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# JUDICIAL REVIEW AND CONTROL OVER ADMINISTRATIVE DISCRETION IN THE PEOPLE'S REPUBLIC OF CHINA

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## 1. Introduction

The control of discretionary powers over an administrative body is a basic political problem in modern government. However, many socialist countries have gone through major developments in this area. Yugoslavia was the first to introduce a system of judicial control of the administration in 1954 with the Law of Administrative Disputes. In the same year, the Hungarians started their work on amending the code of Administrative Procedure. In 1964, Rumania enacted a new statute concerning judicial review; Bulgaria followed this example in 1970. The Law on the Procedure for Appealing to the Courts against Unlawful Acts of Government Officials was adopted by the USSR Supreme Soviet on 30 June 1987 and came into effect on 1 January 1988.[1] Two months before the June 4th Incident in 1989, the National People's Congress of China adopted the Administrative Litigation Law (also known as Administrative Procedure Law). The Law came into effect on 1 October 1990.

The aforementioned socialist countries are representative of the concern felt worldwide about the problem of administrative impropriety. This problem has become so burdensome that these countries must not only admit its seriousness but also take immediate actions to handle it. The employment of judicial intervention into administrative operations in socialist countries cannot be taken to imply the vindication of judicial

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1. Hiroshi Oda, "Judicial Review on Administration", *Public Law* 1989, 111-115.

supremacy over administration. Instead, judicial control should be separated from the legitimate area of discretion of the administration and demonstrate sensitivity to management problems and priorities. A case in point includes a citizen's right to initiate an action in court against administrative impropriety in China. This article attempts to document and analyze the Chinese governmental attitude towards discretionary powers held by government officials.

We will start with an examination of the Administrative Litigation Law (ALL) and demonstrate how broad discretion has been increased dramatically in the interest of administrative efficiency and expediency. Subsequently, we shall document the conditions required to petition for judicial review in accordance with the ALL. This second section considers the direct reasons for administrative impropriety. Rather than discussing these reasons in the abstract, we will analyze the facts in the related case law. It should be mentioned that *Anli* (judicial precedents) do not have a binding legal effect and are still regarded as classified information in China. The underdeveloped state of many areas in Chinese law means that courts use model cases as a guide for decisions in similar cases. Only when a prior case is used to decide similar court cases do judicial precedents have any legal application.[2] Those casebooks that have been published recently lack proper citations, and sometimes do not contain any dates, places and/or names of the parties. Despite these deficiencies, this article discusses cases published in the *Seasonal Bulletin of the Supreme People's Court*. Further, court rulings with proper citations, which have appeared in legal journals and Chinese newspapers, and cases without proper citations, yet popularly cited and discussed in the aforementioned Chinese casebooks, will be used for illustrative purposes.

The third section concludes this article with a discussion of the difficulties in implementing the ALL. It will focus on an analysis of confidential governmental documents on the problems of implementing the ALL.

2. See Nanping Liu, "Judicial Review in China: A Comparative Perspective", 14 *Review of Socialist Law* 1988 No.3, 243-250; Jeanette Pinard, "The People's Republic of China: A Bibliography of Selected English-language Legal Materials", *China Law Reporter* 1985 No.1, 52-55.

## 2. The Relationship of Courts and Administration: Conflict or Constructive Tension

Earlier public service models in Western administrative law view the rise of the administrative state as a challenge to democracy.[3] These models argue that a democratic regime must maintain the separation of powers in order to assure that no branch of government will be able to establish autocratic dominance over the other. The political structure is therefore construed "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy", to paraphrase Justice Brandeis in his famous dictum in *Myers v. U.S.*, 1926.[4] Seen as such, there is a tension between courts and administration. It remains unclear as to whether this tension is a constructive or conflicting one. David Rosenbloom has argued since the early 1970s that an effective working relationship between courts and administration can be developed.[5] Phillip Cooper, in echoing the same view, contended that over the past several decades the federal courts in the United States have begun to recognize the need for greater flexibility and have demonstrated a sensitivity to management problems.[6]

The question as to which type of relationship between courts and administration would lead to responsible government cannot be answered easily. This article does not attempt to resolve that problem. However, two premises are considered to be essential to any discussion about law and administration.

The first is discretion, which is an essential component of modern public administration. Regardless of differences in ideologies and levels of political, social, and economic development, continued social, economic, and technological development has spawned demands for regulation in a broad range of policy areas. In the course of translating vague legislative mandates into policy programmes, administrative dis-

3. See David Rosenbloom, *Federal Service and the Constitution: The Development of the Public Employment Relationship*, New York 1971; *idem*, *Public Administration: Understanding Management, Politics, and Law in the Public Sector*, New York 1986; *idem*, *Towards Constitutional Competence: A Casebook for Public Administration*, New York 1990.
4. *Myers v. United States* (272 U.S. 52, 1926), 293.
5. David Rosenbloom, *op.cit.* note 3, *Federal Service and the Constitution*, 198-227.
6. Phillip Cooper, "Conflict or Constructive Tension: the Changing Relationship of Judges and Administrators", *Public Administration Review* 1985, 643-652.

cretion can be seen as the necessary step to fulfil citizens' needs. The courts have accommodated the growth of administrative discretion. The reason for this is that problems are too diverse and individually specialized and the environment is too dynamic for legislators to provide more than a moderate amount of guidance to those who must administer public programs.[7] Another notion that has gained some recognition is that bureaucratic rationality is a promising form of administrative justice. Administrative action replaces both legislative enactment and judicial adjudication as the primary means for creating legal rules and resolving legal disputes because of its bureaucratic supremacy in terms of professional knowledge, field experience, and a high degree of division of labour.[8] A lack of discretion would stifle creativity and confine administrators to rigid behavioral patterns.

The second premise is that law is intended to, and does, in fact, limit discretion. This is based on the argument that discretion is felt to be a source, or at least a precondition, for arbitrary or unreasonable government behaviour. There is an unavoidable tension between interest and duty when administrators exercise discretion. Commentators argue that individual interests are bound to be at odds with the obligations of the organization. Whenever bureaucrats face a situation in which their individual interests conflict with their role-related duties and obligations, they are likely to resist the demands of the role or at least negotiate some kind of compromise.[9]

Although many have acknowledged citizens' greater reliance on government for the provisions of public goods and services, others have argued that there are circumstantial elements in organizational processes which discourage public bureaucracy's responsiveness.[10] Inadequate resource support and heavy workloads within administration lead administrators to exercise discretion in rationing public service on an *ad hoc*, reactive, and context-dependent form of decision-making.[11] The

7. *Idem*, *Public Law and Public Administration*, California 1983, 643-644; Robert Merton, "Bureaucratic Structure and Personality", *Reader in Bureaucracy*, (Robert Merton, ed.), New York 1952, 361-371.
8. Jerry Mashaw, *Bureaucratic Justice, Managing Social Security Disability Claims*, New Haven 1983, 213-227; *idem*, *Due Process in the Administrative State*, New Haven 1985, 102-170.
9. Terry Cooper, *The Responsible Administrator, An Approach to Ethics for the Administrative Role*, Revised Edition, New York 1986, 64-74.
10. Michael Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Service*, New York 1980, 33-39.
11. *Ibid.*

value of bureaucratic supremacy is downrated because of the growing realization that many of the agencies deal with issues involving broad considerations, including particularly value judgment, which transcend any particular body of specialized knowledge. Complete discretion may be counter productive because it may violate the requirement that administrative decision-makers do not judge over their own cause.[12]

These two premises outlined above should not be viewed as diametrically opposed. The preceding discussion simply suggests that the rule of law requires the administration to derive power from the law and to be limited by it. The extent of this limitation depends on an inquiry into balancing the need for administrative flexibility, the nature of the issue, as well as the resistance of the judges confronting interference against the liberties of the citizens. The extent of the limitation varies over time and in different manners in different countries.

