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Explaining Comparative Administrative Law: The Standing of Positive Political Theory

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EXPLAINING COMPARATIVE ADMINISTRATIVE LAW: THE STANDING OF POSITIVE POLITICAL THEORY

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Abstract: The principal-agent model of administrative law sees bureaucrats as imperfectly supervised agents of their political principals and courts as a tool used by the latter to monitor and check the former. This paper compares how the class of plaintiffs authorized to bring suit against governmental bodies has been defined in three countries where one should expect to find significant barriers to administrative litigation—Japan, Singapore, and the People's Republic of China. Although these three Asian countries have traditionally been one-party dominated states, we do observe substantial differences in how legislatures and courts have addressed the issue of standing over time. It is possible to explain these variations by examining three factors. First, the local governments are, in some countries, sub-entities or agents of the national government. Thus, administrative law might be used to regulate the acts of local governments in addition to agencies, leading to broader notions of standing. Second, the level of political competition could influence the doctrine of standing by incentivizing political incumbents to secure alternative avenues for challenging the policies of their successors. Third, the legal process is not the only mechanism available for monitoring the behavior of agents. For example, the Administrative Management Agency, *xinfang* system, and "Meet the People Sessions" offer channels for non-judicial resolution of administrative disputes in Japan, China, and Singapore respectively. Yet courts and other monitoring mechanisms are not perfect substitutes; the different quality and quantity of the information collected, the creation of legal rules binding future decisions, and transaction costs of overriding judicial outcomes distinguish between them. This last factor is, in general, not easily resolved in one direction or another. The larger conclusion drawn is that Positive Political Theory, while insightful, may not always give an elegant structure to comparative studies in administrative law.

I. INTRODUCTION

Does Positive Political Theory (PPT) explain doctrinal developments in administrative law? This perspective on administrative law, also referred to as "rational choice"[1] or "political economy,"[2] challenges the conventional emphasis in legal scholarship on the values of procedural and administrative

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[1] *See, e.g.*, Linda Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996).

[2] *See, e.g.*, Nuno Garoupa, & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMP. L. 1 (2014) [hereinafter Garoupa & Mathews].

fairness.[3] It does so by characterizing legislative and judicial outcomes as the product of choices by individual or group actors seeking to maximize their interests in a strategic environment. In recent years, however, the PPT account of administrative law in the United States has been called into question by its performance in comparative contexts. After a review of the relevant law in the United States, United Kingdom, France, and Germany, some scholars, such as M. Elizabeth Magill and Daniel Ortiz, have concluded that "something other than constitutional design best explains the existence and shape of judicial review of administrative action"—judicial culture.[4] In contrast, other scholars, such as Nuno Garoupa and Jud Mathews, have presented a model that takes into account the relative control that politicians have over government bureaucracy and courts.[5] By factoring in judicial autonomy, their model "explain[s] differences within legal families in a way that previous political economy models could not."[6] In particular, they argue that differences between American, British, French, and German administrative law conform to PPT predictions.

But administrative law is not applied exclusively to agencies. It may sometimes be used to contest the decisions of local governments. In addition, courts are not the only means for legislatures to ensure that their instructions are being faithfully executed. For example, legislatures have instituted ombudsman offices as another tool used to monitor compliance and rein in agency discretion.[7] These institutional details influence the development of administrative law and should be included in a PPT framework. To illustrate this, this paper will explore the elements required for plaintiffs to have standing to initiate judicial review of administrative action in three jurisdictions: Japan, Singapore, and the People's Republic of China (China).

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[3] *See, e.g.,* M. Elizabeth Magill & Daniel R. Ortiz, *Comparative Positive Political Theory, in* COMPARATIVE ADMINISTRATIVE LAW 134, 134 (Susan Rose-Akerman & Peter L. Lindseth eds., 2011) (stating that "[l]ittle in the last thirty years has so changed thinking about American administrative law as Positive Political Theory (PPT)") [hereinafter Magill & Ortiz].

[4] *Id*. at 145.

[5] *See generally* Garoupa & Mathews, *supra* note 2.

[6] *Id*. at 31.

[7] The ombudsman is a governmental office that investigates public complaints of administrative abuse or inefficiency. It does not exercise a judicial function and instead resolves disputes through recommendations and/or mediation. In the United Kingdom, for example, both the findings and the recommendations of Ombudsmen are non-binding on the government. *See generally* Bradley v. Work and Pensions Secretary [2008] EWCA (Civ) 36 (Eng.). But the Ombudsman may bring to the attention of Parliament instances of maladministration or injustice in the form of special reports. *See* Parliamentary Commissioner Act 1967 (Eng.).

There are several considerations informing the selection of our case studies. First, while Magill and Ortiz limit their attention to judicial review for administrative reasonableness, this article focuses on standing. This is because narrow standing restricts the use of courts as an avenue for politically marginalized interests that seek to challenge official policy. The legal obstacle posed by standing also chills the interpretative development of the law by judicial actors. If the judge who decides a case thereby participates in the "authoritative reconstruction of the law-maker's law,"[8] preventing administrative disputes from being heard reduces the extent to which the judiciary shares in the legislature's power.[9]

Second, these three countries are, or were for a major part of their recent history, stable, party-dominated states.[10] It is therefore unlikely that electoral competition explains disparities between Chinese and Singaporean administrative law. On the other hand, the relatively recent emergence of political turnover in Japan provides a source of variation that is both relevant and interesting for PPT analysis.

Third, citizens in these three countries share similar cultural attitudes towards litigation. There is a substantial body of scholarship that suggests that the Japanese cherish harmony and prefer informal mechanisms of dispute resolution over formal, adversarial procedures.[11] Under the influence of Confucianism, the Chinese have traditionally preferred to settle disputes in private rather than in a courtroom.[12] In Singapore, the

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[8] MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION 69 (2002). This would seem to be true only of common law countries, but judicial lawmaking has been taking place in civil law countries as well. *See, e.g.*, Edward A. Tomlinson, *Tort Liability in France For the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988).

[9] This is not to say that courts may not find a way around the obstacle. *See* Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 262, 272 (Diana Kapiszewski, Gordon Silverstein, & Robert A. Kagan eds., 2013) ("The Court's decision in the *Judges' Case* was thus a classic *Marbury* move: the Court expanded its own jurisdiction by endorsing standing for [public interest litigation], but gave the government what *it* wanted by deferring to the supremacy of the Executive in transfers and appointments.") (emphasis added).

[10] The Liberal Democratic Party (LDP) has governed Japan from 1955 to the present, except for brief interruptions between 1993 and 1994 and between 2009 and 2012. The Chinese Communist Party (CCP) has ruled China since 1949. In Singapore, the People's Action Party (PAP) has been in power since independence from Malaysia in 1965.

[11] *See, e.g.*, Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 44 (Arthur von Mehren ed., 1963). Kawashima asserts that the social rules of respectful obedience or *kyōjun* and authority or *ken-i* undergird most relationships in Japan. Hence, resorting to law is incompatible with the implied hierarchy of Japanese society.

[12] *See* Lester Ross, *Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT'L L. 15, 16 (1989).

government has articulated an ideology that legal scholar Eugene Tan has summarized as "civility over contentiousness," and "responsibilities over rights."[13] Thus, our comparative analysis controls for legal consciousness as a significant explanatory factor.

In dominant-party states where control of the legislative chamber coincides with the exercise of executive power, one should find that the judiciary has a marginal role to play in policing the conduct of administrative agencies. Thus, one should also expect the class of persons permitted to sue for relief in administrative cases to be carefully circumscribed. Yet, the law of standing has diverged in these three jurisdictions. By attempting to explain these and other differences, this paper hopes to demonstrate both the extent and the limits of PPT as a model for understanding administrative law.

Section II offers a quick primer on the principal-agent model that is at the core of PPT. The goal is not to conduct an exhaustive survey but to introduce the type of reasoning that has been applied in recent work on comparative administrative law. Section III summarizes some of the jurisdictional elements for judicial review of administrative action in each of the three countries through a review of statutory and case law. Section IV compares the variation and evolution in standing doctrines and analyzes them through the PPT framework. Section V discusses the range of institutional designs that the legislature could use to monitor and discipline those to whom it has delegated policymaking functions.

II. THE PRINCIPAL-AGENT MODEL

The classic principal-agent paradigm posits bureaucrats as servants of the legislature tasked with implementing the legislative intent as expressed through statutes.[14] Its "central premise" is that "bureaucratic institutions and legislative-bureaucratic interaction . . . [should be interpreted] as promoting the interests of the principal to the greatest extent possible."[15] The

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[13] Eugene Tan KB, *Harmony as Ideology, Culture, and Control: Alternative Dispute Resolution in Singapore*, 9 AUSTL. J. ASIAN L. 120 (2007). The 1991 White Paper distinguished between "Asian societies" that "emphasize the interests of the community" and "Western societies" that "stress the rights of the individual." For Singapore, "an emphasis on the interests of the community" is a "key survival value" to be "preserve[d]" and "strengthen[ed]."

[14] *See, e.g.*, Sean Gailmard, *Accountability and Principal-Agent Theory*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 90, 95 (Mark Bovens, et al., eds., 2014) ("One of the earliest, and still most robust, principal-agent literatures in political science takes bureaucrats as agents of some constellations of political principals – most often Congress, the president or executive actors, and/or courts.").

[15] *Id.* at 96.

legislature might prescribe a mission for an agency without specifying in detail how it is to be accomplished or the rules that have to be followed in reaching a determination. In such situations, the legislature delegates broad authority to the agency. Alternatively, the legislature might seek to constrain agency discretion either by narrowly defining the scope of its mandate or by setting up procedural requirements such as notice-and-comment or cost-benefit analysis. The choice is influenced by, among other things, the level of trust in the bureaucratic agent, in particular whether the agent will faithfully apply his or her expertise to respond to unique circumstances rather than pursue his or her own political agenda and preferences.[16] It is also shaped by the possibility of monitoring the agent and correcting his or her excesses.

