China’s Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective

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INTRODUCTION

Chinese food safety is, to say the least, a pressing issue for the Chinese people and for the rest of the world. The growth of China’s food manufacturing sector and China’s growth as a food exporter mean that it is increasingly important for authorities there to be able to regulate food production, manufacturing, and supply chains. As of 2008, China was the

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1 A note on translations and sources: All translations of Chinese herein are those of the Author, unless otherwise noted. All laws and cases cited herein are available through the database at www.chinlawinfo.com, unless otherwise noted.
third largest source of imported food and aquatic products in the U.S., and it is a significant exporter of those products around the world generally. China’s consumption of a number of food products has grown hugely over the last two decades, from dairy products to salt, to liquor, and to processed foods. Yet SARS, the contaminated baby formula scandals, and the Chinese pet food scandals over the past decade have left an indelible mark on the consciousness of global and Chinese domestic constituencies that are concerned with the public health consequences of the label “made in China.”

As foreign scrutiny of its markets increases, China feels the pressure to conform to international standards. For example, under the recently enacted U.S. Food Safety Modernization Act, there are heightened requirements for food importers. Importers must, in addition to other information required, verify the safety of imports from foreign suppliers. The U.S. Food and Drug Administration (“FDA”) may require certification of the safety of certain high-risk products brought into the U.S. from abroad. Additionally, the FDA must establish foreign offices abroad in at least five countries, review the food safety measures of countries exporting to the U.S., and inspect facilities overseas. The FDA now maintains three offices in the People’s Republic of China (“PRC”) – Beijing, Shanghai, and Guangzhou – in order to ensure the worthiness of the food production operations there.

In response to these concerns and to a growing number of

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7 Id. § 304 (2011).


grotesque food poisoning incidents domestically, China enacted a new Food Safety Law (“FSL”) in 2009. The FSL was in the drafting process for approximately five years, during which it was vetted by a number of regulators and experts from inside and outside of China. At times it was a contentious legislative process because, in order to improve supervision, the Law threatened to reshuffle powerful bureaucratic interests concerning regulatory jurisdiction over production, circulation, and retail of food products. Ultimately, China’s National People’s Congress (“NPC”) felt pressure to enact the Law because of certain public health disasters that caused great public outcry in China. The most high profile of these incidents are the tainted infant formula incidents that occurred, under surprisingly similar circumstances, in both 2004 and 2008. During the latter incident, the Standing Committee of the National People’s Congress (“SCNPC”) was still reviewing the FSL, and the severity of the milk incident appeared to prompt it into action. In a way, one could say that China’s leaders had accountability to the people for these incidents on their minds when they enacted the Law. Despite this promise, the Law’s passage seemed to inspire little press attention, and not much legal academic work has accumulated on its implementation since. Perhaps this is because many are unsure of how much significance to give a new


11 See generally Gao Qinwei, Fensan huo hebing – lun shipin anquan jianguan jigou de shezhi [Separate or Merged – Discussion of the Establishment of the Regulatory Structure for Food Safety], Rong Hualin, 1 GUIZHI YANJIU [REGULATORY RESEARCH], 53-78 (2008) [hereinafter Gao, Separate or Merged] (discussing the debate over regulatory consolidation leading up to the Food Safety Law).


13 This is compared with a huge amount of media attention paid to food safety after the pet food and toothpaste scandals in 2007. See, e.g., Kate Paulman, See Spot Eat, See Spot Die, 15 ANIMAL L. 113, 123-126 (2008) (noting attention paid to pet food issue); see also Mark R. Shulman & Lachmi Singh, China’s Implementation of the UN Sales Convention Through Arbitral Tribunals, 48 COLUM. J. TRANSNAT’L L. 242, 246 (2010) (“The Chinese government has responded to the . . . backlash from foreign importers by declaring a ’special battle’ against poor product quality. Vice-Premier Wu Yi, head of a Cabinet-level panel on food safety and quality, stated, ‘[i]t is a special battle to protect the safety and interests of the general public, as well as a war to safeguard the made-in-China label . . . ’ The Chinese government has taken a strong stand when it comes to punishing those responsible for producing tainted or unsafe products.”).
This Article takes the position that the enactment of the FSL was significant in a number of ways, and it is important to watch and engage in its implementation. The FSL updated China’s outdated “Food Hygiene Law” and set the groundwork for a more internationally compatible food safety regulatory system in China. The Law contains a number of measures aimed at both preventing and resolving future safety problems, such as fake infant formula, dyed bread buns, and poisoned pork. All of this means that legal academics, policymakers, and practitioners in China and – given the continued globalization of food supply, particularly the significant influx of products from China – the U.S. need to find a lens through which to view and evaluate Chinese food safety law and regulation as it develops. This Article makes an argument about how that evaluation should proceed.

Going forward, observers of the FSL and its implementation must determine the potential for progress given China’s institutional constraints. For example, China is beset by corruption and local protectionism; its judicial system is, objectively speaking, weaker than the other political branches of government; and the enforcement of laws is often limited by

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16 See infra Section II, text and accompanying notes.


19 Benjamin L. Liebman, China’s Courts: Restricted Reform, in CHINA’S LEGAL SYSTEM NEW DEVELOPMENTS & CHALLENGES 66 (Donald Clarke ed., 2008) [hereinafter CHINA’S LEGAL SYSTEM].
conflicting government and Communist Party policies. These policies regularly put economic growth and domestic stability before social justice and public health issues.

In the almost three years since the passage of the FSL, the Law is primarily engaging with China’s “limited” legal institutions in three respects: (1) as a tool for citizens to achieve some modest compensation for food safety accidents; (2) as a set of norms that is generating some small-scale, extra-judicial social activism; and (3) as a starting point for a new regulatory scheme governing food safety, employing such tools as specialized standards, increased inspections by more highly competent institutions, mandatory recalls, and risk-based determinations regarding foodborne illness threats.

These three dimensions of the Law can be more succinctly described by the institution (or institutions) they involve, that is: (1) the judicial dimension, (2) the societal dimension, and (3) the administrative and regulatory dimension. As the discussion below will illustrate, breaking a Chinese law down into these three dimensions and comparing them is an important initial step in analyzing the Law’s implementation. This Article concludes that, while the FSL’s implementation may fall short of the desires of some domestic Chinese and international human rights and legal reform advocates in a number of ways, the administrative and regulatory innovations under the Law are still significant. While litigation and public protest may have some relevance in the area of food safety, the institutional innovations in administrative governance under the Law are greater in number, more concrete, and less politically sensitive in most cases.

But can the relevant Chinese agencies be successful in implementing the innovative policy they make through regulations? Success must include accountability to their constituencies in such a way that these agencies set and meet targets, thereby producing measureable improvement in enforcement. As Professor Dorit Rubenstein Reiss states in her study on agency accountability in the United States,

[...] agencies are not always the enemies of accountability. Nor are they always helpless, passive pawns, crushed under

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20 Id.

21 Chenglin Liu, The Obstacles of Outsourcing Imported Food Safety to China, 43 CORNELL INT’L L.J. 249, 289 (2010) [hereinafter Liu, Obstacles] (“Seeking economic miracles, the central government has emphasized higher gross domestic production (GDP) disproportionally to food safety.”).

22 See infra Section III text and accompanying notes.

23 See infra Section IV text and accompanying notes.

24 See infra Sections II and V text and accompanying notes.
the oppressive weight of accountability. Agencies can also be autonomous and important actors in the accountability game, creating new forms of accountability, or accepting and adapting pre-existing forms. They often willingly join in and strive to be accountable. They may well invest substantial efforts in increasing their accountability.\textsuperscript{25}

In China, many of the accountability-generating mechanisms that exist in the U.S. for agencies – a powerful threat of judicial review, strong Congressional oversight, and strong, consistent channels of public criticism – are still developing or in a nascent stage. Yet, in China administrative agencies have the most political space to develop and enforce food safety law. Therefore, this Article argues that future scholarship should focus on how accountable to public needs, reactive to problems, and effective in food safety law enforcement agencies can be without these outside accountability mechanisms. Put differently, how can Chinese agencies be the drivers of their own accountability? This Article contributes a framework for that future analysis.

Herein also lies the unlikely significance of the FSL for Chinese legal studies generally. The FSL, which the Chinese government has every incentive to implement, is not changing the fact that China’s judiciary is neither a check on the power of other governmental institutions nor the neutral and independent dispute resolving institution for which some may be searching. And the FSL is not creating an environment in which citizens are freely able to advocate for its robust implementation from outside of the government. But top-down innovation in the administrative realm continues in food safety and other areas. As these innovations are internalized by bureaucrats and the scientific and other experts they work with, scholarship should focus more in this area for all Chinese laws that generate such agency innovation.

This Article will be divided into five additional parts. Part two discusses the legal environment in which the FSL was enacted and the laws and systems that it updated. It then proceeds to discuss some of the macro-challenges confronting the implementation of law generally in China, and public health law in particular. It concludes with an analysis of the key reforms that the drafters of the FSL were able to push through the political and legislative process into that Law. Parts three through five analyze the significance of the above-described dimensions in the following order: the judicial, the societal, and the administrative regulatory. Finally, part six, the conclusion, offers additional analysis on

\textsuperscript{25} Dorit Rubenstein Reiss analyzes the question of how agencies acting as “autonomous actors that can create and contribute to their accountability environment.” Dorit Rubenstein Reiss, \textit{Account Me In: Agencies in Quest of Accountability}, 19 J. L. \\ & POL’Y 611, 627 (2009).
the significance of the administrative regulatory dimension. The Article concludes with more general thoughts about observing the development of the Chinese legal system and the extent to which, and how, we should take into account the regulatory system when doing so.

I. THE ORIGINS OF THE FOOD SAFETY LAW

A. The Pre-FSL System

The FSL was enacted in a political and legal system that presented undeniable challenges and obstacles, but which also contained a legal infrastructure that provided a meaningful foundation for a number of concepts in the FSL.

The system already contained general laws governing civil liability and the fairness of administrative processes. The FSL was also born into a system containing a specific product quality law, a consumer protection law, and a law governing truth and fairness in advertising. The important point is that the government had crystallized the concepts of consumer protection and product quality and safety in other legislative acts well before the FSL’s enactment.

Substantive food law and regulation had been developing as well. For example, the Food Hygiene Law had been in existence in some form since 1982. The Food Hygiene Law (“FHL”) set forth prohibited acts


31 Zhonghua renmin gonghe guo shipin weisheng fa (shixing) [P.R.C. Food Hygiene Law (Tentative)] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 19, 1982, terminated July 1, 1993) [hereinafter Food Hygiene Law].
with respect to food processing or production and circulation, but it did 
not govern raw agricultural production, which is primarily supervised by 
the Ministry of Agriculture (“MOA”), pursuant to the Agriculture Law. 
The Agricultural Product Quality and Safety Law enacted in 2006 also 
gives the MOA substantial power in this respect. Other substantive laws 
and regulations included those governing the slaughter of livestock, the 
harvesting of aquatic products, and the control of imported and exported 
products and ingredients. Therefore, most of the basic structure for food 
regulation was in place prior to the enactment of the FSL.

The enforcement mechanisms that the above legislation employed 
were primarily administrative and civil. The regulatory organs of 
government were charged with mandatory or coercive enforcement, such 
as assessing the capacity of institutions through the licensing process, inspecting them to ensure compliance, and seizing defective products or shutting facilities down in the event of a potential or occurring outbreak. The body of administrative law at the time permitted individuals and entities to sue agencies in court to correct arbitrary official action that directly affected them. The concept of corporate responsibility for putting in place practices and internal rules that prevented unsafe conditions and resulting health disasters also emerged. The judiciary was


36 See, e.g., Product Quality Law, arts. 40-44 (granting a right of compensation for a faulty product); Consumer Protection Law, arts. 40-41 (granting a right of compensation).

37 Administrative Licensing Law, arts. 4-5.

38 Food Hygiene Law, ch. VII.

39 Food Hygiene Law, art. 37.

40 Administrative Litigation Law, arts. 1-4; see also RANDALL PERENBOOM, CHINA’S LONG MARCH TOWARD THE RULE OF LAW 421 (2002) (describing administrative lawsuits).

charged with enforcing provisions in these laws that permitted citizens to sue corporations for compensation in court in the event that their product caused an individual citizen to suffer bodily or financial harm.\footnote{42 Consumer Protection Law, arts. 40-41.}

Despite this basic infrastructure, these laws and policies appeared to be largely unhelpful.\footnote{43 State Council Decision, supra note 10, at 4-5.} They set out the most basic of procedures relating to health and safety, but there were large holes in their coverage of the food processing and circulation processes.\footnote{44 Id.} In product liability suits, citizens utilized the consumer protection and product quality-related laws when they sought compensation for harm caused by defective products, but the number of plaintiffs and damage awards associated with those suits were not significant enough to act as a motivator for corporations to improve their practices.\footnote{45 Liu, Obstacles, supra note 21, at 279. There were, however, several administrative cases that came to the Supreme Court regarding the limits of various agencies’ enforcement power. SHIPIN YAOPIN ANQUAN XINGZHENG SUSONG [FOOD AND DRUG SAFETY ADMINISTRATIVE LITIGATION] 1-6 (Zhu Lushang ed., 2004) (describing legal issues facing the courts). Despite those cases, there remains considerable confusion about the jurisdiction of the various agencies in this area, which has led to over and under-enforcement. Gao, Separate or Merged, supra note 11 at 55.} The more significant cases on food safety were administrative cases – delineating, for example, the powers of agencies to enforce in certain areas\footnote{46 Gao, Separate or Merged, supra note 11, at 55.} – but even those court rulings did not seem to streamline enforcement.\footnote{47 Interview by author, Shanghai (2010). The Author conducted all interviews cited herein. The identity of the interviewees is confidential, and the notes and materials associated with these interviews are on file with the Author.}

Put simply, none of the regulatory systems or the civil remedies in place resulted in public confidence and trust in the safety of food products, either domestically within China or internationally.\footnote{48 Liu, Obstacles, supra note 21, at 280.} Chinese food products were viewed as shoddy and Chinese corporations as irresponsible.\footnote{49 Id.} China was viewed as a place where the government did not have the capacity (or, at times, the will) to set and enforce the necessary public health laws and regulations.\footnote{50 Id. See also Liu, SARS, supra note 4, at 10-15.} The failings of the law and legal institutions themselves were only part of the problem. A non-exhaustive list of some of the structural, systemic problems contributing to the precarious state of China’s food
supply consists of the following:

- **Transparency**
  Government officials are afraid to communicate with one another and with the public for fear of inciting panic or criticism of their work. Many food safety issues are reported by the media through TV or in print/online, and even then, the media can be effectively silenced by central or local government forces. As a result, typically inadequate information is available to the public concerning the food products and additives that may harm them and the companies responsible for those products.