## 3. The Administrative Litigation Law in China: A Street-level Management Law

Under the general heading of administrative law in common law systems, rules can be found dealing with matters which appear to be "administrative" in a very broad sense. This notion of administrative law singles out a wide range of state activities as acts of an administrative character, some of which may extend beyond the managerial or executive functions of the state.[13] In sharp contrast to this broad notion of administrative matters, acts of administrative character in China are specifically defined. In China, the categorization of such acts includes:

1) *Xingzheng Faqui* and *Xingzheng Guizhang* (administrative regulations and administrative decrees). The former refers to the regulations issued by the State Council and the latter to the regulations issued by the designated administrative authorities. Both are vested with the powers to enact regulations and decrees with a general legal binding effect;

2) *Xingzheng Zhiling* (administrative orders). This category refers to the decisions given by administrative authorities with regard to the in-

12. Ian Thynne & John Goldring, *Accountability and Control, Government Officials and the Exercise of Power*, London 1987, 136.
13. *Ibid.*, 138.

ternal discipline of the organizations, which include orders of authorization, employment, reprimand and dismissal, etc.;

3) *Jueding* and *Jueyi* (decisions and resolutions). The former refers to decisions on important actions and arrangements for administrative related matters, while the latter sees to the resolutions on implementing policies and decisions made;

4) *Zhishi* (directives). This category refers to the directives issued, either in verbal or written form, by higher administrative authorities addressing lower authorities with instructions of tasks to be attained;

5) *Pifu* (official replies). They refer to the official, written reply from superior bodies to the subordinate ones;

6) *Tongzhi* (notifications). They refer to the notifications sent out by an administrative authority to a third party. These notifications are usually part of the administrative procedures, and known as *tonggao* (public notices), *tongbao* (administrative circulars), *gongbao* or *gonggao* (promulgations or announcements);

7) *Shouli* (acceptance of a case). This category refers normally to the decision of an administrative authority to accept a case for further administrative actions to be taken;

8) *Zhengming* (attestation). It refers to the act of an administrative authority to attest to the status, usually a legal one, of a third party, or to certify the status of a legal fact, or to clarify the status of the legal relationship of the person/parties concerned;

9) *Queren* (rectifications). This final category refers to the act of an administrative authority to rectify, after going through specific formal or legal procedures, the legal status of a third person, the status of a legal fact, or the legal relationship of the person/parties concerned.[14]

The above categorization is not meant to suggest that Chinese courts have the power to examine every aspect of an administrative action. The

14. Gan Fang, *et al.*, *Xingzheng Fa Zonglun*, Hebei 1990, 79-80.

powers of the courts in countries like the United Kingdom, Australia, France and the former Soviet Union do not extend to the authority to decide whether the decision under review is or is not correct.[15] Lord Scarman in *Chief Constable of North Wales v. Evans*, 1982 said that judicial review of an administrative action sees to the decision-making process, not to the decision itself.[16] Similar to the practice under English and French law, the working principle applied in China proceeds from a distinction between questions of legality and questions of merits. According to the Provisional Guidelines on Questions Arising from the Specific Application of the Law (ALL) issued by the Supreme People's Court in 1987, Chinese courts are not permitted to delve into the merits of the case. Their work is restricted to the questions of legality, meaning that judicial control checks whether the power has been exercised within the limits set by the law. The courts must refrain from examining the appropriateness of the exercise of a power.

The ALL sets the limits for judicial control on administrative operations by invoking the boundaries between two acts of administrative character: *chouxiang xingwei* (an abstract act) and *juti xingwei* (a specific act). Article 2 of the ALL states that abstract administrative acts cannot be subject to judicial review in court, whereas specific administrative acts can. Article 11 of the ALL defines the scope of acceptance of cases and clearly identifies the following specific administrative acts as reviewable in court. They include:

(1) administrative penalties such as detention, fines, cancellation of permits and licenses, orders to cease production or business or confiscation of property;

(2) coercive administrative measures such as a restriction of personal freedom or the sealing up, seizing or sequestering of property;

(3) infringement by administrative authorities of their operational autonomy as defined by law;

(4) either rejection of, or failure to reply by, an administrative authority to an application submitted to this body for the issuance of permits and licenses, despite its compliance with the legal requirements for application;

15. See Oda, *op.cit.* note 1, 111-121; Colin Reid, "The Polish Ombudsman", 14 *Rev.Soc.Law* 1988 No.3, 255-257; *idem*, "The Ombudsman's Cousin: The Procuracy in Socialist States", *Public Law* 1986, 311-326; John Bell, "The Expansion of Judicial Review over Discretionary Powers in France", *Public Law* 1986, 99-121; Tony Weir, "Governmental Liability", *Public Law* 1989, 41-63.
16. 1 *W.L.R.* 1155 (1982), 1173.

(5) either rejection of, or failure to reply by, an administrative authority to an application for performance of the administrative authority's legal responsibility to protect personal and property rights;
(6) failure by an administrative authority to pay, in accordance with the law, pensions for disabled persons or to the family of a deceased;
(7) an unlawful requirement by an administrative authority with respect to the performance of obligations; or
(8) an infringement by an administrative authority of other personal or property rights.

Apart from the cases stipulated in the preceding paragraph, People's Courts will accept and hear all other administrative cases in which the bringing of proceedings is permitted by law or rules and regulations.

Article 12 states that the People's Courts shall not accept or hear cases in which citizens, legal persons, or other organizations bring proceedings in respect of the following matters:
(1) acts of State pertaining to such matters as national defense or diplomatic relations;
(2) administrative rules and regulations, articles and by-laws or generally binding decisions or orders formulated or issued by administrative authorities;
(3) decisions of administrative authorities on matters such as reward and punishment and appointment and dismissal of personnel; and
(4) specific administrative acts that are stipulated by law as to be finally decided by administrative authorities.