Not always having the resources to monitor the activities of the bureaucracy, legislatures often empower judicial actors to supervise agency activity in a number of ways. For example, legislatures sometimes grant courts the authority to review administrative decisions. In addition, legislatures can create a private right of action, allowing private citizens and interest groups to check agencies that might otherwise be tempted to stray from legislative preferences.[17] In doing so, the legislature uses judges not as policemen who actively "patrol" for infractions, but as "fire alarms" that attract the attention of lawmakers to ongoing violations.[18] In addition, legislators themselves may look to courts as an instrument for preserving their political gains after they leave office.[19] In the context of the United States, for example, Mathew McCubbins, *et al.*, argue that "the primary explanation for the failure of administrative reform proposals before World War II but their success later was the desire of New Democrats to 'hard wire' the policies of the New Deal against an expected Republican, anti-New Deal political tide in the late 1940s."[20] If true, the Congressional supporters of the

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[16] *See, e.g.*, Robert A. Kagan, *The Organization of Administrative Justice Systems: The Role of Political Mistrust*, *in* ADMINISTRATIVE JUSTICE IN CONTEXT 161, 162 (Michael Adler ed., 2010). The delegation of policy-making authority to agents may also be necessary to incentivize them to acquire task-specific expertise. *See* SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING 25 (Benjamin I. Page et al. eds., 2013).

[17] Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1998).

[18] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–166 (1984) [hereinafter McCubbins & Schwartz].

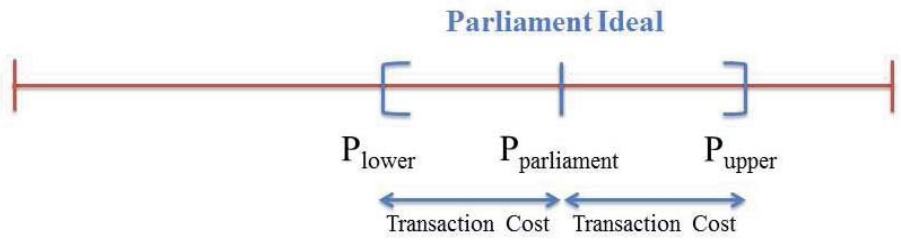
[19] *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 878 (1975); Robert Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 297 (1996).

[20] Mathew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180 (1999).

New Deal did not promulgate administrative procedure to realize the ideal of due process that had hitherto been pursued in an uneven fashion by courts. Rather, they acted to create a forum for scrutinizing agency conduct if and when they came under the command of a politically unfriendly President.

Recent scholarship has emphasized the relevance of political structure for understanding comparative administrative law. Consider the following spatial model of agency regulation under a parliamentary system.[21]

Figure 1

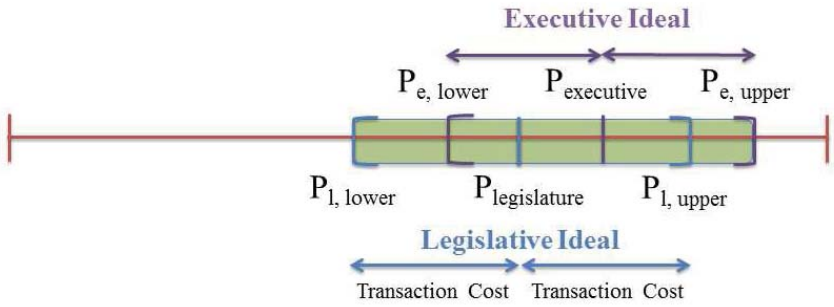


The line above represents a one-dimensional policy space. $P_{parliament}$ is the legislature's ideal. The agency starts by making a policy that is observed by all actors. The legislature may then choose to override the agency, but this involves transaction costs. If the agency selects either P_{lower} or P_{upper}, the legislature is indifferent between overruling and sustaining the agency's action. Under this set-up, the agency has discretion to select any policy between P_{lower} and $P_{upper.}$ This is because the legislature finds the benefits of revising any policy in that interval to be smaller than the costs. Hence, in equilibrium, the agency selects P_{lower} and the legislature allows P_{lower} to stand.

In contrast, under a presidential system, both the legislature and the executive have to agree to reverse an agency's policy.

[21] *See, e.g.*, ROBERT COOTER, THE STRATEGIC CONSTITUTION 154 (2000).

Figure 2



The agency has greater discretion since it is able to select a policy from a larger interval, $[P_{l,\,lower}, P_{e,\,upper}]$.[22] Magill and Ortiz, therefore, argue that if PPT holds, judicial review should "be much more limited in domain and less searching in application in a parliamentary than in a presidential system."[23] They find, however, that this is not borne out by a comparison of reasonableness review in the United States, United Kingdom, France, and Germany. The alternative, they suggest, is the "traditional explanation that administrative law scholars give for the existence and shape of judicial review of administrative action: judicial cultures."[24]

Because judges reviewing agency behavior are themselves agents, political principals must balance the authority delegated to agencies against the discretion exercised by courts.[25] Garoupa and Mathews develop this idea by elaborating a typology consisting, on the one hand, of low or high autonomy agencies and, on the other hand, of low or high autonomy courts.[26] According to this model, agencies are considered "low autonomy" if they operate in a parliamentary system or under a unitary form of government and "high autonomy" if they operate in a presidential system or

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[22] To see that this is true, notice that if the agency promulgates a policy between $P_{l,\,lower}$ and $P_{e,\,lower}$, only the executive, not the legislature, has an incentive to initiate change.

[23] Magill & Ortiz, *supra* note 3, at 138.

[24] *Id*. at 145.

[25] *See, e.g.*, Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, LEWIS & CLARK L. REV. 1565, 1567 (2010) ("Faithful agent theories adopt a principal-agent model of [statutory] interpretation. The interpreter is cast in the role of subordinate agent, seeking in good faith to carry out the instructions of the lawmaker, who is understood to be the principal." (citation omitted)).

[26] Garoupa & Mathews, *supra* note 2, at 13.

under a federal form of government, while courts are considered "low autonomy" if they are specialized or if there is a career judiciary and "high autonomy" if they are generalist or if there is a recognition judiciary. The conclusions of a game-theoretic analysis of the interaction between these types are reproduced and summarized in the following figure.[27]

Table 1

		Agencies	
		Low autonomy	High autonomy
Courts	Low autonomy	➢ Broad delegation ➢ Narrow scope for judicial review ➢ Application of expertise by agencies ➢ Judicial review plays marginal role	➢ Broad delegation ➢ Broad scope for judicial review ➢ Application of expertise by agencies ➢ Judicial review plays important role
	High autonomy	➢ Broad delegation ➢ Narrow scope for judicial review ➢ Application of expertise by agencies ➢ Courts push to expand role of judicial review.	➢ Mixed strategies ➢ Broad and narrow delegations ➢ Agencies sometimes apply expertise and sometimes play safe ➢ Courts sometimes review aggressively and sometimes defer to agency.

While the party-dominated states that we have selected do not hew exactly to any of these ideal types, they could, on first pass, be placed in the quadrant of low autonomy agencies and low autonomy courts. Hence, one should anticipate a narrow scope of judicial review and, in particular, limited standing.[28] We now turn to the law in these countries.

III. STANDING TO SUE IN JAPAN, SINGAPORE, AND CHINA

A. Japan

The Administrative Case Litigation Law (ACLL) of 1962 provides for four types of named suits. The first is "direct attack suits," or *kōkoku soshō*, which encompasses "lawsuits of grievance relating to the exercise of public power by an administrative agency."[29] The second is defined as "party suits,"

[27] *Id*. at 14, 17, 21, 24, 28.
[28] *Id*. at 17.
[29] John O. Haley, *Japanese Administrative Law*, *in* JAPANESE LAW: READINGS IN THE POLITICAL ECONOMY OF JAPANESE LAW 301, 307 (J. Mark Ramseyer ed., 2001) (citation omitted).

or *tōjisha soshō*, in which administrative actions are challenged collaterally in a civil suit.[30] The third is labeled "public suits," or *minshū soshō*.[31] These are corrective actions that may be "instituted by persons qualified to vote without having the qualifications of having any other legal interest."[32] However, such suits must be explicitly provided for by statute.[33] The fourth type of suit is "agency suits," or *kikan soshō*, used to resolve jurisdictional disputes between governmental bodies.[34]

The decision of a public authority is typically challenged through the *kōkoku soshō*, which has a number of procedural standing requirements. Critically, the plaintiff must suffer an injury to his legal interest; an injury-in-fact is not sufficient for standing.[35] A legal interest is usually "created by provisions vesting an administrative agency with the duty of protecting some personal interest."[36] The *Bathhouse Case* is frequently cited as a judicial explanation of this definition.[37] The suit was brought by a bathhouse to contest the issuance of a license to a competitor. Bathhouses were licensed subject to the condition that they be located at least 250 meters apart from each other.[38] This restriction was officially justified on public health

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] One example is a residents' suit, which targets financial irregularity or irresponsibility in local governments. Any registered resident of a prefecture, city, town, or village may sue for illegally expended money to be returned by the defendant to the relevant public entity. Between 1983 and 1987, there were 42 such suits filed against prefectural governments and up to 250 against municipalities. *See* Takehisa Nakagawa, Participatory Administrative Law (unpublished manuscript), http://www.sota.j.u-tokyo.ac.jp/info/Papers/nakagawa.pdf.

