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van Rooij, B.

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# The People's Regulation

The People's Regulation  
*Citizens and Implementation of Law in China*

*Inaugural Lecture*

delivered upon accession to the office of  
Professor of Chinese Law and Regulation  
at the University of Amsterdam  
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by

Benjamin van Rooij<sup>1</sup>

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## Abstract

China has made a move towards society-based regulation, enabling citizens to aid in the implementation of regulatory law. This is a welcome development that may help to reduce the government's problems in enforcing its laws. Societal forces have had some success in improving regulatory efforts to mitigate risk. However, society-based regulation reforms have been halfhearted, as existing and recently introduced authoritarian restrictions obstruct citizens from becoming successful co-regulators. At its worst, China has developed a form of regulation by escalation, where ironically the exact same incentive structures for Chinese regulatory and judicial officials to prevent unrest also stimulate citizens to create instability as a successful strategy to get regulatory law implemented. And thus, China's halfhearted approach to regulatory governance with its focus on stability may ultimately be destabilizing.

## I. Introduction

Over the last three decades, China has achieved the impossible: an unprecedented economic growth on the ashes of Mao's revolutionary destruction, lifting hundreds of millions out of poverty<sup>2</sup> and making China an emerging global superpower, a champion of a state-led growth model.<sup>3</sup>

China's incredible economic rise has been a risky business, though. Consider China's environmental risks. According to recent estimates, pollution causes 750,000 premature deaths annually.<sup>4</sup> About 300 million Chinese drink contaminated water on a daily basis, and 190 million of them suffer from related illnesses.<sup>5</sup> Consider food safety risks that materialized for example when children died after developing kidney stones as a result of drinking milk laced with poisonous melamine.<sup>6</sup> Or what about construction safety risks, for instance when schools collapsed as a result of the Sichuan earthquake, nicknamed "Doufu schools" ("豆腐渣"学校, *doufuzha xuexiao*) because of their substandard cheap construction, resulting in whole school classes dying or getting hurt.<sup>7</sup> Or property risks, for instance the many farmers and urban dwellers who have lost land and housing without proper compensation,<sup>8</sup> and how in eight major urban centers 80% of all new land development has not been done according to legal procedures.<sup>9</sup> Or consider occupational health and safety risks, like the many miners who are injured or die in China's numerous, hazardous, small mines.<sup>10</sup> In 2003, 80% of the world's coal mining casualties occurred in China, while China produced only 35% of the globe's coal.<sup>11</sup>

These risks are no longer contained by China's borders. We live in an interdependent world, both economically and ecologically, with China as one of its dynamic centers. Risks in China are increasingly becoming regional and global risks. Remember the melamine milk scandal and how it created food scares across the East Asian region and beyond.<sup>12</sup> And some days, according to data gathered by the U.S. Environmental Protection Agency, 25% of suspended air particulates in Los Angeles originates from China.<sup>13</sup> Think about the fact that China is now the largest emitter of greenhouse gasses.<sup>14</sup> And also how China has exported fake General Motors car brake linings made of wood chips and cardboard that "could burst into flames with heavy usage"<sup>15</sup> and that may have ended up in the cars that we are driving here. And what about a recent report by the U.S. International Trade Commission estimating that the U.S. economy suffered about \$48 billion due to Chinese intellectual property rights infringements, calculating further that if China imposed enforcement at levels comparable to the US, American employment would increase by 923,000 jobs.<sup>16</sup>

These risks are the topic of my lecture today. I will address how China has been trying to control human-induced risks through regulation. China has done so by establishing an elaborate system of regulatory laws. However, the results of these laws on controlling environmental, health, or economic risks have been disappointing. There is a vicious circle where weak enforcement and low compliance reinforce one another.<sup>17</sup> I will discuss the problem of how to implement regulatory law in China. First, I will look at why state law enforcement has been so weak, by examining problems with detecting violations and then reasons why sanctions are weak. Then the remainder of my lecture will address the possibility of involving citizens in the implementation of such laws.

For this lecture data were used from a variety of sources, including primary data published by Chinese authorities, secondary data collected by Chinese and foreign scholars, and my own data collected during intensive fieldwork about the implementation of arable land protection and environmental law. Each source of data has its own limitations, and readers should be aware that both the variety of sources and their respective biases challenge generalization, even when it is done with care, as is attempted here.

Today I will argue that in order to regulate the risks that have come with China's massive development, a 'decentered approach' to regulation is necessary, where regulatory norms are no longer largely or solely implemented by state organizations. I will demonstrate that China has made a move in this direction by creating opportunities for citizens to provide information about regulatory behavior, as well as act directly against violations of regulatory norms. This move towards involving people as co-regulators has been halfhearted though, as existing and recently introduced authoritarian restrictions preclude citizens from becoming successful regulators. I find that the current halfhearted approach has at its worst created a form of *regulation by escalation*, where ironically the exact same incentive structures used by Chinese regulatory and judicial officials to prevent unrest also stimulate citizens to create unrest as an ultimate attempt to get regulatory law implemented. And thus, China's halfhearted approach to regulatory governance with its inherent and overriding focus on stability may be highly destabilizing. This calls for a rethinking of the current approach to regulation and conflict resolution that requires courage to accept short-term contention and conflicts in order to maintain a longer-term stability that all stand to benefit from.

## II. Understanding Weak State Implementation of Regulatory Law

In the 1980s and 1990s, China largely adopted a state-based model of implementing regulatory law. Even in fields such as intellectual property rights and labor, which traditionally use contract and liability norms that do not need much state implementation capacity, the state was given a large role to detect and punish violations of command and control-type norms.<sup>18</sup> The Chinese state institutions have had trouble implementing regulatory law, both in terms of detecting violations and in responding to stop such violations.

### A. Detecting Violations

During fieldwork I learned firsthand about the difficulties state regulators have in detecting violations of regulatory law. In fact, I was very lucky that the local environmental authorities had not been able to do a good job ascertaining the compliance of local companies. What later proved to be one of the key cases in my research was still listed as a compliant factory on the local environmental regulator's website when I started my study in 2004. The local enforcement authority must have truly thought that this factory was in compliance. In 2004, he said, "This factory is one of our top performers, so why don't you go and study it." It was only after a 2004 enforcement campaign when the inspectors started to do nightly inspections that they discovered what local villagers had long known about and had even told me, that the factory was illegally discharging massive amounts of pollution under cover of night.<sup>19</sup> Had they known this earlier, I would probably never have been able to carry out my research there.

Regulatory agencies in China have suffered from similar problems in detecting violations of regulatory law, including labor,<sup>20</sup> food safety,<sup>21</sup> environmental,<sup>22</sup> arable land protection,<sup>23</sup> and intellectual property rights<sup>24</sup> laws. Weak detection capacity is first of all a problem of workload.<sup>25</sup> The rapid growth of the economy is not matched by sufficient inspection resources, both in terms of personnel and equipment.<sup>26</sup> Cooney notes, for instance, that China's 40,000 labor inspectors are supposed to inspect an estimated thirty million business entities.<sup>27</sup>

The problem of workload is compounded by resistance, obstruction and even intimidation by the inspected enterprises. A common form of inspection resistance is what Wang has summarized using the term 阳奉阴违 (*yangfeng yinwei*, respectful by day, in violation at night).<sup>28</sup> This means that the firm is seemingly in compliance when there are inspections, but as soon as the

inspectors leave, violations continue as before. A good example are the secret nightly discharges (偷排, *toupai*) by factories which know that environmental regulators hardly ever come to their premises at night, as occurred in the case just discussed above in southwestern China. Some enterprises also obstruct inspectors by not letting them enter their premises, and sometimes just stall them while they clear away evidence of violations or sabotage inspection possibilities.<sup>29</sup> Some inspectors have even had to fear for their safety. Labor inspectors have reportedly been beaten and seriously harassed while investigating violations of regulatory law on-site.<sup>30</sup> In one case, a milk production company in Zhuzhou, Hunan Province, first hindered food safety inspectors from entering their factory and then held them hostage for five hours.<sup>31</sup>

In order to deal with the high workload and limited inspection capacity, Chinese regulators, just like regulators elsewhere, have tried to prioritize inspection resources and focus on particular “bad apples”. This approach seems logical<sup>32</sup> but has failed in practice when the regulator lacked sufficient information to make a well-informed distinction between good, average and bad apples.<sup>33</sup> For instance, one of the factories I studied during my fieldwork was incorrectly listed as being ‘in compliance’ and was therefore not being prioritized for extra inspections, as the regulator did not know about its violations and was unlikely to discover them because of the prioritization scheme. More importantly, as Cheng has shown, street level agents in everyday enforcement practice do not prioritize based solely on what are deemed the worst violators but rather on cases that, if not handled, will create the most trouble for the agents involved, which are not always the worst cases.<sup>34</sup>

### *B. Reacting to Violations through Sanctions*

Regulatory enforcement in China has been weak, not just because of a lack of knowledge about violations but also because of a lack of action against regulatory transgressions, as regulators often issue mild sanctions against detected illegal activities. The average environmental fines in 2006 were still only 10,000 RMB or about 1,100 euro.<sup>35</sup>

Sanctions are weak, in part, because regulatory agencies have insufficient legal authority. The maximum statutory fines in many regulatory areas are still rather low. This is especially the case for laws that provide for a set fine level with a specific maximum. For instance, in the field of environmental law, the highest administrative fine is 1 million RMB or about 110,000 euro,<sup>36</sup> for

labor violations it is 20,000 RMB or about 2,200 euro,<sup>37</sup> and for mining violations it is 2 million RMB or about 220,000 euro.<sup>38</sup>

Recently, there has been some improvement. Chinese legislators have started to introduce a flexible form of sanctions, where the fine at least reflects the damage. For food-related violations, for instance, the highest fines are set at ten times the value of the food produced.<sup>39</sup> And for illegal land sales, the maximum fine is 50% of the illegal income made from the transaction.<sup>40</sup> For pollution-related violations, the 2008 Water Pollution Prevention and control law similarly stipulates that the fine for irregular usage of environmental installations is calculated by one to three times the amount of pollution discharge fees that the company would normally have to pay.<sup>41</sup> Even more striking is a new rule in the same law from 2008 that allows environmental regulators to fine between 20% or 30% of the damages caused by environmental accidents. This law thus boldly goes beyond existing environmental legislation, such as the 2005 Solid Waste Pollution Prevention and Control Law that similarly provided for a fine based on 30% of the damages, but with a maximum of 500,000 RMB.<sup>42</sup>

Regulators themselves have also started to test the boundaries of maximum fines. In 2009 the Ministry of Environmental Protection issued a notice that authorized local enforcement agents to impose a new fine for each day a regulated company remained in non-compliance,<sup>43</sup> thereby violating the *ne-bis-in-idem* principle forbidding repeated sanctions for one violation of the law, as laid down in Article 24 of the 1996 Administrative Sanctions Law and also stretching the rule the same law provides in Article 51 that allows for an extra fine of 3% of the original fine for each day a fined enterprise has failed to pay the original fine.

The clearest example of the effect of these new rules is the almost 30 million RMB record fine against Zijin Mining Company following a major pollution spill, using the new rule that allows for a 30% fine of the 90 million RMB damages involved.<sup>44</sup>

However, the problem of weak sanctions is more complex than the lack of authority to punish violations sternly. Even within the current legal boundaries, regulators often do not use the existing sanction authority to its fullest extent. In environmental and land-related violations, for instance, my local research results showed that agents usually will not charge more than 33% of the maximum fine.<sup>45</sup> The most important reason for this is that local regulators, who are mostly locally paid and managed, do not want to upset the local economic development and local industry.<sup>46</sup> Thus, what has been called “local protectionism” (地方保护主义, *difang baohu zhuyi*) is one of the most common complaints about existing law enforcement practices.<sup>47</sup> Good

examples have been detailed in my research on the enforcement of pollution and arable land protection law in southwest China, where local enforcement agents did not act against polluting enterprises and illegal construction as this conflicted with powerful local interests, and also because it was too difficult to do, given the lack of resources and local support.<sup>48</sup> Scholars studying law enforcement against various regulatory offences including piracy and intellectual property rights violations,<sup>49</sup> the operation of illegal mines,<sup>50</sup> corruption,<sup>51</sup> occupational and health safety law<sup>52</sup> have reached similar conclusions. Concurrently, weak enforcement is caused by insufficient central level support. Despite improved support and investment in environmental and social issues at least since the 9<sup>th</sup> five-year plan and especially since the 11<sup>th</sup> and the now upcoming five-year plans, the center maintains economic growth targets that in practice conflict at the local level with regulation which is supposed to safeguard economic, health and environmental risks.<sup>53</sup>

Enforcement agents can also be obstructed by local industries or workers in such industries harassing or threatening them when they arrive on-site to execute sanctions.<sup>54</sup> Dimitrov provides telling examples where armed locals threatened tobacco regulators who sought to destroy locally produced illegal cigarettes, while local police stood by, as villagers destroyed the inspectors' car. And in another case a regulator who had been working undercover was "blindfolded and abandoned in a mountain cave" while his four colleagues were surrounded by a mob of villagers, angry at the inspectors who had come to destroy their illegally produced cigarettes.<sup>55</sup>

Perhaps the worst aspect of all of this is that sanctions have had a limited deterrent effect on the regulated behavior of enterprises. Unfortunately, we lack systematic data on the perception of company managers or workers about sanction probability and severity, which is necessary to make a sound judgment of the deterrent effect.<sup>56</sup> But there is scattered evidence, as discussed above, of cases where there are structurally limited chances of being caught violating regulatory law, and that when caught, sanctions will have a minor impact on the enterprise. Perhaps the clearest example of how little deterrent effect some state enforcement practices have is a recent development I learned about from China's national environmental regulators. They informed me that some companies had made paying fines for pollution-related violations of the law a part of their standard operating budget. And thus violations of the law, even when met with fines and sanctions, become a normal aspect of business.<sup>57</sup>

