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PUBLIC LAW DEVELOPMENT IN CHINA: A MID-COURSE ASSESSMENT

Mike Dowdle

OVERVIEW:

In this paper, I briefly survey China's on-going efforts to develop its regulatory state. To-date, these efforts have focused primarily on structural rationalization. China's accomplishments in this area have indeed been impressive. But I argue that China may well be experiencing a phase-shift in its developmental trajectory, one in which continued focus on structural rationalization might well be increasingly dysfunctional. Instead, I suggest, China should be focusing more on promoting more local initiative and more robust information flows within and between public institutions.

PART I: DEVELOPMENT TO-DATE:

To-date, the bulk of China administrative legal reform and development has focused on codifying, harmonizing and rationalizing the administrative legal-regulatory system. And development in this area has indeed been impressive. Today, most if not all regulatory environments in China are formally structured by a more-or-less robust framework of laws and regulations. These include not only substantive legislation relevant to the particular regulatory

environment, but also an increasingly comprehensive meta-regulatory framework that governs key aspects of administrative behavior per se – what is often referred to as ‘administrative law’. The principal hole in this meta-regulatory legal framework is administrative procedure, but the Chinese legislative community is fully engaged in the process of addressing this lacunae.

However, these laws and regulations are far from being sufficiently harmonized. Individual regulatory environments are still plagued with substantive conflicts between different regulatory instruments, particularly instruments that issue from different regulatory agencies. These conflicts can significantly compromise legal regulatory effectiveness. But there is some evidence that the central constitutional apparatus is making progress in addressing this situation, at least insofar as administrative licensing and compliance with WTO are concerned. In many other areas, such as corporate governance, for example, progress along these lines is less clear.

The other principal aspect on which China’s administrative legal-regulatory development has so far focused has been on administrative rationalization. Particularly since the 1990s, the structure of the administrative apparatus has been increasingly visibilized, codified and streamlined. Overlaps in regulatory authority have been reduced. Core administrative functions – like administrative penalties and legislative record-keeping – have been increasingly centralized. The formal division of regulatory responsibilities between the center and the local has been progressively defined.

As with the related issue of legislative harmonization, however, regulatory development in this area is still far from complete.

PART II: THE PRESENT SITUATION

Recently, the focus of China's public law reforms has shifted from legislative harmonization and bureaucratic regulation more onto issues of implementation and enforcement. As a general matter, Chinese policymakers attribute China's present-day regulatory enforcement problems to three factors. These include a lack of legal awareness and proper regulatory 'mindset' among regulators; lack of adequate supervision of regulators; and continuing institutional ambiguities – particular an institutional overlap between regulatory entities and business entities.

With regards to the first of these factors, the lack of legal awareness and proper regulatory mindset, China has engaged in a number of recent initiatives that seek to address this problem. These include instituting legal training courses for promoting awareness of law among local administrators; and the development of numerous local and provincial regulations requiring local administrators to seek legal advice before making important decisions or issuing regulative documents.

With regards to the issue of supervision, has also begun focusing more attention on 'supervision'. Most of this attention focuses on bureaucratic (vertical) supervision systems – publicized examples include programs with such titles as "the responsibility system of administrative law enforcement", and the "system of investigation into wrong enforcement."

Details regarding such programs, however, are often lacking. But China also is slowly realizing the role that civil society can play in supervision as well (horizontal supervision).

For the most part, however, China's growing concern with enforcement has followed reform trajectories that closely parallel those that propelled its early concern with (formal) legal harmonization and rationalization – namely, focusing on resolving continuing problems of continued institutional ambiguity. This includes continuing the centralization of various administrative responsibilities; the development of more effective legislative recordkeeping; and further rationalization of departmental responsibilities and jurisdictions. A corollary aspect of this is the need to continue rationalizing the boundary between regulatory activity and market activity; and regulatory activity and special-interest lobbying.

At the same time however, there is reason to suspect that China's legal-regulatory system could well be experiencing a fundamental change in its developmental trajectory. For example, in a recent project report to the Asian Development Bank on administrative law reform, the State Council Bureau Legislative Affairs Office (Fazhi ju) noted that:

For a long time there has been too much stress on administrative efficiency. Now, with economic and social progress, people who have had their basic needs satisfied are concerned with fair political participation, fair allocation of social resources and the protection of the underprivileged and environment.

