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The Impact of Transparency and Accountability Mechanisms on Bureaucratic Inertia A Case Study of Work Safety Regulation

Sarah Biddulph

In a competent authoritarian regime such as China, when we think about the application of the principles of transparency and accountability to administrative conduct, we tend to imagine the state as powerful and active. The harms upon which we tend to focus relate to those resulting from exceeding the lawful limits of power or the abuse of power. What we do not expect to find, and what administrative law principles in China do not address very well, is the problem when administrative agencies fail to act and the harms that arise out of this failure. Yet inertia is an increasingly serious issue within the administration of China. To what extent does the proliferation of accountability mechanisms, coupled with the protracted anti-corruption campaign initiated under Xi Jinping in 2012, exacerbate the apprehension of government officials that the more they do, the more exposed they will be to legal and Chinese Communist Party (CCP) disciplinary sanctions? In such an environment, being risk averse and making oneself a small target is sensible.

This sentiment has spread through the bureaucracy to the point that the fourth plenum of the eighteenth Central Committee of the CCP released the Decision on Some Major Questions in Comprehensively Moving Forward Governing the Country According to Law (Fourth Plenum Decision) in October 2014, which included a section that specifically acknowledged this problem.¹ The Fourth Plenum Decision provides in part 3 (entitled “Deeply Move Administration According to the Law Forward, Accelerate the Construction of a Rule of Law Government”):

- (1) Comprehensively carry out administrative functions according to the law. Perfect legal structures for administrative organization and administrative procedure, move

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¹ Central Committee of the CCP, Decision Concerning Some Major Questions in Comprehensively Moving Forward Governing the Country According to the Law Forward, October 23, 2014, <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> (English translation).

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forward with the creation of statutes for bodies, functions, powers, procedures and responsibilities. Administrative bodies must persist in their obligation to carry out their statutory rules and not do what is not authorized by law, *they must have the courage to be responsible, dare to shoulder burdens, firmly correct a lack of action or chaotic actions, firmly overcome laziness and indolence in government, and firmly punish neglect and dereliction of duties*. Administrative bodies may not establish powers outside of the law, they may not decide to impinge on the lawful rights and interests of citizens, legal persons and other organizations without a basis in law and regulation, or to increase their duties. Carry out a governmental power list system, persist in eliminating the space for rent setting and rent seeking through power.²

On several occasions, Xi Jinping has identified bureaucratic inertia as a discipline problem that warrants investigation and punishment by the CCP's Central Discipline Inspection Committee.³ In some places, this has led to specialist rectification campaigns.⁴ Identified as undermining the "mass line" where officials are required to be close to the people and as a breach of Party discipline, the CCP has raised the stakes for those officials who seek comfort or safety in inaction.

This chapter seeks to unpack some of the factors that contribute to bureaucratic inertia. Within China, it is overwhelmingly characterized as a problem of individual turpitude. This chapter supplements this popular vision of individual failing with an analysis of the broader institutional and structural framework within which individual enforcement action sits. It critically examines the impact of legal, bureaucratic, and political forms of accountability on individual motivation as well as upon institutional enforcement priorities and motivations. Are provisions requiring transparency aimed at improving the public's knowledge of government policy and decision making or are they intended to facilitate information gathering by higher-level agencies about the conduct of lower-level agencies? To whom is an agency actually accountable for their decision making: the party affected by their

² Ibid. (emphasis added).

³ Central Discipline Inspection Committee, "If You Have the Spirit of Responsibility, You Should Be Ashamed of 'Official Non-feasance'," January 31, 2016, http://www.ccdi.gov.cn/yaowen/201601/t20160129_140160.html (in Chinese). The Central Discipline Inspection Committee is now subsumed within the Supervision Commission.

⁴ Wang, Shengxia (reporter) and Yang Shengjun (correspondent), "Resolutely Taking the 'Sword' to Lazy Officials, Qinghai's Specialist Rectification Campaign against the Problem of Inappropriate Non-feasance" ["王生霞, 通讯员, 杨生军 '对懒政怠政者坚决'亮剑' - 青海专项治理不担当不作为问题"], March 24, 2018 (in Chinese).

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decision making, the higher-level administrative and political agencies, or a mixture of both?⁵ And what are the impacts of transparency and accountability mechanisms on the motivations for government agencies to perform their duties? Chapter 7 in this volume explored the particular mix of accountability mechanisms that have been adopted in China and that subsume judicial and administrative review to bureaucratic systems of supervision and control. This chapter further develops the themes of transparency and accountability in good governance by considering the important ramifications of the adoption of these particular forms of accountability into the Chinese program of administration according to law. What are the impacts? The example explored in this chapter demonstrates that some are unintended.

This chapter first sets out the general debate about bureaucratic inertia, which goes under the moniker in Chinese of “lazy governance” (懒政怠政).⁶ It then reflects on how inertia affects the quality of governance using the regulation of work health and safety as its specific example. Using this example not only serves to take the analysis of bureaucratic enforcement mechanisms, and the failures of enforcement beyond a general description but also provides some insight into the specific context and consequences of bureaucratic inertia. This broader context involves the continuing high levels of work injury, disease, and death suffered by workers. Failure in law enforcement is but one factor in the broader regulatory environment, but, arguably, it is an important one since it has a number of interrelated impacts. First, it is a failure of deterrence. Second, the failure of enforcement not only undermines the legitimacy of legal rules but also fails to promote the establishment of positive social norms that value the life and health of workers, which together would promote compliance among enterprises.⁷ Given the weakness of private enforcement and the limitations on worker participation in systems of regulation,⁸ the quality of enforcement by state agencies becomes a highly significant, though not exclusive, factor in the ultimate objective of protecting worker health and safety.

⁵ See the discussion of these questions in Jonathan Fox, “The Uncertain Relationship between Transparency and Accountability,” *Development in Practice* 17, 4–5 (2007): 663–71.

⁶ *Lanzheng daizheng*, which literally means lazy governance, idle governance. See, Xiaorong Ou, “The Path to Managing ‘Lazy and Slow Governance’ in Local Level Civil Servants,” *Leadership Science* 22 (2015): 44–45 (in Chinese); Rui Han and Jingping Li, “On the Phenomenon of Administrative Omission in Local Government and Governance,” China National Knowledge Institute, *Public Administration and Law* 6 (2012): 25–29 (in Chinese).

⁷ Huisheng Shou and Gary S. Green, “The Political Economy of Organisational Violence in Chinese Industry,” *Journal of Current Chinese Affairs* 45, 3 (2016): 210–30.

⁸ Benjamin van Rooij, “The People’s Regulation: Citizens and Implementation of Law in China,” *Columbia Journal of Asian Law* 25, 2 (2012): 116–79.

Factors Impacting on Enforcement

Characteristics of Legal Regulation and Law Enforcement

Particularly with regulatory laws in areas such as labour, work health and safety, food safety, and the environment, the preponderance of responsibility for enforcement has been allocated to administrative agencies.⁹ While a definite sphere for private enforcement has been established, the spaces for individual enforcement are fettered in a range of ways (this point is developed in more detail in the discussion of work health and safety regulation). The implementation of these laws, thus, is heavily led by the state.¹⁰ Such an allocation of law enforcement responsibility comports with the dominant mode of governance that sees the party state as having both power and responsibility to initiate and implement policies to promote economic development and public welfare. The attitude and capacity of state agencies with respect to enforcement is thus a central component of effective regulation.

A range of well-known legal and institutional factors influence the enforcement of government agencies. Huisheng Shou and Gary Green divide these factors into two categories: the over-politicization of the legal system and the fragmentation of the bureaucratic structure.¹¹ To that list, we might add two more factors: resources and power and the impact of accountability mechanisms. These factors are present in the regulation of work health and safety as well as in regulatory law more broadly. The over-politicization of administration is manifest in the lack of consistent political support at the local level for vigorous enforcement and in the continuing reliance on campaign-style enforcement to remedy social crises arising from enforcement failures. For agencies dealing with environmental protection, health, food safety, labour, and work safety, a lack of consistent political will to enforce legal standards is a significant impediment.¹² This is most clearly reflected in the lack of unequivocal local government support for enforcement activities that constantly juggle competing policy priorities such as economic growth against the protection of workers, the environment, and food safety, among others. In fact, local agencies are

⁹ *Ibid.*, 118–22.