Elaborating upon the reasons for not providing judicial relief in cases involving abstract administrative acts, Article 12(1) states that acts of State, being classified as political acts, are not justiciable because they are essentially political, and prudence requires judicial deference to other branches of government. Article 12(3) implies that internal matters in public administration are not reviewable in courts for these cases involve issues and concerns beyond the managerial competence of the courts.

Article 12(2) and 12(4) raises an important concern because it substantially limits the availability of judicial review. In the literal sense, an aggrieved citizen is not entitled to recourse in a court if: (a) the alleged administrative act is not classified as specific; and (b) although a specific one, if the administrative act is stipulated by law to be decided

finally by administrative authorities, even assuming that the rights have been infringed by the unlawful act of a government official.

The differences between abstract and specific administrative acts are not easy to disentangle. It might be more useful to illustrate the differences between them by using an example from case law. On 3 February 1987, Xu Guangming was punished by the Guangzhou Public Security Bureau for not complying with the Security Administrative Punishment Act 1982. He was alleged to have driven his motorcycle in the Mingchen Street of the Liwen District in Guangzhou, which was not safe for motorcycling. He had engaged in physical contact with four policemen from the Bureau. The Guangzhou Public Security Bureau charged him for misconduct, failure to comply with the 1982 Act, and physical assault on one of the four policemen. He was later found guilty by the Bureau. The Bureau ruled that he would be administratively detained for 15 days according to Article 19(7) of the 1982 Act. Also, he was fined RMB 100 for his failure to comply with the 1982 Act in driving his motorcycle in a prohibited area.[17]

The plaintiff, Xu Guangming, could initiate an action in court to quash or to alter, in part or in whole, the Public Security Bureau's decision to detain him administratively, the duration of the detention, and/or the decision to fine him and the amount to be fined. He was not, however, entitled to bring a suit against the Bureau to challenge its authority to fine him or the authority of the authorized State bodies to enact administrative regulations and decrees with general binding effect.

To mark the difference between an abstract and specific administrative act, it should be noted that a specific administrative act is a *zhifa xingwei* (law-executing act), creating a specific legal relationship between an administrative authority and a citizen. In contrast, an abstract administrative act is a *zhengce zhiding xingwei* (policy-making act), which creates nothing more than a general relationship between the State and citizens. The policy-making act does not aim to define the relationship between a private individual and the State. Instead, it establishes the legal authority of administrative authorities to enact rules and regulations, which bind all citizens. Logically spoken, the ALL provides that only when a specific "adverse effect" has arisen from a

17. Huanguang Zheung, *Xingzheng Susong Ji Dianxing Anli Tanxi*, Beijing 1989, 10-12.

specific legal relationship between the State and a private individual can People's Courts intervene.

The decision that an abstract administrative act is not judicially reviewable is rooted in the notion that the power to judge the appropriateness of an administrative act is vested in the higher administrative authorities. In a way, it is hierarchical authority rather than judicial power that decides on the appropriateness of an administrative act. Another notion that seeks to explain this arrangement is that an abstract administrative act can only be reviewed in the National People's Congress. Since the State Council is the highest organ of State administration, the power to alter the administrative rules and regulations, administrative orders, decisions and resolutions, directives, etc., rests with the National People's Congress (Article 2, Constitution of People's Republic of China 1982). Thus, the power to alter an abstract administrative act should be seen as a legislative-sovereign act, which is subject to no higher authority. The People's Courts, therefore, have no power to review it.

Drawing upon the demarcation between law-executing and policy-making acts, the ALL provides legal protection merely against unlawful street-level bureaucratic performance. In a way, the ALL implies that problems regarding the exercise of discretion are conceived from matters arising within street-level management. Matters dealing with an abstract administrative act are not justiciable. The reason may well be that aside from implying a lack of expertise in the People's Courts, the ALL deems judicial control on administrative operations involving abstract administrative acts constitutionally inappropriate.

According to the *Fazhi Qingkuang Jianbao* (Report on the Implementation of Law), published by the *Fazhi Ju* (Bureau of Law Making) of the State Council on 24 January 1989, the introduction of the ALL was aimed at enhancing the State's management capability. The document specifically considered the strengthening of the administrative authorities' capability to develop administrative rules and regulations. The Report held that the development of administrative rules and regulations was to provide and further consolidate the legal basis of administrative authorities. When enacted by the designated administrative authorities, the administrative rules and regulations would provide the guidelines by which disputes involving administrative operations between citizens and State organs would be resolved. Nowhere in the Report is reference made to the controlling and structuring of administrative discretion.

To assess the Chinese governmental attitude towards administrative discretion implies answering the fundamental question of how power is apportioned between the People's Courts and administration. When considering Articles 54, 56 and 67 of the ALL,[18] we note that the remedies available from a court include revoking the administrative act (Article 54), compelling the exercise of a specific administrative act (Article 54), ordering compensation (Article 67), and referring the responsible administrative official to public security or procuratorial authorities (Article 56). Since policy choices are essentially policy making acts, the People's Courts must defer making their own decisions. The intent is to respect the decision of the People's Legislature to consign regulatory responsibility to administrative authorities and to entrust that policy choices inherent in translating regulatory statutes and interpreting policy decisions are made by State officials rather than by People's judges. To facilitate managerial flexibility in policy choices, the People's Courts must fully observe the need for administrative discretion.[19] Judicial deference to the administrative agency's need for discretion and interpretation of law is simply one way of recognizing that the People's Courts must step aside to free the agency to resolve what policies and the accompanying statutes shall mean, even such a resolution involves defining the limits of the agency's authority. This observation underscores a critical point: the choice for a deferential model is ultimately a choice about allocating free discretion in policy making level, subject neither to limits nor to control over the exercise of discretion. This choice in itself reflects that the ALL serves to swell administrative power of State organs, and not to help counterbalance it.

By adopting an enumerative clause to limit the availability of judicial review, the ALL simply holds people who perform an "act" responsible in law for administrative impropriety rather than those who decide upon the "act".[20] It follows that the State officials who make and interpret laws are immune from liability and are excluded from judicial scrutiny. Such a provision exhibits the judgement of the People's Legislature underlying the ALL that administrative authorities should have considerable discretion to interpret a regulatory scheme.

18. See *Appendix, The Administrative Litigation Law* 1989, Articles 54 and 56, 3 *China Law and Practice* 1989 No.3, 37-57.
19. *Xingzheng Zhifa Yu Xingzheng Susong*, (Zhicheng Zheng, ed.), Beijing 1990, 375.
20. Edward Epstein, "Administrative Litigation Law: Citizens Can Sue the State But not the Party", *China News Analysis* 1989, 1-9.

