there are indeed difficulties in the effort to evaluate procedures with identical criteria in practice. It would seem that almost all the findings with respect to the theory of procedure are fundamentally concerned with general principles that need to be flexibly applied to different circumstances, rather than with some definite standards applicable to all social settings. Consequently, in this Chapter, such questions as 'how

68 See G. S. Leventhal, supra note 7, pp40-6.
to establish a standard and what is it to measure the extent to which a procedure meets a given objective criterion? and, ‘how to balance the trade-offs needing to be made among various desiderata to design and evaluate a procedure?’ have not definitely been answered. Nevertheless, the inherent values of procedure and their independence have been established.


To deal with the issues depends not only on the level of procedure research in order to promote the design of procedures, but also, I contend, on the techniques and virtues of the people in operating procedures.
CHAPTER FOUR

PROCEDURE AND SOCIAL ORDER

The preceding Chapter considers the range of possible meanings of the term 'procedure' and argues for its value. Clearly, it is only the introduction to a theoretical approach. For a better understanding of procedure, it is necessary to elaborate on some particular social issues. The relationship between democracy and autocracy represents a fundamental and enduring topic in studies of law and political science in China. In recent years, following China’s reform and economic growth, questions about how to balance justice, efficiency and social stability have become increasingly important in Chinese social studies, such as economics, law, politics, and philosophy. In the PRC, the discussion of these questions seems to be substance-oriented.

Yet, I think, these questions may also reflect the most fundamental values that legal procedure in a general sense needs to secure. In an administrative law context, when administrators exercise powers, they are concerned not only with the purely technical mechanisms of making and implementing regulations, and carrying out policies through various processes, but also, in effect, with respective priority of the elements of democracy, justice, efficiency and social stability throughout the processes. That is why I endeavour to analyse the significance of procedure for social order by three subjects in this Chapter, namely, 'procedure and democracy', 'procedure, justice and efficiency', and 'procedure and social stability'. I apply the theories in the discussion that will follow about the role of procedure in administrative law.
1. PROCEDURE AND DEMOCRACY

The term 'democracy' is no doubt a 'hurrah' word in the sense that, in the contemporary world, there are few who will take an explicit stand against the legitimacy of it. Generally, democracy can be defined as a form of government in which the sovereign power resides and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy or oligarchy. This definition is clearly differentiated from Lenin's statement that democracy is a relative and formal thing, a superstructure determined by economic basis; but in essence, as the state, it is a kind of systematic and organisational violence. For instance, democracy in a bourgeois capitalist society emerges as the product of the violent overthrow of feudal forms of property ownership and aristocratic political regimes.

The essence of Lenin's idea of democracy is that democracy is closely associated with class, which entailed for him the destruction of all the democratic features of the ruling class in a state by the oppressed proletarian class, in order to bring about the rule by and in the interests of the latter. Lenin's theory of proletarian democracy symbolises a substantive approach in the sense that it is tied up with the majority principle of democracy. Under this principle, democracy refers to the domination of the social majority, or, it could be said, the sovereign rule of the majority; in this sense it is the rule of the many. In all countries, the many are always poor and the few are rich. Thus democracy is deduced as the rule of proletarian class. This principle might be the mechanism of making decisions conducive to democracy in many instances. Yet, democratic judgement does not always involve substantive elements that are mathematical analyses and numerical comparisons. In a democracy, a majority may be excluded from social life and the exclusion of minorities could be undemocratic in some circumstances. For instance, even the totalitarian and illiberal movement in Germany and Italy in the 1930s in fact enjoyed considerable majority support.

1 See Jack Lively, Democracy, (1975), p2.
In this regard, Robert A. Dahl's theory is still noteworthy. He suggested that the distinction between democracy and autocracy was not the differentiation between majority and minority - it was rather one between government by a minority and government by minorities. According to his theory, particular powers and rights should be given to specific minorities within those areas of particular interest and importance to them, but neither to an arbitrary minority nor to an abstract majority. He assumed that the tyranny of the majority in issue, which so exercised early democratic theorists, was illusory, for there was not a distinct, homogeneous majority deciding all issues as a group but a series of shifting majorities which changed with different issues or at different times. Dahl further contended that democracy of 'minorities rule' must take place under circumstances in which 'all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision'. His idea revealed that participation represented the cardinal aspect of political democracy, in which the role of procedure is quite special. That is to say, democracy is not only a mathematical calculation, but also, and more importantly, refers to the particular way in which a citizen or a particular social group is treated, in dealing with particular interests or rights, by an authority.

Democracy can be seen and usually is incorporated in practice as a kind of social distribution. In this context, it is most likely to be observed in terms of substantive profits and rights. Yet, in a full sense, democracy must consist of three elements. The first is democratic goals - the kinds of outcomes a democracy would seek to ensure. The second is the process to achieve the aims. The last is the outcome of democracy. Today, at least in China, many people hold that the implications of democracy vary with different social and political traditions. This suggests that an absolutely substantive democracy does not exist. This is because democratic goals are normally determined by the background of a social group in terms of class, culture, race, gender or whatever. Meanwhile the extent to which outcomes are judged as more or less democratic is relative and varied. Therefore, it seems unconvincing to interpret

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democracy only with regard to substantive implications, either in the sense of goal or in the sense of outcome, where the means to achieve either or both has been ignored.

In reality, even a dictator may establish substantive laws that are not explicitly contrary to democracy. For example, a dictator's substantive code might not be very different from those of democratic countries. Yet, if in trials of alleged offenders, evidence was taken in secret, the judge was dependent on the executive, and the defendant was not allowed to be heard, the dictator would be subject to criticism for procedural injustice and for undemocratic rule. That is why J. Lively noted that 'on self-description, Rhodesia, South Africa and Tanzania as well as Russia and America are democracies; even military regimes commonly seek justification by pledging themselves to the ultimate restoration of democracy', even if he did not directly stress the importance of procedure in this regard. Moreover, the goals and the substantive judgement of democratic values among different social groups sometimes could be competing things. For instance, previously, in socialist countries, proletarian democracy was explained based on Marxist theory of classical analysis and classical struggle, as another name of the autocracy for bourgeois class.

The experience of former socialist countries further suggests that people feel that democracy is quite abstract from their daily life, where procedural democracy is disregarded. In these circumstances they tend to assume that democracy is rather unrealistic and illusory. Certainly, there has also been a lapse of confidence in the democratic ideal, a pessimism about the possibility or even the desirability of extending its compass, either by the creation of new democracies or by the further democratisation of the old in the other countries.

In Weber's view, to call an administration democratic depends upon two principles. The first is that the administration is based on the assumption that everybody is equally qualified to conduct the public affairs. The second is that all important

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7 See Jack Lively, supra note 1, p2.
8 Ibid, pp4-5.
decisions are reserved to the common resolution of all. In this vein, the achievement of the goals of democracy depends heavily on the means. For example, the whole parliamentary system is essentially a "process", a series of operations, directed towards a certain end, inasmuch as not only whether 'a system of representation exists' but also whether a sovereign power is exercised by the whole body of free citizens are determined by the effectiveness of the corresponding procedures. Equally both the theory of the separation of state powers and the rule of law largely relate to the performance of the government in procedural terms.

Similarly, the psychological findings in the former Chapter indicate that for a person to have an opportunity to express herself and to have her views considered by someone in power plays a critical role in judgements relating to democratic representation. Moreover, people are extremely likely to care more about how they are treated and whether they can effectively participate in state life than about what the democratic goals and commitments are, or even about how much social profits they really achieved, as long as they feel the process of a social distribution is impartial. That is to say, the perception of procedural justice with respect to democracy might involve more than the questions of how decisions are made. It essentially involves how individuals are treated by public authorities and other powerful parties.

As argued, the democratic judgements of citizens are closely bound up with the evaluation of a reasonable form of government and fair procedural systems. In other words, democracy in procedure is of more importance in determining individuals' judgements of democracy than substantive, classic, purposive and resulted-oriented approaches. In short, democracy is highly related to procedural involvements and perspectives of the people in terms of social participation and the respect for individual dignity. The importance of procedure in this regard was asserted by A. Sarat, that 'it would be strange, indeed, to call a legal system democratic, if its procedures and operations were generally at odds with the values, preferences, or

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desires of citizens over a long period of time'. The values of democracy are in large part the processes of democracy, the way in which we administer justice, the way in which the government deals with individuals.

Legal process is no doubt an essential part of the democratic process. Specifically, the role of procedure in democracy in legal settings may include two parts. The first is the restraint of autocracy. This means that the manner of exercise of those state powers that adversely affect the rights and interests of citizens must be prescribed by law, in accordance with fairness and reasonableness. Certainly, the possible variations in respect of particular types of procedures in law are endless. In this regard, the situation in various Western countries illustrates that the constitution fundamentally guarantees procedural democracy, even though there may be a generalised procedural requirement applicable to all legal processes in some legal systems, and specified constitutional provisions requiring that certain processes have prescribed features in others.

Equally, the participation of citizens in state life, their individual dignity and their rights need to be safeguarded by procedural laws, by virtue of which arbitrariness in the exercise of state power may be thwarted. In contrast, unchecked by procedural restrictions in law, a government is quite likely to be autocratic. That is why the history of liberty has been largely considered as the history of the observance of procedural safeguards. As Justice Douglas pointed out, "it is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."

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12 Address by Senator William Fulbright, University of Arkansas at Fayetteville, April 13, 1974, N.Y. Time (magazine), May 25, 1974, 6, at 35.
15 Joint Anti-Fascist Refugee Comm v. McGrath [1951] 341 U.S. 123, at 179. Douglas repeated later, 'it is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat'. Wisconsin v. Constantinean [1971] 400 U.S. 433, at 436.
The second role of legal procedure lies in resolving disputes. In practice, social interests are unlikely to be allocated without arousing disputes, so dispute-resolution procedures are necessary. That is to say, when an allocation is in dispute, procedures are needed and at that point the question of procedural justice arises. In this context, democratic empowerment and satisfaction of the people are determined not only by the constitutional allocation of state powers, the protection of citizens' dignity and rights, and the restriction of arbitrary powers, but also by the existence of social dispute-resolving models for criminal litigation, civil litigation, administrative litigation and even constitutional litigation.

The main adjudicative models and, in particular, the adversarial and inquisitorial (or non-adversary) methods of dispute resolution, can mirror the nature of a democracy to a large degree. In Western countries, traditionally, the feature of the adversarial system is that each side is accorded participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments. Its basic principle is that the parties, not the judge, have the major responsibility for and control over the dispute. The parties control the pace and shape of the litigation, involving investigation, preparation and presentation of evidence and arguments. Thus, the adversarial model can be identified as a 'party-presentation' and 'party-prosecution' system.

The social traditions, on which the adversary system is based, are individualism, a fragmented political system and unparalleled cultural heterogeneity. R. Eggleston noted that the adversary system was an expression of the laissez-faire philosophy that

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held that the less the state interfered between men and men the better.\textsuperscript{20} As opposed to this, in an inquisitorial system, the judges rather than the parties or their lawyers take the main responsibility for the whole litigation. The role of judge is analogous to that of an investigator. This system depends on an efficient judicial bureaucracy, and is based on state intervention or a centralised philosophy rather than on a democratic philosophy.\textsuperscript{21}

2. PROCEDURE, JUSTICE AND EFFICIENCY

It might be said that in a general sense, 'justice' is rather an ethical and philosophical term, while the term 'efficiency' quite often belongs to the category of economics. In the broadest terms, as E. Bodenheimer suggested, justice is concerned with the fitness of a group order or social system for the task of accomplishing its essential objectives, though it is endowed with highly variable features.\textsuperscript{22} In either barter or monetary exchange, justice refers to equity or equilibrium between buyer and seller. In economics, it means that the materials and human resources at large should be allocated impartially at every step of social production, exchange and consumption; while efficiency refers not only to the lowest cost throughout production, exchange and consumption but also to the highest output and satisfaction, thus realising the


\textsuperscript{21} Presumably, inquisitorial systems, which prevailed in continental European countries from the thirteenth until the first half of the nineteenth century, are the direct descendant of the ancient Roman and Canon law. See Mirjan Damask, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', (1973) 121 Uni. of Pennsylvania Law Review 506, at 556, and V. S. Mani, supra note 17, at 18.

\textsuperscript{22} See Edgar Bodenheimer, Jurisprudence - the Philosophy and Method of the Law, (1981), p196, pp207-14; and Alf Ross, On Law and Justice, (1959), p280. The literal meaning of the term 'justice', in Chinese, zheng yi, has a close linkage with that of the words, equity, justness, reason and fairness, and can even be related to the notion of decency and honesty in dealing with another. See 'fair play' and 'fair', in Black Law Dictionary, 6\textsuperscript{th} ed, (1990), p537; and 'Fairness and Justice' in Section 1 Chapter three.
optimum allocation of social resources. That is to say, the higher the social value achieved per unit of cost incurred, the higher the efficiency represented.\(^23\)

The implications of justice and efficiency are undoubtedly beyond the field of economics. Actually, they have been constantly used also as purely political values and expressions in modern times. For instance, in politics and law, justice in procedure cannot be attained without public or popular participation. By contrast, efficiency has been reached if the proposed aim of a law was achieved, regardless of whether the means to implement the law is just or not. In fact, justice and efficiency mark the differentiated but vital goals of law, although the meanings of both concepts, strictly speaking, lack determinacy. In the history of jurisprudential thought, justice as an intuitive concept generally represented the ultimate objective of natural law, while efficiency used to be linked with the ideas of legal utilitarianism and legal positivism, both of which developed after the nineteenth century from economic and other social life.\(^24\)

In this way, unavoidably, there would be a debate between the believers in metaphysical theory and adherents to utilitarianism and analytical positivism about the respective superiority of their beliefs. In the middle of nineteenth century, a strong countermovement against the metaphysical tendencies of the preceding centuries took root.\(^25\) Both Jeremy Bentham and John Stuart Mill looked upon happiness as the supreme principle. As they pointed out, ‘actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness’.\(^26\) When speaking of justice, Bentham and Mill believed that justice should be completely subordinated to the dictates of utility, although Mill added that justice must be sought in two factors besides utility, namely, ‘the impulse of self-defence’ and ‘the feeling of sympathy’.\(^27\) Even today, although some fundamental rights, for example, liberty,

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\(^{23}\) Economists usually define ‘efficiency’ with the term ‘Pareto superiority’, that is to say, an outcome is ‘more efficient’ if and only if at least one person is better off and no person is worse off.

\(^{24}\) See E. Bodenheimer, supra note 22, p214.

\(^{25}\) Ibid, p92.


\(^{27}\) See E. Bodenheimer, supra note 22, pp86-7.
equality, safety and common happiness, have been prescribed in the treaties or
declarations of the United Nations, the believers in utilitarian and positivist
philosophies may still question the determinacy of the implications of a priori
speculation on the concept of justice and its supremacy. That is to say, the ideas that
happiness, egoistic philosophy or hedonism are supreme, and that justice should be
grounded in utility, are still influential.

These attitudes towards the priority of utility and the rejection of intuitive
conceptions of justice, fairness and even natural rights of legal utilitarianism and
positivism constantly lead to the emphasis on efficiency in a variety of social settings.
For example, under the circumstances of a free market economy, the importance of
the idea of efficiency, implying the lowest cost incurred to bring about the best
benefit, is being emphasised increasingly. By contrast, the consideration of a priori
justice or fairness is decreasing nowadays, not only in China but also in many south
east Asian countries and in many other parts of the world. In the sense of law, people
who are followers of efficiency-oriented theory may contend that the underlying role

28 For instance, Art. 1 of the Universal Declaration of Human Rights says that all human beings are
born free and equal in dignity and rights.

29 In this context, R. Posner contended that even viewed as applied utilitarianism, economics is a
distinct field of intellectual activity from philosophical utilitarianism. In his view, for understanding
the terms ‘efficiency’ and ‘justice’ in ethical theory, the concept of ‘wealth maximization’ provided a
firmer basis than utilitarianism did. See Richard A. Posner, The Economics of Justice, (1981), pp48-
51. I make a comment on the idea of ‘wealth maximization’ later in this section.

30 The expression ‘intuitive conceptions of justice’ means that the focus of the understanding of justice
is on its subjective aspect. That is to say that justice can be identified not only with universal norms
and specific institutions designed to achieve a certain goal, but also with variant attitudes of the human
mind to render to everyone her due. This also raises a question concerning the relationships between
the conception of justice in the sense of maintaining a positive order and the subjective or a priori
Wedberg, p14; and E. Bodenheimer, supra note 22, pp213-4.

31 For example, with respect to the direction of economic reform and development, The Report of the
Fifteenth Congress of the Chinese Communist Party of 1997 explicitly stated the principle of the
superiority of efficiency of economic activities. In contrast, justice was only regarded as a subsidiary
element that needs to be considered compared to efficiency.
of law is to maintain the obedience of citizens and political stability, otherwise economic development could be delayed by social dissension.

However, the ideas of natural law present competing values of justice in contrast with the ideas of utilitarianism and positivism. In his influential book, *A Theory of Justice*, John Rawls adopted a metaphysical understanding of social justice and, in particular, a standpoint of anti-utilitarianism, and thus took the position of natural law. He insisted that justice was supreme and represented the cardinal value of a social system, and not every kind of right could be infringed with regard to the balance of political business or social interests. According to Rawls, as the chief value of human action justice requires that equality of social opportunity prevail over social disparity, and excludes the deprivation of the liberty of some people in the purported interests of others.\(^\text{32}\) When commenting on the relationship between justice and efficiency, he insisted upon the priority of the former over the latter. He confirmed that the principle of justice 'is lexically prior to the principle of efficiency and to that of maximising the sum of advantages...'.\(^\text{33}\) Likewise, on this issue, John Finnis contended that the requirements of justice, being the concrete implications of the basic requirement of practical reasonableness, excluded arbitrary self-preference in the pursuit of good.\(^\text{34}\)

It seems that the theoretical controversy between metaphysical theorists and utilitarian supporters associated with efficiency and justice is quite inconclusive due to the substantive indeterminacy of these concepts, as well as the fact that it cannot be determined to what extent they can be well adjusted and coordinated. Metaphysical conceptions, and the theories of utilitarianism and positivism can never fully counter each other's arguments. In any event, to achieve the purpose of either justice or efficiency depends greatly on an effective procedural system. It appears quite workable to turn the debate in various social settings into the search for procedural egalitarianism, which may coordinate the competing values of justice and efficiency.

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\(^{33}\) Ibid. p302.

As argued earlier, people care more about justice in the procedures themselves, by which social interests or rights are allocated and disputes are resolved, rather than about the abstract purposes and even outcomes of these procedures. In many cases, the satisfaction of all concerned can be indeed increased by virtue of the use of a fair procedure without any increase in the real outcomes available for distribution or disputes resolution. For instance, John Rawls deduced that the fair way to divide a cake required that the person who was in charge of the event take her share no earlier than others. Although slavery itself was not a civilised institution, Rawls argued that the question of whether slavery is a fair system or not would depend upon whether one would expect it to be endorsed by all the people who knew they would live in such a society, but who did not know which kinds of positions they would occupy (slaves or slave owners). This is because he believed that social justice resulted from people determining fairness in the basic procedures and forms of a society, rather than being denied participation through the ‘veil of ignorance’.

In the legal arena, when people end up in court, their dispute is not typically a matter of right against wrong, but of right against right, so only a neutral and impartial procedure dealing with disputes can make the final decision favourable and acceptable for disputants. This is especially the case when the final decision is adverse to one party. In essence, impartial procedures quite often can really make people concerned

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35 Leventhal suggests that people in a well-functioning society would have little concern with procedures, for they often do not understand how procedures work. Only in a few situations, he asserts, are people likely to be strongly concerned with procedures. Firstly, an individual would be highly concerned about procedures when she occupies a social role that has the task of maintaining fairness, such as a judge, a juror, a sports referee or an ombudsman. Secondly, the significance of procedures is salient when people are involved in disputes concerning the outcomes of a distribution. The difficulty in Leventhal’s argument lies in his notion of the linkage between the degree of people’s knowledge of procedures and the degree of their concern about them. In other words, it is unconvincing to conclude that people would not necessarily care about how they are treated in terms of procedural justice in the so-called ‘well functioning society’, just because they are not familiar with the operation of particular procedures. See G. S. Leventhal, ‘What Should Be Done With Equity Theory? New Approach to the Study of Fairness in Social Relationships’, in K. J. Gergen at al, ed., Social Exchange: Advances in Theory and Research, (1980), pp48-52.

36 See J. Rawls, supra note 32, p85.

17 Ibid, p12.
feel fair. Therefore, it was said that 'it is not a question of whether the tribunal has arrived at a fair result...the question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at the result',\textsuperscript{38} because doing what is right may still result in unfairness if it is done in the wrong way.\textsuperscript{39} In this context, Slade J. expressed his opinion, 'it is more important that justice should appear to be done than that it should in fact be done'.\textsuperscript{40} This principle, reasserted by Lord Hewart C. J., has been often quoted, namely, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.\textsuperscript{41} That is why K. C. Davis postulated that 'the essence of justice is largely procedural'.\textsuperscript{42}

Likewise, when discussing efficiency, people cannot say that one outcome is more efficient than another, since what people really need to discuss in relation to efficiency is the process itself, by which a goal is achieved. For example, there are no inherently protracted cases, only cases that are unnecessarily protracted by inefficient procedures and management.\textsuperscript{43} The focus here is on procedure \textit{per se}, although the notion of efficiency may have a wider implication, such as the connection between the effect of a decision and the procedure by which the decision was reached. In this vein, the divergent idea of an economic analysis of law, as a kind of utilitarian legal value in modern times, is noteworthy.

The essence of an economic approach in legal settings is to seek to maximise wealth and economic efficiency. The legal procedure is viewed as an expense incurred in achieving an end. Thus the aim of legal procedure is to minimise the expense, including a). error costs - the costs of correcting wrong decisions (e.g. 'liable' and 'not liable' in civil cases, 'guilty' and 'innocent' in criminal cases and, incorrect fine in administrative cases); and b). direct costs (those of making decision, or say, running a legal system involving the time of lawyers, litigants, judges, jurors,

\textsuperscript{40} R. v. Consett Justices, ex parte Postal Bingo Ltd [1967] 2 Q.B. 9, 19.
\textsuperscript{41} The King v Sussex Justices, ex parte, McCarthy [1924] 1 K.B. 256, 258.
\textsuperscript{42} See Kenneth Culp Davis, Administrative Law Text, (1972), p192.
\textsuperscript{43} See preface to The Manual for Complex Litigation, (1982), at ii, 5th ed..
witnesses and other people, expenditure for the salary of law staff, paper and ink, communication service etc.), in short, the cost of procedural apparatuses. A typical standpoint of the economic analysis of law regarding legal procedure is that in general people would not want to increase the costs of legal procedure by one dollar in order to reduce error costs by 90 cents.44

It would be inappropriate to insist that there are no difficulties in enhancing accuracy and minimising cost, which are viewed as the fundamental objectives of legal procedure according to economic analysis of law. In principle, it sounds reasonable that it is not worthy spending one dollar of direct cost to reduce error costs of 50 cents. However, in practice, it is inconceivable that people will always be able to calculate how much the error cost will be reduced when designing a particular legal procedure. Neither the benefits nor the costs flowing from a particular legal procedure are absolutely calculable. As Mashaw questioned, can the costs to the dignity of individuals and the administrative costs of government, for example, be measured in the same currency? Moreover, there is no reason to believe that the court or the legislature has superior competence in calculating the benefits and the costs of respective legal procedures, and thus that the chief tasks of the court and the legislature are to balance social income and expenditure rather than libertarian and fair values. Additionally, the studies in the previous Chapter indicate that a decent procedure that treats the parties involved impartially actually in a dispute really does make the painful task of deciding which party will prevail manageable, and helps to make the decision itself acceptable. This means that the role of effective procedure in reducing the possibilities for further legal dispute cannot be ignored. Hence, it seems more reasonable to rank economic standards as inferior elements for procedural consideration, rather than to overstate them.

Another instance, which is noteworthy with respect to the efficiency argument, can be gleaned from the circumstance of a free market economy, where the efficiency and


the optimum use of natural resources, and the maximisation of competition in economic activities are the determinants. Only through the safeguarding of procedural justice in competition and allocation can the values of efficiency and optimum use be reasonable and considerable, inasmuch as the supreme objective of economic efficiency is to enhance social productivity, increase social property and improve the spirit of humanity. If equality in procedure is disregarded, people would be encouraged to become utility maximisers in market activities, which would lead to imperfect competition (monopoly elements), externalities, and even the decline of morality and corruption. As a consequence economic efficiency may not be continuously present.

Therefore, in a market economy the government must engage in promoting equity through various measures, including legislation. Essentially, the focus of governmental engagement is to ensure procedural justice in economic activities. The emphasis on the role of procedural justice in the setting of a free market economy does not deny the difference in the gains of each economic participant, individual or a group. In other words, the objective is not to seek an absolute equilibrium between individual outcomes. It only means that the rules in respect of the manner of competition and allocation must be fair in order to ensure all participants of the market economy are treated as equals, thereby achieving perfect competition. The opposite standpoint amounts in fact to ‘preferential treatment’ which discriminates against some people because of race, sex or some other factor, and even passes over a more qualified candidate from one group to appoint or admit a less qualified person.

48 The antagonists toward the notion of equal treatment may argue that the notion seems patently false in respect of ability, wealth, status, good looks, height and even weight in society, and in some instances denies people the choice to make their own decisions. See B. Williams, ‘The Idea of Equality’, in P. Laslett and W. G. Runciman ed., Philosophy, Politics and Society - A Collection, (1962), p125. In this context, of great importance to Dworkin is the distinction he draws between the twin ideas of treating people ‘as equals’ and giving people ‘equal treatment’. The primary idea, he says, is that of treating people ‘as equals’, and the idea of ‘equal treatment’ only derives from the former. Indeed, it is the confusion between these two very important and different senses of equality that leads people to reject equality as a moral ideal. See Stephen Guest, Ronald Dworkin, (1992), pp226-30.
candidate from another group. In Nagel's words, this standpoint appears to be a flagrant denial of the rejected candidate's right to equal treatment, no matter how laudable the social goal is.49

3. PROCEDURE AND SOCIAL STABILITY

Stability and change, integration and conflict, function and dysfunction, consensus and constraint are, it would seem, two equally valid aspects of every imaginable society, as Ralf Dahrendorf has said.50 Although in philosophy stability is temporary and relative, while change is absolute, both social workers and politicians have never given up their attempts to obtain social stability in accordance with their own goals. In practice, however, the balance of the relationship between social stability and social change or development marks a fundamental issue of modern times.

What is the meaning of social stability? And how can it be attained? From a social psychological viewpoint, social stability results from the people's respect for and obedience to the ruler's authority. Accordingly, in theory, social stability may refer to three types of social orders. First, in highly moralised societies, like imperial China, and homogeneous societies, such as many Islamic countries, morality, religion and charisma are the most fundamental elements for achieving stability through the way of devotion to the exceptional sanctity, heroism or exemplary character of an individual person.51 Secondly, in exclusively autocratic societies, all the people yield to or are hoodwinked by absolute autocratic authorities. Social stability in this case is another name for exclusive coercion and absolute obedience. The tyranny in Germany in the 1930s exemplified this scenario. In these two circumstances, social stability resulted from the obedience of individuals, irrespective of their dignity and interests. Any dispositions, either of a substantive or procedural nature, which prevented the ruler from exercising absolute and arbitrary powers, rarely existed.

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In modern democratic countries, under the rule of law, people can obtain consensus through a representative system. In other words, they can best achieve their interests and rights through social cooperation.\textsuperscript{52} In this, the third situation, the ruler's or state authority derives from public belief in terms of certainty and regularity rather than coercion. Accordingly, social stability refers to a legally established impersonal order relying upon social consensus.\textsuperscript{53} The evolution from social coercion and social charisma to social consensus mirrors in essence the history of democratic evolution, that is to say, from status to contract.\textsuperscript{54}

The methods used by the ruler to control society are of major importance to determine social stability in a modern sense. In relation to ruling, there are informal and formal methods that are suited to different types of societies, with different implications for social stability as indicated above.\textsuperscript{55} In moralised and homogeneous societies, informal controls, usually involving the functions of morality, religion and custom, are rather effective and are preferable. In this situation, the ruler usually prefers to make use of the force of social tradition, custom and religion to control society. Non-legal methods, such as negotiation and mediation are rather popular in a homogeneous society. For instance, in the Chinese tradition, people disliked lawsuits to resolve disputes, because traditional Chinese societies emanated from a relatively closed and moralised social environment, and because the patriarchal system was prevalent throughout Chinese imperial history.\textsuperscript{56} Thus \textit{li}, a traditional moral system,

\textsuperscript{52} See S. Vago, ibid, p12.

\textsuperscript{53} In Vago's opinion, there are two kinds of perspective of social order - 'integration-consensus' and 'conflict-coercion'. See S. Vago, supra note 51, p15.


\textsuperscript{55} See S. Vago, supra note 51, pp17-9.

\textsuperscript{56} There are some Western lawyers, i.e. Philip Huang, who have suggested that traditional China was more litigious than had previously been thought. See 'Chinese Non-Litigation Tradition', Section 3 Chapter eight in detail.
advocating social harmony in reliance upon individual endurance and obedience, was extremely sophisticated and developed in imperial China.\(^{57}\)

It would appear that the significance of legal procedure might not be salient when social ideologies, interests and structures are relatively unitary. Yet, in societies with pluralistic interests and diverse social values, or where social interests and systems need to be dramatically adjusted, informal controls would be insufficient to maintain social harmony and stability.\(^{58}\) The reason for this is precisely that where the interests and ideas of diverse social parties or groups become adversarial, the unconditional moral, religious or spiritual obedience and sacrifice of the subject can hardly be attainable. In such circumstances formal control, which normally refers to law, arises. Formal social controls are usually characteristic of more complex societies with a greater division of labour, heterogeneity of population, and subgroups with competing values and different sets of morality and ideologies. As observed, ‘formal social controls...are characterised by the explicit establishment of procedures and the delegation of specific bodies to enforce them (laws, decrees, regulations, codes)’.\(^{59}\) In essence, as the underlying component of formal social controls, following the increasing role of law, legalised procedure plays a crucial role in modern societies in overcoming social conflicts.\(^{60}\)

Substantive differences and conflicts between different social groups and classes are inevitable in reality. However, in fact none of these differences is the real enemy of political stability. Rather, discontent with the political system itself represents the true threat in a modern sense. To avoid this threat, attention needs to be directed to the quality of the law, and of the government’s commitments. Political authorities, more importantly, have to also establish fair procedural mechanisms to deal with the conflicts between competing social values and interests among various social groups or parties, so that all sides, especially the disadvantaged, can assume that the political authority has impartial values, and distribution and redistribution are made through

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59 See S. Vago, supra note 51, p162.
60 Also see A. S. Diamond, The Evolution of Law and Order, (1951), pp313-7.
fair procedures. In this regard, procedural opportunities seem to be formal facilities by which to undertake social distribution.

Psychologically speaking, the disadvantaged focus less frequently and explicitly on negative outcomes than on unfair procedures in terms of their acceptance of a society, although substantive differences also can impact upon their attitudes to the society to a degree. To put it in another way, even if only a few people in practice can make progress beyond the position where they begin in life, the disadvantaged in principle need to be persuaded that they are not procedurally discriminated against, and that those with intelligence and ability can theoretically rise to the top of wealth, politics or whatever social positions they aspire to, through their own efforts in a procedurally free, fair, open and competitive society.

The reasons for this point are based upon the fact that people prefer being ruled through a process they assent to, or acquiesce in, rather than by one imposed on them. As the studies in the previous Chapter suggest, decisions are in general more likely to be accepted when the procedure used to make the decisions allows participation by those affected, or seems fair to them. The findings in studies by Lind and Tyler also support this point. They show that an organisation can expect to see greater employee satisfaction, less conflict, better task performance and more obedience to procedures and decision where procedures are fair, and further, that procedural fairness enhances commitment and loyalty to groups and institutions. The findings of N. Friendland et al. showed, in contrast, that unfair procedures resulted in higher levels of disobedience and in more false ‘efficiency’ and clever disobedience than fair procedures. They also found that the non-compliance or non-cooperation

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impacts of unfair procedures would be magnified if certain powers were exploitatively used.64

Likewise, in the political arena, for citizens, the actions of the state would not be reliable without restraint through publicly recognised procedural rules for the purpose of considering citizens’ ideas and interests and avoiding political autocracy. Citizens’ approval of and satisfaction with a state essentially result from their appraisal and experience of its fairness and impartiality, the experiences being generated from the interaction between themselves and the state through various procedures. In other words, the procedures for creating the basic structures of a government and deciding the fundamental principles on which the government distributes social resources and interests would considerably determine citizens’ beliefs and evaluations of political authorities.

