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# Judicial Review of Government Actions in China

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(Draft May 31, 2018)

**Abstract:** China’s laws and policies on the judicial review of government actions are often used as a bellwether of the government’s attitude towards the rule of law. Accordingly, in gauging the direction of legal reform in the Xi Jinping era, recent media reports have highlighted changes in litigation against government agencies as evidence of positive movement towards the greater rule of law, albeit only contradicted by other evidence of political repression and increasing authoritarianism. We provide a selective review of changes in China’s administrative litigation system in the last few years, including the amendment in 2014 of the Administrative Litigation Law (ALL) and a 2018 Supreme People’s Court Interpretation of the same statute, and the impact of judicial reforms carried out since 2014 in general.

In our view, the question of whether lawsuits might be brought against the government has arguably become less interesting than the question of how courts will decide such lawsuits. And the generic notion of judicial independence itself no longer sheds sufficient light on the range of actual and possible judicial responses. Using the purportedly expanded scope of review of informal policy directives as an example, we show that symbolism-motivated advocacy to improve the administrative litigation in China may come at the expense of protecting the non-symbolic functions of judicial review, and of guaranteeing what judges really care about, i.e. the coherence of law and consistency in the delivery of justice.

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## Introduction

China’s laws and policies on the judicial review of government actions are often presented as an important bellwether of the government’s attitude towards the rule of law.<sup>1</sup> Accordingly, in the last few years, in gauging the direction of legal reform in the Xi Jinping era, media reports have highlighted changes in litigation against government agencies as evidence of positive movement towards the greater rule of law, albeit only contradicted by other evidence of political repression and increasing authoritarianism.<sup>2</sup> Regardless of whether the institution of judicial review can bear the symbolic weight that has thus been vested in it—we believe there are many reasons to be skeptical<sup>3</sup>—the last few years have indeed witnessed very momentous changes in China’s administrative litigation system. Specifically, in 2014, the Administrative Litigation Law (ALL) received its first amendment since its original adoption in 1989; the newly (and extensively) amended statute took effect on May 1, 2015.<sup>4</sup> In 2018, China’s Supreme People’s Court (SPC) published a lengthy Interpretation on the Application of the Administrative Litigation Law (hereinafter the “2018 SPC Interpretation”), which replaced and substantially revised previous interpretations and ushered in a number of important doctrinal and institutional innovations. More generally, reforms carried out since 2014 of the Chinese judicial system—including especially the centralization (to the provincial level) of court financing, re-allocation of jurisdiction to higher courts, the creation of new supra-provincial circuit courts, and dramatic changes to judges’ career incentives—all have direct impacts on the administrative tribunals that hear lawsuits against government agencies.

The empirical reality of judicial review makes these statutory, doctrinal, and institutional changes even harder to ignore. During the 5 years from 2013 to 2017, China’s number of first-instance lawsuits against government agencies increased 87%, from 123,194 to 230,432 in each year, and the number of second-instance disputes (i.e. appeals) from such lawsuits increased even faster—207%, or

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<sup>1</sup> The Chinese-language literature in on administrative litigation in China is too voluminous to cite here. We cite specific relevant sources below. For recent scholarship in English, see Haibo He, “How Much Progress Can Legislation Bring: The 2014 Amendment of the Administrative Litigation Law of PRC,” 13 *U. Pa. Asian L. Rev.* 1 (2018); Benjamin L. Liebman, et al, “Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law,” 21st Century China Center Research Paper No. 2017-01 (2017); Wei Cui and Zhiyuan Wang, “The Selection of Litigation against Government Agencies: Evidence from China,” 13(3) *Review of Law and Economics* (2017); and the citations therein.

<sup>2</sup> See, e.g. Ian Johnson, “China Grants Courts Greater Autonomy on Limited Matters,” *New York Times*, Jan. 2, 2016 <https://nyti.ms/1YXhQ7F>; “Justice served, sometimes: For some plaintiffs, courts in China are getting better,” *The Economist*, Vol. 424, Iss. 9060, (Sep 30, 2017): 57.

<sup>3</sup> See Wei Cui, “Does Judicial Independence Matter? A Study of the Determinants of Litigation Patterns in an Authoritarian Regime,” 38:3 *U. Pa. J. Int’l L.* 941-998 (2017)

<sup>4</sup> Hereinafter we refer to the amended Administrative Litigation Law as the 2015 ALL, and to the statute before its 2014 amendment as the 1989 ALL.

from 35,222 to 108,099.<sup>5</sup> On a per capita basis, the volume of administrative litigation in China already surpasses that of Taiwan, and no doubt of some other countries where both democratic accountability and judicial independence are regarded as well established.<sup>6</sup>

In this essay, we provide a selective review of these recent changes in the doctrines and procedures of judicial review. Our review adopts a pragmatic and comparative approach. In our view, the question of *whether* lawsuits might be brought against the government has arguably become less interesting than the question of *how* courts will decide such lawsuits. And the generic notion of judicial independence itself no longer sheds sufficient light on the range of actual and possible judicial responses. However, much media and scholarly commentaries (both Chinese and Western) on judicial review in China remain fixated on symbolic values. Arguably, this fixation has given rise to institutional arrangements that threaten to diminish, rather than enhance, judicial authority.

As a particular example, we examine controversies surrounding the scope of review under the ALL in Sections III and IV. Conventional wisdom has it that the scope of judicial review in China is too narrow. We show that from a comparative administrative law perspective, the scope of review under pre-2015 practice was actually quite normal. It is instead the effort to extend such scope since 2015 that is unusual by international standards. At the same time, we show that an issue that has been central to the practice of administrative law in liberal democracies—namely the standard of review that courts should adopt when examining the justifiability of government actions—has often been ignored both in institutional reform in China and in scholarly commentary. Registering this issue in fact allows us to identify an important rolling back of judicial authority implied by recent reforms. This development raises the possibility that symbolism-motivated advocacy to improve the administrative litigation in China may come at the expense of protecting the non-symbolic functions of judicial review, and of guaranteeing what judges really care about, i.e. the coherence of law and consistency in the carrying out of justice.

Before delving into this particular controversy, we provide background information regarding the ALL amendment (and its subsequent SPC elaboration) and the impact of judicial reform on administrative litigation in Section I. Section II sets out the key empirical observations on the dramatic changes in litigation patterns. The Conclusion offers some reflections on the ALL's evolution.

## I. The 2015 ALL and Post-2013 Judicial Reform

### 1. Background

The revision of the 1989 ALL had been the subject of a decade-long discussion sustained by top-down reform proposals from the Standing Committee of the National People's Congress (NPCSC) as well as the SPC. In December 2003, the 10<sup>th</sup> NPCSC listed the revision of the ALL as a Category II item in its legislative plan — meaning that the NPCSC would start to work on a draft without deliberating on it immediately. It was not until December 2013 that the legislative plan of the 12<sup>th</sup> NPCSC made ALL revision into a Category I item, to be deliberated in the current term. Systematic research on the ALL's

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<sup>5</sup> All statistics cited in this essay (for both administrative and civil-commercial litigation) for 2013-2016 are taken from (or derived from information contained in) the China Law Yearbook. 2017 litigation statistics are based on unpublished data provided to the authors by the SPC.