¹⁰ In relation to labour law, see Sean Cooney, Sarah Biddulph, and Ying Zhu, *Law and Fair Work in China* (London: Routledge, 2013), 64; Sarah Biddulph, *The Stability Imperative: Human Rights and Law in China* (Vancouver: UBC Press, 2015), 57–58. In relation to environmental law, see van Rooij, *supra* note 8.

¹¹ Shou and Green, *supra* note 7, 215.

¹² In relation to enforcement of labour standards, see Cynthia Estlund, *A New Deal for China's Workers?* (Cambridge, MA: Harvard University Press, 2017), 102.

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subjected to pressure not to enforce strictly in order to protect economic growth targets.¹³

However, when the social consequences of these regulatory failures become politically unacceptable, central political-administrative interventions in the form of campaigns follow.

Campaigns are marked by the coordinated enforcement by designated agencies that are required to concentrate their enforcement activities on the targeted problem for a specified period and to punish transgressors severely. Campaigns are accompanied by intense education and publicity. These campaigns are only ever sporadic.¹⁴ While reports from implementing agencies suggest that campaign targets are achieved, the long-term regulatory consequences serve to undermine the autonomy and capacity of the local agencies and to subordinate law enforcement decisions and priorities to variable political will.¹⁵ Thus, campaigns ultimately fail both to resolve the underlying policy conflicts that contribute to the failure of enforcement and to undermine the autonomy and legitimacy of the legal forms of regulation.¹⁶

Fragmentation occurs not only because of the division of priorities between central and local agencies but also because of the division of responsibility between different agencies.¹⁷ Within local agencies, under-resourcing and a lack of institutional power contribute to the lack of enforcement capacity. Local agencies are understaffed, lack legal authorization to impose harsh penalties, and lack coercive powers to enforce the penalties they do impose – problems greatly exacerbated in the poorer regions of China.¹⁸ Labour inspectors, for example, are able to impose fines, but they are not able to order the closure of business for serious breaches.¹⁹ Individual labour inspectors lack autonomy in taking enforcement decisions (which they might need to make on the spot in urgent situations) since

¹³ Benjamin van Rooij, “Implementing Chinese Environmental Law through Enforcement,” in *Implementation of Law in the People’s Republic of China*, ed. Jianfu Chen, Yuwen Li, and Jan Michiel Otto (Leiden: Kluwer Law International, 2002), 154.

¹⁴ Xin Frank He, “Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing,” *Columbia Journal of Asian Law* 17, 1 (2003): 121–45.

¹⁵ Sarah Biddulph, Sean Cooney, and Ying Zhu, “Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking,” *Law and Policy* 34, 4 (2012): 373–401; Benjamin van Rooij, “The Politics of Law in China: Enforcement Campaigns in the Post-Mao PRC,” *Social Science and Research Network*, March 25, 2009, <https://ssrn.com/abstract=1368181>.

¹⁶ Biddulph, Cooney, and Zhu, *supra* note 15.

¹⁷ He Weidong discusses the problem of enforcement silos in the context of enforcement of environmental laws in Chapter 10 of this volume.

¹⁸ Sean Cooney, “Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China,” *Fordham International Law Journal* 30, 4 (2006): 1050–97.

¹⁹ Virginia E. Harper Ho, “From Contracts to Compliance? An Early Look at Implementation under China’s New Labor Legislation Law,” *Columbia Journal of Asian Law* 23, 1 (2009): 53.

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they work under the leadership of the local labour administrative office.²⁰ In the area of work health and safety, combined problems of under-staffing, particularly at the local levels, and poor coordination between inspection agencies have been identified as posing significant barriers to effective enforcement of work health and safety legislation.²¹

Many enterprises resist compliance with the law and hinder inspection and enforcement. It is not unknown for enterprises subject to inspection to hinder access to the site or even to use intimidation and violence against inspectors.²² Even when a financial penalty is imposed, the agency must commence a court action to obtain coercive enforcement if the enterprise refuses to pay the fine, and such cases are successful in obtaining an order only some of the time.²³ In part because of the difficulties in enforcement through the lack of resources and power, administrative enforcement agencies often selectively target certain known serious offenders (though detecting breaches is often difficult), and they adopt collaborative, rather than deterrence-oriented, approaches to enforcement, resulting in weaker and fewer sanctions being imposed for breaches.²⁴ As Benjamin van Rooij points out, weak state enforcement has contributed to low compliance, thus creating a vicious circle.²⁵ Finally, the regulatory costs and individual risks arising out of supervision and accountability mechanisms are also a significant factor in the problem of bureaucratic inertia.

Characteristics of Accountability Mechanisms

Within this broader regulatory landscape, accountability mechanisms comprise one set of incentives and disincentives to action. Sarah Biddulph and Wang Haifeng's chapter in this volume (Chapter 7) sets out the general landscape of accountability mechanisms within which administrative officials work. It makes the point that the operation and effectiveness of legal mechanisms for the supervision of administrative decision making must be viewed in

²⁰ Biddulph, Cooney, and Zhu, *supra* note 15, 122–23.

²¹ Labour Administration and Inspection Program, *Review of Work Safety and Health Inspection System in the People's Republic of China* (Geneva: International Labour Office, August 2010), 14–15. This report states that as of June 30, 2008, there were 43,735 full time work safety inspectors and “47,656 professional staff in safety supervision and administrative departments at provincial, municipal and district/county levels” (at 29). The numbers have increased from 2003 by 99 percent and 108 percent respectively, which suggests a determination to address problems of shortage of inspectors for inspection. See also discussion in Tim E. Pringle and Stephen D. Frost, “‘The Absence of Rigor and the Failure of Implementation’: Occupational Health and Safety in China,” *International Journal of Occupational and Environmental Health* 9, 4 (2003): 309–16.

²² Van Rooij, *supra* note 8, 124.

²³ Ho, *supra* note 19, 52.

²⁴ *Ibid.*; van Rooij, *supra* note 8, 127.

²⁵ Van Rooij, *supra* note 8, 135.

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the context of systems of political and administrative accountability. That is, how does the conduct relate to, and impact on, the annual performance appraisal? If performance targets require an emphasis on increasing the gross domestic product (GDP) or setting mandatory social order targets, then officials would be most reluctant to engage in legally prescribed enforcement conduct that runs the risk of closing local enterprises or provoking a public order incident. Another consideration is whether the conduct relates directly to the implementation of CCP policy, where failure to perform would not only be seen as a failure to enforce the law but also a breach of Party discipline. Where a centrally coordinated enforcement campaign is launched to redress problems arising out of systemic regulatory failures, officials are under a positive obligation to meet enforcement targets, and their performance appraisal targets are adjusted to reflect campaign priorities. Illustrative are the periodic enforcement campaigns to redress the problem of unpaid wages. During these campaigns, officials are under positive duties to meet the performance targets that have been set out as part of the campaign.²⁶

Another consideration is the impact of supervision mechanisms, such as administrative litigation and review, on the decision maker. These mechanisms are generally scrutinized with a view to determining their capacity to protect the interests of those who are the subject of the administrative decision making.²⁷ However, the impact of these accountability mechanisms on the administrative decision maker, despite being examined less frequently, is also important. Virginia Ho suggests that the prospect of a well-resourced and connected local enterprise commencing either administrative litigation or review to challenge a sanction imposed by the labour inspectorate for breaches of work law has a considerable dampening effect on both the decision to impose a sanction and the severity of the sanction imposed.²⁸ If the challenge against the administrative decision is successful, not only is the sanction overturned, but the individual decision maker may also be penalized.²⁹ For example,

²⁶ For a detailed discussion of these points, see the sources in note 16 above.

²⁷ See, for example, Minxin Pei, "Citizens v. Mandarins: Administrative Litigation in China," *China Quarterly* 152 (1997): 832–62; Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge, UK: Cambridge University Press, 2002), 420–24.

²⁸ Ho, *supra* note 19, 52.

²⁹ See, for example, Administrative Punishment Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Chufa Fa 中华人民共和国行政处罚法], National People's Congress (NPC) Standing Committee, March 17, 1996 (effective on October 1, 1996, as amended on August 27, 2009), art. 6(55) (Administration Punishment Law); Biddulph, Cooney, and Zhu, *supra* note 15, 123. In relation to individual liability of police officers for administrative decision-making, see Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge, UK: Cambridge University Press, 2007), 310–12.