In the legal context, specifically, the resolution of disputes in criminal, civil and administrative cases, the effective supervision of government, public participation in social life, the relationship among different political parties and economic organisations or groups and even international cooperation in many fields all depend on legalised procedural rules. At this point, a commentator noted that ‘people’s obedience to the law stems from the respect for the underlying process’.65 This is seemingly because the authority of law is derived from a moral understanding between rulers and ruled. Furthermore, a gross and cynical discarding of formal and predictable procedure, ‘the internal morality’, as L. Fuller suggested, constituted a kind of fraud on those who must obey where there could be no moral understanding between rulers and ruled.66 Lawrence M. Friedman similarly contended that people obey the law, ‘because it is the law. It means they have general respect for the procedures and for the system’.67

65 See Steven Vago, supra note 51, P252.
In the sense that fair procedures can operate to reduce the level of social disputes and conflicts, and hence promote social harmony and stability, there may be a concern that formal procedures for resolving disputes, in particular, adversary procedures, are quite likely to harm post-conflict relations between disputants. Social harmony as a whole would be affected in consequence. By contrast, informal procedures, such as mediation, appear less harmful to post-conflict relations than the methods of formal adjudication. In fact, whether the procedure used to resolve a dispute will harm post-conflict relations between disputants does not depend on its formality or informality. Rather, it depends upon the extent to which it allows the disputants more procedural control, that is, allows disputants to express themselves and to have their views considered by the mediator or adjudicator. To put it another way, as just concluded, procedures high in disputants decision control, high in process control, and involving the use of compromise in decision are more conducive to post-conflict relations than procedures low in disputants decision control and low in disputants process control.\footnote{See Lind & Tyler, supra note 63, pp121-2.}

In summary, citizens might consider fairness in procedure as an important factor not only in enhancing favourable reactions to decisions made by state powers, but also in promoting the satisfaction of them with their legal experiences, and ultimately determining their compliance with the law and perceptions of the legitimacy of social authorities. Through the role of fair procedures, state actions in many instances become less arguable and thus acceptable to citizens. Furthermore, social differences and conflicts should only be generated and, fundamentally, resolved through fair procedures, eliminating any inborn discriminations and partial dispositions. If this is not done, political stability becomes at risk. In this context, procedural fairness can be seen as a buffer between state authorities and the subject, because of its neutrality for social distribution and resolving various conflicts, and its capacity to restrict the abuse of powers.

In addition to this Section, procedure, in the sense of a certain social process to deal with something, as mentioned in the previous Chapter, can be understood from a sociological point of view, as a kind of social tradition, custom and decency. In this
regard, there is a linkage or similarity between procedure and social custom. Therefore, before closing, one issue with respect to the significance of social custom, including judicial custom, for social stability and continuity, which may otherwise be outside the dimension of the present Chapter, should be noted.

That social stability, to a certain degree, rests on social custom is because social norms in many cases tend to be consistent with each other and are strongly supported by tradition. The authority of social custom primarily derives from the continuous individual self-discipline of humans. External and informal restraint, and disapproval of individuals’ anti-traditional actions commonly come from family, friends and neighbours. *Li*, which regulated imperial China extensively and profoundly, was a good example of the significance of social custom for social order. In the legal sector, apart from the role of statutory or descriptive procedural rules, the respect for judicial custom in the common law tradition, which is closely related to the authority of judicature, seems another fundamental approach to social stability.

In practice, often not only procedural rules emanate from judicial custom, as in the case of the rules of natural justice in England, but also the respect for judicial custom itself is quite likely to lead to an emphasis upon procedure. It has been said, for example, that the common law of England, which largely rested upon procedure, ‘is nothing else but the Common Custom of the Realm...consisting in case and practice’, handed down by tradition and experience but also remaining in the memory of the people through all the political changes and invasions. In other words, the common law can in essence be regarded as ‘the general immemorial customs’ (Blackstone) and experiences or historical reasons which the courts declared. In some ways, the respect for judicial custom is little different to advocating the role of procedure in the common law tradition.

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69 See Steven Vago, supra note 51, p17.
70 See ‘Li – The Moral Intention of the Ancient Chinese Law’, Section 3 Chapter eight in detail.
71 See ‘Features in the Civil and Anglo-American Tradition’, Section 1 Chapter six in detail.
Respect for judicial custom basically refers to the continuity of and the public belief in the judicial system. It may involve two underlying aspects, namely, 'consistency' and 'adherence to precedent'. The term 'consistency' means the treatment of like cases alike and different cases differently and implies that there must be a certain logic and coherence in decision. The phrase 'adherence to precedent' (stare decisis) refers to the taking of previous decisions to prescribe decisions in similar cases present before the court, and further, involves the idea that each court is strictly bound by decisions at a higher level, and the higher courts are bound by their own decisions.

The two principles of 'consistency' and 'adherence to precedent' not only determine the moral and legal duties of judges, but also ensure whether and to what extent the judiciary can safeguard individual rights. The principles essentially ensure that certain criteria of justice created by the judges can be applied across persons and over time. For individuals, these two principles in reality can provide some degree of certainty and predictability upon which they can rely in the conduct of their affairs. Thus individual rights in many situations are reflected more by court precedents than by descriptive elements. In the common law tradition, for example, judicial precedent was pivotal, for according to it laws acquire what binding force they have by virtue of a long and immemorial usage and by the strength of custom and reception. In the wording of James I, 'reason is too large. Find me a precedent and I will accept it'. The other requirement of consistency may be properly seen also as an ingredient of justice, and inconsistency is a legitimate ground of criticism of any system of justice.

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73 Basically, the notion of adherence to precedent plays an important role in Western jurisprudence, and a pivotal role in common law tradition. There is a distinction between seeing adherence to precedent as a matter of law in England, and considering it merely as a matter of practice, as is the case in Scottish legal tradition. Further see Anthony Blackshield, 'Practical Reason and Conventional Wisdom: the House of Lords and Precedent', Precedent in Law, ibid, pp115-8.

74 See Precedent in Law, ibid, 'Introduction', p2.


The principles eventually determine the public trusts in the court. In the absence of them, the authority of the judiciary and the law would be eroded. As a result, citizens' respect for social legality, and further the realisation of social harmony and stability would be influenced negatively. The nature and extent of respect for judicial custom are significant for any consideration of procedural justice in a state. The relationship between the lack of trust of Chinese people in the judiciary and the underdevelopment of fair legal procedures in ancient China illustrates this view, which I explore in Chapter eight.7

77 See 'The Tradition of Non-litigation', Section 3 Chapter eight. There is a reason why in ancient China, the respect for li, a social custom, did not necessarily lead to the flourishing of a fair procedure system. See 'Li – The Moral Intention of the Ancient Chinese Law', Section 2 Chapter eight.
CHAPTER FIVE

PROCEDURE AND ADMINISTRATIVE LEGALITY

In modern Western legal theory, administrative legality, which requires the executive power to be exercised in accordance with the rule of law, is secured by supervision of the power. The basic ideas in this respect can be categorised in two ways. One focus is on the significance of procedural rules to restrict and structure the way in which administrative action is taken, which in essence is the prior regularisation of administrative actions. The other emphasises the role of the judiciary or quasi-judiciary in reviewing administrative actions, which is the supervision of administrative activities after a dispute has arisen and thus a posteriori (after the dispute) in character. These two distinct ideas, when traced through different legal traditions, may lead to different institutional features in practice.

The implementation of the former idea commonly results in the necessity of conceptualising and codifying administrative procedures in advance. The latter imposes requirements and principles, by which to review and justify administrative actions, through judicial or quasi-judicial proceedings. The concerns about procedural justice in an administrative law context broadly relate to the procedural criteria by which the judiciary justifies administrative activities and even to the procedures governing the activity of judicial review itself. Hence, it does not necessarily mean that procedural values are locked down upon in the latter case. In practice, procedural requirements can be regarded as just as important a ground upon which to justify administrative actions in the latter case as in the former. In contrast to the latter, this Chapter elaborates particularly on the former approach to procedural values in ensuring administrative legality, which is, I think, of major importance for the PRC.

1 The after-the-dispute supervision of administrative actions also includes the supervision from parliament, social media and other social groups.
1. THE CONCEPT OF ADMINISTRATIVE PROCEDURE LAW

The notion of 'administrative procedure law' can be understood as either statutory rules or other types of rules, principles and case law, which bind the way in which administrative authorities exercise their powers. In other words, administrative procedure law chiefly regulates the actions of administrators and provides rights to citizens whose matters are before them. This is in contrast to administrative substantive law, which often empowers the regulator and imposes obligations on the regulated. It also differs from the law on judicial procedures, which enforces legal obligations and sanctions on many sides, including the prosecutor, the defendant, the defender, the witness and the judge. Moreover, it is different from private law, which regulates the conduct of commercial and trade activities, and imposes legal obligations equally on parties.

Even though there is a strong tendency in public law for principles derived from the work of the courts or tribunals to be extended in part to administrative procedures, lots of countries have enacted administrative procedure codes. Specifically, Austria in 1925 (as amended in 1991), Poland and Czechoslovakia in 1928, Yugoslavia in 1930, America in 1946, Spain in 1958 (as amended in 1992), Bulgaria in 1959, Switzerland in 1968, Sweden in 1971, Germany in 1976, Portugal in 1991 (as amended in 1996), Japan in 1993, Macao in 1994 and South Korea in 1996 followed this legislative trend. That is to say, in many countries statutes are the main source of administrative procedure law.

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1 For example, the law on taxation in many countries not only empowers tax agencies to levy tax, but prescribes citizens' obligations to hand in tax as well. The significance of the classification and conceptualisation of substantive administrative law and procedural administrative law in some countries possibly considerable, whilst in others it may not be. Sometimes, indeed in administrative law practice, the two concepts cannot be separated at all.

2 For example, the Criminal Procedure Law of 1979 (as amended in 1996) of the PRC.

3 For example, it has been asserted that in Australia there was a need to accommodate administrative review principles and procedures to new approaches to decision-making. See Cheryl Saunders, 'Appeal or Review the Experience of Administrative Appeals in Australia', ACTA JURIDICA, (1993), p103.
In some instances, the particular provisions of constitutions may also be looked on as an important source of administrative procedure law. For example, Art. 31 of Japan's Constitution provides, 'no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law'. Another example is the requirement for procedural due process in the United States Constitution (the Fifth and Fourteenth Amendments). In New Zealand, under the Bill of Rights Act of 1990, the right to judicial 'due process' has been developed, specifically, in Sections 21-27. Section 33 (1) of the Constitution of the Republic of South Africa of 1996 provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'. Section 195 of that Constitution provides further procedural requirements of public administration, such as participation, transparency and impartiality. Upon the basis of Article 4 of the Constitution of Switzerland, which concerns citizens' equal rights, the Swiss Federal Tribunal has developed the principle of due process, imposing procedural obligations on cantonal administrations. In Canada, the Canadian Charter of Rights and Freedoms can be regarded as the constitutional source of administrative procedures.

The functions of administrative authorities at large can be classified into decision-making, rule-making and adjudication. Some procedures may need to relate to them all and some may relate to them differently. The scope of administrative procedure law is usually linked to the extent of codification of administrative procedures, which varies in different countries. Thus, in reality, although the administrative procedure

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7 Here the expression decision-making refers to an administrative action that specifically affects an individual's rights or obligations, whilst the rule-making function means that the effect of an administrative action is general; the term adjudication refers to the quasi-judicial function of administrative activities. See Frank J. Goodnow, *Comparative Administrative Law*, (1970), pp26-9; and Kenneth C. Davis, *Administrative Law Text*, (1972), pp3-4, p139, p194-5.
laws of a great number of countries contain some basic and common rules, there are
great differences as to their scope.\textsuperscript{8}

The United States Federal Administrative Procedure Act of 1946 (the APA),
subsuemes procedures for all kinds of administrative actions under one definition. In
the wording of the United States Supreme Court, it is a ‘basic and comprehensive
regulation of procedures in many agencies’.\textsuperscript{9} In the United States, there is neither a
comprehensive judicial review law, such as the Administrative Decisions (Judicial
Review) Act of 1977 (the ADJR) in Australia, nor an independent law dealing with
the constitution of administrative courts such as the Law on Administrative Courts of
1960 in Germany. Consequently, the APA affects the procedures of judicial review
and the matters of the appointment and discipline of administrative judges as well.\textsuperscript{10} In
short, in its function the APA affects a mixture of fields.

Unlike the United States, administrative procedure in other common law countries
refers mainly perhaps to the process of using administrative tribunals to adjudicate
administrative disputes, and not necessarily, more comprehensively, to the way in
which all kinds of administrative actions must be taken.\textsuperscript{11} To put it another way, the
focus upon administrative procedure in many common law countries is the discussion
about the nature of administrative tribunal process in contrast with purely judicial

\textsuperscript{8} See Lorenz Koderitzsch, ‘Japan’s New Administrative Law: Reasons for Its Enactment and Likely
\textsuperscript{10} Sec. 703 and Sec. 705 of the US APA deal with some procedural aspects of judicial review, and
Sections 3105 and 7521 deal with the affairs of the appointment and discipline of administrative judges
respectively.
\textsuperscript{11} Clearly, the implication of the term ‘adjudication’ in these countries is different from its US
counterpart, where it is mainly defined in the US Federal Administrative Procedure Act. The definition
of ‘adjudication’ in Sec. 551(7) of the US APA is primarily a residuary one, ‘Order’, which is the end
result of an ‘adjudication’, means the final agency disposition ‘in any matter other than rule-making
but including licensing’. The scope of ‘adjudication’ in this context is thus dependent upon the content
of the term ‘rule’ as defined in the same Section (4). In other words, ‘adjudication’ under the US APA
is determined by what is not rule-making. See on this point, B. Schwartz, ‘Administrative Terminology
process, rather than an attempt to prescribe the procedures of all kinds of administrative action in a single Act. The attitude towards administrative procedure in these countries can also be used to explain the lesser weight placed on the codification of administrative procedures, for the purpose of providing procedural safeguards in advance. As the Franks Committee suggested, the need for procedural differences outweighed the advantages of a single code or a small number of codes prescribing procedural uniformity; consequently, procedural rules are tailored to the individual needs of each tribunal in the United Kingdom. Furthermore, the attitude stems from the creation of a variety of administrative tribunals in these countries, which has reduced somewhat the need to comprehensively codify administrative procedures for safeguarding good administration.

The Law of Administrative Procedure in Germany of 1976 (Verwaltungsverfahrensgesetz), which lays down all the general principles of such procedure as they developed in the German law, is succinct legislation. The law not only defines the concept of administrative procedure but also prescribes the concept of administrative action. The special procedure for planning permission is also included in the German APL. Nevertheless, the law does not apply to the act of administrative rule-making, unlike the American APA and the Spanish Administrative Procedure Law of 1958 (ley de procedimiento administrativo), which is followed before the

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13 See in detail in the following discussion about the growth of administrative tribunals.

14 Within the meaning of Verwaltungsverfahrensgesetz, 'administrative procedure' is any activity of the administrative authorities with external effects directed at the examination of the conditions, the preparation and the taking of an administrative action or at the conclusion of a public law contract; it includes the taking of an administrative act or the conclusion of a public law contract. (Article 9, chapter one). 'Administrative action' refers to every direction, decision or other sovereign measure, taken by an authority for the regulation of a particular case in the sphere of public law, directed at immediate external legal consequences; a general order (allgemeine Verfügung) is an administrative action. (Art. 35, chapter one).

adoption of new administrative regulations or before making an administrative decision involving an individual (Sections 69 to 71 ).

As in the case of the Law of Administrative Procedure in Germany, the 1968 Federal Administrative Procedure Act in Switzerland (Verwaltungsverfahrensgesetz/Loi sur la procédure administrative) also defines the notion of ‘administrative action’. The Swiss Act regulates the competence of the authorities to issue such action. Furthermore, it stipulates the rights and duties of the parties during the administrative procedure, and contains prescriptions concerning the due form in which administrative actions have to be issued, and the means available for the administration to enforce administrative action if the duties are not observed by the persons concerned.

The 1993 Japanese Administrative Procedure Law, officially promulgated, is another example of the scope of administrative procedure law. In Japanese administrative law, the concept of ‘administrative action’ usually includes ‘administrative determinations’ (applications and disadvantages), ‘administrative guidance’, ‘notification’, ‘public law contracts’, ‘administrative planning’ and ‘administrative rule-making’. The latter three types of administrative act are excluded from the binding scope of the Japanese Administrative Procedure Law, which thus differs explicitly from the relevant frameworks in Germany and the United States.

2. THE ROLE OF ADMINISTRATIVE PROCEDURE

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19 This also explains why Japanese APL no longer can be seen as an example of pure reception of Western legal concepts. Rather, it is an example of ‘home-grown’ legislation addressing very specific domestic problems. See Lorenz Koderitzsch, supra note 8, at 116.
Historically, the structure of Western public law, unlike the traditional private law system modeled on ancient Roman law, was developed by European jurists, who were inspired by natural law thought and by the English experience of struggle between the Crown and the subject, and between state power and individual rights in the seventeenth century. Following this pattern, administrative law provides a framework that limits arbitrary and reckless use of the executive power and, thus, is a typical weapon for the protection of individual rights. In doing so, the role of administrative procedure is crucial.

First of all, for administrative activities to be 'legal', it is not enough that they only conform to the substantive criteria expressed in a rule of recognition, or can be imputed from some basic norms of a legal system. More importantly, administrative legality is also a matter of the way rules operate, of how they are drafted, promulgated, applied, and enforced. For example, an administrative decision, which is made by an administrator without any excess of substantive powers, may still be unjust and harmful to individuals if the decision is achieved in the absence of procedural propriety. Therefore, administrative procedure law determines the legitimacy of administrative activities in terms of openness, neutrality and fairness in order to ensure the equal participation of affected citizens.20

In this context, administrative efficiency and the legal protection of individual rights and interests must be properly balanced in setting out administrative procedures. In practice, state executive power often seems to be dominant over individual rights and interests. At least in the PRC, for example, the majority of substantive administrative laws or regulations, created by the state, are likely to emphasise the obligations of

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20 This idea is called the 'participatory model' of administrative legitimacy in American administrative law theory in contrast with other two models. One is called the 'transmission belt model', which holds that the legitimacy of administration can be guaranteed by the elected representatives' control of administrative activities, because of the citizens' control of the legislature through electoral politics. The other is the 'expertise model' of legitimacy, which suggests that the public acceptability of administrative activities is, to a great extent, determined by professional experience and scientific methodology. See R. Stewart, 'The Reformation of American Administrative Law', (1975) 88 Harvard Law Review 1667, at 1667; and J. L. Mashaw, Due Process in the Administrative State, (1985), pp16-24.
citizens, more than the binding obligations of administrative authorities. Therefore, on the basis of the reciprocity of legal rights and obligations between the administration and the administered, there must be a mechanism for protecting citizens and ensuring their participation in state life, and avoiding arbitrary and capricious administrative action. As previously discussed in Chapter three, such aims depend upon procedural dispositions that chiefly apply to administrative activities.

For example, the state certainly has the power to levy taxes on citizens and impose sanctions on individuals, whose activities are in breach of the law. But the process to do so must be justified.

Secondly, we are unlikely in theory to obtain a common conception, or identical principle of administrative law if we look at administrative law only from a substantive viewpoint, for administration is a rather changeable and subtle social activity. Indeed, the rules regulating diplomacy, national defence, taxation, and sanitation are quite different. Thus, unlike a criminal code, a civil code or a constitutional code, it is impossible to draw up a substantive administrative code that binds all aspects of the administration. However, it is not impossible to develop some common procedures for the administration. In those countries, which have sought to draw up such provisions, therefore, the overwhelming majority of administrative codes are intend to create procedural uniformity, which can increase public understanding of administrative activities. In South Africa, for example, ‘the desirability of a generalised statutory prescription of administrative procedures’ has long been considered a fundamental issue for administrative law reform and has been prescribed in the Constitution (Section 33).

21 This can be illustrated by some provisions of the 1982 Chinese Regulation on the Registration and Administration of Industrial and Commercial Enterprises promulgated by the State Council and of the 1986 Regulation on the Sanction of Security Administration promulgated by the Standing Committee of the NPC.


23 Under Japan’s Administrative Procedure Law of 1993, Art. 1, (1), for instance, the aim of the Law is stated to be that of protecting citizens’ rights by providing general and uniform rules for administrative action only.

When considering the issue of codifying or prescribing administrative procedures, antagonists may well argue that the diversity in the nature and purposes of administrative actions will obviously make it hard to achieve uniformity. Specifically, the variables may be as follows: the status of the administrator; the significance to be attached to the public interest in different administrative contexts; the machinery and means through which an administrative determination is made, and the like. For instance, the particular requirements of the procedure for adjudicating administrative cases or disputes differ from those of the procedure for administrative decision-making or rule-making. Therefore, the objection to the principle of uniformity of administrative procedures as a goal of codification seems to be that any code, enacted to cover all administrative fields (adjudications), would have to be drafted so widely as to provide illusory safeguards only, and possibly lead to administrative delay.

It is true that the effort to enact an administrative procedure Act unavoidably involves the conceptual distinction and classification of administrative actions, as evidenced by the experience of almost all countries who have tried to do so. It is definitely difficult. Yet, from a legislative perspective, the search for uniformity of administrative procedures merely means the prescription of procedural safeguards in

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26 Taking the American APA of 1946 for example, administrative actions in the US are generally classified into 'rule-making acts' and 'adjudicative acts'. The term 'rule-making', means an agency process for formulating, amending, or repealing a rule; the term 'adjudication' refers to an agency process for the formulating of an order, which means whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making, including licensing, sanction, and relief and so on. See American APA, Section 551, (5), (6), (7).
defined administrative fields. With ample consideration of the diversity in the nature of different administrative activities and reasonable classification of them, procedural requirements and conformity are practically achievable. At a minimum, it appears advisable to enact some procedural Acts applicable to limited fields of administrative actions, or to proceed by way of individual procedural rules.\(^\text{27}\) It is certainly also advisable to allow particular administrative agencies or tribunals to formulate more specific procedural rules to meet their own particular needs, by virtue of which the questions of the expertise inherent in the different administrative fields, which an administrative procedure Act purports to govern, and the flexibility needed in applying it can be resolved.\(^\text{28}\)

Thirdly, it is clear that affected citizens are more likely to accept the subsequent administrative decision if they have an opportunity from an early stage to participate in the relevant procedures, and perhaps to influence them through their involvement. Presuming the interests of citizens involved have been considered and protected through a fair administrative procedure, a lot of satisfaction could be achieved within the administrative system. The possibility of administrative disputes between individuals and administrative authorities is thereby likely to be reduced. Therefore, the need for subsequent judicial protection may be less urgent, which is also to say, the judicial protection needed itself may be less stringent.

In this way, the burden on courts or tribunals in respect of administrative cases would be alleviated, because the recourse of citizens to them to deal with administrative disputes would decrease by virtue of the ‘filtering’ role of

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\(^{27}\) For example, in Australia, it has been suggested by the Administrative Review Council in its report No. 35 (1992), “Rule Making by Commonwealth Agencies” that an Act to be called ‘the Legislative Instruments Act’ should be enacted to prescribe the procedures relating to delegated legislation (rule-making).

\(^{28}\) Apart from the technical difficulties in enacting an administrative procedure code, I believe the objection to the uniformity of administrative procedure in some countries in part flows from the conventional interests and ideas of administrative lawyers, who regard themselves as specialists in their substantive areas of law and do not believe that such specialised areas would benefit from generalised procedures.
administrative procedures. From an economical viewpoint, the cost of solving administrative disputes will also be decreased overall. Furthermore, the jurisdiction of the court for administrative disputes, regardless of whether it is ordinary or not, is limited in any country. Administrative cases with respect to matters such as national defence and foreign affairs, usually cannot be handled through the judiciary. Rather, it is preferable to resolve the disputes in these areas through processes within the administrative system. That is why it has been held that, ‘the protection of citizens’ rights should not only be entrusted to an after-the-fact judicial review but should also be supplemented by procedural safeguards’. We can more simply look at a table for this perspective.

Table 3: The 'Filtering' Role of Administrative Procedure

A response to the above might be that the creation of administrative procedures for the goal of both relieving judicial burden and reducing the error cost will increase the overall cost. In fact, the procedural cost overall has a characteristic of ‘equilibrium’. The omission of administrative procedure would certainly increase the direct cost of the after-the-fact review function. The fact of the continued growth of administrative

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29 The legislative history of Japan’s Administrative Procedure Law of 1993 exemplifies this point from a different angle. As summarised, the relative absence of a means for effective after-the-fact judicial review was one of the reasons to enact administrative procedure law in Japan. L. Koderitzsch, supra note 8, at 108.

tribunals in England and other common law countries from the end of World War II may exemplify this standpoint. The growth of administrative tribunals in these countries is in essence attributable to the fact that the economic development and the proliferation of administrative functions to intervene in social life led to many administrative disputes and, as a consequence, the burden on the courts in dealing with these disputes became heavier. Thus the recourse to administrative tribunals was increased deliberately in order to lessen the burden on the courts. In this context, both the reports of the Franks Committee in England in 1957 and the Bland Committee in Australia in 1973 aimed to resolve the issue of the increasing need of administrative tribunals. For instance, the former report concluded:

Reflection on the general and social economic changes of recent decades convinces us that tribunals as a system for adjudication have come to stay. The tendency for issues arising from legislative schemes to be referred to special tribunals is likely to grow rather than to diminish. (paragraph 37)

The growth of administrative tribunals in some common law countries was not only the result of socio-economic changes and the proliferation of executive power, but also had its theoretical background. In theory, proceedings in the courts are normally considered as formal, slow and expensive steps, and are solely concerned with the resolution of a conflict between the parties; furthermore, quite often they are not well equipped to take the general interest into account. In contrast, the process of tribunals can be designed with informal, expeditious and inexpensive features. In respect of the adjudication of administrative cases, administrative process can be designed to consider the public interest, and, unlike the courts, the administrative tribunal involved in deciding a case can also, hopefully, exercise a policing function by instituting proceedings on their own initiative and by exercising a continual supervision over the field of administration with specialisation and expertise. Hence, the creation of administrative tribunals is seen as an expedient contribution to the alleviation of the work load of the courts and the supervision of the executive. See Margaret Allars, ‘Neutrality, the Judicial Paradigm and Tribunal Procedure’, (1991) 13 Sydney Law Review 377, at 377, and G. A. Flick, Natural Justice - Principles and Practical Application, supra note 25, pp6-7. Another reason for the vast growth of administrative tribunals is that the jurisdiction of the court in the common law tradition to scrutinise administrative actions merely involves law review on the grounds of the principles of ultra vires and natural justice, excluding merits or facts review, which is narrower than the jurisdiction of many independent European administrative courts. Hence, there had to be an institution created to handle the area of merits review.
Needless to say, the prediction of the Franks Committee was correct. It was estimated that in England there were at least 2000 administrative tribunals in 1980, and the considerable growth of administrative tribunals in other common law countries is similar. No doubt, the systematic creation and unlimited growth of administrative tribunals will lead to considerable cost. In the U.K., the Tribunals and Inquiries Act of 1971 symbolised the recourse to generalised administrative process for the purpose of regulating the creation and operation of tribunals. Furthermore, for efficiency reasons, the Commonwealth Administrative Appeals Tribunal (AAT), which was a result of the recommendation of the Bland Committee in 1973, was created in Australia under the 1975 Administrative Appeals Tribunal Act to review comprehensively many kinds of administrative decisions, and so as to relieve the need of the Commonwealth legislature to create additional tribunals. As suggested, the AAT was efficient because the same central and regional infrastructure could service a range of review jurisdictions, avoiding the costly duplication associated with random specialist tribunals.

In addition, a procedure-oriented system of judicial review seems to be an expedient approach to the scrutiny of contested administrative decisions. In this light, the court may reconsider administrative decisions for more complete findings, or for a testing of the evidence in a more fair administrative proceeding, rather than dealing immediately with the issue of whether an administrator is wrong. Instead of determining by proofs in court whether an administrative agency has substantively deprived the complainant of a statutory entitlement or, imposing new decision criteria or priorities on the agency, the court may require that such action be preceded by an administrative hearing which would elicit the relevant facts. Also, the court may suggest that an agency reconsider or revoke a decision, due to the violation of a compulsory procedural requirement under an administrative procedure Act, such as the giving of reasons or notice in advance, rather than review the substantive content of the decision.

33 See C. Saunders, supra note 4, p99.
34 See J. L. Mashaw, supra note 20, p26.
In brief, administrative procedural law, in the sense of procedural conformity and generalisation in an appropriate degree, is not only an economical and effective way to confine and structure administrative actions to achieve administrative legality and justice, but also represents a significant technique to provide a more concise and helpful ground for judicial review. The lessons that have been drawn here will be applied to the discussion in the final Chapter of whether there is a need for making a comprehensive administrative procedure Act in China.
CHAPTER SIX

AN OVERVIEW OF

ADMINISTRATIVE PROCEDURE SYSTEMS

The last Chapter argues generally for the role of administrative procedure in administrative legality. For reasons attributable to different historical backgrounds, however, the source of procedural requirements governing administrative justice in Western countries may be a judicial doctrine, a constitution or specific legislation. In searching for some common values, this Chapter further explores, in an administrative law context, systematic features of procedural requirements in both the Civil law and the Anglo-American law countries. I try to link the values to the Chinese administrative procedure system and draw some conclusions from the former for the latter in the following Parts.

1. FEATURES IN THE CIVIL AND ANGLO-AMERICAN TRADITION

Under the historical influence of France, administrative disputes traditionally are adjudicated primarily by administrative courts rather than ordinary courts in most European countries with a civilian legal tradition. Such continental countries as Germany, Holland, Belgium, Italy, Luxembourg, Spain, Portugal, Greece and Turkey

1 A Statute of 16 and 29 August 1790 established this basic division of jurisdiction by removing from ordinary courts any right to decide disputes between citizens and the administration; this right was seen as belonging to the administration itself. See Brice Dickson, Introduction to French Law, (1994), p59.
all have separate systems of administrative courts. Accordingly, administrative litigation (la juridiction administrative) and a dual court system is of major importance in supervising administrative authorities and protecting individuals in European administrative law. In contrast, it is the single or ordinary court system that scrutinises the lawfulness of administrative actions in Anglo-American countries.

Another difference in administrative law between the two legal systems is that, traditionally, considerable attention has been paid to administrative proceedings and substantive issues in European administrative law but not to procedural areas, whilst the notion that substantive rights are to be secured mainly by procedural rules is particularly entrenched in the thinking of Anglo-American administrative law. This point usually is supported by the extensive application in judicial review of the traditional English doctrine of natural justice, or more recently, the principle of procedural fairness, in common law countries within the British tradition. Meanwhile, in the United States, administrative law tends to be understood as procedural law, largely excluding substantive law. For example, K.C. Davis held that administrative law is not the substantive law produced by the agencies, and it is not the substantive

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2 Certainiy, there are some differences between the functions and jurisdictions of particular types of administrative courts in these countries.

3 European administrative law, here and throughout the thesis, is used in a narrow sense. It refers only to a legal tradition, without strictly geographic implications. In fact, the French or the civilian tradition of separate administrative courts was seldom followed in former socialist countries of Eastern Europe. In the Soviet Union, Czechoslovakia, East Germany, there was no judicial review of administrative actions at all. In others, such as Bulgaria, Hungary, Romania and Yugoslavia, a limited range of administrative action was reviewable in ordinary courts, or in special sections of supreme courts. A special administrative court of the traditional continental model was reintroduced in Poland in 1980. The court had broad jurisdiction to set aside administrative actions with exemption of some, like the expulsion of an alien and denial of a passport. See M. Weirzbowsky and S. C. McCaffrey, ‘Judicial Control of Administrative Authorities: A New Development in Eastern Europe’, (1984) 18 International Lawyer 645, at 645. Also see M. Weirzbowski, ‘Administrative Procedure in Eastern Europe’, (1977-78) 1 Comparative Law Yearbook 211, at 211.


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law created by legislative bodies or courts and administered by the agencies; instead, administrative law is the law that governs the powers and procedures of the agencies.6

The reasons for the different stress on procedure between the European and the common law traditions are historical. The common law developed by and large through court decisions. Technically, there was a close historical relationship between the writs (breves) and court decisions because court decisions were the legal consequences of the royal orders contained in the writs. For instance, in the middle of the thirteenth century there was a rule, that no one could sue in the Royal Courts without having obtained a writ from the king (non potest quis sine brevi agere). In history, the writs were designed to lead to a judicial proceeding, and the procedures, whereby the plaintiffs' cases were to be decided, were in consequence established.

By the year 1300, there were hundreds of different writs, each of which, in effect, was both 'an assertion of policy and an assertion of royal jurisdiction'.7 In essence, the writs chiefly dealt with procedural issues. The categorisation of kinds of remedies, as well as the statement of the procedures for invoking them, objectively defined the royal jurisdiction in ancient England. In the meantime, the commentaries upon writs were compiled with the commentaries on procedure, built up on precedents from the middle of the thirteenth to the end of the fifteenth century.8 The emphasis upon procedure in common law history is meaningful not only as a reflection of royal power but also as a limitation on royal power. This enables us to understand that the majority of court decisions were concerned with procedure, which indeed was becoming increasingly technical in the sixteenth century. The sixteenth century, therefore, symbolised the period of excessive procedural formalism of the common law.9

In this way, substantive law was less developed than procedural law in ancient England. As Maine described it, 'so great is the ascendancy of the law of actions in

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the infancy of courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure. Even the earliest two books of authority concerning laws and customs of England, namely, *Tractatus de Legibus et Consuetudinibus Regni Angliae* (Treatise on the laws and customs of the Kingdom of England) written by Glanville between 1187 and 1189, and *De Legibus* written by Bracton in 1569, were works largely on procedure. Hence, procedure is considered as the structure upon which the whole common law of England rested, or the key to the common law. In brief, the common law is the offspring of procedure.

The origin of the *Counseil d'Etat* in France lay in the historical confrontation between the ordinary courts and the executive in the eighteenth century. Contrary to the English lawyer Dicey's famous historical bias, the emergence of independent administrative court actually represented a judicial democratic movement at that time. The establishment of dual court systems in Europe on the French model was not only a reflection of the practical virtues of French administrative courts but also of French control and influence in Europe in the nineteenth century as well. At the same time, French law forms a part of the Roman-Germanic family of law, sharing a common origin in ancient Roman law. Thus similar concepts and principles have developed in many European continental countries. English law on the other hand, historically speaking, has not been 'Romanised', even if there was a certain influence on Equity from Roman law tradition. French law therefore is more easily understood by lawyers in other European countries than by lawyers bred in the Anglo-American tradition. Without a similar historical background, the English practice of administrative law did not follow the French model, instead using the one ordinary court system.