<sup>6</sup> For case volume in the Taiwanese administrative court system in recent years, see <http://www.judicial.gov.tw/juds/report/sg-2.htm> (first instance) and <http://www.judicial.gov.tw/juds/report/sc-2.htm> (appeals).

revision followed these two inclusions in the NPCSC legislative agenda, especially between 2005-7 and then 2012-2014.<sup>7</sup>

The SPC played an important role in this process. A book for which senior SPC judge Jiang Bixin served as chief editor and co-author, *Perfection of China's Administrative Litigation System: A Practical Study for an ALL Revision*, became a classic,<sup>8</sup> and helped to frame many of the major issues in the debate in this area. Jiang participated in drafting the 1989 ALL and was the director of the SPC's Administrative Division between 1999-2002, becoming a SPC Vice President by 2003.<sup>9</sup> The view expressed in his book was as much institutional as it was personal.<sup>10</sup> Jiang identified four major issues as critical to reforming administrative litigation: (1) empowering the administrative tribunal, (2) nurturing a profession of administrative law judges, (3) achieving efficiency and inclusiveness of adjudication, and (4) enhancing jurisdictional flexibility.<sup>11</sup> The SPC's influence on the ALL revision can be seen through both the issues emphasized by the NPCSC during its deliberations and the structure of the revisions to the law. For example, when Xin Chunying, vice director of the NPCSC Legislative Affairs Office, introduced the Draft Revision of the ALL on the last day of 2013, she mentioned the "three difficulties of adjudication" (i.e. of filing a case, of adjudicating a case, and of enforcing a decision rendered), which echoed the "three difficulties" originally formulated by Jiang in 2005.<sup>12</sup> Many provisions of the Draft Revision were also anticipated in the eleven topics that structured Jiang's book.<sup>13</sup> Nonetheless, among the four critical issues identified by Jiang (and his SPC colleagues), the NPCSC prioritized issues of adjudication (including the so-called three difficulties), and hesitated to proceed with the first two, structural issues (i.e. the roles of administrative tribunals and of judges).

Scholars and other actors expressed somewhat different concerns in relation to the ALL revision. According to a survey conducted after the release of the Draft Revised ALL, topics most frequently mentioned as being of interest included: (1) the scope of review, i.e., typology of cases and disputes reviewable; (2) the distribution of cases among different levels of courts; (3) the codification of the role of mediation in the litigation process; (4) public interest litigation, and (5) the review of informal policy documents (IPDs, *guifanxing wenjian*).<sup>14</sup> While almost all these topics can be found in Jiang's 2005 book or other SPC judges' articles or books,<sup>15</sup> they lacked the structural and institutional focus that characterized the SPC reformer's proposals. Thus public commentaries are of interest mainly because they highlighted the exceedingly conservative approach of the 2013 NPCSC Draft, which for the most

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<sup>7</sup> Zhang (2015), p. 66. Before 2003, research on and criticism of the 1989 ALL were sporadic.

<sup>8</sup> Jiang (2005).

<sup>9</sup> Jiang was appointed Vice Director of Constitutional and Legal Committee of the NPC in March 2018, right after the 2018 Judicial Interpretation was published.

<sup>10</sup> The book was co-authored with other SPC judges, including Cai Xiaoxue, Gan Wen, Duan Xiaojing, and Liang Fengyun.

<sup>11</sup> Jiang (2005), pp. 9-12.

<sup>12</sup> *Id.*, pp. 9-10.

<sup>13</sup> These 11 chapters were: (1) the general judicial system, especially court organization and jurisdiction; (2) the scope of review; (3) standing; (4) defendants and third parties; (5) rules of evidence, especially the burden of proof; (6) conditions for case filing; (7) the organization of court proceedings, including summary trials and retrials; (8) the trial system, especially the structure of adjudication; (9) typology of dispositions; (10) enforcement; and (11) improving the administrative compensation system.

<sup>14</sup> Li (2016), p. 114. See Section III for an extended discussion of pre-2015 practice in the review of IPDs.

<sup>15</sup> Li, Wang and Liang (2013), p. 69. ALL experts also held rather philosophical debates about whether a through re-write or an incremental revision was appropriate, and whether an independent administrative court system should be put in place.

part merely compiled existing judicial interpretations.<sup>16</sup> In any case, discussions regarding structural court reform were largely limited to the administrative law community.

Entering 2014, political initiatives of the Chinese Communist Party (CCP) accelerated the process of ALL reform. First, the CCP adopted the “Decision on Several Important Issues for Full-fledged Deepening Reform” in November 2013. Then the Leading Group on Comprehensively Deepening Reform (LGCDR) was established, headed by Xi Jinping. On February 28, 2014, the LGCDR issued the Opinions and Division of Labor to Enforce Deepening Judicial and Social Reform. This document laid the foundation for the system for limiting the proportion of judges in court staffing (*faguan yuan’e zhi*), as well as for creating cross-region/district courts. In October 2014, the CCP passed the Decision on Facilitating Fully-Fledged Rule of Law, which, among other things, urged reforming the docketing system from implementing substantive review to a mere registration system.<sup>17</sup>

In response to these new policies as well as public criticism, the NPCSC published an updated Revised Draft in 2014, amending 61 of the 75 articles of the 1995 ALL. In addition to the original proposal, the draft highlighted the following arrangements: (1) the case registration system, (2) the responsibility of agency leaders to attend court hearings, (3) making administrative reconsideration bodies as defendants, (4) sanctioning improper administrative acts, and (5) judicial review of IPDs. Among these, only the proposal for the case registration system had been anticipated by the 2013 Draft; other new proposals could all be seen as responding to the CCP’s judicial reform policy. This draft was deliberated by the NPCSC and passed with minor changes on November 1, 2014.<sup>18</sup>

## 2. An Overview of the 2015 ALL

The original structure of the 1989 ALL was kept, but the 2015 ALL was elaborated to contain 103 articles. Some major revisions are summarized below.<sup>19</sup>

### a. Incremental Expansion of the Scope of Review

Under the 2015 ALL, individuals, organizations or legal persons may file a lawsuit if they consider an “administrative action” violates their legal rights and interests (Article 2). The term “administrative action” replaced the term “concrete administrative action” in the 1989 ALL, although this drafting change has little significance in itself in expanding the scope of review. More substantively, Article 2(2) extends the definition of “administrative action” to include decisions made by organizations authorized to exercise administrative mandates, such as universities and some regulatory bodies. In addition, Article 12 detailed 11 areas in which legal proceedings may be launched against governments, making explicit reference to violations of agreements on land and housing compensation, unlawful alteration or rescission of agreements on commercial operations franchised by the government, and illegal restrictions of an individual’s physical freedom. While all government actions encroaching on the personal and property rights of plaintiffs can be challenged (before and after 2015), this enumeration identifies areas where the need to cope with social resentment and unrest seems most urgent.

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<sup>16</sup> Li (2016), p.111.

<sup>17</sup> The SPC promptly echoed this policy with its 4th 5-year Reform Plan in July 2014, emphasizing the judges’ quota system, case registration, and cross-region court experiments.

<sup>18</sup> Qiao (2014).

<sup>19</sup> A useful summary in Chinese can be found in Tong (2015), pp.22-27.

The SPC further elaborated the scope of judicial review in the 2018 SPC Interpretation. While the 2015 ALL retains a provision<sup>20</sup> from the 1989 ALL that excludes 4 categories of government actions from judicial review—including formal and informal rulemaking—the 2018 SPC Interpretation sets out another 10 categories of exclusions, which had been gray areas in which judges made inconsistent decisions: (i) public or national security investigations pursuant to the criminal procedure law; (ii) mediation and arbitration as provided by law; (iii) administrative guidance; (iv) reaffirmations of previous decisions; (v) administrative actions without external effect; (vi) preparatory and deliberative acts; (vii) enforcement of court decisions; (viii) internal supervisory acts; (ix) decisions against petitions; and (x) administrative acts that have no actual effects on individuals and legal persons. Together with the 2015 ALL, the 2018 SPC Interpretation now provides clearer statements about the scope of reviewable issues.

Although these are all issues relating to causes of action, discussions of the “scope of review” debate in China also sometimes touch on what issues courts are allowed to render decisions on. We discuss courts’ new ability to review IPDs in Section III.

#### b. Clarification on Standing

The 1989 ALL’s standard for standing was formulated subjectively—one may bring a suit if one “considers” that a concrete administrative action infringes on one’s lawful rights and interests.<sup>21</sup> The SPC’s Interpretation of the 1989 ALL in 2000 stipulated that only those who possess legal rights and interests may bring a case, which interpretation was characterized by some as overly narrow.<sup>22</sup> The 2015 ALL aimed to resolve this controversy. It provides that a person subjected to an administrative action or any other person *with an interest* in the administrative action has the right to file a complaint (Article 25, italic added). The phrase “with an interest” is considered to be broader than “with legal rights and interests” but narrower than “who considers his interest [violated]”.<sup>23</sup>

The 2018 SPC interpretation provides further rules to identify eligible plaintiffs under Article 25 of the 2015 ALL. Parties newly specified as eligible include, for example, (i) persons who file a complaint to an agency to maintain their lawful rights and interests and who wish to dispute the processing agency’s response (Article 12(5)); (ii) a creditor where an agency action towards a debtor damages the creditor’s claim, and where the agency is legally required to provide protection or give consideration to the creditor’s rights (Article 13); (iii) the founder or capital contributor to a non-profit entity that deems an agency action to infringe upon the lawful rights and interests of the entity (in which case the founder or contributor may file a complaint in its own name) (Article 17); and (iv) an owners’ committee of jointly owned property, or a qualified owner (or owners) of such property (Article 18).