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where a labour inspector is found to have acted unlawfully, and infringes on the lawful rights of either the worker or the employing enterprise, the decision maker will be liable to pay compensation.³⁰ While individual liability itself may be appropriate in cases of deliberate and fraudulent misfeasance, these rules do not clearly limit liability to these situations.

These disincentives to proactive and vigorous enforcement therefore need to be set against the risks and structures of legal liability for failure to perform enforcement responsibilities. Where performance is measured by quotas – for example, imposing a certain number of fines or inspecting a certain number of enterprises – failure to meet these targets may have a negative impact on the payment of performance bonuses or on promotion. The jurisdiction to complain about the failure to perform a duty under the Administrative Litigation Law is set out in article 12(3) (where an agency fails to reply within the statutory period to an application for an administrative licence), article 12(6) (refusal to perform or failure to respond to a request to protect personal rights, property rights, and other lawful rights and interests), article 12(10) (failure to pay consolation money, minimum subsistence, or social insurance benefits), and article 12(11) (failure to perform an agreement).³¹ This list has been substantially increased in the 2015 revisions to the law. But it still addresses a specified list (as opposed to a general class) of circumstances where the law imposes a positive duty to make a decision within specified time limits or where there is a legal obligation to perform an agreement. The Administrative Review Law is even narrower in its definition of the jurisdiction to review failures to act, provided in article 6(9) (where there has been a failure to respond to an application to perform a statutory duty or to protect the rights of the person or property or the right to receive an education) and article 6(10) (where there is a failure to issue a pension, pay social insurance money, or make minimum subsistence payments).³²

In examining the potential legal liability for failure to perform a duty, it is thus necessary to determine whether the law imposes a positive duty to respond or to act within a fixed time period – that is, to look at how powers are to be exercised. This requires an

³⁰ Labour Inspection and Supervision Regulations [Laodong Baozhang Jiancha Tiaoli 劳动保障监察条例], State Council, October 26, 2004 (entered into force December 1, 2004), art. 31 (Labour Inspection and Supervision Regulations).

³¹ Administrative Litigation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Susong Fa 中华人民共和国行政诉讼法], April 4, 1989 (effective October 1, 1990, as amended November 1, 2014, and June 27, 2017, with amendments to take effect from July 1, 2017).

³² Administrative Review Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa 中华人民共和国行政复议法], April 29, 1999 (amended August 27, 2009).

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examination of the terms in which the agency is authorized to determine what forms, if any, of accountability exist for failure to perform statutory duties.

Inertia in Work Safety Regulation and Enforcement

The discussion above sets out the institutional and structural factors that shape administrative enforcement priorities and decision making. In China, an alternate, more prevalent, strand of analysis in both academic and central government circles emphasizes bureaucratic inertia as being caused by individual failings. These ideas were aired in an opinion piece for an influential labour magazine published in 2011. In it, Yang Pengfei from the Law Institute of the Shanghai Institute of Social Sciences sets out the nature of the problem of inertia in the area of work health and safety and makes a number of suggestions for addressing it.³³ Even though this article was published some years ago, the current emphasis on bureaucratic inertia as a discipline problem and the constant reiteration of the personal failings of individuals sanctioned for laziness, inserts a strongly individualistic and moral overtone into discussions of this topic. These attitudes coincide with the individualistic orientation of the responsibility system, which imposes sanctions on individual officials where errors are made, regardless of whether system failures contributed to the error.

The article “Bureaucratic Inertia in China: Harms and Strategies for Change” usefully reveals many of the attitudes towards the nature of this problem and is translated in full below: <permissions for this article? permission is required for any published text from which 300 words or more have been quoted. Also, we would need to include a source for the original. Is this your translation? More information required.> <auth: Please forward me the email from Yang Pengfei for the Press’s permissions records.>

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Our nation is currently experiencing a period of social disharmony and active conflicts. Many people find these conflicts puzzling: after thirty years of reforms, China has made spectacular economic progress and our people’s living standards have dramatically increased. According to popular media opinion, which draws upon international resources, when a nation’s average GDP reaches the US\$1,000 to 3,000

³³ Yang Pengfei, “Competitions Must Be Real, and Monitoring Must Be Substantial,” *Contemporary Labor Magazine*, vol. A, October 2011 (title in English; reproduced by permission from Yang Pengfei; translation by author).

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bracket, society will suffer from conflict and fall into what is known as the “middle-income trap.” This deterministic account is hardly persuasive.

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In reality, one only needs to look at related, concrete cases to discover that current social disharmony and conflicts have been caused by inappropriate conduct by government officials or citizens, but our government has not undertaken its responsibility to control and resolve these matters. Certainly, such failures by government departments and officials need not be because of corrupt or criminal conduct on their part: they are more likely the result of irresponsibility and sluggishness. Hence, how best to tackle bureaucratic inertia is an important task for our people.

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1. Manifestations of Bureaucratic Inertia

There is ample evidence that bureaucratic inertia not only exists everywhere from central agencies to village councils, but is also becoming increasingly prevalent. For example, just recently, the State Council ordered all central departments to publicize their expenses by late June, yet by the deadline only three departments had done so. Such an attitude no doubt manifests inertia. Nevertheless, such low-level forms of inertia – procrastination, shirking responsibility, lack of discipline, craving for stability, mindlessness – have recently taken new forms.

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In certain situations, officials keep up a pretense of hard work, but in reality make careless and rash decisions and are reluctant to acquire new knowledge or engage in research. Nor do these stubborn officials genuinely care about people’s needs. When problems arise, they act unreasonably as if utterly lacking in shame, yet they bully the people by reprimanding them and calling them shameless.

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A latent but more serious phenomenon is found among officials who have reaped the honor for the nation’s economic progress over the past few decades, and who have continued to believe that “whatever” conforms to their old ways will work, hence rejecting proposals that do not conform to these old ways. In other words, they do not care the least about reforms and changing society for the better. Problems thus accumulate over days and months and finally lead to big disasters.

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The several phenomena outlined above can be summarized in one term: bureaucratic inertia, which has led to social disharmony and group conflict. Increasing social conflict will prevent society from moving forward or may even make it regress, which is a source of hidden trouble for the Party and the people.

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2. *Causes of Bureaucratic Inertia*

Bureaucratic inertia has many underlying subjective and objective factors. Subjectively speaking, one can attribute such sluggishness and incompetence to the psyche of some officials. For many decades, our nation was poor and backward, and with modernization as the top priority, our society set up stringent standards to keep check on its people. Consequently, inertia among government officials was not obvious. Our situation has long changed: due to economic progress, our society has relaxed its standards. Hence, unfortunately, some regressive customs and habits, including bureaucratism, hedonism, arrogance, and self-centeredness have re-emerged. Hu Jintao's official speech on July 1st this year [2011], which mentioned four dangers faced by the Party and labelled mental inertia the first of them, therefore offered a highly realistic, up-to-date account of our society.

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Laziness and procrastination are human weaknesses that are difficult to overcome, and both constraints and motivations are necessary for deterring such conduct. Hence, with respect to inertia, the various situational and environmental factors should also be identified.

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Objectively speaking, two issues need to be addressed urgently:

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1. Despite the personnel reforms in our government departments in recent years, they still lack a mechanism for competition. This means that as long as officials do not have serious mistakes on their records, they get promoted and will never be expelled. For example, it is not uncommon for some senior officials who get disposed of after committing big mistakes, only to be assigned to positions of the same rank in other departments later on. Further, due to this lack of competition mechanism, and the unchallenging nature of many of the tasks, long-time officials certainly do not get motivated to overcome their weaknesses. Inertia can only be the natural outcome under this system.

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2. Compared to corrupt conduct, which has been effectively tackled by our anti-corruption reforms throughout the years, no effective methods exist to resolve bureaucratic inertia. For example, various performance appraisal processes are often treated as mere formalities, yet punishments are seldom imposed when problems surface. This past April, Wuhan city of Hubei province set up a city-wide initiative that holds officials more accountable for their performance. It describes fifty types of conduct that harm the development of the city, and compares ten types of “incompetence,” including carelessness and lack of performance, to illnesses that need to be cured. Contrary to netizens’ remarks that the initiative, instead of curing incompetence, will produce a bunch of incompetent officials, one can only hope that initiatives such as this will bear fruitful results.