- **A policy of putting economic development first**
  The government has shown both officials and the public that the economic development of the country is among the most important goals, if not the most important. At times, environmental and public health laws and regulations are seen to interfere with that economic development. Officials have, therefore, much less incentive to enforce safety measures and are susceptible to a number of corruptive forces or incentives. First, they may want to seek money from local corporate interests (whether corruptly or quasi-legitimately) — interests that regulatory or civil enforcement of food safety law might ostensibly damage.

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51 See also Charles R. McElwee, Environmental Law in China: Mitigating Risk and Ensuring Compliance 3-9 (2011) (discussing similar obstacles to the implementation of environmental law).

52 Liu, SARS, supra note 4, at 20. See also Jamie P. Horsley, Toward a More Open China?, in The Right to Know, Transparency for an Open World (Ann Florini ed., 2007).


54 See, e.g., Benjamin L. Liebman, Watchdog or Demagogue: The Media in the Chinese Legal System, 105 Colum. L. Rev. 1, 6 (2005) ("Over the past decade, media commercialization and increased media editorial discretion have combined with a rising attention to social and legal problems. This results in powerful incentives for the media to expand their traditional roles. China’s media have become increasingly critical in their news coverage, exposing alleged wrongdoing, criticizing officials for failure to address injustice, and influencing both the outcome of individual disputes and the interpretation of existing legislation.").


economic growth also leads to official promotion, and if safety incidents are permitted to close down local corporations, then there is less chance of vigorous local growth. The same can be said of corporations and individual entrepreneurs – they put profit above safety and cultivate protective relationships with local officials instead of pursuing compliance with regulation. High profile criminal prosecutions and other disciplinary sanctions do not appear to be an adequate deterrent.

- **Maintenance of social stability**
  Under President Hu Jintao, the Party and the government have concentrated heavily on promotion of a harmonious society (*hexie shehui)*. Responding to a number of large protests that have arisen throughout China on hot-button issues during the end of the Twentieth Century and the beginning of the Twenty-First, the regime has endeavored to cover up or suppress, sometimes through more coercive means, anything that raises the national temperature.
  Food safety can be one such issue.

- **Infrastructure and education**
  Food safety depends on certain basic infrastructure and the existence of sufficient education and expertise amongst different actors in the system. For example, some note that China lacks the necessary components to make circulation of fresh food products safe and to avoid contamination in transport. Other experts note that insufficient organizational time, personnel, and funding are devoted to standard enactment. This necessary infrastructure in

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59 See McGregor, supra note 55, at 141-169.


63 Song Hualin, Xueyan shijian jizhong zhongguo shipin jianzuan jiaozhu, [Edible Birds Nest Attacks Food Safety Regulation in China] (Aug. 18, 2011),
China is emerging, and the number and capacity of professionals and professional schools, including public health schools and pharmacy schools, are increasing in the PRC. In addition, the consciousness of the public as to issues of food safety, quality, and health is growing. But, the growth of this infrastructure and the increase in expertise to analyze technical issues related to food safety is an ongoing development, as is the ability of the public to make good choices not only about what they feed themselves and their families but also about how their actions influence the safety of food for others. These processes will need to continue for some time in order to make significant progress. This developmental issue is not a legal problem. As these resources accumulate – assuming they do – they will help regulators ameliorate serious food safety problems; for example, it may help to control the addition of poisonous additives to food.

A more comprehensive discussion of these issues is beyond the scope of this Article. Other scholarship has covered them in depth and is more useful for understanding their contours. Nevertheless, these problems are the macro-issues, which even the enactment of a well-drafted law and a cooperative set of legal actors and institutions cannot necessarily solve. As this Article continues into a more concrete discussion of the FSL and its implementation, it is important to remember that law in China may only have a limited impact on food safety problems in large part because law is relegated to a limited role in Chinese society. Therefore, this Article aims, to the extent possible, to judge the success of

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65 Interview by Author, Shanghai (2006).

66 See, e.g., Walt Bogdanich & Jake Hooker, From China to Panama, a Trail of Poisoned Medicine, N.Y. TIMES, May 6, 2007, at 1 (“Wang Guiping, a tailor with a ninth-grade education and access to a chemistry book, found it easy to enter the pharmaceutical supply business as a middleman. He quickly discovered what others had before him: that counterfeiting was a simple way to increase profits.”).

67 See, e.g., MINXIN PEI, CHINA’S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 4-16 (2006); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 11-39 (1999)
the law in the box into which the Communist Party and the macro-issues described above have put it. There is no sign that the government will permit its various branches and agencies to put food safety policy over economic growth or social stability if food safety comes into conflict with these goals.\textsuperscript{68} Law may have only a moderate impact simply because that is what the coercive forces in China will permit.\textsuperscript{69} The question is what is it reasonable to expect given these limitations?

B. \textit{The 2009 Food Safety Law}

In some ways, the FSL was the result of a process that took nearly thirty years to complete because it is a full-scale amendment of the FHL, which was an amendment to the “Trial” or “Experimental” Food Hygiene Law that was enacted in 1982.\textsuperscript{70} The FSL built upon the basic guidelines originally established by the FHL on the cleanliness and purity of food. It also set more specific requirements regarding the government’s and industry’s roles in managing and supervising inspection and remediating food safety accidents. Like the FHL, the FSL is a law that engages the administrative regulatory organs of government. In other words, it directs central and local agencies as to the work they are required to carry out in, for example, licensing and inspecting food processing or manufacturing and circulation/retail entities.\textsuperscript{71} An important innovation in the FSL with respect to these processes is that the FSL attempts to raise the level of transparency in internal administrative processes, i.e., provisions on improving the flow of information,\textsuperscript{72} and external processes, i.e., more and clearer communication with the public.\textsuperscript{73}

In addition, the FSL includes more tripartism (involvement of non-governmental third parties, such as private entities authorized to test samples) in enforcement.\textsuperscript{74} The FSL encourages consumers to play a role

\textsuperscript{68} See infra Sections II.b and III.b, text and accompanying notes.


\textsuperscript{70} See State Council Decision, supra note 10.

\textsuperscript{71} See, e.g., Zhonghua renmin gonghe guo shipin anquan fa [P.R.C. Food Safety Law], arts. 4, 11, 31 (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 2009, effective June 1, 2009) [hereinafter Food Safety Law]. \textit{See also generally Zhonghua renmin gonghe guo shipin anquan fa shishi xize [P.R.C. Food Safety Law Implementation Provisions]} (promulgated by the State Council, July 20, 2009) [hereinafter Food Safety Law Implementation Provisions] (noting throughout the different roles of the administrative agencies in inspection and enforcement activities).

\textsuperscript{72} Food Safety Law, arts. 82–83.

\textsuperscript{73} \textit{Id.} ch. II.

\textsuperscript{74} \textit{Id.} arts. 7-11.
in enforcement in terms of making informed choices and reporting on the discovery of bad practices; it encourages industry and consumer organizations to help their members to self-supervise,\textsuperscript{75} and it encourages, to a limited extent, corporations and industry associations to self-regulate and create high internal standards. It creates positive incentives for compliance.\textsuperscript{76} And, it grants the courts the power to award enhanced damages when the failure to follow safety rules in the FSL results in physical and financial loss.\textsuperscript{77}

The FSL redefines the aspirational scope of food safety regulation, both along the supply chain and within the environments where food is handled. The focus on comprehensive management of the food system is common to modern food safety legislation -- i.e., from “farm to fork.”\textsuperscript{78} In the food processing factories and supermarkets, and even in collective markets, the Law requires increased attention to the sterility of the facilities and points of contact between machines and employees and food products. Entities have a responsibility to ensure the safety of the food products and materials that they receive;\textsuperscript{79} ensure the safety of the process by which they handle food;\textsuperscript{80} and ensure the safety of the final product as well as the process by which they export it.\textsuperscript{81} In addition, the FSL contains more defined terms, as compared with the FHL.\textsuperscript{82} In this way, the FSL may not always broaden the scope of these concepts as much as possible, but it improves understanding of terms of art and sets a standard for debate about their meaning. These definitions will be, at the very least, useful in the future to refining the scope of food safety law.

Another change that the drafters attempted in the FSL was the creation of mechanisms to centralize and consolidate the management of food safety by the government. For example, it creates a high level Food Safety Commission under the State Council as an overarching, supra-ministry food safety watchdog.\textsuperscript{83} The Commission is comprised of some elite level leaders with the goal of resolving standoffs between agencies

\textsuperscript{75} Id. art. 10.
\textsuperscript{76} Id. arts. 8-9.
\textsuperscript{77} Id. art. 96.
\textsuperscript{79} Id. art. 36.
\textsuperscript{80} Id. art. 27.
\textsuperscript{81} Id. chs. 4-6.
\textsuperscript{82} Id. art. 99.
\textsuperscript{83} Id. art. 4.
with overlapping mandates, but divergent interests. In addition, the drafters of the FSL seem to have placed as much authority as possible in the Ministry of Health, which oversees the Food and Drug Administration. After much debate, the functions of other ministries (for example, the State Administration for Industry and Commerce and the Administration for Quality Inspection, Supervision and Quarantine) were preserved, but adequate communication and coordination is stressed where responsibilities may overlap in order to avoid problems of over or under regulation.\textsuperscript{84} Also supporting the theme of centralization, under the FSL, localities may only enact standards if no central standards on the same subject matter exist.\textsuperscript{85}

The FSL introduces more technically rigorous processes – both scientifically technical and procedurally technical. In several ways the FSL creates more finely drawn procedures for processes that were introduced in the FHL, such as inspection and testing, supervision of food additives, and the imposition of fines and other administrative punishments (termination of licensure, cessation of production, and the seizure of contaminated products or facilities). Although this is a positive development insofar as the FSL fills holes where the FHL may have been too general, increased control over a process is not necessarily a good thing. Tighter control may be unrealistic because of scarce resources or because it may create potential for more opportunistic official behavior.\textsuperscript{86} In other words, it may create more points along a process for officials to demand illicit benefits from stakeholders in order to advance their interests. The greater innovation is the addition of mechanisms or processes by which scientific or medical expertise may be introduced to more bureaucratic regulatory tools.

It should be noted that while the FSL has administrative (regulatory requirements) and civil (compensation remedies) elements, it does not have a criminal dimension.\textsuperscript{87} The Criminal Code was amended in 2010 to include punishments for producing toxic food.\textsuperscript{88}

\textsuperscript{84} Id. arts. 2-5.

\textsuperscript{85} Id. art. 24. Standards, which in the U.S. would be a type of regulation are not deemed as such by relevant PRC legislation, such as the Legislation Law which sets forth the hierarchy of legislative sources, law (falu), regulation (xingzheng fagui), rules (guizhang). Thus, any document termed a “standard” (biaozhun) might occupy a vague place in relation to other sources of law. See Zhonghua renmin gonghe guo lifa fa [P.R.C. Legislation Law] Ch. 3 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000).


\textsuperscript{87} See Food Safety Law, art. 98.

the food safety area will be handled under the Criminal Code. It remains to be seen whether these prosecutions will serve as a consistent deterrent of perverse conduct, rather than a mere way to set an example of severe consequences. As in all corruption cases, swift and heavy handed, but at times inconsistent, punishment has been employed in numerous contexts to set an example. However, it is questionable as to whether the odds of being one of these examples, when compared to the economic benefits to the official of corrupt behavior, prevents the targeted conduct.

II. JUDICIAL DIMENSION OF THE FOOD SAFETY LAW

This assessment of the Chinese judiciary’s involvement in the enforcement of the FSL comes at a time when these courts are looked upon by American and Chinese scholars as disappointing. They lack independence from political forces within the Communist Party, are saturated with propaganda and Party rhetoric, and are bullied by other branches of the government and even aggressive petitioners and protest mobs on occasion. The courts lack the power to enforce their judgments effectively, and for that reason, sometimes avoid making decisions. They strong-arm parties into mediating suits, when the law calls for mediation and settlement to be voluntary.

The size of the contribution that courts in China make to the development of the substantive content of Chinese law and its enforcement is much smaller than in the U.S. This is partially because the courts are technically forbidden to interpret the law or strike down inconsistent legislation, even though they do engage in interpretation of laws in some instances in order to attempt to fill holes left by inadequate


91 See id.; see also MCGREGOR, supra note 55, at 137-38.

92 Id. at 16.

93 Carl F. Minzner, China’s Turn Against Law, 59 AM J. COMP. L. 935, 940-46 (2011).


95 The Chinese constitution grants legal interpretation powers officially only to the Standing Committee of the National People’s Congress. XIANFA [CONSTITUTION] art. 67(4) (1982).
or incomplete law and regulation.96 Pockets of legal innovation by courts do exist through thoughtful adjudication of cases within politically acceptable limits.97 Perhaps the most notable exceptions to the illusive prohibition on legal interpretation by the courts are the “judicial explanations” by the Supreme People’s Court, which do add substance to the provisions of national laws and guide the judiciary in the handling of cases.98 In any event, courts in China are not free to be the architects of long-standing, game-changing precedent that judges in the U.S., who have presided over impactful public interest litigation, have been. Additionally, Chinese courts rarely develop conventions of broad applicability.99 When they do engage in legal innovation, there can be consequences for those involved, such as professional discipline.100

Recent scholarship asserts that, despite political limitations, courts in authoritarian regimes have a number of utilities. They can help leaders adjudicate disputes with political opponents (however unfairly); they can shore up legitimacy; they can render a regime internationally credible for purposes of economic development; and they can discipline an otherwise wayward administrative bureaucracy when ideology fails.101 Courts in authoritarian regimes can also become a forum for a conversation between the state and an increasingly autonomous civil society, even though they are not necessarily the place where one can expect regularized, formal

96 Liebman, Restricted Reform, supra note 19, at 20.

97 The case of Qi Yuling, for example, in which a Chinese court based a judgment on a constitutional provision ensuring education for Chinese citizens, which sparked great scholarly debate over whether the Constitution could then be used to support a judgment. The judgment of the Court was later revoked. See Jihong Mo, Constitutional Law of the People’s Republic of China and Its Development, 23 COLUM. J. ASIAN L. 137, 176 (2009) (describing the case and the subsequent revocation of the court’s opinion years after it was issued).