On the other hand, the revised ALL refrains from giving non-government parties rights to commence public interest litigation. In a 2017 amendment of the ALL, the NPCSC added paragraph 4 to ALL Article 25, providing that the procuratorate may bring a suit when responsible administrative agencies engage in conduct (or fail to take action) in violation of the law, in areas of environmental protection, food and drug security, state assets protection and state land use right transactions, and where national or public interest may be harmed. During the debate on the ALL revision, both civil

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<sup>20</sup> Article 13.

<sup>21</sup> 1989 ALL Article 2.

<sup>22</sup> Jiang (2013), p.9.

<sup>23</sup> Tong 2015, p 25.

society and public prosecutors were considered options for public interest litigation.<sup>24</sup> The revised ALL clearly chose the more conservative option.

### c. Improving Adjudication

The 2015 ALL endorses the case registration system that began to be implemented in May 2015 for both civil and administrative cases, which made courts more accessible for potential plaintiffs. Previously, courts would accept cases only after a substantive review of the filed documents. Many cases were screened out with no reasons given, and sometimes for being too “sensitive” or “complicated”.<sup>25</sup> The new case registration system requires that all complaints be registered and filed automatically with only minimal review. If a court declines to take a case, it must issue a reason for the rejection and the decision can be challenged.

The revised ALL also reforms the allocation of jurisdiction, allowing intermediate courts to adjudicate disputes involving government agencies above the county level (Article 15). Article 18 further authorizes the SPC and high courts to designate certain courts to adjudicate disputes across jurisdictions. While the statute contemplates no move to independent administrative courts, the door is not completely closed: both the Beijing 4<sup>th</sup> Intermediate Court and the Shanghai 3<sup>rd</sup> Intermediate Court were created in 2015, based on the original railroad court model,<sup>26</sup> and mainly deal with administrative cases in Beijing and Shanghai, respectively.

The 2015 ALL also adds mediation as a type of remedy. A traditional theory had it that government agencies were to enforce the law and should be prohibited from bargaining with individuals. That theory, however, has become anachronistic with government powers extending to many economic areas. Contemporary studies provided evidence that mediation mitigates conflicts and reduces administrative costs.<sup>27</sup> The 2015 revision reflects this new understanding of functions of mediation in public law.

### d. Court Leverage on Agency Defendants

The revised ALL requires that the person in charge of the defendant agency appear in court or designate staff members to do so (Article 3). If the agency refuses to perform acts required by a judgment, the person in charge will be detained; and if the circumstances of such refusal are serious and constitute a crime, criminal liability will be imposed on the person in charge (Article 59). Moreover, the revised ALL provides that the court may sanction the responsible government official with 50-100 RMB each day if he or she fails to comply with the court decision (Article 96(2)) and may also publicize the

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<sup>24</sup> Jiang (2013), p. 16. Before 2015, courts had accepted cases brought by non-governmental organizations. For example, Jin (2014) (p.70) discusses a 2009 case brought by All-China Environment Federation against Guizhou Qingzhen City Land Resource Bureau. In 2014, the Environment Protection Law was revised and Article 58 provides that registered social organizations may bring public interest litigation. However, the NPCSC revised the ALL on June 27 2017 to authorize the procuratorate to bring public interest suits. The 2017 ALL revision therefore excludes civil society from public interest administrative litigation, although public interest litigation through civil proceedings is still possible.

<sup>25</sup> In a survey conducted in 2013 (Lin and Song 2013), 19.4% of participant judges admitted that they have rejected cases that should have been accepted. Note that media reports, such as that in the New York Times (Johnson, supra note 2)—claiming that “by the mid-2000s, about 60 percent of these cases were rejected outright by courts, according to government statistics”—often fail to provide the source of cited statistics.

<sup>26</sup> Railroad courts used to be affiliated with Ministry of Railroad and had cross-region jurisdictions.

<sup>27</sup> Hu and Tang 2011 (see especially footnote 4, at p. 5) present 7 local courts that experimented with administrative mediation starting from 2006.



non-compliance of the government agency (Article 96(3)). These unique provisions were enacted to deter government misconducts through social and psychological pressures.

### 3. Reform of the Judiciary in General

As already discussed, the revision of the ALL benefited from the CCP's general judicial reform effort after 2013, especially with respect to case registration and new arrangements for jurisdictional assignment. Indeed, the revision of the ALL must be considered as a part of China's general judicial reform. Before 2013, the SPC's various reform plans had stalled due to reform measures being perceived as too aggressive or even as possibly eroding CCP authority. For example, the second 5-year Plan (2004-2008) expressly promoted judicial independence and judicial authority. Yet it was precisely during this period that the SPC had to repeal its 2001 judicial interpretation on the Qi Yuling case (a landmark case displaying judicial activism in constitutional interpretation). By 2013, the Party's Propaganda Department had even explicitly designated "judicial independence" as a politically incorrect term.<sup>28</sup> Moreover, systematic institutional changes, especially in terms of court organization, personnel reform and financial security, required political support from the NPC (for parliamentary authorization of fundamental organizational changes), the State Council (for court finance), as well as from the Party. Without broad political support, previous judicial reforms invariably ended up focusing narrowly on improvements of professionalism and procedure.<sup>29</sup> In contrast, the SPC released its 4<sup>th</sup> Judicial Reform Plan (2014-2018) after the CCP issued its own rule of law policy (in October 2014): the new plan functioned as a detailed implementation strategy for the Party's new policy, and can claim to directly reflect the Party's preferences. As a result, this new round of judicial reform was able to achieve crucial goals that eluded previous reformers.

Some aspects of structural judicial reform specifically addressed administrative litigation. These include (1) creating circuit courts of the SPC to adjudicate important, cross-jurisdictional cases (both civil and administrative); (2) creating lower-level, cross-region courts to adjudicate environmental law, bankruptcy, important administrative and other types of cases that might encounter local interference; and (3) encouraging intermediate courts to take on first-instance administrative cases and allowing basic level courts to swap jurisdictions on administrative cases.<sup>30</sup> All three measures aim to prevent local interference and enable relatively independent and neutral adjudication.<sup>31</sup> Other aspects of judicial reform are also relevant for administrative litigation. These include, for example, promoting judicial transparency by introducing open trial and the online publication of court decisions.<sup>32</sup> They also include screening out over 60% of court employees that previously had the title of judges, many of whom were under-qualified.<sup>33</sup> The process of reappointing judges as qualified judges is still ongoing in 2018.

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<sup>28</sup> Circular on the Current Ideological Field, in *Mirror*, vol. 43, August 2013, Hong Kong. The circular was famous for listing 7 prohibited terms, or "seven no's" in China.

<sup>29</sup> Indeed, as a backlash to the Second 5-Year Reform, the SPC's Third 5-Year Reform emphasized popular responsibility.

<sup>30</sup> See, 2013 SPC Notice on Carrying Out the Pilot Work of Centralizing Jurisdiction in Administrative Cases; 2014 SPC Guiding Opinion on Centralized Adjudication of Administrative Cases on a Cross-Administrative-Region Basis.

<sup>31</sup> Since 2015, the SPC has created six circuit courts, as well as two cross-district courts in Beijing and Shanghai.

<sup>32</sup> See Liebman et al, *supra* note 1.

<sup>33</sup> According to Gao (2015), only 39% of the judges under the previous status quo will be able to keep their titles as judges.