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3. *Bureaucratic Inertia and Strategies for Change*

How are problems arising out of bureaucratic inertia to be resolved? One should take heed of the following strategies, based upon the above analyses and drawing upon experiences accumulated here and abroad:

<begin numbered list within the excerpt>

1. Improving education: Problems caused by mental inertia among government units and officials cannot be eradicated by punishment. The best way to resolve them is through education. The first and foremost task is setting up an educational initiative aimed at informing officials about the Party, nation, and the world so as to instill in them a shared sense of glorious historical mission. Second, a professional and career-oriented program should be set up to equip officials with up-to-date knowledge and problem-solving skills, so that they can perform with the highest competence and introduce reforms with utmost confidence.
2. Increasing monitoring: Monitoring officials is difficult. The initiative set up by the Wuhan Municipal government is one possible method. Nevertheless, experiences gathered from our nation and abroad tell us that internal monitoring is far from sufficient, or Hu Jintao would not have stressed the need to prevent mental inertia. The most crucial step, therefore, is to strengthen the external monitoring processes, such as those carried out by the news media, the Internet and society. Should our press freedom be broadened to allow investigative journalists like

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those in Hong Kong to keep a check on officials, they will feel far more pressured and motivated to excel at work than they are at present.

3. Introducing a competition mechanism: Although our nation does not have a multiparty rule by any means, we can borrow from the fruits of several hundred years of western civilization to introduce into our governmental system a certain competition mechanism. In fact, the Party's democratic reforms in recent years can serve as a mental starting point. Besides intra-party democracy, further possibilities can be explored on the administrative level, for instance, a limited-term system for major government officials, a voting system for major competitive positions, a contract system for general officials, and a performance accountability system for all employees – all these can serve as effective means of dealing with the inertia in our current system.

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Should our nation head in the above directions in its push for reform, reinforce its infrastructures of enforcement teams and strive to mobilize its resources, we are fully confident that it can effectively resolve the problems arising out of bureaucratic inertia, and walk out of the social disharmony of the “middle-income trap.”³⁴

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Accountability and Work Safety

In this opinion piece, Yang locates blame for bureaucratic inertia on contradictory forces: internal appraisal procedures that punish wrong conduct but that do not sanction under-performance and feelings of impunity. He emphasizes the failings of the individual in terms of integrity, education, and motivation and proposes reforms to address these shortcomings while also identifying institutional disincentives to enforce. In this view, he is far from alone.³⁵ As discussed above, these individual motivations and failings are deeply embedded in the more complex array of institutional and legal factors that influence how officials exercise (or do not exercise) their official functions. The discussion that follows seeks to place this discussion of individual failings within its institutional context using the example of the regulation of work health and safety.

³⁴ Ibid.

³⁵ Han and Li, *supra* note 6; Ou, *supra* note 6.

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This chapter outlines a range of interlocking factors that underlies the stubbornly high level of work injury, disease, and death. The impact of the legal system's politicization and fragmentation is developed through an examination of regulation of work health and safety. Tim Wright locates work safety within the broader political economy of work. He identifies three key features – namely, the disempowerment of workers in the workplace, the competitive pressures on enterprises, and the weaknesses in enforcement – that combine to undermine good work health and safety outcomes.³⁶

The Nature of the Problem

Caixin, a respected magazine, reveals that at a meeting of the National Administration of Work Safety (as it then was) in 2016, it was reported that there were 60,000 work-related accidents, involving 41,000 deaths.³⁷ Of these accidents, there were 750 comparatively large incidents, which resulted in 2,877 deaths, and thirty-two especially large workplace accidents, which resulted in the deaths of 571 people. In total, 200 people were given a disciplinary sanction, and ninety-seven people were transferred to judicial organs for prosecution.³⁸ The director of the State Administration of Work Safety, Yang Huaning, attributed the increase in major work fatalities to institutional and enforcement weaknesses: “insufficient research, poor coordination, regulatory enforcement insufficiently strict, failure

³⁶ Tim Wright, “The Political Economy of Coal Mine Disasters in China: ‘Your Rice Bowl or Your Life,’” *China Quarterly* 179 (2004): 629–46.

³⁷ Workplace accident is a direct translation from the Chinese (生产安全事故), though the term workplace incidents is more appropriate as many of these “accidents” could readily have been prevented.

³⁸ “In 2016, 60,000 Work Safety Accidents Occurred with 41,000 Deaths”, *Caixin*, January 17, 2017, accessed September 27, 2017, <http://china.caixin.com/2017-01-17/101044841.html>. According to the Measures for the Reporting, Investigation and Handling of Work Safety Accidents the definition of especially serious incidents is one that causes the death of at least thirty persons, serious injury to at least 100 persons, or direct economic loss of at least 100 million renminbi (art. 3[1]). A serious incident is one that has caused the death of between 10 and 30 persons, serious injuries to between 50 and 100 persons and direct economic loss of between 50 and 100 million renminbi (art. 3[2]). A large accident is one that has caused the death of between 3 and 10 persons, serious injury to between 10 and 50 persons, and direct economic loss of between 10 and 50 million renminbi (art. 3[3]). An ordinary accident is one that has caused the death of less than 3 people, serious injuries to less than 10 persons, and direct economic loss of less than 10 million renminbi (art. 3[4]). Measures for the Reporting, Investigation and Handling of Work Safety Accidents [Shengchan Anquan Shigu aogao he Diaocha Chuli Tiaoli 生产安全事故报告和调查处理条例], State Administration of Work Safety (SAWS), June 1, 2007.

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to grasp the ‘last mile’ approach,³⁹ and poor team building.”⁴⁰ Of all health and safety problems in China, mine accidents, and, within this sector, coal-mining accidents, are the most significant problem.⁴¹ Commentators agree that, despite claims to the contrary, the poor record on work safety and work-related diseases remains unrectified.⁴² While the focus of this chapter is not on the causes of work-related accidents and diseases, it is useful to locate the role of state agencies’ enforcement powers within this broader web of factors that has led to such disastrous safety and health outcomes for workers.

Workers in precarious and dangerous work such as township and village enterprises and mines are commonly migrant labourers from impoverished rural areas or individuals who have been laid off from the state-owned sector, with poor education and employment prospects. These workers have inadequate skills and training, particularly in production safety, and are often accused of engaging in risky behaviour. Many accidents occur because of the failures arising from the lack of safety training.⁴³ However, many workers in dangerous workplaces seldom have an opportunity to undertake training, have little input into identifying or controlling work-related hazards, and frequently do not have medical insurance.⁴⁴ Such factors are especially relevant to mine accidents, where workers are particularly vulnerable because they need work and because of the existence of a large reserve labour force.⁴⁵ These workers are not in a position either to be aware of, or to insist on, safety protocols; their job security is precarious, employer violence against workers is common, and workers are prevented from forming a collective themselves and do not enjoy effective representation from enterprise unions. They are overrepresented in the statistics on those suffering work-related disease, injury, and death.⁴⁶ In theory, workers can improve the

³⁹ The term “‘last mile’ approach” refers to popularizing ideology by giving ideological precepts practical form and aligning them with everyday experience. It is designed to improve the work style of officials and to strengthen their relationship with ordinary citizens. Specifically, it directs officials to redress the lack of trust (including the cold and disrespectful attitude of officials and official corruption) between officials and the people, giving lip service to ideological work, serving people instead of ordering them about, and communicating with people in terms they can understand. “The Key to Popularization of Ideology Is in ‘Going the Last Mile’”, *The Masses*, July 23, 2015, accessed September 27, 2017, <http://www.ccln.gov.cn/sixiang/maliwenku/mlzh/136476.shtml>. (in Chinese)

⁴⁰ Ibid.

⁴¹ Wright, *supra* note 36.

⁴² Fan Geng and Joseph Homer Saleh, “Challenging the Emerging Narrative: Critical Examination of Coalmining Safety in China, and Recommendations for Tackling Mining Hazards,” *Safety Science* 75 (2015): 37–38.

⁴³ Ibid., 41.

⁴⁴ Xiaorong Wang et al., “Occupational Health and Safety Challenges in China: Focusing on Township-Village Enterprises,” *Archives of Environmental and Occupational Health* 66, 1 (2011): 4.

⁴⁵ Wright, *supra* note 36, 643–44.

⁴⁶ Wang et al., *supra* note 44, 8.

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effectiveness of health and safety regulation both through private enforcement that holds the employer to account and through improving state-led enforcement by which the state holds the employer to account.⁴⁷ At present, they can effectively do neither.