What is the reason that, historically, less emphasis has been placed on procedural areas in French administrative law in contrast with the Anglo-American system? In

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11 See, Henri Lévy-Ullmann, supra note 8, p60, p68.
12 Ibid, p59.
14 See B. Dickson, supra note 1, p1.
origin, the French administrative court was a quasi-administrative agency. It not only had plenary jurisdiction (*le contentieux de pleine juridiction*) to determine administrative disputes in respect of both law and merit, but also performed an advisory role for the government. By contrast, the ordinary courts in the common law system deal only with issues of law in administrative cases. It seems, therefore, that the characteristics of French-style administrative courts in terms of plenary jurisdiction, a close relationship to administrative agencies and more specialised administrative judges, meant that they could respond more accurately and effectively to the needs of highly developed administrative procedure system as opposed to the ordinary courts in the common law countries.

2. THE SHIFT IN EUROPE

The comparative lawyers' conclusion that Anglo-American administrative law, in contrast to its European counterpart, was characterised by the central importance of procedure was true. More recently, however, there has been a shift towards a greater emphasis on procedural safeguards in European administrative law. Furthermore, some typical procedural features in the conventional proceedings of French administrative courts, which seemingly have been underestimated in comparative administrative law, also need to be mentioned in this Section.

Firstly, in the democratic constitutions of continental Europe written in the aftermath of World War I, there actually is a tendency to express in written norms those principles and techniques of procedure of the British system which are part of the unwritten law.\(^1\) Some of the fundamental procedural requirements already enshrined in the European Convention of Human Rights (1953) related to judicial proceedings, such as the rights to a 'fair hearing' and to 'trial within a reasonable time'. In practice, since the case of *Transocean Marine Paint Association v. Commission*,\(^2\) the European Court has developed a general doctrine of what it calls 'the rights of the defence' (*les droits de la défense*), which marks the first example of

the Court drawing on English law in the elaboration of its general principles.17 The view which held that there is a general rule of Community law that 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known even in the absence of a specific legislative provision', has been accepted by the European Court.18

If at the outset of the Community, the development of European administrative law could be identified as falling within French conceptions of legal protection against the administration, today, it is the influence of English law on the safeguarding of fair administrative procedure which are most visible.19 The establishment of an administrative procedure in European Community law is regarded as essential having regard to the general principles of the rule of law.

Secondly, in individual cases, a number of European countries, including Poland, Czechoslovakia, Yugoslavia, Bulgaria, Spain, Switzerland, Sweden, Germany and Portugal, have enacted their administrative procedure Acts since the enactment of the General Administrative Procedure Act in Austria in 1925 (Allegemeines Verwaltungsverfahrensgesetz). The movement towards the codification of administrative procedure in European countries in this century is indeed a discouragement to the identification of an ignorance on their part in relation to procedure in administrative law.20

Thirdly, although some European countries, like France, have not passed an administrative procedure Act, the French administrative courts have developed their own procedures with special characteristics.21 In fact, the requirement to hear both

19 See J. Schwarze, supra note 5, p1197, p1430.
21 The procedure before the Conseil d'Etat in France is quite unlike any court procedure in England and differs also from that before the civil courts in France. This is principally because it shares the
sides before a decision is arrived at is also recognised by French droit administratif. This rule must be observed in disciplinary and other proceedings of such a nature as render it necessary to give the applicant an opportunity to meet the government’s case against him and to question witnesses (the principle of contradictorie - which requires that each side must be able to contradict what the other side has put). 22 The procedures of the French Conseil d'État, as characterised by Brown and Garner, are simple, highly effective and inexpensive, for in the instruction of the rapporteur (special members in the administrative section of French administrative courts) and the conclusions of the Commissaire du gouvernement, the plaintiff has the aid both of an investigation into the facts and a survey of the law which have no counterpart in English proceedings for judicial review. Especially in the recours pour excess de pouvoir (judicial review proceedings), legal representation is not required. 23

In Germany, apart from a particular code regulating the activities of administrative authorities, there is another elaborate federal statute, the Verwaltungsgerichtsordnung of 1960, as amended, governing the procedure of administrative courts. Under the Verwaltungsgerichtsordnung, the procedure of administrative courts is of greater simplicity than that of ordinary courts, although the Law is enacted on the model of the Code of Civil Procedure. 24 In Switzerland, both of 1968, the Administrative Procedure Act and the Law Concerning the Organisation and the Procedure Before the Federal Administrative Court (Gesetz über die Verwaltungsgerichtsbarkeit des Bundesgerichts/Loi sur la juridiction administrative du Tribunal Fédéral) cover the entire process of administrative activities at federal level. 25


Fourthly and finally, procedural ultra vires is a cardinal ground for review of administrative action in many European countries. In Germany, for instance, ‘disregard of form and procedure’ is a ground of judicial control, and a breach of procedural or formal rules may result in the nullity of an administrative act.\textsuperscript{26} In French administrative law, \textit{vice de forme} also is an important ground upon which to challenge administrative actions. The French administrative courts make a distinction between substantial and insubstantial formalities. A failure to observe a substantial formality will lead to the voidability of the subsequent proceedings.\textsuperscript{27} With regard to the position of procedure in Italy, S. Galeotti held that ‘the two rules of natural justice are not unknown to the case-law of the Consiglio di Stato (Italian Council of State)’.\textsuperscript{28} Moreover, under the requirements of the Swiss Federal Tribunal, cantonal administrations are obliged to inform individuals about the preparation of an administrative decision limiting their rights or imposing new obligations on them, and to give them a chance to argue their cases before the administrative authority. In other words, in Switzerland, an administrative decision must be made in due form and, the individual adversely affected by the decision has the right to be heard by administrative authorities.\textsuperscript{29}

\section*{3. CONCLUSION - COMPARATIVE COMMENTS}

In general, there has been a tendency towards a minimum or ‘relative procedural uniformity’ in administrative law to protect individual rights and interests in many Western countries. Even in the continental countries, there has been a shift towards a greater focus on administrative procedure in this century. On the other hand, administrative procedure in some common law countries may be understood more


\textsuperscript{27} L. N. Brown and J. F. Garner, supra note 21, p146.

\textsuperscript{28} See S. Galeotti, \textit{The Judicial Control of Public Authorities in England and in Italy}, (1954), p181.

\textsuperscript{29} See Thomas Fleiner-Gerster, supra note 25, p37.
frequently as the processes of administrative tribunals (adjudicative or quasi-judicial function) than as a single piece of legislation generally binding the manner of various administrative activities. In these countries, procedural justice is fundamentally governed by the traditional doctrine of natural justice.\(^3\) France seems to be another exception to the practice of seeking procedural uniformity in administrative actions. This has perhaps ensued from the fact that French administrative judges are no less respected and trusted than common law judges in guaranteeing a posteriori supervision of maladministration by virtue of their special experiences and distinct trial procedures.

It is true, comparatively, that the methods of rationalisation, generalisation and conceptualisation in traditional continental jurisprudence, which have had great influence upon many countries in the world, have little, if any, parallel in English law or in any other common law system.\(^3\) Moreover, from the perspective of effective administrative courts, English administrative law is by no means as developed as its French counterpart. Yet, in the area of administrative procedure, the notion that 'despite the remarkable developments which have occurred in English administrative law in the last 30 years or so, England still has a long way to go before it matches the sophistication of the law in France,'\(^3\) would seem over-pessimistic. In contrast with European countries, the administrative procedural system in Anglo-American countries is more effective and vigorous and, thus, in a better position in many ways.

Firstly, the US Federal Administrative Procedure Act of 1946, which was tailored to meet the constitutional due process requirement, is still the most comprehensive and influential legislation of administrative procedure in the world. It has become a model for corresponding legislation in a number of countries, such as the German Administrative Procedure Law of 1976 and Japan's Administrative Procedure Law of

\(^3\) Nevertheless, according to the advocacy by the Institute for Public Policy Research in Britain, the draft of the written Constitution for the United Kingdom contains the fundamental procedural right to a fair and public hearing in its first division of the bill of rights. See A Written Constitution for the United Kingdom, (1991), ed. by Robert Blackburn, p37, p168.


\(^3\) See B. Dickson, supra note 1, p60.

Secondly, apart from the traditional remedies of prerogative writs or orders for reviewing administrative actions, a more recent principle of procedural fairness has been created and widely applied in Britain and other common law countries. The doctrine of natural justice or procedural fairness in its earlier formulation related to powers which by their exercise affected legal rights or interests. Yet, one can be treated unfairly in various ways, even though rights and interests are not violated. Thus in recent times, it has become commonplace in the common law world to refer to the possibility that a person is under a duty to be fair if in the exercise of a power he or she can affect the 'legitimate expectations' of another person to some form of right, liberty or benefit. This suggests that the boundary of the traditional doctrine of natural justice has been broadened, covering many more decision-makers and types of decisions than in the past.

In the common law countries, based on the doctrine of natural justice or procedural fairness, procedural review represents a typical mechanism to supervise the administration and protect individuals. By way of contrast, although the traditional English doctrine of natural justice has been transplanted into the spirit of the Community law in terms of 'the rights of the defence', it is applied in a less developed form in other Member States. The distinction between substantial and insubstantial formalities in France exemplifies this standpoint. In France, although the Conseil d'Etat has held that a person concerned in administrative actions should be given

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33 In general, these remedies include mandamus, prohibition and certiorari, injunction, declaratory judgement, habeas corpus and quo warranto. The drawback of these remedies seems that the technicality of their application sometimes is not only incomprehensible but also quite absurd for the layman and even some lawyers. See The Commonwealth Administrative Review Committee Report (Kerr Report), August 1971, Australian parliamentary paper No. 144, at 16-20.

34 See detail 'Natural Justice and Procedural Fairness', Section 3 Chapter seven.

35 See T.C. Hartley, supra note 17, p159.
notice and enabled to present her defence,\textsuperscript{36} the procedural starting point of the \textit{droit administratif} is that the administration is required to observe only those procedural requirements that are imposed by some legal text.\textsuperscript{37} In other words, procedural requirements are imposed on administrative activities only by statutes or regulations in France. German law is in a similar position to French law in the sense that the court decisions will depend upon whether it treats a formal or procedural provision as mandatory or directory in this context.\textsuperscript{38} It also stands on a sounder footing in so far as the 1976 Law of Administrative Procedure clearly enacts that an administrative decision will not be subject to invalidation on the ground of violation of a provision relating to form or procedure if the observance of such provision would have led to no difference in the decision.\textsuperscript{39}

It is true that today, for the purpose of making the principle of natural justice or procedural fairness more definite, and thereby more accessible to citizens, it is becoming important to identify more clearly what procedures will be used in what kinds of situation.\textsuperscript{40} However, it also is unquestionable that, through the application of natural justice or procedural fairness, procedural justice has been more extensively and flexibly protected in the common law countries than it has been in Europe. In other words, even if there have been some remarkable shifts in this century towards the importance of procedure in the municipal law of many European countries and the law of the Community, the conventional conclusion that in administrative law, the Anglo-American system emphasises the significance of procedure more strongly than the continental tradition still seems convincing.

\textsuperscript{36} See the case of the widow Trompier-Gravier decided by the \textit{Conseil} on the 5th of May, 1949, c. f. Z. M. Nedjati and J.E. Trice, supra note 22, p122.


\textsuperscript{38} M. P. Singh, supra note 26, p73.

\textsuperscript{39} Ibid, pp72-7. Some German lawyers concede that such exemption excludes unnecessary litigation and delay. But at the same time, as criticised, the principle of sanctions imposed without the requirement of form and procedure is inconsistent with the rule of law.

CHAPTER SEVEN

NATURAL JUSTICE IN THE COMMON LAW TRADITION

The previous Chapter analyses the historical reasons why the ancient English law focused on procedure, and the development of procedural concerns in European countries in this century, and compares the common law and civilian systems from a procedure perspective. In this Chapter, I have chosen to focus on the English doctrine of natural justice. This is because, being a fundamental ground for the court to redress maladministration, it historically marked, and today still marks the most important procedural requirement for administrative justice in many common law countries. Meanwhile, in recent years the doctrine has been frequently noticed by Chinese administrative lawyers, when they draw on the experiences of the common law system in resolving procedural issues. Moreover, in the Chapter, I trace the evolution of the doctrine of natural justice or procedural fairness in contrast with that of the doctrines natural law and 'due process' in the United States Constitution.

1. NATURAL LAW IN RELATION TO NATURAL JUSTICE

The expression, 'natural law', which was created by the ancient Greek philosophers and developed by the Roman jurists, usually refers to a kind of abstract reason existing in the universe or above the human society, and implies the principles of natural right or wrong. Although the definite meaning of natural law is still a controversial matter, there is no doubt that it has greatly influenced legal development over the centuries. 'The doctrine of natural law has existed continuously for almost twenty-five hundred years in various forms. During this period it has been used as a
criterion for the evaluation of human positive law and as an ideal by which legal systems should be guided. Historically, the theory of natural law was concerned with what should be the permanent and ultimate foundation of law and how to make human positive law in accordance with justice, which to some extent can be looked upon as the most fundamental issue of legal philosophy. In this way, natural law is the true test by which the justice of law is to be decided.

The term ‘justice’ can be found in the works of Plato and Aristotle who endeavoured to find the foundation of human behaviour. Aristotle, in particular, distinguished between natural justice which is universal and immutable, and conventional justice which is binding because it was ordered by some authorities. In the eyes of Stoics, natural law was a universal ideal of good conduct upon which all human positive law should be founded. Gaius equated natural law with *jus gentium* that was generally accepted as unchangeable by all the Italian tribes because *jus gentium* depended on reason (the law of Nations). As Henry Maine says, ‘the law of Nations so far as it was founded on the principles of natural law is equally binding in every age and all mankind’.

In the Middle Ages, it was asserted that the will of God guides the world and the natural law is founded on the will of God. Hence, it was thought that the eternal law was the moral law in accordance with the Christian doctrine, and that positive law should coincide with natural law. In consequence, an edict of the Emperor that conflicted with natural law was regarded as a nullity. Natural law which binds because of a sanction involved a certain course of action after due consideration of all the circumstances. Positive law was a degree of reason made for the good of all men by one who was responsible for the common good. The principle of natural justice is the term that expresses the idea of the Middle Ages. We also can see this point through what Yelverton C. J. said in 1470:

> We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law; then they resort to the law of nature which is the ground of all laws, and according to what they consider to be most beneficial to the common weal they do, and also we

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shall do. If we are to make a positive law on this point we ought to see what is most necessary for the common weal and to make our law accordingly.¹

During the long period of time which the common law of England was being developed, a similar process was invoked by the common law courts, and a divine origin was frequently ascribed to natural law.² As pointed out, the notion of common law as something not residing in rules but in more fundamental principles expressing a transcendent reason or ancient wisdom had close affinities with natural law doctrines asserting the existence of some higher (moral) law governing and providing ultimate authority for the ordinary rules of human (positive) law.³ In Calvin’s case (1608),⁴ it was said that the law of nature which God at the time of the creation of the nature of man infused into his heart was part of the law of England and immutable, and should be superior to any judicial or municipal law. Being the eleventh law of nature in Leviathan, Thomas Hobbes pointed out, if ‘a man be trusted to judge between man and man, it is a precept of law of Nature, that he deal equally between them’. ‘The law of England is pure primitive Reason’, Judge Jerman asserted in 1649.⁵ In 1675, in the case of Thornborough v. Baker,⁶ Lord Nottingham explained that the rule which the mortgagee’s interest in mortgaged land is confined to security for the money loaned as attributable to ‘natural justice and equity’. In Moses v. Macferlan, Lord Mansfield said, ‘...the defendant, upon the circumstances of the case, is obliged by the ties of natural justice’.

Used in these circumstances, natural justice is another name for natural law, although devoid of some at least of the theological and philosophical overtones and

¹ Y.B. 8 Edw. IV, 21.
⁴ 7 Co. Rep. 1a, p126.
⁵ The year books, i vol. 12, mo. (Cambridge 1921), p18.
⁶ 3 Swans. 628, 630.
implications of that concept.\textsuperscript{11} The relation or similarity between natural law and natural justice was asserted by Lord Esher M. R.'s famous definition, 'natural justice - that is...the natural sense of what is right or wrong'.\textsuperscript{12} The ancient connection between them has been neatly expressed by the definition of natural justice as that part of natural law that relates to the administration of justice.\textsuperscript{13} Marshall said, 'the words natural justice, which implied the existence of moral principles of unarguable truth guided by God, were here clearly not used in their restricted modern sense but were synonymous with natural law'.\textsuperscript{14}

Natural justice, which derived from natural law in the past, and which was expressed occasionally as a synonym for 'natural law', 'natural equity', 'the laws of God', and 'summum jus', differs from natural law in implication and has been confined to specific maxims today.\textsuperscript{15} Even though traditionally there was no concrete statute requiring the maxims of natural justice, the justice of the common law has actually supplied the omission of the legislature. In this context, natural justice is said to express the close relationship between English law and moral principles.\textsuperscript{16} In modern times, natural law is a metaphysical concept with both procedural and substantive implications, whereas natural justice, as a judicial doctrine of the common law, relates only to the implication of the former.

2. NATURAL JUSTICE AND PROCEDURAL DUE PROCESS IN TRADITION

Essentially, there is nothing technical about the principles of natural justice. It normally includes two basic aspects, namely, the hearing rule (\textit{audi alteram partem} - the idea that the parties should be given a proper opportunity to be heard) and the rule

\begin{itemize}
\item\textsuperscript{11} Paul Jackson, \textit{Natural Justice}, (1979), second ed., p1.
\item\textsuperscript{12} \textit{Foinet v. Barrett} [1885] 55 L.J.Q.B. 39, 41
\item\textsuperscript{13} See D. J. Hewitt, supra note 3, p184; and P. Jackson, supra note 11, p6.
\item\textsuperscript{14} See H. H. Marshall, supra note 5, p9.
\item\textsuperscript{15} See D. J. Hewitt, supra note 3, p139; and Marshall, supra note 5, p184.
\end{itemize}
against bias (*nemo judex in causa sua* - the notion that a person adjudicating should be disinterested and unbiased). Traditionally, the rules of natural justice applied only to judicial or quasi-judicial functions, or where there was a duty to act judicially, and not to administrative functions.\(^{17}\) Hence, the Report by the Donoughmore Committee said, 'although natural justice does not fall within those definite and well-recognised rules of law which English courts of law enforce, we think it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and person who have to give judicial or quasi-judicial decisions ought to conform'.\(^{18}\)

The problem lies in the fact that the theoretical line between one class of function and the other is obviously blurred. In practice, the common law courts have not performed adequately in setting up criteria by which they can be distinguished.\(^{19}\) Moreover, there are some who argue that sufficient attention has not been paid to the great difference between various kind of cases in which it has been sought to apply the principle of the doctrine. Hence it would be difficult to reconcile the authorities on it due to its vagueness.\(^{20}\) There are others, however, who contend that it would be wrong to attempt to give an exhaustive classification of the cases where the principle (natural justice) would be applicable.\(^{21}\) They often suggest that the rules of natural justice are infinitely flexible and capable of accommodating whatever set of factual circumstances is in issue.\(^{22}\) In other words, the requirements of natural justice must depend upon the circumstance of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth.\(^{23}\) They argue that it is impossible to lay down in advance universal rules as to the content of natural justice, and as to the question of whether the principles of natural

\(^{17}\) See the judgement of Gibbs J. in *Salemi v. MacKellar* (number 2) [1977] 137 C.L.R. 396, at 419-20.


\(^{21}\) *Attorney-General(Hong Kong) v. Ng Yuen Shiu* [1983]2 A.C. 629, at 636.


justice must be applied, and if so, what those principles require, because these questions depend on the circumstances of each case.\textsuperscript{24}

The question whether the rules of natural justice have been modified by a statutory provision will depend upon the true construction of the statutory provision in light of the common law principles.\textsuperscript{25} A statutory provision may explicitly state that the rules of natural justice are to apply in circumstances where at common law those rules may not have been held applicable. On the other hand, in circumstances where the common law rules may be applicable, a statutory provision may explicitly or implicitly exclude their application. An express exclusion of the rules may be found not only in a statutory provision, but also in a piece of subordinate legislation or in a provision found in the rules of a non-statutory body.\textsuperscript{26} Again, the question of whether the rules of natural justice have effectively been excluded, expressly or by implication, is likely to be decided on a case by case basis. The rules of natural justice generally are inapplicable to the exercise of legislative power even in the form of delegated legislation.\textsuperscript{27}

Historically, the notion of ‘due process of law’, which referred to procedure by original writ or by an indicting jury, first appeared in place of ‘the law of land’ in the statutory interpretation of 1345 of the Magna Carta (1215) by Parliament, under Edward III. It was declared:

\begin{quote}
G. A. Flick has tried to summarise the following categories of cases for the purpose of providing some guidance as to both the existing categories of case involving the application of this principle, and the categories that will evolve in the future. They include namely: 1). the right to liberty; 2). property rights-reality; 3). interference with livelihood; 4). employment; 5). reputation and character; 6). privileges (license); 7). clubs and other associations; 8). legal expectations. See G. A. Flick, supra note 22, pp27-36.

\textsuperscript{24} Durayappah v. Fernando [1967] 2 A.C. 337, at 349-50. In 1969, ‘natural justice’ was written into the Foreign Compensation Act 1969 in the UK, s. 3(10); in Canada, see the 1970 Federal Court Act, s. 28 (1) (a).

\textsuperscript{25} G. A. Flick, supra note 22, p36.

No free man shall be taken or imprisoned or designed or outlawed, or exiled or in any way ruined, nor will we go or sent against him, except by the lawful judgement of his peers or by the Law of the land.  

The term ‘due’ means linguistically ‘ordinary’. Therefore, in the United States, the constitutional requirement of due process was originally created to provide an ‘ordinary’ process, thereby avoiding special processes for special persons or for particular actions having legal consequences for any person’s life, liberty, or property. In other words, the understanding of the due process constraint may have been that it provided protection against oppressive governmental action enforced through special proceedings.

Even though a fair hearing before an impartial tribunal is also a requirement of due process, natural justice has not been thoroughly inherited and transplanted in the United States. However, a procedural due process system, based on the Fifth and Fourteenth Amendments of the United States Constitution, has been developed as the most fundamental procedural requirement. The due process clause normally is considered as the constitutional heir to English concerns about Star Chamber proceedings, and to the American revolutionary concern about an arbitrary colonial magistracy.

As with natural justice in Britain and other common law countries, it is well recognised that due process, which is a fundamental constitutional principle in American jurisprudence, is a flexible concept. As a descriptive concept, due process has been used to explain and organise a great variety of existing legal rules and procedures; as a normative principle, it has been used to justify existing rules and

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29 The term ‘ordinariness’ was, through the interpretation of American court, later supplanted by the word ‘appropriateness’, as the crucial implication of the term ‘due’. See Jerry L. Mashaw, Due Process in the Administrative State, (1985), pp50-6.
procedures and to generate new ones. It essentially means that 'judicialisation' is required in many kinds of state-action cases, such as the police and administrative agencies, and both criminal and civil processes are subjected to its constraint as well. Yet, the clause 'due process' in the United States Constitution is not one purely of form or procedure. Due process claims are asserted as a constitutional right, as limits on the permissible activities of government. The part of a citizen's bundle of constitutional rights that has developed under the due process clause is and always has been both substantive and procedural. It was even said that due process did not demand particular historical forms of procedure, but rather protection of 'the very substance (content) of individual rights, liberty and property'.

When explaining the application of due process, it was contended:

If due process is interpreted as a mechanical yardstick, unalterable regardless of time, place and circumstances, it may make government unworkable. Its content must therefore vary with circumstances. The Constitution does not require full judicialization in every conceivable case. Whether a judicial-type trial is required depends upon a complexity of factors; the nature of the right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which should be taken into account.

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33 The term 'judicialisation' basically refers to the process of submitting official decisions to adjudicative procedures. See Jeffrey Jowell, 'The Legal Control of Administrative Discretion', (1973), Public Law, at 183.
34 The substantive aspects of due process were recognised explicitly in some of the nineteenth century tax cases, such as Loan Association v. Topeka [1874] 87 U.S. 20, Wall 655. Nevertheless, since the 1930s, the Supreme Court in the United States has tended to regard due process as involving purely procedural questions, e.g. Mathews v. Eldridge [1976] 424 U.S. 319. Taken from the note of the interview in the Melbourne Law School with Professor Jeffrey S. Lubbers from the American University, Jan. 27, 1998.
35 Hurtado v. California [1884] 110 U.S. 516, at 532. Thus the notion of 'due process' in the US sometimes needs to be divided in practical terms into 'procedural due process' and 'substantive due process', although the attempt to distinguish them can never be entirely successful. See J. L. Mashaw, supra note 29, pp4-5, pp71-3; and Wang Mingyang, American Administrative Law, Chinese ed., (1994), p383.
That is why in Frankfurter's view, 'due process is perhaps, the least frozen concept of our law - the least confined to history and the most absorptive of powerful social standards of a progressive society'.

Again, in *Griswold v. Connecticut*, he said, 'due process, unlike some legal rules is not a technical conception with a fixed content...[it is] compounded of history, reason, the course of past decisions...'.

Previously, it was held that the adjudicative function, covering all administrative actions other than legislative action, attracted due process whilst the legislative function did not. Put simply, it was held that 'constitutional procedural due process requirements apply primarily to adjudication, not to rule-making' in America. Thus, the applied scope of procedural due process in the United States is similar to that of natural justice in Britain and other common law countries. It only binds decision-making and adjudicative acts, and is not generally applicable to rule-making.

It is noteworthy that there is a significant difference between traditional notions of due process and natural justice. As a general proposition, traditionally it was assumed that there is no duty to state reasons for judicial or administrative decisions in English law, and that the giving of reasons is not required by the rules of natural justice. Nevertheless, the situation in Britain and other common law countries has been

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39 It is in this context that the distinction between the adjudicative function and the legislative function becomes crucial in the U.S.. See *The Commonwealth Administrative Review Committee Report* (Kerr Report), August 1971, Australian parliamentary paper No. 144, at 56.
42 However, in 1981, Gellhorn and Robinson noted that procedural due process constraints, such as notice, a trial-type hearing and an impartial decision-maker, might apply to a rule-making proceeding in which a very small number of persons were affected exceptionally, in each case upon individual grounds. See G. O. Robinson and E. Gellhorn, "Rulemaking 'Due Process': An Inconclusive Dialogue", (1981) 48 Uni. of Chicago Law Review 201, at 201.
changed. For instance, in Britain today not only the higher courts, but all the courts, at least in relation to some of their decisions, are under the obligation to give reasons.\(^4\)

In Australia, under the Administrative Decisions (Judicial Review) Act 1977 and the recognition of the High Court, the existence of the individual right to reasons increasingly is encouraging administrators give reasons at the time the decision is made.\(^4\)

3. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The growth of the welfare state caused the taking of decisions of various kinds by various administrative agencies. Some of the decisions taken even had some attributes of judicial decision-making. In these circumstances, no matter how the judges in the common law world use the terms 'judicial', 'quasi-judicial' or the concept of 'a duty to act judicially' to define the boundaries of natural justice, the traditional scope had to be broadened to deal particularly with administrative functions. The flexible and pragmatic attitudes of common law judges towards doing this have significantly encouraged the shift of the application of natural justice. Extension of the hearing principle of natural justice to a wide spectrum of administrative decisions is one of the marks of judicial activism in modern times.\(^4\) Furthermore, the development of the doctrine of procedural fairness marked an impressive advance in the common law relating to judicial review of administrative actions.\(^4\)

In Australia, for example, since the end of World War II, the courts have applied the rules of natural justice for the protection of citizens in circumstances in which even twenty five years ago no redress would have been available. Courts, tribunals, government departments and agencies, clubs and other bodies and persons in authority

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\(^4\) D. J. Mullan, supra note 19, p300.
have all been required to observe natural justice. Rights, property, livelihood, employment, character and reputation, privileges, even legitimate expectations have all been brought within the protection of the rules of natural justice. 48

Likewise, the English courts increasingly have had resort to such alternative expressions to the term natural justice as ‘fair play in action’ 49 and ‘a fair crack of the whip’. 50 These phrases have the advantage of emphasising that requirements of natural justice vary with the circumstances of individual cases. 51 Meanwhile, following this pattern, the recognition of a duty to act fairly, with some procedural content, gradually emerged from the courts and into the lawyers’ books in the common law world. 52 In other words, the concept of fairness, which in its traditional sense meant a bona fide consideration and might not be related directly to a hearing, 53 began to involve a procedural content whenever any one was affected by a statutory decision, irrespective of how that decision was classifiable. 54 The term ‘natural justice’ is being increasingly replaced by a general duty to act fairly. 55

For example, in Board of Education v Rice, Lord Loreburn LC stated, ‘I need not add that in doing either they must act in good faith and fairly listen to both sides, for

48 J. A. Lee, Administrative Division, Supreme Court of New South Wales, Australia, in the ‘Foreword’ of G. A. Flick, Natural Justice - Principles and Practical Application, supra note 24, v, vi.
51 See P. Jackson, supra note 11, p11.
52 Megarry VC. explained that ‘the suitability of the term fairness in such cases is increased by the curiosities of the expression natural justice. Justice is far from being a natural concept. The closer one goes to a state of nature the less justice does one find. Justice, and with it natural justice, is in truth an elaborate and artificial product of civilisation which varies with different civilisations’. McInnes v. Onslow-Fane [1978] 1 W.L.R. 1520.
54 D. J. Mullan, supra note19, p283.
55 See de Smith, Woolf & Jowell, supra note 44, p401.
that is a duty lying upon every one who decides anything. But I do not think they are bound to treat the matter as though it were a trial'.

It was concluded that, 'since 1967 the (English) courts began to employ the term ‘duty to act fairly’ to denote an implied procedural obligation - the contents of which may fall considerably short of the essential elements of a trial or a formal inquiry - accompanying the performance of a function that cannot...be characterised as judicial in nature”.

Lord Diplock said the rules of natural justice ‘mean no more than the duty to act fairly...I prefer so to put it’. In the common law countries, the judicial attitude towards procedural propriety in the administrative state can be summarised as following:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

Even though ‘procedural fairness’ has been widely discussed in academic literature, few authors have identified the ends to which fairness should be invoked. Its content is therefore infinitely flexible. In some instances, it means nothing more than acting in good faith, whilst in others it is directed to what may broadly be identified as participation in decision-making. ‘It ranges from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representation, to a fully fledged hearing...’ 

In this light, a fundamental issue raised

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56 [1911] A.C. 179 HL(E), at 182.
57 See de Smith, Woolf & Jowell, supra note 44, p398.
60 In Melhnes v. Osiowian-Fane, three situations were distinguished for providing some guidance as to which individual interests should be protected by fair procedures. 1). ‘forfeiture’ or ‘deprivation’ cases, where a vested interest (such as a licence) has been withdrawn; 2). ‘application’ cases, where no interest yet exists, but is merely being sought (such as an application for a licence, passport or a council house); and, 3). ‘expectation’ cases, where there is a reasonable expectation of a continuation of an existing benefit which falls short of right. [1978] 1 W.L.R 1520.
61 See D. J. Mullan, supra note 19, p314.
is whether the more recent expression of procedural fairness can be distinguished from the traditional doctrine of natural justice. It has been said on many occasions that natural justice and fairness are to be equated, and are used in the same sense.

However, fairness is not only used as a synonym for natural justice, or to describe the minimal form of that concept as it applies to administrative bodies, but also as a standard to guide the courts in many situations which cannot be described as raising questions of natural justice. It may sometimes impose a higher standard than that required by natural justice. In Bates v. Lord Hailsham, for instance, Megarry J noted the suggestion that 'fairness implies a standard of procedural fairness for those decision-makers not obliged to follow the rules of natural justice'. It is true that it has been recognised in the context of administrative decision-making it is most appropriate to speak of a duty to act fairly or to accord procedural fairness, because the expression 'natural justice' has been associated, perhaps too closely, with procedures followed by courts of law in the common law tradition. In contrast, the expression of 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.

To put it slightly different, the justification for procedural supervision in non-judicial contexts must lie in some theory of procedural justice. On this point Megarry J said, 'let me accept that in the sphere of the so-called quasi-judicial, the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness'. The difference between procedural fairness and natural justice means that they are different standards, one lesser and applying to administrative decisions and one higher and applying to judicial and quasi-judicial decisions. That

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64 See P. Jackson, supra note 11, p12.
67 See R. A. Macdonald, supra note 53, at 1.
68 Bates v. Lord Hailsham, supra note 65, at 1378.
is to say, procedural fairness is not exactly another name for natural justice or a part of natural justice.