It is worth pointing out that some of the reform measures—especially the case registration system and scheme to disqualify 60% of all judges—went against the preference of the judiciary, and were promoted as a part of the CCP’s political agenda. Whether this will produce some kind of strategic backlash from the courts is yet to be seen. Also, although “de-localization” is a clear goal of the reform, it is not clear if the central government will provide necessary financial support to lower-level courts. Moreover, even the new cross-region courts (funded by the central government) are still expected to adopt the existing bureaucratic structure, where the court president can intervene in all cases adjudicated and thus threaten independent adjudication.

## II. The Empirical Realities of Judicial Review

It is increasingly difficult to ignore quantitative realities in discussing China’s administrative litigation process. The enactment of the 2015 ALL was accompanied by dramatic changes in litigation patterns in the Chinese judicial system in general. As Table 1 displays, the levels of all types of non-criminal litigation in China rose rapidly in the last few years. The growth rate of civil and commercial litigation displayed two large jumps in 2015 and 2017, each in excess of 20%. The result was a cumulative increase of 67.93% in case volume in four years. During the same period, the volume of administrative lawsuits increased cumulatively by 87.05%, but the main gain occurred in 2015.<sup>34</sup> One reading of these differing patterns is that judicial reforms in 2015—perhaps most importantly, the reform of the case registration process—presented similar shocks to administrative and civil litigation, whereas the reforms in 2016 and 2017 mainly affected civil but not administrative litigation.

**Table 1 Patterns in Administrative Litigation and Other Civil Litigation**

	Growth in cases filed over prior year		Adjudication rate		Ratio of concluded to filed cases		Ratio of appeals filed to first-instance cases closed	
	Civil and commercial	Admin	Civil and commercial	Admin	Civil and commercial	Admin	Civil and commercial	Admin
2013			31.92%	40.15%	96.51%	97.96%	8.62%	29.19%
2014	6.75%	15.17%	38.07%	52.31%	96.42%	92.31%	9.13%	38.17%
2015	21.55%	55.34%	43.62%	61.08%	94.82%	90.19%	9.59%	39.23%
2016	6.58%	2.31%	46.94%	64.90%	100.02%	99.79%	10.11%	46.59%
2017	21.43%	2.19%			102.14%	99.43%	8.59%	47.18%

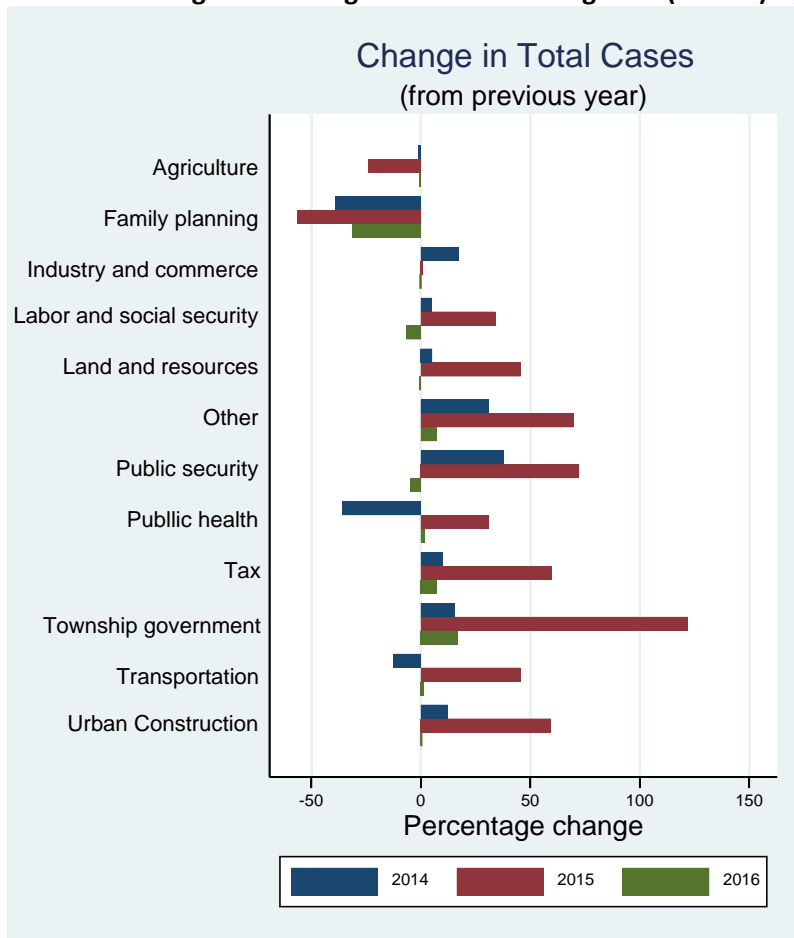
Table 1 also identifies another type of parallel developments in administrative and civil litigation. Notwithstanding the sharply rising case volume that courts face, and notwithstanding court personnel reform that began in 2014 and led to reductions in the number of court staff participating in adjudication, the adjudication rate—the percentage of all concluded cases that resulted in the court issuing a full or summary judgment—saw strong increases across the board. The adjudication rate for administrative lawsuits increased from 40% to almost 65%. The same rate increased for civil cases from 32% to 47%. In other words, courts not only accepted a lot more cases, they also adjudicated a substantially higher proportion of lawsuits. That courts have become more efficient in deciding cases is also evidenced by the ratio of concluded cases to filed cases, which can be viewed as a rough proxy for court backlog. Although this ratio dipped in 2014 and 2015 for both civil and administrative cases, it

<sup>34</sup> The prior peak in first-instance administrative litigation was found in 2011 (136,353), thus the 15.17% uptick of litigation in 2014 from the prior year can be viewed as an instance of normal fluctuation.

recovered in both areas by 2016 and 2017. The substantial increase in litigation volumes, in other words, created no court congestion.

These parallel developments imply that it would be difficult to attribute rising aggregate administrative litigation volumes to the revised ALL, because it would be hard to disentangle the effect of the statutory amendment from those caused by the very substantial changes to the court system in general. More generally, little causal inference can be made based on these statistics alone. For example, the last two columns of Table 1 show that while the rate of appeals remained steady for civil and commercial cases, the proportion of appeals for administrative litigation experienced a substantial increase. However, the largest increase occurred in 2014, before the 2015 ALL took effect and before the large jump in case volume in 2015.

**Figure 1: Changes in volume of litigation (2013-6) by defendant agency type**



Finally, within administrative litigation, Figure 1 shows that not all government agencies faced increases in lawsuits. Suits against both family planning and agriculture agencies showed three consecutive years of decline: nationwide, cases filed against family planning agencies shrunk astoundingly from 8203 in 2013 to 1500 in 2016. Lawsuits against public health departments also experienced cumulative decline, and negative year-on-year growth was also observed in some years for

lawsuits against labor and social security, public security, and transportation bureaus.<sup>35</sup> Overall, the fastest growing areas of litigation were against township governments (cumulatively 200%), Other (138%), public security (126%), and taxation (88.67%).

These empirical patterns are clearly noteworthy, even though the existing discourse on the ALL, with its focus on judicial constraints on the executive, provides little by way of a framework for assessing them.<sup>36</sup> We now turn to examine that discourse more closely, in particular its critique of the pre-2015 ALL scope of review.

### III. A Comparative Perspective on the Scope of Review

Under pre-2015 law and practice, Chinese courts' power to review regulations and other policy directives adopted by executive branch agencies took three main forms. First, if a regulation (*quizhang*) is offered as the legal basis of agency action, a court must determine whether the regulation is legal and in force before giving it application as law.<sup>37</sup> Second, if some "other normative document" (*qita guifanxing wenjian*, which we refer to as informal policy document or IPD here) was offered as the legal basis of an agency action, such document had no binding force on courts. Courts could nevertheless give it effect after reviewing and confirming its legality, validity, as well as reasonableness and appropriateness.<sup>38</sup> That is, legality was not sufficient for an IPD to be given effect: a court had discretion to disregard IPDs based on judgments about their reasonableness and appropriateness—or it could even simply disregard them altogether, without review. Third and finally, there is a set of circumstances in which a court may suspend judicial proceedings and seek resolutions of conflicts among formally binding legal rules, through interlocutory procedures that transmit questions to the executive branch. One such circumstance is irresolvable conflicts among ministerial and subnational regulations,<sup>39</sup> but the interlocutory procedure is available also for a wider range of conflicts among other types of formally binding law.<sup>40</sup>

It has long been conventional wisdom among commentators on Chinese administrative law that these parameters for judicial review are too restrictive.<sup>41</sup> The restrictions most frequently criticized are two. First, Article 12(2) of the 1989 ALL explicitly ruled out lawsuits brought merely to challenge "administrative statutes and regulations, or decisions and orders with general binding force formulated and announced by administrative entities." That is, agency adoption of formal or informal rules—colloquially labeled "abstract administrative actions"—cannot be causes of action, even if the rules

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<sup>35</sup> After growth in 2014, lawsuits against industry and commerce bureaus also barely moved despite rapid growth in other areas.