[34] *See* Gyōsei jiken sosho ho [Administrative Case Litigation Law], Law No. 139 of 1962, translated in 2 EHS LAW BULL. SER. NO. 2391 (1989), at 21, http://www.refworld.org/docid/3fbe13c1a.html [hereinafter ACLL]; *see also* Haley, *supra* note 29, at 307–308.

[35] "Suits for revocation of a disposition and decision (hereinafter referred to as "revocation litigation") may be filed only by persons having legal interests for seeking the revocation of the said disposition or decision (including persons having legal interests to be recovered by the revocation of a disposition or decision even after the effect of the disposition or decision no longer exists due to the expiration of the period or any other reason)." ACLL, *supra* note 34, at Art. 9. "In a revocation litigation, no person shall seek a revocation on the grounds of illegality not concerned with his legal interest." *Id.* at Art. 10.

[36] Ichiro Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075, 1087 (1968). *See also* Masashi Kaneko, *Les Juges et les Grands Choix Politiques et Administratifs de l'Etat en Droit Administratif Japonais*, *in* ETUDES DE DROIT JAPONAIS 380 (Société de Législation Comparée, 1989) and MARK J. RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 199–201 (1999).

[37] Saikō Saibansho [Sup. Ct.] Jan. 26, 1955, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 89 (Japan), *translated in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 293 (1964). *See also* Ichiro Ogawa, *supra* note 36, at 1087–88 n.45; HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 689–92 (1978); CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 509 (2012).

[38] Saikō Saibansho [Sup. Ct.] Jan. 26, 1955, 9 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 89, *translated in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 294–95 (1964).

grounds.[39] The court found, however, that the constraint was also "intended to prevent undue competition among public bathhouse proprietors" and that a "plaintiff's business interest should be considered protected by lawful operation of the licensing system."[40] Therefore, "he may well have standing to ask for the annulment of a third party's license, because his interest is not a mere reflex, but rather a legal interest . . . ."[41]

A dispute concerning the construction of a shopping center in Etsurigo Village also serves to illustrate the concept of "legal interest." The Diet passed the Large Scale Retail Stores Law in 1973, superseding the Department Store Law of 1937.[42] Under the previous regulatory regime, department stores could not engage in any business unless they obtained prior administrative clearance.[43] The 1973 law eliminated the registration requirement, but required entrants to keep the Ministry of International Trade and Industry appraised of any proposed activity.[44] Furthermore, the Ministry could require the entrant to negotiate with existing merchants in the area over the terms under which the latter would agree to the opening of a new store.[45] In January 1981, 117 local merchants petitioned for nullification of the Ministry's recommendation of a plan submitted by the Etsurigo Shopping Centre Cooperative Co. and revised by the Tohoku Large Stores Council. The plaintiffs alleged conflicts of interest and procedural irregularities,[46] but their contentions were summarily rebuffed.[47] The court ruled *inter alia* that the mention of "enterprise opportunities" in Article 1 of the Large Scale Retail Stores Law did not give rise to anything more than a "reflex" interest on the part of existing businesses.[48]

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[39] Ichiro Ogawa, *supra* note 36, at 1088 n.45.

[40] *Id*.

[41] *Id*.; *see also* RAMSEYER & NAKAZATO, *supra* note 36, at 200–01.

[42] Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396, 404–05 (1996).

[43] *Id*. at 405.

[44] *Id.*

[45] *Id. See also* Jean Heilman Grier, *Japan's Regulation of Large Retail Stores: Political Demands Versus Economic Interests*, 22 U. PA. J. INT'L ECON. L. 1 (2001).

[46] Upham, *supra* note 42, at 411 ("Specifically, the local merchants alleged that President Takahashi of the Etsurigo Chamber of Commerce, whose son was the president of the Etsurigo Shopping Center Cooperative, had a direct conflict of interest and had selected members of the Adjustment Board solely on the basis of their pro-shopping center views.").

[47] *Id*. at 415 ("Had consumers been suing MITI on the ground that the 6.390 square meters allotted to Jusco in the recommendation was too small to serve their interests, the result would have been the same. . . . [T]he only potential plaintiff . . . would be a prospective large retailer dissatisfied with the amount of space given him through the adjustment process.").

[48] *Id.*

In a more recent example, the Japanese Supreme Court held that residents whose persons and property would be threatened in the event of a natural disaster had standing to challenge the approval of the construction of six golf courses upstream of the River Ozato.[49] The justices were persuaded that the provisions of Article 10-2 of the Forestry Law "should be construed to aim not only at the ensurance [*sic*] of the public interest function of the forest . . . [but also] the protection of the safety of the life and health of the inhabitants living within a certain range of areas adjacent to the area to be developed as a specific interest of the individuals."[50]

Intimately tied to the question of standing is the doctrine of *shobunsei*, sometimes translated as "ripeness"[51] or "in the nature of a disposition."[52] Article 3 of the Administrative Case Litigation Law defines *kōkoku soshō* as "a litigation of dissatisfaction relating to the exercise of public power by an administrative agency."[53] For a *kōkoku soshō* to go forward there must first be a *shobun*.[54] As articulated by the Supreme Court of Japan in 1955, a *shobun* is an "official action which forms the rights and duties of the citizens or confirms the scope thereof."[55] In that case, a notice from the Atami City Agricultural Council to a farmer regarding the boundaries of the latter's land was found not to be a *shobun* because it had no legal effect and was not adverse to the farmer's property rights.[56] The lesson drawn is that "supervisory orders, permissions, approvals, and regulations among agencies or within a single agency cannot be the object of litigation."[57]

Prior to the enactment of the ACLL in 1962, it was generally understood that plaintiffs could not file a "preventive" suit.[58] While many hoped that the ACLL would lead to a broader notion of *shobun*, subsequent developments indicated that the traditional understanding had not been displaced. The outcome of *Edogawa Ward v. Minister of Transportation* is especially instructive in this regard.[59] In 1972, the Minister of

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[49] Saikō Saibansho [Sup. Ct.] Mar. 13, 2001, 55 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 283, http://www.courts.go.jp/english/judgments/text/2001.03.13-1996.-Gyo-Tsu-.No.180.html.

[50] *Id*.

[51] *See e.g.* RAMSEYER & NAKAZATO, *supra* note 36, at 196.

[52] Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of* Shobunsei *as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37, 38 (1985).

[53] ACLL, *supra* note 34, at Art. 3.

[54] Saikō Saibansho [Sup. Ct.] Feb. 24, 1995, 9 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 217.

[55] *Id*.

[56] *Id*.; s*ee also* Dziubla, *supra* note 52, at 45.

[57] Dziubla, *supra* note 52, at 53.

[58] Ichiro Ogawa, *supra* note 36, at 1083.

[59] Tokyo Kōtō Saibansho [Tokyo High Ct.] Oct. 24, 1973, 722 HANREI JIHŌ 52.

Transportation published plans for a railway line linking Tokyo to Narita and signed off on its construction by the contractor, Japan Railway Construction Corporation. Residents within a designated area of 200 meters from the proposed tracks sought judicial relief. The Tokyo High Court dismissed the claim:

> At the stage of the approval of a Construction Implementation Plan, it has not necessarily been concretely confirmed who will in the future become an interested party when the Plan is executed. In that sense, a Construction Implementation Plan and its official approval must be considered as abstract in nature. In other words, that approval is unlike a concrete disposition directed at a specified individual. Furthermore, there is no provision that requires its publication, and it itself has no effect whatsoever on citizens' rights and duties.[60]

The implication is that any potential claim must be deferred pending actual implementation of the policy.[61] However, this means that sunk costs and irreversibility of damage could eventually militate against judicial invalidation of the administrative act.[62]

Restrictive construction of *shobun* also facilitates the use of administrative guidance, a form of regulation whereby an authority invites the relevant parties to voluntarily adhere to its guidelines.[63] As the advice has no legal effect until it is actually enforced, it has historically not been considered a reviewable action. For example, in *Okamura v. Japan*, the Ministry of Foreign Affairs requested that 345 political activists not apply

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[60] Frank K. Upham, *After Minamata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 ECOLOGY L.Q. 213, 237 (1979).

[61] *See, e.g.*, *id.* at 238; Dziubla, *supra* note 52, at 47; GOODMAN, *supra* note 37, at 514.

[62] *See, e.g.*, Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Mar 27, 1997, 1598 HANREI JIHŌ 33, 39 (Japan), *translated in* 38 INT'L LEGAL MATERIALS 397, 428-29 (1999). ("Nibutani dam has already been completed with an enormous expenditure of tens of billions of yen and is filling with water… we are [thus] forced to recognize the extraordinary harm to the public interest that would arise from reversing the Confiscatory Administrative Rulings. Additionally, we find that the *Poromoy Chashi* has already been destroyed and the *Pe-ure-pukka* and *Kankanrerekehe Chinomishir* have each been demolished by the dam construction. Even if the Confiscatory Administrative Rulings are reversed, these sites cannot be restored."). The expropriation of Ainu lands was declared illegal but the dam was permitted to continue operation.