Those who advocate distinguishing procedural fairness and natural justice meet some resistance. The opposite view holds that the distinction between the rules of natural justice and the rules of fairness not only generates efforts to ascertain the content of the rules of fairness as opposed to the content of the rules of natural justice, but also encourages further unsatisfactory line-drawing on the part of the courts.\(^70\) At present, the common law judges actually have already developed a fundamental rule that a statutory authority having power to affect the rights, properties and legitimate expectations of individuals is bound to comply with the rules of natural justice. For instance, in South Africa, recognition of the legitimate expectations of individuals, and eradication of strict application of the rules of natural justice in all cases where potential prejudice is proved, have considerably enriched administrative law jurisprudence via a number of judgements of the court during the early 1990s.\(^71\) In Britain, 'in the case law since the late 1960s, the courts have demonstrated considerable flexibility in their manipulation of the principal criteria used for determining the circumstances in which a duty to observe the rules of natural justice would be implied'.\(^72\) So, if natural justice and fairness came to be viewed as separate and distinguishable standards, there is a very serious danger that the law in this area could become even more complicated and less rationally based than it is at present.\(^73\)

R. C. B. Risk described such a circumstance:

...until recently, it (natural justice) unambiguously included the entire range of common law procedural rights. About ten years ago, an expansion of rights began under the label 'fairness', and this expansion has caused some ambiguity and uncertainty in the meaning of natural justice. It can, and sometimes does, include the 'fairness' rights, but it can also and sometimes does, exclude 'fairness',

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\(^70\) D. J. Mullan, supra note 19, p303.


\(^72\) See de Smith, Woolf & Jowell, supra note 44, p379.

\(^73\) Paul Jackson, Natural Justice, (1973), p37.
and in this sense it denotes only part of the entire range of rights that we have called 'procedures'...The cases must occasionally be read carefully to determine which meaning is intended."

For the purposes of this debate, no definite answer can be obtained across the common law world, for the judges in different countries have not responded in the same way. However, one thing is clear. The courts in the common law countries have increasingly freed themselves from the traditional constraints of natural justice in developing the requirements of procedural propriety. In other words, regardless of whether the rules of natural justice and the rules of procedural fairness are the same or not, if the doctrine of natural justice is to be of use in the administrative state, it has to be developed and extended.

CHAPTER EIGHT

CHINESE CULTURE AND PROCEDURE SYSTEM

A legal system itself, to a great extent, has national features, comprehensively influenced by a nation’s religion, philosophy, economic structure, and even geographic position, and thus can be considered as a cultural phenomenon. In this regard, on the one hand, a legal system can mirror the character or decency of a nation. Conversely, studying cultural elements of a society affords us insights into the condition in which brings a legal system being. That is to say that by a cultural analysis, we can understand more profoundly and comprehensively the essence of the legal system. Historically, it was against the background of Chinese culture over thousands of years that the formulation and development of its legal system was completed. The ancient Chinese legal system was no doubt indispensable to its philosophy, values and ideas, morality and ethics, and traditional national spirit. Therefore, in order to better understand the situation in modern and contemporary times, this Chapter analyses the nature of the ancient Chinese legal procedure system from a cultural perspective.

Evidence with respect to the protection of individual dignity and rights through the legal procedure system in ancient Chinese society, I think, cannot be found. This standpoint may cause arguments. There is an opposing view that procedural integrity was quite important in the ancient Chinese law. Its adherents demonstrate that even

2 See Derk Bodde and Clarence Morris, Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases, (1967).
early in the Western Zhou dynasty (about 11 - 770 B.C.), legal procedure (litigant procedure) was already noteworthy, according to the study of epigraphs. From the shui hu di legal materials, it was shown that procedural guidelines preoccupied the Qin state. Indeed in the Han dynasty (206 B.C. - A.D. 220), the procedure of contract was already highly systematic. In view of the sociological relationship between procedure and social custom, such adherents might also contend that legal procedure system in ancient China ought to have been sophisticated, because the influence of li, being a system of morality and custom, was rather extensive and profound in Chinese history.

For this debate, my argument in this Chapter is divided into three Sections. In the first, I analyse the weakness of concepts of fairness in the ancient Chinese procedure system through a discussion of xing (criminal penalty), the focus of the ancient Chinese law (fa). Secondly, I explore li, which is the moral intention of the ancient Chinese law, in contrast with legal procedure. In the third Section, I elaborate on the Chinese legal tradition of non-litigation, which in my view is a crucial reason for the underdevelopment of the procedural fairness system in Chinese legal history.

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5 In addition, resistance to my position often assumes that the practices of the ancient Chinese administration, such as the official disqualification (hui bi) system and the imperial examination system, were also noteworthy. In my perspective, the practices of the ancient Chinese administration essentially were subject to the domination of the Emperor. The purpose of either the disqualification system, dating back to the Eastern Han dynasty (25 - 220 A.D.), or the imperial examination system, dating back to the Tang dynasty in 736, was to essentially guarantee the selection of the most trustworthy and competent person for the domination of the Emperor rather than to respect the interests and rights of individuals. Therefore, it seems unconvincing to conclude that the conduct of the ancient Chinese administration carried some features of procedural fairness in a modern sense. Also see Liang Zhiping, To Seek the Harmony in Natural Order - the Study of Traditional Chinese Legal Culture, Chinese ed., (1991), p61, p63, and Zhang Zhongqiu, Comparative Studies of Chinese and Western Legal Cultures, Chinese ed., (1992), p183.
1. CRIMINAL PENALTY (XING) - THE FOCUS OF THE ANCIENT CHINESE LAW

It is common to consider the English word ‘law’ as equivalent to the Chinese word ‘fa’. Yet strictly speaking, the implications of the two are quite different. Fa in Chinese legal tradition can be understood in two ways. On the one hand, it is a positive conception, mainly including criminal law and the law regarding the administration. On the other hand, fa also refers to a kind of moral system, which is closely related to the Chinese term ‘li’.  

In the former sense, the meaning of fa is quite similar to that of xing (criminal penalty) and li (code) in Chinese legal culture. In ancient Chinese ideas, fa, li and xing were often not distinguished. It was explained in the book Shuo Wen Jie Zi that ‘fa is the same thing as xing’. In the Code of the Tang dynasty (Tang Lü Shu Yi-Ming Li), fa was described as the same as li. That is to say they were interchangeable. According to the theories of some Chinese legal historians, the concept of xing was the essence of both fa and li, which derived from war (bing) between different tribes and nations in far ancient Chinese times. In function, the ancient Chinese law chiefly involved physical penalty. From the first Chinese statute (fa jing) to the model of the ancient Chinese law (tan li su yi), the contents of a number of the most famous ancient Chinese codes illustrate this point.

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7 In Chinese legal history, from the Tang dynasty, li and dian, which cannot be appropriately translated with equivalent words into English, were distinguished and used to address different categories of law. Lü was normally the title of the law particularly with respect to personal action, whilst dian was the title of the law regarding the administration.


Table 4: A List of the Ancient Chinese Codes

The reasons for the central position of criminal penalties in both ancient Chinese legal thought and in the system itself are twofold. First, commercial activities had been restricted throughout ancient Chinese history under the influence of the conventional idea, expressed in the phrase, ‘to emphasise agriculture and control commerce’ (zhong nong yi shang). Therefore, such features of commercial society as free trading, individual independence and the idea of contract were less developed in Chinese history. The laws associated with commercial activities were in consequence not sophisticated. Neither the modern concept of the citizen nor the civilian concept of a legal person existed in the ancient Chinese law. For example, there are 436 articles in Da Qing Code, which is the last ancient Chinese code. The majority of these articles were associated with criminal penalties (Articles 254-423), whereas a small part of them dealt with civil activities (Articles 75-156). In this regard, a Japanese lawyer once stated:

The private law system in ancient China regarding commercial activities does not exist in contrast with European history of private law. The so-called fa in the ancient China on the one hand referred to

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10 Also see D. Bodde and C. Morris, supra note 2, pp56-7.
11 In imperial China, the control of commerce in the sense of the restraint of private commercial activities represented a continuing policy of rulers, although the specific measures adopted for the purpose might vary with different regimes and dynasties. See Fu Zhufu, ‘Sources of the Policy of Restricting Commerce, Systems and Impacts’, Dissertations on the History of Chinese Economy, Chinese ed., (1980), p608, pp665-8.
12 See D. Bodde and C. Morris, supra note 2, pp60-1.
the law of criminal penalty, on the other hand referred to the law in respect of the constitution of bureaucratic institutions, focusing on the enforcement of administrative decisions and penalty for the breach of administrative rules.  

At the same time, ancient China was a society with advanced ideas of totalitarianism. This is the other reason for the emphasis on criminal penalties. In particular, ideas relating to the integration of the family and the state greatly enhanced autocracy in ancient China. Historically, the purpose of certain legislation was to even abolish privacy, because it was seen as harmful to legality. Furthermore, the interests and the power of the state were always superior to those of individuals. As a result, all aspects of private life in ancient Chinese society were encroached upon by state power, and civil law actually had been 'criminalised'. For example, disputes over civil activities, such as rent, sale and purchase, were resolved through criminal methods in ancient China. This phenomenon began with the Western Zhou, and there was no crucial change until the later Qing dynasty. Moreover, all the rules concerning marriage could be found only in criminal law, such as the fourth Chapter of Tang Lü Shu Yi, entitled ‘the code of family and marriage’. Beyond this, the rules regarding debt, trust and tort also were ‘criminalised’ in the Tang code. The following table gives examples.

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14 See ‘The patrimonial feature of the Chinese society’, ‘The integration of the family and the state’ and the clan system in Section 2 this Chapter.

15 See Han Fei Zi - Gui Shi.

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<th>Marriage</th>
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<td>persons who get married with the same family name shall be punished with two years deportation. ‘code of family and marriage’</td>
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<th>Family</th>
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<tr>
<td>a son or grandson, who wants to be independent and divide the property from the whole family when his parents or grandparents are still alive, shall be punished with three years deportation. ‘code of family and marriage’</td>
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<th>Sale &amp; Purchase</th>
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<td>when the price of a purchase is decided, a buyer shall receive 30 blows of bamboo, if he does not make a contract for the purchase of private servants, horses and ponies, bovine, mules and donkeys with the seller after each three days; the seller shall receive 20 blows of bamboo. ‘Za Lu’</td>
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<td>the action of damage to streets, roads and fields shall be punished with 70 blows of bamboo; if a land is digged by the infringer, he shall receive 50 blows of bamboo, and reconversion shall be done by him. ‘Za Lu’</td>
</tr>
</tbody>
</table>

**Table 5: Illustration of Some ‘Criminalised’ Civil Rules in Tang Lu Shu Yi**

From the foregoing discussion, it does not appear entirely convincing to conclude that the law in respect of litigation procedure was developed in ancient China. It would be more accurate to say that only the procedural system in respect of criminal punishment was rather sophisticated, which essentially involved the official intimidation of subjects through criminal penalties (xing or zhong yu) and thus, far from fairness and humanity. Even the Tang Code, which was the basis for all later ancient Chinese codes, was principally useful as a procedural guide for deciding punishments. The official law in imperial China focused almost exclusively on procedures for determining punishments for crimes against the state.

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17 Also see the comments of Brian Mcknight, ‘Tang Law and Later Law: The Roots of Continuity’, originally published in Chinese and selected in Recent American Academic Writings on Traditional Chinese Law, supra note 3, p.257.
2. **Li - THE MORAL INTENTION OF THE ANCIENT CHINESE LAW**

1). **Li and Procedure**

As a Chinese character, *li* can be found even in the inscriptions on bones from the Shang dynasty (about 16 -11 B.C.), carrying the meaning of sacrificial rites.\(^{18}\) Afterwards, the meaning of *li* was gradually extended and became one of the most fundamental aspects of Confucianism, which provided the cardinal moral principles during most of the time of imperial China. Confucianism sometimes is also called 'the religion of *li*'.

In some respects, the literal meaning of *li* is similar to that of English words such as rite, manner, custom, etiquette and decency.\(^{19}\) In general, *li* has usually been described as ‘unchangeable reasons’ and ‘the order of the heaven and the earth’.\(^{20}\) It is the wisdom of the ancient sages and wise men, which derived from the order of heaven (*tian*). The description in *Xun Zi* contributes to the further understanding of *li*.

What is the origin of *li*? Say: every one has desire from their birth; if someone cannot realise their desire, they will request; quarrel must occur if the request lacks any limitation. Quarrel means chaos, and chaos must result in poverty. The ancient emperor dislikes the chaos, thus he makes custom (*li*) to regulate it in order to satisfy the desire and the request... This is the origin of *li*.\(^{21}\)

In the book of *Law in Imperial China*, Bodde and Morris explained:

In its narrowest (and probably original) sense, it (*li*) denotes the correct performance of all kinds of religious ritual: sacrificing to the ancestors at the right time and place and with the proper deportment and attitude is *li*; so is the proper performance of divination. In a broader sense, however, *li* covers the entire gamut of ceremonial or polite behaviour, secular as well as religious. There are numerous rules

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\(^{18}\) See *Yin Xu Shu - Qi Qiang*, 'Later Part'.


\(^{20}\) See *Li Ji - Yue Ji*.

\(^{21}\) See *Xun Zi - Comments on Li*. 
of li for all customary situations involving social relationships, such as receiving a guest, acquiring a wife, going into battle, and the many other varied duties and activities of polite society. Finally, li in its broadest sense is a designation for all the situations and relationships, both political and social, which make for harmonious living in a Confucian society.22

The role of the practice of li, in the saying of Confucius in Lun Yu - Xue E is to achieve harmonious order. He explains it in this way.

Lead through policies and discipline through criminal punishments the people may be restrained, but without a sense of shame. Lead through virtue, discipline through li, and there will be a sense of shame and conscientious improvements...If the administrator likes to use li to dominate the state, subsequently the people will become docile.23

As indicated above, li marks a category of ethics and a moral system with variable implications; it possibly means a ceremony, custom, value and order, and even refers to a social and political system in an extended sense. Li shaped social manners and customs, regulating the whole social relationship in ancient Chinese society. In Chinese history, when a crisis occurred, the crucial function of li was to rebuild the harmonious basis of the social fabric.24

The term 'procedure', in the sense of an established and traditional way of doing things, symbolises a mode or a special type of custom associated with a specific field of social life.25 In this way, the intention of li in ancient Chinese could be conveyed through the terms of procedure, method, way and strategy.26 In function, li played a coordinating role in many fields of social life. This function also is akin to that of procedure as a vehicle for governing social order. Yet, the implication of li is broader and its requirements are more flexible than those of the expression of procedure. Li is

22 Derk Bodde & Clarence Morries, supra note 2, p19.
23 See Lun Yu - Wei Zheng & Xian Wen.
24 See Karen Turner, Recent American Academic Writings On Traditional Chinese Law, supra note 3, p131
a moral concept without any specific form. Procedure does not necessarily have ethical implications, though a particular procedure may more or less reflect the moral attitudes of its designer. The specifications of a procedure usually invoke definite norms with a specific form.

There is a debate between some American sinologists about whether li consisted of concrete rules or was a spontaneously pre-existing order. In fact, no absolute conclusion can be drawn. On the one hand, li cannot be seen as a code or a statute with prescriptive features. On the other hand, it is a rule system with many norms, as summarised by a number of ancient Chinese wise men. Before the Han dynasty, especially in the period of the Western Zhou, li was created only for governing the behaviour of aristocrats (shi), while xing was designed exclusively for the purpose of punishing the people of different races and the multitude of ordinary people. At that time, li consisted purely of moral norms and customs, derived from primitive habits in far ancient Chinese society. In this period, li was different not only from criminal penalty (xing), but also from the ‘legalised’ form li took from the Han dynasty onward.

After the Qin dynasty, the Confucian spirit and sometimes the actual requirements of Confucian li gradually were put into Chinese legal codes. In particular, from the Han dynasty onward, li, which according to the Confucians, was the most fundamental force in governing social life, developed ‘legalised’ moral features in imperial China. This situation was described as ‘the Confucianisation of law’ or chu

27 The conclusion that li is a vivid and spontaneous social order rather than concrete rules was made by Roberto M. Unger in his book Law in Modern Society, and was criticised by William P. Alford in his article, named ‘The Inscrutable Occidental? Implications of Roberto Unger’s Uses and Abuses of the Chinese Past’, (1986) 64 Texas Law Review 915, at 915-20.

28 See Zhang Zhongqiu, supra note 5, p13.

29 There were two distinct ideas in the imperial Chinese legal thought, namely Confucianism and Legalism (school of law). The historical debate between them occurred in the Spring and Autumn Period of Chinese history (770-476 BC), regarding the relative superiority of law and morality and the relationship between them. The Legalists held that strict law and stern penalties were crucial for achieving social peace and unity. Hence, there must be clear legal rules applicable to all the people irrespective of their social background, and people in breach of the rules must be strictly punished. The
In contrast, the positive law focusing on xing emphasised by the Legalists, was actually a subsidiary mechanism.30

In this situation, li was a kind of rule in the sense that it sought to educate the people and to guide their behaviour to comply with moral concerns.31 Nevertheless it was not necessarily abstracted from direct legal consequences or a penalty when a particular rule of li was breached. Even when some principles of li acquired legal validity,32 its binding force came from moral self-restraint, advocated by the clan and the state, rather than from direct enforcement through state power. Li is not a statute, but rather a moral system, and quite different from legal procedure. Nevertheless it can be seen that li is akin to the term procedure in some ways.

2). Li in Opposition to Procedural Justice

No doubt, li had great influence in ancient China. Even today, only through the correct comprehension of li can people properly understand Chinese society. As Hans Kung described it,

Confucian thought places more emphases on the importance of ancient etiquette, former religions and popular customs, and social manners and formal rules than Christianity. Until the nineteenth and...
In theory, it seems that the emphasis on *li*, or traditional social manners and customs, should have resulted in greater attention to procedure in ancient China and the emergence of a fair procedural system in a modern sense. So, why did this not happen? To answer this question, it is necessary to discuss the intention of *li*.

Firstly, unlike theism and polytheism, Confucianism is a humanistic system of ideals. It reflects a kind of inner-worldly asceticism without a religious goal, though it also emphasises the harmony between *tian* (heaven) and human beings (*ren*).\(^3\) In order to achieve social order, the focus of Confucianism is on the immanence of morality, that is *li*. Confucianism was distinct from ancient Chinese Legalism, which highlighted external and state enforcement to achieve the same ends.

*Li* also reflects humanism in its characteristics. In Confucian ideas, *li* is not made by a God, *tian* or pre-existing beings, but by wise men who act in good faith and are superior to ordinary people.\(^3\) Compared to the God in Christianity, Confucians believe that the men who made *li* are secular persons. As a result, in ancient China, law, as legalised *li* in most cases, is an extremely artificial and secular thing. ‘Law is neither anything enacted by heaven, nor is it anything from earth. It steps from the midst of humans themselves’.\(^3\) In contrast, natural law thinkers in the West believe that there always are external, permanent and metaphysical reasons and rules, which are the ground of and superior to all kinds of human desires and behaviours. They are above any particular person or group. Typically, the rule of wise or ideal men is more significant in Confucian thinking than it is in the natural law ideas of the West.\(^3\)

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\(^3\) See Qin Jiayi and Hans Kung, supra note 19, pp103-4, p115.

\(^3\) Ibid, pp112-4.

\(^3\) See *Men Zi* - Liang Hui Wang Xia.

\(^3\) *Huai Nan Zi*.

\(^3\) On this point, R. P. Peerenboom’s opinion is the same as mine. He challenged Joseph Needham’s influential statement that the Confucian notion of *li* can be equated with natural law ideals in his
Secondly, as another result of the distinction between the superiority and inferiority of different people, \( li \) is closely related to hierarchy and aristocracy. In general, \( li \) can be categorised within three cardinal ‘guides’, namely, ruler guides subject, father guides son, and husband guides wife; and into the five constant virtues, namely, benevolence, righteousness, propriety, wisdom and fidelity. The three cardinal guides represent the feudal and hierarchical characteristics of \( li \). The five constant virtues reflect its features of self-restraint, self-sacrifice and endurance.

In imperial China, the effect of \( li \) in essence was the fawning upon the Emperor. Certainly, it excluded individualism. For instance, Confucius insisted on requiring the people to do what they are asked to do, without letting them know why they must do it. Why should an administrator do things in accordance with \( li \)? Confucius thinks that if he does so, it will be easier to control the people.\(^{38}\) The sayings of Confucius suggest that \( li \) makes the subject tame and obedient, disregarding their desires, through differentiating people according to their age, gender and class, or in terms of elder and younger, male and female, and gentleman and \( xiao \) ren (the populace or petty man).

As Bodde and Morris contended, of all the differences between Legalist \( fa \) (law) and Confucian \( li \), none is more basic than the universalism of the former, (its refusal to make exceptions for particular individuals or groups), as against the particularism of the latter, (its insistence upon differing treatment according to individual rank, relationship, and specific circumstance).\(^{39}\) In accordance with \( li \), Chinese imperial codes provided penalties differing sharply by reference to the class status of the offender and his victim. Zhu Xi in the Song dynasty contended, ‘when dealing with a litigation, prior to hearing the fact, such things as the superiority and inferiority, upper and lower, the older and younger, and the consanguinitious relationship of the parties

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\(^{38}\) See *Lun Yu - Tai Bo* and *Xiang Wen*.

\(^{39}\) Bodde & Morris, supra note 2, p29.
involved must be identified. For example, an offence committed by a person against his or her junior or inferior would be punished less severely (or even not be punished at all) than an offence against a person’s senior or superior. For this purpose, there was a typical system in imperial China, which was termed *ba yi*, in which eight groups qualified for exemption from punishment. Although the scope of *ba yi* somewhat varied from dynasty to dynasty, in general, members within *ba yi* could only be arrested or tortured with permission of the Emperor, and prosecuted in accordance with special procedures. They also enjoyed special treatment during these proceedings and were given reduced punishment.

As indicated above, *li* prescribed dramatically differing patterns of behaviour according to a person’s social background within one’s family and in society at large. This idea of hierarchical difference, with resulting differences in behaviour and privilege, remained alive in Confucianism throughout imperial times. In the early twentieth century, *li* was ever described as ‘the religion of eating human beings’ in the sense that it had suppressed, to the point of eliminating, the individuality of human beings.

Finally, the feudal family in the ancient Chinese society, where *li* so frequently played its role, hindered the development of democratic ideas and democratic systems. Typically, the Chinese people lived in clans in the countryside and even today many still do so. The organisation of the clan traditionally had been the basis of agricultural Chinese society. In this respect, Max Weber’s vision of China in the nineteenth century is still noteworthy. He linked Confucian ideology, rooted in family custom, to the despotic nature of the Chinese patriarchal state. He thought that Chinese ruling elites did not legitimate their authority through formal laws or

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40 Zhu Zi Da Quan.
41 *Ba yi* originally came into being in Zhou Li in the Zhou dynasty (11th century - 221 B.C.). It was first prescribed in the Law of the Wei dynasty (220-265), and existed in all subsequent imperial Chinese codes. For example, in Tang Law (the Tang Dynasty 618-906), *ba yi* included members of imperial family, descendants of former imperial relatives, persons of great virtue, high officials and their immediate relatives.
universal ethical standards, but 'discharged business in a thoroughly patriarchal fashion'. In ancient China, due to the patriarchal clan system and consanguinity, a real state in a modern sense was not built. The state was only an enlarged family. In a family, under the three cardinal guides, the father, and husband, guides the son and wife respectively, and there were sharp differences in the rules which applied to each of them.

In imperial China, an inferior person who reported a crime of his or her superior within the family would be punished even if the report were true. For example, a son who brought an accusation of parental wrongdoing before the authorities had thereby breached filial obligations and hence was subject to heavy punishment from the Han dynasty onward. A son who did not revenge his father would be blamed and would not be regarded as a good person, even if his action was in compliance with law.

On the other hand, under li, there was a typical doctrine that a son with filial piety (xiao) should not be punished. It meant that although a son concealed a crime of his father, or killed the person who killed his father, the son would be regarded as a person with loyalty (zhong) and filial piety, who should thus be excluded from penalty. Confucius believed that 'the reason is in the given circumstance that a son

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44 In this context, Liang Zhiping pointed out, 'from the Song dynasty onward, the custom of arranging and recording the genealogy of the clan and family flourished. The existence of the clan system in consequence has become one of the most important features in the life of the people. The intervention of the clan system in the countryside was the crucial determinant of rural economic activities even in the Ming and Qing dynasties. Furthermore, almost all-economic activities were undertaken within the clan system in accordance with the principles of it'. See Liang Zhi Ping, supra note 5, pp116-21.
45 For example, a son who struck or beat a parent suffered decapitation, irrespective of whether or not injury resulted. However, no penalty applied to a parent who beat his son, unless the son died, in which case the punishment was 100 blows of heavy bamboo if the beating was provoked by the son's disobedience, and one year of penal servitude plus sixty blows of heavy bamboo if the beating was wrongful. Likewise, a wife who struck her husband received 100 blows of heavy bamboo, whereas a husband who struck his wife was punished only if he inflicted a significant injury. The situation between elder and younger continued this pattern in the context of the ancient Chinese family. See Qu Tongzu, Law and Society in Traditional China, (1965), p24, pp43-4.
46 See Bodde & Morris, supra note 2, p40.
concealed for his father's offence'. In practice, under the influence of the doctrine of 'the son conceals for his father's offence' (zi wei fu yin), which had implications even for his other relatives, an official would be punished in the Tang dynasty, if he asked a person to be a witness in case relating to the person's relatives.

There was inevitably sharp conflict between the generality of state law and the moral requirements of li within the family. In reality, the priority of family rules was emphasised and prized over state law. Thus the fairness of adjudication to a large extent was sacrificed to protect the clan system. It was not unreasonable for the ruler to be content with the sacrifice. As long as the goal of social stability was obtained, the ruler would consider it worthwhile to subordinate the generality of state law to the moral requirements of li within the family. In the world of social relations outside the family, the concept which corresponded to xiao (filial piety) was zhong (loyalty to superior), which essentially means the loyalty to ruler. In these circumstances, a fair and equal system could not be set up within the family in ancient Chinese society. Neither could it be set up in the state.

In summary, li disregards material benefits, individual dignity, and the generality of state legality, but focuses on obligations to superior people. Its main aims are secular asceticism, moral guidance, feudal hierarchy and the patriarchal clan system. Under the influence of li, individualism and liberalism hardly were encouraged. Apparently, li excludes the rule of law that requires that social relationship shall be regulated chiefly by concrete and certain legal norms (state law). In the result, legal procedure in imperial China aimed to secure the domination of the ruler rather than the protection of individuals. The ancient Chinese codes were designed mainly to intervene between the bureaucracy and the individual through moral persuasion and criminal punishment. There are both cultural and historical reasons why li did not lead to a fair procedure system in ancient China.

47 See Lun Yu - Zi Lu.
48 See Tang Lu Shu Yi - Ming Li.
3. CHINESE NON-LITIGATION TRADITION

1). Ideological Impact

In the 1980s, K. Leung and E. A. Lind conducted a cross-culture study in the United States. In the study, Chinese (Hong Kong) and American (middle west) undergraduates were asked to rate their preference for different procedures, including adversarial adjudication and inquisitorial adjudication, and to resolve a hypothetical dispute. The answers showed a greater preference for adversarial than for inquisitorial procedures on the part of the American sample, but not among the Chinese. The Chinese subject participants showed no preference for either procedure. Most of them preferred mediation (informal procedure) to handle the dispute.49

Leung and Lind did not give a definitive explanation of the differences in procedural preference from a cultural perspective. The real reason for the reactions of the Chinese sample in the study is related to their tradition of non-litigation. The Chinese tradition of non-litigation, by and large, has two aspects. In the first place, the Chinese disregarded litigation. In the second place, they sought to avoid litigation. No country, of course, advocates litigation. Few countries, however, can match the disdain towards litigation of ancient China.50 The tradition of non-litigation was closely related to traditional Chinese philosophy and ethics.

Above all, the absence of disputes and of litigation, rather than the improvement of material life, were considered as cardinal symbols of an ideal Confucianised society.

50 This point has been somewhat challenged by P. Huang’s studies on the Qing civil justice system. Huang argued that the Qing civil justice system was in fact based upon a coupling of a formal system guided mainly by adjudication and an informal system guided mainly by compromise. Civil cases even constituted in practice a major and integral part of the Qing’s legal system. See Philip C. Huang, Civil Justice in China: Representation and Practice in the Qing, (1996), pp11-8.
Confucius said, 'do not be afraid of shortage rather than equilibrium; do not be afraid of poverty rather than peace, because equilibrium means no poverty, and peace means no shortage, and then stability will be achieved'. In other words, desires and profits are more contemptible than material poverty and shortage, for desires and profits are likely to strangle the benevolence and righteousness of human beings. Confucius says, 'a gentleman always is fond of righteousness (yi), whilst a villain always is fond of profit'. Even Han Fei, a legalist, agreed with this idea. He once made the statement "nothing can be compared to ‘desirable’ in the sense of generating disaster".

Therefore, paradise in a Confucian sense referred to a highly morally-educated society, where there are no disputes and litigation at all and where the people pay taxes, serve corvee, and respect their superiors (ruler, husband, elder brother, father and so on) in accordance with li. There was a famous statement of Confucius, who had been a judge in the 6th century B.C., that 'there is no difference between me and others in hearing and handling disputes, yet what I am searching for is no disputes and litigation'.

Under the influence of Confucianism, it was believed that the more a person liked litigation, or the more litigation took place in an area, the worse the morality of the person or the area would be. Litigation in principle was regarded as the result of a decline in morality, because it was seen to be the result of various desires and disputes concerning profits, and of the collapse of benevolence and righteousness. Accordingly, litigation (song) was seen as an evil concept in Chinese culture. A series of Chinese phrases regarding litigation, such as master of song, rogue of song, favourite-song fellow, skills of song, and collective song were all derogatory terms.

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51 See Lun Yu - Ji Shi.
52 See Lun Yu - Li Ren.
53 See Han Fei Zi-Jie Lao.
54 See Lun Yu - Yan Yuan.
By contrast, despising song, non-song, and avoiding song were considered as commendatory attitudes and habits.

Not only Confucianism, the orthodox thought in imperial China, but also other influential ideologies and religions, like Taoism, Buddhism and Legalism, looked upon social harmony and stability as the most fundamental objective of state administration. Thus, these too, rejected litigation. Nevertheless in general terms, there are certainly some differences among them.

The Taoists were interested in governing by doing nothing that went against Nature, such as mistrusting reason, logic and morality. In the Taoist view, there was an order, unity or a way (dao) of nature that existed in Heaven. Everything came into being and existed in a natural way (dao). Typically, the Taoists held that nothingness was important because out of nothingness came things (you sheng yu wu). Hence any desires and disputes against Nature would be useless. The ideal society was accordingly one in which human beings were in harmony with Nature without any wisdom, desires, profits, knowledge, disputes or artificiality whatever. For instance, in *Dao De Jing* (the Code of Morality):

**Chapter 19**
Banish wisdom; discard knowledge,
And the people will be benefited a hundredfold.
Banish benevolence; discard morality,
And the people will be dutiful and compassionate.
Banish skill; disregard profit,
And thieves and robbers will disappear...
Banish learning and there will be no more grieving.

**Chapter 65**
In olden times the best practisers of the Tao
Did not use it to awaken the people to knowledge,
But to restore them to simplicity.
People with much knowledge are difficult to govern,
So to increase the people's knowledge is to destroy the country.
Furthermore, in *Lao Zi*:

Chapter 3
Banish wise men,
Disputes will disappear in the people...
Without desirable things,
The people will be in order.
Therefore the role of the sage is
To fill the people's stomachs,
To weaken the people's ambitions,
To strengthen the people's bones'
And eventually to make them without knowledge and desire.\(^{56}\)

By contrast, the Confucians and the Legalists were not interested in Nature at all. The real goals of both Confucianism and Legalism were the same, that is, social order and obedience. Nevertheless the basic idea of the Legalists was intimidation through severe penalties, prescribed in laws fixed beforehand, and they despised the complex of customs and ceremonies (*li*), which were the key mechanisms of the Confucians. In other words, the real aim of the penalties advocated by the Legalists was to avoid the use of penalties, because the subject would be scared. Shang Yang, a Legalist once said:

Through war to avoid war,
War will be meaningful;
Through slaughter to avoid slaughter,
Slaughter will be meaningful;
Through penalty to avoid penalty,
Penalty will be meaningful.\(^{57}\)

Attention also should be paid to the influence of Buddhism on Chinese attitudes to litigation. Buddhism was an imported but quite influential religion in China.\(^{58}\) It

\(^{56}\) Translation of Chapter 19 and 65 of *Dao De Jing* is cited from Joseph Needham, *Science and Civilisation in China*, ibid, p87.

\(^{57}\) See Shang Jun Shij-Hua Ce Pian (Chapter of Strategy).


considered emptiness as the key point and looked upon existence as an illusion. In accordance with Buddhist belief, any person could hope to be reborn in a highly pure and happy land in the Far West through devotional practices before the person’s death. All earthly joys, pleasures and existences and the entire living world were transient, worthless and unreal. Buddhism encouraged individuals to believe that the significance of life lies in practical devotion (accumulating goodness) and prayer, in order to be able to avoid heavy punishment after death and eventually to achieve a good rebirth with descendants enjoying wealth and honours (cycle of life).

In this context, according to Buddhism, disputes and litigation were secular things, which would be banished. In Chinese history, Buddhism was accepted by rulers in many dynasties, because the ideas of devotion, accumulation of goodness, rebirth and the like to a considerable extent fooled the people who believed them, and palpably contributed to social harmony and stability, which were also the favourite points of the indigenous Chinese native thoughts of Confucianism, Taoism and Legalism.²⁹

2). Systematic Features

In practice, the long-term official slogans relating to non-litigation and avoidance of litigation provided two important criteria to appraise the performance of officials in many dynasties in imperial China.²⁶ For example, ‘making the countryside peaceful and avoiding song’ was prescribed in the Sixteen Articles of Imperial Statements, and

²⁶ Historically, Buddhism texts poured into China from India in an unceasing stream from the middle of the second century onwards, although the first Buddhists arrived in China about the middle of the first century. See J. Needham, supra note 55, pp406-8.