## 4. Administrative Impropriety in China: Abuse of Discretion, A Street-level Perspective

The preceding discussion does not seek to undermine the importance of the ALL. The 1982 provision dealing with a citizen's right to bring a proceedings against administrative impropriety[21] is considered a breakthrough and an advancement towards the development of rule of law in China. It is hopelessly remote to expect that a new political structure on the basis of separation of powers can be evolved in the near future in China. The provision of judicial control on street-level bureaucratic performance seems to be one practical way to deal with administrative impropriety.

Modern social science theory provides a solid basis to underscore the importance of monitoring street-level bureaucratic behaviour. It has been argued that the decisions made by street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressure, effectively become the public policies they carry out.[22] Common sense dictates that citizens are increasingly dependent on the government to provide services. The result, however, is that they are placed in a no-choice situation. Inadequate resources trap the street-level bureaucrats between an overbearing workload and a lack of time and energy for attending to all of the citizens' needs. To overcome this problem, they develop a series of stereotypes in order to ration their time, energy and concern in trying to meet all the citizens' needs. In such a discretion-prone situation where one has to work in the absence of direct and close proximate supervision, administrative impropriety is likely to occur.

Modern legal analysis concentrating on the judicial control of the abuse of discretion often revolves around acts of legal power, *i.e.*, acts which, if valid or invalid, produce legal consequences. An assessment of the policy consequences of administrative operations does not usually fall into the domain of administrative law.[23] The study of law-executing acts or acts of street-level bureaucrats seems appropriate to start an analysis on the issue of judicial control on administrative discretion in China.

21. The right to sue an official was first promulgated in the 1982 Security Administrative Punishment Act.
22. See Lipsky, *op.cit.* note 10, 117-131.
23. H. Wade, *Administrative Law*, London 1982, 349.

Legal commentators have severely criticized Article 4 of the ALL, which states that in hearing administrative cases, the People's Courts shall take facts as their basis and law as their criterion. The vagueness in this provision has left the appropriate standard by which courts should determine the legality of administrative acts open for debate.[24] Nonetheless, the ALL provides an effective mechanism for checking against administrative impropriety. Article 32 of the ALL states that the defendant (an administrative authority) shall bear the burden of proof with respect to specific administrative acts and shall provide evidence for performing such specific administrative acts and the regulatory documents on which such specific administrative acts were based. It requires that an administrative authority put forward proof of: 1) clarification of the facts; and 2) the basis of their acts on appropriate rules and regulations.[25] By switching the burden of proof, the ALL has struck a balance of power between a citizen and an administrative authority. By enabling individuals to challenge the validity of such administrative actions, Chinese officials must now appear in courts and defend the legality of their acts.

The meaning of administrative impropriety is not susceptible of clear and uncontroversial definition. This article chooses to discuss this concept along the basic ideal of the rule of law: government by law and not by men.[26] The rule of law means that all government actions must be founded in law, as well as authorized by law. In the Chinese context, the analysis of administrative impropriety can be illustrated by a range of court decisions developing the principle of governing acts that have a specific administrative character. In requiring the reasonable exercise of power, the People's Courts are working within the boundaries of principles similar to those of the West, although categorized in a different manner.[27] Thus, the exercise of a power by administrative authori-

24. Jin Xiang Jueyi de Piao Tongji, *Wen Hui Pao*, Hong Kong, 5 April 1989, 1; Susan Finder, "Like Throwing an Egg Against a Stone, Administrative Litigation in the People's Republic of China", 3 *Journal of Chinese Law* 1989 No.1, 23.
25. Huanguang Zheung, *op.cit.* note 17, 34-35.
26. See discussion in Michael Allen, Brian Thompson & Bernadette Walsh, *Cases & Materials on Constitutional & Administrative Law*, London 1990, 119-124.
27. See discussions in Michael Allen, *et al.*, *op.cit.* note 26, 367. The ways to categorize the grounds for judicial review vary. In *Council of Civil Service Unions v. Minister for the Civil Service*, 1985 AC 374, 402, Lord Diplock developed the principles of illegality and irrationality. Michael Allen, *et al.*, re-categorized Lord Diplock's ideas and put these ideas under the general rubric of illegality, which covered the following groups:

ties will be struck down if it makes one or more of the following determinations: 1) the principal evidence is insufficient; 2) the application of laws and regulations is erroneous; 3) the legal procedures were violated; 4) a decision exceeded authority or; 5) an abuse of authority by an administrative authority.[28]

### *4.1 Review on Evidence*

The first principle is the review on evidence. Aside from defining "competence evidence",[29] the ALL stipulates that the clarification of matters through a process of analysis and abstraction from facts determines the legal nature of an administrative act and hence the applicable rules of law. The key phrase to be studied here is "clarification of matters". In *Lin Jianxiong v. Fuxin Weisheng Ju* (the Bureau of Medical and Health in Fuxin), the court decided that four conditions should be met before an administrative penalty could be imposed upon an individual for an act in violation of the law. They are:

1) the alleged individual must be capable of performing such an act and fully aware of his right;
2) the alleged individual must have a "subjective" purpose of doing the legal wrong;
3) the alleged individual must have performed the act; and
4) the alleged act must have violated the corresponding rules and regulations.[30]

In another case relating to an unlawful act of a law-enforcement agency, the court annulled the specific administrative act as it was based

(1) An authority must not exceed its jurisdiction by purporting to exercise powers which it does not possess.
(2) An authority must direct itself properly on the law.
(3) An authority must not use its power for an improper purpose.
(4) An authority must take into account all relevant considerations and disregard all irrelevant considerations.
(5) An authority to which the exercise of a discretion has been entrusted cannot delegate the exercise of its discretion to another unless clearly authorized to do so.
(6) An authority must not fetter its discretion.
(7) An authority must not act in bad faith.
(8) Finally, an authority acts unlawfully if it fails to fulfil a statutory duty.

It must be remembered that in drafting the Administrative Litigation Law, Chinese officials have adopted a similar but nonetheless different categorization.

28. See *Appendix, The Administrative Litigation Law* 1989, Article 54.
29. See *Appendix, The Administrative Litigation Law* 1989, Article 32.
30. Zhicheng Zheung, *Beigao Xi Shang de Qidi, Xingzheng Susong Daian Jingxi*, Jiangsu 1990, 193.

on irrelevant considerations and ignored relevant considerations.[31] This is the express basis of the reasoning in revoking administrative decisions.