[63] *See generally* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984); Takehisa Nakagawa, *Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 ADMIN. L. REV. 175 (2000).

for passports to attend a festival in Moscow.[64] This request was not considered to be a reviewable disposition.[65] Since there was no formal application, there could not have been any refusal, and hence *shobun*, by the Ministry of Foreign Affairs. While it is natural that consent should act as a bar to remedy, informality can take on coercive overtones when the time horizon of interactions is long and the powers of the governmental agency are broad.[66]

Despite traditionally narrow rules of standing and *shobun*, judicial interpretations and legislative reforms have gradually opened the door to a more generous application of these principles. In 2001, the Justice System Reform Council expressed a vision: to "transform the excessive advance-control/adjustment type society to an after-the-fact review/remedy type society."[67] Amendments to the ACLL in 2004 codified evolving case law,[68] and provide for standing if the plaintiff has a right protected by a statute or ordinance that is relevant to the administrative action being reviewed.[69] This shift is exemplified by *Izuka v. Director of Kanto Regional Development Bureau* ("Odakyū Railroad Case").[70] There, the Supreme Court of Japan partially reversed the judgment of the lower court, ruling that residents

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[64] Tokyo Kōtō Saibansho [Tokyo App. Ct.] 1962, 8 SHŌMU GEPPŌ 1836 (Japan). *See also* Young, *supra* note 63, at 954.

[65] Tokyo Kōtō Saibansho [Tokyo App. Ct.] 1962, 8 SHŌMU GEPPŌ 1836 (Japan). *See also* Young, *supra* note 63, at 954.

[66] *See* Takehisa Nakagawa, *supra* note 63 (explaining that the concept of informality in the United States refers to the absence of either concrete rules or adversarial procedures whereas informality in the Japanese context implicates either extra-statutory policy-making or the employment of extra-statutory methods).

[67] *Recommendations of the Justice System Reform Council*, JUSTICE SYSTEM REFORM COUNCIL (June 12, 2001), http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

[68] Saikō Saibancho [Sup. Ct.] Feb. 17, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 56, *translated in* 10 WASEDA BULL. COMP. L. 36, http://www.waseda.jp/hiken/jp/public/bulletin/pdf/10/ronbun/A02859211-00-000100036.pdf; Nagoya Kōtō Saibansho [Nagoya High Ct.] Jan. 27, 2003, 1818 HANREI JIHO 3, *translated in* 23 WASEDA BULL. COMP. L. 67 (2003) http://www.waseda.jp/hiken/jp/public/bulletin/pdf/23/ronbun/A02859211-00-000230067.pdf); *see also* HITOSHI USHIJIMA, *Administrative Law and Judicialized Governance in Japan*, *in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 93 (Tom Ginsburg & Albert H.Y. Chen eds., 2009); GOODMAN, *supra* note 37, at 511; Narufumi Kadomatsu, *Judicial Governance Through Resolution of Legal Disputes - A Japanese Perspective*, 4 NAT'L TAIWAN U. L. REV. 41, 156 (2009).

[69] Gyōsei jiken Soshōhō No Ichibu Wo Kaiseisuru Hōritsu [Act for Partial Revision of the Administrative Case Litigation Law], Law No. 84 of 2004 (Japan) ("[T]he court shall also make reference to the purport and purpose of any relevant laws and regulations that share the purpose with the governing laws and regulations, and when considering the contents and nature of the interest, the court shall take into account the contents and nature of the interest that is likely to be injured if the disposition is made in violation of the governing laws and regulations as well as how and to what extent that it is likely to be injured.").

[70] *See* Yuichiro Tsuji, *The Legal Issues on Environmental Administrative Lawsuits Under the Amendment of ACLA in Japan*, 1 YONSEI L.J. 339, 354 (2010).

whose property would not be directly affected by an approved over-ground rail line were nevertheless eligible to sue because they had a protected legal interest.[71] Their legal interest issued from city ordinances that were enacted to safeguard the welfare of neighboring residents, in particular from damage to their health and living environment from noise and vibration.[72] The doctrine of legal interest was further elaborated in a 2008 decision, *Nakamura v. Hamamatsu City*.[73] In that case, the court reasoned that the promulgation of a plan for land readjustment immediately foreclosed the options of individual landowners.[74] It became "necessary to obtain permission from the prefectural governor in order to carry out, within the implementation zone, activities such as changing the shape or nature of the land or constructing, remodeling or extending buildings or other structures, which are likely to hinder the implementation of the land readjustment project . . . ."[75] The effect was therefore not "general or abstract."[76]

The definition of a *shobun* has also been interpreted more broadly by Japanese courts. In *Nakamura*, the Grand Bench recognized that any revocation of the disposition of land substitution at a later stage "would cause serious confusion to the project as a whole" and be injurious to the public interest.[77] It therefore announced that "it is reasonable to allow the filing of a suit to seek revocation of a decision to adopt a project plan at the stage when the decision is made."[78] Further, in a 2004 case, the Supreme Court held that a written notice of violation served on an importer by the director of the quarantine station was a *shobun*.[79] The judgment of the Tokyo High Court, finding the notification to be "practical guidance" to the appellant and not legally binding on the Director-General of Customs, was

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[71] *Id.*

[72] Saikō Saibansho [Sup. Ct.] Dec. 7, 2005, 2004 (Gyo-Hi) no. 114, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2645, http://www.courts.go.jp/english/judgments/text/2005.12.07-2004.-Gyo-Hi-.No..114.html. *See also* GOODMAN, *supra* note 37, at 511–12; Narufumi Kadomatsu, *supra* note 68, at 158 (describing it as the "leading case on the interpretation of the newly inserted Paragraph 2 of Article 9 of the ACLA").

[73] Saikō Saibansho [Sup. Ct.] Sept. 10, 2008, 2005 (Gyo-Hi) no. 397, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2029, http://www.courts.go.jp/english/judgments/text/2008.09.10-2005.-Gyo-Hi-.No..397.html.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Saikō Saibansho [Sup. Ct.] Apr. 26, 2004, 2003 (Gyo-Hi) no. 206, 58 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 989, http://www.courts.go.jp/english/judgments/text/2004.04.26-2003-Gyo-Hi-No..206.html.

quashed.[80] The next year, the Supreme Court of Japan heard *Takano v. Governor of Toyama*, an appeal from the Nagoya High Court.[81] The plaintiff in *Takano* had declined a "recommendation" made under the Medical Service Law.[82] The 1987 Notification from the Director of Insurance Bureau had cautioned that:

> If despite the recommendation made by the prefectural governor under Article 30–7 of the Medical Service Law because of particular necessity for facilitating the achievement of the medical scheme, the hospital has been established and an application has been filed for designation of the hospital as an insurance medical institution, the hospital shall be regarded as "extremely inappropriate" as provided in Article 43–3(2) of the Health Insurance Law, and the prefectural governor shall consult with the regional social insurance council for refusal to grant designation.[83]

In light of the "considerable certainty" of the "consequences," the document sent to the applicant qualified as a disposition within the meaning of Article 3(2) of the ACLL.[84]

Table 2: Summary of Japan

	Japan Pre-2004	Japan Post-2004
Interest	Legal interest has to be expressly created by governing statute that charges the agency to protect some personal interest; others as provided by statute (under *minshū soshō*)	In determining legal interest, to also consider "purport and purpose" of relevant laws and regulations
Action	Existence of *shobun*, i.e. an official action pertaining to rights and duties of citizens; internal and inter-agency orders and regulations not subject to suit; no "preventive" suits; excludes administrative guidance	*Nakamura* (reviewability of "preventive" suits); *Takano* (reviewability of administrative guidance if consequences are "considerabl[y]" certain)
Entity	Administrative agencies; local governments (under *minshū soshō*)	Administrative agencies; local governments (under *minshū soshō*)

Between 1990 and 2007, there has been a gradual rise in the number of

[80] *Id*.
[81] Saikō Saibansho [Sup. Ct.] July 15, 2004, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1661, http://www.courts.go.jp/app/hanrei_en/detail?id=760.
[82] *Id*.
[83] *Id*.
[84] *Id*.

administrative cases litigated before the courts.[85] Yet, it was estimated in 1997 that approximately twenty-five percent of all such suits were still being dismissed for lack of standing, or *shobun*.[86] Although there has been movement in the direction of liberalization in the years leading up to 2004, its impact on governance and regulation in Japan still awaits detailed study.

B. Singapore

A colony of the British Empire from 1819 to 1963, the Singapore legal system has traditionally been influenced by legal developments in England. Of the 1,383 cases cited as authorities in the 527 decisions of the High Court of Singapore reported between 1965 and 1985, 23.8% of them were local, whereas 66.7% were English.[87] It is therefore no surprise that the framework for judicial review of administrative acts in Singapore is similar to that of the United Kingdom. Indeed, in a lecture on the subject delivered in 2010 to students at the Singapore Management University, Chief Justice Chan Sek Keong commented that the "courts [of Singapore and the U.K.] apply the same principles because we inherited the same system of law."[88] The law of standing inherited from English law derives from the rules of court that restrict standing to parties having a sufficient interest and is reinforced by the common law distinction between private and public law.[89]

The first hurdle to be cleared before a suit may proceed is that the matter being contested has to be susceptible to review by the courts.[90] Amongst other things, the issue has to be one of public law. In *Council of Civil Service Unions v. Minister for the Civil Service*, Lord Diplock emphasized the importance of the source of the decision-making authority, which "is nearly always nowadays a statute or subordinate legislation made

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[85] Narufumi Kadomatsu, *supra* note 68, at 147.

[86] HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 164 (1997).

[87] Walter Woon, *The Applicability of English Law in Singapore*, *in* THE SINGAPORE LEGAL SYSTEM 230 (Kevin Y.L. Tan ed., 2d ed. 1999).

[88] Chan Sek Keong, *Judicial Review-From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students*, 22 SING. ACAD. L.J. 469, 473 (2010).

[89] *See* H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 562–63, 572–74, 582–83, 589–90 (10th ed. 2009).