<sup>36</sup> Some Chinese scholars interpret plaintiff win rates as reflecting judicial attitudes. See, e.g. He *supra* note 1. Such interpretations are highly unreliable when decided cases are not representative of the general population of disputes. In a test not shown here, we regressed the plaintiff win rates in 2013-6 for 12 different types of agencies on the adjudication rate for the same agency-years, using agency and year fixed effects. Consistent with prior findings (Cui and Wang 2017), the coefficient was negative—meaning that holding all other things equal, higher adjudication rates generate lower plaintiff win rates—but it was not statistically significant.

<sup>37</sup> 1989 ALL Article 53, par. 1; Shanghai Meeting Minutes, Section 1, par. 1.

<sup>38</sup> Shanghai Meeting Minutes, Section 1, par. 1.

<sup>39</sup> 1989 ALL Article 53, par. 2.

<sup>40</sup> Shanghai Meeting Minutes, Section 2(2)-(4).

<sup>41</sup> See He, *supra* note 1; Tong 2015.

adopted are suspected to be illegal, unreasonable, or otherwise flawed.<sup>42</sup> This provision remains unchanged in the 2015 ALL, despite the fact that the 2014 amendment no longer refers to “specific administrative actions” in its provisions on permissible causes of action. Second, Chinese courts could not invalidate or “strike down” agency rules (formal or informal) in the sense of precluding them from future enforcement. Instead, they only have the choice (for the most part) of not applying an invalid or otherwise unacceptable rule in a given case. This remains the case under the 2015 ALL, although, as discussed below, the SPC has adopted some extraordinary measures to put the executive on notice of the need to change invalid IPDs. Conventional wisdom has it that these two restrictions rendered the law of administrative litigation in China defective; such wisdom partially fueled the ALL revision, and will now doubt continue to color criticisms of the ALL in the future.

From a comparative perspective, however, this conventional view is puzzling and indeed seems confused. Both types of restrictions described above—on causes of action and on available remedies—are quite common in modern liberal democracies that enjoy the strong rule of law. Both also have generally applicable institutional explanations. In this section, we do some clearing of the ground in this area. Our goal is not to be contrarian and simply prove conventional wisdom wrong. Instead, because the conventional wisdom has had a direct impact in the design of China’s public remedial system, identifying its errors is crucial for appreciating how radical some aspects of the ALL are. For example, the process, described in the next section, by which courts are now expected to offer “judicial recommendations” for the repeal, amendment, or suspension of IPDs is, to our knowledge, internationally unique.

### 1. Limitations on Remedies Provided by Civil Law Courts

The logic of the two restrictions on the scope of judicial review is best explained in reverse order. First, it is useful to state an obvious explanation why Chinese courts may not be permitted to “strike down” problematic agency rules. This has to do with the idea that civil law judiciaries, on which the Chinese judiciary is modeled, are generally expected to apply the law, not to make law. Relatedly, decisions by civil law courts generally do not have precedential value, because they do not create norms of general application. While some modern courts in civil law countries present exceptions to these general rules, the rules continue to characterize the power of most civil law courts. Precluding formal regulations from reinforcement clearly raises suspicions of both lawmaking (i.e. revoking binding law) and claiming to set precedents, while precluding IPDs from enforcement also sets precedents.

This basic logic is supported by the fact that, in civil law countries, courts’ ability to invalidate agency rules seems to be the exception, not the rule. Take, for example, Germany, where there are very strong constitutional protections of citizen’s rights and which enjoys a strong administrative litigation system that is widely emulated across the world. When assessing the lawfulness of an agency action, a German administrative court can review a regulation on which such act is based and may rule that it is inconsistent with higher law and therefore void.<sup>43</sup> However, this is not a matter of “striking down” a regulation: it is an assessment of its validity as a preliminary question; such preliminary findings

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<sup>42</sup> The SPC clarified in 2000 that “decisions and orders with general binding force” refer to “normative documents” that may be repeatedly used and that are not issued in respect of specific subjects. 2000 SPC Interpretation. This provision was retained in the 2018 SPC Interpretation.

<sup>43</sup> A formal referral to the Federal Constitutional Court or Parliament is not necessary or provided for under German administrative court procedure rules.

generally do not have any binding effect—not even between the parties to the lawsuit.<sup>44</sup> Similarly, German courts generally do not review informal policy announcements but directly apply the law when assessing the lawfulness of government actions.<sup>45</sup> There are instances in which courts comment on the lawfulness of informal agency rules: such assessment may be necessary if the informal rules contain instructions on how to exercise discretion.<sup>46</sup> Nonetheless, similar to the situation with respect to regulations, an assessment of the lawfulness of an informal rule constitutes a preliminary matter and therefore does not have any binding effect.<sup>47</sup>

Of course, it is well known among comparative legal scholars that the absence of *stare decisis* in civil law systems does not necessarily prevent a court decision from having wider impact. In practice, some degree of *de facto* precedential value may be observed, particularly in decisions of a court of last instance. Courts of first instance usually refer to decisions of higher courts in their reasons and such decisions are easily accessible. Judgements can also be endowed with practically binding effect within the executive branch through general administrative instructions.<sup>48</sup> Nothing precludes court decisions from having this kind of effect in China—indeed increased transparency in adjudication can be expected to strengthen it.

Existing surveys of administrative litigation in Europe confirm that the institutional logic we identify is not specific to China or Germany.<sup>49</sup> For example, Dutch administrative courts “will leave all or part of the lower provision out of application” if they find a violation of higher laws.<sup>50</sup> Similarly, under Italian law, individuals generally do not have the right to challenge a normative act “*per se*”.<sup>51</sup> This logic also represents the rationale for the set of extraordinary remedies that the 2018 SPC Interpretation delineates for the finding of illegal IPDs: judicial recommendations to the executive branch backed by the threat of retrying cases where problematic IPDs are involved. The unusual character of these remedies (discussed in Section IV) arguably results from an effort to enable civil law courts to do what they generally cannot do.

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<sup>44</sup> Panzer in Schoch/Schneider/Bier, *Verwaltungsgerichtsordnung*, supplement 33, June 2017, section 47 at 8.

<sup>45</sup> Schmitz in Stelkens/Bonk/Sachs (eds.), *VwVfG*, 9. edition 2018, section 1 at 212-213.

<sup>46</sup> If such instructions are invalid, administrative decisions based on them are usually unlawful because the official making the decision may be viewed as “misusing” his or her discretion by considering the instruction to be (internally) binding. See Arno Scherzberg and Josephine Seidl, *Administrative Litigation in Germany*, in Yuwen Li (ed.), *Administrative Litigation Systems in Greater China and Europe*, New York 2014 at 157-158 for an overview of judicial review of administrative exercise of discretion.

<sup>47</sup> Lindner in Posser/Wolff (eds.), *VwGO*, 44th edition, 01.01.2018, section 121 at 30-32.

<sup>48</sup> For example, the German Ministry of Finance publishes selected judgements of the Federal Finance Court in section II of its “*Bundessteuerblatt*” (Federal Tax Gazette), which makes them internally binding for tax officials.