### *4.2 Review on the Application of Law*

The second principle is the review on the application of law. The theory behind this principle is that People's Courts are obliged to ensure that administrative authorities are applying rules and regulations legally. The discretion exercised by a public security bureau at issue in the case, *Huang Weijun v. Gongan Ju* (Public Security Bureau), in which the Bureau had taken a mediating role between the parties concerned. The *Huang* court overruled the Bureau's and the lower court's decision on the basis of Article 50 of the ALL, which stipulates that in hearing administrative cases, the People's Courts shall not apply mediation.[32]

It is policy to rule against a misapplication of law involving the founding of administrative decisions on ineffective and inappropriate administrative rules and regulations.[33] In *Chen Yulia v. Shuilin Ju* (Bureau of Water Conservancy) and *Shiyou Yehun Huazhi Gongsi* (Petroleum and Oil Liquefaction Company) *v. Chengshi Huanjing Baohu Bangong Shi* (City Environmental Protection Office), the courts ruled that all laws should be prospective and cannot be a retroactive. The decision of the administrative authority was set aside simply because the law did not exist at the time of the action.[34]

Through their decisions, the courts in *Lin Jianxiong v. Fuxin Weisheng Ju* set forth some further guidelines for the application of rules and regulations regarding the imposition of an administrative penalty. Firstly, to minimize administrative impropriety, the court held that an administrative penalty can be imposed only on acts specifically defined as punishable by law. Secondly, the same act cannot be punished twice. Thirdly, the form of an administrative penalty must be in full accord with those specified by administrative authorities.[35]

31. *Ibid.*, 148-151.
32. *Ibid.*, 26.
33. *Ibid.*, 26, 43, 181.
34. *Ibid.*, 187, 197.
35. *Ibid.*, 194.

### *4.3 Review of Procedure*

The third principle deals with the review of procedure. Administrative impropriety is always associated with procedural irregularities, situations in which procedures, although they are prescribed by law, are not followed. Although it is reasonable to infer a presumption of procedural regularity from Article 54 (2)(c) of the ALL, the ALL does not include a clause requiring that a person or body exercising governmental or some other type of power should allow a person whose rights may be adversely affected to present a case before or after the performance of some administrative or other act.

Speaking of the questions of procedural irregularities, the court in *Fang Zhengping v. Yuzheng Jiangdu Guanli Zhan* (Fishing Administration and Management Monitoring Station) annulled an administrative decision in which the alleged administrative authority had forced the plaintiff to pay a penalty before an administrative judgment was rendered.[36]

From the limited number of available cases, it becomes clear that the rule of demanding procedural regularity has not been seriously observed. The decision rendered in *Xia Mingbao v. Huangxu Village Government*, provides an excellent example of this. The plaintiff purchased a 114-square-metre, three-room, new tile-roofed house in Dantu County, Xia Ziaogen for the amount of RMB 5400. Upon purchasing his house, he was told by the authorities to demolish his original houses. He demolished two and kept one. The Village Government decided that the plaintiff should demolish his old houses within sixty days. However, he did not carry out this order within the stipulated time. The Village Government therefore enforced the demolition order of the remaining house. The Village Government, however, should have brought a court action before demolishing the plaintiff's old house. The Dantu County Court ruled that the Village Government had infringed the plaintiff's property rights. Further, as the court added, the demolition procedures adopted by the Village Government's order were improper. However, having considered this, the court ruled that, since the plaintiff himself had violated the provision stipulating that each person may only occupy a living area of 26 square metres, he was to be denied compensation.[37]

36. *Ibid.*, 198-200.
37. See 8 *China Law and Practice* 28 September 1987, 22-23.

The courts do not always clearly analyze the facts, and occasionally serious mistakes are made. In an action arising from the dispute between *Guilin Maojin Chang* (Guilin Towel Manufacturing Factory) *v. Guilin Shicheng Jiang Ju* (Guilin City and County Bureau of Building and Construction), the court's decision was severely condemned for violating Article 50 of the ALL, which prohibits a court from applying mediation, as well as Articles 24 and 25, prohibiting an administrative authority from being a plaintiff in administrative proceedings.[38]

### *4.4 Review of Ultra Vires*

Various attempts have been made to find a general principle underlying the reasons for judicial review on administrative operations in China. One of the most developed principles so far is that the People's Courts may review an action which is *ultra vires* – outside the power of – the authority whose action is being challenged.

On the grounds that a decision or action was *ultra vires*, the People's Courts have included within their judicial review, not only acts which fall outside the statutory powers of the administrative authorities, but also acts which were unauthorized. In *Zheng Fuguang v. Tudi Guanli Ju* (Land Management Bureau), the plaintiff had applied for a permit to build a house in an area originally designated for agricultural uses. The plaintiff obtained the permit from the Daiji Village Government and eventually built a house. The County Land Management Bureau later informed the plaintiff that, according to the Articles 38, 45 and 52 of the Land Management Laws of the People's Republic of China, he could not convert the use of a land from agricultural to residential purposes without the consent of the proper authority. He was accordingly instructed to demolish his new house. The plaintiff filed an action against the County Land Management Bureau. The plaintiff argued that he had received the proper permit issued by the Daiji Village Government. He also contended that if the court were to rule that the permit issued by the Government was invalid, the Daiji Village Government should be liable and compensate the loss he suffered.[39] The court ruled that the Daiji Village Government had issued a permit without legal authority, and therefore the permit was invalid. The court awarded the plaintiff full compensation of his losses.

38. See Huanguang Zheung, *op.cit.* note 17, 14-15.
39. See Zhicheng Zheung, *op.cit.* note 30, 36.

The People's Court in *Li Chuanyi v. Dongsha Xiang Zhengfu* (Dongsha Village Government) invoked another notion under the principle of *ultra vires*, stating that an authority must not act in bad faith. The Dongsha Village Government decided to launch a major construction project for a giant brick-making plant. The project required the demolition of various houses located on the construction site. The plaintiff was one of the people who were required to move. Without going through all necessary legal procedures and obtaining the plaintiff's consent, the head of the Dongsha Village Government demolished the plaintiff's house on the grounds that "an individual must obey and follow the collective". The court decided that the specific administrative act of demolishing the plaintiff's house had infringed the plaintiff's property right, that the act was improperly performed and animated by an improper motive, wilfully ignoring the legal procedures and maliciously performing the demolition.[40]

In monitoring against administrative impropriety involving *ultra vires* acts, the court in *Zhu Mou v. Linqing Xiang Zhengfu* (Linqing Village Government) laid down a general three-fold test. Firstly, whether the *zhuti* (the principal agency) which exercised the power has acted or decided to act had the legal capacity to do so. Secondly, whether the content of specific administrative acts were within the jurisdiction granted to the administrative authority by law. Thirdly, whether in the course of doing or deciding to do something that is *intra vires*, the act was properly executed and the legal procedures were taken into account while executing specific administrative acts.[41]

In determining whether an administrative penalty is *ultra vires*, the court in *Lin Jianxiong v. Fuxin Weisheng Ju* (Medical and Health Department in Fuxin) developed five specific guidelines to test the legality of a specific administrative act. Firstly, the administrative authority that performs the act must have the authorized power to do so. Secondly, the administrative authority must have the power to penalize the alleged act specified by law. Thirdly, the imposition of a penalty must be lawful. Fourthly, the administrative penalty must be imposed in full accordance with the legal procedures required by law. And finally, the alleged act must have been determined to be an act in violation of the corresponding rules and regulations.

40. *Ibid.*, 159.
41. *Ibid.*, 169.