[90] *Jeyaretnam Kenneth Andrew v. Attorney-General* [2012] SGCH 210 ("Leave to apply for prerogative orders will not be granted unless the court is satisfied as to the following: (a) The subject matter of the complaint is susceptible to judicial review; (b) The material before the court discloses an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant; and (c) The applicant has sufficient interest in the matter.").

under the statute."[91] A later judgment, rendered in *R. v. Panel on Take-overs and Mergers, ex parte Datafin plc,* found the Panel on Take-overs and Mergers, an unincorporated, informal, and self-regulating body, to be nevertheless subject to judicial review.[92] The critical factor there was the nature of the power being exercised. By "devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers," the Panel could indirectly alter the legal status of persons.[93] In the words of Lord Justice Lloyd, "[i]t has a giant's strength."[94] Thus, the *Datafin* test considers both the source and the nature of the power being exercised. This precedent was absorbed into Singapore law through *Public Service Commission v. Lai Swee Lin Linda*[95] and reaffirmed in *UDL Marine (Singapore) Pte. Ltd. v. Jurong Town Corp*.[96] The former concerned the dismissal of an employee, while the latter involved a lease renewal. In both cases, the court noted that the action of the statutory agency, though ultimately having some basis in statute, came under contract law. On the other hand, the public reprimand of the director of a corporation listed on the Singapore Exchange, an investment holding company, contained a public element and could therefore be reviewed.[97] The court noted, among other things, that the Singapore Exchange "is an approved exchange under [Section] 16 of the [Securities and Futures Act]"[98] and that "reprimand of directors of a listed company by . . . a front-line securities regulator, carries financial and business implications."[99] These facts made the reprimand power a public function "susceptible to judicial review for minimum compliance with the standards of 'legality, rationality and procedural propriety.'"[100]

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[91] Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 AC 374 (HL) 409 (Lord Diplock) (appeal taken from Eng.) (UK)

[92] *R. v. Panel on Take-overs and Mergers, Ex Parte Datafin Plc*, [1987] QB 815. (Eng.) [hereinafter *R v. Panel on Take-overs and Mergers*); *see also* Thio Li-Ann, *Law and the Administrative State*, *in* THE SINGAPORE LEGAL SYSTEM 160, 178 (Kevin Y.L. Tan ed., 2d ed. 1999).

[93] *See R v. Panel on Take-overs and Mergers*, *supra* note 92 at 826.

[94] *Id.* (Lord Lloyd) at 845.

[95] *Linda Lai Swee v. Public Service Commission* [2000] SGHC 162 (although the court eventually concluded that the dismissal of a Land Office employee was undertaken pursuant to contract, it recognized the validity of the source test applied in *Datafin*).

[96] *UDL Marine (Singapore) Pte. Ltd. v. Jurong Town Corp.* [2011] SGHC 45.

[97] *See Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd*, [2012] SGHC 103 [hereinafter *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd*]; *see also Manjit Singh s/o Kirpal Singh v. Attorney-General*, [2013] SGCA 22. The curious reader may wonder about the status of administrative guidelines under Singapore law. *See, e.g.*, *Lines International Holding Pte Ltd v. Singapore Tourist Promotion Board and Port of Singapore Authority*, [1997] 2 SLR 584 (rejecting the argument that guidelines have to be officially promulgated to be enforceable); Thio Li-Ann, *supra* note 92, at 172–173.

[98] *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd*, *supra* note 97, at [21].

[99] *Id*. at [25].

[100] *Id*. at [28].

The second obstacle is that the plaintiff must have a sufficient interest in the case. Section 31(3) of the United Kingdom's Senior Courts Act of 1981 provides that leave for judicial review shall not be granted unless "the applicant has a sufficient interest in the matter to which the application relates."[101] This rule was duly applied in the seminal case of *R. v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd.*[102] The plaintiff, an association of taxpayers, alleged that the grant of amnesty to a group of casual employees was illegal. The Court of Appeals discerned a "genuine grievance," but the House of Lords unanimously reversed.[103] In so doing, their Lordships articulated a two-stage test.[104] Leave would be refused at the first stage to "busybodies" who possess no genuine interest whatsoever.[105] To succeed at the second stage, the applicant then has to demonstrate a strong case on the merits, balanced by the degree of his or her concern.[106] For Lord Scarman, the Federation had failed to adduce any evidence for the breach of a statutory duty and therefore lacked "sufficient interest."[107] Lord Wilberforce, in particular, asserted that "one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed."[108] In his view, "an aggregate of individuals each of whom has no interest cannot of itself have an interest."[109] This narrow reading drew a lament from Lord Diplock, who regretted the "grave lacuna" in public law.[110] For him, "outdated technical rules" should not obstruct "[vindication of] the rule of law."[111]

The latter position has come to be embraced by English judges. In *R. v. Her Majesty's Treasury, ex parte Smedley*,[112] a taxpayer was permitted to

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[101] *See, e.g.*, WADE & FORSYTH, *supra* note 89, at 562. *C.f.* M.P. JAIN, ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE 513 (3d ed. 1989).

[102] *See* R v. Inland Revenue Commissioners, Ex Parte National Federation of Self-employed and Small Businesses Ltd., [1982] AC 617 (HL) (appeal taken from Eng.) (UK) [hereinafter R v. Inland Revenue Commissioners].

[103] R v. Inland Revenue Commissioners, Ex Parte National Federation of Self-employed and Small Businesses Ltd, [1980] QB 407, 425.

[104] R v. Inland Revenue Commissioners, *supra* note 102 (*per* Lord Wilberforce. Lords Diplock and Scarman agreed. Lord Fraser disagreed.).

[105] *Id*. at 646.

[106] *See* WADE & FORSYTH, *supra* note 89, at 591. *See also R v. Monopolies and Merger Commission ex parte Argyll Group*, [1986] 1 W.L.R. 763.

[107] *See R v. Inland Revenue Commissioners*, *supra* note 102, at 653–55 (Lord Scarman).

[108] *Id.* at 633 (Lord Wilberforce).

[109] *Id.* (Lord Wilberforce).

[110] *Id.* at 644 (Lord Diplock).

[111] *Id.* (Lord Diplock).

[112] R. v. Her Majesty's Treasury, ex parte Smedley [1985] 1 QB 657 (UK).

challenge the government's payment of certain sums to the European Community and in *R. v. Secretary of State for Foreign Affairs ex parte World Development Movement Ltd.*,[113] a pressure group[114] was held to have sufficient interest to challenge the disbursement of aid funds for the Pergau Dam in Malaysia. The courts in Singapore appear to have adopted the "sufficient interest" test, with applicants having to produce a "*prima facie* case of reasonable suspicion."[115] However, the Chief Justice has suggested extra-judicially that this "is not, in my view, also to say that our courts will apply the [sufficient interest] test with the same rigour as the U.K. courts."[116]

Additionally, the case law in both Singapore and Malaysia has introduced a distinction between public and private rights.[117] In *Tan Eng Hong v. Attorney-General*, the appellant sought to have a statute invalidated on constitutional grounds.[118] The Singapore Court of Appeal clarified that "a public right is one which is held and vindicated by public authorities, whereas a private right is one which is held and vindicated by a private individual."[119] The applicant who wishes to enforce a public right has to establish a violation via an injury that is also personal.[120] This doctrine made an appearance in *Jeyaretnam Kenneth Andrew v. Attorney-General*.[121] Jeyaretnam was a member of an opposition party who had sued for prerogative orders and declarations against a 4 billion USD contingent loan extended by the Monetary Authority of Singapore to the International Monetary Fund.[122] The Singapore Supreme Court ruled, incidentally, that as Jeyaretnam was unable to prove any damage particular to himself, he did not have *locus standi*.[123]

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[113] R. v. Secretary of State for Foreign Affairs ex parte World Development Movement Ltd., [1995] 1 WLR 386 (UK).

[114] A pressure group is similar to a lobby or interest group.

[115] *Public Service Commission v. Lai Swee Lin Linda* [2001] 1 SLR 133; *see also In re Lim Chor Pee, ex parte Law Society of Singapore* [1985–1986] SLR 998.

[116] Chan Sek Keong, *supra* note 88, at 481.

[117] *See Government of Malaysia v. Lim Kit Siang* [1988] 2 M.L.J. 12 (the Malaysian Supreme Court declined to follow the liberal approach of English cases, attributing it to the new wording of the English Rules of the Supreme Court).

[118] *Tan Eng Hong v. Attorney-General*, [2012] SGCA 45, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14979-tan-eng-hong-v-attorney-general-2012-sgca-45.

[119] *Id.* at para. 69.

[120] *See id.*

[121] *Jeyaretnam Kenneth Andrew v Attorney-General* [2012] SGHC 2010.

[122] *Id.* (Jeyaretnam contended that the concurrence of the President had not been manifested, contrary to article 144 of the Singapore Constitution).

[123] The Supreme Court of Singapore has two divisions; the higher one is the Court of Appeal and the lower one is the High Court.

Table 3: Summary of Singapore		
	Test	Cases
Interest	➢ Sufficient interest ➢ At the first stage, applicant must have genuine interest ➢ At the second stage, applicant has to make out "*prima facie* case of reasonable suspicion" ➢ Injury has to be personal	➢ *Lai Swee Lin Linda* (adopts the sufficient interest test) ➢ *Jeyaretnam Kenneth Andrew* (applicant seeking to enforce public right also has to demonstrate special injury)
Action/ Entity	➢ Public nature of the power being exercised	➢ *Yeap Wai Kong* (reprimand of a company by the stock exchange is a public function)

Between 1957 and 2009, there were 79 judicial review cases reported, or an average of 1.5 cases per year.[124] Although the citizenry has grown increasingly conscious and assertive of its rights,[125] the practice and discourse has generally been partial to a non-adversarial relationship between the executive and the judiciary, with the latter supporting the former in the mission of good governance.[126] There has not been a move towards a relaxation of *locus standi* rules.