### C. Campaigns to Improve Enforcement

One way to deal with weak enforcement has been the organization of crackdowns and enforcement campaigns. Some examples are campaigns against fake products, unsafe food, forced labor, illegal land usage or industrial pollution.<sup>58</sup> As I have elaborated in detail in my earlier work, these campaigns have led to short-term, stop-gap effects but have become ritualized shows of effort rather than achieving a sustained impact.<sup>59</sup> My fieldwork in southwest China traced the effects of an enforcement campaign against arable land protection law violations and one against pollution law violations. Being directly on site in the villages where the violations took place as the campaigns unfolded, I was able to trace how they were organized and what effects they were having. In both campaigns I saw that the extra pressure on particular violations forced regulators and local governments to increase their detection capacity, unearthing violations that had gone unnoticed until then. However, neither campaign had much impact as the underlying causes for the ongoing violations could not be solved, including lack of structural regulatory capacity and local protectionism, combined with the profits made from violations and limited local social support for addressing the violations. One heavily polluting firm was fined a mere 10,000 RMB, even though it was found to have fooled inspectors on purpose for years. Moreover, widespread illegal building practices were not punished at all, and instead a plan for legalization was made that was never to be executed as local companies did not have the funding to bear the costs of legalizing their land rights.<sup>60</sup> These findings are fully in line with studies of other campaigns, including those against corruption<sup>61</sup> and pirated goods,<sup>62</sup> and even the massive Strike Hard (严打, *yanda*) campaigns against crime in general.<sup>63</sup>

Academics have questioned the simplicity of the campaign-type law enforcement mentality during which swiftness and harshness are seen as the solution to a whole range of different problems.<sup>64</sup> Sun Guoyang, as translated and summarized by Trevaskes, states that “Strike Hard promotes the idea that all social problems should be dealt with using severity”.<sup>65</sup> He then questions: “Why in the three main Strike Hard campaigns [organized in 1983, 1996 and 2001] have we been unable to break out of the cycle that crime cannot be completely defeated? It’s simple. Attacking crime does not eliminate crime. The ebb and flow in crime rates are connected closely to social contradictions, so significant reductions in crime cannot come about simply through the efforts of the criminal justice agencies.”<sup>66</sup> Similarly, Wang Mingliang noted that there is no scientific evidence that the harsh approach against crime during Strike Hard paid off and helped decrease crime, as criminal behavior is

too complex to be merely addressed through harsh punishment.<sup>67</sup> An Congcong further holds that campaigns against crime can only be effective if their harshness is combined with other measures.<sup>68</sup> As Dimitrov summarizes campaigns against pirated goods: “Campaigns deliver high-quantity, but not necessarily high-quality enforcement.”<sup>69</sup>

Scholars have shown that even for enforcement campaigns where success was reported, the data that was produced is highly questionable. Tanner describes, for example, how data had been doctored in the first Strike Hard campaign, quoting sources published in China that officials had “contrived numerous ways to artificially improve their statistics” in order to show satisfying results to superiors.<sup>70</sup> Tanner further notes that the high percentage of criminal cases solved during the early Strike Hard was the result of selecting cases to work on that were easily solved, thus not necessarily the severe and difficult cases the campaign sought to address.<sup>71</sup> Even worse, Tanner details that in this early crackdown, people were arrested and the case was reported as solved, while in fact the “key criminal offender” had never been apprehended.<sup>72</sup> Dutton further mentions that police in the 1980s started to underreport crimes due to the extensive pressure they were under to clean up cases, achieving 85 – 95 percent solution rates.<sup>73</sup> Similar questions about the trustworthiness of data exist in regulatory campaigns. The anti-pollution violations campaigns serve as an example. SEPA officials in Beijing have reported that they have had difficulty getting trustworthy local information and have been actively obstructed in doing so by local authorities and, as a result, have resorted to verification inspections and public involvement.<sup>74</sup> Data is further untrustworthy simply because the local enforcement agents lack sufficient data about compliance behavior and therefore have no way of knowing exactly what percentage of violations they are addressing, nor are they able to verify for certain whether the situations investigated are in compliance or not. In addition, we see that there can be collusion between the local enforcement agents and the enterprises they are supposed to crack down on, to show results. A good example is how during crackdowns on pirated goods in 2004, local shops in Kunming closed for a couple of days, so that inspectors could report them as being in compliance (or at least as being ‘not in violation’). Right after the crackdown, shops reopened. One shop was located right next to a local police station involved in the original crackdown.<sup>75</sup>

#### *D. Recentralization to Improve Enforcement*

Another way of improving enforcement has been through an attempted recentralization of enforcement authority (垂直管理, *chuzhiguanli*, “vertical

management reform”), in order to find a more structural solution to end local protectionism. This reform effort started in the 1990s in bureaucracies including the Industry and Commerce Bureaus (in 1998),<sup>76</sup> the Quality Technology Supervision, the Securities Supervision Commission (both in 1999),<sup>77</sup> the Pharmaceutical Supervision Management Bureaus (in 2000),<sup>78</sup> the State Statistical Bureau (in 2004),<sup>79</sup> and the State Land Resource Management Bureaus (in 2004).<sup>80</sup> Andrew Mertha details how these reforms were initiated from the center, and how they attributed budget and management authority over sub-provincial bureaus to provincial-level bureaucracy in question.<sup>81</sup> Another way of how the center has tried to reassert power over local-level law enforcement has been the establishment of branch offices directly overseeing law enforcement in certain regions covering multiple provinces in China. This first started with the People’s Bank of China establishing branch offices in 9 regions covering multiple provinces in order to strengthen regional macro-control and to create more independence from provincial level governments.<sup>82</sup> In 2006, the State Environmental Protection Agency (since 2008 converted into the Ministry of Environmental Protection) established 5 branches overseeing law enforcement work and 6 branches overseeing nuclear pollution law regulation of several provinces each, all directly funded and controlled from the center.<sup>83</sup> Another example is how the Ministry of National Land Resources adopted plans to establish 9 inspectorate branch offices and the Ministry of Construction started setting up 6 similar inspectorates, both to be directly paid and managed by these central-level ministries.<sup>84</sup>

Whether these recentralization efforts have been and will be successful in overcoming either protectionism or weak law enforcement remains to be seen. After recentralization, the new non-local authorities still face local governments that are able to obstruct law enforcement they deem unfavorable.<sup>85</sup> In some aspects, the reforms may have made matters worse. First of all, recentralization may cause chaotic coordination of law enforcement involving several bureaucracies, with departmental protectionism and fragmentation along vertical lines instead of horizontal ones.<sup>86</sup> Second, centralized bureaus may become stand-alone units, with little exchange either with central-level bureaus or local bureaus, as they are unlikely to exchange or rotate leadership or personnel.<sup>87</sup> And further, recentralized bureaus are in danger of being even more pressed for resources compared to local units<sup>88</sup> and may even come to partly depend again on local governments.<sup>89</sup> In some cases the salaries of recentralized personnel have remained lower than those of personnel working in locally paid bureaucracies.<sup>90</sup> Related to this last statement, observers have been worried

about corruption, questioning whether the weak supervision of recentralized administrations far away from their direct managers will be effectively controlled, especially now that local people's congresses do not have the authority to supervise such recentralized units.<sup>91</sup> Finally, Chen wonders how the vertical management reforms can solve the fundamental conflicts of interests between, for example, arable land protection and human social and economic development that have hampered law enforcement in certain areas.<sup>92</sup>

### III. Can Society-Based Implementation Improve Regulation?

All of this paints a bleak picture for the implementation of risk regulation in China. Low compliance and weak state enforcement have become mutually reinforcing, creating a vicious circle that undermines the implementation of regulatory law.<sup>93</sup> Such a vicious circle is embedded in and facilitated by a governance structure susceptible to the capture of state regulatory institutions by business elites.<sup>94</sup> The unclear demarcation between state and market institutions,<sup>95</sup> the state's lack of steering and coordinating capacity,<sup>96</sup> and the dominance of informal networks over formal legal structures<sup>97</sup> foster the capture of state regulatory institutions by business elites in China. This creates a particularly challenging context that undermines the capacity and independence of state enforcement authorities.

Is the whole situation hopeless then in China? Is any attempt to analyze the problems to find a solution towards improvement just a "rearranging of the deck-chairs on the Titanic"? Or, to stay in the analogy, can we create some lifeboats to save as many passengers as we can?

#### *A. Regulatory Governance and 'Decentered' Regulation*

Well, a first reassurance is that China is not unique nor the worst<sup>98</sup> in many of these problem areas, and many countries worldwide have found that state-centered systems to implement regulation are challenging and are having problems in terms of effectiveness, efficiency, accountability, coordination, professionalization and integrity. There is a large body of literature from OECD countries showing how difficult it is for state regulators to implement regulation, whether through deterrence,<sup>99</sup> collaboration,<sup>100</sup> or even mixed strategies.<sup>101</sup> In addition, there has been much criticism in OECD countries of state-led regulation burdening business with ineffective and unreasonable

regulatory rules.<sup>102</sup> This has led to a search for alternative forms of regulation. Solutions were sought in the form of industry self-regulation,<sup>103</sup> co-regulation,<sup>104</sup> or enforced self-regulation<sup>105</sup> through using voluntary instruments sometimes combined with state regulation and by using indirect economic incentive structures instead of direct command and control norms deemed inefficient and ineffective.<sup>106</sup> Concurrently, scholars have proposed involving citizens in the regulation, participating in standard setting, information gathering about regulatory behavior, and influencing the behavior of regulated actors to comply with the regulatory norms (behavior modification).<sup>107</sup> Black has summarized this move away from state-based regulation and from direct regulation with the government mandating what economic actors should do to a broader mix of actors and instruments as a move towards 'decentered regulation'.<sup>108</sup> Braithwaite, Coglianese and Levi-Faur have used the term 'regulatory governance' to capture a similar historical process.<sup>109</sup> Meanwhile, Gunningham, Grabovsky and Sinclair have used the term 'smart regulation' to indicate hybrid constellations of state, market and societal regulatory instruments and implementation mechanisms.<sup>110</sup>

### *B. Society-Based Regulation*

To improve regulation in China, citizens can play an important role by aiding implementation of regulatory law, as well as by assisting and substituting government enforcement work.<sup>111</sup> Unlike state and enterprise actors, societal actors are less directly caught in the close state-enterprise relations that challenge current regulatory implementation.

It is hopeful to know that OECD research shows that such societal forms of regulatory implementation can be effective. Kagan, Gunningham, and Thornton have for instance used the term 'social license pressures' to show that apart from regulatory and economic licenses, firms also need to have a social license consisting of the support of local communities to continue operations.<sup>112</sup> Their study of environmental regulation has shown that these state, market and social forces can strongly interact to develop and implement regulation.<sup>113</sup>

In non-OECD countries there is a separate tradition of looking at the role of citizens as regulators. This tradition is not so much one of seeking an alternative to a state regulatory system deemed overly intrusive and inefficient, but rather an alternative to a non-functioning or even non-existent system of state regulation. Most of these studies, including those from Vietnam, Bangladesh, Mexico and Indonesia, also show citizens can play three core regulatory roles (standard setting, information gathering and behavior

modification) even in contexts where the state has failed to do so.<sup>114</sup> Braithwaite concludes for developing countries in general: “By utilizing NGOs and local social pressure, developing countries might develop a ‘regulatory society’ model, bypassing the regulatory state. Where capacity remains limited, private bounty hunting (such as fees for successful private prosecutions) may become an appealing tool for achieving certain regulatory objectives.”<sup>115</sup> However, these studies do show that citizens are more successful as regulators if they are sufficiently educated, wealthy, and independent from the regulated industry, and if they are supported by regulatory and judicial institutions of the state.<sup>116</sup> My own work has demonstrated that social pressures play a very important role in the implementation of pollution and land regulation in southwestern China. Similar to Gunningham et al.<sup>117</sup> I found that once there is a positive interaction or convergence of social, economic and regulatory forces, a sustained implementation of regulation can be achieved. However, I also found, similar to Blackman’s research results on pollution control in Mexico, that a converse interaction with economic and social forces against regulation can undermine implementation, in cases where society and state actors are captured by economic interests opposed to regulation.<sup>118</sup>

In China’s challenging context of implementing regulatory law, citizens can at least<sup>119</sup> play two important roles: gathering and sharing information about the behavior of regulated actors, and taking legal and factual action to influence the behavior of these actors towards compliance with regulatory norms. Chinese citizens seem to be rather well equipped to play a role as regulators, being reasonably well educated with rising income levels, and having a state that has a relatively strong regulatory and judicial capacity when compared to many other non-OECD countries.

However, at first glance it may seem counter-intuitive to look at the role of citizens in the implementation of regulatory law in China. Is China not an authoritarian state with limited freedom of speech, limited freedom of press and organization, and thus a highly constricted citizenship and civil society?

At the same time, we should note that China is an authoritarian state where an embedded form of civic organizations has grown rapidly, especially in the fields of labor, health, and environment.<sup>120</sup> It is an authoritarian state with a commercialized state media, which reports increasingly about popular local injustices and scandals.<sup>121</sup> And it is an authoritarian state that attempts to tightly control an increasingly growing, activist, and creative group of online netizens sometimes able to thwart or resist or mock such controls.<sup>122</sup> Moreover, it is an authoritarian state that has at times promoted media and popular supervision of local authorities and enforcement agencies failing in

their duties.<sup>123</sup> In short, China may have become a post-totalitarian<sup>124</sup> authoritarian state, where citizens have developed and been able to get some room to play a regulatory role, albeit always within the strong confines of the party-state.

In theory, it thus seems that citizens in China can help add inspection capacity to state regulators and could potentially act more independently, not being immediately caught in the captured state-enterprise relationship. In addition, involving society is politically attractive as the responsibility for regulation becomes shared, and if things go wrong, the blame is shared as well.

Thus, society-based implementation of regulation may be just the medicine to cure China's regulatory failures. The question is: how can citizens do so in China's authoritarian context? The remainder of this lecture will discuss how over the last decade China has increased opportunities for citizens to gather and share information about regulatory violations and initiate action to stop such violations. I will discuss these developments and evaluate the success and limits of this new approach. First, I will discuss how citizens can assist in detecting violations of law. Subsequently, I will address how they can take action against violations themselves, both through litigation as well as through collective action.

## IV. Citizens as 'Barefoot Inspectors'

Reliable information about the behavior of regulated actors, including *who* does *what* and *where*, is a precondition for regulation and 'regulability'.<sup>125</sup> A lack of information about regulated behavior is perhaps the Chinese regulatory system's most important Achilles heel, since even if regulators want to regulate, they cannot do so simply because of a lack of trustworthy information about the *who*, *what* and *where* of regulatory transgressions. A promising turn is that reforms of the last decade or so may enable Chinese citizens to start acting as *barefoot inspectors*, gathering and sharing information about violations of regulatory law and the behavior of regulated enterprises.