²⁹ Nevertheless, the differences between Buddhism and indigenous Chinese philosophies are obvious. Buddhism essentially holds that phenomena have no real existence, and the visible world is illusory, while both Taoism and Confucianism believe that there is a naturalistic and realistic world, as does Legalism. Indigenous Chinese philosophies never discussed mortality, death and rebirth. Although Taoism held that the key idea to world is no action contrary to nature, the Taoists still think that the world is real and has material characteristics, whereas the Buddhists believe that desire, spirit and all kinds of existences are mortal and empty. For Confucianism and Taoism, the regulating of the things in this world is the main objective, whereas for Buddhism, the objective is to escape from this world.

²⁶ See Fan Zhongxin et al, supra note 26, pp180-1.
published as a basic state policy by Emperor Kang Xi in the Qing dynasty. It even was prescribed as an important duty of officials at both county and prefecture levels in the same dynasty.\(^{61}\) In order to achieve the aims of non-litigation and the avoidance of litigation, moral education (moralisation) accordingly was looked upon as one of the fundamental duties of ancient Chinese officials. The contents of moral education were the three cardinal guides and the five constant virtues of \(li\) that I mentioned above.\(^{62}\) The aim of education was to reduce the number of disputes and the incidence of litigation. In fact, many imperial officials were proud of their capacity to educate the people morally, and avoid litigation.

In ancient China, the real goal in dealing with litigation was to patch up the dispute and reconcile the parties concerned through moral instruction and inspiration rather than to find the truth of the dispute itself. The resolution of litigation was an additional type of moral education. It was quite common for an officer to counsel others to avoid litigation when he sentenced parties to a litigation.\(^{63}\) There was a traditional Chinese judicial idea, expressed in the phrase ‘through punishment to educate the subject’. In this light, officers in litigation used to be as concerned about the titles and moral duties of parties as they were with the truth of a matter, especially in civil cases. It was the concern for morality and ethics in litigation that weakened the factual rights and wrongs.

As a result, reconciliation was frequently used for handling litigation. Many cases where there had already been resort to official process were handed over to informal forums, such as the clan, for reconciliation. If reconciliation failed in a case, there were quite a lot of interesting methods to resolve the case. For instance, when an officer was inclined to avoid litigation, the plaintiff and the defendant could be beaten fifty times with a plank respectively. It was hoped that both the plaintiff and the

\(^{61}\) Affairs Regarding Prefectures and Counties Prescribed by the Emperor.

\(^{62}\) See ‘\(Li\) in Opposition to Procedural Justice’.

\(^{63}\) In this context, the officer in function can be seen as a judge. But in ancient China, there was no substantial distinction between administrative officials and judicial officials. All officials could be called \(guan\) (administrative officials) in Chinese. See the detail in the following context.
defendant would become scared and abandon the dispute. Such a method of dealing with litigation was based on the premise that the punishment of the plaintiff must be similar or equal to that of the defendant. Then the indignation of the parties would be minimised, and further litigation avoided. To beat parties respectively and equally was a typical official way of resolving litigation in imperial China.

People who were professional litigants or who encouraged others to litigate, and even official judicial clerks, were considered contemptible in ancient China. They were described as knavish people or scum by scholars. Not only common people distrusted professional litigants, but also, in many Chinese dynasties, a person who encouraged or assisted others to litigate was likely to be punished by the officer who was responsible for the litigation. The officer responsible for a case normally liked to ask the parties involved to tell him who had encouraged and helped them in their litigation. In particular, the activity of encouraging group litigation was seen as a serious crime regardless of whether the claim of a litigation was right or not. Punishment of a ‘rogue of litigation’ was another reflection of the official attitude toward eliminating litigation.

To ordinary people, litigation in imperial China was a bad thing for the reputation of the whole family. ‘Lots of litigation shames a family, and lots of disputes disgraces a

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64 For example, there was a dispute concerning property between two brothers in Sichuan province in the Qing dynasty (Emperor Kang Xi). When an officer heard this case, he merely asked the two parties (the brothers) to address each other as ‘elder brother’ and ‘younger brother’, rather than trying to find the facts of the case and or determining how to allocate the property. After having addressed each other less than fifty times in this manner, both of the parties felt quite shamed and burst into tears. As a result, the dispute and the litigation were over. See Good Judgements Regarding the Dispute of Property between Brothers.

65 For example, Deng Xi, who lived in the period of Spring and Autumn (770-476 B.C.), and who might be regarded as the earliest Chinese lawyer was eventually executed for teaching others how to litigate, encouraging litigation and charging the people involved in a case. See Lü Shi Chun Qiu - Li Wei, and Zuo Zhan - the Ninth Year of Ding Gong. Furthermore, in the Qing dynasty (the 11th year of Emperor Guang Xu) a person who encouraged a group litigation caused by the blackmail and corruption of a local officer was beaten with one hundred planks and banished three thousand miles away. See Xin Zeng Xing An Hui Lan (the Collection of New Criminal Cases) vol. 12, the 11th year of Emperor Guang Xu, handed in by the general of Heilongjing province.
whole family'. In the Ming dynasty, in the Maxims of Family Administration, Zhu Bailu contended that, 'disputes and litigation need to be forbidden for a family, for litigation would result in bad things'. In reality even today, frequent disputes and litigation are considered shameful, and in particular, disputes between relatives within a clan.

In ancient times, when disputes could not be avoided, most Chinese people were reluctant to bring their disputes to official agencies. To ordinary people, who were involved in a dispute, a formal process of resolving it meant only terrifying officials and judicial guards with planks, frightful tools of penalty, troublesome official papers and avaricious associate judicial clerks. In place of a formal or official process, they had recourse to informal reconciliation or private resolution. The dispute might be mediated by a patriarch, by respected friends, or by elder relatives, who could not only resolve the dispute, but also preserve the reputation of the parties involved.

In this light, in the Song dynasty, it was once said:

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66 See Lu You Zu Xun - Jie Zi Lu.
67 Participating in the first British embassy to China in the Qing dynasty, Staunton also noted that Chinese people disliked suits. He observed that Chinese people had conventional ideas, customs and principles of their own. When hearing cases, the official more frequently dealt with personal relationships. There was no jury system to ensure the truth. The job of an attorney did not exist. There were no complicated procedures in litigation. It was common to give bribes to the judge. Thus suits would cost a lot. Furthermore no matter whether a suspect was factually innocent or guilty, he or she could be tortured in a proceeding. See Sir George Staunton, An Authentic Account of An Embassy from the King of Great Britain to the Emperor of China, Chinese ed., (1994), pp416-9, Yie Duyi trans.
68 In doing so, clan law in ancient China formed a semi-autonomous social field governing most disputes, which objectively reduced the need for formal or official resolution of disputes and, to a considerable extent, led to the underdevelopment of formal litigation. Clan law included family rules, clan rules and admonitions. The development of statutory clan law began in the Han dynasty (206 B.C.-A.D. 220), and the most developed dynasties in respect of statutory clan law were the Ming dynasty and the Qing dynasty. As J. Needham noted, though not without judicial institutions, China had been willing to recognise only the order of nature, and to exalt only the rules of morality. The state, and its delegate the judge, had always seen their power as restricted in the face of the omnipotence of the heads of clans and guilds, the fathers of families, and the general administrators, who had laid down the duties of each individual in his respective domain, and settled all conflicts according to equity and local custom'. See J. Needham, supra note 55, p521.
Do not litigate over little things,
Do not wish the help of litigation,
For it will cost much,
Not worthy to sell an ox for a cat. 69

By and large, the judiciary in ancient China lacked independence, in the sense that neither its organization nor its decisions were independent of the administration. 70 This also contributed to the distrust of the formal processes of the judiciary by the Chinese people. In the West there have long been tribunals the role of which has been not only to apply the law, but often also to interpret it in the light of arguments in which all the contradictory interests are represented and defended. 71 By contrast, all state powers in ancient China belonged to the emperor. State functions were not divided between the administration, legislature and judiciary. 72 Chinese people in practice merely knew one category of official. And the lack of consistency and adherence to precedent when official agencies adjudicated cases intensified the lack of trust of Chinese people in official processes.

69 See Er Ke Pai An Jing Qi, vol. 10.
70 In this context, for instance, Bodde and Morris pointed out that (in imperial China) on the lowest level, that of the xian (district or county), which was the level where governmental law impinged most directly upon the people, administration was conducted by the xian magistrate as merely one of his several administrative functions. Although he usually lacked any formal legal training, he was obliged to act as detective, prosecutor, judge, and jury rolled into one. Fortunately for the operation of the system, however, a legal secretary, who did possess specialised knowledge of law, commonly assisted the magistrate in his judicial work. The secretary was merely a personal employee of the magistrate, who paid his salary out of his own private purse. Hence the secretary was not permitted to try cases himself or otherwise to take an active part in the trials. See Derk Bodde & Clarence Morris, supra note 2, pp4-5.
71 See J. Needham, supra note 55, p521.
CONCLUSION:

In general, legalism, historically advocated by the Chinese Legalists and focusing on the generality of fa (law), was less important than legal moralism in the traditional Chinese political ideal. In one sense, the intention of moralised law was li, which in its implications was far removed from individualism and liberalism. In another, law was related to criminal penalties. Law in the latter sense plus other defects of official process in imperial China caused a distrust on the part of the Chinese people in the judicial function. Meanwhile, on the ideological plane, either Confucianism or Legalism, or even Taoism and Buddhism, reinforced the idea that social harmony and stability were crucial. Harmony and stability implied no desires, no profits, no disputes and no-litigation. In making up for the weakness of official and formal processes for dispute resolution, li and the clan system determined social continuity and stability in ancient China. Moreover, the Chinese history of disdaining and avoiding litigation further restricted the development of the formality and fairness of judicial procedures. Procedure in Chinese history had little independent significance and was scarcely recognised as a legal subject.
CHAPTER NINE

CHINESE LEGAL SYSTEM - A PROCEDURAL PERSPECTIVE IN
THE TRANSFORMATION PERIOD 1840-1949

The preceding Chapter dealt with the features of ancient Chinese law from a procedural viewpoint. From the military failure of the Qing dynasty in the Opium War (1840-1842) until the establishment of the communist regime in 1949, the Chinese political and legal systems were extremely influenced by the West. No other influence in Chinese history was comparable to that of this period. From the old system and structure to the new, the indigenous Chinese legal system, with thousands of years of history behind it, began to be changed and reformed. This phase was actually the ‘transformation’ period and the beginning of the modern history of Chinese law.¹ It is an essential part of the social and cultural background of the Chinese legal procedure system. This background in turn provides a necessary arena for the discussion of procedural justice in an administrative law context in the PRC, which is the subject of this thesis.

1. LEGAL REFORM AND ITS IMPACT UPON LEGAL PROCEDURE IN THE LATE QING DYNASTY

The military failure of the Qing dynasty in the Opium War resulted in the conclusion in the Chinese society at that time, that the decline of China was attributable not only to its

underdevelopment in science but also to flaws in the Chinese political and legal systems. In the legal context, the learning of western law, including Japanese law, and the rethinking of Chinese legal traditions became significant from the late nineteenth century under the slogans of ‘new administration’ (xin zheng) and ‘probationary constitutionalisation’ (yu bei li xian). In the early twentieth century, the Qing monarchy even started to constitutionally reform its monarchical regime, (the Outline of Constitution in the Thirty-Fourth Year of Emperor Guang Xu 1909), in order to ease a series of domestic social conflicts and to satisfy the requirements of Western countries. China’s legal traditions with the characteristics of moralisation, self-restraint, clan control, non-litigation and criminalisation, first encountered the challenges from the West in terms of individualism, liberalism, constitutionalism and the rule of law at this time.

In China’s own legal tradition, there was no distinction between litigation law and substantive law. The concept of ‘procedure law’ or the idea of legal procedure did not exist at all. It was not until the end of the Qing dynasty that the concept of ‘procedural law’, bearing a meaning similar to litigation law and distinguished from substantive law, began to be recognised by Chinese imperial lawyers. Under the impact of Western legal ideas, Shen Jiaben, the most outstanding imperial lawyer dealing with the legal reform in the late Qing dynasty, stated that criminal law was substance (ti), whilst litigation law was function (yong). For example, he said, ‘the aim of legislation could not be defined without complete substance (criminal law); the implementation of law could not be successfully achieved without complete function (litigation law); one was indispensable to the other, and both should not be disregarded’.² ‘It is not criminal law lacking reasonableness, rather incomplete criminal litigation law that might be harmful to innocent people’.³ In the field of civil litigation (song), ‘the operation of the judiciary would encounter difficulties, if the law governing the fairness and reasons in this category could not be enacted promptly’.

² See New Laws and Orders of Emperor Gung Xu of Great Qing (Da Qing Gung Xu Xin Fa Ling), vol. 19.
⁺ Ibid.
In 1906, the relevant Ministers responsible for the amendment of laws of the Qing dynasty, Shen Jiaben and Wu Tingfang, drafted a code initially entitled 'Law of Criminal and Civil Litigation', drawing on western legal experience. This was the first independent procedure law in Chinese legal history. It meant that the Chinese legislative tradition of having one law dealing with various legal subjects (zhu fa yi ti), with a history of about 2000 years, was abolished. The draft law consisted of five chapters (260 articles overall), including attorney and jury systems. It was rejected by conservative Ministers, and in the end, the draft was not passed. It was also in 1906 that the first Chinese law school, the Capital Law School, was officially created in Beijing. The Western idea of civil procedure law and criminal procedure law was taught from the second year of the academic course in this law school, the whole period of legal education lasting three years.5

In the second year of Emperor Xuan Tong (1910), Shen Jiaben was asked to draft an independent criminal procedure law for the purpose of constitutional reform of the Qing monarchy.6 Under this draft, which consisted of 14 chapters (515 articles overall), a series of principles for litigation were put forward, including public trial, equal treatment of the plaintiff and defendant, a system for prosecution, four grades of courts and a maximum of three trials for each case. In the same year, 'the Draft Civil Procedure Law of Great Qing', which included 21 chapters (800 articles overall), regulating the organisation of trials, litigants in civil proceedings, ordinary and special procedures, was also submitted to the Emperor. Both the drafts of the criminal procedure law and the civil procedure law were systematic and advanced.7 In fact, a number of the principles of litigation of succeeding Chinese regimes, such as prosecution, public trial, appeal, the distinction between ordinary procedure and special procedure, were more or less inherited from these draft laws.

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To be sure, the new Chinese litigation system in the late Qing dynasty mainly derived its knowledge of the statutory experience of modern European and Japanese legal systems through translated laws and academic books. This can be proved in part by the focus of Chinese translations of foreign litigation laws at that time. Up to the first year of Emperor Xuan Tong (1909) of the Qing dynasty, influential translated litigation laws included: the German Civil Procedure Law (as amended), the German Law of Enforcement, the Japanese Criminal procedure Law (as amended), the Japanese Civil Procedure Law (as amended), the Japanese Criminal Procedure Law, the Japanese Civil Procedure Law, the French Criminal Procedure Law, the Austrian Civil Procedure Law, the Explanations of Japanese Civil Procedure Law, the Comments on Japanese Criminal Procedure Law, the Outline of Comments of Japanese Civil Procedure Law and so on.  

Although the reform of legal procedure in terms of Westernisation and constitutionalisation was advocated and even undertaken by some radical officials and intellectuals in the late Qing dynasty, resistance from traditional Chinese legal culture hindered the implementation of the new 'Westernised' legal rules and ideas. Apart from the obstruction from conservative elements, the collapse of the Qing regime in 1912 led to the failure of the legal reform. For these reasons, principles such as those of an open trial, the jury and a defence by lawyers, prescribed in the amendment to the draft of Criminal Litigation Law of 1910, together with the aim of setting up a Western style constitutional monarchy with a system of separated judicial and executive powers in 1906, could not be ultimately achieved.

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8 See (1909) 3 The Orient Gazette (Dong Fang Za Zhi), Chinese ed..  
9 The debate about the virtues of Western political and legal systems and Chinese tradition never ceased in China from the late Qing dynasty. Apart from technical reasons and the needs of autocracy, the 'unfortunate' fact that historically, Western legal ideas, like Christianity, came into China together with the dumping of opium, Western military invasion, plunder, and a series of unequal treaties, seems to be another reason to explain the attitude of cultural resistance of Chinese legal extremists. From this time, in the sentiments of Chinese antagonistic to the West, Western ideology began to be described as 'spiritual opium'.

2. PROCEDURE SYSTEM IN REPUBLICAN CHINA 1912 - 1949

The fall of the last Chinese monarchical state, the Qing dynasty, took place in 1911. Republican China (RC) was established by the Chinese Nationalist Party (the KMT) in 1912. Strictly speaking, Republican China was in fact not a unified state, but a state with a number of factions mainly ruled by different warlords or regional militarists, who were explicitly or implicitly influenced and supported by different Western countries including Japan. For example, in the mid-summer of 1912, the top executive in every province was the military governor (du du). Furthermore, twelve of the remaining ‘home’ provinces of China had soldiers as military governors, except the Manchurian provinces and Gansu province, where conditions differed and comparison is difficult.

The history of Republican China can be divided into four phases: namely, the Nanjing provisional government of the KMT (January-February of 1912), the Bei Yang or Beijing government of warlords (March of 1912- June of 1928), the Guangzhou and Wuhan government by the KMT (July of 1925-April of 1927), the Nanjing government of the KMT (earlier 1927-1949).

At the beginning of Republican China, China for the first time lost her powerful monarchical symbols of political integration with a history of over two thousand years. In

11 A ‘warlord’ (the Chinese equivalent, jūn fā) refers to a person who commanded a personal army, who, during the period of Republican China, controlled or sought to control territory, and who acted more or less independently and generally with little national spirit. See further, The Cambridge History of China, vol. 12, ‘Republican China 1912-1949, part I’, ed. by Denis Twitchett and John K. Fairbank, (1983), pp284-7.
12 See D. Twitchett & J. K. Fairbank, ibid, p214.
13 Republican China refers loosely to the period from 1912 to the founding of the People’s Republic of China in 1949. As the text suggests, however, there was no unified regime in China in this phase. Different governments of different political factions coexisted. For instance, from the fall of the Qing dynasty, the Bei Yang government last until 1928, whilst the Nanjing government was already established in southeast part of China early in 1912.
exchange, political power was drawn from warlords, especially from the leaders of the modern new army units, in different provinces of China. In other words, the dominant political forces in the early Republican China were those with the best access to foreign military equipment and expertise. It seemed to some Chinese political elites at that time that the only option for redressing the collapse of traditionally centralised political authority, in the form of the family monarch, and retaining social unity was modern constitutionalism. This is because, since the late nineteenth century, it had been advocated in Chinese society that constitutionalism, political authority and national power appeared conspicuously linked on the basis of the experience of Western countries and Japan. As a result, the establishment of a constitutional republican state became the chief goal and slogan of Chinese political movements during this period.

In practice, however, it appeared that the expectations of Chinese elites for state stability and national unity in a constitutional order were unrealistic. This was evidenced by a series of failures to implement Constitutions, from the Provisional Constitution of the Nanjing provisional government in 1912 to the Constitutions of the Bei Yang warlords government, and further to those of the Nanjing government.

The reasons for the unsatisfactory state of constitutional movements in Republican China may in my view include the following elements. Firstly, constitutional movements, which started from the late Qing dynasty under the propaganda of the radical intellectuals and the officers of 'Westernisation' (yang wu pai) at that time, had insufficient understanding and the support from the populace. This circumstance was the result of the fact that, prior to 1949, the great majority of Chinese, approximately 75 per cent of the population, were agricultural or rural, whilst a much smaller non-agricultural or urban sector existed in semi-modern treaty-port cities along the Chinese eastern coastline. The underdevelopment of literacy, transportation and information systems in rural China thwarted the spread of modern constitutional ideals from urban areas.¹⁴

¹⁴ Mainland China geographically is divided into a number of areas by three rivers systems (north, central and south), and a series of mountains. The railroads system in Republican China was quite undeveloped. In the early 1930s, the whole of continental China had only 9400 miles of railways overall. See William C.
Secondly, without unification and a real centralised political authority for the whole of China, military power became the eventual determinant of state politics. Non-military groups were prevented by warlords from creating a national political regime through a constitution. In reality, the political heritage of warlords was more militarists and militarism. The KMT necessarily had to develop a powerful military arm to compete with the warlords of Bei Yang and later to combat the Communists, and to resist Japanese military invasion. In the process the military came to dominate the party and the state. The ‘militarisation’ of politics in Republican China to a great extent led to the failure to implement a modern constitution.

Third, during this period, the function and spirit of modern constitutionalism were changed into a tool and an excuse for the political struggle between different factions and warlords. In fact, the rulers from different political factions had gradually learnt how to make use of constitutions to afford them a basis for claiming legitimacy rather than to restrict their powers. They devoted a great deal of effort to advocating the significance of loyalty to a constitution, while permitting themselves to feud over the meaning of its provisions. As a result of this situation, in Republican China the populace eventually lost their belief in constitutions. For them propaganda about loyalty to a constitution was only a manoeuvre. In this regard, comparatively, it was concluded that,

Kirby, Germany and Republican China, (1984), chapter 7, p194. This meant that geographical access to many areas in mainland China was limited in earlier times.

On the impact of the Japanese military threat and the emphasis of the KMT on military modernisation in the 1930s, see W. C. Kirby, ibid, pp217-22. In the 1930s, the factual paramount leader of the KMT, Jiang Jieshi, was greatly affected by his German military adviser General Hans von Seeckt, who had worked as the creator of the Prussian national army. Seeckt saw the army as the ‘manifestation of the state’ and a ‘symbol of national unity’. Fundamentally, the army was the ‘instrument of politics’ and the ‘basis of the ruling power’. His militarised philosophy and plan for modernisation of the KMT’s army in fact had been agreed to by a number of senior KMT leaders and largely implemented in the 1930s. See W. C. Kirby, ibid, pp114-24.

in the individualist West constitutions are seen as rules for protecting personal rights and regulating inevitable conflicts of interests. In China, constitutions have been seen as basic statements of current community purpose around which to rally collective energies, as devices for promoting consensus and preventing error. As such, constitutions in China have been regarded as susceptible to change when community purpose changed.\(^\text{17}\)

In fact, at least in my opinion, a constitution in essence is not a temporary political declaration determined by the purpose of a particular social group, faction or minority, but rather, a record of social compromise stemming from the conflicts among pluralist social interests. Actually almost all constitutions enacted in Republican China were contrived by a social minority, including urban intelligentsia, business circles, higher officials, armed bands, landlords and even heads of secret societies.\(^\text{18}\) However, under these constitutions, no attention had been paid to the interests and desires of Chinese agricultural society, which represented the overwhelming majority of the whole Chinese population. Therefore, the implementation of constitutions during this period inevitably lacked the support of the social majority. This was another reason for the failure of the constitutional movement at this time.

Likewise, from 1912 to 1949, by reference to the experience of legal reform in the late Qing dynasty and through the continued knowledge derived from Western legal systems, a large number of procedure laws were laid down and promulgated by different governments in Republican China. The laws contained a variety of principles of modern

\(^{17}\) See D. Twitchett & J. K. Fairbank, supra note 11, p258, pp307-8. In practice, for example, during the twelve years (1912-1924) of the Bei Yang warlords government, scholars have counted seven individuals as president or head of state, one of them twice, twenty-four cabinets, five parliaments or national assemblies and at least four constitutions or basic laws.

\(^{18}\) The nature of the revolution in 1911 has been popularly identified as ‘bourgeois’ in China. In fact, urban bourgeoisie only played a subsidiary role at the earlier stage of the revolution. Thus in the English or the French sense, the description of the Chinese event of 1911 as a bourgeois revolution has been questioned by some Western scholars, due to the fact that diverse groups were involved in the revolution. See D. Twitchett & J. K. Fairbank, supra note 11, p729, p856.
Western law, some of which were implemented to different degrees. For example, under the Provisional Constitution of the Nanjing provisional government in 1912, a number of constitutional procedural principles, such as the separation of powers, the independence of the judiciary, and the supervision of the state apparatus, were explicitly prescribed. It was noteworthy that a number of administrative procedure laws were firstly promulgated in this period, like the Administrative Review Law and the Administrative Litigation Law in 1914. Moreover, ping zheng yuan, the earliest Chinese administrative court, was subsequently established. Administrative cases even occurred in practice. The enactment of these laws marked the beginning of modern Chinese administrative law.

The following table illustrates the enactment of procedure laws during this period.

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19 A famous administrative case occurred in 1916. In October of this year, there were twenty-eight officers who were dismissed by the order of the Minister of Internal Affairs (nei wu bu zhang). According to the Administrative Litigation Law of 1914, the officers challenged the decision of the Minister through ping zheng yuan (administrative court). Ping zheng yuan assumed that the decision of the Ministry of Internal Affairs was unlawful and revoked the decision. Then the judgement was submitted to the President of the state for implementation. The Minister disregarded the judgement in that the existence of ping zheng yuan, as the Minister contended, was established only in accordance with the Administrative Litigation Law of 1914, but lacking constitutional ground. Although the dispute eventually resulted in a struggle for political power, it was perhaps the first time for a neutral tribunal to review and correct an administrative decision in Chinese history. See ‘Unofficial Biography of Bei Yang’, Da Fa Wan Bao (Tai Wan), March 13 in 1971, c.f. Zhan Hengju, ‘Administrative Review and Administrative Litigation’, The Modern Legal History of China, Chinese ed., (1973), pp337-8.
constitutional laws:
1. The Amended Outline of the Constitution of the Provisional Government of RC of 1912
2. The Provisional Constitution of RC of 1912 (amended in 1913, 1923 by Bei Yang government and
1936, 1947 by Nanjing government)
3. The Central Departments of the Provisional Government of RC and Their Powers of 1912
4. The Law of the Senate of 1912
5. The Legislative Procedure Law of 1928

criminal procedure laws:
1. The Regulation of Criminal Procedure of 1921 (by Bei Yang government, amended in 1928 and 1935 by
Nanjing government, entitled as ‘the Criminal Procedure and Implementation Law’)
2. The Regulation of Criminal Procedure of Special Cases of 1944
3. The Regulation of Criminal Procedure of Special Courts of 1948

civil procedure laws:
1. The Regulation of Civil Procedure of 1921 (by Bei Yang government, amended in 1931, entitled as ‘the
Civil Procedure Law’, and ‘the Implementation Law’ in 1932; both were amended again in 1935)
2. The compulsory Implementation Law of 1946 (amended in 1945 and 1948)

administrative procedure laws:
1. The Regulation of Administrative Review of 1913 (amended in 1914, titled as ‘the Administrative
Review Law’)
and 1942)
3. The Constituent Law of Administrative Court of 1932 (amended in 1948)

Table 6: The Legislation of Procedure Laws in Republican China 1912 - 1949

During the whole period of Republican China, the government was highly militaristic
and autocratic. Thus the requirements of procedural laws were prescribed only on paper. They could not be systematically put into effect. For example, the statutory requirements
of constitutional procedures were implemented at random, or changed frequently from
case to case, by warlords during the Bei Yang government. Meanwhile, da li yuan, the

20 For instance, when electing the president of Republican China on October 6 of 1913, Yuan Shikai, the
head of Bei Yang warlords, arranged thousands of plain-clothes men and local ruffians in advance. The
plan was that if the ‘right’ person could not be ‘elected’ as the president, no representative of the
parliament of the Bei Yang government would be allowed to leave the voting room. After voting three
times, the representatives had to give up the procedural requirements of the Provisional Constitution of
1912 for a presidential election. In the end, Yuan Shikai was elected. See Fan Mingxin et al, The Legal
supreme judicial agency of the Bei Yang government, in the absence of any formal legal procedures, made great use of the methods of case law and judicial interpretation in an attempt to satisfy the needs of warlords government. At local level, it was even prescribed that ‘the ways of trials shall be determined individually by the director of the county (xian zhi shi) or the officers who are responsible for a case’.  

Similarly, under the military domination of the Nanjing government, procedural fairness and democratic constitutionalism also existed only in name or slogan. From a constitutional perspective, the one-party regime of the KMT had a dramatically negative influence on political democracy and on the principle of the separation of powers. According to the 1928 Guiding Principles of Training Administration (Xun Zheng Gang Ling), both the government of the KMT and the Legislative Council (li fa yuan) were subject to the guidance and supervision of the Central Executive Conference (or Committee) of the KMT. Under the 1928 Legislative Procedure Law, the Legislative Council in fact only carried out the principles and requirements that were determined by the KMT. The KMT in essence was superior to all state powers. Hence the independence of the Legislative Council and the fairness of constitutional procedures were obviously questionable.

Under the political and military influence of the KMT, criminal procedures also lacked fairness. Firstly, as was the case in the Bei Yang government, judicial arbitrariness was a serious problem at county level in the regime of the Nanjing government. Executive and judicial powers were combined and exercised by the administrative director of the county, who was a judge, an administrative director and a prosecutor at the same time. The integration of judicial and administrative functions in the Chinese legal tradition remained at county level in Republican China. Secondly, the powers of criminal government were ‘elected’ through similar methods to Yuan’s. Therefore, the constitutional and democratic procedures just set up in China, were seriously impaired at that time.

21 See the Interim Regulation for the Director of County to Hear Litigation.

investigation, searching, detention and arrest could be exercised by a variety of people and agencies, such as prosecutors, administrative officers, police, gendarmes and espionage agencies. There were no strict procedural constraints for the protection of citizens' personal safety and freedom. Thirdly, the procedural rights of citizens, granted by basic laws, were constantly restricted and deprived by special regulations. Under the 1944 Regulation on Criminal Procedures of Special Cases, special criminal cases could be tried without prosecution and openness, and the rights of appeal of the parties involved were allowed to be exercised only with respect to questions of law.

Moreover, in the sphere of civil litigation, the Chinese tradition of non-litigation, and distrust of judicial agency remained, though a formalised law of civil procedure was promulgated in 1912 and a number of amendments were undertaken subsequently. In particular, a series of constitutional manoeuvres, the increasing flexibility of judicial procedures, as well as militarised and politicised implementation of law made the Chinese populace believe that formal legal procedure could scarcely resolve private disputes. Actually, there was no significant impact upon the Chinese tradition of a clan society from social revolution and reform in most parts of China in the late Qing and Republican China. For Chinese people, the way to handle private disputes, in most cases, was still informal, and often within the clan system.

23 In particular, under the 1929 Interim Method of the Constitution of the Jury for Anti-Revolutionary Cases, in trials concerning anti-revolutionary (communist) cases, all the members of jury had to be the members of the KMT. The verdict of 'guilty' or 'innocent' was determined by them and declared by a judge thereafter. If a department of the KMT was dissatisfied with the judgement of a court, the prosecutor had to appeal in accordance with the requirements of the department. In this situation, the KMT was superior to both the court and the prosecutor's office in criminal proceedings.

24 See Table 6.
IMPLICATIONS:

The foregoing analyses suggest that neither in the late Qing dynasty, nor during the period of Republican China was the implementation of a modern Chinese procedure system successful. Legal reform in the late Qing dynasty ultimately failed when the regime fell. From 1912 to 1949, reunification could not be actually achieved in Chinese society. Ingrained localism, that is to say, province against province, prefecture against prefecture, continuing war among warlords, the struggle for power within the KMT and the long-term political and military confrontation between the KMT and the Chinese Communist Party, as well as the military invasion of Japan in the 1930s, restricted the implementation of the new modernised Chinese laws.

Law, no matter how well it is designed, can not really be implemented without an appropriate social environment in terms of unified state powers and authority. This aspect was of particular importance in modern China, because the modernisation of the Chinese legal system in essence was a social reform, drawing on ideas from outside, to be implemented by the central government amongst the lower social classes, rather than a spontaneous social transformation occurring unconsciously from the lower populace to the upper central authority. Therefore, without a unified, centralised and constitutional regime to pursue a deliberate course, the modernisation of the legal procedure system could hardly be understood and accepted by the people. In other words, the lack of a powerful central government, and insufficient information and understanding, negatively influenced the acceptance of Western legal ways by the populace with its own deeply-rooted Chinese legal culture.

25 The Chinese Communist Party was established in 1921.
In Republican China, on the one hand, as the result of the collapse of traditional Chinese political authority, each government had to exercise state powers procedurally with the title of ‘constitutional legitimacy’. On the other hand, the struggle of political powers using military force was of paramount importance for every government. Procedural laws were frequently implemented under political and military influence. As a result, they were removed from the comprehension and belief of the Chinese populace. Thus procedural laws were hardly workable, although many of them were well designed from a technical perspective.

Legal procedure itself is a kind of ‘technical approach’ for handling social disputes and achieving social harmony. In this sense, it may be asked why the modernised Chinese legal procedure system did not contribute to social unity and political stability. In my view, the paradigm of modern China never questioned the value of legal procedure. The experience of the modernisation of the legal procedural system in Republican China and even the late Qing dynasty really suggested that only in a peaceful state with a normal political order based on an efficient constitution or equivalent documentary authority, rather than in a state with a militarised or separatist political authority can the role of legal procedure be realised. Simply, in these circumstances, legal procedure could not act directly as a means to suppress military struggles and formulate fundamental political programs.

To give praise where it is due, the devotion of the Chinese legal elite and enlightened politicians to modernising the Chinese legal system nearly succeeded, even though their efforts lacked a unified value and ideology. Their work contributed to the development of an embryo Chinese legal procedure system by reference to Western law, which actually changed the Chinese tradition of not drawing a distinction between substantive and procedural law. They also, in different degrees, aroused a consciousness about modern constitutionalism in Chinese people. In particular, through the 1912 Provisional Constitution, promulgated by the Nanjing provisional government, ‘republicanism’ and such principles as the separation of powers, the sovereignty of the people, the procedural
supervision of the state apparatus, the spirit of democracy and the rule of law began to be rooted in Chinese society.