C. China

The rise of administrative litigation in China coincided with the legal and economic reforms of the early 1980s, as the new proprietors of privately-held corporations acquired both the incentives and the wherewithal to seek judicial reversal of unfavorable administrative decisions.[127] Since the passage of the Administrative Procedure Law of the People's Republic of China of 1989[128] (more accurately translated as the Administrative Litigation Law, or ALL), the last two decades have witnessed a steady increase in the number of administrative cases filed by Chinese citizens.[129]

[124] Chan Sek Keong, *supra* note 88, at 474 (relief was granted in 22 of the 79 cases).

[125] *See* Yuen-C Tham, *When Citizens Take the Government to Court*, THE STRAITS TIMES, Jan. 25, 2014, at 37 (Sing.).

[126] *See, e.g.*, Tan Boon Teik, *Judicial Review*, SING. L.R. 70 (1988); Chan Sek Keong, *supra* note 88. *See also* Thio Li-Ann, *supra* note 92, at 203–04 ("In Singapore, the government ethos of efficiency and maintaining public order provides the backdrop to the operation and development of administrative law. The judicial predilection for the utilitarian concerns of efficiency, economy, and effectiveness is evident from the case law.").

[127] Susan Finder, *Like Throwing an Egg Against a Stone—Administrative Litigation in the People's Republic of China*, 3 J. CHINESE. L. 1, 6–9 (1989).

[128] Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), http://en.pkulaw.cn/Display.aspx?Lib=law&Id=1204&keyword= (China) [hereinafter Administrative Procedure Law].

[129] *See infra* Figure 3.

The results of a survey conducted in 2010 show that administrative cases commenced between 1987 and 2010 may be classified into four main categories: those involving public security, issues related to urban construction, land disputes, and labor disputes. The concentration of lawsuits within these subject matters not only reveals the most salient interests and concerns of ordinary people, but also reflects the influence of "standing to sue" as articulated in Article 2,[130] Article 11,[131] and Article 12[132] of the ALL. To bring suit against an administrative agency, a prospective plaintiff must establish that: 1) the challenged administrative action directly affected the rights and duties of particular individuals, corporations, or other organizations; 2) the plaintiff suffered an injury-in-fact that infringed upon a lawful right and interest; and 3) the administrative agency was susceptible to suit.[133]

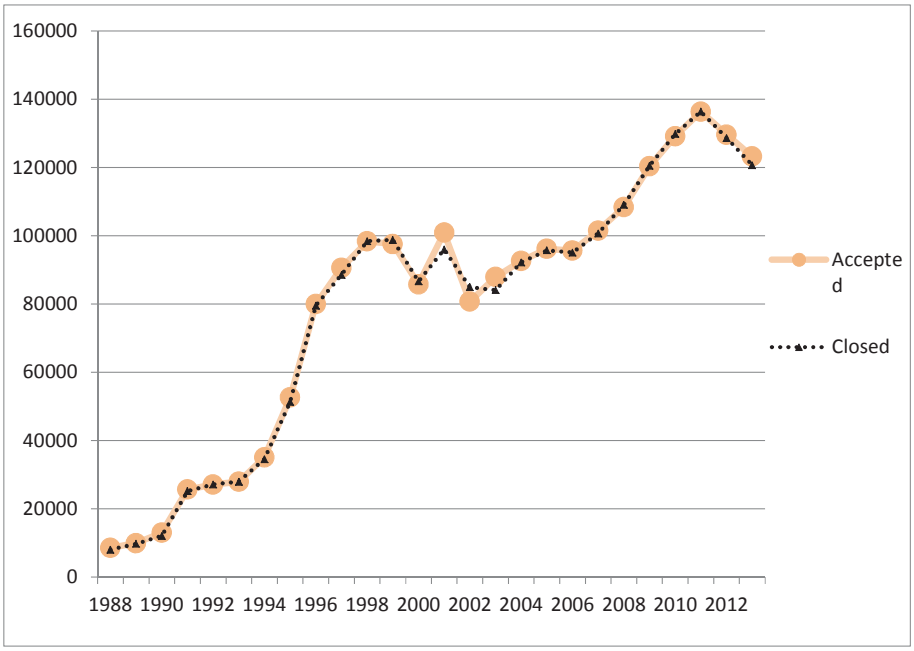
[130] Administrative Procedure Law, *supra* note 128, at Art. 2 ("A Citizen, A legal person or other organizations have the right to litigate a lawsuit to the people's courts in accordance with this Law once they consider that a concrete administrative action by administrative organs or personnels infringe their lawful rights and interests.").

[131] *Id.* at Art. 11 ("The people's courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts: (1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept; (2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept; (3) infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ; (4) refusal by an administrative organ to issue a permit or license, which one considers oneself legal qualified to apply for, or its failure to respond to the application; (5) refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of property, as one has applied for, or its failure to respond to the application; (6) cases where an administrative organ is considered to have failed to issue a pension according to law; (7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and (8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property. Apart from the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.").

[132] *Id.* at Art. 12 ("The people's courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters: (1) acts of the state in areas like national defence and foreign affairs; (2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs; (3) decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel; (4) specific administrative acts that shall, as provided for by law, be finally decided by an administrative organ.").

[133] He Haibo, *Xingzheng Fazhi, Women Haiyou Duoyuan* [How Far from Administrative Legalism], 6 ZENGFA LUNTAN [TRIB. POL. SCI. AND L.] 25, 40–41 (2013).

Figure 3: The Number of Administrative Cases Accepted and Judged Between 1988 and 2013 in China[134]



First, the challenged administrative acts must directly affect the rights and duties of particular individuals, corporations, or other organizations.[135]

[134] This chart is drawn from data between 1989 and 2014 in the Law Yearbook of China, an annual publication. Zhongguo Faxuehui (中国法学会) [China Law Society] 759, 771, 802, 819, 835, 849, 862, 876, 891, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (1989–98); Zhongguo Faxuehui (中国法学会) [China Law Society] 1023, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (1999); Zhongguo Faxuehui (中国法学会) [China Law Society] 1211, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2000); Zhongguo Faxuehui (中国法学会) [China Law Society] 1258, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2001); Zhongguo Faxuehui (中国法学会) [China Law Society] 777–78, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2002); Zhongguo Faxuehui (中国法学会) [China Law Society] 645, 675, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2003–04); Zhongguo Faxuehui (中国法学会) [China Law Society] 615, 616, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2005); Zhongguo Faxuehui (中国法学会) [China Law Society] 487, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2006); Zhongguo Faxuehui (中国法学会) [China Law Society] 593–94, 617, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2007–08); Zhongguo Faxuehui (中国法学会) [China Law Society] 1001, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2009); Zhongguo Faxuehui (中国法学会) [China Law Society] 920, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2010); Zhongguo Faxuehui (中国法学会) [China Law Society] 1052, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2011); Zhongguo Faxuehui (中国法学会) [China Law Society] 1066, ZHŌNGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2012); Zhongguo Faxuehui (中国法学会) [China Law Society] 1211, ZHONGGUO FALU NIANJIAN (中国法律年鉴) [LAW Y.B. CHINA] (2013).

In other words, a prospective plaintiff is entitled to commence an administrative suit only when the action in question implicates a *specific* person or situation. The term is emphasized in Article 2 of the ALL in contradistinction to internal administrative acts[136] and abstract administrative acts,[137] both of which are immune from judicial oversight.[138]

In 2000, the Chinese Supreme Court promulgated "The Interpretation of Several Problems Referring to the Implementation of 'Administrative Procedure Law of the People's Republic of China,'"[139] to clarify the definition of administrative acts not subject to legal challenge as stated in Article 12 of ALL. Administrative acts not subject to legal challenges include internal administrative acts, abstract administrative acts, administrative guidance, and certain official certificates.[140]

Internal administrative acts are defined as the decisions of an administrative organ regarding awards, punishments, appointments, or relief of duty applicable solely to its own personnel.[141] A case involving the People's Bank of China (PBOC) provides a suitable illustration. On November 20, 1988, PBOC dissolved its Jiangxi branch and replaced it with the newly-founded Wuhan branch. The Wuhan branch resolved to change the name of the Cadre School of People's Bank of Jiangxi Province and to

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[135] *See* Song Yafang, *Juti Xingzheng Xingwei Gainian de Zaisuli* [*Rethinking the Concept of Specific Administrative Act*], 4 HENAN SHENG ZHENGFA GUANLI GANBU XUEYUAN XUEBAO [JOURNAL OF HENAN ADMINISTRATIVE INSTITUTE OF POLITICS AND LAW] 4 (2006).

[136] Article 12 of ALL states that "[t]he people's courts shall not accept suits brought by citizens, legal persons or other organizations against . . . decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel." Administrative Procedure Law, *supra* note 128, at Art. 12.

[137] *Id.* ("The people's courts shall not accept suits brought by citizens, legal persons or other organizations against … administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs.").

[138] *See* Guan Baoying, *Lun Chouxiang Xingzheng Xingwei yu Juti Xingzheng Zhuti de Fenli* [*Separating the Main Body of Abstract Administrative Acts and Specific Administrative Acts*], 4 Falv Pinglun 3 [Law Review] (2006).

[139] Zuigao Renmin Fayuan Guanyu Zhixing《Zhonghua Renmin Gongheguo Xingzheng Susong Fa》Ruogan Wenti De Jieshi, (最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释) [The Interpretation of Several Problems Referring to the Implementation of "Administrative Procedure Law of the People's Republic of China"], (promulgated by Sup. People's Ct., Mar. 8, 2000, effective Mar. 10, 2000), http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=26982 [hereinafter Interpretation of Several Problems Referring to the Implementation of Administrative Procedure Law].