98 These sources of interpretation binding on the people’s courts have been allowed to continue. See, e.g., Zuigao renmin fayuan guanyu zhixing zhonghua renmin gonghe guo xingzheng susong fa ruogan wenti de jieshi [Interpretation of the Supreme People’s Court on the Several Questions Regarding the Implementation of the Administrative Litigation Law] (promulgated by Sup. People’s Ct., Mar. 8, 2000) (last visited Aug. 10, 2011).

99 Liebman, Restricted Reform, supra note 19, at 19 (“Some judicial innovation is a consequence of the wide discretion Chinese judges have in resolving cases. Unclear legal standards mean that courts must frequently fill gaps.”).


legal process. Much of this is true with respect to how Chinese courts are useful to individual members of society. Chinese courts support economic development; correct some forms of abusive official behavior; and serve as a part of larger public interest advocacy. For example, in the late 1980s, the Chinese government set in place administrative litigation to correct official abuses and misfeasance. However, there is little evidence that Chinese courts, at least in the food safety context, help litigants to obtain individualized justice consistently, either through single suits or class actions, nor is there evidence that litigation can be used as a means of promoting more structural reform.

A. Civil Tort Litigation

Like the FHL, the FSL includes a mechanism for individuals harmed by defective food products to apply to the courts for compensation. It is not altogether apparent why the drafters choose to include what one could appropriately call a food-tort provision in the FSL, when 2009 also saw the enactment of a long-anticipated general Tort Law. Although the Tort Law provides that when more specific tort liability standards exist in another law, those more specific standards shall

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102 See Tom Ginsburg, Administrative Law and Judicial Control of Agents, in RULE BY LAW, supra note 101, at 67-72.

103 See Liebman, Restricted Reform, supra note 19, at 66.


105 To say a bit more about these two ideas: Litigation in the food safety context might be said to serve two functions, individualized justice and structural reform. Neither of these functions or purposes is mutually exclusive. Individualized justice means that the individual who the company or state has harmed gets compensated and (subjectively) achieves a sense of satisfaction that the wrong that they have suffered has been appropriately acknowledged and condemned. Serving a structural reform purpose means that the litigation changes the system and influences behavior. Here it means that the officers/proprietors of companies, small and large, think twice about their behavior because of the threat and the ensuing financial burden and public embarrassment associated with a lawsuit.

106 Food Hygiene Law, art. 48 (“Whoever in violation of the provisions of this Law is responsible for a food poisoning accident or transmission of a disease caused by food-borne bacteria, or commits other acts in violation of this Law, which results in harm to others, shall assume civil responsibility for compensation in accordance with the law.”), translation available at http://asianlii.org.cn/legis/cen/lawsfhlotproc392 (last visited Mar. 20, 2012).

107 Food Safety Law, art. 96.

take precedence over its general provisions,\textsuperscript{109} there is evidence that suits for compensation for defective food products are also covered by the provisions on product liability in the Tort Law.\textsuperscript{110} What few opinions are available in electronic databases under the FSL show that the FSL is now being cited in conjunction with the Tort Law as essentially providing for the same remedy. Although duplicative, it is not uncommon for similar provisions to appear in several different laws reflecting different policies. For example, the FHL, the Consumer Protection Law, and the Product Quality Law all contained provisions under which private litigants could bring food tort actions.\textsuperscript{111} The opinions in civil cases for food torts prior to the FSL reflect that parties were citing to more than one of these laws when bringing a suit, and courts were often relying on multiple laws in their reasoning without explaining the specific differences in the language of those laws and its significance, nor explaining differences in policy or in the nature of the type of claim each law provided.\textsuperscript{112}

Despite questions about the necessity of these provisions given other laws, the FSL expands the civil food tort remedy offered in the FHL. First, the FSL contains a punitive damages provision.\textsuperscript{113} The punitive sum is ten times the purchase price of the food.\textsuperscript{114} The primary food tort provision in the FSL is Article 96, which states:

\begin{quote}
When a violation of this Law causes bodily harm, injury to property or other loss, then the offending entity shall assume civil liability for compensation in accordance with law. If the entity processes food products that are non-compliant with food safety standards or sells food products
\end{quote}

\textsuperscript{109} Id. art. 5.

\textsuperscript{110} See, e.g., Zhao yingmei su Beijing yike long lianxiao chaoshi youxian zeren gongsi [Zhao Ying Mei v. Beijing Yike Long Supermarket] (Beijing Fengtai Dist. Ct. 2011); Guangzhou baijia chaojiishichang youxian zeren gongsi baoli fenghuayuan fendian yu li zhaoyuan [Guangzhou Baijia Supermarket v. Li Zhaoyuan] (Guangzhou Interim. Ct. 2010); Guangzhou jiaguang chaoshi youxian zeren gongsi yuanunun dan yuan meng jian [Guangzhou Jiaguang Supermarket v. Mengjian] (Guangzhou Interim. Ct. 2010) (interpreting the punitive damages provisions in the FSL and the Tort Law in harmony but concluding that punitive damages were not applicable because there was no evidence of bodily or financial harm).

\textsuperscript{111} Consumer Protection Law, art. 34; Product Quality Law, art. 41; Food Hygiene Law, art. 48


\textsuperscript{113} Food Safety Law, art. 96

that it clearly knows to be non-compliant with food safety standards, then in addition to seeking compensation for loss, the consumer may seek ten times the price from the processor or seller in compensation.\textsuperscript{115}

In addition to Article 96, in order to strengthen the ability of a consumer to receive some compensation, a company is obligated to pay civil damages before paying any criminal or administrative fines.\textsuperscript{116}

Like the FSL, the Tort Law contains a provision calling for civil compensation to be paid before administrative and criminal penalties.\textsuperscript{117} While mainly providing for compensatory damages, the Tort Law provides for a punitive compensatory sum in product liability cases when the manufacturer continues to produce a product with a defect known to cause harm to human health, but it does not put a ten-times-the-price limit on the punitive award.\textsuperscript{118} No case reviewed thus far shows that the Tort Law’s text has caused a court to increase or decrease the punitive sum available in food tort cases. Because the language of Article 96 seems to indicate that\textit{ any} violation of the FSL that results in loss is actionable, it would seem that a violation of the FSL would be negligence per se under the Tort Law’s product liability provisions.\textsuperscript{119} An open question is, perhaps, whether compliance with the FSL means that there cannot be an action under the Tort Law.

Another innovation in the FSL is that it expands the range of actors along a supply chain that a consumer can hold accountable for damages.\textsuperscript{120} Professor Xu Haiyan argues that the FSL’s provisions strengthen the standards and expand the range of actors that must assume civil liability when compared with both the Consumer Rights Law and the Advertisement Law.\textsuperscript{121} For example, the FSL heightens liability for the different parties involving collective markets. These markets, which are often outdoors and contain transient vendors with sometimes questionable license credentials, are a source of significant concern because vendors

\textsuperscript{115} Food Safety Law, art. 96.

\textsuperscript{116} Food Safety Law, art. 97.

\textsuperscript{118} Tort Law, art. 47.

\textsuperscript{119} For example, under the medical malpractice provisions of the Tort Law, violation of law or regulation is constructive fault. Tort Law, art. 58.


may utilize less sophisticated hygiene measures than the managers of major supermarkets and because they make it difficult to trace the origins and circulation of harmful products when accidents occur. Before the FSL, under the Consumer Protection Law, when a merchant of food products rents a stall in a collective market, if a consumer of that merchant’s food products is injured after the lease has expired, then the lessor of the stall or the manager of the particular commodities fair or sales exhibition (zhanxiao hui) at which the food product was sold may bear liability.  

Both of these parties retain a right of indemnification against the vendor. The Consumer Protection Law does not make the manager of the collective market liable.

The FSL now provides that the manager of the market, the manager of the fair, and the lessor all have a duty to inspect the credentials of the vendors at the market. They also have a duty to inspect the stalls periodically. If they fail to execute that duty, then they must assume legal responsibility for the error. In this way the FSL expands the scope of consumer protection litigation because it gives the managers and lessors in markets their own responsibilities, instead of merely requiring that they assume liability after the vendor has failed to appear. On the basis of the FSL, therefore, the consumer may join the managers and lessors to their suit against the actual vendor of the harmful food products.

Another innovation is that the FSL makes advertisement spokespersons liable for false food advertisements that they are involved in promoting. The FSL provides: “If social organizations or other organizations or individuals recommend food products to consumers through the use of a false advertisement, and in doing so, they damage the legal rights and interests of the consumers, then they shall assume joint liability with the food processor and circulator.” The Advertisement Law only permits suits against the company itself for misrepresentations.

Although Article 96 is arguably an improvement on the FHL’s food

122 Id.
123 Consumer Protection Law, art. 38
124 See Xu, supra note 121.
125 Id. at 38-40.
126 Food Safety Law, art. 90.
127 See Xu, supra note 121, at 42.
128 Id. at 44-48.
129 Food Safety Law, art. 52.
130 Advertisement Law, art. 38.
tort remedy, there is little evidence that Article 96 has generated cases in which litigants, either individually or as a class, consistently receive adequate compensation for serious food poisoning incidents. The few available opinions under the FSL reveal that the cases that were accepted and produced opinions involved decidedly non-controversial facts in which the injuries were minor, if not nominal. Several facets of these cases are notable. First, none of them involve death or serious injury. Plaintiffs got sick from the food products, or noticed that they were defective without becoming ill, but there is a general absence of any emotionally charged cases wherein highly negligent food manufacturing or circulation techniques resulted in high profile consequences. Second, a number of disputes were dismissed for lack of simple evidence, such as inability to trace a product back to its origin or to indicate its specific defects. Despite general discovery provisions in the Civil Procedure Law, litigants do not seem to be permitted to engage in vigorous discovery which, at least in the U.S., could compel paperwork from the defendant calculated to lead to proof that defective products were purchased there. In addition, consumer groups complain that they do not have the power to bring suit on behalf of individuals involved in mass incidents, who often do not have the resources to conduct suits effectively.


132 Interview by Author, Shanghai (2011).

133 See, e.g., Limouxue su Shenzhen shi yongmousheng gongmao youxian gongsi [Li X Xue v. Shenzhen X Sheng Trading Co.] (Shenzhen Baoan Dist. Ct. 2010) (case dismissed because plaintiff failed to provide evidence that the food products fell below standards and caused bodily harm or financial loss); Xudajiang su Guangzhou baijia chaqio shichang youxian gongsi zhengjia guangchang fendian deng [Xu Dajiang v. Guangzhou Baijia Supermarket] (Guangzhou Tianhe Dist. Ct. 2010) (dismissed for lack of evidence, plaintiff failed to meet burden); Yang zhiqiang yu guangzhou baijia chaqio shichang youxian gongsi deng [Yang Zhiqiang v. Guangzhou Baijia Supermarket], (Guangzhou Interm. Dist. Ct. 2010) (case dismissed because plaintiff failed to prove a connection between the product and the retailer); Guangzhou Baijian Supermarket v. Li Zhaooyuan (Guangzhou Interm. Dist. Ct. 2010) (punitive damages dismissed for failure to provide evidence of any physical or financial harm); Shanghai lianjia chaqio youxian gongsi yu xumou [Shanghai Lianjia Supermarket v. Xu Mou (Shanghai Interm. Ct. 2010) (dismissed in part because plaintiff failed to prove that products fell below food safety standards); Wangmou su Shanghai mou gengli youxian gongsi deng [Wang Mo v. Shanghai Mo Libian Co.] (Shanghai Putuo Dist. Ct. 2010) (dismissed in part because plaintiff failed to prove evidence of harm).

134 See supra note 133.

135 Liebman, Populist Threat, supra note 91, at 281-82.

136 22 jia chengshi xiaofei weiquan danwei huyu fuyu qi daibiao xiaofei zhe quanyi susong quan [22 Municipal consumer groups call for the right to represent
problematic because the cases appear to place nearly the entire evidentiary burden on the plaintiff in FSL cases. The plaintiff bears the burden to show that he purchased the food product from, for example, the retail store that he is suing; that the store failed to conform to food safety standards; and that the defective product caused the plaintiff loss.\(^{137}\) If the plaintiff is able to show at least that the product was deficient, he may win, at times, the nominal sum of the purchase price.\(^{138}\) However, if the plaintiff cannot show causation and additional physical or pecuniary harm, then the decuple (10x) punitive damages sum will not be awarded. In none of the cases surveyed has there been an award of punitive damages.\(^{139}\)

Also, likely because of the lack of access to evidence or in depth discovery procedures, reported cases are usually against retailers of food products. It is fairly easy to sue the known-source of the product, and the FSL permits such suits where the retailer sold clearly substandard products, but the prevalence of labels lacking manufacturer information and small-scale producers that might even close down after making a certain profit on substandard products are also problems.

This survey of cases does not show the number of cases that are mediated or settled, and therefore produce no formal opinion.\(^{140}\) Given the known preference of Chinese courts for mediation, the absence of sensitive or emotional cases in which the injuries are severe or a large number of people were wronged may indicate that, where there has been a serious injury, the companies may be more willing to settle, or the courts may play a more active role in pushing the parties to settle.\(^{141}\) Indeed, this method may not be entirely to the disadvantage of the plaintiffs because courts may encourage the defendant to pay more when going through less public settlement procedures than through formal process.