As a result, the traditional paramount authority of the family monarch was in form replaced by 'constitutional legitimacy' in Chinese history. Constitutionalism became a mechanism for invigorating the ties between the ruler and the ruled, and for establishing a new political structure in order to resolve differences. In the mean time, the emergence of administrative law in China marked new approaches to deal with the relationship between executive power and individuals. From the enactment of independent procedural laws to positive experiences with a new-type judiciary, the achievements during the transformation period were left as a legacy for the People’s Republic of China, the subsequent regime of Republican China.
CHAPTER TEN

SOCIAL CONDITIONING AND LEGAL CONSTRUCTION IN THE P.R. CHINA - A PROCEDURAL PERSPECTIVE

1. AN OVERVIEW OF THE OUTSET OF THE P.R. CHINA

Following a series of military failures, the regime of Republican China ultimately collapsed on the Chinese mainland in 1949. In October of the same year, the Chinese communists established a new regime, the People’s Republic of China. This meant a central government had gained full control of mainland China, thus achieving state reunification thirty seven years after the fall of the Qing dynasty. At the beginning of the new Chinese communist regime, Chinese productivity and the Chinese economy had been largely destroyed through the long-term wars and national dissension that had taken place since the late Qing dynasty. In these circumstances, consolidation of the new regime and reconstruction of the national economy naturally became the chief tasks for the new government.

There was no systematic theory or model to guide the communist party in setting up new political and economic systems. This is because firstly, from a political perspective, the traditional Chinese political authority in the person of a family monarch, and the traditional Chinese legal system had been replaced by new ideas about constitutional legitimacy and party dictatorship since 1912. Both of them were imported from the West. Neither had been successfully implemented during the period of Republican China
because of its political and military collapse, and eventual fall. Therefore the new Chinese communist regime had to seek new ideas and methods to construct its political and legal systems. Secondly, the search for a ‘socialist’ and a ‘communist’ road by a number of radicals could, of course, be traced back to the period of the May Fourth Movement in 1919, and the terms ‘socialist’ and ‘communist’ had been the revolutionary slogans of the Chinese Communist Party for decades since that time. Yet, prior to 1949, there had been feudal ownership of land for thousands of years in rural China. Semi-modern capitalism, including an indigenous urban petty bourgeoisie, and bureaucratic economies mainly existed in a primary form along the region of eastern coastline, whilst the elements of a purely state-owned economy were rare. Thus, the real features of the Chinese economy were far removed from socialism or communism, beyond limited experiences of land reform, achieved by the CCP in scattered revolutionary bases. In this regard, no direct reference could be found within China for the economic movement of socialism. There were a number of options for the CCP to consider at that time.

The first option was to seek guidance from the experience of the CCP itself in political manipulation and economic administration that was achieved in revolutionary bases. These experiences fell into the following categories:

1 In consequence, social Darwinism, liberalism, socialism and communism basically represented the most influential western ideas in modern Chinese thought from the mid 19th century to the early 20th century. Socialism emerged in China as an ideological force, first in the conflicting models of German Social Democracy and Bismarckian state intervention in the economy, and later in the form of Leninist communism. See Martin Bernal, Chinese Socialism to 1907, (1976), pp129-97. Yet, it was not until the founding of the PR China that socialism or communism became an official ideological model in China.

2 In modern Chinese, ‘revolution’ is a term with fuzzy edges, referring to either violent or peaceful struggles or reforms in politics and ideas.

3 In 1927, the political alliance of the KMT and the CCP was destroyed, because the KMT wanted to eliminate the force of the CCP through military suppression. After a number of failed CCP military uprisings against the KMT, the majority of the CCP forces had to move to rural mountainous and border regions, mainly in the southern part of China, including Jiangxi, Hunan and Fujian provinces, where different administrative zones met, in order to set up revolutionary bases for survival. In these regions, the original Rural Soviet regime of the CCP, based on the alliance of workers-peasants, was established. In 1934, the CCP had to abandon these revolutionary bases and started the Long March to the northern part of
a). The advocacy of social egalitarianism and patriotic sentiment through particular techniques. These included the wiping out of land-based elite systems and the allocation of the land to landless peasants in local rural society, in order to materially induce their mobilisation against the old social order (land-reform); the liberation, and the formation of egalitarian movements of women (anti-feudalism); and the rejection of the existence of foreign forces upon unequal bases (anti-imperialism).

b). The enhancement of military forces, and the assumption by the CCP of control of the army.

c). The political manipulation by the CCP of other areas of activity, including ideology, propaganda, literature, arts and education.

d). The promulgation of highly politicised and scattered laws, which meant that the focus of law was not on its neutrality and technical consistency, but rather on the CCP political requirements.4

The legal system of the CCP before 1949, it has been contended, “was different in some ways from that in the peaceful phase (after 1949), because it gradually developed in scattered rural bases under the circumstance of fierce class struggles and wars. To ensure victory in the revolutionary war and the central task of class struggle was an important characteristic of the ‘evolutionary’ legal system, which was also quite changeable due to rapid changes of revolutionary circumstances”.5 In the revolutionary phase (before 1949), there was no strict distinction between law and the CCP orders, policies, declarations, programs, directions, outlines and methods. For example, the early land ‘laws’ or ‘rules’ were promulgated only under the title of political programs in some of the CCP’s

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revolutionary bases until the promulgation of the Land Law of the Soviet Republican China in 1931. As the CCP’s political declarations and policies, the ‘laws’ and ‘rules’ promulgated in revolutionary bases varied quite frequently with the CCP’s political needs in different periods. There were no particular institutions to enact law, no specific and consistent agency to implement law, and no uniform requirements for the titles and hierarchy of different ‘laws’ and ‘rules’ at that time. In essence, most of the ‘laws’ and ‘rules’ focused on political programs, elections, land, marriages and counter-revolutionary affairs. For instance, the 1930 Constitutional Outline of the Soviet Republican China provided:

The regime of the Soviet belongs to workers, peasants, red soldiers and other labourers and the populace; only warlords, bureaucrats, landlords, rich peasants, monks and priests, and all exploiting people and anti-revolutionary fellows have neither the right to elect their representatives to participate in the regime, nor the right to political freedom (Art. 2). Furthermore, the fundamental task of the worker-peasant democratic regime is to abolish all feudal remains and to eliminate the entire presence of the major powers of imperialism in China (Art. 1).

The second option for the CCP in establishing new systems was to borrow from foreign models and experiences. At the outset of PR China, it was evident that she could not fully prosper without learning from outside. Broad consensus existed within the CCP leadership in the beginning era of the People’s Republic about the desirability of adopting the Soviet Union’s model of socialism. This was the result of the close relationship between the CCP and the Soviet Union in politics and ideology, dating from the 1920s.

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6 Ibid. pp298-303; and Zhang Xipo and Han Yanglong, supra note 4, pp20-36.
7 See Zhang Xipo and Han Yanlong, ibid, pp219-25.
9 The Constitutional Outline of the Soviet Republican China was promulgated in Jiangxi revolutionary base in Sep. 1930.
10 From the very inception of the CCP, the Soviet impact upon its development was, of course, many-sided and profound. ‘Moscow was at once the locus of authority and the source of inspiration for the world communist movement from the 1920s to the 1940s and beyond’. See Roderick MacFarquhar and John K.
This also was a logical corollary of the CCP's foreign policy of seeking intimacy with the Soviet Union, which was determined by international circumstances, and especially by the hostile American attitude towards the CCP at that time. In these circumstances, apart from the Soviet model, the leaders of the CCP were hardly receptive to other western political and economic ideas. The dichotomy of world ideology in the 1940s and the 1950s between socialism and imperialism or capitalism made another course impossible. In other words, both international factors and ideological orientation inevitably made the CCP leadership choose the Soviet model, a decision also underpinned by the commitment of military and economic aid by the Soviet Union to Chinese socialist modernisation.

The last option seemed to be the political and economic experiences of the former regime, Republican China. Yet, apart from limited urban petty and national economies that were permitted to remain by the CCP, almost all the old Chinese economic structures were abolished in accordance with the requirement of the socialist movement. That is to say, in the economic arena, it was decided that nothing could be inherited from Republican China. Similarly, the whole legal system of the KMT and all of its laws, which had been collected in a complete volume and divided into six categories (*Liu Fa Quan Shu*), were entirely abolished by the CCP in early 1949.

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11 In fact, in May and June 1949, the CCP tried to get in touch with the US via the American ambassador to China. However, in the end, the US government refused to negotiate with CCP leaders. See R. MacFarquhar and J. K. Fairbank, *The Cambridge History of China*, vol. 14, The People's Republic, part 1: the Emergency of Revolutionary China 1945-1965, (1987), p263. In 1 July 1949, in his famous article, 'On the People's Democratic Dictatorship', carried in *The People's Daily*, Mao Zedong said, "[t]he forty years' experience of Sun Zhongshan and the twenty-eight years' experience of the Communist Party have taught us to lean to one side, and we are firmly convinced that in order to achieve victory and to consolidate it, we must lean to one side. In the light of the experiences accumulated in these forty years and these twenty-eight years, all Chinese must lean either to the side of imperialism or to the side of socialism without exception". See 'On the People's Democratic Dictatorship: in Commemoration of the 28th Anniversary of the Communist Party of China', *Selected Works of Mao Zedong*, vol. 4, Chinese ed., (1960), pp1477-8.

According to the ‘Directive Concerning the Abolition of the KMT’s Liu Fa Quan Shu and Identifying Judicial Principles in Liberated Areas’, promulgated in February 1949, the laws and legal system of the KMT were defined as the weapon of suppression of the people’s resistance. Therefore, the laws definitely could not be implemented in the regime of the people’s democratic dictatorship. It was determined that, where various programs, laws, regulations, and decisions promulgated by the people’s government and army already existed, people’s judicial work should be undertaken in reliance upon them. Otherwise, reliance was to be placed on the policies of the CCP and on the orders of the people’s government. Judicial cadres were to be educated and reformed, according to the ideas of Marxism-Leninism and Mao Zedong thought in respect of the state and law. They were also to be organised to criticise the laws of European countries, America, Japan and other capitalist countries, as well as those of the KMT, in order to eliminate the influence of the ideas in these laws. After all, the options available to the CCP for the construction of its legal system at the outset of the PRC were its own experiences, accumulated in revolutionary bases and liberated areas, and Soviet model.

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13 As concluded, the reasons for entirely abolishing the legal system of the KMT include the following. First, the KMT regime was overturned by the CCP through violent means. Second, the CCP’s understanding of law was one-sided, to the extent that as a ruling instrument law merely expressed the will of the dominant class. Third, in Chinese tradition law was notably related to the emperor’s power and used to arouse the populace’s hostility. Fourthly, the old legal system seemed unsuitable for the new socialist and communist economic structure. See Guo Daohui, Li Buyun et al (ed.), A Record of the Contention on the Science of Law in Contemporary China, Chinese ed., (1998), pp8-11.

14 In the 1952 Judicial Reform Campaign, there was an idea called ‘a concept of bricks and tiles’ (zhuan wa lun) that compared the legal system of the KMT to a building. The idea viewed that the building must be overturned, yet, its bricks and tiles might be utilized. Such a view had been criticized and objected to for many years and surely was not taken by the CCP. Subsequently, the abolition of the Liu Fa Quan Shu and the absence of a complete new legal system resulted in great difficulties for judicial work of the communist regime in the 1950s. Also the abolition somewhat contributed to the overflow of the attitude toward disregarding the continuity and authority of law thereafter. Ibid, p17, pp24-5, p31.
2. THE DEVELOPMENT OF THE LEGAL SYSTEM OF THE PR CHINA

1). The Initial Period

The entire period of the PRC’s legal system, loosely speaking, includes three phases, namely, the initial phase, the arrested phase and developmental phase. In the initial period, from the founding of the PRC in 1949 to 1957, the chief goal of the CCP was to consolidate its regime and to reconstruct the economy. In consequence, a series of laws, including a Constitution, other basic laws and various administrative regulations, were promulgated by the Chinese Political Consultative Conference (CPPCC), the National People’s Congress (NPC, the legislature later substituted for the former), the Central People’s Government Council and the State Council. The most significant legislation in this phase was the Constitution of 1954, which was the formal substitute for the provisional constitution, the Common Program, enacted in September 1949 by the CPPCC. Under the 1954 Constitution, the basic state organs, such as the NPC, the chairman of the PRC, the State Council, the People’s Congresses and their Standing Committees at local levels, autonomous organs in autonomous regions, the people’s Courts and Procuratorates, the constituents and powers of these organs, and the list of citizens’ fundamental rights and duties, were explicitly provided for.

The achievements of legal construction in this period were largely based on the CCP’s own previous experiences and the Soviet Union’s model. For example, the 1954 Constitution was, as Mao Zedong said, ‘based mainly on our own experience but has also drawn upon what is good in the constitutions of the Soviet Union and East European people’s democracies’. Moreover, the Chinese government also paid close attention to

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15 At the outset of the PRC, the CPPCC was a contemporary legislature, whose legislative power was replaced by the NPC in accordance with the 1954 Constitution. At present, the CPPCC, which is a symbol of Chinese political system of multi-political parties cooperation led by the CCP, does not have explicit state powers.

Soviet legislation on family and marriage relations in the early 1950s. From a jurisprudential perspective, in the first phase, the pattern of Chinese legal theory also was plainly inherited from the socialist experience of the Soviet Union. The Stalinist legal theory not only influenced the ideas of CCP senior leaders, but also was taught and propagandised as an orthodoxy in law departments and colleges during the period. In general, the influence of Soviet jurisprudence on the PRC’s legal ideas was as follows.

The first influence was from Marxism-Leninism itself in terms of class analysis, legal nihilism and legal instrumentalism. It is true that the theory of Marxism-Leninism was a political and ideological construct rather than a study of systematic principles and specialised theories of law. What Marx and Lenin actually contributed to socialist legal theory was some fragmentary comments that only somehow reflected their political attitudes towards law. In classical Marxism-Leninism, law, as a pure norm or technique, was rarely discussed independently from class and the state (anti-normative).

The fundamental contribution of Marxism towards law was its theory of class analysis and the idea of the disappearance of law in a communist society. This meant that the

and the pattern of the Soviet Union’s Constitution of 1936 existed in three respects. First, a number of Chinese state bodies and organs had no Soviet counterpart, such as the Chinese creation of a state Chairman, not relying on top officials of the congress system (the Supreme Soviet in the Soviet Union) to perform as the head of the state. Secondly, unlike the election system provided by the 1936 Soviet document, there was no equivalent prescription of universal, equal and direct suffrage by secret ballot in the 1954 Chinese Constitution. Finally, under the 1954 Constitution, the PRC was declared as a ‘unified multinational state’, where ‘autonomous’ minority regions were inalienable parts of national territory. In other words, unlike the Soviet Union, the Chinese Constitution failed to incorporate a fiction that ethnic minority regions could secede. See R. MacFarquhar and J. K. Fairbank, The Cambridge History of China, vol. 14, supra note 11, pp104-5.


emergence, content and value of law were essentially determined by the ruling class, in particular, by its material conditioning. Capitalist society was the last stage for the existence of law. The state, classes and the differences of classes would wither away in a communist society, where law would simultaneously disappear, for the state was the precondition of the existence of law. In Lenin’s early years, he was a typical communist leader, contributing to legal nihilism. Prior to the founding of the Soviet Union in 1917, he denied the positive value of law and argued for the abolition of law in a new soviet regime. Nevertheless Lenin’s idea of the complete abolition of law proved unrealistic during the period of construction of a new socialist country. Lenin later changed his ideas about legal nihilism, arguing that during the transition period from capitalism to socialist and communist societies, law, as a tool, would be necessary for the dictatorship of the proletarian regime and the realisation of communism. Yet, he also insisted that the revolutionary dictatorship of the proletariat should be beyond the restraint of law in that it was to be achieved and maintained by the proletariat through violence against capitalism. This is the notion of legal instrumentalism.

The second influence of Soviet jurisprudence on the law of the PRC was the legal theories of Stalin and Vyshinsky. In the Stalinist era, socialism and Lenin’s legal instrumentalism were combined as a new model of law in contrast with the Western model. When the 1936 Soviet Constitution was promulgated, socialist law, like the socialist state itself, was assumed to remain until the disappearance of capitalist encirclement. It was declared that socialist law belonged to the people, reflected the will of the people and was for the people. Furthermore, it was entirely and completely directed against exploitation and exploiters.

Although Vyshinsky advocated the normative aspect of socialist law, he nevertheless suggested that the chief goal of law was subject to the political requirements of the party and government. Moreover, the authority of law derived fundamentally from the force of state coercion. As one of the superstructures above the relationships of production forming society’s economic structure, law was defined by Vyshinsky as

the totality (a) of the rules of conduct, expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state authority - their application being guaranteed by the compulsive force of the state in order to guard, secure, and develop social relationships and social orders advantageous and agreeable to the dominant class.  

According to Vyshinsky’s idea, the aim of socialist law, which was enacted through socialist democracy, was to enhance the fulfilment of the people’s material, spiritual and societal needs. The conflict between social interest and personal interest, between society and the state, and between individuality and individual interests were to be eliminated. Thus private law would be inappropriate in socialist countries. Instead, public law or state law represented the major branch of Soviet socialist law. This approach, coupled with Vyshinsky’s definition of law, was highly influential as the orthodox socialist jurisprudence in the PRC in the 1950s.

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25 Certainly, the practice of Stalin’s totalitarianism was in many aspects contrary to his invention and Vyshinsky’s idea of socialist legal theory.

26 See Andrei Y. Vyshinsky, supra note 24, pp74-86. Vyshinsky’s standpoint was consistent with the idea of Lenin in his letter to the People’s Commissar for Justice in 1922. Lenin wrote, “we do not recognise any ‘private’ thing; with us, in the field of economics, there is only public, and no private Law. The only capitalism we allow is that of the State...For this reason, we have to widen the sphere of state interference with ‘private’ legal relations, and to enlarge the right of the State to abolish ‘private’ agreements. Not the ‘corpus juri Romani’, but our revolutionary consciousness of Justice ought to be applied to ‘civil Law relations’...”. Letter to Kursky, c.f., Rudolf Schlesinger, Soviet Legal Theory: Its Social Background and Development, (1951), p150.

2). The Arrested Period

1957 to 1977 was the second phase of the PRC's legal development. From 1957, following the split in the Sino-Soviet political alliance and CCP's increasing resistance to Soviet experience, Mao Zedong, the paramount leader of the CCP, began to assume that law was useless.\(^\text{28}\) During this period, and particularly from 1966 to 1976, the period of the Cultural Revolution,\(^\text{29}\) legal nihilism permeated the whole political life of China.\(^\text{30}\) In consequence, the entire embryonic socialist legal system was destroyed and suspended. The typical images of the Cultural Revolution were vividly described by Harry Harding.

The young Red guards, in military uniform, filling the vast Tian An Men square in Beijing, many weeping in rapture at the sight of their great Helmsman standing atop the Gate of Heavenly Peace; veteran communist officials, wearing dunce caps and placards defiling them as 'monsters' and 'freaks', herded in the backs of open-bed trucks, and driven through the streets of major cities by youth only one-third their age; the wall posters, often many sheets of newsprint in size, filled with vitriolic condemnations of the 'revisionist' or 'counterrevolutionary' acts of senior leaders. The little red book carried by the Red guards - a plastic bound volume containing selected quotations from Chairman Mao (Mao Zedong) - remains a symbol of the revolt of the young against adult authority.\(^\text{31}\)

\(^{28}\) See Ming Bao, Hong Kong, (1983), the 27th of June, p20.

\(^{29}\) Stuart R. Schram's explanation of the meaning of the title 'the Cultural Revolution', the full title being 'the Great Proletarian Cultural Revolution', was convincing. He contended that the adjective 'great' was purely rhetorical or emphatic. The truth of the whole movement had nothing to do with the terms 'proletarian', 'cultural' and 'revolution', although Mao plainly believed it to be all three of these things. See R. MacFarquhar and J. K. Fairbank, The Cambridge History of China, vol. 15, supra note 10, p87.

\(^{30}\) Nevertheless there had been some efforts to re-vitalize the legal system by the middle 1960s. See Dong Biwu, On the Socialist Democracy and Legality, Chinese ed., (1979), p134. For instance, the State Council from 1959 to 1960 promulgated more than four hundred administrative regulations. See Lan Quanpu, supra note 7, p167; and Victor H. Li, supra note 12, p29.

\(^{31}\) See R. MacFarquhar and J. K. Fairbank, supra note 10, p107.
The Cultural Revolution was to a large extent a product of Mao Zedong's personal thought and, in particular, legal nihilism.\(^\text{32}\) His idea of legal nihilism not only stemmed from his practical experience of long-term military struggle and Chinese traditional feudal ideas, but also from the ideological impact of Marxism and Leninism, in terms of class analysis and legal instrumentalism, including Stalinist totalitarianism.\(^\text{33}\) The idea of continuing class struggles through launching mass campaigns may represent the focus of Mao's thought. He once remarked, ' [a]s state machines, army, police, court and so on, are the vehicles for one class to suppress the other. For the hostile class, they are the suppressing vehicles and violence rather than merciful things'.\(^\text{34}\) Although Mao insisted that through the implementation of law the people could be educated and inspired by the ideas of communism,\(^\text{35}\) he always objected to a purely legal order. He thought that law

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\(^{32}\) In the early 1960s, Mao was increasingly dissatisfied with China's political scene. The CCP had adopted a number of policies of other senior leaders that Mao regarded as inappropriate and unnecessary. Meanwhile the personal tensions between him and some of his important lieutenants became serious. Against this background, the Cultural Revolution, in my view, was in essence a mass campaign, advocated and launched by Mao Zedong, with the support of a coalition that consisted of a group of radical intellectuals, idealistic young students and the state army. Mao's aim was to strengthen and consolidate his personal power within the CCP, and eventually to ensure the pattern of PRC's development in accordance with his personal ideas. The form of the Cultural Revolution, created by Mao, was to challenge the authority of the government and attack the agencies of the CCP at all levels, from the central right down to the local, through the masses and, especially, the youthful zealots. The movement eventually became too much for Mao to control, turning into, in terms of violence, chaos and factionalism, a tragedy of the whole nation.


\(^{35}\) See Lu Yonghong, supra note 23, pp9-10.
could not meet the needs of class struggle in most cases and, particularly, in a situation where the needs of revolution were dramatically changed.

In August 1958, for instance, when Mao talked about the connection between rule by law, in the sense of the traditional Chinese Legalists, and rule by men, advocated by Confucianism, he contended:

You can't rely on law to rule the majority of the people; for the majority of the people you have to rely on cultivating habits... who could remember so many clauses of a civil code or a criminal law? I took part in establishing the Constitution, but I don't remember it...Every one of our (party) resolutions is a law; when we hold a meeting, that is law too ...Our various systems of regulations are concocted for the most part, to the extent of 90 per cent, by the bureaux. Basically, we don't rely on all that. We rely mainly on our resolutions, holding conferences,...we don't rely on civil or criminal law to maintain order. The National People's Congress and the State Council have their stuff (na yi tao), whilst we have the stuff of ours (party).36

Under such circumstances, law in practice was null in the Cultural Revolution. The People's Congresses (the legislature), the People's Courts and Procuratorates, and the Public Security Bureau did not work at all, and 'Revolutionary Committees' were the substitute for the people's government at all local levels at that time. The people's freedom, life and property were no longer guaranteed. In the Revolution, the mobilised masses searched the houses of 'class enemies' and confiscated their properties without any legal procedure. From CCP senior leaders down to the populace, hundreds and thousands of people were unlawfully arrested and tortured randomly. Some of them were even persecuted without any legal restriction until they died, defiled as 'counterrevolutionary' or the like.37

3). The Developmental Period

The third phase of the PRC’s legal development covers the period of recovery and redevelopment of the PRC’s legal system from 1978 to now. Following the death of Mao Zedong and the collapse of Mao’s radical supporters, the resolution of the Third Plenum of the Eleventh Central Committee of the CCP, held in December 1978, represented the termination of Mao’s theory of ‘continuing the revolution under the proletarian dictatorship’. In consequence, class struggle was no longer the chief task of the CCP. From the Third Plenum, Deng Xiaoping began to take the central position in CCP’s leadership. His fundamental goal was ‘to do the best to realise social stability and develop social productivity for the purpose of modernising China’s industry, agriculture, national defence and scientific technology’. This marked a radical turn from Mao’s era.38

Deng Xiaoping was a pragmatist in ideology. After directly suffering from over ten years of social chaos, caused by the rule of man, Deng concluded that there could never be socialism and socialist modernisation without democracy.39 He further realised that neither socialist democracy nor social stability could be achieved in the absence of a system of law. In his eyes, law was not principally the vehicle of class struggle, but rather the means for maintaining social stability and unity, and for developing socialist democracy and economy. Class struggle was no longer the chief concern in the People’s Republic.40 He insisted that socialist democracy and legality were inseparable. On the one hand, autocracy would come into being without democracy. On the other, without legality, democracy would cause social chaos.41 Therefore, Deng advocated using one hand to enhance material construction, and the other to develop legality.42 Specifically, he

38 Also see R. MacFarquhar and J. K. Fairbank, supra note 10, ‘Succession to Mao’, pp377-88.
40 Ibid, ‘To liberate thought, seek the truth of factual law, and look forward in a unity consistently’, (jie fang si xiang, shi shi qiu shi, tuan jie yi zhi chao qian kan), p132.
41 Ibid, ‘To adhere to the four basic principles’, (jian chi si xiang ji ben yuan ze), p155.
emphasised the authority of law and the importance of the equality of all citizens before the law (fa li mian qian ren ren ping den). He said:

The citizen should be equal before law and system...Every body should have equal rights and duties, stipulated by law. Nobody should not be allowed to have priorities when he was in a breach of law.43

In such a situation, in the new phase of the People's Republic, the slogan of constructing socialist legality was put forward.44 The slogan said that people 'must have laws to rely on; must rely on the promulgated laws; must strictly implement the laws; and must be responsible for the violation of the laws' (you fa ke yi; you fa bi yi; zhi fa bi yan; wei fa bi jiu). In consequence, the Public Security Bureau, the People's Courts, the People's Procuratorates, the People's Congresses, the Agencies of Judicial Administration (si fa xing zheng ji guan) and the State Supervision Agencies (jian cha ji guan), all of which were abolished during the period of the Cultural Revolution, were rebuilt one by one. The legal profession also began to recover and develop in the early 1980s. In 1982, a new Constitution, reflecting the spirit of the CCP as revealed in the Third Plenum, was promulgated and substituted for the 1978 Constitution based on Mao Zedong's theory of class struggle. Article 38 of the 1982 Constitution provided:

The Chinese Communist Party shall operate within the stipulation of the Constitution; a member of the Party, who violates administrative disciplines and state laws, shall be dealt with in accordance with them; a member with a breach of criminal law shall be expelled from the party.

43 See 'The reform regarding the systems of leadership of the Party and the state', Selected Works of Deng Xiaoping (1975-1982), supra note 39, p289.
44 I do not equate Deng's views on democracy with the views on democracy associated with Western liberalism. Although Deng's view on democracy is an apparent departure from that of the Maoist period in the sense of class inequalities, he contends that the implementation of democracy must fundamentally rely on citizens' compliance with formal state rules rather than on the respect for individual dignity and rights. Meanwhile, the doctrine of legal equality does not extend to political relations between the CCP and society. Any challenges to Party leadership and socialist system are legally prohibited. See Pitman B. Potter, 'Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China', (1994) 138 The China Quarterly 325, at 335-41; and Stanley B. Lubman, 'Introduction', in Pitman B. Potter ed., Domestic Law Reforms in Post-Mao China, (1994), pp3-5.
Meanwhile a vast body of laws, administrative regulations (xing zheng fa gui) and local regulations (di fang fa gui) concerning various spheres of social life were amended and promulgated by the NPC, the State Council and local People's Congresses.45

The study of law began to recover and a number of law departments at universities and law institutes were reopened from 1979. Basically, the aims of the Chinese legal studies course in this period of recovery were to overcome the Soviet legal influence of the 1950s, and to set up a new socialist legal system with indigenous Chinese characteristics. Fundamental questions and discussions in legal studies included: a). the relationship between the rule of law and the rule of man, and the role of law in the process of PRC political reform; b). the rethinking of Marxist legal theory, and the attempt to eliminate Stalin's and Vyshinsky's legal ideas and the methodology of legal studies; c). the role of law for the development of Chinese economy and, particularly, for economic reform and for the socialist market economy in recent years, and the openness to the outside; d). the lessons to be drawn from comparative legal studies, including the experiences of both the Anglo-American and the European legal traditions, and from indigenous Chinese legal tradition and the legal experiences of Republican China; e). the establishment of an independent and complete Chinese legal system; and f). a series of questions in respect of specific legal spheres.

3. A PERSPECTIVE ON THE PRC'S PROCEDURAL LAWS

The extreme attitude of the CCP towards the system of legal procedure of Republican China, and its subsequent attitude of instrumentalism and in some cases, legal nihilism, lasting for about twenty years, engulfed the independence and certainty of procedural characteristics in the PRC's legal system. In fact, little attention has been directed to the technical requirements of legal procedures, and few Chinese books have specifically explored jurisprudential issues of legal procedure. No doubt, in both theory and practice,

45 Also see Chapter 2 in Part one.
procedural and technical aspects of law have remained underdeveloped in the PRC’s legal history. Instead, substantive aspects of law, in the form of politicised expressions, class analyses and instrumentalism were overriding.

It is helpful to analyse the features and development of the PRC’s constitutional, criminal and civil procedures, before discussing the value of procedural justice for administrative legality in China. This is so because firstly, in terms of legal hierarchy, some contents of the PRC’s Constitutions provided the bases for the Chinese administrative procedure system. Secondly, the Chinese legal tradition of non-distinction between judicial and administrative functions has been retained in the PRC. Hence the characteristics of judicial procedures may mirror those of administrative procedures. Finally, administrative, civil and criminal cases in the People’s Republic are adjudicated by the same court. In particular, administrative litigation had always been regulated by civil procedure law in the PRC. Moreover, some techniques of administrative procedures stemmed directly or indirectly from judicial procedures. Thus analyses of criminal and civil procedures contribute to the understanding of some procedural issues in the administrative law context.

1). Features of PRC Constitutions

As the result of the constitutional revolution in the late Qing and Republican China, no form of monarchy would any longer be acceptable for either the majority of the Chinese populace or the political elite. Thus, a constitutional republic was the only form of CCP regime capable of achieving social consensus and promoting state stability. Even prior to the establishment of the PRC in October 1949, a provisional constitutional document, the Common Program had been promulgated by the CPPCC. Apart from the Common Program, overall there were four constitutional documents in the PRC’s history, which subsequently were promulgated by the NPC in 1954, 1975, 1978 and 1982.
A). political and ideological impact

In the 1940s, Roscoe Pound suggested that

... teaching and writing on the Chinese constitution have tended to be from the standpoint of political science rather than law, and a tendency to treat constitutional questions, which under the constitution should be legal, as political, to attempt to adjust jurisdictional lines by compromises at conferences of party leaders and of departments, instead of law, has been noticeable.\footnote{See The Law in China as Seen by Roscoe Pound, edited by Tsao Wen-yen, Tai pei, (1953), p6.}

After decades, Pound’s conclusion remains valid as a description of the PRC’s constitutional situation. From a procedural point of view, the four constitutions of the People’s Republic and, in particular, the 1975 and 1978 Constitutions, could be considered as highly politicised declarations, determined by the CCP’s political, economic and social purposes at different phases.\footnote{For instance, as Cohen described, the brevity of the 1975 Constitution, and its high slogan content, minimal statement of goals and vague allocations of power only encouraged the cynical to believe that the mountain had been labored and brought forth a mouse. See Jerome A. Cohen, ‘China’s Changing Constitution’, (1978) 76 The China Quarterly 794, at 803.} Moreover, the ideological influence on the Constitutions was also obvious. For instance, under the 1954 Constitution, the preamble (Para. 6) and Article 4 provided:

Our country enters into an alliance with the great Soviet Socialist Republic...The People’s Republic of China shall rely on state organs and social forces, and gradually eliminate the exploitative system and set up a socialist society through socialist industrialisation and socialist reform.

The 1975 Constitution provided:

We shall insist on fundamental CCP routes and policies during the whole phase of socialist history; insist on continuing revolution under the proletarian dictatorship; in order to make our mother country advance forever along the way, guided by Marxism, Leninism and Mao Zedong thought (Para. 4, the preamble). The Chinese Communist Party is the centre of leadership of the Chinese people (Article 2). State organs and their personnel shall conscientiously study Marxism, Leninism and Mao Zedong thought; insist on
politics in command; object to bureaucracy; closely contact the masses; serve the people with the whole heart (Article 11). The proletariat shall exercise dictatorship over the bourgeoisie in the superstructure, including all cultural spheres (Article 12).

The 1978 Constitution stated:

Chairman Mao Zedong is the creator of the People's Republic of China. All revolutionary and constructive victories in our country were achieved under the guidance of Marxism, Leninism and Mao Zedong thought. To hold high and guard firmly the great flag of Chairman Mao forever is the fundamental endurance for the rally and struggle of all nations in our country and for continuing the affair of the proletariat to the end (Para. 3, the preamble). The armed forces of the People's Republic of China are in command of the Chairman of the Central Committee of the Chinese Communist Party (Article 19).

Under the current 1982 Constitution:

The people of all Chinese nations shall be continuously under the leadership of the Chinese Communist Party, under the guidance of Marxism-Leninism and Mao Zedong thought; insist on people's democratic dictatorship, socialist route (Para. 7, the preamble)...The People's Republic of China is a socialist country with people's democratic dictatorship under the leadership of worker class and based on the alliance between workers and peasants. Socialist system is fundamental in the People's Republic. Any organisation or person is prohibited destroying socialist system (Article 1).