Another set of contributing factors relates to enterprises and the competitive environment in which they operate. Increasing market competition in all sectors places pressure on wages and working conditions.⁴⁸ There is great diversity in the size and form of ownership of enterprises, with many being small and owned either privately or by the township or village. An overwhelming proportion of small- and medium-sized enterprises, particularly township and village enterprises, have little or substandard safety measures and little or no protective measures in place.⁴⁹ The production of cheap goods with low cost technology, particularly in township and village enterprises and private enterprises, relies on low wages and poor conditions for a competitive advantage.⁵⁰ In these circumstances, it is easy to transfer the risks back to the workers.

In the mining sector, for example, small privately owned, or township and village owned, mines have the worst safety record. In mining, workplace accidents increase during both the expansion and contraction of the sector. Between the late 1970s and the early 1990s, government policy enabled the rapid expansion of coal mining, which saw an explosion in the number of small village or privately owned mines, which, in turn, overwhelmed the capacity of regulatory agencies to monitor them.⁵¹ These mines were operating at the limits of their capacity or above it, leading to a dramatic increase in the number of mine accidents. Subsequently, efforts to close smaller mines in 1997–98, in 2006–7, and again in 2014 resulted in an increase in illegal mines, which fell even further outside the scope of regulatory oversight and were almost inevitably connected with official corruption.⁵² A direct result of this “close-down” policy was a dramatic increase in mining fatalities.⁵³ During periods of contraction, cost-cutting also impacted on safety because safety equipment was not being updated, and mines were increasingly contracted out.⁵⁴ In fact, many individuals have seen the efforts to force township and village enterprises to improve safety standards as a way for state-owned mines to eliminate competition with the real impact being the closure of small

⁴⁷ See generally the discussion in van Rooij, *supra* note 8.

⁴⁸ Wright, *supra* note 36; Geng and Saleh, *supra* note 42, 38–39.

⁴⁹ Wang et al., *supra* note 44, 4.

⁵⁰ Wright, *supra* note 36, 637.

⁵¹ Geng and Saleh, *supra* note 42, 39–40.

⁵² *Ibid.*, 40–41.

⁵³ *Ibid.*, 41.

⁵⁴ Wright, *supra* note 36, 639–40.

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township and village enterprises and privately owned mines and those workers losing their jobs..⁵⁵

However, Shou and Green argue that, more than these financial or competitive pressures, enterprises perpetuate a form of “organizational violence” against their workers through their conscious disregard, or even wilful creation, of the risk of physical injury and harm..⁵⁶ While calculations of financial gain are relevant, they argue that the legitimacy of the rules and employers’ care for the well-being of workers are key factors..⁵⁷ The quality of law enforcement is implicated in two ways. In part, the attitudes of employers are related to a failure of deterrence where the risks of enforcement and the imposition of large penalties are not significantly substantial or can be mitigated or avoided. Also, this poor enforcement has the indirect effect of failing to send a message that the targeted conduct is wrong. Shou and Green argue that strong enforcement has the capacity to instill a particular set of values that, if internalized by employers, would have the effect of promoting compliant behaviour..⁵⁸ These factors are also relevant in understanding the poor success of corporate social responsibility (CSR) programs and initiatives to improve corporate conduct in China..⁵⁹ CSR codes of conduct are in part driven by internalized corporate values as well as by the fear of commercial repercussions from consumers. CSR programs have been initiated and supported by large multinational corporations (MNCs) and linked to China through their international supply chains; however, despite their proliferation, these programs have not been particularly effective..⁶⁰ Similarly, although CSR has expanded beyond MNCs and their suppliers to domestic Chinese enterprises, the effectiveness of these CSR programs has been limited and has ultimately failed to improve the conduct of the worst offenders. Scholars now place more hope in strengthened regulation and improved enforcement, pointing to difficulties in obtaining firm compliance and the weakness of private enforcement, which is exacerbated by the weakness of labour unions and labour non-governmental organizations..⁶¹

⁵⁵ Ibid., 641, 644.

⁵⁶ Shou and Green, *supra* note 7, 204–5.

⁵⁷ Ibid., 213.

⁵⁸ Ibid., 219–21.

⁵⁹ Sean Cooney, “CSR Is Not the Main Game: The Renewed Domestic Response to Labour Abuses in China,” in *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice*, ed. Kate Macdonald and Shelley Marshall (London: Ashgate, 2010), 353.

⁶⁰ Ibid., 352.

⁶¹ Ibid., 354. The author is rather optimistic about the role that labour non-governmental organizations (NGOs) can play in assisting workers; however, this chapter was written before the major crackdown on labour NGOs and so may be overly optimistic in the context of 2017 regulatory enforcement. For a later, more sober view of the status of independent worker advocates, see Estlund, *supra* note 12, 116–21.

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The final set of factors relates to the weakness in, and disincentives to, vigorous enforcement. Enforcement is implicated not only in terms of its deterrent effect but also in terms of its capacity to legitimate work safety rules and values and so foster greater compliance. Improving the efficiency of state-led enforcement thus remains a significant challenge in addressing the overall problem of workplace safety.⁶² While the agencies responsible for work health and safety claim that the regulatory initiatives they have introduced have been successful in reducing fatalities in mines and in reducing work-related accidents and injuries, academic commentators including Fan Geng and Joseph Homer Saleh argue that these claims do not reflect reality.⁶³ The question of how effective regulation is to achieve its stated objectives remains of central importance.

International Commitments

China is under obligations, both international and domestic, to improve the legal regulation, enforcement, and compliance of work health and safety standards. China is actively engaged with the International Labour Organization (ILO) to strengthen work health and safety.⁶⁴ China has already acceded to three work health and safety-related conventions: 1981 ILO Convention no. 155 on Occupational Safety and Health; 1988 Convention no. 167 on Safety and Health in Construction; and 1990 Convention no. 170 on Chemicals.⁶⁵ Between January 2016 and December 2017, Chinese agencies also worked with the ILO on a project entitled *Improving Workplace Compliance, Fostering Preventative OSH Culture*. One of the targets of this project was to prepare for the ratification of several work health and safety-related conventions: 2006 Convention no. 187 on Promotional Framework for Occupational Safety and Health Convention; 1947 Convention no. 81 on Labour Inspection; and 1993 Convention

⁶² Wright argues that state regulation of mine safety occupies a central role in improving the circumstances of the most vulnerable workers. See Wright, *supra* note 36, 635. In relation to work law generally, see Estlund, *supra* note 12, 113–14.

⁶³ Geng and Saleh, *supra* note 42, 37–38.

⁶⁴ International Labour Organization (ILO) Country Office for China and Mongolia, *China: Decent Work Country Programme 2016–2020* (Beijing: ILO, March 27, 2017), 7, http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_549135.pdf (*China: Decent Work Country Programme*).

⁶⁵ ILO Convention no. 155 Concerning Occupational Safety and Health, June 22, 1981, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312300; ILO Convention no. 167 Concerning Safety and Health in Construction, June 20, 1988, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:; ILO Convention no. 170 Concerning Safety in the Use of Chemicals at Work, June 25, 1990, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312315. *China: Decent Work Country Programme*, *supra* note 64, x.

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no. 174 on Prevention of Major Industrial Accidents..⁶⁶ A key aim of this project, and of ILO engagement with the Chinese government more generally, is to work to promote occupational safety and health and to strengthen enforcement in this area..⁶⁷

Overlapping Responsibilities and Jurisdictional Issues

After the establishment of the People's Republic of China in 1949, the institutional structure and responsibility for work health and safety has been constantly evolving, the most recent development taking place in March 2018. The first agency established to supervise work safety was the Department of Labour Protection established in 1951 within the All-China Federation of Trade Unions (ACFTU)..⁶⁸ In the reform era, the dramatic increase in the number of work-related fatalities and injuries eventually became an embarrassment to the state and risked social unrest..⁶⁹ At the government level, a specialist work health and safety agency was not established until after the major government restructuring that was carried out in 1998. In December 1999, the State Administration of Coal Mine Safety (SACMS) was established..⁷⁰ and, in March 2001, the State Council established the State Administration of Work Safety (SAWS), which has overall responsibility for the regulation and supervision of work safety, including standard setting, licensing, training, reporting, inspecting, and imposing sanctions for breaches..⁷¹ These agencies were established in an attempt to redress

⁶⁶ ILO Convention no. 187 Concerning the Promotional Framework for Occupational Safety and Health, June 15, 2006, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187; ILO Convention no. 81 Concerning Labour Inspection in Industry and Commerce, July 11, 1947, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081; ILO Convention no. 174 on Prevention of Major Industrial Accidents, June 22, 1993, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C174; ILO Country Office for China and Mongolia, *Improving Workplace Compliance, Fostering Preventative OSH Culture* (Beijing: ILO, October 13, 2016), http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_532398.pdf.