In sum, while information regarding cases may be lacking or incomplete, the cases available for this examination seem to indicate that high profile public interest litigation, for example, in the form of class actions, has not emerged in the courts under the FSL.\(^{142}\) Instead, the

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138 Id.

139 Id.

140 Cf. Minzner, supra note 93, at 944-45 (discussing how rates of mediation have risen in the PRC pursuant to new political limitations on the courts).

141 Id.

government prefers to handle the higher profile mass cases administratively through mass compensation funds, and attempts at litigation in sensitive cases, such as the defective infant formula cases that have resulted in illness or death, have been either delayed or thwarted entirely.

The typical low-profile case under the FSL seems to proceed as follows. Two citizens Lu and Pan purchased twenty boxes of fine quality moon cakes at the Sanwei Supermarket in Qinyang City, which they planned to give as presents to their close relatives and friends. In total, they paid 3230 RMB for the moon cakes, or approximately $538.00. When they returned home and tasted the moon cakes, they discovered a funny, “gritty” taste. Wanting to get in touch with the manufacturer of the cakes, they looked on the box, but found almost no information at all: no name, make, quantity, expiration date, or ingredient or nutrition content information. They also could not find the address, licensing credentials or other manufacturer related information required under Chinese law.

Lu and Pan first went to the local branch of the State Administration for Industry and Commerce (“SAIC”) in Qinyang city. The Qinyang SAIC investigated and issued a mandatory recall, forcing the defendant to remove the illegal product from the shelves. The parties were given sixty days to apply for reconsideration of the Qinyang SAIC’s order to either the Jiaozuo City SAIC or the Qinyang People’s Government, both higher authorities with the power under the Administrative Reconsideration Law to reverse the Qinyang SAIC’s decision, but it appears that they did not do so. They were also given the failure of class actions in the tainted milk cases).

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144 Yoo, supra note 142, at 568-69.


146 Id.

147 Id.

148 Id.

149 Id.

150 Id.

151 Id. Recalls are mandatory under the FSL. Food Safety Law, art. 53.

opportunity to bring the case to a people’s court within three months of the decision.\textsuperscript{153}

Lu and Pan brought suit against the supermarket arguing that it had openly sold food products that violated food safety standards, exhibiting complete irresponsibility for the health and safety of consumers. Lu and Pan sought the return of the purchase price, ten times that sum in punitive damages, and litigation costs and attorneys’ fees.\textsuperscript{154} The legal bases for the suit were a number of similar provisions in different laws: Article 122 of the General Principles of Civil Law,\textsuperscript{155} Article 11 of the Consumer Protection Law, Articles 41 and 42 of the Product Quality Law, and Article 96 of the FSL.\textsuperscript{156}

The court concluded that the plaintiffs had in fact purchased twenty boxes of moon cakes from the defendants for a total of RMB 3230.\textsuperscript{157} The ability to provide evidence led the court to order the defendant to return the purchase price to the plaintiffs.\textsuperscript{158} However, the court concluded that the evidence that the plaintiffs submitted to the court could not prove that the defective food products had caused bodily harm, property loss or any other type of damage, so no punitive damage award was required under the facts of the case.\textsuperscript{159} The court did not award litigation expenses because it was clear that the plaintiffs had not been honest about certain expenses they had incurred in discovering and reporting the defect.\textsuperscript{160}

The other cases publicly available in which the court relies on the provisions of the FSL are similar – there is no death or serious physical harm; the verdict is evenhanded; and, insofar as one can ascertain, there is not much publicity associated with the cases. Perhaps one reason for this is that a recent food safety incident, which occurred before the passage of the FSL, generated public outcry, embarrassed the government.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} General Principles of Civil Law, art. 122.

\textsuperscript{156} Id. The Tort Law had not been implemented when the suit was initiated on December 1, 2009. Id. See also Tort Law, art. 92.

\textsuperscript{157} The court briefly resolved the standing issue in favor of the plaintiffs. As the direct purchaser of the products that the defendant was selling, the case had a direct advantageous/disadvantageous relationship with the plaintiffs and therefore allowed them to sue under Article 108 of the Civil Procedure Law. Lu haili deng su Jiaozuo shi sanwei shangye guangchang youxian zeren gongsi qinyang fen gongsi [Lu Haili et al. v. Jiaozuo City Sanwei Commercial Co., Ltd.] (Luo Yang Dist. Ct. 2010).

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id.
domestically and internationally, and resulted in a crackdown on food safety lawyers and activists. This occurred when Chinese public interest lawyer Li Fangping attempted to bring suit on behalf of the parents whose children were either killed or injured when toxic amounts of melamine appeared in the baby formula that they fed their children.\textsuperscript{161} The melamine, which is an industrial plastic used to thicken and increase the quantity of milk, caused kidney stones in the children. Before anyone stopped this practice, melamine contaminated milk, which was distributed in part by the huge dairy company Sanlu, had killed six children and left another 300,000 injured throughout 2007-2008.\textsuperscript{162} The children with injuries, which included children adopted by U.S. families from Chinese orphanages where the toxic formula was used, may have lingering health effects for the rest of their lives.\textsuperscript{163}

When the problems began to emerge in the press just after the 2008 Olympics, Li Fangping was optimistic that the government might allow suits, perhaps even against the milk giant Sanlu, which was at the heart of the scandal.\textsuperscript{164} Li said that, despite the fact that no such suits for compensation had occurred when a similar infant formula scandal left children in Anhui province with enlarged heads due to malnutrition in 2004, he thought the parents would be able to sue for compensation this time.\textsuperscript{165} Li and other public interest lawyers began counseling the families about their options.\textsuperscript{166} The government began to pledge that it would give the infants free medical care, but reports around the country came out that parents were being charged at hospitals.\textsuperscript{167} Sanlu’s first response was merely to offer a refund for the product the parents had purchased.\textsuperscript{168}

Despite Li’s optimism, courts refused to accept lawsuits by


\textsuperscript{164} Ng Tze-Wei, \textit{Ample Opportunities for Public to Sue for Damages}, \textit{SOUTH CHINA MORNING POST}, Sept. 18, 2008, at 4.

\textsuperscript{165} \textit{Id.} (“Despite the lack of legal precedents from the milk powder crisis in 2004 that left babies with enlarged heads, Mr. Li [Fangping] was confident that consumers could sue for compensation this time round, ‘provided that the judicial system does not clamp down on these claims.’”).

\textsuperscript{166} \textit{Id.}


\textsuperscript{168} \textit{Id.}
affected families for compensation. The courts were either waiting to see whether the government and the dairy industry would pay compensation, thus delaying the suits, or the suits were rejected outright. A lawsuit involving 63 plaintiffs that sought fourteen million RMB in compensation was rejected in Shijiazhuang. Another case was rejected in Lanzhou City, Gansu province for 1 million RMB, which was filed on behalf of the parents of a six-month-old boy who died of kidney failure after consuming contaminated Sanlu milk. The court stated that it could not accept the case until it knew whether higher-level authorities would issue guidelines to deal with this sensitive issue. Lawyers like Li Fangping, who volunteered their time and advice, or wanted to, were threatened and harassed by local leaders to stay away from these cases. The guilty corporations ultimately did pay compensation into an administrative fund. The courts did not play a role by adjudicating suits brought by private lawyers independent of the universal compensation plan. Although some promises were made that such suits would ultimately be permitted, they seem to have amounted to nothing so far.

The attempted contaminated milk litigation pre-dates the enactment of the FSL, but there is little to indicate that the Law would change anything now. Indeed, Li Fangping and another parent activist, Zhao Lianhai, are still being persecuted as a result of their involvement in that case. As described above, the concepts underlying Article 96, such as product liability and corporate responsibility, were already present in other laws that could have served as the basis to obtain compensation in the kind of lawsuit that Li Fangping wanted to bring. The former case, brought by Lu and Pan, seems to be more indicative of what the government and the judiciary will tolerate under the FSL.

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170 Henry Sanderson, China Court Refuses to Accept Tainted Milk Lawsuit, ASSOC. PRESS, Dec. 8, 2008.


172 Id.

173 Id.

B. Administrative Litigation

Courts in China are permitted to review specific official actions for legality when the citizens or entities that bring suit have standing because they are directly affected by those actions under the Administrative Litigation Law (“ALL”).\(^{175}\) A court’s decision not to enforce an administrative decision because the agency official acted without authority will, at most, invalidate the action itself, but never the applicable administrative regulation on which the legal action was based. This review is in addition to methods by which citizens can apply to the administrative agencies that perpetrated the action for “reconsideration” under a system called administrative reconsideration and a parallel petitioning system that works similarly called “Letters and Visits.”\(^{176}\)

In addition to reviewing administrative actions for legality in response to complaints by citizens or entities, many administrative agencies must also go to court to enforce their coercive sanctions. Evidence shows that they have been doing this for a while, but the Administrative Coercive Measures Law, enacted in 2011, now spells out expressly that unless they possess the power to enforce their administrative sanctions directly, agencies must go to court to seek enforcement.\(^{177}\) The court reviews the proposed administrative action to ensure that it is not arbitrary or contrary to facts in evidence.\(^{178}\)

As noted above, the FSL gives agencies a number of new standards to enforce against food producers and retailers. These standards create the potential for courts to have to review the legality of administrative action as part of an enforcement action. Research into available case databases and interviews shows that there have been no significant cases in which parties cite the FSL in this respect. There has, however, been other litigation involving the government’s actions with respect to food manufacturing entities. Consider the following case.

Company A came under investigation by a local Bureau of Industry

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\(^{176}\) Although these systems involve adjudicatory practices, they are not carried out by judicial organs of government. Therefore, they are not considered in this section.


\(^{178}\) Shanghai shipin yaopin jiandu guanli ju mou fenju yu mou xiaoxue [Shanghai FDA v. X Elementary School] (Shanghai Fengming Dist. Ct. 2009).
and Commerce ("the Bureau") for selling lamb chops with duck meat mixed into them.\textsuperscript{179} The Bureau conducted a spot inspection and then asked the vice-manager of Company A to come down to their offices and provide relevant materials, including their license and other registration, financial, and tax information.\textsuperscript{180} Ultimately the Bureau concluded that Company A’s behavior amounted to a violation of the Product Quality Law, and it ordered Company A to pay a fine of approximately $75,000.\textsuperscript{181} The Bureau also ordered Company A to cease production of that product and pull what it had produced from the shelves.\textsuperscript{182}

Company A applied for administrative reconsideration, requesting review of the Bureau’s ruling by the administrative authorities.\textsuperscript{183} When that application was rejected, Company A filed suit in a people’s court alleging that the Bureau had made its decision against the weight of the evidence.\textsuperscript{184} The lower court rejected the application, concluding that the facts were “clear,” the process was “fair,” and the application of the law was “accurate.”\textsuperscript{185} For these reasons it refused to vacate the order of the Bureau.\textsuperscript{186}

On appeal, Company A again argued that the order was based on unclear and even falsified evidence.\textsuperscript{187} Company A presented the product’s label, which showed “duck meat” as an ingredient, and it stated that there was no regulation prohibiting the two from being mixed together.\textsuperscript{188} Company A argued that the Bureau had created its own record of facts regarding its questioning of Company A’s employees.\textsuperscript{189} It also argued that the fine was unfairly calculated. The Bureau refuted these allegations.\textsuperscript{190}

The court ultimately accepted the Bureau’s version of the facts, noting that, although Company A had presented a label, it had presented

\textsuperscript{179} Dalian shi mou shipin youxian gongsi yu Dalian shi gongshang xingzheng guanli ju [Dalian City X Food Product Company v. State Administration for Industry and Commerce.] (Dalian Interm. Ct. 2010).

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} Id.
no evidence to show that the label was indeed affixed to products sold to consumers. It was reasonable to conclude that Company A’s behavior had violated the provisions of the Product Quality Law against the pollution and falsification of food products, but the court presented no discussion of how it had pieced regulatory provisions together to come to this conclusion. For these reasons, the Bureau’s order and decision were enforced. The court did not discuss the meaning of the law and regulation and their application to the present facts in depth. Instead the court pointed to minor evidentiary errors that mandated dismissal of the appeal.

Another case involved the local government’s curtailment of a local corporation’s right to do business by ordering inspection authorities in the county not to inspect the plaintiff’s meat products. A government official had issued a directive via telephone to this effect. After a lengthy review of the arguments of the parties and the hard evidence in the case, which clearly showed an animus towards this specific company, an appellate court ultimately reversed the trial court’s order dismissing the company’s complaint and ordered reconsideration of the validity of the government’s action, deciding that the telephone order was a reviewable administrative action. It is unclear how the matter was ultimately resolved.

A survey of approximately seven hundred cases brought under the ALL related to food products since the ALL’s enactment shows that the majority of cases were trademark cases involving a food company. However, the Supreme People’s Court did release a compilation of the major administrative cases it had handled related to food and drug law, most of which related to the legal basis and/or jurisdiction of various agencies to levy fines or other penalties at corporations. In short, based on this limited data, administrative litigation in this area appears to be

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191 Id.
192 Id.
193 Id.
194 See Id.
196 Id.
197 Id.
199 FOOD AND DRUG SAFETY ADMINISTRATIVE LITIGATION, supra note 45, at 5-6.
aimed at policing the market for anticompetitive behavior and curbing predatory government action towards food and drug manufacturers. No cases could be located in which the enforcement of food law was called into question on a sensitive issue relating to, for example, the failure of an agency to enforce in a situation which resulted in death or bodily harm to one or more citizens.

C. The Relevance of the Courts

As the cases above show, the ordinary citizen may have modest success at obtaining compensation through the courts. Chinese consumers are not shy litigants when they believe they have been cheated or harmed by a company. And, although savvy public interest lawyers know that class actions are difficult, if not impossible, and the formal legal process may be less than promising, they know they can succeed in raising education and awareness by launching a court case and holding repeated press conferences to discuss their progress. When their complaints are rejected, citizens can sometimes launch protests or submit a complaint against the courts through the same administrative petition system that they would use to question the action of an administrative agency. Under pressure to avoid protests or high numbers of citizen petitions, the courts will often rehear the case, and sometimes may even change their verdict in order to avoid unwanted media or high-ranking official attention. At times, carefully making an issue bigger gets the government to reconsider a specific policy.