In the PRC's history, its constitutions were quite changeable. The procedure for amending them was simple.48 When a new political faction came into power, the

48 The procedure to amend the constitution stipulated in the 1954 Constitution was, 'the National People's Congress exercises the power of amending the constitution' (Art. 27 a). An amendment of the constitution shall be approved by a two-thirds majority of the whole representatives of the National People's Congress (Art. 29 a). Under both the 1975 and 1978 Constitutions, there were no procedural requirements for amendment. The only relevant provision in the two Constitutions was that 'the National People's Congress exercises the power of amending the constitution' (Art. 17, the 1975 Constitution; Art. 22, the 1978 Constitution). Under the 1982 Constitution, the procedure is, 'the National People's Congress exercises the power of amending the constitution' (Art. 62 a). An amendment of the constitution shall be put forward by the Standing Committee of the People's Congress or by over one-fifth of the whole representatives of the
constitution would be amended in consequence. Under the circumstances of fierce struggles for political power, constitutions were regarded as vehicles for consolidating and legitimating the powers and interests of 'triumphant' factions, especially during the period of the Cultural Revolution. Such a situation was not only the continuation of the constitutional situation in Republican China, but also a product of the CCP's ultra-left thought of legal instrumentalism. In essence, the PRC's constitutions were subject to the CCP's political needs. Changes to the constitutions used to be a symbol of the final stamp of legitimation on already existing and approved practices. In other words, each constitution has marked the ascendancy of a particular leading group and policy orientation, and contained a clear indication of the policy directions the Party at the time wanted to take. However, the Party itself has scarcely been obliged to follow constitutional precepts, and there is no mechanism for making it do so. Thus, the authority of the PRC's constitutions could never be compared to that of Western countries. For example, Article 19 of the 1975 Constitution provided, 'though the NPC has the power to appoint and remove the premier and constituent members of the State Council, this power shall be exercised in accordance with proposals of the Central Committee of the Chinese Communist Party'.

B). weakness of procedural certainty

It is evident that there never was a modern constitution that explicitly rejected the principles of the sovereignty of the people. Nevertheless procedural regularity can be seen as the basis for identifying which kind of constitution or regime is conducive to achieving these principles. The experience of the People's Republic indicates that highly politicised

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Ultra-left thought of the CCP loosely refers to Mao Zedong's thought from the late 1950s that insisted on the central position of rigid ideology, class struggle and mass campaigns.


Also see Lu Yonghong, supra note 23, p130.
constitutions based on legal instrumentalism and even nihilism are doomed to a deficiency in respect of procedural technicality necessary to coordinate state powers and protect individual rights. True a PRC’s constitution used to be a formalization of existing power configurations rather than an authentic institutional framework for adjusting relations between the political forces that compete for power in dynamic relationship.52 For many years, the political life of the PRC was actually governed by CCP policies and its leader’s ideas. Citizens’ participation in state politics was realised through various fanatic mass campaigns and struggles, which were based on radical class discrimination between the proletariat and the exploiting class, and dogmatic ideological classifications in terms of socialism, feudalism, capitalism, imperialism and socialist imperialism.53 Constitutions in most cases existed in name only. To the Chinese populace, the lack of constitutional procedural certainty caused the separation of the PRC’s constitutions from their daily life.

In particular, the 1975 and 1978 Constitutions contained many sentimental, popularised and politicised words and expressions far removed from legal technique and terminologies, such as ‘traitor’, ‘counterrevolutionaries’, ‘imperialism’, ‘hegemony’, ‘socialist imperialism’, ‘evildoer’, ‘browbeating’, ‘head for more successes’, and ‘flunkey’ and so on.54 Under the 1975 Constitution, for example, it was prescribed:

53 Prior to the PRC, the CCP’s mechanism of launching mass campaigns to arrive at a political consensus was developed in revolutionary bases, especially, in Yanan, such as the Rectification Campaign of 1942. In the PRC’s history, the main mass campaigns included: the Suppression of Counterrevolutionaries Campaign, the Three Antis Campaign (corruption, waste and obstructionist bureaucracy) and the Five Antis Campaign (bribery, tax evasion, theft of state property, cheating on government contracts and stealing economic information) from 1950 to 1952; the Anti Rightists Campaign and the Great Leap Forward in 1957; the Socialist Education Campaign from 1963 to 1964; and the Cultural Revolution from 1966 to 1976. See Jonathan D. Spence, ‘mass party, mass campaigns’, The Search for Modern China, supra note 3, pp533-40, pp570-72.
54 Also see Michael Schoenhals, Doing Things with Words in Chinese Politics, (1992), pp38-43.
The state shall put such socialist principles into practice as 'no person can obtain food without working' and 'from each according to his ability, to each according to his work' (Art. 9).

Great fanfare, great non-interference, great debate and great banner criticism (da ming, da fang, da bian lun and da zi bao) are new forms of socialist revolution created by the masses' (Art. 13).

The Chinese People's Liberation Army and the people's militia are the sons and brothers army (zi di bing), led by the Chinese Communist Party...The Chinese People's Liberation Army shall be a team of struggle forever; meanwhile it shall be a team of work and production (Art. 15, a, c).

Moreover Article 15 (b) of the 1978 Constitution provided:

The composition of the leading members of state organs at various levels shall be governed by the principle of the combination of the old, the middle and the youth in accordance with the requirements of the successors of the proletarian revolution cause.

There were two main aspects of weakness of procedural regularity in the PRC's constitutions. First, the relationships between the CCP, the state organs and the army had and still have not been ideally resolved. Under both the 1975 and 1978 Constitutions, it was explicitly prescribed that the CCP was the centre of the leadership of the whole Chinese people. Meanwhile, the Chinese People's Liberation Army (CPLA) was under the leadership of the CCP and the command of the chairman of the Central Committee of the CCP. In particular, the 1975 Constitution directly provided that the NPC was the supreme organ of state powers under the leadership of the CCP.\(^{55}\)

Under the 1954 and 1982 Constitutions, the relationship between the CCP, the NPC and the CPLA was not stipulated. For instance, the PRC's armed forces, under Art. 20 of the 1954 Constitution, belonged to the people. Yet the leadership of the CPLA was not explicitly provided for. Although both the 1954 and 1982 Constitutions prescribed that the NPC was the supreme organ of state powers, and the State Council of the PRC, that is the supreme state administrative organ and the executive apparatus of the NPC, the

\(^{55}\) See Art. 2 (a), 15 (a), (b) of the 1975 Constitution, Art. 19 of the 1978 Constitution.
NPC's relationship with the CCP in the hierarchy was not clearly stipulated. By contrast with other constitutions, under the 1982 Constitution a new state agency, the Central Military Committee of the PRC, was created, as the leading department of national armed forces, which is responsible for the NPC and its Standing Committee (Art. 93, 94). Nevertheless there is already a central military committee and a chairman within the CCP. Thus, whether the chief of the CCP, the chairman of CCP Central Military Committee and the chairman of PRC Central Military Committee must be the same person or not, and if not, what their relationships are and who has paramount leadership of the CPLA, is still uncertain.

Moreover, the principle of the independence of the People's Courts, which was first stipulated in Article 78 of the 1954 Constitution but abolished in both the 1975 and 1978 documents, has been provided for in the current Constitution of 1982. According to Article 126 of the current Constitution, 'People's Courts exercise judicial power independently in accordance with the provisions of the law, and shall be free from interference by any administrative organ, public organisation or individual'. However, this Article did not provide for the relationship between the People's Court and the CCP. In reality, the attainment of personal independence for judges in the adjudication of cases still confronts many problems, because the Party still has considerable impact on judicial work.

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56 See Art. 21, 47 of the 1954 Constitution, and Art. 57, 85 of the 1982 Constitution.

57 In principle, the Trial Committee (shen pan wei yuan hui) is the eventual department to decide cases within the People's Court. Hence, the responsibility of the court to adjudicate cases is collective, but not personal. There is a ‘CCP Group’ in every People's Court. The president of a court at a certain level is usually the director of the CCP Group within the court at the same time. Beyond this, there is also another agency outside the People's Courts, called the ‘Political and Legal Committee of the CCP’ (zheng fa wei yuan hui), at every judicial level. The Committee may direct the work of the People's Courts on behalf of the Party. Yet, there is no procedural regulation governing the relationship between them. The same situation exists in the People's Procuratorate system, which is prescribed as an organ of state supervision of law under the current Constitution.
Secondly, many constitutional stipulations granting citizen's rights and protecting individual interests existed only in principle, lacking any means of implementation, although all PRC constitutions prescribed that all powers of the country belonged to the people. Specifically, direct and free election of people's representatives above county level has not been put into practice so far. The procedural system for the people to supervise state organs, functionaries and the CCP has not been established. Notwithstanding the existence of some substantive stipulations in every constitution.

For example, all PRC constitutions provided that all state organs or functionaries shall be supervised by the people, and that citizens had the right to make complaints or charges to relevant state organs, or to expose any state organ or functionaries for violation of laws or dereliction of duty. Furthermore, under the 1954 and 1982 Constitutions, in Art. 97 and Art. 41 (c) respectively, 'citizens who have suffered losses resulting from the infringement of their rights by any state organ or functionary have the right to compensation'. However, it was not until the promulgation of the PRC's Civil Procedure Law (for trial implementation) in March 1982 that there was a real procedural law for citizens to exercise their rights to challenge administrative agencies. Chinese citizens did not have a procedural basis for seeking state compensation until the promulgation of General Principles of Civil Law of the People's Republic in 1986.

58 See Art. 2 of the 1954 and 1982 Constitutions; Art. 3 of the 1975 and 1978 Constitutions.
59 See Art. 17, 97 of the 1954 Constitution; Art. 27 (c) of the 1975 Constitution; Art. 17, 55 of the 1978 Constitution; Art. 27 (2), 41 of the 1982 Constitution.
60 Under Article 3 (b) of the Civil Procedure Law of the People's Republic of 1982 (for trial implementation), it is provided 'the provisions of this law are applicable to administrative cases that by law are to be tried by the People's Courts'.
61 Article 121 of the General Principles of Civil Law provided, 'the state organs and functionaries shall be responsible for civil liability if the lawful rights and interests of citizens or legal persons are infringed by their duty activities.'
2). Judicial Procedure System

The judicial system had been disrespected and underdeveloped in the PRC for a long time. It was not until June 1979 and March 1982 respectively that the Criminal Procedure Law and Civil Procedure Law of the People's Republic of China were first promulgated, although People's Courts and Procuratorates systems were set up in the early 1950s. In other words, there were no procedure laws governing the judicial processes of both criminal affairs and civil disputes for about thirty years. This situation, from a technical viewpoint, was caused by the CCP's negative attitude towards the previous judicial system and procedure laws of Republican China. At the beginning of the PRC, judicial procedures were only gradually developed through the making of some isolated principal regulations and accumulating the experiences of implementing them in accordance with the needs of land-reform, the policy of Suppression of Counterrevolutionaries, the Three Antis Campaign, the Five Antis Campaign and other social reforms. The features of the judicial system and the individual regulations regarding judicial procedures were highly influenced by legal instrumentalism.

In fact, a draft dealing with principles of litigation procedure in respect of both criminal and civil cases was put forward as early as the first PRC National Conference of Judicial Works in July-August of 1950. Subsequently, three draft legal documents, 'Criminal Procedure Regulation' of 1954, and two documents entitled simply 'Criminal Procedure Law(s)', of 1957 and 1963 respectively, were completed and discussed by special departments. Also in 1957, the People's Supreme Court drew up a draft of 'Trial

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62 Both the People's Court and Procuratorate systems were established according to the following regulations, promulgated at the Twelfth Conference of the Committee of the Central People's Government in September 1951: Interim Regulation on the Constitution of the People's Courts of the People's Republic of China, Interim Regulation on the Constitution of the Supreme People's Procuratorate of the Central People's Government and the People's Procuratorate at All Local Levels.

63 See Zhang Zipei, supra note 37, p39.
Procedures for Civil Cases'.\(^{64}\) However, eventually none of them were passed and promulgated due to political disregarding of the value of judicial procedures. Even the PRC’s initial judicial system and the expert drafts relating to the amendment of judicial procedures were disregarded and abolished during the Cultural Revolution, under the legal nihilism advocated by the CCP’s extreme leftists and fanatical mass campaigns.

In the PRC, although there had not been a procedural law governing civil affairs for decades, many civil disputes used to be resolved through people’s conciliation systems, including non-governmental (neighbours, relatives and people-to-people organisations), governmental and judicial mediation. The CCP’s emphasis on the mechanisms of non-governmental or mass conciliation to deal with civil disputes could be traced back to its experience in revolutionary bases, where it was accepted that ‘the step of mediation must be undertaken prior to litigation’ and that ‘mediation is fundamental, whilst trial is subsidiary’.\(^{65}\) This emphasis was somehow consistent with the Chinese legal tradition of discouraging litigation and advocating non-litigation in the sphere of civil affairs. It meant that the weakness of civil procedure in the PRC did not cause any upheavals in Chinese society.

In particular, under the impact of socialist ideology and mass mobilisation, most Chinese people lacked any conceptions of and consciousness about private property and civil rights. Even personal marriage and privacy were subject to political requirements in Mao’s era.\(^{66}\) In these circumstances, the possibility of and opportunity for civil disputes

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\(^{65}\) See Cai Fabang *et al*, ibid, p41.

\(^{66}\) The dominance of the Chinese clan system was one of the crucial features in maintaining the order of the Confucianised Chinese society in ancient times. Yet, from the 1930s to the 1960s, the CCP’s practice of socialism and communism in mainland China, especially in rural places, including the policies of land-reform, class discrimination, collectivisation and deformation of traditional religion and rites, greatly influenced for the first time the traditional structure of powers in rural China. In urban China, from the 1950s, through a series of socialist campaigns aimed at political transformation, the CCP started to introduce a much higher degree of regimentation and control over the urban population than before, with
were reduced in the PRC because of the fanatical political enthusiasm of Chinese people. The focus of the Civil Procedure Law of 1982, and its Amendment of 1991, were still the pre-eminence of state judicial power over private proceedings rather than the independence of litigants. This reflected the ongoing influence of statism and the continuing disrespect for the neutrality and democracy of legal procedure.

The consequences of the disrespect for judicial procedure in criminal proceedings in the PRC were miserable. It was stipulated in the PRC’s constitutional documents of 1954, 1975 and 1978 that citizens’ freedom and residence were inviolable, and that no citizen could be arrested except with the approval or decision of judicial organs. However, in the PRC’s history there had not been a criminal procedure law governing the constitutional principles for thirty years.

The methods of criminal trial in the PRC stemmed from the CCP’s experience, acquired in revolutionary bases by various special or dependent ‘judicial’ agencies and mass organisations, such as the State Political Safeguarding Bureau (zheng zhi bao wei chu) and the Counterrevolutionaries Committee (su fan wei yuan hui) in the 1930s, and the Judicial Bureau (si fa chu), the People’s Tribunal and the People’s Court in the 1940s. In general, the CCP’s experience had convinced it that judicial work ought to be subject to politics and the central task of suppressing enemies - a flexible and untechnical concept - as well as in conformity to the way of the masses (jian chi qun zhong lu xian). There was greater intrusion into the personal details of citizens’ lives and more pressure to change behaviour and relationships. Further see R. MacFarquhar and J. K. Fairbank, supra note 10, pp619-653 and pp682-716, ‘The Countryside under Communism’ and ‘Urban Life in the People’s Republic’.

67 That is why some scholars contend that the ‘revolutionary’ requirements of socialism or communism are consistent with the moral spirit of traditional Chinese Confucianism in the sense of personal sacrifice, endurance, loyalty to the state and reduced emphasis on law.


69 See Articles 89 and 90 of the 1954 Constitution, Art. 28 (a) of the 1975 Constitution, and Art. 47 of the 1978 Constitution.

70 See Fan Mingxin et al, supra note 5, pp343-54.
no distinction between judicial and administrative functions at that time. The independence of the judiciary and of judges was rejected by the CCP. Instead, it was determined that judicial agencies were to be subject to the unified leadership of the CCP’s committee at the same level.\textsuperscript{71}

Under this political influence, the simplification of procedures and the suppression of enemies represented the major emphasis of the CCP’s criminal procedure system prior to the PRC. This experience dramatically affected the PRC’s criminal procedure system, which was embodied in the Criminal Procedure Law of 1979. Article 1 of the law provided:

\begin{quote}
The Criminal Procedure Law of the People’s Republic of China, which takes Marxism-Leninism and Mao Zedong Thought as its guide and the Constitution (1978) as its basis, is formulated in the light of the concrete experiences of the people of all China’s nationalities in carrying out the people’s democratic dictatorship, led by the proletariat and based on the worker-peasant alliance, that is, the dictatorship of the proletariat, and in accordance with the actual need to strike the enemy and protect the people.\textsuperscript{72}
\end{quote}

To some CCP leaders, the features of previous criminal procedures seemed to be fascinating for the standpoint of maintenance of class dictatorship and political control. However, in practice, the concepts of ‘the people’, the proletariat and class enemy were interpreted at random, only by reference to the needs of the struggle for political power within the Party. In the absence of fair criminal procedures and judicial independence, the continual mobilisation of mass sentiment against imputed criminals in the past led to a

\textsuperscript{71} Ibid. p350, p419, p475.

\textsuperscript{72} This Article has been amended in accordance with the ‘Decision on Amending the Criminal Procedure Law of the People’s Republic of China’ made by the Fourth Session of the Eighth NPC on 17 March 1996, and now providing ‘[T]his law is enacted in accordance with the Constitution (1982), governing the correct implementation of criminal law; the punishment of crimes; the protection of the people; the safeguarding of the state’s social and public security; and the maintenance of the socialist order’ (Art. 1, PRC Criminal Procedure Law, as amended).
constant manipulation of the ignorance of the masses.\textsuperscript{73} So it was not strange that persons, who brought some 'criminals', or rather 'enemies' up for trial one day, were arrested by others with similar titles the day after. Thereafter, it would take much time and energy to rehabilitate the mishandled cases, in order to achieve political amity.\textsuperscript{74} This is evidenced by the vast body of unjust, framed-up and wrong cases occurring in the CCP's history, from the magnified 'counterrevolutionaries Movement' (\textit{su fan yun dong}) in the 1930s and the 'Yanan Rectification' in the 1940s,\textsuperscript{75} to the tragedies of the Cultural Revolution and other radical political campaigns in the later periods.

It became clear that personal dignity and freedom were extremely likely to be violated without objective criteria, independent adjudicators and neutral criminal procedures. This point was realised and emphasised within the CCP in the late 1970s. Subsequently, the PRC's first Criminal Procedure Law was promulgated in 1979. The aims of the law were stated as:

\begin{quote}
To ensure that the facts of crimes shall be accurately and promptly ascertained, that the application of law shall be correct and that criminals shall be punished; to guarantee that innocent people shall not undergo criminal prosecution (Art. 2).
\end{quote}

The law also prescribed the division of judicial powers and responsibilities. It was provided that no other organs, organisations or individual except judicial organs should have the right to exercise judicial powers.\textsuperscript{76} Consistently with this provision, Articles 37, 38 and 39 of the 1982 Constitution provided for the first time in the PRC's history that


\textsuperscript{76} Article 3 provided that, 'the Public Security Organs shall be responsible for investigation, detention and preliminary examination in criminal cases. The People's Procuratorates shall be responsible for approving
the freedom of the person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except with the approval of a People’s Procuratorate or by the decision of a People’s Court, and an arrest must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens freedom of person by other means is prohibited, and unlawful search of the person of citizen is prohibited. The personal dignity...the residences of citizens...are inviolable.

The promulgation and implementation of the first Criminal Procedure Law of 1979 marked great progress in the attainment of judicial independence, democracy and procedural justice in the PRC. Yet, the negative impact of the previous judicial experience of the CCP could hardly be entirely eliminated in a short time. That is to say that the practice of the Law still differs from its proposed ideals. Specifically, some judicial principles and requirements, such as the assumption of guilt, the cooperation between judicial organs (Art. 5), the absence of a right to silence, the limitation of lawyers’ participation in proceedings (Art. 27-30), and the downplaying of oral evidence, lacked fairness to the defendant. Some of these defects in legislation have been significantly improved by the ‘Decision on Amending the Criminal Procedure Law of the People’s Republic’ in 1996. All the same, as a scholar has suggested, ‘the fairness of criminal procedure is a fundamental issue. The focus of judicial practice is to punish criminals strictly rather than to protect innocent defendants from criminal prosecution and punishment’. The following procedural issues still arise in practice through the influence of the Party and government on judicial work: body searches and searches of citizens’ residences conducted without legal approval; detentions and arrests in violation of the requirements of legal procedure; the obtaining of evidence, testimony, and statements unlawfully; and the disregarding of the rights of lawyers and other defenders.

arrests, conducting procuratorial work (including investigation) and initiating public prosecution. The People’s Courts shall be responsible for adjudication’.

CONCLUSION:

In Chinese history, social conflicts, between the rich and the poor, the aristocrats and the populace, and the ruler and the ruled, used to be resolved through violence when a dynasty was overturned and replaced by another. Once again, the transition from Republican China to the People’s Republic was achieved through military struggles, or in modern Chinese terms, ‘revolution’ (ge ming) and ‘dictatorship’ (zhuan zheng). In the CCP’s theory, there were absolute ideological and class differences between the two regimes. Hence, violence and state enforcement were fundamental means of tearing down the previous political, economic and legal system, regardless of justification, legal procedure and other peaceful means.

As early as 1912, according to The First Declaration of the Chinese Communist Party for the Current Situation, the CCP held that ‘democratic revolution refers to one class overturning another, and one regime replacing another...The realisation of democracy means the holding of powers (zhang quan) by the democratic class, but it cannot be achieved through a provisional constitution or holding a meeting in the parliament at all’. The subsequent activities of the CCP followed the pattern of this Declaration for decades. The efforts and achievements of the modern Chinese legal procedure system in Republican China were disregarded by the CCP. Furthermore, legal procedure was of little importance in maintaining the continuity of Chinese culture and achieving social harmony in the eyes of the CCP leadership.

Unlike the experience of Republican China, where long-term civil war or military confrontation, external invasion and separatist regimes caused the factual incompetence and eventual collapse of constitutional and procedural devices, the reunification of mainland China in 1949 provided the precondition for implementing a real modern legal system with constitutional democracy. However, based on the CCP’s own experience in revolutionary bases, and drawing on Soviet legal instrumentalism, for decades law in the PRC was seen only as the means of class dictatorship. Law was not supreme. On the
contrary, it was subject to the will of the Party. Institutionally, the Party was above the legislature. The function of the judiciary also was not independent of political interference. It could not protect individual rights efficiently because the neutrality, fairness and accessibility of judicial procedures were questionable. For a long time legal procedure played little role in handling social conflicts and preventing the occurrence of political chaos in the PRC. Finally, legal instrumentalism turned into legal nihilism and anarchy. As a result, the Cultural Revolution, a tragedy of the whole nation, happened.

Apart from legal instrumentalism, the weakness of legal procedure in the PRC also resulted from the theory of socialist monism. The focus of legal procedure rests on the premise that various social interests are theoretically equal and guaranteed to the same extent in law; and that social justice is associated with the extent to which conflicting interests can be resolved through equal and fair procedures. By contrast, the theory of socialist monism held that the interests and will of the state, the collective and the individual were congruent. If conflict occurs in practice, the interest of the state is to be placed above all. In fact, the monist social theory of interests and wills could not have been carried out without individual sacrifice, mass sentimentalisation and state enforcement.

The Chinese experience illustrated that legal instrumentalism is quite likely to be intertwined with purpose-oriented legal models, but not with legal procedure. Admittedly, the cynicism of the Chinese people towards law today stems not only from the influence of Confucianism, but also, and more directly, from legal substantialism. The Chinese experience has also suggested a theoretical basis of my research. That is that respect for law on the part of individuals is determined eventually by their satisfaction with the extent to which it is relevant to the means for protecting their rights and achieving social justice, rather than by how persuasive its purpose is.
CHAPTER ELEVEN

THE ROLE OF PROCEDURE IN CHINESE ADMINISTRATIVE LAW

The previous Chapter suggested that the legal achievements of the PRC prior to the 1980s were very much the products of legal instrumentalism. Law was considered merely as an instrument of class dictatorship and was put into effect through a series of politicised principles embodying the CCP’s political objectives. It existed only in name as a symbol of substantive and purposive justice, having little to do with the means for protecting citizens’ political and economic interests and rights. Such a situation determined the features of Chinese administrative law. In fact it was the Party, not law, that determined how administrative authorities treated citizens. This Chapter identifies procedural defects in Chinese administration and argues for a role for administrative procedure in ensuring justice in China. In doing so, it relies on the theories and systematic comparisons in the earlier parts. Finally, the Chapter focuses on the need for and potential of a comprehensive administrative procedure Act in China.

1. PROCEDURAL DEFECTS IN CHINESE ADMINISTRATION

In recent years, it is noteworthy that the enactment of the Administrative Litigation Law of 1989, the Administrative Sanction Law of 1996, and the Amendment of the Criminal Procedure Law also of 1996 in China mark the shift towards highlighting the role of procedure in Chinese legislation. The focus of the laws is increasingly upon the means of ensuring individuals’ participation, and safeguarding their lawful rights and interests, replacing highly politicised and over-purposive prescriptions. In 1996
projects to set up and formulate procedures and systems for scientific decision-making and democratic supervision, and to enhance administrative efficiency, were endorsed as a component of the construction of socialist democracy and legality in China. In the same year, it is also noteworthy that the 'Interim Regulation on the Disqualification of Holding Positions and Exercising Powers of Public Servants of the PR China', dealing inter alia with personal favouritism in administrative processes, was promulgated by the State Council.

These achievements indicate that the Party in principle has begun to emphasise the role of legal procedure for improving the quality of Chinese administration. However, the effort to effectively eradicate maladministration in China would undoubtedly encounter many challenges. From an administrative law perspective, procedural defects in Chinese administration remain serious in many respects.

Firstly, in general terms, statute is a traditional feature of the Chinese legal system. As a result, a general judicial principle, imposing procedural requirements with flexible and extensive applicability, like the doctrine of natural justice in the common law, cannot exist in China. At the same time, unlike the due process Article of the United States Constitution, which is the fundamental guarantee of administrative justice in procedure, there has never been an equivalent stipulation in PRC constitutions. Although Chinese administrative lawyers often regard Article 2 (c) and Article 27 of the 1982 Constitution as the source of a guarantee of procedural justice in the exercise of state powers, the argument is unconvincing.

Article 2 (c) of the Constitution stipulates:

1 The Ninth Five-year Project of the National Economy and Social Development, and The Outline of Long Term Objectives of 2010 of the People's Republic of China.
2 The Interim Regulation regulates the holding of public positions and the exercising of public powers in the case of relatives, where public servants undertake public activities in the fields of supervision, audit, arbitration, hearing cases, tax levying, approval of funds, personnel examination, appointment and dismissal, award and sanction, employment, and deployment and so on. The word 'relative' has a broad ambit, including couples, direct blood ties, indirect relationships by consanguinity within three generations, and close relationships by marriage.
The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law.

Moreover, Article 27 provides:

All state organs comply with the principle of simple and efficient administration, the system of responsibility for work and the system of training functionaries and appraising their performance in order constantly to improve the quality of work and efficiency and to combat bureaucratism.

The former stipulation is quite abstract, and only focuses on a kind of purposive justice. The latter Article is largely a directive about the internal working processes of administrative agencies.

The absence of a requirement of due process in successive Chinese constitutions reflects a fundamental weakness in the Chinese legal system. Without constitutional requirements, it would be difficult to consistently regulate administrative activities and ensure procedural justice through implementing legislation. In fact, the National People's Congress and its Standing Committee enacted few laws previously relating to administrative procedures in China. Instead, administrative authorities laid the overwhelming majority of procedural requirements down themselves.³

Secondly, as a result of the excessive-exercise of rule-making power within administrative structures, rules relating to administrative procedures, scattered amongst administrative regulations and departmental rules, represent major problems in terms of cursoriness and inconsistency.⁴ This is not surprising. It is not to be expected that someone can effectively restrain themselves through rules that they themselves have made. Rules implemented by administrative agencies themselves with respect to their own procedures were characterised by a focus upon citizens' obligations and the demand for obedience, which affected the burden of proof and cost.

³ See infra Table, 'Selected Laws and Regulations of Administrative Procedures in the PRC'.
However, the rules ignored the duties of administrative authorities themselves in terms of openness, provisions for hearings, the giving of notice, open reasoning, time limitations, and accountability.\(^5\) In other words, in earlier times, the focus of administrative procedures in the rules was only on the authority and convenience of administrative agencies rather than on fairness and democracy. Administrative procedure even was equated with the exercise of administrative powers in China.\(^6\) Moreover, many administrative agencies cared only about how to obtain more departmental and regional powers, and to gain advantage from them, contributing thereby to corruption and bureaucratism in practice.

In 1980, the ethos of Chinese government officials was described by Deng Xiaoping as:

Standing high above the masses; abusing power; divorcing oneself from the reality and the masses; expending a lot of time and effort to put up an impressive front; indulging in empty talk; attaching to a rigid way of thinking; being hide bound by convention; overstaffing administrative organs; being dilatory, inefficient, and irresponsible; failing to keep one’s word; circulating documents endlessly without solving problems; shifting responsibility to others; and even assuming the airs of a mandarin, reprimanding other people at every turn, vindictively attacking others, suppressing democracy, deceiving superiors and subordinates, being arbitrary and despotic, practising favouritism, offering bribes, participating in corrupt practices in violation of the law.\(^7\)

One cause of this situation was the weakness of administrative procedures. Even today, the relationship between administrative authorities and the administered reveals a shortfall in terms of fairness and balance in procedure. In practice, the concept of administrative law is far from a protection of individuals, and ensuring transparency and accountability in the exercise of administrative powers. Administrative procedure

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is treated as the procedural obligations of citizenship rather than as a process for safeguarding good government. This has caused much criticism.  

In this respect, the most deficient spheres at present are the exercise of the powers of administrative licensing, and the imposition of administrative sanctions. The social freedom and economic activities of Chinese citizens have been significantly affected by misuse of licensing powers, involving the overlapping amongst administrative agencies of the powers of approval, indistinct licensing processes, legal irregularities in the establishment of systems, and wholesale corruption. It is not surprising that to get a license or an approval from administrative agencies may require a citizen to obtain several dozen official stamps.

In 1996, the Administrative Sanction law was promulgated in China. The background to the enactment of the law mirrors the problems of the exercise of administrative power in this area. As a result of the Chinese tradition of feudal autocracy and Soviet legal instrumentalism, the word 'administration' in practice is closely associated with the word 'sanction' in China. Since the late 1970s, a total of over 240 laws has been promulgated by the National People's Congress and its Standing Committee, 202 of which are related to administrative sanctions. At the same time, there are over 800 administrative regulations and 4000 local regulations, relating to the imposition of administrative sanctions upon individuals. Statistically, administrative authorities implement eighty percent of Chinese laws.

The administrative goal of ensuring the smooth implementation of laws and regulations, while simultaneously taking departmental, regional and even personal

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8 See Zhang Qingfu and Fong Jun, supra note 4, pp121-2.
10 For example, it took eight hundred official stamps, a used up copying machine, a van, and one full year to apply for a license to import a set of foreign production facilities in a county in southern China. The application was not approved in the end. See Huang Daqiang, Selections of Sino-Foreign Administrative Cases, Chinese ed., (1988), p35.
advantages from the administered, resulted in the burgeoning of administrative sanctions.\textsuperscript{12} In 1995, it was estimated that in Beijing, with its population of over ten million people, the number of administrative sanctions exceeded ten million.\textsuperscript{13} This situation also led to an explosion in the types of administrative sanctions. Up to 1992, the number of types of administrative sanctions in China was over ninety, stipulated by various laws, administrative regulations, and departmental and regional rules.\textsuperscript{14}

The key issue was that prior to the promulgation of the Administrative Sanction Law in 1996, no law prescribed which state agencies held the power to make provision with respect to the types of administrative sanctions, procedural and institutional requirements for making and implementing decisions, jurisdiction to disputes, and remedies. In other words, no administrative agencies and social organisations were forbidden to lay down the rules for punishing individuals. The flaw was obvious. For instance, the persons or agencies that made the decision to fine individuals could also collect the money and use it. Furthermore, the rules relating to the powers and types of administrative sanctions which could be imposed by People’s Congresses and administrative authorities at different levels were overlapping and inconsistent. In particular, procedural requirements concerning hearings, evidence, notice, reasoning and after-the-fact remedies were constantly neglected.

There are similar problems in the spheres of administrative inspection, adverse determinations, and administrative enforcement. When exercising the powers to restrict personal freedom, or to seal up, arrest or freeze property, the procedures lacked regularity and fairness. For instance, administrative authorities without showing their identity or other relevant papers to individuals often undertake administrative inspection and enforcement in practice. At the same time, in place of a

\textsuperscript{12} Ibid.

\textsuperscript{13} Ibid.

\textsuperscript{14} See Wang Yongqing, The Theory of the Operation of Administrative Sanction, Chinese ed., (1994), p94. At present, under the Administrative Sanction Law, the number has been reduced to six, including warning, fine, confiscation, an order to suspend production or business activities, suspension or revocation of a permit or license, and detention (Article 8). Correspondingly, laws and administrative regulations may set up other types of administrative sanctions, but only the former is entitled to stipulate the sanction in respect of personal rights (Article 9).
rigorous taxation system in China, various unreasonable charges and other demands for funds, which usually lacked lawful justification and procedural certainty, are placed upon individuals.