### *A. Potential, Form, and Impact of Society-Based Information*

My fieldwork in southwest China has taught me about the potential of citizens as informants of regulated behavior. In 2004, as discussed above, local authorities were confident enough of a local factory's compliance not only to list this on their website but even to send me, a foreign researcher, over there

to study it. Following a couple of weeks of building trust in the locality, I slowly began to learn about what the villagers knew of what was happening in the factory. They told me that the factory was operating mainly at night and very little during the day. And they also told me that at night there sometimes were large discharges that created a strong, penetrating smell. I learned that, following several illegal spills, their fish had died, and their crops had turned red. And during all of this time, the regulators that I was also interviewing knew nothing about this.<sup>126</sup>

Citizens have several means to share information about regulated actors. They can directly turn to regulatory state authorities, through written complaints or visits or calling the various hotlines set up locally and nationally. Issuing such complaints to the government has become an important form Chinese citizens use to deal with grievances, with for instance over 13 million petitions compared to about 4 million first instance court cases in 2004.<sup>127</sup> Over the last decade or so there has been a rapid increase of environmental complaints, for instance, rising steadily to about 800,000 in 2009.<sup>128</sup> Similarly, there are many complaints to the labor inspectorates about labor-related transgressions and violations, with labor inspectors receiving nearly 400,000 complaints in 2008.<sup>129</sup>

Another method that citizens may use in order to address regulatory indiscretions and violations is by turning to the media. The commercialized state media<sup>130</sup> is increasingly interested in reporting local injustices. Highly popular investigative journalism shows of the national TV station CCTV regularly air reports, often based on what local citizens tell them, concerning labor, pollution, land, mining, and food safety issues. In one recent example, CCTV aired a show about the adverse effects of fake traditional cures based on a mother's 8-month-long investigation after she had discovered her son had fallen ill from such treatment. Following the television program, the chain of bathhouses involved was ordered to shut down by relevant governmental regulators.<sup>131</sup> Another good example of the positive impact of the effects of information-sharing through the media is the action taken by civic organizations over the last year to draw attention to occupational health and pollution violations at Apple's sub-contractors. These contractors had been using the poisonous chemical substance n-hexane to clean iPhone and iPad screens, resulting in severe illnesses among workers. A report published by an alliance of NGOs in January 2011 and subsequently published in China<sup>132</sup> and the international media<sup>133</sup> forced Apple to acknowledge the problems and also to name the sub-contractors involved, promising to address the issue.<sup>134</sup>

## B. The Promotion of Barefoot Inspectors

Regulators have increasingly come to rely on information from citizens about local regulatory behavior. Given the high workload and limited inspection capacity, Chinese regulators have had to rely on a reactive enforcement style, detecting violations of law through citizen complaints.<sup>135</sup> Over the last decade, regulators have started to stimulate citizens directly to come forth with their complaints. A good local example is how environmental authorities in Zhejiang province, facing secret nightly discharges that they could not inspect themselves, offered rewards for valid information about violations of law to local citizens. As a result, local peasants became full-time quasi-inspectors spending night after night on their mopeds moving from factory to factory to catch the factories' *toupai* illegal discharge practices.<sup>136</sup> This local experiment became part of the national environmental enforcement policy when enforcement campaigns introduced public participation hearings, hotlines and rewards for successful information.<sup>137</sup> And with the introduction of the 2005 State Council Regulations on Letters and Visits,<sup>138</sup> the party-state introduced a general reward system for citizens issuing valid complaints and comments that "aid national economic and social development or that help the functioning of governmental institutions or the protection of social public interests".<sup>139</sup>

Concurrently, higher levels of government have stimulated public participation and citizen information-gathering and -sharing as a form of extra oversight on local governments they fear protect local industry and shirk their enforcement duties. A good example is what a central-level Ministry of Environmental Protection Official told me more than a decade ago. He stated that when he visited provinces for inspections, local governments would arrange visits to model factories and provide highly positive reports about local improvements. Simply to get more reliable information, he organized public hearings and established hotlines to get information independently of the local authorities.

Such citizen-based oversight has a longer history. We can find it in the contemporary "letters and visit" complaints petition system that, according to Minzner, has served an important governance function of enabling higher authorities to check local government behavior through citizens.<sup>140</sup> This is also evident in Article 41 of the 1982 Chinese Constitution that gives citizens the right to criticize and comment on the government and government officials.<sup>141</sup> Moreover, it is discernable in major national speeches and policy documents. In 2005, Prime Minister Wen Jiabao stated for instance, "Only when the people supervise the government can we prevent that the government slackens."<sup>142</sup> And in the same year the national work report

contained a broader policy to stimulate media oversight of governmental authorities and bureaus.<sup>143</sup>

Citizens have been further enabled to gather and share information about regulatory behavior and regulatory enforcement through the adoption of freedom of information regulations, most notably the 2007 State Council Open Government Information Regulation and the 2008 MEP Environmental Open Government Information Measures.<sup>144</sup> Moreover, the 2002 Environmental Impact Assessment Law instituted a public participation system allowing and stimulating citizens to come forward with information about future construction and planning projects, in part also tapping into the wider information potential locked in China's illiberal society.<sup>145</sup> Furthermore, other Chinese laws contain clear provisions through which the party-state acknowledges the importance of citizens in providing information about regulatory and governmental behavior, in fields including soil conservation, dangerous chemicals, and housing demolition regulation.<sup>146</sup> A recent and noteworthy example is a new local regulation from Guangdong Province rewarding citizens who report foreigners who outstay their visa or carry out illegal labor.<sup>147</sup>

### *C. Limitations to Society-Based Data Gathering and Sharing*

There are, however, severe limitations to the role citizens can play as barefoot inspectors. Citizens do not always have information about the regulated behavior. This is not surprising, since theoretically speaking one of the classical arguments for regulation and intervention in markets is to overcome an information imbalance.<sup>148</sup> The more visible and simple the regulated behavior, the more likely citizens will have information about it. Thus for instance, citizens have easier access to information about contractual labor affairs (such as payment arrears and working hours) and noise pollution, and less information about occupational health, food safety and water pollution. Citizens also often lack ex-ante information about regulated behavior and only find out about it once the negative effects of such behavior have become manifest, as for instance in the case of the melamine milk powder incident. The more complex the linkage between cause and effect of violations of law, the less likely citizens will be able to get timely information. In some cases of environmental health hazards, for instance, the recognition that local pollution was causing cancer took decades,<sup>149</sup> and thus also the collection and supply of information to relevant actors were stalled.

The limits of the information available to citizens and the types of citizens who have access to information create a bias in the potential effects of citizen-

based regulation. What are most pollution-related complaints about? Water pollution? Air pollution? No, most complaints are about noise pollution.<sup>150</sup> Also, we see that there is a clear correlation between income levels and complaints,<sup>151</sup> thereby indicating that a system of regulation which relies too heavily on citizens for its implementation could strengthen income inequalities, causing extra social and environmental injustice.

Even when citizens have sufficient information and when they have developed grievances, they may not necessarily share such information with those outside of their immediate community, even when the state and media ask them to do so. A good example is that only 4.7% of Chinese farmers who have lost their land without proper compensation have issued a complaint petition to the authorities,<sup>152</sup> although land-related matters are amongst the most important Chinese grievances.<sup>153</sup>

So why is this? Why do citizens sometimes not turn to the media or state, or refuse to talk to them, even after discovering severe damage due to regulatory violations? The answer is that citizens need to think it is beneficial to come forth with information. Wang contends, for instance, that workers are unwilling to cooperate with labor inspectors fearing to lose income.<sup>154</sup> At one of my fieldwork sites, during nearly three decades of pollution with severe financial and health consequences, local citizens only tried to issue a complaint about pollution to local regulators *once*. They did so in 1985 when they contacted the township authorities, the lowest level of government. Perhaps the fact that at the time this resulted in nothing but the factory sending two cars, allegedly packed with gifts for the township cadre, may explain why later no further action was taken. By 2009, citizens stated, “If we tell the environmental authorities, they will come and fine the company, and the money ends up going to the state and not to us.” Thus, citizens need to have a certain amount of trust in the institutions they contact, as well as perceive that such information provision is useful for them before they share information about regulatory transgressions. Here it is interesting to note that these local environmental authorities never managed to encourage such trust. In the local environmental impact assessment procedures, for instance, they never truly consulted with local villagers as mandated by law, but simply wrote in each assessment the same single line that the local villagers welcomed the factory’s expansion plans for economic growth and were not concerned with possible risks.<sup>155</sup> There is no indication that they ever communicated with citizens about their inspections or about the few times that they did issue a fine.

Before citizens are willing to share information with the media, they must also think that this is beneficial. While many citizens probably think that

media reporting may help advance their case, in some cases unscrupulous reporters have elicited reporting fees to come down and investigate or report on stories of local violations and damages.<sup>156</sup> In other cases citizens have been less willing to share information with the media. In the southwestern Chinese case discussed above, after an explosion occurred in the factory in 2008 killing several workers, local citizens were not willing to talk to the media that came into their locality. They stated that after watching new investigative journalism TV-shows concerning local injustice for more than a decade, they did not believe that it had led to any real change, “just look around us, where is the change?”<sup>157</sup>

The important lesson here is that mere knowledge about the regulated behavior that has caused grievances<sup>158</sup> is not enough for citizens to play a successful role as barefoot inspectors. Citizens must also perceive that sharing information is beneficial, which is in part a strategic decision<sup>159</sup> and in part a matter of trust in state institutions and the media.

#### *D. Governmental Limits to Information Gathering and Sharing*

Trust in state institutions and the media is not promoted by a government that, while stimulating citizens to aid in detecting violations, also obstructs citizens in getting and sharing relevant information. Although some laws and policies have stimulated citizens to make complaints, other laws have restricted their possibility to do so. Such limitations were introduced by the 2005 State Council Regulation on Letters and Visits. This regulation limits the possibilities for complaining to higher levels of government, ruling that citizens shall present their complaint at the corresponding level or the next higher level, and that higher-level governments shall not accept petitions that are still being handled at lower levels.<sup>160</sup> The regulation also restricts the number of citizens allowed to present their complaints in person at the government offices to no more than five.<sup>161</sup> The 2005 regulation further introduces stricter punishment for irregular or illegal complaints submissions, including the broadly worded behavior of “inciting, colluding with, coercing or enticing others with money or things of value to write letters or make visits, or manipulating others from behind the scenes into doing so”.<sup>162</sup> The regulation is careful, however, to prevent strong government responses against petitioners submitting complaints. Article 47 for instance provides that in dealing with irregular petitions, officials must first try persuasion, criticism, and education, and only if that fails involve the public security bureaus. In addition, Article 46 provides for criminal sanctions against governments criminally retaliating against petitioners.

Moreover, China still operates an authoritarian system of information control, which seeks to guide in detail what citizens can and cannot know. The China Digital Times website provides a regular account of how Chinese propaganda authorities tightly control the media. In a section called “The Latest Directives from the Ministry of Truth”, this website shows how Chinese censorship works in detail, with week by week reports of the various items that are not allowed to be reported or with detailed instructions on how certain national and international news is to be communicated.<sup>163</sup> Chinese citizens thus live, and grow up, in a context with tightly controlled news. This can severely undermine not only their access to information, but also their trust in governmental information, and their willingness to share information with the government but also with the governmentally controlled media.

And it is not just information about the government that is controlled, but any information deemed sensitive for whatever reason by the authorities involved, whether central or local. And thus, governments restrict information collection about construction safety, food safety, pollution, and land usage. Often such cases concern local enterprises, and sometimes they concern local governments, but rarely do they involve matters of national security or the position of the CCP as a whole. Local authorities have for instance obstructed parents of children poisoned by metal pollution from gathering information about such pollution and its effects on their loved ones.<sup>164</sup> Another example is how Tan Zuoren, a citizen activist, was arrested and sentenced to five years in jail for seeking to find out why so many schools collapsed in the 2008 Sichuan Earthquake and whether their construction had been up to standard.<sup>165</sup>

And even though we saw that by law, Chinese citizens still have the right to share information about regulatory violations and regulatory enforcement with the relevant authorities, and have at times been encouraged directly to do so, citizens that file complaints about violations of the law or sub-standard enforcement practices cannot do so without risk. Risk includes arrest, harassment, prosecution, and in the worst cases some citizens have ended up in black jails or psychiatric wards, sometimes for years.<sup>166</sup>

In one case in Hebei, local police arrested citizens seeking to file a collective complaint about pollution on charges of instigating public turmoil, keeping them in detention for six weeks. Following their release, the petitioners initiated administrative litigation and reached a settlement with the local government on compensation. Nonetheless, after the administrative suit was dropped, the activists were again arrested, prosecuted and tried for blackmail and instigating acts of turmoil against social order. In the first instance, the defendants were found guilty and sentenced to three to four years in prison.

They later won in an appeal, and the case was retried. In the second trial, this case drew national media attention, but this did not change the retrial verdict. Three of the representatives again received similar prison sentences, and were also sentenced to pay fines and even compensation to the factory that had been operating illegally.<sup>167</sup>

Complaints about land-related regulatory transgressions provide further examples of the risk of sharing information about regulatory violations. In Qincun, a village some two hundred kilometers south of Kunming in southwest China, villagers unlawfully lost several 100 Mu of arable land to a landscape theme park development project without satisfactory compensation. Dissatisfied, one of the local villagers bought some legal books and found that their rights had been violated. When a second batch of land was to be taken, he tried to issue a complaint to municipal and provincial-level governments to stop the local township and district authorities from taking the land illegally without paying in full. The district authorities reacted by arresting this local champion of the people, whom local villagers had started calling their own “Deng Xiaoping”.<sup>168</sup> The Qincun petition-related arrest is not an isolated phenomenon in China. In Shishan village, in Fujian province, Lin Zengxu, who had issued a complaint about illegal land practices, was arrested by a local police squad of 12 men as he napped one afternoon. The police gave Lin a severe beating and wanted to take him away to jail. However, family, neighbors and friends were able to fight off the police and rescue the man who had for years tried to stop illegal land grabbing and get higher compensation for farmers losing their land. Lin later escaped to Beijing.<sup>169</sup> Also, in Fujian province in Qingkou Town, Xiao Xiangjin, another leader of a peasant protest movement against illegal land seizures who had filed a higher level petition, tried to escape the police when they came to lift him from his bed in the middle of the night. At first, he was able to flee, though later, when boarding a plane to Beijing to issue a petition with the central government, he was detained and questioned at Fuzhou airport. Upon his return to Fuzhou, he was arrested and sent to a “re-education through labor” (劳教, *laojiao*) camp “for having entertained prostitutes four times in his home and office at Qingkou”.<sup>170</sup> Only the provincial-level authorities would have been able to detain Xiao at Fuzhou airport, which shows how high up the local protectionism in these kinds of cases can run.