### *4.5 Review of Abuse of Power*

Unlimited and unchecked discretion is a threat to liberty. Street-level discretionary powers are highly intrusive of personal freedom. It is almost impossible to maintain a close supervision over street-level officials. To require officials to be responsive and responsible to citizens' needs implies that greater operative powers are delegated to them. As such, it may hold the danger of allowing the bad, the lazy, the overworked and the impatient to be high-handed, officious, vexatious and downright mean.[42]

The notorious case of abuse of power is vividly epitomised in *Li Jun and Li Tong v. Gongan Ju* (Public Security Bureau), in which the chief of the Nanjie Public Security Station, Wu Guyi, and his officials applied unreasonable use of force against the plaintiffs. Wu Guyi was asked to investigate an illegal construction in Li Jun's girlfriend's house. Without disclosing his identity and in plain clothes, Wu came to the scene, yelled at and kicked the plaintiffs, ordering them to stop the construction proceedings. The plaintiffs and Wu engaged in physical contact. Wu left and later came back with six armed security officials. Wu ordered the officials to apply force, and did not restrain them from using unreasonable force against the plaintiffs.

The plaintiffs were later charged with "causing obstruction to the law-executing officers", according to Article 19 of the Security Administrative Punishment Act of 1986. The plaintiffs were found guilty. The Bureau ruled that Li Jun be administratively detained for 15 days, and Li Tong, 10 days. The plaintiffs appealed for an administrative review with the Regional Public Security Bureau. The ruling was, however, sustained. The plaintiffs then took the case to the Regional Court. The court overruled the two Bureaus' decision and held that in the course of performing an otherwise lawful act, Wu and his officers abused their power by applying unnecessary and unreasonable force.[43]

Another equally notorious and widely-reported case concerns the abusive exercise of power in the Department of Transport at Xian City. The plaintiff, Huang Mingzhi, ran a bus company in the rural area of Xian City. Another company, Xian Nanmen Company, also operated a bus service in the same area. The latter company lodged a complaint

42. Christopher Ryan & Katherine Williams, "Police Discretion", *Public Law* 1986, 285-310.
43. See Zhicheng Zheung, *op.cit.* note 30, 140.

to the Xian City Department of Transport that its business was seriously jeopardized by Huang. Occasionally, the Xian Nanmen Company instructed people to attack Huang's drivers, to physically detain the cashiers of his company, and to disperse those people who intended to board Huang's buses.

The plaintiff complained several times to the Department, and met with no response. He then filed a complaint to the superior authority against the Department, which consequently irritated the people within the Department of Transport. Together with the Bureau of Planning and Production in Xian City, the Department sent a notification to the plaintiff, instructing him to operate his business in another area. The new line ran through areas where only few people would be able to use the bus service. The plaintiff then came to see the Director of the Department. As a result, the Director ordered the detention of the buses owned by Huang. The Provincial Department of Transport later noticed the case and issued a directive, demanding that Xian City Department of Transport release all unlawfully detained buses of the plaintiff. The Department, however, took no action and failed to respond to the directive. The plaintiff then brought his case to court, which subsequently overruled the decision of the Xian City Department of Transport and severely criticized the Department for its abusive exercise of power.[44]

One noted feature of the above-mentioned cases is that abuse of power involves not merely acts of an individual but also acts of individuals at different levels of the hierarchy in administrative authorities. Two other cases, *Shenyang No.9 Leather Shoe Factory v. Shenyang No.1 Leather Shoe Factory* and *Zhang Xinxin and Sang Ye v. Beijing People's Broadcasting Station*, have shown the same pattern. They clearly manifest the intriguing problem of administrative impropriety in China. Basing themselves on the argument that mere higher departmental authority is sufficient, officials have defended their acts of the exercised discretion.[45] The senior officials of the administrative bodies clearly appeared to have been unwilling to examine the legal basis of the subordinates' discretionary acts. Hierarchical supervision originally designed to monitor discretion has turned out to be a reinforcement of abuse of power.

44. Xian Shi Jiaotong Bumen Paichi Daji Zhuanye Hu Shouhai Zhe Si Ju Gaozhuang Wenti Zhi Jin Mei Jiejui, *Renmin Ribao*, 2 July 1985, 3.
45. See 6 *China Law and Practice* July 18, 1988, 34-40.

## 5. Guanxi Wang: An Institutionalized Form of Abuse of Powers

The preceding depiction of an institutionalized form of abuse of power strikes a deep legal chord in China. It is apt to hinge on the idea that holding street-level bureaucracies responsible through court rulings means challenging the whole of administrative operations. When the ALL pinpoints the administrative authority, and not the individual official to be responsible in courts, it is likely to create and intensify the conflict between court and administration. This section will first analyze the major difficulties in controlling administrative impropriety by examining confidential documents issued by the Chinese authorities. Secondly, it proposes that an additional provision to hold an individual official responsible for a wrongful act should be added to the ALL.

The study of abuse of discretion in China must include an analysis of *guanxi wang* (relationship networking). This concept is a complicated phenomenon, particularly in Chinese relationships. The most commonly-noted feature of this relationship networking is that of back-door practice. The development of an inter-locking personal relationship has been consolidated to the extent that it has created an informal structural network. Different *danwei* (units) and *xitong* (systems) within an organization have also established different networks. To effectively assure proper governance requires the co-operation of the different networks within an organization. Adjusting to another's move implies a give-and-take attitude, thus satisfying a variety of interests among actors. This creates another chain of power centres, sometimes strengthening and mostly undermining the authority and autonomy of administration.

One form of relationship networking in China is *bumen zhuyi* (departmentalism). The notion of departmentalism does not assume that all officials in the same department belong to the same circle. In fact, it refers to a situation where a handful of people, mostly senior officials, cover up the unlawful acts of their subordinates in order to balance the interests of different circles within the department. Fundamental to this observation are several presumptions. Firstly, in maintaining a certain level of operational effectiveness, senior officials should work within this organizational climate to allow give-and-take. Secondly, such networking creates an extensive system which benefits all who help generate it. Thirdly, the networking feeds upon itself, developing different levels of leading positions within the government as

well as the party, throughout the different departments.