Ultimately, in China, the goal of implementing procedural requirements necessary to ensure fairness within administrative structures in practice has not yet been attained. In particular, the exercise of the powers of administrative licensing, sanction, inspection, enforcement and the charges without justification are seriously in disorder. In the absence of procedural safeguards, these actions constantly infringe the lawful rights and interests of individuals. The Chinese administration in general is characterised by too little emphasis on the protection of individuals on the one hand, and bureaucratism, favouritism and despotism in many fields on the other. In this respect, the conventional model of administrative procedure may be identified as neither 'democratic' nor 'efficient'.

2. PROCEDURAL VALUE FOR CHINESE ADMINISTRATIVE LEGALITY

The mechanisms for overcoming the defects mentioned above may take various forms. Possibilities include strengthening the power and status of the People's Congress and the People's Court, reform of the relationship between the Party and state powers, and more active education amongst the populace and within state organs about the rule of law. Each of these is noteworthy. Yet two questions are most fundamental.

First of all, the exercise of rule-making power by administrative agencies must be restructured and regularised in China. This is because procedural defects in Chinese administration are linked with constitutional issues as mentioned above. The arbitrariness in Chinese administration results not only from the weakness of judicial power, in the sense of the capacity of courts to correct defects in administrative procedures by reviewing administrative actions, but also from the abuse of the

\[15\] Taken from the note of the interview with Professor Luo Haocai, Vice-President, the People's Supreme Court of China, in Beijing on April 11, 1995.
exercise of legislative power by administrative authorities. In reality, there are always some local governments and departments of central government who exceed their legislative powers in pursuing regional and departmental interests. Second, procedural safeguards in respect of individual rights and interests must be given greater emphasis in both legislation and judicial review. In China, it is particularly necessary to elevate the role of administrative procedure, and to focus on regularising the exercise of most administrative actions that are adverse to individuals. The reasons are as follows.

Firstly, it was either the clan system and monarchy in ancient Chinese society, or the charisma of a political leader and a party for most part of this century, and thus, so to speak, the rule of man and not the rule of law that were the fundamental forces in coordinating or mitigating the relationship between the state and individuals. However, all these forces, with apparently oppressive and autocratic features, have gradually declined or are being now replaced by the rule of law with its characteristics of social consensus and general application. These changes imply the decline of the traditional Chinese agricultural and consanguineous society, the collapse of feudal monarchy, the development of modern industrialised market economy, and an increasing consciousness of modern democracy, individualism and liberalism.

Prior to the economic reforms at the end of the 1970s, economic enterprise had not existed in the PRC for a long time. The private economy had nearly vanished. State

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17 Statistically, in 1994, there were totally 199 local regulations that were promulgated in seven provinces and municipalities, including Beijing, Guangdong and so on, whilst 25 of them dealing with the types of administrative sanctions exceeded the limits of laws and administrative regulations. The number of local rules regarding administrative sanctions in the proposed regions was 120, yet, only 19 of the rules were made on the basis of laws, administrative rules and local regulations. In the same year, there were 95 departmental regulations that were promulgated by seven departments of the State Council, whilst 33 of them for establishing administrative sanctions were in the absence of legislative authorities. Taken from (1996) 6 Governmental Legality (zheng fu fa zhi Shanxi province), Chinese ed., at 11.

and collective enterprises were subsidiary bodies of the government without any economic autonomy. In theory socialist monism prevailed, which held that the interests and wills of the state, the collective and the individual were congruent. The relationships between the state, and citizens or social groups used to be directed and regulated heavily in reliance on the policy of the Party and government, but not law. If conflicts occurred, the interest of the state prevailed. Political obedience and administrative orders, plus mass sentimentalisation and individual endurance, were the bases and the fundamental means of carrying out policy and resolving disputes between the state and individuals.

Economic reform led to fundamental changes in the People's Republic. The reform originally aimed to turn an exclusively socialist country, with state and collective ownership, which had come to be regarded by the Party as the crucial obstacle to Chinese economic development and prosperity, into a system with diverse ownership, embracing state, collective, private and foreign elements. The aim of the reform at present has been said to set up a kind of market economy in China in an attempt to create a competitive environment, where every market subject, either public or private, can be freely, and equally engaged in economic activities, so that economic efficiency can be maximised. The reform in the types of social ownership resulted in the growth of social plural interests. In these circumstances, the previous highly centralised and planned socialist economy in the People's Republic of China, underlining the function of government administration of economy, had to be reformed in depth and breadth, which meant lots of social groups and their interests needed to be adjusted and reallocated, in order to increase economic freedom.

Such situations make it inevitable that differences in social values, attitudes and modes of thought of various social groups will emerge in the process of reform in China, as their interests become independent and their will becomes autonomous,

20 Ibid pp87-92.
especially private interests. That is to say, social dissatisfactions and conflicts will constantly emerge in many ways. To deal with the conflicts, the values of certainty, neutrality and regularity of law, which necessarily are associated with the values of legal procedure rather than with legal instrumentalism and substantialism, must be emphasised. Meanwhile in a market economy, as argued in Chapter four, expedient legal procedures are indispensable to the realisation of such values as efficiency, justice and equality. In this respect, Jiang Ping has affirmed that the market economy must be in order, and one of the key ways to achieve this is to highlight and formulate legal norms with respect to procedure.

In the administrative law context, although according to the premise of a market economy, government should avoid direct involvement in micro-economic activities as much as possible, it must nevertheless become involved in the implementation of law (xing zheng zhi fa) and in the provision of some direct services as well. This is necessary to overcome monopolies and prevent unjust competition in various administrative spheres, such as industrial and commercial administration, taxation, customs, sanitation and anti-epidemic administration, standardisation, audit, bank, information agency and so forth. In this light, many specific administrative actions

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23 The role of legal procedure in coordinating social order and relieving social disputes in current Chinese social reform, at large, may be related to a variety of relationships, including the government and individuals, individuals themselves, local and central interests, and even the interests between different state agencies, and different departments within administrative system. This Chapter particularly argues the role of legal procedure in the Chinese administrative law context. For its role in a general sense, see Ji Weidong, 'Procedure in Comparative and Sociological Perspective', (1993) 7 Journal of Comparative Law, Chinese ed., at 5. He contended that the reestablishment of social consensus, the adjustment of competitive order and the avoidance of social chaos through the neutrality of legal procedure should be seen as an important premise in carrying out the current Chinese social reform.


that are disadvantageous to the administered, such as inspection, enforcement, licensing, sanction and disadvantage imposition may cause disputes between administrative authorities and market participators.

It would be difficult to effectively resolve such disputes and to reduce the possibilities of conflict, while fostering an image of good government and a belief in the satisfactory state of the market economy, in the absence of an administrative procedure system. This is because, as I have argued earlier, legal procedure, just like a 'cushion', is the key to relieving and resolving social disputes in modern societies. The more neutral and fair a procedure is, from the perspective of the parties involved, the more acceptable and satisfactory the decision made by an administrative authority via the procedure, will be.26 To put it more specifically, where an administrative action, either regulatory or adjudicative (quasi-judicial), or even rule-making in nature, adversely affects the specific rights and interests of individuals, a procedural device for ensuring participatory governance, the restriction of arbitrary powers, fair legal treatment, social efficiency and stability must be employed.27 Nevertheless these requirements may need to be applied to different types of administrative actions in different degrees.

Secondly, unlike the situation in some common law countries, such as Australia and the United Kingdom, there is not an administrative tribunal system in the PRC, dealing with various administrative disputes within administrative agencies. Institutionally, the fundamental way to resolve these disputes in China is the judiciary. Under the Administrative Litigation Law, the practice of the People's Court scrutinising unlawful administrative actions commenced in China over a decade ago and has been underlined in recent years. However, the function of the court scrutinising administrative activities is limited, compared either to its counterpart in the common law countries or to the French-model administrative courts in many


26 See Chapter three (3), 'Procedure Value'.

European countries, in terms of the scope of judicial review, the quality of judges, the tradition of non-litigation in Chinese legal culture, and the status of the court.\textsuperscript{28}

So far the People's Court has not been entitled to hear constitutional disputes, which are regarded as purely political issues, having little to do with the law, or to deal with the cases in respect of the function of administrative rule-making. To put it another way, the court does not have plenary jurisdiction over administrative cases. In reality, the independence of the judiciary is problematic, and the judgments of the courts in administrative cases often cannot be smoothly implemented. This is not only technically because the courts in China do not possess the relevant means to carry out their decisions in comparison with the courts in the common law countries, but also because the judiciary is in many ways subject to both the Party and the executive.

Some people contend that only if the status of the People's Courts is strengthened can administrative justice be achieved. This is not necessarily so. Apart from the familiar difficulties associated with the scrutiny of the administration by the judiciary in terms of the lack of administrative specialisation, the focus on the 'pathology' of administrative actions and the increase in the costs of proceedings,\textsuperscript{29} attention must be paid to the corruption of judges and the lack of trust of the Chinese populace in the role of courts in defending justice.\textsuperscript{30} Of course it will take time for both the populace

\textsuperscript{28} See Chapter two (3) and Chapter eight (3).


\textsuperscript{30} In China, judges are not always lawyers. Thus bilateral understandings and beliefs do not exist between two legal careers. In practice, it is quite prevalent for lawyers and parties involved in criminal or civil cases to offer bribes to judges in charge of the lawsuits in order to win the cases. Such a circumstance no doubt affects the competence and reputation of the People's Court to adjudicate administrative disputes.
and public servants to become used to the young Chinese judicial review system.\textsuperscript{31} Hence to simply strengthen the powers of the court or to advocate the role of judicial review seems not to be the whole answer to securing good administration in China. It should be achieved through a combination of factors in any country. In the Chinese context, the change of the inferior status of the judiciary and the endurance of its neutrality and fairness are tasks to be undertaken simultaneously. Meanwhile, means other than judicial review must be employed to bind administrative powers. These include the development of procedural requirements within administrative agencies, and enhanced supervision from the People’s Congress, the media, and society at large.

Thirdly, to bind administrative actions through procedures today will provide definite grounds in law for an administrative authority to reconsider a decision made by a subordinate or inferior administrative agency. In particular, it can contribute to the procedural review of administrative activities by the People’s Court. The present vague provisions make this task difficult for the court in practice. Article 54 (ii) (c) of the 1989 Administrative Litigation Law provides that the People’s Court may order that a specific administrative action be quashed or partially quashed, and that the respondent may be ordered to perform another specific administrative action, where statutory procedures are violated. Yet, in practice, the stipulation is without effect in the People’s Court. The key issues in this respect are related to two aspects.

One is the basis upon which to identify ‘the violation of the statutory procedures’ of administrative agencies. Do the relevant bases include departmental and local rules, or merely refer to laws and administrative regulations? The answer is not given in the Administrative Litigation Law, even though it has been suggested that the relevant bases refer only to the latter, and that the former documents are for ‘reference’ purpose only.\textsuperscript{32} The other issue is the circumstances under which ‘the violation of

\textsuperscript{31} As some Chinese administrative lawyers have declared, the judicial review system is ahead of the development of Chinese society, in that ordinary people are still somewhat puzzled by the endowment of a right to accuse the government, and the civil servants are not entirely used to it either. See Lin Feng, Administrative Law - Procedures and Remedies in China, (1996), p9.

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statutory procedures' directly affects the validity of administrative decisions. Under Article 54 of the Law, the legal consequence of violating statutory procedures is unclear. There are some who suggest that the court should not necessarily quash a specific administrative decision in circumstances where statutory procedures are violated, but the substantive content of a decision is not unlawful - not excessive of the power. According to this view, the court should quash an administrative decision, only where its procedural unlawfulness is serious enough to cause infringements of individual rights and interests. There are others who argue that the liability in respect of violating statutory procedures is unconditional, not subject to the condition that a decision-making body has exceeded its power or that a decision already has infringed individual rights and interests.

Therefore, in China, the lack of an effective judicial principle, such as the rule of natural justice in the common law, providing flexibility in the scrutiny of administrative procedures, and the absence of general constitutional requirement governing procedure, reflect the shortfall in potential jurisdiction of the Chinese judiciary over procedural unlawfulness or defects in administrative activities. Indeed, this twin absence makes the role of statutory administrative procedures more crucial in China than it is in the common law countries. In this respect, it has been concluded that in China there is a close connection between the regularisation of administrative procedures and the corresponding review of the People’s Court.

Finally, today, to Chinese legalists, systematic improvement of the administrative law sector principally involves enacting various laws and regulations for the regulation of administrative activities. Chinese administrative law focuses largely on legislation. The approach has attracted criticism in the face of continuing evidence of

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33 In this case, as suggested, the court may either point out the defect or unlawfulness of a decision in procedure, or formally put forward judicial proposals, instead of quashing it. Ibid.

34 Nevertheless, they think that it is necessary to distinguish different procedures with distinct legal impact on individuals, as the implications of a violation of statutory procedures might be quite complicated. The classification of legal procedures may include discretionary and statutory procedures, internal and external procedures, and decisive and implementing procedures. See Luo Haocai, supra note 32 and Ying Songnian et al., supra note 32.

the salient contrast between the vision and reality of Chinese administrative law. People may ask the following. Why is administrative law removed from the life of the Chinese populace? Can hundreds of laws and administrative regulations really contribute to the fairness of the administration?

These questions reveal to a certain extent that administrative procedure, which mirrors the way the government treats individuals and determines their attitudes towards administrative law, has not yet been given its due weight in the legislative campaign in respect of administrative activities in the PRC. This situation is closely related to the Chinese tradition of moralisation and disrespect for legal procedure, and to the preponderance of legal instrumentalism and other undemocratic characteristics in modern and contemporary times.

In the PRC, the exercise of executive power, the one power which most constantly and directly affects individuals in their social existence, is not differentiated from that of other state powers in many cases. Moreover, it is also closely related to the authority and reputation of the Party, because government, the administration, state powers and the Party are nearly the same to the populace in the People’s Republic. To emphasise the values of legal procedure in Chinese administration, for example, individual participation, equal legal treatment, transparency, governmental accountability, and humanity, by which bureaucratism, favouritism, despotism and corruption can be reduced and avoided, would be a way to increase the belief of Chinese citizens in administrative law and to enhance the harmony of the relationship between political authorities and them.

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3. TO ENACT A COMPREHENSIVE ADMINISTRATIVE PROCEDURE ACT: NECESSITY AND POSSIBILITY

As discussed in the preceding Section, it is crucial to codify administrative procedures to safeguard procedural justice in Chinese administration. In practice, inspired by the codification of administrative procedure in a number of Western countries, in particular in the U.S. and Japan, the introduction of an equivalent system in the PRC began to be advocated from the early 1990s. A further reason for emphasising the statutory method of achieving improvement in administrative procedures was that traditionally, Chinese law was a statutory system. Hence, it seemed to Chinese administrative lawyers that the statutory method would need to take on major importance in establishing an administrative procedure system in China. As a result, the focus of discussions relating to administrative procedure at present is on how to draft a comprehensive administrative procedure Act in order generally to bind the manner of performance of various administrative actions.

The drafting of a comprehensive or single administrative procedure Act must encounter the following obstacles. First of all, the objective of the legislation must be definite. In theory, as discussed in Chapter four, procedure can be seen as an effective mechanism to achieve democracy, justice, efficiency and social stability. Thus, it seems uncontroversial to say that both the emphasis on administrative authority (efficiency and social stability), and the protection of individuals (democracy and justice) can successfully be realised through administrative procedure. Yet, in the enactment of an administrative procedure Act, attention cannot be paid, to the same extent, to the two tasks. Furthermore, it would be difficult to enact legislation, if its focus were eclectic and indefinite. If the focus of the Act were only on one of these tasks, its aims, basic principles and requirements would be more coherent. Therefore, the adoption of the latter attitude towards the drafting would simplify the technicality of this process.

There are still some Chinese administrative lawyers and practitioners whose attitude towards the legislation governing administrative procedures is either eclectic or double-sided. It can be concluded that in the PRC, the principles of both democracy and fairness, focusing on participation and the avoidance of administrative bias and arbitrariness respectively, should be the aims of legislation in respect of administrative procedure. The question is whether 'administrative efficiency' also needs to be seen as one of the fundamental objectives of the legislation, and if so, what the real implications of 'administrative efficiency' are? The latter largely determines the former question.

The problem may be resolved as follows. In the spirit of modern administrative law, as concluded in Chapter five, administrative efficiency should no longer be taken to refer to the absolute obedience of individuals which has been advocated by both traditional Chinese legal culture and legal instrumentalism in communist China. Rather, it involves an emphasis on expeditiousness, simplicity, timeliness, and convenience in administrative procedures. Viewed in this light, the principle of administrative efficiency may be seen to be as crucial as the principles of democracy and justice or fairness. It follows that the fundamental aims of administrative procedure in China can only be to eliminate maladministration, avoiding the infringement of individual rights, and enhancing administrative efficiency based on individual rights and interests. Thus the focus of the Chinese Administrative Procedure Act to be enacted should be on democracy and justice.

Secondly, it has been mentioned that the classification of administrative actions and the corresponding procedures are the bases for the design of the legislation governing

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40 See Chapter five, 'Administrative Procedure and Administrative Legality'.
administrative procedure in many countries. Most importantly, even though there seemingly is no perfect or absolute system of classification for administrative actions, to distinguish administrative rule-making action from decision-making and administrative adjudicative action should become a focus for legislation in China, precisely because procedures binding the three actions are different. The purpose of the classification should be subject to the objective of the legislation, that is, the protection of individual lawful rights and interests and the avoidance of administrative arbitrariness. For example, participation and openness are fundamental principles of administrative rule-making action, while the requirements of notice, reasonableness, hearing, expedition or timeliness, disqualification for bias, consistency, finality and remedies should not be neglected for administrative decision-making and adjudicative actions.

Thirdly, in the light of the studies on the classification of administrative actions in Chinese administrative law, administrative procedure in China may include: 1). rule-making or administrative legislation procedure; 2). administrative supervision and inspection procedure; 3). administrative enforcement procedure; 4). administrative awards procedure; 5). administrative licensing procedure; 6). administrative charges and requisitions procedures; 7). administrative sanction procedure; 8). administrative review procedure; 9). administrative arbitration procedure; 10). administrative mediation procedure; and 11). administrative adjudication procedure.

It would be unnecessary to codify the procedures for every type of administrative action enumerated above. What should be done through the legislation is to establish binding procedures for those administrative actions in Chinese administrative practice, which are closely related to the correctness and legitimacy of the exercise of executive

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42 See Chapter six.
43 The classification here does not necessarily include the actions of administrative contract, and administrative guidance and plan.
44 To be sure, administrative adjudication in Chinese administrative law refers to the activities of administrative authorities to adjudicate civil disputes between individuals. Its implications differ from those of the phrase 'administrative adjudication' in the US Federal Administrative Procedure Act of 1946, Section 551(7), which refers to all the activities of the administration except administrative rule-making action.
power, such as the rule-making action, and which are directly disadvantageous to individuals and have the potential to infringe their rights unlawfully, such as administrative licensing and enforcement. The urgency of codifying other types of administrative actions, such as administrative awards (xing zheng jiang li) and mediation, seem less than that in respect of the rule-making power and other disadvantageous actions, and might be satisfied by the stipulation of specific departmental or local rules made within the administrative system. The procedures for internal administrative actions, which are not directly associated with individuals but rather are related to the activities within administrative structures, can be regulated through these rules as well.

In recent years, the following laws and administrative regulations with regard to administrative procedures have been promulgated in the PRC.

1. Regulation on the Methods to Handle Documents of State Administrative Agencies, enacted by the State Council in 1987;
2. Interim Regulation on the Procedure for Enacting Administrative Regulations, enacted by the State Council in 1987;
3. Regulation on the Registration of Administrative Regulations and Departmental Rules, enacted by the State Council in 1990;
4. Regulation on Administrative Supervision, enacted by the State Council in 1990;
5. Regulation on the Sanction of Security Administration (amendment), by the Standing Committee of the National People's Congress in 1994;
6. Administrative Review Regulation (amendment), by the State Council in 1994;
7. Interim Method of Disqualification in respect of Holding Positions and Exercising Powers of State Public Servants, enacted by the State Council in 1996;
8. Administrative Sanction Law, enacted by the Standing Committee of the National People's Congress in 1996.

Table 7: Selected Laws and Regulations of Administrative Procedures in the PRC

Meanwhile, drafts of a new Legislative Law, dealing with the division of legislative power, and legislative technique and procedure, and of an Administrative Licensing Law are due to be discussed and passed by the National People's Congress soon. In these circumstances, the remaining categories of administrative actions, whose procedures need to be codified, are administrative enforcement, administrative
charges and requisitions, and administrative inspections. The question arises as to whether an attempt to codify the procedures of the remaining types of administrative actions deserves to be undertaken in China in the near future. And if so, would it be necessary to accomplish this task through the enactment of a comprehensive administrative procedure Act? The aim of such an Act would be to prescribe the procedures of all types of administrative actions disadvantageous to individuals and of the administrative rule-making action. The answer to these questions may be ‘no’. The real argument is that the focus on the role of legislation in prescribing administrative procedures is not the same thing as the enactment of a comprehensive administrative procedure Act.

The reasons are as follows. Firstly, it is questionable whether the alternative of comprehensive codification of administrative procedures is superior to that of individual legislation. The criteria involved in assessing the relative merits of the two ways include cost, efficiency and consistency, provided both of them ultimately can meet the purpose of administrative justice. To establish binding procedures governing relevant administrative actions through separate legislation specifically tailored to needs seems more flexible and attainable than using comprehensive legislation. The variety, complexity and specialty of administrative actions in principle makes it hard to identify general procedural rules which will both be satisfactory, and achieve uniformity in the legislation. Even a procedural Act binding a single type of administrative action can hardly be achieved in practice without careful investigations and studies of the area of administration in question. Furthermore, inadequate comprehensive legislation is quite likely to affect the flexibility and efficiency of the administration.

45 Taken from the note of the interview with Professor Ying Songnian from China’s National College of Administration in Melbourne on June 18, 1996.
46 Taken from the note of the interview with Judge Jiang Huiling of the People’s Supreme Court in Beijing on April 3, 1995.
For example, the focus of procedural requirements, such as participation, hearing, notice, reasonableness, and the right to remedies, plainly differs between administrative actions conferring rights and those actions imposing obligations or sanctions; between decisive administrative actions and implementing actions; and between legislative and adjudicative actions, external and internal actions and so forth. These requirements also may not be crucial to the same degree as between different activities, such as administrative enforcement, administrative charges, administrative requisitions and administrative inspections, whose procedures remain to be codified in China in the near future. In fact, even the American Administrative Procedure Act of 1946, on the basis of which many Chinese administrative lawyers argue for comprehensive legislation, has encountered many difficulties in practice.48

Secondly, it is noteworthy that the concept of using administrative procedure to restrain administrative arbitrariness, and to safeguard individual rights and interests, did not naturally emerge in Chinese society. Rather, it was transplanted from the West, although some comparable notions in Chapter eight are found in ancient Chinese administration, as mentioned, such as disqualification and the imperial

48 The United States Federal Administrative Procedure Act was initially meant to control the extremely expanded adjudicatory activities of regulatory agencies. It contains relatively detailed rules for formal administrative adjudication, yet says little about other forms of administrative action. Most of all, it does not prescribe procedures for informal adjudication, even though the vast majority of decisions that government makes directly affecting individuals fall into this category. As administrative law’s focus changed from formal evidentiary proceedings to rule-making and informal adjudication, the courts and, particularly, the lower courts, began to interpret the APA innovatively to accommodate these changes. In 1990, the Congress amended the APA to provide for negotiated rule-making (Negotiated Rule-making Act of 1990, Public Law, 101-648). In the meantime, it has enacted many agency-specific procedural schemes to which the APA was irrelevant, reflective of its tendency to adopt the method of individually restraining the procedures of distinct administrative actions outside the framework of the APA. It has been predicted that the Congress in the US will continue to create procedures tailored to the particular needs of various substantive spheres through separate statutes, rather than rewriting the APA in an attempt to impose a unitary procedural code. Such a situation, as some lawyers contend, may feature the trend of the fragmentation, or dis-integration of American administrative law. See Peter H. Schuck, Foundations of Administrative Law, (1994), chapter 3, ‘Note and Questions’, pp72-3; Martin Shapiro, ‘APA: Past, Present, Future’, (1986) 72 Virginia Law Review 447, at 447; and E. Donald Elliot, ‘The Dis-Integration of Administrative Law: A Comment on Shapiro’, (1982-1983) 92 The Yale Law Journal 1523, at 1523-36.
examination system. By contrast, the practices of criminal and civil proceedings could be dated back to ancient times. During the transformation period of the Chinese legal system, from the middle of last century to the founding of the People's Republic, the influence of the West on the ideas and systems of administrative procedure was less dramatic than that on Chinese criminal and civil procedure systems. Soviet jurisprudence, having been influential for a long time in communist China, was also incongruent with the spirit of administrative procedure.

Thus, in view of Chinese legal tradition and social conditioning, it would inevitably take a long time to implement an entire administrative procedure system for the purpose of dealing fairly and effectively with the relationship between government and the administered. In short, such a process has to be incremental. The enactment of a comprehensive administrative procedure Act would be a great legislative achievement. Nevertheless, first of all, attention must be paid to the efficacy of legislation, that is, the best way of making both Chinese administrators and populace accept the new system. If the legislation is over-general, the attempt to seek uniformity of administrative procedures may negatively affect its implementation. If so, administrative lawyers are likely to be criticised by the people once again on the basis of over-regulation.

Thirdly and finally, there is already a series of isolated administrative procedure laws and regulations, enacted or to be enacted by the National People's Congress and the State Council to separately satisfy the requirements of procedural justice in China. In

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49 Although both the criminal procedure act and civil procedure Act were first enacted in the late nineteenth century, the earliest rules with respect to criminal procedure may be traced back to the Chinese Warring States Period (475 - 221 B.C.), as evidenced by the relevant contents and, in particular, the Chapters of qiu (imprisonment) and pu (arresting), (Six Chapters of Fa Jing, written by Li Kui). See Zhan Hengju, The Modern Chinese Legal History, Chinese ed., (1973), TaiWan, p201. Moreover, as early as in the Qing dynasty, the systems of conciliation (tiao chu) and the suppression of litigation (xi song), based on traditional Chinese moral system of li and the clan system, were rather developed, both of which can be regarded as the factual civil procedure system in the Chinese legal history. See Cao Pei, 'Primarily Exploring the Civil Procedure System at County and Prefecture Levels in the Qing Dynasty', (1994) 2 Chinese Legal Sciences, Chinese ed.

50 See Zhang Chunsheng, supra note 39, p7.
other words, the procedures of many administrative actions that deserve to be regulated have already been codified as stated above. As it stands at the moment, some of the recent laws and administrative regulations in relation to administrative procedures are to the satisfaction of Chinese administrative lawyers.\textsuperscript{51} In such a circumstance, it would be worth systematically amending and coordinating existing administrative procedural laws and regulations rather than giving up all of them and substituting a comprehensive procedure Act with general applicability in their place.\textsuperscript{52} As to the remaining administrative actions disadvantageous to individuals, and whose procedures are still beyond legal restraint, the objective of procedural regularisation can still be achieved. This may be accomplished through the enactment of separate laws and administrative regulations, which can be seen as the main existing characteristic of procedural legislation in Chinese administrative law.

\textsuperscript{51} Such as the Administrative Sanction Law of 1996.

\textsuperscript{52} See Cheng Jianfu, supra note 38, pp64-5.
CONCLUDING COMMENTS

There has been a trend in the sphere of law, in general terms, towards highly purposive and outcome-oriented models in many countries, while the values of procedure, underlining the independence of 'the means' from 'the end' and 'the purpose', at least in China, have not been given their due weight. The early part of this thesis has presented a theoretical argument about the unique values of procedure in the achievement of social justice in a variety of social settings, in terms of democracy, justice or fairness, efficiency and social harmony. The contrast is with consequentialism, utilitarianism and totalitarianism that focus on substantive frameworks (purpose and outcome). This theoretical argument concerning the positive values of procedure in safeguarding social justice is then applied to the area of law and, in particular, administrative law, in different legal traditions.

The law in China, both in ancient and modern times, illustrates the point impressively. Traditionally, law in China was principally concerned with penalty and suppression, subject to the authority of a consanguineous monarchy. Law was far from peace. The role of law in ancient China typically was subsidiary to morality and the clan system. In such a situation, *li* was the intention of law, focusing upon individual endurance, social hierarchy and patriarchal relationships. Law disregarded procedural dispositions, involving neutrality and fairness to obtain social consensus. As a result, almost every time in Chinese history, violent uprising or revolution has been the only way of handling social conflict in extreme circumstances.

In modern times, the subordinate status of law has persisted, even though the role of morality and the clan system have gradually decreased with socio-economic changes and
influences from the outside. Chinese law, either during the transformation period or in the communist regime, was still instrumental. The Chinese legal procedure system was extremely underdeveloped apart from a few laws with purpose-oriented features and little practical effect. In essence, law in modern China deferred to militarised or sentimentalised politics. As before, for most of this century, Chinese law in reality lacked neutrality, fairness and public respect. From a procedural perspective, the dysfunction of modern Chinese law and the cynicism of the Chinese populace about it, resulted from its weakness of procedural contents and values.

It seems that from the traditional Chinese philosophies of Legalism (cruel penalty), Confucianism (moral sages), Taoism (nothingness) and Buddhism (emptiness), to the ideas of class revolution, dictatorship and socialist monism of the Chinese communists, legal procedure has not been given its due consideration. In particular, Confucianism and socialism in the era of Mao were similar in the sense of their opposition to the certainty, neutrality and generality of legal procedure. Nevertheless, the difference was that, for individuals, the sacrifice of interests and endurance according to Confucianism only involved moral duties, which could be attained through personal immanence. By contrast, they had become political obligations in socialist monism, which were realised through state enforcement and mass mobilisation. Another difference between them was that socialism previously distinguished the rich from the poor, the exploiting class from the proletariat. Yet, Confucianism advocated the extent of moral education or perfection as the key criteria to categorise people.

From traditional physiocracy and natural economy to industrialisation and mercantilism, from a highly centralised planned-economy to a market economy, and from socialist monism of interests and property to social pluralism, the socio-economic reform in China, starting from the end of the 1970s, plus the enduring impact from the West, have caused dramatic ideological and systemic changes in the People’s Republic. It was the reform and the corresponding changes that led Chinese lawyers to attempt to re-evaluate and reconstruct their legal system. Obviously many challenges face them. This thesis argues that one of the most significant things to be done is to eliminate the impact
of legal instrumentalism in order to strengthen the autonomous role of law in social life privately and publicly, and thereby, to deal with the issues and conflicts occurring in connection with the Chinese economic and political reform. In achieving this, substantive values, judged in terms of purposes or outcomes are, of course, important. More crucial, however, is a focus on the justice of the procedures to achieve them.

Under such circumstances, the development of administrative law in the People’s Republic, which is an independent area of law dating back only to the early 1980s, has encountered familiar barriers, by which I refer principally to the remaining influence of legal instrumentalism and procedural defects contained in the practice of the administration. In order to overcome these barriers and achieve administrative legality in China without sacrificing efficiency, fairness, transparency and accountability, the arguments in the thesis postulate the following.

First, the basic principles of procedural justice, such as fairness, peace, humanity, rationality and predictability, must be implemented through the entire range of administrative activities in the PRC, from administrative rule-making action, to administrative regulatory and adjudicative actions (xing zheng li fa, xing zheng zhi fa and si fa). Naturally, of course, some specific requirements, such as participatory governance, respect for individual dignity, equality of treatment, the suppression of bias, correctness and timeliness, and the right to remedies, may need to be prescribed to different degrees in respect of different administrative actions.

Secondly, in order to guarantee procedural justice in administrative activities, Chinese administrative law needs to be conceived of as a comprehensive system. This means that in addition to the after-the-fact scrutiny of procedural maladministration by the People’s Court, attention also needs to be paid to procedural restraint of the exercise of administrative powers within administrative structures in advance. In particular, the procedures governing rule-making and other actions constantly imposing specific burdens or disadvantages upon citizens, must be given procedural justification, because of the
limited role of the Chinese judicial review system and procedural defects in administrative practice.

Thirdly, the establishment of binding procedural rules in respect of selected administrative actions in China does not necessarily mean the enactment of a comprehensive administrative procedure Act as early as possible. In view of the legislation which already exists and which is to be promulgated shortly, covering administrative supervision, administrative reconsideration, administrative sanction, rule-making and administrative licensing, it would be an expedient and equally satisfactory option for the National People’s Congress and the State Council to separately codify the procedures of the remaining proposed administrative actions.

Lastly, underlying the political ideal of procedural justice in administrative law is respect for individual interests and dignity rather than monism of social interests and totalitarianism. This is because it is only in the circumstance of social pluralism, that the interrelation between state administrative power and individuals can possibly become adversarial. Therefore, it is also in this circumstance, that a neutral and fair procedure system to mitigate and resolve these conflicts in principle becomes necessary.

In a broader sense, the task of avoiding administrative injustice through procedural frameworks restricting the manner of performance of administrative activities, may involve supervision from external forces, such as the judiciary or independent tribunals, and other state organs. The task is also, more fundamentally, tied up with constitutional issues. Hence, in response to the dramatic socio-economic changes and the increasing need for the role of law in the PRC, it would be advisable to prescribe general underlying principles of procedural justice applicable to all kinds of state actions in the Constitution. This would not only strengthen the procedural justice of the administration, but also would contribute to the transformation of the whole Chinese legal system from the previous instrumentalism to its autonomy and functionalism.

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