[140] *Id*. at Art. 3–5; Administrative Procedure Law, *supra* note 126, at Art. 7 ("The people's courts shall not accept suits brought by citizens, legal persons or other organizations against . . . decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel."); *see also* He Haibo, *supra* note 133, at 40.

[141] Interpretation of Several Problems referring to the Implementation of Administrative Procedure Law, *supra* note 139, at Art. 6.

appoint Jiangxi Financial College to manage the school's employees, funds, and fixed assets. The Cadre School of People's Bank of Jiangxi Province then initiated an administrative suit against the "Notice Related to the Matters of the Former Cadre School of People's Bank of Jiangxi Province" issued by Wuhan Branch of the PBOC.[142] The Intermediate Court of Jiangxi Province found the reorganization undertaken by the Wuhan branch to be an internal administrative action and accordingly dismissed the appeal.[143]

As defined by the Supreme People's Court, abstract administrative acts are rules, regulations, decisions, and orders that are rules of general applicability that are formulated and announced by administrative organs.[144] The courts may never review abstract administrative acts. One common example is "red-titled documents," or *hongtou wenjian*.[145] These are directives of departments subordinate to the state council, local people's governments at or above the county level and their respective departments, or town administrations. They are not included in the body of statutes, administrative regulations, and rules. Xinhua reported that in 2005, sixty-eight "red-titled documents" issued by eleven cities and eighteen administrative agencies of Heilongjiang Province were contrary to law.[146] In addition, a study conducted in Anhui Province found that as of 2004, sixty percent of the 110 provincial-level "red-titled documents" were inconsistent

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[142] Jiangxi Sheng Renmin Yinhang Ganbu Xuexiao Su Zhongguo Renmin Yinhang Wuhan Fenhang Jinron Jigou Tiaozheng Xingzheng Chuli Jueding An (江西省人民银行干部学校诉中国人民银行武汉分行金融机构调整行政处理决定案) [The Cadre School of People's Bank of Jiangxi Province v. Wuhan Branch of People's Bank of China], Dec. 12, 2005 NANCHANG INTERM. PEOPLE'S CT., http://hubeigy.chinacourt.org/public/detail.php?id=4110.

[143] *Id.*

[144] Interpretation of Several Problems Referring to the Implementation of Administrative Procedure Law, *supra* note 139, at Art. 3.

[145] *See Hongtou Wenjian Pingdian* (红头文件评点) [*The Notes of Red-Titled Document*], (人民日报《民主政治》周刊) [PEOPLE'S DAILY: DEMOCRATIC POLITICS WEEKLY] (Jan. 2, 2008), http://politics.people.com.cn/GB/8198/114987/ (explaining that "red-titled documents" are so named because they usually bear red titles and stamps; these documents are issued by both central and local administrative agencies to regulate the duties and rights of citizens under their jurisdiction); *see also Hongtou Wenjian Shiyu Nanbei Chao de Xiwei Shiqi* (红头文件始于南北朝的西魏时期) [*Red-titled Documents Originated from Wei Western Period of Nanbei Dynasty*], (人民日报《民主政治》周刊) [PEOPLE'S DAILY: DEMOCRATIC POLITICS WEEKLY] (Jan. 2, 2008), http://history.people.com.cn/n/2014/0715/c372330-25283205.html.

[146] Zengshuang Gao, *Rang Hongtou Wenjian Yuanli "Bawang Tiaokuan"* [Making "Red-titled Document" Stay Away from "Inequality Clauses"], XINHUA NEWS AGENCY, July 11, 2005, http://www.hlj.xinhuanet.com/xw/2005-07/11/content_4613159.htm.

with applicable laws and regulations.[147] Although contrary to law, these abstract administrative acts were not reviewed by courts.

There are a few other matters besides abstract and internal administrative acts that cannot be reviewed by the courts.[148] For example, the decision of governmental bodies to grant funding for the support of certain local corporations, often classified as administrative guidance, does not qualify as a specific administrative act[149] because it is not binding and has no direct legal consequences.[150] In addition, an official certificate pronouncing the recognized cause of and liability for a fire is not subject to review because it does not alter the existing rights and duties of the involved parties.[151]

The injury-in-fact has to infringe upon a plaintiff's "lawful right and interest" for the plaintiff to have standing to sue in China. Article 11 further limits the range of "lawful rights and interests": the court should only accept an administrative case if "an administrative organ is considered to have infringed upon rights of the person and of property."[152] Thus, other rights, such as those associated with environmental damage and degradation may not be litigated under the ALL. In 2001, two professors from Southeast China University alleged that a viewing tower built on the peak of Purple Mountain was inimical to the preservation of natural and historical sites and

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[147] *E.g.*, The Industrial and Commercial Bureau of Anhui (ICB) promulgated a red-titled document that required businesses engaged in advertising to be certified as "credible organizations" so as to avoid a presumption of false advertising. This was found by the Legal Affairs Office of Anhui to be illegal because it bypassed the legislative process to impose additional obligations on local businesses. Keqiang Tao, *Renmin Shiping: Haiyou Duoshao "Hongtou Wenjian" De Weifa Tiaokuan Meiyou Jiuzheng* [How Many the Illegal Provisions of "Red Tapes" Have Not Been Corrected?], PEOPLE'S DAILY, Nov. 17, 2004, http://www.people.com.cn/GB/guandian/1033/2995065.html.

[148] *See* Interpretation of Several Problems Referring to the Implementation of Administrative Procedure Law, *supra* note 139.

[149] Dianshi Longsheng Shichai Chang Bufu Fuding Shi Renmin Zhengfu Xingzheng Fuyou Fuqiang Cuoshi An (点石隆胜石材厂不服福鼎市人民政府行政扶优扶强措施案） [Diantou Longsheng Stone Co., Ltd. v. Fuding Municipal People's Government] (Fuding Local Ct. July 19,2001), http://old.chinacourt.org/html/article/200211/04/17116.shtml.

[150] *Id.*

[151] *See* Huangmou Su Chongqing Shi Wanzhou Qu Gongan Xiaofang Zhidui (黄某诉重庆市万州区公安消防支队) [Huang v. Wanzhou Dist. Fire Department] (Chongqing Wanzhou NO.2 Interm. People's Ct. Aug. 7, 2007), http://www.cq2zfy.gov.cn/information/displaycont.asp?newsid=14639. *See also* Gongan Bu Guanyu Dui Huozai Shigu Zeren Rending Bufu Shifou Shu Xingzheng Susong Shouan Fanwei De Pifu (公安部关于对火灾事故责任认定不服是否属行政诉讼受案范围的批复) [Official Reply of Ministry of Public Security about Whether the Recognition Certificate of Fire Liability Has Standing to Sue in Administrative Litigations] (promulgated by the Ministry of Public Security, effective Mar. 20, 2000), http://www.chinalawedu.com/falvfagui/fg22598/55390.shtml.

[152] Administrative Procedure Law, *supra* note 128, at Art. 6.

harmed the environmental benefits of the public.[153] They sued the Nanjing Planning Bureau for failing to respect their lawful property rights based on the argument that they bought an annual tour ticket for Purple Mountain.[154] However, the Nanjing Municipal Intermediate Court did not accept the suit, citing insufficient injury-in fact.[155] This rejection exemplifies two common hurdles to establish the infringement of a "lawful right and interest": the non-recognition of political and social rights, and the burden of demonstrating that a plaintiff was directly affected by the administrative action.

As a general matter, personal and property rights in Chinese law do not encompass political and social rights, even those ostensibly guaranteed by the Constitution.[156] The withholding of approval for the establishment of a social organization, cancellation of organizational registration, and restrictions on demonstrations are generally not grievances that may be brought into the courtroom.[157] In administrative cases implicating political

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[153] Wu Weixing, *Lun Huanjingquan De Sifa Baozhang* [*Judicial Guarantee of Environmental Rights*], THE RESEARCH INSTITUTE OF ENVIRONMENTAL LAW WUHAN UNIVERSITY (June 29, 2003), http://www.riel.whu.edu.cn/article.asp?id=25509.

[154] *Id.*

[155] *Id. See also Shi Jianhui, Gu Dasong Su Nanjingshi Guihuaju Weifa Xingzheng An* (施建辉、顾大松诉南京市规划局违法行政案) [*The Case of Shi Jianhui, Gu Dasong v. Nanjing Planning Bureau Against Illegal Administrative Acts*] (Nov. 16, 2004), RESEARCH INSTITUTE OF ENVIRONMENTAL LAW, WUHAN UNIVERSITY, http://www.riel.whu.edu.cn/article.asp?id=26404.