If even the provincial-level authorities are involved in protecting and covering up local land abuses, citizens have nowhere to turn to except the central government in Beijing. Given the rapid growth of petitioners turning to the capital, it is not surprising that many petitioners have been detained in Beijing or sent straight back, in an effort to control central level

complaining.<sup>171</sup> Local governments nowadays have special agents that are responsible for tracking and escorting petitioners back to the locality.<sup>172</sup> Thus, we can conclude that China's stimulation of citizens to act as *barefoot inspectors* is increasingly halfhearted, and one could even say directly obstructed by the same governmental authorities that promoted and needed it in the first place.

### *E. How Incentive Structures Obstruct Information Sharing and Cause Destabilization*

The problem here is that the institutional design of the complaints system is flawed. As Minzner and Liebman have noticed, there is an inherent contradictory incentive structure in place. Increasingly, government authorities, and even judges, are negatively evaluated if their decisions cause complaints, and especially if such complaints involve larger groups, going to higher levels, and are combined with other forms of action.<sup>173</sup> Cheng's research clearly shows what effects complaints can have for local officials. In X city in southeastern China, where Cheng did his research, local agents could lose up to 20 points for each petition related to their field of work to provincial-level authorities. A loss of 60 points, or just three provincial level petitions, could lead to job dismissal according to the local cadre evaluation system.<sup>174</sup>

As a result of such incentive structures, it is not surprising that some authorities have sought to control citizen complaints and keep them as local as possible. However, the same incentive structures stimulate citizens to do just the opposite as citizens soon learn that local grievances often involve local authorities, and that moving up to higher levels and with larger groups is more likely to illicit a greater response to their grievances. By making more trouble through their complaints, citizens can create a better bargaining position vis-à-vis local authorities, using the leverage of the incentive structure that punishes local authorities for social unrest.<sup>175</sup> When they thus seek to involve higher-level authorities and use bolder forms to share information, they increase the sensitivity of the case and also the chances of repression from the local authorities involved who stand to lose much should the complaints reach higher levels. This may cause new local grievances and yet another escalation and another. Or alternatively, the risk needed to make information-sharing work may mean that citizens become dissuaded from complaining at all, and thus also from sharing valuable information that state regulators need.

## V. Citizens as Regulatory Plaintiffs

If providing information about regulatory violations does not prove sufficiently effective, Chinese citizens can also try more direct courses of action, seeking to influence the regulated behavior and implement regulatory law. One such course of action is going to court, suing regulated actors in order to end their violations.

### A. Stimulating Regulatory Litigation Possibilities

The good news is that over the last fifteen years, the possibilities for Chinese citizens and civic actors to take legal action directly against regulatory violations through litigation have expanded. There has been a move away from a mere state-dominated model of implementation in the 1980s and the early 1990s towards laws that use broader civil law instruments such as property, contract and tort law from the 1990s onwards. Specifically, there is a marked change in the liability (责任, *zeren*) sections of Chinese regulatory laws detailing the legal responses to violations of the law, with extended and easier tort action possibilities: a reduced burden of proof for citizen plaintiffs (especially for proving causation),<sup>176</sup> the usage of non-fault liability,<sup>177</sup> the introduction of a form of quasi-punitive damages,<sup>178</sup> making payment of civil compensation a priority over paying administrative or criminal fines,<sup>179</sup> and also specifically allowing for collective litigation.<sup>180</sup>

Labor law provides a clear example of the legal shift from state institutions to also including citizens in the implementation of regulatory law. Comparing the 1994 Labor Law with the 2007 Labor Contract Law, the former mostly provides for implementation mechanisms involving state labor authorities or the criminal justice system.<sup>181</sup> A good example is that in case of failure to pay wages, this is to be addressed chiefly by the labor inspectorate ordering payment, rather than prescribing workers to take action in the courts themselves.<sup>182</sup> In the 1994 law, civil liability, and thus implementation of the law through workers taking legal action, is largely<sup>183</sup> described as a secondary aspect additional to administrative and criminal enforcement.<sup>184</sup> The 2007 Labor Contract Law, by contrast, has provisions that enable implementation through providing extra rights to the workers to be enforced through civil law means. Article 82, for instance, provides that for every month that a company has not arranged a signed contract with its workers or has failed to arrange for a tenured contract if legally obliged to do so, the company has to pay double salary.<sup>185</sup> Similarly, the new law provides for payment of double salary for illegal termination of contract.<sup>186</sup> These new rules stand in stark contrast to

Article 98 of the old law that states that in case of illegal termination of the contract or deliberately not issuing a contract, the employer shall be ordered to rectify this situation by the relevant administrative authorities, and only secondarily stating that when there are damages, it shall be liable to pay them to the worker.

Another field evidencing a legal shift from the state to a mixture of state and citizens is land law. Although farmers' 30-year land use rights as well as the collective property rights were codified most clearly in the 1998 law, this law mainly gave a role to state authorities in upholding the law's norms concerning illegal transfers, sales, usage, requisitioning or expropriation of land.<sup>187</sup> Further, it provided that governmental authorities responsible for allowing illegal requisitioning and land usage should be liable in case of any damages.<sup>188</sup> However, besides these implementation norms, which are mainly about the protection of the collective ownership as a whole and about the regulation of land usage, the 1998 law did not emphasize the remedies available to farmers themselves in case of problems due to violations of their land *use rights*. The 2003 Rural Land Contract Law elaborates the farmer land use rights that were originally codified in the 1998 Land Management Law. The new law details an implementation system that chiefly depends on civil liabilities, creating civil liability for violation of land use rights in general,<sup>189</sup> and specifically for unlawful actions including illegal land reallocations, violations of land production sovereignty rights, and forced land transfers.<sup>190</sup> In addition, it provides that such unlawful transactions shall be void, and thus seeks to implement such norms as protecting farmers, by granting them extra rights, without involving or mentioning administrative authorities or their enforcement action.<sup>191</sup>

Apart from these substantive regulatory laws, auxiliary laws have also opened up possibilities for citizens to pressure the state to deal with violations and provide information. Here the 2008 State Council Open Government Information Regulations should be mentioned, which provide Chinese citizens with the right to gain access to governmental information, including information about their enforcement performance and their monitoring data, in theory making it easier for citizens to get evidence using governmental data for their regulatory litigation.

In recent years, civic organizations have gained better legal possibilities for taking direct action in court. Especially in the environmental field, the newly established environmental courts have started to experiment with allowing public interest litigation in which the plaintiffs do not need to have a direct interest in the case.<sup>192</sup> Meanwhile, since the 1990s a new type of lawyer and legal aid has developed in China: the public interest lawyer and legal aid

centre, which are ideally suited to supporting citizens in pursuing regulatory litigation against consumer safety, labor or environmental issues.<sup>193</sup>

### *B. Some Numbers and Positive Findings*

Citizens have most clearly made use of these expanded possibilities for regulatory litigation in the field of labor. Here the new labor contract law and the concurrent financial crisis seem to have spurred the number of labor disputes to unprecedented heights, with an increase of 100% in 2008, and a further increase of 10% in 2009 and with the number of labor-related court cases currently up to 317,000 in 2009, compared with a mere 126,000 in 2006.<sup>194</sup> Also, in the field of intellectual property rights, there has been an immense growth in the number of cases.<sup>195</sup>

However, in other fields such as the environment, land, and food safety, there has been much less litigation. Of the many Chinese farmers who have lost their land without proper compensation, only 0.90% has gone to court.<sup>196</sup> And in the field of the environment, where there are about 800,000 complaints annually<sup>197</sup> compared with about 400,000 labor complaints,<sup>198</sup> there are only about 3000 environmental court cases per year,<sup>199</sup> so only 1% of the amount of labor court cases. Actually, cases with regard to labor and IPR (intellectual property rights) may be the less logical exceptions to the rule that Chinese citizens suffering from regulatory violations generally do not go to court<sup>200</sup> as there are many obstacles to successful regulatory litigation, as discussed in detail below.

Although a lack of data complicates a systematic analysis of the outcomes and not to mention of the impact of regulatory litigation, there is at least some indication of success. One can think for instance of landmark cases, such as the class action suit in Fujian province where 1721 citizens won a case against a polluting local company, thereby not only getting compensation, but also an injunction to end the pollution. And of the pollution compensation cases recorded by Chinalawinfo, about 66% were won by citizen plaintiffs.<sup>201</sup> Additionally, in the field of labor, Su and He have found that under pressure to prevent unrest, courts have responded directly to citizen demands, guiding them, sometimes while still on the street protesting, through 'fast-track' adjudicative channels. Sometimes judges complete legal procedures 'within hours', with favorable outcomes to the workers involved.<sup>202</sup>

### *C. Deciding to Go to Court*

At the same time, citizens and civic organization have not always fared well in seeking to use the courts to implement regulation. The Chinese road from regulatory grievance to final legal remedy is long and full of obstacles. As we saw, not all Chinese citizens suffering from regulatory infringements choose to go to court. Citizens seeking to initiate litigation must first convince themselves that it is useful to do so. Here the perception of the court is important. Courts in China are not independent of the state, and they fulfill functions beyond mere adjudication and actually serve as broader governmental dispute processing and norm formation departments. In cases involving powerful companies closely aligned with the state, as is often the case, it is therefore understandable that citizens do not turn to courts that they are likely to perceive as aligned with the local government, which itself is aligned with such enterprises. From this perspective, one could even wonder why Chinese citizens go to court for regulatory violations at all.

Here one answer may be that experience matters. A survey from 2001 found that Chinese citizens ranked their courts higher than counterparts in Chicago *before* they had any litigation history.<sup>203</sup> By contrast, experienced court users scored far lower than the US respondents, showing that actual court practice was much worse than expected, causing a form of “informed disenchantment”, as Gallagher has called it.<sup>204</sup>

If more experience means less trust in courts and probably less willingness to go to court, China may face a court legitimacy crisis. Since the survey from 2001, the number of Chinese citizens with court experience or with friends and relatives with court experience has risen dramatically, especially since the growth in labor cases and the fact that non-experienced citizens are likely to have been informed by friends and family with some experience.<sup>205</sup> And this may well mean that Chinese citizens today will have less trust in going to court than before.

### *D. Lawyers and Public Interest Lawyers*

Citizens who want to take legal action must find a lawyer to aid them. Chinese lawyers, like most in the world, prefer profitable and non-risky cases,<sup>206</sup> which these regulatory cases often are not. It is rare that victims of regulatory violations can pay much for lawyer fees, and it is common that these cases involve sensitivities when suing well-connected enterprises with close governmental ties. In the lawyer’s cost-benefit calculation for taking on these cases, risks of economic, judicial and physical repression against the lawyer

him- or herself and even their family members must increasingly be taken into account.

The main hopeful development here is that over the last decade or more, a special group of lawyers (public interest lawyers) has emerged that is less interested in making money and less afraid of the risks these cases entail.<sup>207</sup> These lawyers have played a major role in stimulating regulatory litigation against pollution, unsafe products, hazardous construction, illegal building and land usage, as well as labor violations.

During the past couple of years, however, these public interest lawyers have become increasingly pressured. Some of the more activist and outspoken among them have gotten into trouble, for instance, after taking on housing demolition cases related to the Beijing Olympics, after initiating legal action on behalf of the parents of victims of the melamine milk scandal, or after taking on cases on behalf of parents of schoolchildren killed or hurt in the collapsed schools during the Sichuan earthquake.<sup>208</sup> More recently, in the winter and spring of 2011, following the political reforms in the Middle East, Chinese authorities organized a crackdown on lawyers and legal activists, many of whom had been involved in regulatory cases related to food safety, land, and construction. Lawyers who had been harassed before, including Teng Biao, Ni Yulan, and Xu Zhiyong, were detained, often without formal indictments, for weeks at end.<sup>209</sup> Their personal lives were invaded, in some cases with state security agents even following their children to school.<sup>210</sup>

Of course, all of these examples are well-known, and Fu and Cullen have labelled these lawyers as rights-protection (维权, *weiquan*) lawyers,<sup>211</sup> who have maintained a strong public profile and have spoken out directly against the current power-holders, taking on cases that can generate the strongest media coverage and impact. However, their control and harassment may have broader implications and may be a deterrent for other lawyers to take on cases about similar regulatory problems that are not yet attracting wide media coverage and scrutiny. Also, the state seems to have expanded its control and repression to mainstream public interest lawyers, who now also receive visits from state and public security officials to explain their work over a cup of tea.

### *E. Court Functioning*

Finding a lawyer is but one step on the long and difficult road of acting against regulatory violations in China's courts. Courts, funded and managed by local governments that are often directly or indirectly involved in these cases, are not always sufficiently impartial. A first problem can be to get the court to accept a case. For cases deemed troublesome or sensitive, Chinese judges have

simply refused to accept them, exercising wide discretion in which cases to accept and which ones to refuse.<sup>212</sup> Some courts have, for instance, refused to accept cases in which the plaintiff was judged to lack evidence for the causal relationship between the defendant's act and the plaintiff's damages, even though the law clearly reversed the burden of proof for such causation to the defendant.<sup>213</sup>

Here it is important to note that the level of trouble or sensitivity is not only determined by the extent to which cases can undermine the position of the CCP as a whole, but also and perhaps even more by how much these cases can pose a threat or cause trouble for the local governments, courts and judges involved in the case. As such, cases about land, labor or environmental disputes involving local enterprises with close ties to governments that pay and manage the courts may be seen as sensitive or troublesome.