<sup>49</sup> It may be worth pointing out, however, this issue has not been widely investigated in the comparative administrative law literature, and is left out of discussion, for example, in many chapters in Susan Rose-Ackerman, Peter L. Lindseth and Blake Emerson (eds.), *Comparative Administrative Law*, 2nd edition, Northampton 2017. In addition, some civil law jurisdictions have (historically rooted) particularities, such as French administrative law which exhibits “a striking judge-made culture” and “is essentially based on case law”, see Dominique Custos, *The 2015 French code of administrative procedure: an assessment*, in Rose-Ackerman et al, *id*, and Sylvia Calmes-Brunet, *Effective legal protection in French law*, in Zoltán Sente and Konrad Lachmayer (eds.), *The Principle of Effective Legal Protection in Administrative Law*, New York 2017, at 107.

<sup>50</sup> Pieter van Dijk, *Judicial Review of Administrative Decisions in the Netherlands*, in Li (ed.), *supra* note 46 at 131-132.

<sup>51</sup> Fulvio Cortese, *Effective legal protection in Italian law*, in Sente and Lachmayer *supra* note 49, at 182.

## 2. Limitations on Pre-enforcement Review

If a court cannot strike down formal or informal agency rules, it should also not hear disputes the main purpose of which is to challenge the validity of such rules—the reviewing court would not be able to provide any remedy. This simple logic already goes a long way to justify the non-justiciability of “abstract administrative actions”. Using U.S. terminology, we will label the judicial review of an agency rule before its enforcement “pre-enforcement review”. From a comparative perspective, pre-enforcement review indeed requires extensions of the traditional powers of a civil law court.

Again we offer Germany as an example. The German Code of Administrative Court Procedure (VwGO) is widely known for a set of special provisions in Section 47 (“*Normenkontrolle*”), whereby most state regulations and municipal by-laws are subject to direct judicial review for up to a year after their enactment. An individual can bring a lawsuit challenging such regulations if she can demonstrate that the regulation and its enforcement potentially infringes upon her individual rights.<sup>52</sup> Higher administrative courts can declare regulations to be void insofar as they find any violation of state, federal or constitutional law, including procedural requirements.<sup>53</sup> If a higher administrative court finds a regulation to be void, by law, the ruling has effect *erga omnes*, i.e. not only *vis-à-vis* the parties to the lawsuit.<sup>54</sup> This establishes an equivalent to precedential value. However, this is precisely understood to be a singular feature of Section 47 direct review, compared to the effect of other court decisions under German law.

In contrast, federal regulations cannot be struck down by administrative courts with general effect. At the pre-enforcement stage, they can only be reviewed by means of declaratory action (“*Feststellungsklage*”) pursuant to section 43 of the VwGO. Under special circumstances, an individual can initiate court proceedings to obtain a ruling that she has a right to the enactment or amendment of a regulation or that her legal status is unaffected by an unlawful and therefore void regulation.<sup>55</sup> Court decisions in the course of such declaratory action have effect only *inter partes*, i.e. they are only binding *vis-à-vis* the parties to the lawsuit.<sup>56</sup> It is only because such declaratory actions can be initiated against the promulgator of the rule as the defending party that the latter may be expected to abide by the judgement by making the necessary dispositions.<sup>57</sup>

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<sup>52</sup> This admissibility criterion does not preclude the court from assessing the merits based on any violation of statutory law, including rules that only serve the public interest

<sup>53</sup> When a violation of European law is identified, the courts will declare the regulation to be inapplicable.

<sup>54</sup> Giesberts, in Posser/Wolff (eds.), VwGO, 44th edition, 01.01.2018, section 47 at 65.

<sup>55</sup> German Constitutional Court, January 17, 2006 – 1 BvR 541/02 (BVerfGE 115, 81).

<sup>56</sup> Id; German Federal Administrative Court, June 28, 2000 – 11 C 13/99 (BVerwGE 111, 276); January 28, 2010 – 8 C 19/09 (BVerwGE 136, 54); see also Scherzberg and Seidl, *supra* note 46, at 153.

<sup>57</sup> German Constitutional Court, January 17, 2006 – 1 BvR 541/02 (BVerfGE 115, 81). Any act of state can be subject of a federal constitutional complaint, including state and federal regulations. However, actions are only admissible if an individual demonstrates that the administrative remedies outlined above have been exhausted. The strict interpretation of this doctrine of subsidiarity of constitutional review by the German Constitutional Court has led to doubt if direct constitutional review of regulations is a possibility at all. See R Emmert in Maunz/Dürig, Grundgesetz-Kommentar, supplement 81, September 2017, article 80 at 142 with further references.

Finally, in general, informal policy announcements themselves cannot be subject of judicial pre-enforcement review due to such announcements' lack of legal effects. Only the acts based on such announcements will be reviewed by administrative and constitutional courts.<sup>58</sup>

These aspects of German administrative law illustrate the alienness of pre-enforcement review to civil law courts. However, it is important to emphasize that limitations on pre-enforcement review arise not only in civil law countries. Such review can be rare even in common law jurisdictions. In the United States, pre-enforcement review of federal agency actions is strongly tied to the "notice and comment" procedural requirement for rulemaking under the Administrative Procedure Act (APA). But for the APA, traditional justiciability doctrines would impose substantial restrictions on pre-enforcement review.<sup>59</sup> It is now recognized among comparative administrative law scholars that the APA itself is a very American institution, and notice and comment procedures are relatively rare in parliamentary (as opposed to presidential) political systems.<sup>60</sup> In other words, as far as we can tell, the practice of pre-enforcement review of agency regulations is sustained critically by procedural requirements on rulemaking, and these procedural requirements are themselves rare creatures. Consequently, even in common law jurisdictions like Canada, the UK, and Australia, pre-enforcement reviews are rarely heard of.

### 3. Scope v. Standard of Review

The prevalence of these constraints on the "scope of judicial review" in liberal democracies has two implications. First, these constraints do not in themselves render the ALL either exceptional or inadequate. Second, to modify these constraints could involve relatively unusual institutional design, given the parameters of a civil law judiciary (and of a nominally parliamentary system). The 2015 ALL and 2018 SPC Interpretation precisely advance such unusual design. Before discussing this new development, however, it is important to highlight another dimension of judicial review, namely the *standard* of review that a court should apply in adjudication, especially when the agency action in dispute is based on some interpretation of statutes that the agency favors but which the plaintiff challenges. In many liberal democracies, the standard of judicial review has attracted extensive attention from administrative law practitioners and scholars. By contrast, although the issue has also inevitably arisen in Chinese practice, it has received very limited attention from commentators. Importantly, it is along this neglected dimension that the 2015 ALL and the 2018 SPC Interpretation have dealt a setback to judicial review.

Note from the outset that the standard of review is an important question regardless of whether the reviewing court is of the civil or common law variety. Regardless of whether a court "merely" determines whether to apply a policy interpretation advocated by the government, or whether

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<sup>58</sup> An exception to this rule are "norm-like" administrative provisions. It is the prevailing opinion in German legal literature that such provisions can be subject to the same review as regulations. However, "norm-like" provisions of practical importance are federal provisions and can therefore not be struck down with general effect in the course of administrative court procedure. Giesberts in Posser/Wolff (eds.), VwGO, 44th edition, 01.01.2018, section 47 at 29.

<sup>59</sup> William M. Landes and Richard A. Posner, "The Economics of Anticipatory Adjudication," *The Journal of Legal Studies* 23, no. 2 (Jun., 1994): 683-719.

<sup>60</sup> Jensen, Christian B., and Robert J. McGrath. 2011. "Making Rules about Rulemaking A Comparison of Presidential and Parliamentary Systems." *Political Research Quarterly* 64, no. 3: 656-667; Stiglitz, E. and J. M. de Figueiredo (2015), *Democratic Rulemaking*, Oxford Handbook of Law and Economics.



the court has the power to invalidate such an interpretation, the court needs to decide the standard to which the government's position must be held. A comparison of four regimes—in China, the U.S., Canada, and Germany—suggests that the adoption of such standard depends not at all on the constraints on the scope of review.

Under the pre-2015 status quo—mostly articulated through the 2004 Shanghai Meeting Minutes—the standard by which Chinese courts reviewed the purported legal basis of agency actions depended on the nature of the purported basis. If a formal regulation is the ground offered, then a court must determine the regulation's legality before giving it effect. If an IPD is the purported ground, then a court must review its legality and reasonableness/appropriateness before giving it effect. It logically follows that IPDs receive more stringent review and less deference than regulations. However, beyond this, no guidance was offered as to the standards applicable when conducting either legality or reasonableness/appropriateness review.