The problem of departmentalism was raised in Document 115, Legal Reference Information, published on 31 March 1989. Officials from the *Gongan Ju* (Public Security Bureau) of Jiangsu Province and *Shuiwu Ju* (Tax Revenue Bureau) of Fujian Province confessed that high-level collusion existed which concealed the smuggling of cigarettes and evasion of taxes. Since these practices involved senior government and party officials, the courts in Jiangsu and Fujian provinces had chosen either not to investigate the practices or to demand a share of the resulting profit.[46]

According to Document 74, Report on the Implementation of Law, published on 29 September 1989, the Land Management Bureau in the Heilongjiang Province reported that 80 percent of all the reported cases concerning the unlawful occupation of land involved leaders at different levels in the Provincial Government. Officials from the Dalian County's Land Management Bureau indicated that 23 out of the 24 heads of the Town and Village Governments were involved in cases of unlawful or improper use of land.[47]

By 1990, 328,000 party members had been disciplined during a two-year anti-corruption drive. The move was the result of investigations into more than 400,000 alleged cases of corruption by members of the Communist Party of China during that period. Of these cases, 600 involved members holding senior party and government posts at provincial level or higher.[48] One commonly-cited case concerning the networking groups involved the governor of Jiangxi Province, Wei Xiance. In 1985 he was asked by the plaintiffs, Li Gongqing and Ge Yong, to coerce the Customs to release 2000 sets of confiscated video recorders. Finally, the goods were released. This case was handled by the Nanchang Municipality Intermediate People's Court, and all the accused were sentenced to imprisonment for periods ranging from two to ten years.[49]

The most notorious case involving departmentalism was reported in *Nanfang Weekly*. It involved a president of a People's Bank, who was

46. Office of Legal Working Committee, State Council, People's Republic of China, *Fazhi Cankao Zhiliao*, 31 March 1989, 1-5.
47. Bureau of Law Making, State Council, People's Republic of China, *Faqui Zhinxing Qingkuang Fanying*, 29 September 1989, 1-5.
48. "Party Outgrowing Population", *Hong Kong Standard*, 19 July 1991, 13.
49. See 1 *China Law and Practice* No.8, 28 September 1987, 32-36.

convicted of raping a girl. He was fined only RMB 500 by the Public Security Bureau. Yet, another case of departmentalism appears in Document 246, published on 6 December 1990, where a section chief of a Management Bureau had reportedly engaged in *daomei* (unlawful reselling of government properties or commodities). He had made a "personal" profit amounting to a total of RMB 10,000. Although he was convicted of the offence, he was merely fined RMB 1,000. The shocking part of this case is that the superior of the section ordered that the fine of RMB 1,000 be paid by the administrative authorities and not from the section chief's own pocket.[50]

Many legal commentators have noted that one of the most serious problems in administrative litigation is that court decisions on administrative issues often cannot be enforced. Gao Heng, in an article published in *Fazhi Ribao* on 6 January 1989, reported similar institutionalized forms of abuse of powers. He claimed that government officials refused to enforce court decisions to return a plaintiff's property. Also, they impose similar or more severe penalties on a plaintiff, and even illegally detain a plaintiff or otherwise restrict his movements.[51]

### *5.1 Government by Men*

Two factors are considered to be essential in the development and expansion of relationship networking in China. The first factor is that of government by men. Government by law does not mean that the exercise of administrative discretion will be prohibited. Rather, it implies that the development of administrative discretion must be circumscribed by a stable, clear, and open legal framework. If the law is to be obeyed, it must be capable of being obeyed, *i.e.*, it must be such that people including government officials know what the law is so they can act upon it.[52]

In contrast to the requirement of government by law, the State Council requires local and lower administrative authorities to act according to its decisions. However, it has provided virtually no instructions for

50. Office of Legal Working Committee, State Council, People's Republic of China, *Fazhi Cankao Zhiliao*, 31 March 1989, 1-5.
51. See Gao Heng, Xingzheng Susong Lifa Yingdang Mianxiang, Xingzheng Susong Shishi, *Fazhi Ribao*, 16 January 1989, 3; Susan Finder, *op.cit.* note 24, 26; Jun Feng, "Lun Xingzhen Susong Zhong Falu Shiyong de Jiga Wenti", 1990 (unpublished Master Thesis), 24.
52. See Michael Allen, *et al.*, *op.cit.* note 26, 121-122.

local and lower administrative authorities on how to act. A global examination of confidential documents and related case law shows the difficulties in cultivating a system of government by law in China.

Document 74, *Report on the Implementation of Law*, discusses one basic problem in operating the State Council's decisions. Section Two of the document suggests that most of the administrative rules and regulations are drafted with no specific intent and/or are devoid of any concrete content. The document points out the dangers of allowing flexibility while issuing wide interpretive powers. Also, it refers to the dangers of inviting street-level bureaucrats' abuse of powers.

To substantiate this point we refer to Document 19, *Report on the Implementation of Law*, issued on 5 February 1990, which indicates a similar problem. Section 2 (8)-(10) of the document reports that in Guangdong Province, activities of smuggling, producing, selling, buying, and broadcasting of obscene articles, in written, printed, video, or audio forms, are subject to administrative and/or criminal penalties. This document also mentions that the responsible people are to be severely punished. However, nowhere in the document is reference made to clear instructions detailing the punishment.

Section One of the Document 74 considers another serious problem in the structuring of administrative discretion. The problem is one of the conflict of laws. Most problems in controlling administrative impropriety are associated with legitimacy in the exercise of powers. This problem usually centers around the question as to which administrative authority is conferred with the necessary powers to issue a valid order and which body should impose duties instructing the power-holders on how to exercise their powers. A considerable amount of case law deals with disputes over the scope of powers, and zoning and the effectiveness of decisions made by the Land Management and City Planning Bureaus at the various levels in the government. In tracing the roots of the problem, this section of the document clearly shows that the 1984 City Planning Laws and the 1986 Land Management Laws fail to spell out which administrative authority has the authoritative power to decide on land use. Also, they do not distinguish the distribution of powers between them. The development of the rationale of Chinese legislation is an important element in government by law. The law must be systematic, logical, and workable. It must be possible to obey one law without acting contrary to another.

It is the essence of government by law to institute an administrative

order charged, among other things, with the duty of applying the law and producing effective guidance. To be able to meet this target, the government must provide a clear, open, and stable set of laws in directing law-executing activities. In the case, *Shengyang City v. Chao Hendung*, the Shengyang People's Court found itself in a situation in which it did not know how to respond. The administrative authority decided to prosecute the plaintiff for corruption. Yet the Shengyang People's Court could not find a law applicable to this particular case.[53] Documents 18 and 19, *Report on the Implementation of Law*, issued on 5 February 1990, clearly manifest the same deeply-entrenched problem – the lack of appropriate and corresponding sets of laws – in controlling administrative discretion in China. The two documents indicate the urgent need to develop laws with regard to activities involving gambling, prostitution, and the producing and selling of obscene articles. It is simply impossible to ask people to obey the laws when there are no relevant laws to follow.

Jerome Cohen has analyzed ten guidelines which, in his opinion, are encountered by the American legal community when dealing with China's legal system.[54] Among them, the aspect of "internal law" is perhaps the most frustrating. In trying to capture and consolidate the powers given to administrative authorities, the State government delegates discretionary powers to the provincial-, county-, and city-level control units to tailor-make their administrative decrees and regulations. This practice promotes privileges because it enables the establishment of secret legal relations. Also, it creates a wide area left to "administrative discretion" to be filled in by secret regulations, granting unrestrained powers to local implementation units.[55] It is a basic requirement of legal certainty that laws are available to all. There is no salient reason why certain laws should be shrouded in mystery. The practice of internal law stigmatizes the development of government by law and further enhances the expansion of government by men.