At the same time, judges have sometimes been explicitly forced to proactively accept cases deemed especially sensitive and threatening to local social stability, in the hope that brokering a solution in court can prevent further instability.<sup>214</sup>

Once a case is accepted, litigation fees are set at a level relative to the claim made.<sup>215</sup> For regulatory cases which may involve high claims, yet with low chances of winning, this can deter citizens from pursuing further action in court. Class action, known in Chinese as 'collective litigation' (共同诉讼, *gongtong susong*), can be important in cases that involve many victims, as it helps lower litigation costs per person. At present, the law clearly stipulates that class action is allowed. See for instance Article 55 of the Civil Procedure Law and Article 88 of the new Water Pollution Prevention and Control Law.<sup>216</sup> In 2005, however, the Supreme People's Court issued a notice limiting class action suits.<sup>217</sup> The notice proscribes that courts can split up class action suits if they find that "it is not easy to handle the case as a class action suit". In addition, the notice redirects jurisdiction over class action suits to courts at one level lower than with normal procedures. As Wang has noted, this may considerably strengthen the effects of local protectionism in these cases.<sup>218</sup> The All China Lawyers Federation (ACLF) has further strengthened control over class action cases as it has adopted a new rule that forces lawyers to ask for approval before starting any case involving more than 10 plaintiffs.<sup>219</sup> The SPC decision and the ACLF rules are examples of how the Chinese state has sought to reduce public pressure and control and prevent social unrest.<sup>220</sup> As Fürst notes, restrictions on class action can have important consequences for lawyers and litigants as they increase the legal work and costs as claims need to be made separately.<sup>221</sup>

Further, sometimes judges have misapplied the law. Such misapplication may also favor the citizens. Liebman, Su and He show in their studies that under pressure of complaints and a fear of instability, courts have adjudicated cases while caring less about procedural fairness or formal legality, yet more about substantive outcome, namely accommodating complaining or protesting litigants.<sup>222</sup> In other cases, misapplication has had negative consequences for citizen plaintiffs. In environmental court cases, judges have denied citizen plaintiffs compensation and injunctions by forcing citizens to provide evidence for causation despite the fact that, as mentioned, the burden of proof is legally reversed.<sup>223</sup> In one particular case, a court continued such interpretation despite three higher court and procurator revision decisions telling it to apply the law properly.<sup>224</sup> Another misapplication of the law is that courts sometimes do not award damages to plaintiffs, finding that there has not been an unlawful act violating the law that can justify such damages, even though the law does not require the act to be unlawful in case of liability for pollution. In a study of all pollution liability cases published on Chinalawinfo.com, one of China's main online legal databases, in 44% of all cases where plaintiffs were not rewarded any damages, the court argued that there had not been an infringement of laws or regulations.<sup>225</sup> They may do so because of a lack of competence but can also do so for less legitimate reasons, being caught in local vested interests or just due to plain corruption.<sup>226</sup>

A new development is that over the last five years or so, as Minzner as well as Fu and Cullen have documented, courts increasingly refuse to render a final judgment and insist on parties resolving their differences through court-managed mediation.<sup>227</sup> Minzner shows how courts use internal standards to evaluate judges, which include indications of the number of cases resolved through court-based mediation, with higher rewards for higher percentages of cases mediated, even rewarding judges in some courts who go beyond 80% mediation rates.<sup>228</sup> Such mediation is often not voluntary and may well result in citizens accepting a settlement under pressure that is not necessarily in their favor, especially since often an unbalanced power position exists, with weak citizens suing strong economic actors with good political ties.<sup>229</sup> This type of forced mediation also does not bode well for voluntary compliance with the mediation decision. Although normally such voluntary compliance is an advantage of mediation, Minzner demonstrates that mediated judgments in China nowadays require the same as adjudicated judgments, and in one Beijing court even more forced execution.<sup>230</sup>

Even if the court decides in favor of the citizens, litigation may not have the desired effect on implementing regulatory law, since in many cases the execution of judgments, despite much effort and reform, remain

problematic.<sup>231</sup> Consider, for instance, the Pingnan case in which 1721 citizens successfully won a collective suit against a local polluting company, which included a rare injunction to clean up the pollution.<sup>232</sup> Now, years after the ruling, although compensation has been paid, the company has yet to clean up the pollution itself.<sup>233</sup> To make matters worse, a recent study by Xu and Tian has looked at one particular and serious problem in courts executing civil judgments: the use of violence by parties resisting execution. Their research has documented how since 1983 there has been a general and steady increase in such violence, and thus we see that similar to regulatory enforcement agents being directly obstructed by threats and violence, courts also increasingly have to be careful when enforcing the law.<sup>234</sup>

#### *F. The Role of Civic Organizations in Litigation*

In all this, civic organizations can play a very important role in aiding citizens to initiate, organize, and successfully carry out regulatory legal action. In addition, nowadays there is even some room for civic organizations themselves to sue violating enterprises in court, using the mechanisms that have expanded legal standing provided in some courts, such as the environmental courts.<sup>235</sup>

In the successful class action suit of 1721 plaintiffs against a polluting enterprise in Fujian for instance, the Beijing-based Center for the Legal Assistance for Pollution Victims (CLAPV) played a major role. Not only did it provide free legal advice to the main plaintiffs and helped them organize themselves, but CLAPV was better able to convince the judges because they had been trained in CLAPV's environmental legal awareness and expertise judicial training program.<sup>236</sup>

CLAPV has played a much broader role in stimulating environmental litigation. Since 1999, it has operated a telephone hotline, whose volunteers provide advice to Chinese pollution victims, and has handled over 10,000 phone calls in 10 years. Moreover, it helps pollution victims find lawyers, recently even opening its own law firm solely to serve this purpose. At the same time, CLAPV is engaged in training and advocacy activities seeking to influence both judicial officials as well as the legal rules they are supposed to apply in court. CLAPV's founder Wang Canfa has for years lobbied to reverse the burden of proof for causation in environmental cases, succeeding first in 2004 with the Solid Waste Pollution Law and later in 2008 with the Water Pollution Prevention and Control Law, as well as in 2010 with the Tort Law.

China has many other similar legal aid organizations playing similar roles. Over the last few years, we have seen the rapid development of similar

organizations in labor law in for instance Shanghai,<sup>237</sup> Nanjing,<sup>238</sup> Shenzhen and Beijing.<sup>239</sup> Meanwhile, China has many other legal aid centers catering to both the general population as well as specific vulnerable groups, such as women, children and people with disabilities. Some are run as university legal aid clinics, while others are run independently, sometimes even by former migrant workers.<sup>240</sup>

These centers have become important intermediaries supporting citizens in litigation against enterprises which have violated labor law, and often in harboring public interest lawyers wishing to take on such cases. Gallagher shows that, apart from their direct effect in supporting litigation, these legal aid centers have become important meeting places where citizens share experiences, learn from one another and become ‘informed’, even when being ‘disenchanted’ with the outcomes of litigation.<sup>241</sup>

Even the All China Federation of Trade Unions (ACFTU)<sup>242</sup> and its local branches reportedly have had a positive role in aiding worker litigation. According to Chen, the official trade unions have “played an active role in providing legal aid to the workers and pursuing settlements in their favor”.<sup>243</sup> This study finds, in contrast to most other studies of official trade unions, which emphasized their lack of independence and worker representation,<sup>244</sup> that official unions use “private workers’ cases to advocate labor rights in workplaces and to call for more effective law enforcement”.<sup>245</sup>

There are, however, structural limitations to the roles that Chinese civic organizations can play in regulatory litigation, and recently their position has been restricted further. Existing and new rules on foundations, social organizations, and private non-enterprise units (PNEU) have placed direct limitations on how non-profit NGOs can organize and finance themselves, especially undermining their independence and reach.<sup>246</sup> Compliance with these rules has proved so difficult for some civic organizations that many have established themselves as quasi-enterprises, which has the distinct disadvantage that they have to pay taxes that officially registered civil organizations are exempt from. There are an estimated 100-200,000 such quasi-enterprise civic organizations in China. During a 2005 campaign organized in Beijing, 2047 of such fake enterprises were found.<sup>247</sup>

Many legal aid civic organizations have problems finding sustainable funding<sup>248</sup> since they have limited access to funds in China and have to resort to foreign assistance that can easily dry up and that has recently been further restricted by Chinese regulation. Despite its many successes, China’s main environmental legal aid center, for instance, still has problems in creating sufficient resources to move from a voluntary towards a more sustainable professional organization.<sup>249</sup>

And even though public interest standing has started to develop in the environmental courts, allowing a greater role for direct action by civic organizations, for example when they cannot find suitable citizens as main plaintiffs, in practice results have been meager. Gao, analyzing the first two years of the functioning of China's environmental courts, finds that there have been only four public interest cases, all involving either governmental or semi-governmental organizations as plaintiffs, and no real civic organizations.<sup>250</sup>

Increasingly, we also see that civic organizations offering legal advice and assistance for regulatory litigation have been directly controlled by governmental authorities. In 2009, Gongmen, a civic organization, acting on behalf of the families of children affected by the melamine-tainted milk, was fined and shut down for not having paid taxes for a donation it received from Yale.<sup>251</sup> In 2010, the Beijing University Women's Legal Aid Center had to close down after losing the sponsorship of the university, following more than a decade of successful legal aid to women.<sup>252</sup>

A document posted online by a Hong Kong labor organization offers us a rare glimpse into how the Chinese authorities are viewing legal aid organizations and legal aid workers. This internal report, made by the Guangdong provincial CCP Committee on Politics and Law, analyses the role of legal aid organizations providing legal assistance to local workers. Listing names of both organizations as well as individuals working there, the report's details reveal that these organizations use illegal means and measures to instigate litigation and unrest. The report concludes that these organizations have "antagonized contradictions and disputes", "pushed up the cost of dispute arbitrations and complicated their resolution", "undermined social harmony and stability", made "labor relations worse", "disturb(ed) public order management" and even 'endangered' "national security". The last concern is explained by pointing at the means by which "Western anti-Chinese forces, headed by the US, engineer their "peaceful transition" agenda in China to smear the name of our government via the use of overseas NGOs and via collecting labor news and information on judiciary cases".<sup>253</sup> If these published documents represent a wider view shared by authorities in China, it could well help explain recent restrictions for civic organizations involved in regulatory litigation.

### *G. Compensation, not Regulation*

The discussion so far has been about the available possibilities and obstacles faced by citizens resorting to court in their action against regulatory violations. However, I have not yet addressed the regulatory impact of such litigation. In

other words: to what extent is litigation a good way to influence the behavior of regulated companies and to end violations of the law? Unfortunately, we do not have sufficiently systematic and detailed data about court outcomes nor of what their effects have been on the enterprises involved. Case databases and media reports only show the final judgment at best, and sometimes a few journalists will report on execution of judgments. However, little research is performed on what happens after that. Does it change the behavior of the enterprises involved? And does its impact reach beyond these firms, to other businesses breaking regulatory law? How do managers perceive major cases reported in the news with citizens winning damages and sometimes even injunctions against companies similar to their own?

Lacking such data, it is impossible to make an empirically founded analysis of the regulatory impact of litigation. We can speculate though. First of all, we know that the chances of getting sued in court for regulatory violations are relatively low, especially in certain fields, such as environment and land where litigation rates are about 1% of the number of reported grievances. Moreover, the chances that citizens will actually be able to win and enforce a judgment with sufficient strength in terms of either the amount of compensation or the force of an injunction are still rather slim. So, purely from a rational-choice calculation model of the deterrent effect of regulatory litigation,<sup>254</sup> the effect of citizens suing violating enterprises on the overall implementation of regulatory law is likely to be low. Here China's near complete lack of a case law system<sup>255</sup> further complicates regulatory litigation, as it complicates using singular cases as break-through examples that have an impact on future litigation.

What we may have in the best of cases is compensation and not regulation, with citizens winning and getting compensation for damages, but failing to influence other companies and even the defendant in their own case to prevent and control harm caused by regulatory violations in the future. Strengthening the practice of compensation instead of regulation is a recent practice of governments and courts paying citizens instead of the regulated actors that are legally obliged to do so. Su and He, for instance, detail how local governments and judges have paid workers directly out of their own pocket in cases where the employers could not be located and still owed wage arrears.<sup>256</sup> Liebman shows how some courts have even established special funds to pay off litigants, fearing the consequences of disgruntled citizens making complaints about the court.<sup>257</sup> Obviously, while this practice may be favorable to citizens and for stability as Su and He argue, it also undermines the regulatory effect of litigation.<sup>258</sup>

## *H. How Judicial Accommodation Causes Escalation, not Stability*

Social stability-oriented incentive structures have made judges more concerned for maintaining stability than for adjudicating cases according to the law. As we have seen, judges are faced with such unrest and so much pressure to accommodate citizens' demands that they organize speedy procedures and, if push comes to shove, even pay citizens out of their own pockets.<sup>259</sup> Liebman describes these developments as follows, "At present the formal legal system appears less interested in outcomes that are fair or consistent than in outcomes that avoid instability. As one judge explained, law is less important than either economic development or social stability. Consistent application of legal rules is not viewed as a mechanism for ensuring social stability. Social stability is obtained by buying-off those who complain and by greater use of discretion, not by replacing discretion with law."<sup>260</sup>

The question is, however, whether the current approach will lead to the desired stability. First, as Su and He have also observed, by accommodating those who make complaints and trouble, the courts provide an incentive for more petitions and unrest.<sup>261</sup> An additional issue is that while accommodation through compensation might provide a stop-gap relief for the immediate victims of regulatory violations, accommodation in itself, but especially if paid for by the state and not the violating enterprise, does not provide much incentive to end the regulatory violations that have caused the grievances in the first place.

Thus, the Guangdong CCP Committee of Politics and Law may be right in fearing a loss of social stability and complaining that the local legal aid organizations have stimulated workers to extend leverage on dispute resolution institutions by lodging complaints and organizing collective action. However, their conclusion that the legal aid organizations are solely to blame is wrong: lawyers and legal aid workers have made strategic use of the incentive structures that the CCP itself introduced while hoping to maintain stability.

The existing incentive structures stimulate escalation, with litigants trying to exert pressure on the courts through political forms of action. This may ultimately politicize and sensitize cases that normally would not be seen as overly sensitive, as seems to have been happening with environmental, construction, land, food safety and labor cases. It may make courts more unwilling to accept such litigation<sup>262</sup> and make lawyers pursuing these cases increasingly suspicious, considering them objects to be managed and controlled. This may cause some lawyers to radicalize from general public

interest lawyers to more politically oriented cause lawyers asking for broader political change.<sup>263</sup> Meanwhile, other lawyers and litigants may retreat, giving up on fighting these cases in the courts, in the face of the risk of organizing sensitive activities in an authoritarian context with limited chances of success in terms of mitigating long-term risks.