⁶⁷ See the announcement of the project entitled “Improving Workplace Compliance, Fostering Preventative OSH Culture,” ILO, http://www.ilo.org/beijing/what-we-do/publications/WCMS_532398/lang--en/index.htm.

⁶⁸ Wenchuan Zheng], ed., *Encyclopedia of Trade Union Work*] (Beijing: Haiyang Press, 1992), 358.

⁶⁹ Geng and Saleh, *supra* note 42, 37.

⁷⁰ General Office of the State Council Notice on Printing and Implementing the Implementation Plan for the Reform of Coal Mine Safety Supervision Management System [Guowuyuan Gangongting Guanyu Yinfa Meikuang Anquan Jiancha Guanli Tizhi Gaige Shishi Fangan de Tongzhi 国务院办公厅关于印发煤矿安全监察管理体制改革的实施方案的通知], Information Office of the State Administration of Emergency Management, [chinasafety.org.cn](http://www.chinasafety.org.cn), <http://www.chinasafety.org.cn/templet/default/ShowPage.jsp?id=106>.

⁷¹ In March 2018, the National People's Congress approved the Institutional Restructuring Plan, which reduced the total number of agencies under the State Council to twenty-six. One reform was to

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the rising levels of work-related injury disease and death and to protect both worker safety and health and state assets. This joint responsibility is reflected in the authorization of legislation such as the Work Safety Law, which prescribes in its objects clause the protection and promotion of work safety and sustainable economic and social development (article 1).⁷²

However, other agencies also exercise jurisdiction relating to work safety and health, creating a complex and overlapping regulatory structure. For example, occupational disease is regulated by the National Health and Family Planning Commission (NHFPC) (which was renamed the National Health Commission [NHC] in March 2018) according to the Law on Occupational Diseases.⁷³ Inspection and enforcement power is shared by local health departments and inspectors from SAWS. In workplaces such as coalmines, for example, where dust diseases such as pneumoconiosis and mine explosions and collapses are prevalent, there is a clear overlap between the jurisdiction of the SACMS and the NHC.⁷⁴ Similarly, a number of other state agencies exercise jurisdiction in relation to health and safety in different sectors including the Ministry of Construction, the Ministry of Agriculture, the Ministry of Public Security, the Ministry of Transport, the Ministry of Water Resources, and the General Administration of Quality Supervision, Inspection and Quarantine, among others.⁷⁵ Another layer of regulatory overlap is with the powers to inspect workplaces and enforce work law exercised by the labour inspectorate within the Ministry of Human Resources and Social Security (MOHRSS).

Occupational Health and Safety and Work Law

While the most recent reorganization of agencies under the State Council has moved SAWS and the SACMS into the NHC, at the time of writing the details of the merger and how it will

establish the National Health Commission (国家卫生健康委员会) (NHC). The occupational safety and health functions of SAWS were transferred to the NHC as part of this institutional reorganization.

⁷² Work Safety Law of the People's Republic of China [Zhonghua Renmin Gongheguo Anquan Shenchan Fa 中华人民共和国安全生产法], NPC Standing Committee, June 29, 2002 (entered into force November 1, 2002, amended August 27, 2009, and August 31, 2014) (Work Safety Law).

⁷³ Law on the Prevention and Control of Occupational Diseases of the People's Republic of China [Zhonghua Renmin Gongheguo Zhiyebing Fangzhi Fa 中华人民共和国职业病防治法], NPC, October 27, 2001 (entered into force May 1, 2002, amended December 31, 2011, and July 2, 2016) (Law on Occupational Diseases).

⁷⁴ Changyou Zhu, Nailian Yang, and Yuhang Wang, *National Profile Report on Occupational Safety and Health in China* (Beijing: ILO, March 2012), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_186991.pdf; Mimi Zou, "Falling through the Legal Cracks: The Fragmentation of China's Occupational Safety and Health Regime," *LAWASIA Journal* (2016): 1–18, <https://ssrn.com/abstract=2741466>.

⁷⁵ Zhu, Yang, and Wang, *supra* note 74, 18.

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be implemented have not yet been announced. It currently appears that SAWS and the SACMS will retain their identity and functions, though they will be located henceforth within the NHC and possibly be constituted as an internal division or divisions. For this reason, the discussion below continues to refer to these agencies as SAWS and the SACMS. Since the NHFPC has been superseded by the NHC, all references below to the functions of the old NHFPC have been changed to refer to the NHC. The enforcement of the Work Safety Law is the responsibility of SAWS.⁷⁶ In the administration of occupational diseases, SAWS shares jurisdiction with the occupational health inspectorate of the NHC and the labour inspectorate within the MOHRSS. They are required to “strengthen communication and cooperate closely.”⁷⁷ At the local level, SAWS officials are required to establish annual inspection plans, and SAWS inspectors exercise the power to supervise and carry out inspections under both the Work Safety Law and the Law on Occupational Diseases.⁷⁸

Recent amendments to both the Work Safety Law and the Law on Occupational Diseases have expanded both their enforcement and punitive powers. Under the Work Safety Law, SAWS inspectors exercise the power to enter premises, access documents and interview employees, issue fines or correction orders, and, where there is failure to comply, order the suspension of the business, order the evacuation of workers from dangerous areas, and impound facilities and equipment that are in breach of national safety standards.⁷⁹ In order to compel a reluctant enterprise to cease business, SAWS can mandate that the supply of electricity or explosives be suspended.⁸⁰ Where there is an accident, the person in charge may be suspended from their position, fined, or subjected to criminal sanctions.⁸¹ Businesses that obstruct safety inspectors are also liable to be fined or may be subject to criminal liability.⁸² While these sanctioning powers appear to be very extensive, the SAWS inspectorate must obtain cooperation of other agencies to exercise the most severe of them. SAWS is not authorized to close a business itself but must make the recommendation to the government department with the authority do so – namely, the State Administration of

⁷⁶ Work Safety Law, *supra* note 72, art. 9.

⁷⁷ Law on Occupational Diseases, *supra* note 73, art. 9.

⁷⁸ Work Safety Law, *supra* note 72, art. 59; Law on Occupational Diseases, *supra* note 73, arts. 63–64.

⁷⁹ Work Safety Law, *supra* note 72, arts. 62, 90, 91, 94–103.

⁸⁰ *Ibid.*, art. 67.

⁸¹ *Ibid.*, arts. 90, 91, 92, 109.

⁸² *Ibid.*, art. 105.

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Industry and Commerce (SAIC). A decision to impose administrative detention on an offender must be made by the public security agency.⁸³

Similarly, under the Law on Occupational Diseases, both SAWS inspectors and local inspectors from the NHC can issue warnings, order corrective action to be taken within a prescribed time limit, impose a fine, order operations to cease where the situation is serious, or request the government department with authority to order a shut down or the suspension of operations or construction.⁸⁴ The ultimate power to order an enterprise to cease operations is exercised by the SAIC, and, thus, its cooperation must be sought and obtained for the most severe penalty to be imposed.⁸⁵ While SAWS officials exercise many of the coercive powers, to date, the division of power and responsibility between different agencies and the details of how they will cooperate remains to be specified. The institutional and regulatory division between occupational disease and work safety, as well as the poor coordination between these sectors, has been noted with concern by international bodies such as the ILO, which is a proponent of an integrated approach.⁸⁶ The most recent reorganization to bring SAWS and the SACMS closer together may go some way to addressing this level of regulatory fragmentation. However, it will be necessary first to see the details of how this reorganization is to be given effect internally within the NHC before concluding that it has been addressed effectively.

The responsibility for health and safety is separated from other labour inspection functions, which are exercised by the labour inspectorate within the MOHRSS, which the 2018 reorganization by the State Council has not addressed. Within the MOHRSS, the labour inspectorate is responsible for ensuring compliance with labour laws and standards. The labour inspectorate exercises wide-ranging power under the 2004 Labour Inspection and Supervision Regulations to supervise work law, including concluding labour contracts, wages and social insurance, working conditions, working hours and leave, child and female workers, social insurance, and training (article 11).⁸⁷ The labour inspectorate has special responsibility for females and minors as well as being responsible for administering work injury insurance schemes. It also exercises broad powers to conduct inspections of workplaces, respond to

⁸³ *Ibid.*, art. 110.