### *5.2 Unfettered Policy Discretion*

Another factor accounting for the prevalence of relationship network-

53. *Seasonal Bulletin* 1987 No.1, 3.
54. See "Conference Promotes Rules of Law in China", 1 *China Law and Practice* No.8, 28 September 1987, 15-18.
55. See Hon S. Chan, "Christianity under Communism: The Case of China", (unpublished manuscript), 25.

ing in China is the unfettered policy discretion given to administrative authorities. Policy making acts usually fall outside judicial scrutiny. This doctrine does not stand on its own. It should, however, be remembered that in the final analysis, the doctrine rests on the basic idea that policy making acts and policy makers should not be allowed to pervert the law. This problem is serious in China because there is no effective legal machinery to guide against distorted enforcement or to shackle the abuse of discretion.

The problem of distorted enforcement was raised in Document 62, *Legal Reference Information*, issued on 11 April 1990. In the report, the *Shenji Ju* (Auditing Bureau) of the Nanchong County documented that the Nanchong Public Security Bureau had collected RMB 49,000 by imposing administrative punishments on activities dealing with prostitution and security violations during the period between January and July 1989. Yet the bureau failed to turn in RMB 32,000 to the Auditing Bureau. The Document also states that the Nanbu County had collected RMB 500,000 for activities in violation of the "one-child policy". Again, it failed to submit RMB 400,000 to the Auditing Bureau.

The problem is not only about the unwillingness of the bureaus to turn over the money; it is also about the fundamental question of who is to guard the guardians, the government officials, on behalf of citizens. The crux of the problem is that the administrative authorities are given powers to impose those actions, which are deemed appropriate. In the absence of clear instructions, the administrative authorities are given a free hand, for example, to substitute administrative fines for imprisonment. Document 115, *Legal Reference Information* (issued on 31 March 1989), Document 9, *Report on Implementation of Law* (of 29 September 1989), Document 62, *Legal Reference Information* (dated 11 April 1990), and Document 147, *Legal Reference Information* (of 19 July 1990) all discuss this problem in great depth. In general, these documents severely condemn the system of substituting fines for imprisonment. They do so mainly on the grounds that this practice might lead to problems such as bribery, corruption, inconsistent standards of a fining system, personal malice, revenges, etc.

Particularly burdensome are the practices of *linchen zhi* (remaining sum from administrative fines allotted for departmental uses) and *daoba jiangli jin* (reward for deriving additional administrative fines), as discussed in Document 9, *Report on the Implementation of Law*. These practices link up the handling of administrative punishments with

financial rewards. They, understandably but regrettably, create an economic incentive for administrators to ignore the need for legal justice. It was common practice until 16 July 1991 for the Shengzhen's Public Security Bureau to impose administrative fines on activities dealing with prostitution. In fact, the law stipulates a more severe punishment, such as imprisonment.[56]

There is a management reason to explain the abusive use of administrative fines in China. In Document 115, *Legal Reference Information*, the Monitoring Bureau of Fujian Province reported that some judicial organs required lower-level and other administrative authorities to shoulder the burden of expenses for official trips, living and housing allowances of their officials, etc. The financial authorities at the various levels of the government allowed administrative authorities to retain a certain portion of administrative fines to cover these expenses. The prerequisite for ensuing administrative survival and growth is the possibility of securing financial independence. Seen as such, it is unrealistic to ask officials to rank their concern for legal justice higher than those of organizational survival and institutional growth.[57] The provision of unfettered policy discretion simply facilitates the abusive exercise of substituting administrative fines for imprisonment.

## 6. Conclusion

This article has used case law and confidential documents to analyze the Chinese attitude towards, and the problems concerning, discretionary powers held by officials in China. The inability to control discretionary powers over the administration has created an actual as well as legal significance position of public administration in China. This leads us to four conclusions.

First and foremost, the focus on shackling street-level officials' law-executing acts does not lead to an easy solution for administrative impropriety in China. The nature of distorted enforcement in administra-

56. The Inhibition of Prostitution, Substitution of Administrative Fines for Punishment in Shengzhen, *Ming Pao* (Hong Kong), 16 July 1991, 9.
57. Hon S. Chan, Kenneth K.K.Wong, "Environmental Attitudes and Concerns of the Environmental Protection Bureaucrats in Guangzhou: The People's Republic of China: Implications for Environmental Policy Implementation", *Environmental Protection and Social Development, Role of Non-Governmental Organizations,* (H.K.Wong, ed.), Conference Proceedings, Hong Kong, 169.

tion is rooted in the continual assurance of an unrestrained policy discretion given to administrative authorities. It is important to strengthen hierarchical control over the abuse of discretion. Clear, open, and stable laws, governing administrative behaviour and fettering the arbitrary exercise of discretionary powers, must be developed, particularly as regards control over policy-making discretion.

Second there is the need to expand the role of the judiciary. The power to initiate judicial proceedings against individual officials is considered to be a more effective way of tackling the problem of administrative impropriety. The preceding discussion shows that a greater part of the problem is how to break down the relationship networking operating at various levels of government in China. Strengthening hierarchical or institutional controls alone will not be adequate to deal with administrative impropriety. Legal sanctions will be an important factor in reducing occasions for abuse of discretion.

Third, the need to develop the notion of responsible agents should be recognized. The ALL obviously seeks to promote responsible government. To be responsible, a public official must know what acts are legitimate and within the scope of his powers. In delivering a service to the public, a street-level bureaucrat is required to exercise fresh thinking and flexibility. Yet, it is equally important to hold individual officials responsible for deliberate acts in violation of the law. Assessing the need for responsible agents acquires more importance than the concern about responsible government, for the simple reason that no responsible government is possible without responsible agents within its government. By holding the public bureaucracy and public officials responsible for their wrongful acts, it can provide them with an incentive to restrain themselves from abusing their discretion.

Finally, this analysis suggests the need to examine administrative responsibility in the context of law and administration. To understand the notion of administrative responsibility, it is assumed that decisions of public officials are responsible in a derivative sense, that is, as a manifestation of actions taken by responsible actors. The ability of an individual administrator to assess conflicting demands from the public and to exercise discretion in that regard should be the primary focus of a viable account of administrative responsibility. Yet it does not mean that the delegation of powers to administrative authorities may not be revoked.

The major outcome of this article can best be summarized in the

statement that as long as the delegation of powers is revocable by either administrative or judicial means, discretionary powers are not relinquished.[58]

58. Hon S. Chan & Jack Lo, "Hong Kong Facing China: Administrative Competence of the Independent Commission Against Corruption and Fundamental Rights of Public Employees", 13 *The Asian Journal of Public Administration* 1991 No.1, 60.