## VI. Citizens as Collective Agents

If complaining or litigation is not possible or effective, citizens can also take collective action as an ultimate means to implement regulatory law. There are two such options we shall discuss now: exit and protests.<sup>264</sup>

### *A. Exit as a Form of Regulation*

'Exit' is the option of abandoning a regulated actor or product, and through such abandonment, decreasing the risk for oneself associated with such an actor or product, while also creating pressure to change the behavior causing such risk for others.<sup>265</sup> Exit is most potent in labor regulation in the most developed parts of China. A recent study of three manufacturing factories in Guangdong Province performed by one of my students has shown that factories now have an annual turnover of staff of 30-40%. Meanwhile, new employees can only perform 50-75% of their job during the first six months, and replacing 40% of workers, who mostly change jobs just before the Chinese New Year, takes another month. To reduce the immense costs resulting from such loss of skilled labor, companies have a strong incentive to keep their trained and skilled staff happy and prevent them quitting. And therefore these workers have increased leverage to bargain for better working conditions and compliance with regulatory standards.<sup>266</sup>

Exit or the threat of exit is not always an option, however. It requires knowing about the risks early enough to leave them or threaten to leave them if they are not controlled. Furthermore, it requires the possibility to actually exit. Here we see its limitations with environmental and land-related violations, in which citizens cannot easily decide to 'exit' or leave. Similarly, for most food violations consumers will only 'leave the product' when they are alerted of the risks, which may often require action by others first as many consumers are unable to tell which food is safe. And even in the field of labor, exit may only work in the most developed manufacturing industries, in the coastal areas where there are many alternative jobs close at hand.<sup>267</sup> One can

ask, for instance, why people keep on going into the mines in inland Shaanxi province, when those mines are so clearly dangerous.

### *B. Increased Collective Action*

It is not surprising that citizens have turned to the streets. Over the last decade, protests have become increasingly popular, rising up to 78,000 large-scale protests in 2005, the last year for which we have somewhat reliable data from the Chinese authorities, and up to a reported 180,000 in 2011 according to an estimate by a Beijing-based Chinese sociologist.<sup>268</sup> When the state fails to enforce the law, and complaints and litigation are troublesome, and exit is also not an option, protesting may be a last resort towards change. Protests help to gain leverage both in direct negotiations with the enterprise, but also in dealing with state regulators and courts.

Following Su and He, we see that the contemporary Chinese party-state has had a versatile attitude towards protesting. On the one hand, the party-state tries to align itself with disgruntled citizens in an effort to maintain legitimacy. Since 2003, protests are no longer labeled as ‘mobbing crowds’ (暴徒, *baotu*) or ‘illegal associations’ (非法集会, *feifa jihui*), but instead as ‘mass incidents’ (群体性事件, *quntixing shijian*),<sup>269</sup> providing a symbolic condoning of protesting as a normal and neutral phenomenon. On the other hand, the party-state fears protests and the social unrest they cause, and has therefore made tremendous efforts to nip them in the bud wherever they occur, as well as hold local governments accountable for causing or mishandling protests that spin out of control.<sup>270</sup>

### *C. Success of Collective Action*

Some protests have proved successful in bringing about the implementation of regulatory law. One good example is the case of the Honda strikes of 2010. In this case, local legal aid groups promoted legal awareness and helped organize a structure for debating labor rights. Failed negotiations with two employees sparked a broader strike in one plant that quickly spread to other plants after the media reported about it.<sup>271</sup> All of this led to an increase in wages and labor conditions in similar production facilities throughout China’s coastal production areas.<sup>272</sup>

In another example, citizens in Xiamen organized a demonstration that they called a ‘stroll’ (散步, *sanbu*). They did so in protest against an Environmental Impact Assessment (EIA) permit, which was granted to a new chemical factory thought to severely damage local health. They were supported by

academics, the media and also the local real estate sector, and succeeded in pressuring the authorities to reconsider the EIA decision and relocate the project away from Xiamen.<sup>273</sup>

Su and He's work also shows how Chinese workers have successfully organized collective action to get local governments, and the courts as mentioned above, to help accommodate their claims, most notably getting payment for wage arrears.<sup>274</sup>

#### *D. The Risks of Protesting*

Protesting is not without danger, however. There are numerous examples where local protesters have been arrested and prosecuted for disrupting the order. Cai's in-depth study of cases of collective resistance shows that in more than 60% of the cases studied, protesters suffered a form of repression.<sup>275</sup> His study describes the usage of exemplary punishment to deal with protest leaders, following central level policy to "isolate and punish the minority and to win over, divide and educate the majority".<sup>276</sup> A good example is how, following the successful case of the citizens organizing a stroll in Xiamen, the local government issued a notice seeking to detain those behind the organization of this protest stroll.<sup>277</sup>

Protests can also lead to violence. There have been incidents of the government using direct force against peaceful and non-threatening protesters, and in several cases opening fire against demonstrators. In one of the worst cases so far, a group of 10,000 people in Dongzhou village in Guangdong Province were reportedly protesting against the construction of a power plant on their land, being unsatisfied with the sub-standard compensation they would get for losing their land rights. When local authorities sent in 1,000 armed police officers, things got out of hand. Following an exchange of tear gas canisters and bricks and home-made explosives, the police opened fire, shooting to wound or kill. Their live ammunition allegedly wounded 8 – 50 villagers and killed between 3 and 20 people, according to different eyewitness accounts.<sup>278</sup> Cai, Su and He have rightly argued that instances of unilateral government-directed violence against protesters are exceptions and not in line with internal policies on how to respond to protesters.<sup>279</sup> Most violence comes either from hired thugs used by local governments or enterprises to break up protesters, or through escalation by citizens and local officials.<sup>280</sup> Ang writes about land-related protests, "The clashes have become increasingly violent, with injuries sustained on both sides and huge amounts of damage done to property as protesters vent their frustration in the face of indifferent or bullying

authorities.”<sup>281</sup> Also, discussing land protests, Catherine Baber, deputy Asia director at Amnesty International, states, “The increasing number of such disputes over land use across rural China and the use of force to resolve them suggest an urgent need for the Chinese authorities to focus on developing effective channels for dispute resolution.”<sup>282</sup>

Environmental disputes show a similar escalation of the usage of violence in protests. Some polluting enterprises, sometimes backed up by local police, have resorted to violence to disperse protesting or blockading citizens. In the worst cases, they even did so after the protest or blockade had ended, out of pure retaliation.<sup>283</sup> In one instance, villagers who had been protesting severe pollution caused by a local iron mine, which allegedly had led to 40 cancer deaths in one township in two years, blocked the road to the mine. The enterprise running the mine then organized a team of 100 people to go to the village. The villagers were severely beaten up and so frightened that they spent the night on their rooftops or in the nearby hills.<sup>284</sup>

### *E. Understanding the Effects of Protests*

Protests organized despite these risks do not always improve the implementation of regulation. In one community where I performed my fieldwork, there have been protests for thirty years. Each time a pollution accident has occurred, citizens have blocked the factory gates. And each time they have let their leaders negotiate a deal, which consisted of compensation of part of the damage. However, this has never resulted in full compensation, nor led to a structural solution to prevent and control such damage. And all of this has occurred while local villagers have become increasingly worried about their health and safety. So in this case, thirty years of protests have failed to regulate pollution. There are several reasons why this did not happen: A dependency of the local community on the polluting enterprise; cooptation of village leaders by the local enterprise; a lack of trust in state and media institutions; a shared pessimism amongst villagers about what they can accomplish; accepting small pay-offs that they know will not even cover their damages; and finally, the idea of prevention and regulation instead of compensation is simply beyond their current framework of reference.<sup>285</sup>

This example shows that even the ultimate remedy, protesting, can fail as a way for citizens to aid the implementation of regulatory law. Cai has made an in-depth analysis of the conditions under which protesting citizens are able to get their demands met. Analyzing a sample of cases of collective citizen action, Cai developed a rational choice-type model of protest success. His model shows that governments are more likely to give in to citizens’ demands if “the

costs of accommodating their demands are low and their resistance is powerful".<sup>286</sup> In addition, his data show that if their demands are high but resistance is weak, the government is mostly likely to respond with repression.<sup>287</sup> In Cai's analysis the costs of concession include financial and political costs, such as demands on local government resources, demands that negatively impact local revenue generation and local development, and demands that require the government to discipline local state agents. Cai defines the forcefulness of resistance in terms of the number of participants (more than 500), the number of casualties (more than zero) and media coverage.<sup>288</sup> Cai further shows that Chinese citizens have been most successful when organizing forceful protests that are either peaceful or disruptive, yet are unlikely to succeed if the collective action itself is violent.<sup>289</sup>

#### *F. Why Collective Action Is not a Sustainable Form of Regulation*

With the difficulties of legal action, and even the restrictions on implementation through information provision and complaints, protests may be the ultimate remedy for citizens to invoke their rights and get the government and even the courts to respond to demands that have long been ignored. Su and He, for instance, clearly show that protesting can help workers get local authorities and courts to arrange swift accommodation of worker demands.<sup>290</sup> This is all done in the name of maintaining stability, as local officials respond to incentive structures, geared to control unrest and keep things as local as possible.

However, the long-term and structural effects on stability remain questionable. Accommodating protesting citizens may be in their direct interest, but unless such accommodation entails not just compensation of financial demands but also a form of preventing and controlling the behavior that caused the grievances in the first place, it cures the symptoms instead of the actual disease. Moreover, accommodating protesters fuels escalation. Accommodation signals that protesting can work, spurring others to protest as well. In addition, based on Cai's research model, we know that the likelihood of successful protesting requires a forcefulness in scale, media attention and elicited casualties that is perceived as larger than the costs of the demands made.<sup>291</sup> And therefore, this instigates an incentive not only for more, but also for stronger and larger protests, at least by those willing or desperate enough to bear the risks.

## VII. Conclusion

Over the last decade or so, China has made a shift towards regulatory governance, creating legal and political space for societal forces to aid state institutions in regulating environmental, health, and financial risks. This shift has been direly needed as China's state regulatory institutions have at times been challenged to the core, lacking independence and capacity. The shift has produced some positive results with clear examples of citizens providing information or taking legal or political action to successfully implement regulatory law.

However, the shift towards regulatory governance and society-based implementation of regulatory law has been halfhearted. The Chinese party-state has provided space for greater participation and action with one hand, while restricting it with the other. And perhaps for that reason, there are still many examples and indications of citizens failing to successfully implement regulatory law. Of course, with the lack of data and the broad topic discussed here, it is difficult to ascertain precisely whether success or failure prevails, or even where and when there have generally been positive or negative results.

What we can say for sure is that regulation in China remains highly challenging. China's regulatory conditions with close state-enterprise relations and widespread disregard for the law have unfavorably interacted with perverse incentive structures geared towards maintaining stability. Civil servants, whether they are enforcement agents or judges, are told not to take risks, especially not those that might undermine economic growth or social stability. Companies know that by paying minor fines and compensation packages they can continue to gain extra profits or decrease losses by violating the law. And citizens learn that they may get some compensation with limited risks, but in order to truly end regulatory violations and fully mitigate their effects, they know that stronger action is necessary, as only this will stir the risk-averse state officials to support their cause, although on the other hand, it may also result in strong repression. All of this shows that regulation is more likely to be strongly implemented if there is some form of escalation, and thus China has at its worst an unhealthy system of *regulation by escalation*. Most cynically, this can mean that China's emphasis on maintaining stability has created and institutionalized a system that ultimately may be *destabilizing*.

This necessitates a fresh look at social stability and its relation to regulation in China. We should first of all recognize that many of the disputes that have been causing social unrest originate from regulatory violations. Second, we should acknowledge that there are structural reasons why regulatory violations occur – most importantly due to the close state-enterprise relations

and the disregard for law and legal rules. Third, citizens and civic-type organizations could theoretically aid the implementation of regulation, being more independent from enterprises than state regulators. However, for society to play a successful role in implementing regulation, certain conditions must be met. Society regulators need a better and more complete form of freedom of organization that empowers them and makes them less dependent on the state and on regulated enterprises. They need a fuller form of freedom of information, which includes freedom of speech and freedom of the press, and true open government information that allows citizens to gather and share information and make well-informed judgments on how to respond to regulatory violations. They also need a more impartial and capable judiciary that provides a better accessible and independent legal channel to take action against regulatory violations, making the law and not the street the preferred ultimate remedy against regulatory grievances. China has of course been taking steps in this direction. Concurrently, such reforms have remained highly sensitive as the party-state fears losing control over society and the legal system. And indeed, taking these steps more fully than is being done now requires courage to accept a decrease in control and an increase in short-term instability. However, it seems that only by allowing such space can society aid the implementation of regulation and help improve long-term social stability.

This lecture contributes to our theoretical understanding of contemporary shifts in global regulatory governance. Across the world, regulation has increasingly witnessed a trend not just of state institutions dictating what market actors must do, but also of decentered regulatory networks, with state, society and market forces interacting to regulate risk.<sup>292</sup> Concurrently, there is increased interest in how to regulate risks arising from emerging markets in Asia, Latin America, and Africa; countries which have so far received very little attention from regulatory scholarship.

The case of society-based implementation of regulation in China is an important example of both mentioned trends. It demonstrates that in order to understand non-state forms of regulation, and especially society-based regulation, the academic field of regulatory studies must expand. This field can no longer focus solely on insights from the economy, public administration, business administration and criminology on how state sanctions shape economic behavior. It must also engage with theories and insights from studies about dispute resolution, access to justice and contentious politics to understand the conditions for societal forces to start playing a regulatory role.

A second broader lesson is the need for a comparative approach both in regulatory studies as well as in the study of Chinese law and governance. Many of the issues discussed here are unlikely to be unique to China, and only a thorough systematic comparison with other OECD and non-OECD countries will help us understand where regulation in China is different and where it is not. Such comparative research is vital to develop a “reoriented” regulatory theory that no longer merely derives from four or five key OECD countries. Concurrently, a comparative analysis will help produce a much deeper understanding of how regulation functions in countries such as China, enabling a more fruitful search for how regulatory instruments and actors can be matched successfully to control human-induced risks.