Still, there is currently little evidence of judicial innovation under the FSL, and given that the Chinese judiciary’s traditional role in law enforcement is generally limited, there seems to be a low probability that judges will contribute to the substantive development of food safety law. Nor does the threat of a court order or judgment appear to be growing into a significant avenue for ensuring government or corporate accountability. As Chenglin Liu has argued, the courts could prove to be valuable at generating change if they were permitted to accept civil suits, either in the form of individual suits or class actions, which hold corporations

200 Paul French, supra note 62, at 17-23 (noting the consumer protection litigation culture).

201 Interview by author, Beijing (2010).

202 Liebman, Populist Threat, supra note 91, at 286-91.

203 Id.

204 Keith Hand, Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China, 45 Colum. J. Transnat'l L. 114 (2007) (discussing policy reforms related to custody without repatriation after advocacy by scholars following a police abuse incident in which a student was killed).
accountable for manufacturing truly dangerous food products. However, as an unfortunate result of the constraints of the current system, desperate plaintiffs sometimes receive little to no compensation and it is difficult to achieve structural reform through litigation.

III. SOCIAL PROTEST & ENFORCEMENT

Another question is whether society has been or could be successful at shaping the enforcement of food safety provisions through advocacy. This has been covered to some extent when discussing lawsuits in the courts, which have turned out to bring only minimal to moderate progress, and it will also be covered below in the context of citizens’ participation in the agency rulemaking process or in reporting on wrongdoing (whistleblowing). However, in many areas, the law has empowered individual citizens or emerging non-governmental groups in China to seek out relief or push for the law’s implementation on behalf of themselves or on behalf of a greater group or class of citizens adversely affected by a particular phenomenon. In other words, citizens in China sometimes use the provisions of laws to generate protest movements of varying scale, which may be un-tethered or tangential to formal government or court process, in order to pressure the government to change its policy through a combination of shaming and threatening highly-valued social stability.

Some groups or scholars in universities have also sought to assess the implementation of the law, to research and critique its effectiveness, and to advocate for broader reform in the form of legislative or regulatory amendments. For example, a graduate student at Fudan University in Shanghai recently established a website that collects and indexes news articles related to food safety accidents that harm individuals. That effort

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205 Chenglin Liu, Profits Above the Law: China’s Melamine Tainted Milk Incident, 79 Miss L. J. 371, 416 (2009) [hereinafter Liu, Profits Above the Law] (“Without the possibility of consumer litigation to address food safety issues there is little incentive for milk processors to correct their problems, given their close governmental ties. Despite the judicial system’s present inability to adequately address compensation issues, the ability of injured persons to file lawsuits could offer an effective mechanism for providing redress for harm caused by dangerous products and deter misguided production processes. Moreover, trial proceedings would shed light on processors’ hidden but dangerous practices. Private litigation would also force milk processors ‘to examine harmful practices that might otherwise receive inadequate attention.’ In essence, litigation would compel milk producers to internalize the costs of doing business and take precautions long before problems arise.”).

206 KEVIN J. O’BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA 5 (2006) (tracing “what can happen when villagers frame their claims around Communist Party Policies, state laws, and official values; solicit assistance from influential allies; and combine legal tactics with collective action to defend their ‘lawful right and interests.’”).
was widely reported in the Chinese press, and the website seems not to have offended the government, which engages in comparable efforts.207

The extent to which the government embraces or permits this type of advocacy may seem arbitrary, but it can be thought about in terms of a number of factors, inter alia, (1) the issue area, e.g., environmental,208 public health, and labor rights; (2) the track record of the group of individuals or attorneys bringing the suits; (3) the government agencies that the suit might affect, e.g., Public Security, Ministry of Health, and Ministry of the Environment; and (4) the affect on a particular locality, e.g., perceived damage to local official reputation, to local companies (economics), and to local social stability.209 When social popular advocacy crosses a line and becomes a threat, the government may take action to limit that advocacy. That threat of government intervention has become a limit on the implementation of the law more generally. The examples discussed in this Section illustrate that measured protests may have some success provided that the government does not view the protests as so threatening that it “cracks down” or represses the protest by violent or other coercive means. The first scenario is an example of how the enactment of a law generates the consciousness of a right amongst members of the general public and motivates them to enforce that right on their own, rather than going through government institutions. The second scenario is an example of how advocacy can cross a line and generate a response from government to curb those individuals who are seeking to enforce their rights under the law.

In April of 2010, approximately one year after the FSL was enacted, an activist group posted the following story on its website. Two men, Mr. Zhang and Mr. Ma went into a Walmart in front of the Xiamen


208 HUMAN RIGHTS DICTIONARY: INTERNATIONAL, MAINLAND CHINA, HONG KONG & TAIWAN 241 (Huang Mo, et al. eds., 2007) (“Although the Chinese government exerts strict control over non-governmental organizational activities, between around 1995 and 2005 the government was increasingly lenient toward a small number of environmental organizations.”).

209 In his book Water Warriors, Andrew Mertha explores three case studies in which popular activism was applied to hydraulic dam issues in China. He argues that the “fragmentation” of the policy process in the PRC has allowed for additional political space to emerge for scholars and NGO activists. ANDREW C. MERtha, CHINA’S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE 1-11 (2008). While any in-depth discussion of the factors that make up the political space for pluralism in China are beyond the scope of this Article, and the list above is certainly not meant to be exhaustive, but prior issues have shown that what is acceptable is very context specific.
train station. While shopping, by chance, they bought a carton of tea that appeared to be a “Three Without Product,” meaning that the tea was not labeled with the manufacturing company’s name, its address, or its phone number. This practice is prohibited by Article 42 of the FSL. Upon purchasing and opening the product, they discovered that the inner bag was labeled in a way that was also clearly barred by the Advertisement Law – the product was advertised with “absolutist” language about its perfection. Proceeding to the local bureau of Industry and Commerce, Mr. Zhang and Mr. Ma requested that the agency initiate an investigation of these products. After speaking to people there, they convinced the inspectors to look into the Walmart products. The inspectors did so, and ultimately seized the products. The story documents this with pictures of the seized goods.

The next day, the two men phoned Walmart and demanded a refund for the defective product as well as ten times the price of what they paid in punitive damages according to Article 96 of the FSL. When the Walmart executive that they spoke to refused, they made signs and banners and staged a protest in front of the Walmart indicating that it sold “Three Without Products,” or substandard food products. Although Walmart refused to compensate the individuals in this case, it would not be out of the realm of possibility for a company or a government agency to do so. In other cases unrelated to food safety, protest has produced

211 Id.
212 Id. See also Food Safety Law, art. 42 (“Article Forty-Two: The outside of prepackaged food products shall have a label. The label shall contain the following items: (1) The name of the product, the specifications, the finished content, and the date of processing or production; (2) A listing of the ingredients or mixed materials; (3) the name of the processor, its address, and its contact information; (4) the expiration date; (5) the standard number for the product; (6) the storage conditions; (7) the common names of all additives used in accordance with national standards (8) the license number of the processor; (9) other information required by law, regulations or food safety standards.”)
215 Id.
216 Id.
217 Id.
218 Id.
results.\textsuperscript{219} It also appears that no police action was taken against the men to stop their protest. While Zhang and Ma’s behavior did not result from any failure of the government itself, and might even be viewed by some as opportunistic, the use of protest and reputational shaming in order to enforce legal rights is becoming an increasingly common phenomenon in the PRC.\textsuperscript{220} The practice has been observed in Western legal circles as a failure of formalistic legal processes in the courts, but it has also been touted as a success of the law itself as a tool for the restraint of corporate and government interests.\textsuperscript{221}

Xi Chen similarly observed the emergence of opportunistic protests or troublemaking in China in order to achieve demands.\textsuperscript{222} In utilizing this technique, disaffected groups attempt to lobby the government or obtain resources by combining protest (through, for example, the peaceful visits of a group of petitioners to government offices) with elements of moderation, such as a legal basis or some message that the discontented group does not wish to subvert or severely challenge the government.\textsuperscript{223} Although Zhang and Ma were not seeking resources from the government, their protest may be characterized as opportunistic in the way that Chen Xi describes it.\textsuperscript{224} They combined elements of moderation – their legal basis, their report to the government, and their phone call to management – with elements of agitation.\textsuperscript{225} The provisions of the FSL have the potential to shape the expectation of the treatment that citizens should be receiving from the government and from corporations, and therefore may continue to serve as the basis for opportunistic protests.

Protests entail great risks and costs, as exemplified by the story of the food safety activist Zhao Lianhai. Zhao was an advertising executive and “former editor of a newspaper specializing in food and product


\textsuperscript{220} Xi Chen, Between Defiance and Obedience: Protest Opportunism in China, in GRASSROOTS POLITICAL REFORM IN CHINA 253, 256-57 (Elizabeth J. Perry & Merle Goldman, eds. 2007).

\textsuperscript{221} Cf. ELIZABETH ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA’S FUTURE 132 (2004) (quoting an unnamed scholar, “The Party knows from its own experience that it is possible to start a mass movement capable of overthrowing a government from just a small group of about a dozen people. As such, control is vital.”)

\textsuperscript{222} Xi Chen, supra note 220, at 220, 276-281.

\textsuperscript{223} Id.

\textsuperscript{224} Id.

\textsuperscript{225} Id.
Shortly after he quit that job, however, his young son was the victim of the tainted baby formula. After drinking the milk contaminated with melamine, Zhao’s little boy developed kidney stones, at age three. Beginning with some brief inquiries online Zhao ultimately established a website for the jieshi baobao, or the “Stone Babies.” Zhao originally convinced parents who wanted to petition the government to remain calm. Keeping victims calm and focused was part of the impetus for starting his website. Thousands of parents signed up for the site, and his online endeavor grew into more formalized advocacy – e.g., seeking heavier sentences for those involved with the milk scandals and protesting the decision of the authorities to bar concerned parents from attending the criminal trials of the Sanlu milk company executives. Zhao also advocated for adequate compensation for the parents through the courts.

Ironically, for someone who began by urging parents not to officially challenge the government through a petition, the police nevertheless arrested and imprisoned Zhao on charges of subversive activities, specifically provoking quarrels and making trouble. After being convicted and sentenced to two and a half years in prison, he began a hunger strike in jail, which he intended to continue until the verdict was overturned. However, in a reversal which some argued was based on the threats of authorities against his family, Zhao fired, or was successfully coerced into firing, his attorneys, and he quieted down. He relinquished his right of appeal and was sent home on medical parole, where he continued to be watched.

227 Id.
228 Id.
229 Id.
231 Id. See also Parents’ Fury Over Melamine Sentences, SOUTH CHINA MORNING POST, Jan. 23, 2009.
235 Id.
236 Id.
the zone of tolerance that the government has for these activities.\textsuperscript{237} Other lawyers or parents who looked into compensation for this scandal, met with similar threats from the government.\textsuperscript{238}

Part of the issue with Zhao’s activities was that he was demanding lawsuits when the government wanted to deal with the crisis – a very public crisis of significant size and severity – administratively. The government required that Sanlu and other dairy companies at fault pay money into a compensation fund that came to be managed by the China Life Insurance Company.\textsuperscript{239} This mechanism for compensating the victims of natural and public health disasters has gained popularity amongst PRC academics and governmental officials. Indeed, more literature has appeared advocating for further use of such administrative compensation funds for food safety disasters in the future.\textsuperscript{240}

According to news reports, the families of the children affected by the melamine tainted milk received an initial payment to cover their child’s medical expenses and the remainder of 200 million RMB was deposited into the current fund to compensate them for additional problems that their children may encounter as they grow.\textsuperscript{241} For the initial payout, parents whose children did not have to undergo surgery received 2000 RMB in compensation, and parents whose children did have to undergo surgery received 30,000 RMB in compensation.\textsuperscript{242} Many of the parents dispute the claim that the initial fund have been generous enough to dispense with all of the medical costs of their young children, as well as doubt that there would be funds sufficient to cover their expenses in the future.\textsuperscript{243} At one point a high official in the Chinese government noted publicly that parents unhappy with the settlement with the dairy companies could seek compensation through the court system, but it is

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\bibitem{237} Keith Richburg, \textit{China Jails Man for Activism After the Tainted Milk Scandal}, WASH. POST, Nov. 11, 2010, at A10 (“Zhao’s attorneys and others said the sentence appeared to indicate that China’s ruling Communist Party remains intolerant of critics – including AIDS activists, environmentalists, and others well outside the political realm – and that it will be particularly tough on those who use the Internet to organize others around a cause.”).
\bibitem{240} Sun & Wang, \textit{supra} note 143, at 16.
\bibitem{242} Ma, \textit{supra} note 226.
\bibitem{243} Liu, \textit{Profits Above the Law}, \textit{supra} note 205.
\end{thebibliography}
unclear whether the courts accepted many suits, much less produced significant additional compensation.\footnote{244}{Vivian Wu, Top Court’s Official’s Vow Gives Hope to Families of Milk Scandal Victims, SOUTH CHINA MORNING POST, Mar. 4, 2009, at 7. See also, First Lawsuit in China Milk Scandal Delayed, AFP, Dec. 8, 2009.}

This negative reaction to Zhao’s work may also be in part due to the government’s own actions or omissions in exacerbating the milk scandal. It has been revealed that the media was ordered to keep quiet in 2008 about the milk issues in order not to dampen the Olympic mood.\footnote{245}{Tina Wang, Olympics Led to Milk Scandal Hush-Up Some Say, FORBES, Sept. 17, 2008, http://www.forbes.com/2008/09/17/china-milk-scandal-markets-equity-cx_tw_0917markets03.html.} Moreover, the scandal deepened when, in 2009, it was revealed that melamine tainted milk was back because companies had been recycling and selling the recalled tainted milk from 2008.\footnote{246}{Frank Ching, Victims Two Ways in China, THE GLOBE, Feb. 17, 2010, at A21.}

Zhao Lianhai’s case illustrates the existence of a boundary of how far the government will let non-governmental figures and organizations go in advocating for the enforcement of the law and holding corporations accountable for creating defective food products. Mr. Zhao arguably crossed two boundaries: first, accumulating such a large group of followers and rallying them around a common cause as he did touches on the regime’s sensitivities about social stability;\footnote{247}{ECONOMY, supra note 221, at 121.} and second, the government’s concerns that public health incidents can have rippling economic effects gargantuan enough to destroy a large company like Sanlu if it is pelted with compensation demands and bad press.\footnote{248}{See Liu, Profits above the Law, supra note 205, at 3-5.}

IV. REGULATORY INNOVATION

Although the courts play some role in adjudicating the food tort and administrative law cases, the FSL does not represent a significant innovation in their role, particularly when compared with the innovations related to the administrative agencies involved in this area. Unlike the courts and society, the bureaucracy develops new institutions, new theories, new definitions, and new tools of enforcement with less resistance from the Party. Agencies are given greater political latitude to interpret the law and be creative in enforcement. This Section is not concerned with the question of “why” agencies receive more political space, rather it analyzes one of the regulatory innovations under the FSL with the goal of determining some of the ways in which effective implementation might occur despite the macro constraints on the rule of law described in Section II.
Tracing the history of administrative agencies in China since the establishment of the PRC reveals three trends relevant to the issues addressed here. First, the agencies have gone from a set of organizations once governed heavily by Communist ideology and, often internal, Party policy to ones that are now governed to a much greater extent by publicly available laws, regulations, and other rules. Second, there has been an evolution from a large number of agencies, like the Ministry of Electricity and the Ministry of Railways, that controlled major sectors of the economy to a much smaller number that regulate sectors with private actors, or private-acting entities. Third, a more recent trend has been the change from reliance on the typical techniques of coercive enforcement and monetary penalties to a newer reliance on softer regulatory measures, such as privatization and private sector monitoring, risk analysis, public participation in rulemaking, transparency measures, and whistleblower incentives.