⁸⁴ Law on Occupational Diseases, *supra* note 73, arts. 69, 70, 71.

⁸⁵ *Ibid.*, art. 77.

⁸⁶ Zou, *supra* note 74.

⁸⁷ Labour Inspection and Supervision Regulations, *supra* note 30.

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complaints, require the production of documents (article 15), and impose sanctions such as warnings, correction orders and fines (article 18).

Problems of Coordination: Silos and Campaigns

There remains a significant division of responsibility between the supervision of health and safety and work law. The institutional division of responsibility between the supervision of health and safety and work law is not uncommon because of the specialist knowledge and skills required to police work health and safety. However, there is an inevitable overlap between the responsibilities of SAWS and the labour inspectorate, particularly where an enterprise is in breach of a wide range of work and safety-related standards. In these cases, coordination between agencies is necessary to facilitate effective enforcement. As yet, there is no formal arrangement for the coordination of their work.⁸⁸ Article 66 of the Work Safety Law provides that agencies can conduct joint inspections, but if SAWS discovers safety issues that are to be handled by another department it shall transfer them “in a timely manner.” Article 18 of the Labour Inspection and Supervision Regulations also requires labour inspectors to transfer matters involving illegality that do not fall within their jurisdiction to other authorized agencies.

Viewed from the perspective of the regulation of occupational health and safety, the current regime is fragmented by the separation of occupational safety and occupational diseases, when there are many circumstances in which these hazards overlap.⁸⁹ The level of fragmentation is increased by the overlapping and complementary enforcement responsibilities exercised by different government agencies: SAWS, the labour inspectorate, and the local health department. Thus, effective enforcement becomes complicated by the requirement that the enforcement agencies not only have the will and capacity to enforce but also the effective means to coordinate their enforcement powers and to obtain the cooperation of other government agencies in imposing the most severe punishments on offending employers.

In a system where cooperation is difficult because of the strength of institutional silos, campaigns are often used to redress serious regulatory failures. The regulation of health and

⁸⁸ Biddulph, Cooney, and Zhu, *supra* note 15, 121.

⁸⁹ This is especially the case with mines and where enterprises have moved from the east to the west where lack of coordination is compounded by a lack of personnel and resources to inspect. ILO, “Review of Work Safety and Health Inspection System in the People’s Republic of China,” August 2010, 34, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_240207.pdf.

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safety is no exception. For example, between August 2009 and the end of 2010, a coordinated targeted enforcement campaign involving SAWS, the MOHRSS, the NHC, and the ACFTU was conducted to address problems with dust and the hazards of other highly toxic substances, with a focus on mining and quartz sand processing. During this campaign, it was reported that 166,479 enterprises engaged in self-evaluation and reform, 588,977 hazards were identified, and 521,182 of them were rectified. Work safety departments inspected 152,013 firms, found 442,339 hazards, of which 313,002 were ordered to be corrected on the spot, and 106,857 were given a time limit to address the issues. In total, 341 firms were closed down.⁹⁰

Legal Accountability for Enforcement Actions

In addition to the impediments to enforcement that stem from either poorly defined or overlapping jurisdictional responsibilities, the legal prescription of how powers must be exercised, coupled with liability provisions, provide an additional perspective in understanding nonfeasance. Article 87 of the Work Safety Law sets out circumstances in which a safety inspector may be sanctioned, either by an administrative sanction such as demotion or dismissal, or subjected to criminal liability. These circumstances include positive acts such as granting approvals where the approval should not have been granted and failures to act such as failing to perform a regulatory duty such as revoking an approval after discovering the entity is in breach of standards, failing to deal with regulatory breaches after discovering the employer was acting in breach, and failing to deal with hidden risks of a serious accident after it has been discovered. Abuse of power or acting to obtain personal gain will also be subject to disciplinary sanctions.⁹¹ Articles 82 and 83 of the Law on Occupational Diseases provide for disciplinary sanctions to be imposed on the departmental chief and the responsible person for failing to report, or withholding, information on hazards or accidents or failing to perform their regulatory functions, abusing power, neglecting duties, or falsifying documents, reports, or evaluations. These are obligations that flow from the discovery of a threat or hazard. In many cases, they would only be detected once an incident or the diagnosis of disease occurs. But many inspectors consider it unfair that they bear responsibility given the institutional difficulties they face in performing their functions.⁹²

⁹⁰ Zhu, Yang, and Wang, *supra* note 74, 41.

⁹¹ Work Safety Law, *supra* note 72, art. 87.

⁹² ILO, *supra* note 89, 34.

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Other types of positive obligations, such as the obligation to transfer a safety issue to the authorized agency, are amorphous in that they fail to specify a time limit apart from requiring that the individual act in a “timely manner.”⁹³ A failure to transfer is also difficult to subject to a sanction. Article 68 of the Work Safety Law merely provides that performance of work safety regulatory functions is to be subject to supervision by the administrative supervision organs of the state. Supervision agencies are empowered to investigate and sanction violations of the law under article 6 of the Administrative Supervision Law, so they are oriented more towards positive acts of violation rather than the failure to act.⁹⁴ In addition, as the administrative supervision agencies work together with the CCP’s Discipline Inspection Commission, their primary regulatory focus has been on investigating and prosecuting corruption rather than nonfeasance.

Supervision Mechanisms

Consistent with the general trend of Chinese regulation to strengthen procedural requirements for exercising administrative power, SAWS issued the Provisions on Procedures for Enforcing the Work Safety Law.⁹⁵ These provisions set out detailed procedural requirements for examining and issuing licenses and permits (which operate with reference to the Administrative Licenses Law),⁹⁶ for imposing sanctions (which follows the scheme set out in the Administrative Punishment Law),⁹⁷ and for exercising coercive powers (which follows the scheme set out in the Administrative Coercion Law).⁹⁸ On the spot fines are limited to less than 50 renminbi (approximately US\$7.50) for an individual and 1,000 renminbi (approximately US\$153) for an entity. They must be imposed in writing by at least two authorized officials of SAWS, with proof of their credentials. They are required to listen to, take a written note of, and take into account any explanation by the person to be sanctioned

⁹³ Work Safety Law, *supra* note 72, art. 66.

⁹⁴ The Ministry Administrative Supervision exercises power under the Administrative Supervision Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Xingzheng Jiancha Fa 中华人民共和国行政监察法], **NPC Standing Committee, May 9, 1997 (amended June 25, 2010)**.

⁹⁵ Provisions on Procedures for Enforcing the Work Safety Law [Anquan Shengchan Zhifa Chengxu Guiding 安全生产执法程序规定], State Administration on Work Safety, July 15, 2016.

⁹⁶ Administrative License Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Xingzheng Xuke Fa 中华人民共和国行政许可法], NPC Standing Committee, August 27, 2003 (effective on July 1, 2004).

⁹⁷ Administrative Punishment Law, *supra* note 29.

⁹⁸ Administrative Coercion Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Xingzheng Qiangzhi Fa 中华人民共和国行政强制法], NPC Standing Committee, June 30, 2011 (entered into force January 1, 2012).

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and receive a written acknowledgement that they have received the written sanction. They must then file a copy of the sanction with the local SAWS agency.⁹⁹ While these procedures provide for a highly transparent process for imposing a sanction, they also impose a high regulatory burden on officials seeking to impose a relatively minor fine.

For sanctions above the threshold for an on-the-spot fine, ordinary procedures require that investigation and interviews be carried out by at least two inspectors, who must a case on file and a written report on the investigation and recommendations. In addition, a review of the case file must be made by the legal division to ensure compliance with the legal standards, and the report must be finalized and all relevant supporting documentation attached for examination and approval by the authorized person (usually the head of the department). Prior to imposing the sanction, the person subject to sanction must be notified of the recommended sanction, facts, evidence, reasoning, and legal basis for the decision so that they have an opportunity to respond. A decision must be formally served to the person or official representative of the entity.¹⁰⁰ A person may in some circumstances request an administrative hearing prior to imposition of a penalty.¹⁰¹ Where a fine is not paid within the time specified in the sanction notice, an additional daily penalty of 3 percent of the original amount will accrue up to 100 percent of the original penalty. The agency must apply to the people's court for coercive enforcement of the sanction, which may include freezing, confiscating, or auctioning assets or equipment to satisfy the amount owed.¹⁰²

This regulatory scheme in relation to health and safety is consistent with the general form of both empowerment and accountability of regulatory law discussed above. While SAWS inspectors, labour inspectors, and health department inspectors exercise a range of powers, they still lack coercive power in important ways, including where they must obtain the cooperation of other government agencies to revoke a business license, provide permission to operate, or impose administrative sanctions. Where an offending enterprise fails to comply with a fine or order, the agency must commence enforcement action in court, exposing the agency both to increased bureaucratic costs and the risk that the court may not support the agency's application.