### *The Netherlands China Law Centre*

In all of this I believe that academics in China but also abroad have a central role to play. Through my work at this great university, I hope to make a contribution. I realize that I do so humbly following a long Dutch China law tradition. This tradition originated in the China training of Dutch colonial civil servants in Leiden and Xiamen, whose curriculum included much emphasis on law. Later, this tradition was continued by Dutch scholars including Van der Valk, Meijer, Van Gulik and Hulsewé who were amongst the leading academics in the study of Chinese law outside of China until the 1980s.

The Netherlands China Law Centre, which the faculty has allowed me to establish, now takes this tradition to the study of contemporary regulatory challenges in China. It is developing an interdisciplinary and comparative approach to the study of law and regulation in China, focusing in particular on the perspective of state enforcement authorities, enterprise managers and personnel subjected to regulation, and also on the regulatory role of citizens, as discussed today. The centre seeks to both draw on and contribute to the rich interdisciplinary body of regulatory literature, which so far has had limited interaction with data from countries such as China. I have been lucky and privileged to do so together with wonderful and talented PhD fellows, who will form the next generation of a Dutch school of China law scholarship.

### *A Word of Thanks*

Finally, I have come to my word of thanks, as I stand here only through the support of many others to whom I am extremely grateful. I will not mention many names, as I do not have the time and space to do so today, and I hope you

will understand. I want to thank the College van Bestuur for establishing the chair in Chinese Law and Regulation and consistently supporting the faculty in furthering this new field of research as well as collaboration with China in the broader sense. Also, I want to thank the faculty board members, faculty staff, and in particular the Dean for initiating the development of this field in Amsterdam, and his unwavering support of my endeavors therein. In addition, I want to thank my former colleagues and in particular Professor Jan Michiel Otto, my promotor, for providing me with a stimulating research environment for socio-legal studies, law and development, for a decade. Moreover, I want to thank my fellow China law and regulatory enforcement and compliance colleagues throughout the world. And of course, I want to thank all of the NCLC fellows and staff for being such great colleagues and working hard together to make this into a successful research endeavor. On a more personal note... I want to thank all of my friends and family. And last but not least, Lieve papa en mama, zonder jullie enthousiasme en inspiratie had ik hier natuurlijk nooit gestaan... en Janine, Max en Mare: op naar ons volgende avontuur?

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## Notes

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81. Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*; Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations."
82. He and Tang, "'Chuizhiguanli" Fengqi Yangdi Boyi: Quanli Bianjie Shangdai Qingxi ("Vertical Management Reform" Starts a Game of Chess between the Center and the Local: Boundaries of Authority Remain to Be Clarified)."
83. Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."
84. He and Tang, "'Chuizhiguanli" Fengqi Yangdi Boyi: Quanli Bianjie Shangdai Qingxi ("Vertical Management Reform" Starts a Game of Chess between the Center and the Local: Boundaries of Authority Remain to Be Clarified)."
85. Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations." 804, 807; Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."
86. Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations." 806; Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."; Dimitrov, *Piracy and the State, the Politics of Intellectual Property Rights in China*. 49-50.
87. Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations."
88. *Ibid.*, 807; Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*.
89. Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*.
90. Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations." In other cases, Chen actually observes salaries of centralized personnel may be much higher and this may create unfairness in the bureaucracy. Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."
91. Mertha, "China's "Soft" Centralization: Shifting *Tiao/Kuai* Authority Relations"; Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."
92. Chen, "Lengguan Zhengfu Chuizhiguanli: Ying Heli Huaafen Zhongyang Difangjian Zhize Quaxian (A Cold Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences between the Center and the Local)."
93. Cf. Gjal Hupples and Robert A. Kagan, "Market-Oriented Regulation of Environmental Problems in the Netherlands," *Law Policy* 11 (1989).

94. Clifford Russell and William Vaughan, "The Choice of Pollution Control Policy Instruments in Developing Countries: Arguments, Evidence and Suggestions," in *International Yearbook of Environmental and Resource Economics*, Vol. VII, ed. Henk Folmer and Tom Tietenberg (Cheltenham, UK: Edward Elgar, 2003).
95. T. Saich, *Governance and Politics of China* (New York: Palgrave, 2001). Kellee S. Tsai, *Capitalism without Democracy: The Private Sector in Contemporary China* (Ithaca, New York: Cornell University Press, 2007); Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State*.
96. Mertha, "China's "Soft" Centralization: Shifting Tiao/Kuai Authority Relations ". K. Lieberthal, "Introduction: The "Fragmented Authoritarianism" Model and Its Limitations," in *Bureaucracy, Politics, and Decision Making in Post-Mao China*, ed. K.G. Lieberthal and D.M. Lampton (Berkeley: University of California Press, 1992).
97. Mayfair Yang, "The Resilience of *Guanxi* and Its New Development: A Critique of Some New *Guanxi* Scholarship," *China Quarterly* 170, no. June (2002). Yanjie Bian, "*Guanxi* and the Allocation of Urban Jobs in China," *China Quarterly* 140, no. December (1994); P.B. Potter, "Guanxi and the PRC Legal System: From Contradiction to Complementarity," in *Developing Civil Society in China: From Rule by Law toward Rule of Law*, ed. P.B. Potter and M.W. Dowdle (Washington, D.C.: The Woodrow Wilson International Center for Scholars, 2000). Ling Li, "Legality, Discretion and Informal Practices in China's Courts: A Socio-Legal Investigation of Private Transactions in the Course of Litigation" (Leiden University, 2010). —, "Corruption in China's Courts," in *Judicial Independence in China*, ed. Randall Peerenboom (Cambridge University Press, 2010); —, "Performing Bribery in China: *Guanxi*-Practice, Corruption with a Human Face," *Journal of Contemporary China* 20, no. 68 (2011).
98. Comparing China's environmental regulation for instance with Indonesia's, one cannot but admit that China at least is making some effort and having some success with administrative sanctions against polluting industry, whereas Indonesia's regulators have hardly been able to take any stern action at all. Cf. J. McCarthy and Z. Zen, "Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro Industrial Pollution in Indonesia," *Law Policy* 32, no. 1 (2010).
99. There are mixed findings from the general criminological literature on the general deterrent effect of sanctions. While originally finding little deterrent effect of sanctions in studies until the 1960s, later studies have found that some kinds of sanctions for some kinds of crimes and some kinds of criminals can in fact have a deterrent effect. A common empirical finding in the criminological deterrence literature is that the perception of probability is more important than perceived sanction height. However, persons that have been punished, the same body of work finds, are more likely to offend again. For an overview, see Bruce A. Jacobs, "Deterrence and Deterrability," *Criminology* 48, no. 2 (2010). See also, H.G. Grasmick and G.J. Bryjak, "The Deterrent Effect of Perceived Severity of Punishment," *Social Forces* 59 (1980); H.G. Grasmick and R.J. Jr. Bursik, "Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model," *Law Society Review* 24, no. 3 (1990). In the regulatory literature, we see

similar mixed findings as in the studies on crime. We see, for instance, that the sanction probability is more important than the sanction severity. Also, we see that there are certain kinds of regulatory norms that are complied with even when there are low perceptions of deterrence. In addition, scholars have questioned the reasonableness and feasibility of a deterrence approach to law enforcement and thus compliance. See R.J. Burby and R.G. Paterson, "Improving Compliance with State Environmental Regulations," *Journal of Policy Analysis and Management* 12, no. 4 (1993); W. Gray and John T. Scholz, "Analyzing the Equity and Efficiency of Osha Enforcement," *Law Policy* 13 (1991); M. Vandenberg, "Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance," *Stanford Environmental Law Journal* 22 (2003); Thornton, Gunningham, and Kagan, "General Deterrence and Corporate Environmental Behavior.,"; D. Spence, "The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law," *California Law Review* 89 (2001); Richard Lempert, "Organizing for Deterrence: Lessons from a Study of Child Support," *Law Society Review* 16, no. 4 (1981/1982); Daniel Nagin, "General Deterrence: A Review of the Empirical Evidence," in *Deterrence and Incapacitation: Estimating the Effect of Criminal Sanctions on Crime Rates*, ed. A. Blumstein, J. Cohen, and D. Nagin (Washington D.C.: National Academy of Sciences, 1978); Bardach and Kagan, *Going by the Book, the Problem of Regulatory Unreasonableness*; K. Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution* (Oxford: Clarendon Press, 1984); Marius Aalders, "Moving Beyond Command and Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment," *Law Policy* 19 (1997); John Braithwaite and Toni Makkai, "Testing an Expected Utility Model of Corporate Deterrence," *Law Society Review* 25, no. 1 (1991); Kirk R. Williams and Richard Hawkins, "Perceptual Research on General Deterrence: A Critical View," *Law Society Review* 20, no. 4 (1986).

100. On the other hand, cooperation-type enforcement has also been criticized. Critics have worried about how close ties between the regulator and the regulated can lead to lax compliance. See generally Neil Gunningham, "Negotiated Non-Compliance: A Case Study of Regulatory Failure," *Law Policy* 9 (1987); Bardach and Kagan, *Going by the Book, the Problem of Regulatory Unreasonableness*; May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 646. Already in the 1950s, Bernstein's book on independent commissions raised this issue when discussing how agencies can become captured by their regulated actor. See M.H. Bernstein, *Regulating Business by Independent Commission* (Westport (Connecticut): Greenwood Press, 1955 (reprinted in 1977)). A recent study on agro-environmental law enforcement in Denmark by May and Winter, for example, revealed that cooperative enforcement was undermined by capture-like effects. May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 646. Of course, we can add, especially for countries high on Transparency International's Corruption Perception Index (CPI), that a high degree of discretion, as exists in compliance-style enforcement, coupled with a monopoly on sanctions and issuing permits for sanctioned acts can also have corruptive

- effects. Klitgaard has summarized this point in a formula: Corruption = Monopoly + Discretion – Accountability, see R. Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 1988). 75. See also, Anthony Ogus, “Corruption and Regulatory Structures,” *Law Policy* 26, no. 3 (2004). 341-2.
101. There has been much writing proposing to deal with the defects of both the deterrent and cooperative strategy through a pragmatic and responsive form of implementation, in which the regulator adapts its response to the behavior and attitude of the regulated actor. See R. Baldwin and J. Black, “Really Responsive Regulation,” *The Modern Law Review* 71, no. 1 (2008); I. Ayres and J. Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002); J. Braithwaite, “Responsive Regulation and Developing Economies,” *World Development* 34, no. 5 (2006); V. Braithwaite, “Responsive Regulation and Taxation: Introduction,” *Law and Policy* 29, no. 1 (2007); L.P. Feld and B.S. Frey, “Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation,” *Law and Policy* 29, no. 1 (2007); Laura I. Langbein, “Responsive Bureaus, Equity and Regulatory Negotiation: An Empirical View,” *Journal of Policy Analysis and Management* 21, no. 3 (2002); S. Leviner, “An Overview: A New Era of Tax Enforcement—from “Big Stick” to Responsive Regulation,” *Regulation Governance* 2, no. 3 (2008). Recently, scholars have also been discussing the limits to this approach, as it is regarded as difficult if not impossible to implement and may even, when well implemented, not yield the expected effects of improving compliance. See P. Mascini and E.V. Wijk, “Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory,” *Regulation Governance* 3, no. 1 (2009); V. L. Nielsen and C. Parker, “Testing Responsive Regulation in Regulatory Enforcement,” *Regulation Governance* 3, no. 4 (2009). Parker has meanwhile argued that while a mixed strategy of responsive regulation, using both formal sanctions as well as shaming techniques, might be effective to create stronger deterrence, it may at the same time provide the wrong moral message in cases where there is little support for the law that is being enforced, leading to reactance, resistance and political action to change the law. See C. Parker, “The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement,” *Law Society Review* 40, no. 3 (2006).
  102. Bardach and Kagan, *Going by the Book, the Problem of Regulatory Unreasonableness*; Albert Weale, *The New Politics of Pollution* (Manchester: Manchester University Press, 1992); Neil Gunningham and Darren Sinclair, *Leaders and Laggards, Next-Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002); Ayres and Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate*; Cary Coglianese and Jennifer Nash, eds., *Regulating from the inside, Can Environmental Management Systems Achieve Policy Goals?* (Washington, DC: Resources for the Future, 2001); Benjamin Hunt, *The Timid Corporation, Why Business Is Terrified of Taking Risk* (West Sussex: Wiley, 2003).