Related to the first trend, in stark contrast to the limits placed on judicial interpretation of law, administrative agencies in China are a rarely acknowledged source of abundant legal interpretation of national laws. The agencies issue a great deal of administrative rules, some made through formal procedures, including notice and comment, and decisional documents (of less formal rank) typically referred to as “normative

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249 A concise discussion of the administrative and regulatory dimension of a law like the FSL in China is a challenge because the administrative bureaucracy, from central to local, includes such a complex web of relationships and institutions, some that date back to the founding of the PRC and some farther back than that. Bureaucratic politics in China is an illuminating field of study for those who wish to truly understand the opportunity structure in which China’s agency officials operate. See, e.g., KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM chs. 6-7 (2004) (discussing the view from the outside, the “organization of political power and its consequences” and the “view from the inside” regarding the Party’s control over the government.); see also KENNETH LIEBERTHAL & MICHAEL OKSENBERG, POLICYMAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 63-74 (1988). This Section discusses the ultra-outside view of the interaction between bureaucrats and the laws they must follow and the administrative rules and documents they make to implement those laws.


252 See Ching, supra note 246.

documents.” The rules and normative documents can define terms undefined in the law, allocate responsibility where the law does not, and structure implementation systems. Despite the existence of judicial interpretations by the Supreme People’s Court, administrative regulations are perhaps the greatest source of analogies to help interpret and decipher vague terms and concepts in new laws and regulations. Finally, new cutting-edge policies can emerge through experimentation by the provinces, with different local agencies taking more liberal or conservative approaches to an issue, which the central government ultimately resolves through regulations of its own. As noted above, the Chinese state has not developed a meaningful channel of judicial review for these administrative regulations and rules, nor is there another strong and consistent outside check on agency power, whether in the form of another government institution or citizen watchdog group.

Unfortunately, comprehensive studies on how Chinese administrative agencies interpret the law and how they approach its implementation are not yet prominent. For this reason, it sometimes seems that in studying Chinese law scholars forget that the administrative bureaucracy through rulemaking has a chance to interpret the law, learn new regulatory techniques and internalize them, and seek consultation with outside experts.

Related to the third trend of implementing new theories of public management, those reforming the bureaucracy in China have studied movements in administrative reforms in the U.S. and other countries. For example, agencies have explored customer-service oriented techniques as well as those that improve the quality and value of services provided to the public. Shenzhen and Hunan are two provincial-level units that have instituted major efforts to improve the quality of government services. The Chinese government has also expressed interest in public management techniques, such as “the New Public Management,” “Reinventing Government” and networked government, in which the government relies upon and manages its relationship with private sector

254 See LIEBERTHAL & OKSENBERG, supra note 249, at 63-74 (discussing implementation systems with respect to environmental law).


256 Ma Yingjuan, ZHENGFU JIANGUAN JIGOU YANJIU [ON GOVERNMENT REGULATORY AGENCIES] 79 (2006) (citing sources from Western Europe and the U.S.)

organizations and companies in order to accomplish public goals.\textsuperscript{258} Finally, agencies have started to incorporate regulatory techniques, which place a greater emphasis on problem solving as opposed to designing and following one-size-fits-all procedures.\textsuperscript{259} In his book, \textit{The Regulatory Craft}, \textsuperscript{260} Malcolm Sparrow emphasizes three key elements of progressive regulatory reform in the U.S.: a “focus on results,” “adoption of a problem solving approach,” and “investing in collaborative partnerships.”\textsuperscript{261} The second element – problem solving – includes using risk-assessing strategies in order to allocate key resources and devise a “tailor-made” solution for a problem.\textsuperscript{262} Sparrow cites Herman Goldstein’s work on \textit{Problem-Oriented Policing} and applies it to the work of administrative agencies. Goldstein examines examples of local policing in which the police did not attempt to design “procedurally correct” solutions, but instead looked for patterns of activity and planned solutions for each situation accordingly.\textsuperscript{263} Professor Goldstein states that:

\begin{quote}
[t]he approach calls for the police to take greater initiative in attempting to deal with problems rather than resign themselves to living with them. It calls for tapping police expertise. It calls for the police to be more aggressive partners with other public agencies. Focusing on problems, because it is a practical and concrete approach, is attractive to both citizens and the police. By contrast, some of the most frequent proposals for improving police operations, because they do not produce immediate and specifically identifiable results, have no such attraction. A problem-oriented approach, with its greater appeal, has the potential for becoming a vehicle through which long-sought organizational change might be more effectively and more rapidly achieved.\textsuperscript{264}
\end{quote}

\textsuperscript{258} Interview by author, Shanghai (2011).
\textsuperscript{259} See infra Section IV.A text and accompanying notes.
\textsuperscript{260} MALCOLM K. SPARROW, \textit{THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE} 89 (2000) (discussing regulatory innovations in which various federal and state agencies created “dynamic systems or mechanisms for identifying high-risk areas, quantifying them, comparing them, selecting focus areas, and then managing them on a continuing basis”).
\textsuperscript{261} \textit{Id.} at 100.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.} at 71-73.
Sparrow notes that one way to achieve better regulatory enforcement is to create a process and an infrastructure that allows bureaucrats to apply problem-solving methodologies. 265 Sparrow focuses in particular on problem-oriented solutions in federal and local agencies in the form of risk control or risk management. 266 The introduction of this type of problem-solving methodology into Chinese food safety regulation, in part in the form of risk-based determinations, would be a positive development, and it could be a departure from typically less effective methods in China. 267

To put this into the Chinese context, in earlier eras of Chinese regulatory development and up to the present day, it has consistently been the case that agencies often make procedural refinements to more general provisions in law, creating additional layers concerning who does what, where, when, and how. 268 These procedures were and are intended, to some extent, as a vehicle to maintain discipline amongst government officials where ideology has disappeared and left behind a dangerous vacuum. 269 However, the practice of adding procedures and rules to an area has not served the bureaucracy in China well, at least not in the area of food safety, wherein the bureaucracy has consistently failed to prevent the spread of food borne illness issues or to resolve those situations quickly. It is widely agreed in China that the officials have not done enough to correct food safety problems. 270 A departure from this procedural rigidity to more flexible practices of understanding, communicating and creatively managing public health problems are, therefore, worthy of future observation.

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265 Id.
266 SPARROW, supra note 260, at 214-15.
267 The third element, forming key partnerships, also has potential under the FSL, as it encourages the development of industry associations, some forms of consumer participation, and contracting out to private laboratories. Sparrow articulates the first element as a focus on results, which is a rejection of traditional measures of outputs and productivity and a search for more meaningful indicators of progress, particularly measurable effects in specific problem-areas, but has yet to emerge in China in a recognizable form. SPARROW, supra note 260, at 90.
269 LU, supra note 56, at 15 (showing discontent with official action on food safety in China).
270 Chinese Experts Blame Supervisory Agencies for Food Safety Problems, supra note 17 (showing that officials have not done enough to correct the food safety problem).
A. The Promise of Risk Assessment

The FSL has generated a considerable number of administrative rules and regulations in just two short years of existence. One of the great number of regulatory undertakings under the FSL is the use of risk-based analysis to track problems and make decisions regarding the size and imminence of threats. Experts around the world acknowledge that risk analysis has a number of utilities. It helps the government set standards to decide the maximum daily tolerance for certain food additives, and it can assist with assessing the threats associated with microbial pathogens and chemicals. Once the severity of a threat has been assessed, it can be compared with the magnitude of other threats in order to allocate scarce resources and resolve problems. The World Health Organization

271 In addition to other regulations cited in section V and throughout this paper that have emerged since the FSL was enacted in the winter of 2009, there have been other major legislative undertakings. See, e.g., Chukou shipin shengchan qiye beian guanli guiding [Food Export Production Enterprises Registration Regulations] (promulgated by Admin. Quality Inspection Supervision and Quarantine 2011); Shipin anquan xinxi gongbu guanli banfa [Food Safety Information Publication Regulations] (promulgated by Ministry of Health 2011); Shipin jianyan jingou zizhi rending guanli banfa [Accreditation Regulations for Food Inspection Institutions] (promulgated by Admin. Quality Inspection, Supervision and Quarantine, 2010); Shipin shengchan xuke shencha tongze [Food Production Licensing Investigation Principles] (promulgated by Ministry of Health, 2010); Tielu yunying shipin anquan guanli banfa [Measures on Food Safety Shipping Via Rail] (promulgated by State Administration for Industry and Commerce, 2010); Food Safety Law Implementation Provisions, arts. 1-15. These add little to the provisions in the FSL and will likely be revised soon. Interview by author, Shanghai (2011). See also William P. Alford & Benjamin L. Liebman, Clean Air, Clear Processes? The Struggle Over Air Pollution Law in the People’s Republic of China, 52 HASTINGS L. J. 703, 727 (2001) (noting how implementing regulations and other specific regulations issued after an NPC law can create opportunities to revisit issues struggled with during the law’s drafting).

272 Risk assessment is not a brand new concept in Chinese law. The term has been employed in other contexts, such as public security and finance for approximately five or six years. In the public health realm, it was employed in the Animal Quarantine Law, the Disaster Remediation Law, and, more importantly for these purposes, the Agricultural Product Quality and Safety Law, which was enacted in 2006. The Regulations enacted under the Food Safety Law, however, appear to be among the first comprehensive, formal statements about what risk assessment in the public health context, substantively, should mean. Cf. dongwu weisheng fengxian pinggu zhuangjia weiyuanhui changzhang [Bylaws of the Animal Hygiene Risk Assessment Expert Commission] (promulgated by Ministry of Agriculture 2009) (setting forth procedures but not articulating the technical principles according to which risk assessment is to be conducted).


274 Id.
("WHO") notes: "When used to establish food standards and other food control measures, risk analysis fosters comprehensive scientific evaluation, wide stakeholder participation, transparency of process, consistent treatment of different hazards and systematic decision-making by risk managers." And risk analysis may prompt the adoption of more formal procedures related to the technique of cost-benefit analysis for public health agencies managing food safety in China. This would allow those agencies to focus not only on the harm of foodborne illness, but also on balance between the costs of enforcement and the benefits to be gained from it.

The WHO calls this risk-based technique "food safety risk analysis." Typically, food safety risk analysis consists of three stages – risk assessment, risk communication, and risk management. The severity of the threat is assessed, the assessment is communicated to relevant actors in the system, and the actors implement a solution that counteracts the threat. In the Chinese system, however, the government employs the concept of "risk" in two food safety-related processes: risk monitoring and risk assessment. Risk monitoring appears to be a more long-term tracking of data on a wide variety of foodborne contaminate. Risk monitoring is not defined in the FSL, but in its Food Safety Risk


276  David M. Driesen, Distributing the Costs of Environmental, Health & Safety Protection: The Feasibility Principle, Cost-Benefit Analysis and Regulatory Reform, 32 B.C. Envtl. Aff. L. Rev. 1, 48 (2005) ("Cost-benefit analysis is a form of analysis. Most scholars recommending CBA [cost-benefit analysis] for environmental, health, and safety regulation argue that agencies should "consider" CBA. They generally say little or nothing about how precisely CBA should influence outcomes under technology-based provisions (or any other statutory provisions). A mandate to consider CBA does not provide any guidance about the content of decisions. An agency can, in principle, consider CBA, and conclude that the duty to protect public health is paramount and the costs should be ignored. Conversely, it could conclude that the existence of any cost at all should wholly defeat any environmental regulation."). Cost benefit analysis is alive and well in China. A search for articles in a database for the term cost-benefit analysis (chengben xiaoyi fenxi) reveals 47 pages of results.