The increasingly detailed procedural requirements for imposing a sanction certainly increase the transparency of decision making. Those enterprises potentially subject to

⁹⁹ Ibid., Provisions on Procedures for Enforcing the Work Safety Law, art. 25.

¹⁰⁰ Ibid., Provisions on Procedures for Enforcing the Work Safety Law, ch. 4, s. 2.

¹⁰¹ Ibid., ch. 4, s. 3.

¹⁰² Ibid., Provisions on Procedures for Enforcing the Work Safety Law, art. 26.

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sanction or having a coercive measure imposed must be provided with all of the relevant facts, evidence, and reasoning that support the proposed sanction. They are given an opportunity to respond and to have their views taken into account before the decision is made. Where the sanction is major, they may request an administrative hearing prior to a decision being made. After a decision is made, they may challenge it either through administrative review or administrative litigation. Where the law sets out detailed mandatory procedural requirements for exercising coercive powers or sanctions, the effect is to increase the scope of matters that might make a decision unlawful and thus increase the scope of administrative review and litigation. In 2015, the MOHRSS was the agency with the fourth highest number of administrative litigation cases brought against it (after the Ministry of Urban Construction, the Ministry of Natural Resources, and the police), with 16,467 out of a total of 220,398 cases filed in that year. In 933 cases, its decision was upheld, and in 1,443 cases, it was rescinded. A high proportion of cases – 3,717 – were withdrawn prior to judgment, and, in 1,362 cases, the application to file the case was rejected. In only 224 cases, was the MOHRSS ordered to perform its legal duty.¹⁰³ In 2015, of the 12,291 cases brought forward, the decision was upheld in 2,293, the decision was rescinded in 1,167, and the MOHRSS was ordered to perform its legal duty in only 123 cases.¹⁰⁴

The other side of the coin is that increasingly detailed procedural requirements for exercising powers impose a heavy burden on inspectors who are already overstretched. Accountability mechanisms for officials take two main forms. The first is administrative disciplinary sanctions, and, in some cases, criminal prosecution with respect to conduct in breach of duties as set out in the Work Safety Law and the Law on Occupational Diseases, for abusing power or acting corruptly or in violation of positive obligations. The Work Safety Law also imposes liability for failure to act where a breach or hazard has been discovered. The other form of liability is the possibility that a decision may be rescinded where the enforcement conduct is found to be unlawful (administrative litigation) or either unlawful or improper (administrative review, where the decision may also be changed). In some circumstances, legal liability may flow to an individual. For example, where a labour

¹⁰³ Law Yearbook Editorial Committee, ed., *Law Yearbook of China 2016* (Beijing: Law Yearbook Press of China, 2016), 1298. The statistics do not identify administrative litigation cases with respect to work safety and occupational health decisions.

¹⁰⁴ Law Yearbook Editorial Committee, ed., *Law Yearbook of China 2015* (Beijing: Law Yearbook Press of China, 2015), 1015.

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inspector acts unlawfully and infringes on the lawful rights or interests of an employer or worker, he or she will be personally liable to pay compensation.¹⁰⁵

Private Enforcement and Union Participation

In work health and safety law, the primary beneficiary should be the worker. Workers are authorized to report violations to work safety inspectors, but workers have limited capacity to require vigorous enforcement of the law. In addition to the weakness of a worker's capacity to act as an agent of private enforcement, it is necessary to consider the role and limits of trade union enforcement on behalf of workers. In both the Work Safety Law and the Law on Occupational Diseases, trade unions are given a primarily consultative and educative role, and their capacity to take proactive steps to protect workers is limited in practice.¹⁰⁶ They are empowered to participate in democratic management and oversight, to protect the lawful rights and interests of employees, and to develop or amend policies.¹⁰⁷ The Law on Occupational Diseases similarly provides that trade unions shall oversee and protect lawful rights and interests and have a right to be consulted on formulating and amending rules and regulations on the prevention and control of occupational diseases.¹⁰⁸ Trade unions should also assist in providing publicity and training, consult with employees, require corrections, or mandate that the employer take protective measures and participate in an accident investigation.¹⁰⁹ Trade unions lack power to direct workers to leave a dangerous work site or situation and are only authorized to suggest that an employer evacuate workers from dangerous sites where the life or health of employees is at risk. It is not much comfort that the employer is only obliged by law to "handle the suggestions immediately."¹¹⁰

Conclusion

The analysis in this chapter highlights the need to examine transparency and accountability mechanisms and their broader impact on governance in specific contexts. For every advance in improving transparency and accountability in official decision making, there is also a cost. Analyzing the regulation of work health and safety has certainly progressed in terms of

¹⁰⁵ Labour Inspection and Supervision Regulations, *supra* note 30, art. 31.

¹⁰⁶ Pringle and Frost, *supra* note 21, 312.

¹⁰⁷ Work Safety Law, *supra* note 72, art. 7.

¹⁰⁸ Law on Occupational Diseases, *supra* note 73, art. 4.

¹⁰⁹ *Ibid.*, art. 40.

¹¹⁰ *Ibid.*, art. 40; Work Safety Law, *supra* note 72, art. 57.

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improving the stringency of procedural requirements for the exercise of enforcement powers, which has significantly improved the transparency (in terms of the person or enterprise that is subject to enforcement action) and accountability of the agency for that decision.

But the cost has been that these procedures impose additional burdens on enforcement agencies. The examination of the nature of legal authorization of agencies responsible for supervising work health and safety has revealed a number of interlinked disincentives to proactive enforcement. The first is that many agencies have overlapping jurisdictions and responsibilities where mechanisms for coordination are weak, if they exist at all. The second is that many of the most severe penalties that can be exercised, such as closing a business, require the timely cooperation of other government agencies to implement. In a country where administrative silos are strong, this adds to the difficulty of regulation. Third, where an enterprise fails to comply with a sanction, such as by paying a fine or rectifying breaches, the agencies must apply for enforcement by the courts, which increases time, cost, and the risk that their decision may not be enforced at all. Fourth, mandatory procedures increase the burden of enforcement and, for small sanctions, may discourage inspectors from imposing the sanction at all. Finally, accountability mechanisms such as litigation and review in a significant proportion of cases often result in a decision being rescinded.

Experience from policing has shown that the introduction of accountability mechanisms has had the perverse effect of dampening enforcement rather than improving the standards of enforcement. In enforcement environments such as occupational health and safety, the balance of power between enforcement agencies and enterprises is not strongly in favour of the enforcement agency. They are often understaffed and overworked, detention is difficult, and they are often confronting a regulatory subject that is motivated and has the financial resources to challenge their decisions. Where the enterprise is poor or illegal, the problem of enforcement remains, differing only in that the responsible person may be difficult to locate or the enterprise may lack assets (or has diverted those assets) to pay fines, compensate injured workers, or comply with the rectification notices. In addition, where an inspector may be subject to personal liability if the decision is found to be unlawful, the dampening effect is compounded.

The analysis in this chapter has shown how transparency and accountability mechanisms, in certain particular regulatory environments, can have the perverse effect of discouraging regulatory and enforcement activity in an area where it is desperately needed. While these effects are not unique to the Chinese situation, the particular focus on individual responsibility, coupled with tightening Party oversight and control have arguably exacerbated

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problems of officials shirking their duties. This case study provides an illustration of the unintended consequences that might flow from the transplant of one model of accountability (independent review of administrative decision making) into an environment where political and institutional models of accountability are differently constituted. As reforms are made to address these problems, they may constitute one phase in the recursive cycle that moves from problem recognition to law reform in seeking to change entrenched modes of regulation and the control of administrative power.

Notes

[<insert notes here>](#)

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