103. Marius Aalders, "Self-Regulation and Compliance with Environmental Law from a Global Perspective," in *Towards Integrated Environmental Law in Indonesia*, ed. N. Niessen and A. Bedner (Leiden: CNWS, 2003); Richard N.L. Andrews, "Environmental Regulation and Business "Self-Regulation"," *Policy Sciences* 31 (1998); Andrew A. King and Michael J. Lenox, "Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program," *Academy of Management Journal* 43, no. 4 (2000); D. Sinclair, "Self-Regulation Versus Command and Control? Beyond False Dichotomies," *Law Policy* 19, no. 4 (1997); Anthony Ogus, "Rethinking Self-Regulation," *Oxford Journal of Legal Studies*, no. 15 (1995).
104. Gunningham and Sinclair, *Leaders and Laggards, Next-Generation Environmental Regulation*. 27.
105. R. Fairman and C. Yapp, "Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement," *Law Policy* 27, no. 4 (2005).
106. Neil Gunningham, Peter Grabosky, and Darren Sinclair, *Smart Regulation, Designing Environmental Policy* (Oxford: Oxford University Press, 1998). Daniel J. Fiorino, *The New Environmental Regulation* (Cambridge, Massachusetts: MIT Press, 2006); Coglianesi and Nash, eds., *Regulating from the inside, Can Environmental Management Systems Achieve Policy Goals?*
107. Bridget M. Hutter and Joan O'Mahony, "The Role of Civil Society Organizations in Regulating Business," *LSE, CARR Discussion Paper Series*, no. 26 (2004); Bridget M. Hutter, "The Role of Non-State Actors in Regulation," *LSE, CARR Discussion Paper Series*, no. 37 (2006); Bridget M. Hutter and Clive J. Jones, "From Government to Governance: External Influences on Business Risk Management," *Regulation Governance* 1, no. 1 (2007); Christopher Hood, H. Rothman, and Robert Baldwin, *The Government of Risk* (Oxford: Oxford University Press, 2001).
108. Julia Black, "Critical Reflections on Regulation," *LSE, CARR Discussion Paper Series* (2002).
109. John Braithwaite, Cary Coglianesi, and David Levi-Faur, "Can Regulation and Governance Make a Difference?," *Regulation Governance* 1, no. 1 (2007).
110. Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*.
111. Of course, self-regulatory, voluntary and market-based instruments are also relevant for China. In the field of environmental regulation China has since 1979 used pollution discharge fees, and more recently it has started the usage of tradable emission permits that are deemed more efficient and effective forms of regulation. China has also experimented with self-regulatory environmental management systems, clean production audits and Corporate Social Responsibility systems for labor and social rights protection, and recently the Chinese Ministry of Commerce has promoted that Chinese enterprises adopt internal compliance management systems. These systems are beyond the scope of this paper, and I have addressed them in a comparative perspective in a different paper. See Van Rooij, "Greening Industry without Enforcement? An Assessment of the World Bank's Pollution Regulation Model for Developing Countries." For more on this topic, see also World Bank, *Greening Industry, New Roles for Communities, Markets and*

- Governments*; Hua Wang, "Pollution Charge, Community Pressure and Abatement Cost: An Analysis of Chinese Industries," *World Bank Policy Research Working Paper*, no. 2337 (2000); Hua Wang and David Wheeler, "Pricing Industrial Pollution in China: An Econometric Analysis of the Levy System," *World Bank Policy Research Working Paper*, no. 1644 (1996); —, "Endogenous Enforcement and Effectiveness of China's Pollution Levy System," *World Bank Policy Research Working Paper* May(2000); Hua Wang et al., "Environmental Performance Rating and Disclosure: China's Greenwatch Program," *World Bank Policy Research Working Paper*, No. 2889 (2002).
112. Robert A. Kagan, Neil Gunningham, and Dorothy Thornton, "Explaining Corporate Environmental Performance: How Does Regulation Matter?," *Law Society Review* 37, no. 1 (2003).
  113. Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Shades of Green, Business Regulation and Environment* (Stanford: Stanford University Press, 2003). N. Gunningham, R.A. Kagan, and D. Thorton, "Social License and Environmental Protection: Why Businesses Go Beyond Compliance," *Law Social Inquiry* 29, no. 2 (2006).
  114. Mainul Huq and David Wheeler, "Pollution Reduction without Formal Regulation: Evidence from Bangladesh," *World Bank Policy Research Working Paper* 1993-39 (1993); Shakeb Afsah, Allen Blackman, and Damayanti Ratunanda, "How Do Public Disclosure Pollution Control Programs Work? Evidence from Indonesia," *Resources for the Future Discussion Paper* 00-44 (2000); Shakeb Afsah, Benoit Laplante, and David Wheeler, "Controlling Industrial Pollution: A New Paradigm," *World Bank Policy Research Working Paper*, no. 1672 (1996); —, "Regulation in the Information Age: Indonesian Public Information Program for Environmental Management," <http://web.worldbank.org/servlets/ECR?contentMDK=20798617sitePK=1909405>; Allen Blackman and Geoffrey J. Bannister, "Pollution Control in the Informal Sector: The Ciudad Juarez Brickmakers' Project," *Resources for the Future Discussion Paper* 98-15 (1998); Dara O'Rourke, *Community-Driven Regulation, Balancing Development and the Environment in Vietnam* (Cambridge, Massachusetts: MIT Press, 2004).
  115. Braithwaite, "Responsive Regulation and Developing Economies." 884.
  116. O'Rourke, *Community-Driven Regulation, Balancing Development and the Environment in Vietnam*; Van Rooij, "Greening Industry without Enforcement? An Assessment of the World Bank's Pollution Regulation Model for Developing Countries."
  117. Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*.
  118. Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases.*; Blackman and Bannister, "Pollution Control in the Informal Sector: The Ciudad Juarez Brickmakers' Project."
  119. Of course, citizens can also play a role in making regulatory norms. There is a clear indication that they have started to do so with, for instance, university professors acting as NGO leaders and legislative consultants, or lawmakers now having to stimulate public consultations upon publishing legislative drafts. As this paper

- focuses on implementation and not on lawmaking, this shall not be discussed further here.
120. See for instance, Peter Ho and Richard L. Edmonds, eds., *China's Embedded Activism: Opportunities and Constraints of a Social Movement* (London and New York: Routledge, 2008).
  121. For a recent good overview of this development, see Susan Shirk, "Changing Media, Changing China," in *Changing Media, Changing China*, ed. Susan Shirk (Oxford: Oxford, 2011). Benjamin L. Liebman, "Changing Media, Changing Courts," in *Changing Media, Changing China*, ed. Susan Shirk (Oxford: Oxford, 2011). Judy Polumbaum and Xiong Lei, *China Ink, the Changing Face If Chinese Journalism* (Lanham: Rowman and Littlefield, 2008).
  122. Guobin Yang, *The Power of the Internet in China* (New York: Columbia University Press, 2009); Qiang Xiao, "The Rise of Online Public Opinion and Its Political Impact," in *Changing Media, Changing China*, ed. Susan Shirk (Oxford: Oxford, 2011); Johan Lagerkvist, "Legal Legitimacy in China: The Case Of "Black Internet Cafés"," *Paper Presented at the Lund Conference on Making Law Work, Beijing 2-3 December* (2006); Han Li, Jie Zhang, and Rathindra Sarathy, "Understanding Compliance with Internet Use Policy from the Perspective of Rational Choice Theory," *Decision Support Systems* 48 (2010); Lokman Tsui, "The Panopticon as the Antithesis of a Space of Freedom, Control and Regulation of the Internet in China," *China Information* 17, no. 2 (2003).
  123. Xiaobing Deng and Yuanyuan Feng, "Xibu Xingzheng Zhifa Huanjing Yu Yulun Jiandu Hudong Huanxi Yanjiu (Research on the Interaction between Administrative Enforcement and Supervision by Public Opinion)," *Xingzheng Faxue Yanjiu* 2009, no. 1 (2009). 70.
  124. Edward S. Steinfeld, *Playing Our Game, Why China's Rise Doesn't Threaten the West* (Oxford: Oxford University Press, 2010). 6-7.
  125. Cf. Lawrence Lessig, *Code, Version 2.0* (New York: Basic Books, 2006). 38.
  126. For details, see Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*.
  127. Ethan Michelson, "Justice from above or Below? Popular Strategies for Resolving Grievances in Rural China," *China Quarterly* 193, no. March (2008). 49. It is difficult to compare national numbers since 2005, since the counting mechanism has changed and no longer counts multiple complaints for the same grievance to different organs. See Benjamin Liebman, "A Populist Threat to China's Courts?," in *Chinese Justice: Civil Dispute Resolution in Post-Reform China*, ed. Mary Gallagher and Margaret Woo (Cambridge: Cambridge University Press, 2011).
  128. SEPA, *Zhongguo Huanjing Tongji Nianbao 1999 (China Environmental Statistical Report 1999)* (Beijing: SEPA, 2000); —, *Zhongguo Huanjing Tongji Nianbao 2000 (China Environment Statistical Report 2000)* (Beijing: SEPA, 2001); —, *Zhongguo Huanjing Tongji Nianbao 2001 (China Environment Statistical Report 2001)* (Beijing: SEPA, 2002); —, *Zhongguo Huanjing Tongji Nianbao 2002 (China Environment Statistical Report 2002)* (Beijing: SEPA, 2003); —, *Zhongguo Huanjing Tongji Nianbao 2003 (China Environment Statistical Report 2003)* (Beijing: SEPA, 2004); —, *Zhongguo Huanjing Tongji Nianbao 2004 (China Environment Statistical Report 2004)* (Beijing: Zhongguo Huanjing Kexue

- Chubanshe, 2005); —, *Zhongguo Huanjing Tongji Nianbao 2005* (China Environment Statistical Report 2005) (Beijing: Zhongguo Huanjing Kexue Chubanshe, 2006); —, *Zhongguo Huanjing Tongji Nianbao 2006* (China Environment Statistical Report 2006). P.R.C. Ministry of Environmental Protection, *Zhongguo Huanjing Tongji Nianbao 2008* (China Environmental Science Press, 2009); —, *Zhongguo Huanjing Tongji Nianbao 2009* (2010).
129. Ministry of Human Resources, *Zhongguo Laodong Tongji Nianjian 2009* (China Labour Statistical Yearbook 2009) (China Statistics Press, 2010). 474.
  130. Informal media are also increasingly important. At times, citizens have shared information online concerning cases of corruption or injustice, sometimes organizing themselves as so-called ‘human flesh search engines’ (人肉搜索, *renrou sousuo*) through which they publish information online about officials or businessmen of whom citizens claim to have perceived unjust or corrupt behavior. There are clear examples of how such online action has helped to regulate corruption. See CCTV, “Wangluo ‘Renrou Sousuo’ Fawei Chou Tianjiayan Juzhang Xiaman,” (2008), [http://news.xinhuanet.com/video/2008-12/30/content\\_10581169.htm](http://news.xinhuanet.com/video/2008-12/30/content_10581169.htm), Hui Che, “Nanjing ‘Tianjiayan’ Shijian: Renrou Sousuo Kaoyan Xiangguan Bumen Lixing,” (2008), <http://house.people.com.cn/GB/98374/101031/8571870.html>.
  131. Newssc.org, “Sichuang Yansu Chachu ‘Tianpopo Xijiutang’ Daliang Guke Shangmen Tuikuan”(Sichuang Province Strictly Dealt with the Tian Grandma Bubble Shop, Many Customers Required Refund),” (2011).
  132. Friends of Nature, Institute of Public and Environmental Affairs, and Da’erwen Association, “Pingguo De Lingyimian (the Other Face of Apple),” (2011), [http://www.ipe.org.cn/Upload/file/%E8%8B%B9%E6%9E%9C%E7%9A%84%E5%8F%A6%E4%B8%80%E9%9D%A2\\_Final-20110119-2.pdf](http://www.ipe.org.cn/Upload/file/%E8%8B%B9%E6%9E%9C%E7%9A%84%E5%8F%A6%E4%B8%80%E9%9D%A2_Final-20110119-2.pdf); Sohu News, “It Hangye Zhongjinshu Wuran Diaoyan Baogao Tekan Pingguo De Lingyimian (a Special Look at the Other Face of Apple, a Research Report on Heavy Metal Pollution in the It Industry),” (2011), <http://green.sohu.com/20110119/n278967734.shtml>.
  133. Reuters, “Chinese Workers Urge Apple to Act on N-Hexane Poisoning,” (2011).
  134. David Barboza, “Workers Sickened at Apple Supplier in China,” *New York Times* (22 February 2011), <http://www.nytimes.com/2011/02/23/technology/23apple.html>; Tim Gray, “Sickened Ipad Factory Workers Ask Apple for Help,” *iPadNews Daily*, <http://www.ipadnewsdaily.com/sickened-ipad-factory-workers-ask-apple-for-help-1234/>; Oscar Garschagen, “Ziek Van Apples Nieuwe iPhones En Ipads,” *NRC Handelsblad*, no. 29 (8 March 2011), <http://archieff.nrc.nl/index.php/2011/Maart/8/Economie/29/Ziek+van+Apples+nieuwe+iphones+en+ipads/check=Y>.
  135. Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*.
  136. —, “Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns.”
  137. *Ibid.* —, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases*.
  138. The most important mechanism by which the party-state supports and institutionalizes citizens to share their information about regulatory transgression is the letters and visits petitioning system (信访 *xinfang*) through which Chinese

- citizens can lodge complaints. The contemporary petitioning complaints system that China has developed since the 1950s has served as a way for the Chinese statist party-state to get better information about subordinate levels of administration, who have often willingly tried to fool higher levels. See Carl F. Minzner, “Xinfang: An Alternative to Formal Chinese Legal Institutions,” *Stanford Journal of International Law* 42 (2005).
139. 2005 State Council Regulation on Letters and Visits, Art. 8.
  140. Minzner, “Xinfang: An Alternative to Formal Chinese Legal Institutions.”
  141. 1982 Constitution of the People’s Republic of China, Art. 1.
  142. Deng and Feng, “Xibu Xingzheng Zhifa Huanjing Yu Yulun Jiandu Hudong Huanxi Yanjiu (Research on the Interaction between Administrative Enforcement and Supervision by Public Opinion).” 70.
  143. *Ibid.*, 70.
  144. Implementation of these regulations has had mixed results, as will be discussed in more detail below. See Jamie P. Horsley, “Update on China’s Open Government Information Regulations: Surprising Public Demand Yielding Some Positive Results,” (2010). and see also Article 19 and CLAPV, “Access to Environmental Information in China: Evaluation of Local Compliance,” (2010).
  145. NPC Legal Committee, “Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenyi Jiegou De Bao Gao (Report on the Results of Review of the Draft Prc Eia Law),” in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2003); NPC SC, “Shenyi Huanjing Yingxiang Pingjia Fa Caoan Shenyi De Yijiang (Opinions on the Draft PRC EIA Law),” in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. NPC SC Legal Affairs Committee (Beijing: Falü Chubanshe, 2003).
  146. Examples of such other laws include:
    1. 2010 Law on Administrative Supervision, Art. 6, first sentence: “Supervision shall rely on citizens. Supervision department shall establish reporting system: citizens, legal persons and other organizations have right to sue or report officials’ discipline transgressions to supervision department. Supervision department shall accept the reporting and investigate [...].”
    2. 2010 Water and Soil Conservation Law, Art. 8: “any units and individuals [...] have right to report behaviors which cause water and soil resources destroyed or soil erosion.”
    3. 2011 Administrative Regulation on Dangerous Chemicals Safety, Art. 9: “any units and individuals have right to report transgressions to supervision department of dangerous chemicals safety. Such department shall deal with the reporting in time after receiving a report. For a report on which the receiving department does not have jurisdiction, it shall be transferred to related department in time.”
    4. 2011 Regulation on the Expropriation of Building on State-owned Land and Compensation, Art. 7: “Any units and individuals have right to report transgressions to related people’s government, housing expropriation department and other related departments. The receiving department shall check and deal with the report in time.”

147. Mimi Lau, "Guangdong Rule Urges Residents to Flush out Foreigners Who Overstay," (2011), <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0ao/?vgnnextoid=eb875782217of21oVgnVCM100000360a0a0aRCRDss=Chinas=News>.
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261. Su and He, "Street as Courtroom: State Accommodation of Labor Protests in South China." 181.
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