278  Id.

279  Sparrow, supra note 260, at 6.

280  The FSL requires that risk monitoring and risk assessment be employed in making regulatory determinations regarding prevention and remediation of food safety issues. The FSL gives some general guidance on how both techniques are to be incorporated into the regulatory process, but it does not define these terms conceptually or procedurally. On a basic level it requires that the government utilize scientific experts
Monitoring Administrative Provisions (Trial) (“Risk Monitoring Regulations”) the Ministry of Health (“MOH”) has defined the term as “the systematic and sustained gathering of monitoring data and related information regarding food borne illness, food pollution, and harmful contaminants in food products and the implementation of integrated analysis and immediate reporting activities.”\textsuperscript{281} In order to implement the concept defined here, the Risk Monitoring Regulations require that the local branches of public health agencies develop plans to enforce against contaminates that threaten to cause food poisoning incidents.\textsuperscript{282} There is limited information available about these plans and how they are compiled on the basis of data, whether they are amended, and whether they have been evaluated post-hoc to test their effectiveness in preventing food safety disasters.

In addition, the Risk Monitoring Regulations are complimented by the Food Safety Risk Assessment Administrative Provisions (Trial) (“Risk Assessment Regulations”) that are meant to cover contaminates that present a more specific problem.\textsuperscript{283} Although these regulations do not comprehensively define the concept of risk assessment, they do introduce and define the concepts of “hazard,” “hazard identification,” “hazard characterization,” “exposure assessment,” and “risk characterization.”\textsuperscript{284} These are the principles and definitions according to which risk assessment is to be conducted. The Risk Assessment Regulations state:

Hazard: Refers to microbes, chemicals, physical elements existing in food products or food states that have the potential to negatively impact human health.

Hazard identification: According to scientific data and literature such as from epidemiological studies, animal testing, in vitro testing, and structure-activity relationships, confirming that human exposure leads to adverse health consequences, the likelihood for adverse health consequences, and the group of humans or specific sector at

\begin{itemize}
  \item [281] Shipin anquan fengxian jiance guanli guiding (shixing) [Food Safety Risk Monitoring Administrative Provisions (Trial)] art. 2 (promulgated by Ministry of Health, Nov. 2, 2010).
  \item [282] Id. arts. 4, 16.
  \item [283] Shipin anquan fengxian pinggu guanli guiding (shixing) [Risk Assessment Administrative Regulations (Trial)] arts. 3-5 (promulgated by Ministry of Health, Sept. 9, 2010) [hereinafter Risk Assessment Regulations].
  \item [284] Id. art. 19.
\end{itemize}
risk.

Hazard characterization: The description of instances of adverse health effects or of quantitative data, on the basis of animal testing, clinical research, and epidemiological research that confirms the relationship between the dose of the hazard and the adverse reaction and the mechanisms of the affects. If possible for toxic hazards, a safe tolerance level for human ingestion should be established.

Exposure assessment: The description of the path through which the hazard enters the human body, estimating the ingestion level that different groups of people will have of the hazard. According to the level of the hazard present in food and the amount of the food purchased, the first step is estimating the total intake level from meals, while at the same time considering non-edible paths by which the hazard could enter the body, comparing the overall intake level into the human body with the safe intake level.

Risk characterization: On the basis of the hazard identification, the hazard characterization, and the exposure assessment, conducting an overall analysis of the risk of the adverse consequences to human health produced by the harm and the degree of those consequences, describing and explaining uncertainties in the course of the risk assessment process.

The government has formulated a Risk Assessment Expert Commission (“Commission”) to carry out these stages of analysis. It is striking that, although the Risk Assessment Regulations do allocate considerable power to the MOH, they grant a fairly substantial amount of responsibility to the Commission. The Commission consists of scientists from prestigious public health schools from around China and official representatives from sections of the government, such as the MOH, and emerging local risk assessment commissions in localities.

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285 Id. art. 19.
286 Id. arts. 4-5.
287 Id. art. 3.
that are doing sophisticated food safety work have similar membership.\textsuperscript{289} Thus, the Risk Assessment Regulations explore a way to bring technical competencies into contact with bureaucratic interests in a way that encourages a more scientific analysis of food safety issues by the authorities.

Although general procedures for “risk communication” or “risk management” have not yet emerged, the determinations of the Commission assist in other regulatory processes. For example, the MOH has enacted regulations that require that a risk assessment be performed before new food additives are approved or old food additives are approved for new uses.\textsuperscript{290}

Risk assessments play a role generally in the enactment of national food safety standards.\textsuperscript{291} The National Food Safety Standards Administrative Provisions (“Standards Regulations”) call for more consultation with experts in the administrative process.\textsuperscript{292} A specialized organ – the National Standards Review Commission (“Standards Commission”) – is charged with reviewing and enacting standards.\textsuperscript{293} The Standards Commission, which is composed of experts in relevant fields, is required to take into account risk assessments and risk monitoring results, and other scientific data when enacting standards.\textsuperscript{294} In addition, these administrative measures encourage more public participation by scientific experts and by the general public in the standard making process.\textsuperscript{295} The Standards Regulations give any citizen, juristic person, or organization the power to put forth a proposal for a food safety standard.\textsuperscript{296} This means that scientists, academics, and other emerging civil society organizations could conceivably provide important technical input where the government lacks

\textsuperscript{289} See Taylor & Hoffman, supra note 273.

\textsuperscript{290} Shipin tianjiqi xinpinzhong guanli banfa [Food Additive New Product Administrative Regulations], art. 3 (promulgated by Ministry of Health, 2010).

\textsuperscript{291} Shipin anquan guojia biaozhun guanli banfa [Food Safety National Standards Administrative Provisions], art. 9 (promulgated by Ministry of Health, 2010) [hereinafter Standards Regulations].

\textsuperscript{292} Id. arts. 1-10.

\textsuperscript{293} Id. arts. 8-9.

\textsuperscript{294} Id. Cf. Biaozhun huafa shishi xize [Implementing Provisions of the Standardization Law], art. 19 (promulgated by State Council 1990) (Aug. 10, 2011) (giving trade associations and academic and research institutions a role in the formulation of standards).


\textsuperscript{296} Standards Regulations, art. 9.
Newer drafts of the general Standardization Law, which governs all standard-making in China and is scheduled for revision shortly, add public input requirements into standard-making procedures in other subject areas as well.

The risk-based processes of “risk assessment” and “risk monitoring” under the FSL represent an innovation and a step forward for regulatory governance on several fronts. First, as noted, these risk-based processes are typical of Chinese regulation in that they set forth a procedure, but they are arguably atypical in that the procedure is meant to support or at least encourage a problem-solving process. The Risk Assessment Expert Commission makes a determination based on data as to the imminence of the threat, which relevant officials could then use in prioritizing goals and allocating resources. This is a departure from some of the more rigid administrative decision-making and enforcement processes in China that focus on a one-size-fits-all solution.

Risk assessment and its use in China represent something else about the development of regulation and public management as well – the idea of dealing in terms of risk means employing a flexible standard to make a determination and an acknowledgment that the system will have to endure and live with some degree of danger; this is a far cry from the modes of thinking that characterized governance in the earlier days of control by the Communist regime, which assumed that problems could be cleanly and absolutely resolved.

Chinese law was often more black and white back then, calling for clear lines of right and wrong. The notion of allocating resources to the highest risk areas means that there is some degree of “wrong” that the government and society should be comfortable with. To paraphrase one administrative law scholar, China has entered an industrial era where public health risk is inevitable, but the question now is what degree of risk society can be comfortable with. While this flexibility may not be as absent from other areas of law as it used to be, it is still notable that this kind of realism is finding its way into an area of law and governance that needs help as badly as food safety.

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298 Biaozhunhua fa (cao’an) [Standardization Law (Draft)] (text on file with author).

299 See Li Qiugao, Fengxian kongzhi fazhihua yanjiu [Research about Legislating Risk Control], 8 FAXUE ZAZHI [LAW SCIENCE MAGAZINE] 32, 34 (2011) (discussing the challenge of the nature of uncertain brought about by the need for risk control in legislation for a modern market economy, when previously law had been based on degrees of certainty).

Risk-based food safety regulation also provides a means of strengthening the relationship between science and administrative governance. This fits with the trend of looking for better expertise and specialization in the performance of government functions or services. One of the future challenges for China will be creating the requisite degree of capacity and specialization within the bureaucracy in order to adequately manage this growing scientific expertise. In this respect, food and drug agencies are certainly not devoid of expertise in China. For example, the Shanghai FDA (“ShFDA”) has managed to raise its technical competency, and engage technical, academic, and other skilled personnel without difficulty. The ShFDA is the publisher of China’s annual Blue Book on Food and Drug Safety, which collects data and articles. It sends its personnel abroad to various institutions to research the issues confronting them. As a result of these and other programs, that organ has earned a good reputation both internationally and domestically. Of its personnel, 14.98 percent have a master’s degree, 1.15 percent have a PhD, and 74.98 percent have university degrees. These qualities make the agency better at understanding the complex problems that arise in the food and drug areas and, provided that other procedures are sound, better at dealing with those problems. More attention should be paid to the developing capacity and expertise in the bureaucracy to manage food safety issues.

Agencies must ensure that the risk analysis process is designed to guarantee that expert participants are ethical, neutral, and reasonable in


302 See, e.g., SHANGHAI SHI SHIPIN YAOPIN ANQUAN YANJIU ZHONGXIN [SHANGHAI FOOD AND DRUG SAFETY CENTER], SHIPIN YAOPIN YU JIANQUAN ZHENGCE YANJIU BAOGAO [REPORT ON FOOD AND DRUG SAFETY AND REGULATORY POLICIES] (2010).


305 Shanghai is currently in the process of forming its own risk assessment commission. Guanyu dui 2011 nian shanghai shi shipin anquan fengxian pinggu ni lixiang xiangmu jinxing gongshi de tongzhi [Public Notice of the Establishment of a Risk Assessment Project in Shanghai], SHANGHALGOV (July 5, 2011), http://www.shanghai.gov.cn/shanghai/node2314/node2319/node12344/node12344/t26182086.html (listing the names of the risk assessment expert commission members, who come from academia, the ShFDA’s research institute and the various divisions of the ShFDA itself).
their determinations. But officials should respect the autonomy of the scientific process and accept its results, despite the fact that these results might be perceived as damaging an agency’s reputation. It is not easy to be an apolitical scientist or public health expert in China. Jiang Yanyong, the doctor who reported on SARS to the government, discovered this when he ultimately found himself under house arrest. 306 Another example of this phenomenon can be seen in the measures regulating pharmaceutical drugs or the healthcare profession, which place limits on the professional judgment of doctors. 307 There is a lack of trust in the ethical behavior of doctors in China, partly because doctors have been known to prescribe medicine recklessly in order to earn extra money. 308 Abuses of power by doctors have caused regulators to crack down on medical ethics by increasingly tailoring laws to alter the financial incentives that lead Chinese physicians astray. 309 There may at times be a similar reason for distrust in the food regulation area, particularly when scientists have ties to companies. 310

Science and the scientific process have limits, 311 but scientific expertise and bureaucratic management processes arguably have the potential to balance each other’s weaknesses if the government can design the correct framework for interaction. Donald Elliott articulates the relationship between science and the administrative process:

[w]hen the system works properly, good science is a chorus of independent expert voices that come together with

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306 Melinda Liu, Woes of a Do-Gooder, NEWSWEEK, Oct. 18, 2004, at 49 (“In April 2003 Dr. Jiang Yanyong became a Chinese folk hero after disclosing the true extent of Beijing’s SARS epidemic and exposing a government cover-up. The retired Army surgeon, who is one of China’s best-known antigovernment critics, surely saved lives with his alert; indeed, his name was even bandied about this month as a contender for the Nobel Peace Prize. But Jiang, 73, wasn’t exactly rewarded for his effort. After a seven-week detention this summer, the whistle-blower remains under a loose form of house arrest – unable to leave his residential compound without permission. Three weeks ago Jiang was permitted to leave home and enjoy a meal in public with relatives and friends. It was his second outing in a matter of days.”).

307 Jiangxi sheng yiliao jigou chuanglin heli yongyao guanli banfa (shixing) [Jiangxi Province Interim Administrative Measures on Reasonable Pharmaceutical Drug Use at Medical Treatment Clinics] (promulgated by the Health Bureau of Jiangxi Province 2005).

308 Interview by author, Beijing (2011).


310 See Shen Kui, supra note 300.

311 See Id.
sufficient coherence and force to constrain policy, structure debate, and influence policy. Rarely does science dictate a unique policy outcome; more often, it structures a policy dialogue among different disciplines and constituencies by defining a problem and a range of options, but it may also figure in the decision of which options to adopt.\footnote{312} Ultimately, Professor Elliott concludes that the system should work to ensure that “scientists and politicians work together to produce policies that are better than either would produce on their own.”\footnote{313} If China can put into place a system that allows science to play a role in shaping internal policy debates and administrative decisions, better food safety-related decisions and enforcement could develop.\footnote{314} The design of a risk analysis system can also become more effective by taking advantage of broader trends in administrative reform, such as a commitment to increased transparency, capitalizing on public input into rule- and standard-making, and the development and maintenance of a more professionalized bureaucratic culture in China.\footnote{315} China’s rising culture of freedom of information, or as it is referred to in the Chinese context, “open government information,” could enhance the development of more transparent risk assessment and management processes, as well as risk communication. The beginning of such an enhancement already exists in the Risk Assessment Regulations, which require that the results of risk assessments are made available to the public.\footnote{316} Public participation has also been an important accountability-generating mechanism that has found its way into more facets of administrative governance in China. Depending on the model of public participation that the relevant agencies adopt in implementing risk analysis and standard making processes, distrust of scientific experts can be ameliorated by a public that includes other scientists and experts to conduct peer review.\footnote{317} And, as these food safety specific processes develop, they will be influenced by larger efforts to improve administrative governance overall, such as efforts to reduce corruption.