Interestingly, this approach bears resemblances to U.S. federal doctrine on judicial review. U.S. courts' standard of review of agency statutory interpretation also depends on the ways in which an agency's position is developed. When formal regulations (i.e. mostly rules that have gone through the notice and comment procedure required by the APA) are at stake, courts apply the "Chevron test", which, in many instances, lead to a high level of deference.<sup>61</sup> By contrast, if only an informal policy position serves as the ground of agency action, courts apply the less deferential "Skidmore standard".<sup>62</sup> While under both types of standards, courts have been observed to be more likely to defer to agency actions than not, the varying standards of review (both between Chevron and Skidmore tests, and within the Chevron test itself) clearly give courts greater interpretive authority in some circumstances than others. How to characterize these standards thus has been an obsession of U.S. legal scholars.<sup>63</sup>

By contrast, neither Germany nor Canada distinguish between formal regulations and informal agency rules in setting standards of review. In Germany, the crucial distinction is between the interpretation and determination of constituent elements of a statutory provision ("*Tatbestand*") and the exercise of discretion ("*Rechtsfolge*").<sup>64</sup> With respect to *Tatbestand*, courts generally have full authority to determine the correct interpretation of the law.<sup>65</sup> Deference to the executive's interpretation of laws, including informal policy announcements, is subject to the legislature granting such administrative margin of interpretation.<sup>66</sup> High complexity or an agency's technical competence are

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<sup>61</sup> Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 80 *Georgetown Law Journal* 833

<sup>62</sup> Kristin Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 *Colum. L. Rev.* 1235 (2007).

<sup>63</sup> For a recent discussion, see Adrian Vermeule, *Chevron as a Legal Framework*, JOTWELL (October 24, 2017) (reviewing Kristin Hickman and Nicholas R. Bednar, *Chevron's Inevitability*, 85 *Geo. Wash. L. Rev.* 5 (2017), available at SSRN), <https://adlaw.jotwell.com/chevron-as-a-legal-framework/>; Kevin M. Stack, *Overcoming Dickey in Administrative Law*, 68(2) *University of Toronto Law Journal* 293-311 (2018)

<sup>64</sup> See Yutaka Arai-Takahashi, *Discretion in German Administrative Law: Doctrinal Discourse Revisited*, *European Public Law*, Vol. 6 Issue 1, 2000 at 73.

<sup>65</sup> German Constitutional Court, November 22, 2016 – 1 BvL 6/14, 1 BvL 6/15, 1 BvL 4/15, 1 BvL 3/15 (BVerfGE 143, 216).

<sup>66</sup> See Schmitz in Stelkens/Bonk/Sachs (eds.), *Verwaltungsverfahrensgesetz*, 9th edition, 2018 at 213.

in itself not a justification for deference.<sup>67</sup> In practice, explicit normative authorization is rare and courts are rather reluctant to assume implicit authorization.<sup>68</sup> Therefore, while court decisions may be influenced by previous administrative interpretations of the law *de facto*, courts tend not to defer to administrative decisions openly. It is only with respect to the facts of a case that courts defer to administrative provisions that standardize fact-finding efforts (in some areas of law).<sup>69</sup>

Canada, despite having a common law judiciary, takes an approach to statutory interpretation that arguably bears greater affinity to Germany than to the U.S.. Historically, courts frequently applied the “correctness” standard of review to all questions of statutory interpretation, which required little of courts by way of deference. In the seminal *Dunsmuir* decision in 2008,<sup>70</sup> the Supreme Court of Canada indicated that the “correctness standard” should be largely limited to areas where courts have distinctive competence,<sup>71</sup> whereas a reasonableness standard should be applied to the remaining areas. Moreover, there ought to be a presumption of the reasonableness of agency interpretation, which implies a more deferential view. However, a heavy dose of “contextualism” has led Canadian courts to fashion different subcategories of the reasonableness standard, leading to concerns that many courts engage in “disguised” correctness review.

Putting aside the richness and high complexity of these administrative law doctrines from different countries, our basic point is that the standard of review is widely regarded in Western democracies as a crucial factor determining the outcomes of judicial review, and that such standard can vary in ways that are independent of whether the judiciary is of a civil or common law character. Just as the Canadian standards of review seem more stringent than the American ones, the German standards of review seem more stringent than the Chinese ones. Nonetheless, it is possible to read into the pre-2015 practice in China a template that resembles the American standards, where courts are entitled to substantial non-deference at least with respect to IPDs. The 2018 SPC Interpretation, however, has fundamentally altered this state of affairs: courts’ standard of review of informal agency rules no longer includes reasonableness, and therefore is much weaker and requires courts to display greater deference.

#### IV. Innovations in the 2018 SPC Interpretation

The 2015 ALL for the first time provides plaintiffs with a right to request the court to review an IPD that the plaintiff deems to be “not in accordance with the law” (*buhefa*), concurrently with

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<sup>67</sup> German Constitutional Court, December 16, 1992 – 1 BvR 167/87 (BVerfGE 88, 40); see also Jan Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, *German Law Journal*, Vol. 9 No. 10, 2008 at 1271-1275.

<sup>68</sup> Examples of implicit authorization include administrative decisions that are based on predictions, risk assessments or evaluations. Oster, *id*; Yutaka Arai-Takahashi, *supra* note 64 at 75-76; Decker in Posser/Wolff (eds.), *VwGO*, 44th edition, 01.01.2018, section 114 at 35-36.

<sup>69</sup> For example, financial courts will apply amortization rules established by the tax authorities unless such provisions are unfair or lead to obviously incorrect results. Koenig, in Koenig (ed.), *AO*, 3<sup>rd</sup> edition, 2014, section 4 at 56-59.

<sup>70</sup> For a recent set of discussions, see *The Dunsmuir Decade*, <http://www.administrativelawmatters.com/blog/2018/01/11/the-dunsmuir-decade10-ans-de-dunsmuir/>.

<sup>71</sup> These include, for example, constitutional questions regarding the division of powers between Parliament and the provinces, determinations of true questions of jurisdiction, any question of general law “that is both of central importance to the legal system as a whole and outside the [agency’s] specialized area of expertise”, and questions regarding the jurisdictional lines between two or more competing specialized tribunals.

reviewing the agency action that serves as the original cause of action and to which the IPD purports to provide legal basis.<sup>72</sup> Such right to review does not extend to formal regulations.<sup>73</sup> Since courts are still generally required to consider the legality of any relevant formal regulation, the “review” of an IPD must therefore possess a special meaning. Accordingly, a newly added Article 64 of the 2015 ALL provides that if a court deems that any IPD to be “not in accordance with the law”, then not only should the court not rely on it to determine the legality of the disputed agency action—this was already the case under the pre-2015 law—the court should also provide the promulgating authority with “disposition recommendations”. In other words, the making of “disposition recommendations” (*chuli jianyi*) to the executive branch has become a remedy that a plaintiff may request as a matter of right.

The meaning of this new procedure received important elaboration in the 2018 SPC Interpretation, which contained a separate chapter on the concurrent review of IPDs. First, if a court discovers upon the review of an IPD that it is possibly illegal, it should seek the opinions of the promulgating agency, and give permission to such agency to state its opinion in court.<sup>74</sup> Second, courts are instructed to review the legality of IPDs, and do so with regard to not only the provisions on the basis of which the disputed agency action was taken but also “related provisions”. Specifically, any IPD is “illegal,” if it

- (1) exceeds the statutory remit of the promulgating authority, or the scope of delegation provided by statutes and regulations;
- (2) contravenes the provisions of any superior law;
- (3) illegally increases any obligation, or derogates from any lawful rights and interests, of any private party without appropriate basis in any formal law;
- (4) fails to comply with any approval procedures or public issuance procedures stipulated by law, or seriously violates promulgation procedures; or
- (5) otherwise violates the provisions of statutes or regulations.<sup>75</sup>

This set of factors represents the first time that the SPC has provided explicit guidance on legality review of IPDs.<sup>76</sup> In particular, the reference in clause (4) to procedures of approval, issuance, and promulgation in general suggests, for the first time, that violating adoption procedures may itself be sufficient ground for deeming IPDs invalid. However, what types of procedural requirements can be taken into account in the application of clause (4) remains to be seen.<sup>77</sup>

Third, consistently with pre-2015 practice, the 2018 SPC Interpretation instructs that illegal IPDs should not be used as the basis for a decision on the challenged agency action. It also instructs that the judgment should make explicit statements about such illegality.<sup>78</sup> Contrary to pre-2015 practice, however—and especially overriding the relevant provisions in the 2004 Shanghai Meeting Minutes—the 2018 SPC Interpretation instructs that once an IPD passes the legality test, it should be given legal effect. There is no longer any mention of a “reasonable and appropriate” review. In other words, *lawful IPDs are now binding on courts*. The standard of review for IPDs is lowered both relative to previous

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<sup>72</sup> 2015 ALL Article 53, par 1.