Elsewhere, that Report also stated:

In the early period of the past 26 years, greater importance was attached to economic development and the government's administration of economy according to law, and

considerable progress was made in this regard. But social progress lagged behind of economy, triggering some troubles. In recent years, the awareness of such troubles has led to stress on the coordinated development of economy and society [Part II, section II, 2)].

The Report's also acknowledged the need for "new approaches to and new modes of government to better adapt to new environment and new reality" and that "institutional improvement is not well adapted to the ever-changing real situation of reform and opening."

This parallels observations made by international observers. Randy Peerenboom, for example, has recently noted:

After twenty-five years, China is now embarking on a new – and critical - phase in the reform process. Economic reforms have resulted in a dramatic change in Chinese society, leading to greater demands on the legal system. All state actors – people's congresses, administrative agencies, the procuracy, the police – are under pressure to reform to meet the demands of a more diversified market economy and an increasingly pluralistic citizenry with greater consciousness of their rights. They are expected to handle matters in a just and efficient way, to be more transparent and to allow more public input in the decision-making and supervision processes.

. . . .

The period of easy reforms, if there ever was one, is over. At this stage deeper reforms are required, as acknowledged in the State Council's white paper on democracy, and by the [Supreme People's Court].¹

¹ Randall Peerenboom, Expert's Report: "China's Judicial and Administrative Law Reforms in Comparative Context: Rising Expectations, Diminishing Returns and the Need for Deeper Reforms," p. 1-2.

All this leads one to wonder about the efficacy of China's continued focus on structural, bureaucratic and legal rationalization. The problem is that bureaucratic rationalization is not an effective strategy for catalyzing or implementing transformative change. In fact, just the opposite: bureaucratic rationalization could well end up solidifying and institutionalizing precisely those aspects of the legal-regulatory system that impede the effective response to China's transforming regulatory demands.

PART III: ASSESSING THE FUTURE

Along these lines, some notable, new developmental trends have been observed. These include establishing "feedback" (monitoring) and accountability systems; including more public participation in administrative decisionmaking; institutionalizing cost-benefit analyses in legislative drafting; strengthening the administrative reconsideration and public petitioning systems, promoting and reforming methods for hiring and promoting career civil servants.

Of these, the last of these trends, that of reforming methods for hiring and promoting career civil servants, seems to represent the most important, new and promising developmental trajectory with regards to China's regulatory system. As mentioned above, one of the major impediments regulatory development in China is the resistance of many lower-level officials. This resistance has generally been attributed to a lack of 'legal consciousness' among public administrators. And the developmental response has generally been to address this issue through education. However, many studies suggest that this resistance often is not due so much to regulatory or

moral ignorance as it is to perverse professional incentive structures. If advancement and promotion are determined primarily by certain kinds of economic achievements, for example, lower-level administrators will intentionally choose to ignore legal niceties when those niceties threaten to interfere with promotion-promoting economic growth. In such situations, more training and education would be of little effect, since the legal violations are not do to lack of knowledge, but to a considered and informed desire to improve one's own lot.

A case in point: One of the problems that impede effective public administration in China is the close link between administrative organs and 'economic entities'. China actually promotes this linkage through the established practice of rotating public officials between administrative units and economic entities.² This rotation often allows economic entities to gain significant say over officials' professional development, and thus gives these officials significant incentive to incorporate the private economic concerns of these enterprises into his or her regulatory activities. Neither structural rationalization nor training seminars can address this problem. The problem is one of professional incentives, and it can only be addressed by rethinking the way that civil service careers are being structured by the system.

The other developments mentioned *might* represent significant steps towards establishing this new developmental trajectory. But their prospective contribution is more circumscribed.