\footnote{312}{Donald Elliott, Science in the Regulatory Process: Strengthening Science’s Voice at the EPA, 66 L. CONTEMP. PROB. 45, 46 (2003).}
\footnote{313}{Id. at 49.}
\footnote{314}{See Thomas O. McGarity, Public Participation in Risk Regulation, 1 RISK 103 (1990), available at www.law.unh.edu/risk/vol1/spring/mcgarity.htm.}
\footnote{315}{Id.}
\footnote{316}{Risk Assessment Regulations, arts. 5,18.}
\footnote{317}{McGarity, supra note 314.}
B. Other Innovations

Food safety regulatory innovation is not limited to the risk-based tools above. It bears repeating that the FSL provides a basis for other innovation as well. For example, following the Law’s passage, the General Administration for Quality Inspection, Supervision, and Quarantine (“AQISQ”) enacted new regulations to strengthen labeling requirements, setting forth a more detailed set of regulations to clarify the information required and its placement.318 In addition, the AQISQ took action to strengthen accreditation requirements for private laboratories that agencies can rely on to conduct tests on questionable food products.319 The MOH, in conjunction with other agencies, has enacted “food safety transparency measures” to facilitate the flow of information generally in food safety control processes.320 Finally, the State Council and different provinces have enacted guidelines regarding rewards to whistleblowers that report food safety problems to the authorities.321 Some rewards can go as high as 20,000 RMB or over 3000 USD, which provides some incentive to report food safety law violations.322 The number of new systems and techniques that the bureaucracy is employing to deal with this problem far outweighs what the courts have done in the food safety area.

C. A Long Road Ahead

The effectiveness of these regulatory innovations remains to be seen, but, more importantly, their degree of success is sometimes difficult to decipher. The opaqueness of China’s agencies makes it difficult to see what targets, if any, have been set to understand whether new regulatory tools are working. What internal benchmark will agencies use to assess whether risk assessment and risk monitoring are being employed in the


319 Shipin jianyan jigou zizhi rending guanli banfa [Accreditation Regulations for Food Inspection and Testing Organizations] (promulgated by the General Administration for Quality Inspection, Supervision and Quarantine Aug. 5, 2010).


321 Duodi shipin anquan jubao jiangshang xian bei zhi qiantuo [Limits on Food Safety Reporting Awards in Various Localities May be Inappropriate], FAZHI RIBAO [LEGAL DAILY], Nov. 7, 2011, http://www.legaldaily.com.cn/index_article/content/2011-11/07/content_3080067.htm?node=5955. See also Shipin yaopin tousu jubao guanli banfa (shixing) [Measures Regarding Complaints and Reports on Food and Drug Products (Trial Implementation)] (promulgated by the State Food and Drug Administration, Dec. 29, 2011).

322 Id.
right way and producing the desired result? In addition, how is the public
to evaluate the process? For example, the MOH website has several pages
devoted to the food safety risk assessment commission, but the agendas
and minutes of their meetings are not public, although the MOH has begun
to put the actual risk assessments online.\footnote{The Ministry of Health has approximately six risk assessments available online. See Fengxian Pinggu [Risk Assessment], SHIPIN ANQUAN ZONGHE XINXI WANG [COMPREHENSIVE FOOD SAFETY INFORMATION NET], http://www.nfsiw.gov.cn/business/htmlfiles/foodaqxxw/s60/index.html (last visited October 25, 2011).}

Despite the clear improvement of general regulations on
government transparency, the transparency efforts of Chinese agencies are
still incomplete.\footnote{See Peerenboom, More Law, Less Courts, supra 250 at 180.} It is a step forward that all of the provincial-level FDAs have websites that publish at least some information, if only abstract information, about enforcement initiatives or the development of food safety law and policy.\footnote{See HEBEI FOOD SAFETY NET, http://www.hebfs.gov.cn/CL0001/index.html (last visited Mar. 23, 2012).} With the exception of a few, most provinces also have separate food safety nets, which are government webpages devoted exclusively to food safety reporting.\footnote{See, e.g., JILIN PROVINCE FOOD SAFETY NET, http://www.jlfs.gov.cn/; HEILONGJIAN PROVINCE FOOD SAFETY INFORMATION SERVICE NETWORK, http://www.hljfs.gov.cn/; JIANGSU FOOD SAFETY NET, http://www.jsfoodsafety.gov.cn/; ZHEJIANG FOOD SAFETY INFORMATION NET, http://www.zjfs.gov.cn/; FUJIAN FOOD SAFETY SERVICE NET, http://www.fujian-foodsafe.gov.cn/; JIANGXI FOOD SAFETY INFORMATION NET, http://www.jxfs.gov.cn/; HENAN FOOD SAFETY AND QUALITY NET, http://qs.haqi.gov.cn/; GUANGDONG FOOD SAFETY NET, http://www.gdfs.gov.cn/; GUANGXI FOOD SAFETY NET, http://www.gxfsn.gov.cn/CL0215/; CHONGQING FOOD SAFETY PROMOTION ASSOCIATION, http://www.cqfs.org.cn/fs/; SICHUAN FOOD SAFETY NETWORK, http://www.scfoods.gov.cn/CL0002/; SHANXI FOOD SAFETY NETWORK, http://www.sxfs.gov.cn/ (last visited Mar. 6, 2012).} However, these local FDAs put less than comprehensive information online and sometimes are reluctant to embarrass local corporations publicly for legal infractions. At times an online posting will reveal the infraction but not the name of the business or entities involved.\footnote{Interview by author, Shanghai (2011).} A review of the websites of the provincial branches of the FDA shows that they do not consistently release important information, such as which companies fail inspection, are fined, or are involved in foodborne illness outbreaks.\footnote{Collection of websites and results on file with author.} Efforts and results do vary

from locality to locality and from agency to agency, of course. For example the Shanghai FDA releases more detailed information than most local food safety-related agencies regarding illegal food and drug advertisements, including the name of the product being advertised and the basis for illegality. The Beijing FDA also releases information about contaminated food incidents in order to warn the public to stay away from those products. There are some numbers available on how many companies the central government closes for food safety violations, but no other data about the specifics of those closures and little comparing them with closures from other years.

Even if there is improvement, can the use of different, more complex regulatory tools (and the internal capacity they generate), increased transparency, greater reliance on outside expertise, and stronger, expanded avenues for public input result in better food safety enforcement, when there is no strong governmental or public accountability check on the agencies? The Party may provide some degree of discipline, but it is not designed to ensure the effective implementation of food safety on a consistent basis. The leadership of the agencies will have to create a culture that encourages adherence to substantive goals and combats corruption, secrecy, and perverse incentives (that emphasize economic growth over safety) in order to negotiate their way to fulfilling their mandate for protecting food safety. For example, the pressure to prioritize local economic development and avoidance of scandal to maximize promotion opportunities are two, at times overlapping, interests that cause bureaucrats to lose their way in China. Officials may want to supplement their meager salary with rents from local corporations – and the Party’s seemingly vigorous anti-corruption campaigns have not been a deterrent. They will also wish to avoid costly safety measures hindering economic development and thus lowering their standing in their locality or their chance of a promotion, which may be tied to the level of economic development they achieve. Officials will also want to cover up scandals

visited October 26, 2011).


332 See id.

333 See Drew Thompson and Hu Ying, Food Safety In China, 1 GLOBAL HEALTH & GOVERNANCE 5 (2007).

334 LIEBERTHAL & OKSENBERG, supra note 249, at 123.
that embarrass them.\textsuperscript{335} The latest report to the National People’s Congress on the implementation of the FSL gives a negative account of local monitoring and indicates that the localities must do more to increase supervision and enforcement.\textsuperscript{336} In response to this issue, local governments in Beijing, Shanghai, and Guangzhou have announced that they will institute a policy of tying official performance evaluation to the success of food safety work.\textsuperscript{337} This is a step in the right direction, but the answer to the question posed above seems yet unknown.

Some would argue that increased enforcement measures in the FSL have already been somewhat successful. Officials point to an overall decline in the number of large-scale food safety outbreaks in 2010.\textsuperscript{338} The authorities managed to keep the Olympics and the World Expo in Shanghai relatively food safety disaster free,\textsuperscript{339} indicating that at least in cities like Beijing and Shanghai, effective administrative enforcement is possible, even if on a small scale. However, specific data helping to promote an understanding of what methods work in what circumstances is conspicuously absent.

Given all of the factors discussed above, future scholarship should focus on the following in evaluating the implementation of the FSL (and possibly other laws that may follow its pattern):

- General questions on the processes through which agencies approach the implementation of the law. In this respect, we need a greater understanding of how agencies interpret the law and regulations made by higher levels of government, and how they approach and subsequently assess implementation. Some of these issues scholars can assess from the outside, by conducting a thorough evaluation of agency rules and documents, as well as an analysis of the private institutions and actors on which agencies are starting to rely for some of their

\textsuperscript{335} McGREGOR, supra note 55, at 120. 


\textsuperscript{339} Interview by author, Shanghai (2010). See also SHANGHAI ANNUAL REPORT, supra note 304, at 5.
work. But much more can be gained if agencies make public information about their internal processes and their structures.

- Scholarship should continue to observe the extent to which Chinese regulators are focusing on problems, as opposed to procedures, in the food safety context. In other words, to what extent (and how well) are bureaucrats focusing on the realities of large scale food safety problems and then working within the constraints of their agencies and the overall administrative system to resolve parts of those problems? Are those problems getting resolved in a way that benefits the public?

- Related to the point above, are greater transparency and the resulting fear of public scorn, pushing the bureaucracy and industry to do better, or simply to hide their activities better? Is public input into rulemaking processes truly informing bureaucrats about where they could go, or went wrong? Can solicited input from scientific experts be a check on official abuses?

- More attention must be paid to legal structures that enhance scientific ethics and professional autonomy, as well as the interaction between scientists and the bureaucratic processes. Scholars should ask which non-governmental processes and institutions are ensuring that scientific judgments have integrity, and where should (and can) Chinese agencies fill holes left by private ethics structures?

- Can technology reduce human error and corruption, and increase effectiveness in the Chinese bureaucracy?

- Finally, are there other forces driving bureaucrats to do better? For example: do they see the potentially deleterious effects of food safety issues on their own lives and family? Are they driven by the integrity or leadership skills of agency heads or vice-heads? Does national image (when considering food exports) and/or agency image drive them to ensure that laws and policies address the pressing issues of toxic food?

Given the proliferation of new regulations and regulatory techniques over the last three years with regard to food safety, it will be important to improve academic understanding of how the mechanics of legal innovation in the administrative bureaucracy work.

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340 Professor Reiss discusses how these factors and circumstances have contributed to agency accountability in the U.S. Reiss, supra note 25, at 631-68.

341 Id.
CONCLUSION

The FSL exists in a system where political forces at times suspend the law’s operation and development. However, the FSL is a law that covers daily necessities. Public health and environmental regulations are necessary to guarantee certain essential infrastructure for a nation that aims to achieve consistent economic and technological growth. In a recent work report to the National People’s Congress, Premier Wen Jiabao noted that food safety problems are “significant” and the government and people must “work tirelessly and painstakingly” to resolve them. After all, the Chinese government gains nothing by the deaths and illness of its citizens, and, if it fails to prevent those occurrences, it risks seriously undermining a certain platform of legitimacy that it has developed as being the protector of wealth and happiness. At the same time, it is the involvement of such an essential item of everyday life that also makes food safety that much more of a sensitive topic between the government and society, as some of the well-publicized cases indicate. If a government tries and fails at providing and protecting the basic necessities, then how legitimate can it be?

In order to avoid public sensitivity and protest as well as avoid harm to economic growth, preventative administrative enforcement currently appears to be the most cultivated and innovative area of implementation. In contrast, civil or administrative suits in court serve to provide constrained amounts of compensation or some limited relief from administrative action. In the case of large-scale disasters, the government seems to be more interested in compensation funds set up and administered by the bureaucracy. The use of legal provisions as a basis for other forms of citizen organization and enforcement appears to be permitted by the government within an arbitrarily limited set of circumstances. Although regulatory agencies may be constrained by corruptive forces and political pressure, the use of regulation to develop the law appears to be less politically sensitive, and is permitted to develop more freely, than the use of adjudication to develop the content or enforcement


343 WEN JIABAO, REPORT ON THE WORK OF THE GOVERNMENT 9 (Xinhua Trans. 2011); Food Safety to Become Priority of Ministry, PEOPLE’S DAILY, Feb. 16, 2011, at 5 (“In the next five years, China’s top health authority plans to make ensuring food safety into one its ‘major health service projects,’ in a change meant to better protect the public from occasional foods safety hazards.”).

344 Sun & Wang, supra note 143, at 37.

345 See supra Section III.
of the law. This Article has argued that regulatory edicts in this area are evidence that more substantive conversations are taking place in the bureaucracy concerning the reality of what food is bad, unhealthy, and dangerous, and under what circumstances. If these issues remain a real part of the internal debate, there may be greater attention to and competence in handling food safety.

Development of the law and its enforcement by the administrative agencies – even when it involves experimental regulatory techniques that are non-coercive and involve non-governmental forces – will probably not present the same type of threat to the government that bottom-up protest and litigation generate. Moreover, interpretation of national laws by the bureaucracy in the form of regulation made through a formal process or more informal regulatory guidance may not generate the same threatening force that an independent judiciary does – for example, a judiciary that freely interprets the law and acts as a check on other forms of government. For many leaders in China, the judiciary in that mold becomes a euphemism for long-feared and vehemently rejected ideological imperialism. For food safety, which is becoming primarily a regulatory area, the question now is whether new regulatory tools and better regulation generally have the potential to be built up to a point at which regulation effects some overall change, even if other avenues of accountability do not develop at the same rate.

Although this is a specific area – public health – its discussion has larger utility for the study of Chinese law. First, law cannot be ignored because it is the most developed language of policy in important areas. The FSL is not so vague or general as to be entirely subverted by conflicting policies, and it is taken seriously by governmental actors and valued by citizens. Second, although many view neutral and independent courts as fundamental to the rule of law, the FSL demonstrates that Chinese courts have utility and are relevant even when they do not always embody these values.

Most importantly for this discussion, the administrative bureaucracy has the potential to be a force in developing the law in a positive direction, perhaps even without forces such as consistently independent judges, a high degree of press freedom, and freely organized private organizations. Scholarship should continue to focus on the progress that the bureaucracy can make with the types of regulatory innovations discussed above. This Article has indicated a number of issues on which this might occur. There is, in short, a good deal of analysis yet to be done on the complex bureaucracy in China, which makes up a large part of the implementation effort of the FSL and other significant laws.