<sup>73</sup> *Id.*, par 2.

<sup>74</sup> 2018 SPC Interpretation Article 147.

<sup>75</sup> *Id.* Article 148

<sup>76</sup> However, such guidance presumably does not apply to the review of the legality of formal regulations.

<sup>77</sup> There are also no known statutory procedures for the promulgation of IPDs; there are at best some formal regulations that stipulate such procedures (see Cui 2010 for early examples in the tax area). Many procedural requirements for the adoption of IPDs are, ironically, set out in informal bureaucratic documents.

<sup>78</sup> 2018 SPC Interpretation, Article 149

practice, and to comparable practices in the United States (e.g. the Skidmore standard in reviewing informal agency rules). For advocates of strong judicial review, this can only be viewed as a major step backward.

Instead of elaborating the standard of review and strengthening judicial review along this dimension, the 2018 SPC Interpretation offers an unprecedented set of non-judicial remedies, where a reviewing court may initiate a post-adjudication process of communication with the executive branch, sometimes even obliging the latter to take action. Specifically, in the case of an IPD found to be illegal, a court, after entering a decision on the particular dispute, shall issue “disposition recommendations” to the agency promulgating the IPD. It may also copy “the people’s government at the same level as the agency, any agency at the next higher level, the supervisory authority, and any recordation authority of the IPD” on the recommendation.<sup>79</sup> Moreover—going beyond what is contemplated in Article 64 of the 2015 ALL—a court *may*, within three months from the date when the decision takes effect, provide the promulgating authority with “judicial proposals” (*sifa jianyi*) for an amendment or repeal of the IPD. If a court decided to submit such a judicial proposal, an agency receiving the proposal “shall” (*yingdang*) make a written reply within 60 days from the date of receipt of the proposal. In the case of emergency, a court may even propose that the promulgating authority, or the agency at the next higher level, immediately suspend the enforcement of the IPD.

The power for the judiciary to propose the amendment or revocation of IPDs (albeit only ones that are not in accordance with law) seems extraordinary. It is indeed unclear what basis a court has for imposing an obligation on the executive branch to respond. As if to strengthen its power to do so, the 2018 SPC Interpretation provides that if a court deems an IPD to be legally invalid, it is required to file the decision (post adjudication) with the court at the next higher level for the record.<sup>80</sup> Moreover, if an IPD promulgated by a department of the State Council or a provincial agency is involved, any judicial proposal made to the executive branch should also be submitted to provincial high courts and the SPC for record.<sup>81</sup> This seems to ensure that the finding of an illegal IPD will be escalated within the judiciary, and that first-instance courts are not left to their own devices to pursue the (rather entrepreneurial) undertaking of issuing recommendations to the executive branch.

The filing of decisions and proposals with higher courts also potentially facilitates a final set of remedies. The 2018 SPC Interpretation provides that “where the president of a court at any level discovers that any effective judgment or ruling of the court erroneously determined the legality of an IPD, and deems that a retrial was necessary, he/she would make a referral to the adjudication committee for the court for discussion.”<sup>82</sup> Moreover, “if the SPC or any superior court discovers that an effective judgment or ruling of a lower court erroneously determined the legality of an IPD, it (the SPC or superior court) has the authority to conduct a retrial or to appoint a subordinate court to do so.”<sup>83</sup> The ability of the judiciary to re-open cases that implicate controversial executive branch policy seems to provide an important incentive for agencies to respond to recommendations from the judiciary.

Table 2 summarizes these extraordinary measures.

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<sup>79</sup> Id, Article 149

<sup>80</sup> Id, Article 150

<sup>81</sup> Id, Article 150

<sup>82</sup> Id, Article 151, par. 1.

<sup>83</sup> Presumably, this type of retrial can be triggered both when the error involved was determining a legally invalid IPD to be valid, and when a legally valid IPD was determined to be invalid.

**Table 2: Remedies for the review of formal and informal agency rules**

	Pre-2015	2015 and after
Illegal regulations or IPDs as cause of action	No	No
Illegal regulations and IPDs not to be applied	Yes	Yes; new instructions on IPD legality review
Unreasonable or inappropriate IPDs not to be applied	Yes	No; court must give effect to legal IPDs
Post-adjudication procedures for recommendations to executive branch	No	Yes: <ul style="list-style-type: none"> <li>• Mandatory disposition recommendations</li> <li>• Optional judicial recommendations to amend or repeal (to which promulgating agencies must respond)</li> <li>• Optional recommendations for suspension of enforcement</li> </ul>
Post-adjudication procedures for filing with higher courts	No	Yes: Mandatory recording of illegal IPDs with higher courts
Right of higher courts to retry cases based on illegal IPDs	No	Yes
Interlocutory procedures for conflicts among regulations	Yes	Yes

### Conclusion

Our selective examination of recent developments in the judicial review of government actions in China prompts two reflections. First, much scholarly discussion in China about judicial review has engaged with proposals to revise the ALL, yet the ALL’s revision is clearly a matter of top-down institutional design, driven visibly by a small group of actors in the SPC and NPCSC. It is therefore useful to raise the question whether this sociological origin of the discourse on ALL has affected its content. For example, radical proposals that lack clear functional justification but that accentuate the symbolism of judicial review—such as creating a separate administrative court system, requiring agency chiefs to appear in court, and emboldening judges to constrain executive branch rulemaking—seem to attract perennial interest. At the same time, basic facts about how the thousands of court administrative divisions across China have handled cases tend to remain obscure—with the SPC acting as one of the few sources of information. Indeed, even the well-known “three difficulties” of bringing suits against agency defendants are not well-documented empirically: empirical accounts of what proportion of lawsuits had been declined by courts at the outset, for example, vary widely in their estimates. Accounts of grass-root judicial experimentation are similarly infrequent. While scholars in China have already begun to fill these gaps in research, it is important—especially for western commentators—to recognize the existence of these gaps and not conflate a stylized discourse on administrative litigation with its reality.

Second, the possibility that the discourse on judicial review in China has become too stylized, dominated by a few all-too-familiar tropes, is highlighted by the substantial changes that transpired in the last few years. An 87% increase in first-instance cases and 200% increase in appeals, accompanied by little court backlog and a sizeable increase in the rate of adjudication, provide prima facie evidence for

greater efficiency in court operations. But this is clearly not the same as the expansion of judicial power that many have advocated. However, Chinese scholars and policymakers have yet to articulate a framework for conceptualizing what forms enhanced judicial power should take. Should it, for examples, be courts' frequent use of various sanctions of agency misconduct in the course of litigation, of the power to make judicial recommendations for amending or repealing illegal IPDs, or of the authority to retry cases? Or should it, again for an example, be the ability of individual judges to introduce policy considerations into adjudication through reviewing the reasonableness of IPDs (which the Shanghai Meeting Minutes contemplated but which the 2018 SPC Interpretation seems to abolish)? An important and common theme in contemporary administrative law scholarship in liberal democracies is how to preserve the integrity of judicial review while recognizing the limitations of the judiciary within the modern state in the interpretation and enforcement of policy.<sup>84</sup> Arguably, this theme has largely been absent from Chinese discourse in reforming the ALL, even though, at least from a comparative perspective, it is a theme that can hardly be neglected.

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<sup>84</sup> See sources cited in notes 61-70 supra.

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