Collectively, these themes can be seen as efforts to promote more effective regulatory feedback. In this way, they could represent a significant departure from the traditional developmental

² See 党政领导干部交流工作规定, art. 12.

emphasis on the codification, harmonization, rationalization and centralization of the regulatory system—emphases that work primarily to promote the effectiveness of center’s command-and-control function. Studies of institutional innovation, particular transformative innovation of the kind that China may be presently facing, have found that getting the feedback mechanisms right is very important to the success of the transition. The particular kinds of knowledge that feed transformative innovation, experiential knowledge, tend to enter an organization primarily at its lower bureaucratic levels. By contrast, the traditional, bureaucratic command and control structures, such as those that have heretofore been the overwhelming focus of China’s regulatory development, are designed to transmit information down through the organization, rather than up. Establishing effective feedback mechanisms that can transmit otherwise lower-level, experiential knowledge into organizational consciousness is often a critical step in promoting institutional innovative capacity.

But as actually implemented, recent efforts to regulate feedback mechanisms have often worked to impede rather than facilitate the particular kind of change-inducing feedback discussed above. The recent reforms of the petitioning system can be seen as a cautionary case-in-point. There is some question whether the May 1, 2005 regulatory amendments to this system mentioned in the Report were indeed concerned with promoting letter-and-petitions as a more effective form of regulatory feedback. Some of its provisions suggest a stronger concern with promoting regulatory order—i.e., more effective regulatory command and control – “[laying] a solid foundation [for] lawful and orderly work” in the words of the Report – over the petitioning system. In doing this, they could actually work to impede rather than promote the petitioning system’s feedback capacities. The Report’s interest in feedback might mean greater interest in

regulatory learning. But it could also simply represent simply another means for centralizing regulatory control.

Another example of the ambiguous nature of this kind of reform is seen in China's recent effort to introduce cost-benefit analyses into policy decisionmaking. While looking nice on paper, analyses are likely to be difficult to implement in a regulatory environment in which significant portions of administrative expenditures occur off-the-books, and in which there is little apparent experience in regulatory accounting. They would be of questionable benefit in a regulatory environment that has little experience with social accounting standards such as green accounting.

At the end of the day, I think that China's need to focus its public law development much more on collecting and analyzing concrete issues and experiences – case-studies if you will -- and on related issues of prioritization, and less on codifying generalized lists of problems and needs. Local (by which I mean include both the geographically local and the bureaucratically localized) experiences in trying to deal with specific regulatory problems should be canvassed, compared and explored. Progress benchmarks should be established, based on actual, existent solutions rather than on idealized standards.

This may require or otherwise benefit from the development of national social accounting and regulatory audit systems. For example, the National Statistics Bureau's Green GDP project (a limited form of social accounting) would seem to be a critically important experiment that, if proven effective, could be adapted and expanded to other social areas so as to inject concerns for fairness and justice more effectively into regulatory decisionmaking. Regulatory audit systems

provide standardized frameworks for assessing the cost and benefits of regulatory schemes, and thus allow for meaningful comparison of different regulatory schemes.

Similarly, I would recommend that legislative harmonization be pursued through regulatory audits and bureaucratic harmonization be pursued through ‘learning-by-monitoring schemes’. Regulatory audits would allow legislative harmonizers to compare the effectiveness of competing regulatory schemes, and to learn from the (divergent) experiences of divergent local schemes rather than simply snuffing these local schemes, and the knowledge they have acquired, out of existence. Similarly, ‘learning by monitoring’ schemes³ would seek to resolve regulatory overlap and ambiguity through mutually exploration and comparison of the different experiences and competences of the overlapping regulators. It would ‘rationalize’ regulatory order by allowing the overlapping regulators to negotiate division of responsibilities among themselves rather than by formalistic extrapolations from an abstract organizational chart.

This is not intended as an argument against centralization *per se*. Indeed, I agree with the Report’s suggestion that it is particularly necessary to centralize administration or oversight of those aspects of administrative responsibilities that pose significant free-rider problems, or that are likely to affect the foundational security of property and liberty that the PRC Constitution grants to its citizenry.

Along these lines, I would further recommend that consideration also be given to the development of a centralized administrative reconsideration system—perhaps similar to the

³ See Charles F. Sabel, (1994). “Learning by monitoring: the institutions of economic development,” in Smelser, N J and Swedberg, R (eds) *The Handbook of Economic Sociology*. Princeton, NJ: Princeton University Press.

French administrative court system. The same rationales that advocate centralization of administrative licensing and other administrative punishment powers would argue for the centralization of administrative reconsideration. It would also streamline resource allocation, and eliminate a major source of redundancy among administrative bureaus.