[156] There is no constitutional court in China. Although the Chinese Constitution is accorded deference both publicly and officially, in practice, it is an exhortatory document that is not applied or interpreted. The origin of this phenomenon can be traced back to an official reply from the Supreme People's Court in 1955, which stated that the "the Constitution is the fundamental law of the state and has supreme legal authority. . . . It does not include the regulation on how to convict and punish in the field of criminal law. Thus, we agree with the judicial decision made by your court, the Constitution shall not be applied as the legal basis of conviction and punishment in the criminal cases." Zuigao Renmin Fayuan Guanyu Zai Xingshi Panjue Zhong Buyi Yuanyin Xianfa Zuo Lunzui Kexing De Yiju De Fuhan（最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函）[The Official Reply of Supreme Court Regarding to the Statement that Constitution Shall Not be Applied to Be the Legal Basis of Conviction and Punishment in the Criminal Cases] (promulgated by Sup. People's Ct. July 20, 1955, effective July 20, 1955), http://www.chinacourt.org/law/detail/1955/07/id/142.shtml. The Chinese Constitution has only been applied to interpret a case in two instances, and has subsequently disappeared from all other written judgments. *See* Qi Yuling Su Chen Xiaoqi Maoming Dingti Dao Luqu Qide Zhongzhuan Xuexiao Jiudu Qinfan Xingmingquan Shoujiaoyu De Quanli Sunhai Peichang An（齐玉苓诉陈晓琪冒名顶替到录取其的中专学校就读侵犯姓名权、受教育的权利损害赔偿案）[Qi Yuling v. Chen Xiaoqi], (Shandong High People's Ct., Aug. 23, 2001), CIL.C.21952 (EN) (PKUlaw), http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117462464&keyword= 齐 玉 苓 &EncodingName=&Search_Mode=accurate; Yuandong Xie (谢远东) *Shi Yuequan Haishi Hufa ZhongziGuansi De Yiwai Zhanfang* (是越权还是护法 种子官司的意外绽放) [The Analysis of Zhong Zi Case: Overstepping Authority or Protecting Law], (人民日报) PEOPLE'S DAILY, (Nov. 26, 2003), http://www.people.com.cn/GB/14576/14528/2213325.html.

[157] He Haibo, *supra* note 133, at 40-41.

or social rights, standing may be granted only if specifically authorized by statute.[158] For instance, Article 33 of the "Regulation of the People's Republic of China on the Disclosure of Government Information" authorizes courts to hear citizen requests for information based on the violation of a political right without having to inquire into the existence of a direct harm.[159] In 2008, municipal-level governments handled 683 petitions for administrative reconsideration of Open Government Information (OGI) requests.[160]

It is also important to note that Article 12 of the "Interpretation of Several Problems Referring to the Implementation of 'Administrative Procedure Law of the People's Republic of China'" further requires that the purported infringement *directly* affect a litigant's personal and property rights.[161] Thus, citizens may not question governmental expenditures through administrative litigation on the theory that they are taxpayers.[162] For instance, in 2006, a farmer sued Changning Municipal Financial Bureau for purchasing two unbudgeted cars.[163] The Changning Municipal Intermediate Court declined to receive the lawsuit on the basis that the act in question did not directly concern the plaintiff.[164]

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[158] *Id*.

[159] Article 33 of Regulation of the People's Republic of China on the Disclosure of Government Information states, "where any citizen, legal person or any other organization believes that a specific administrative act committed by an administrative organ in carrying out government information disclosure work has infringed upon his/its legal rights and interests, he/it may apply for administrative reconsideration or bring an administrative lawsuit according to law." Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli（中华人民共和国政府信息公开条例）[Regulation of the People's Republic of China on the Disclosure of Government Information] (promulgated by St. Council, Apr. 5, 2007, effective May 1, 2008), Art. 33, http://en.pkulaw.cn/display.aspx?cgid=90387&lib=law.

[160] Jamie P. Horsley, *Update on China's Open Government Information Regulations: Surprising Public Demand Yielding Some Positive Results*, FREEDOMINFO.ORG Apr. 23, 2010, http://www.law.yale.edu/documents/pdf/Intellectual_Life/CLOGI_Update_for_freedominfo_Horsley_article_4-6-10.pdf.

[161] Interpretation of Several Problems Referring to the Implementation of Administrative Procedure Law, *supra* note 139, at Art. 7.

[162] *See* Jiang Shilin Su Henan Sheng Changning Xian Caizhengju An (蒋石林诉湖南省常宁县财政局案) [Shilin Jiang v. Changning Municipal Financial Bureau]; *see also* Jiang Shilin Su Changning Shi Caizheng Ju Weifa Gouche An (蒋石林诉常宁市财政局违法购车案) [Shilin Jiang v. Changning Municipal Financial Bureau against unbudgeted cars' purchase], http://news.sina.com.cn/c/2006-12-29/183711917743.shtml (last visited Oct. 26, 2015); He Haibo, *supra* note 133, at 41.

[163] *Id.*

[164] *Id.*; *see also* Huang Yuanjian (黄元健), *Gongyi Susong Yu Caizheng Jiandu—Jiang Shilin Su Hunan Sheng Changzhou Shi Caizheng Ju An* (公益诉讼与财政监督—蒋石林诉湖南省常宁市财政局案) [*Public Interests Litigations and Financial Supervision: Jiang Shilin v. Changning Municipal Financial Bureau*], Beijing Yingxiang Lushi Shiwu Suo (北京市义派律师事务所）[BEIJING IMPACT LAW FIRM] (Apr. 4, 2007), http://www.bjimpact.org/Article.asp?ArticleID=280.

Third, the authority complained of must be susceptible to suit.[165] The "Interpretation of Several Problems Referring to the Implementation of 'Administrative Procedure Law of the People's Republic of China'" classifies all organizations exercising an administrative power delegated in accordance with the law as administrative organs.[166] In 1997, Chen Jianeng sued the Organization Department of Sichuan Province[167] after he had been reassigned by his employer, the Sichuan Petroleum Administration, as a result of the defendant's action.[168] The Supreme People's Court dismissed Chen's appeal on standing grounds.[169] Even though the Organization Department of Sichuan Province's decision would probably have been unreviewable as an internal administrative act, the court did not reach that question, basing its verdict on the definition of administrative organs.[170] The Organization Department of Sichuan Province is apparently not an organization legally vested with administrative power.[171] The cases also suggest that Chinese courts would exempt some forms of public associations

[165] Although the ALL does not explicitly qualify the right of action against administrative acts of the CCP, these cases rarely gain standing as a matter of practice. The Chinese State Council, as the highest administrative organ, possesses a unique legal status, distinctive from other administrative bodies, and is only rarely vulnerable to administrative litigation. Article XIV of Administrative Reconsideration Law of the People's Republic of China authorizes the State Council to function as a court of law and to render a final ruling on administrative reconsideration appeals. "The applicant who refuses to accept the administrative reconsideration decision may bring a suit before a people's court; or apply to the State Council for a ruling, and the State Council shall make a final ruling according to the provisions of this Law." Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa (2009 Xiuzheng) (中华人民共和国行政复议法（2009年修正）) [Administrative Reconsideration Law of the People's Republic of China (2009 Amendment)] (promulgated by Standing Committee of the National People's Congress, Aug. 27, 2009, effective Aug. 27, 2009) Art. 14, http://en.pkulaw.cn/display.aspx?cgid=167114&lib=law. To some extent, this prevented the Chinese State Council from being named as a defendant in an administrative suit. *See* He Haibo, *supra* note 133, at 40–41.

[166] Article 1 states that, "a citizen, a legal person or other organizations have the right to litigate a lawsuit to the people's courts once they consider that a concert administrative action by administrative organs or other organizations that exercise administrative power." Interpretation of Several Problems Referring to the Implementation of Administrative Procedure Law, *supra* note 137, at Art. 1.

[167] Because the People's Republic of China is a party-dominated state, the Organization Department has an enormous amount of control over personnel within the PRC. The Organization Department is indispensable to the CPC's power, and the key to its hold over personnel throughout every level of government and industry. It is one of the key agencies of the Central Committee, along with the Central Propaganda Department and International Liaison Department. *See* SICHUAN ZU GONG WANG (四川组工网）[ORGANIZATION DEPARTMENT OF SICHUAN], http://www.gcdr.gov.cn/info/ (last visited Nov. 24, 2014).

[168] Chen Jianeng Su Sichuan Shengwei Zuzhi Bu Qinquan Shangsu An (陈嘉能诉四川省委组织部侵权上诉案) [Jianeng Chen v. The Organization Ministry of Sichuan Province], (promulgated by Sup. People's Ct., 1997), http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=118324465&keyword=陈嘉能 &EncodingName=&Search_Mode=accurate; *see also* http://www.pkulaw.cn/case/pfnl_118324465.html?keywords=陈嘉能诉四川省委组织部&match=Exact.

[169] *Id.*

[170] *Id.*

[171] *Id.*

from review. For example, in *Changchun Yatai v. Chinese Football Council*, the Beijing Municipal Second Intermediate Court concluded that the plaintiff could not contest the decisions of a "self-regulating organization."[172] This is despite the fact that the Council discharges an administrative function under the "Law of the People's Republic of China on Physical Culture and Sports."[173]

The number of administrative cases handled by the Chinese courts has grown in the twenty-six years following the introduction of the ALL in 1989. Despite this, they make up only a minor fraction of the caseload of Chinese courts. Between 1998 and 2002, there were only 463,328 administrative cases, accounting for a mere 1.73% of all cases decided by the Chinese judiciary in these five years.[174] The three elements summarized below partially reflect the relatively narrow standing granted to plaintiffs under Chinese administrative law.

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[172] *See* Han Yong, *Anli Fenxi Changchuan Yatai Julebu Su Zhongguo Zuxie Xingzheng Chufa Budang* (案例分析 长春亚泰俱乐部诉中国足协行政处罚不当) [*The Case Analysis: Changchun Yatai v. Chinese Football Council*] (Jun. 2006), TIYU YU FALÜ JIUFEN ANLI PINGXI [SPORTS AND LAW: CASE ANALYSIS ON SPORTS DISPUTES], http://article.chinalawinfo.com/ArticleHtml/Article_33179.shtml (last visited Dec. 12, 2014).

[173] The State practices classified administration of sports competitions at different levels. Comprehensive national games shall be administered by the administrative department for physical culture and sports under the State Council or by the administrative department for physical culture and sports under the State Council in conjunction with other relevant organizations. National competition of an individual sport shall be administered by the national association of the said sport. Measures for the administration of local comprehensive sports games and local individual sport competitions shall be formulated by the local people's governments. *See* Zhongguo Renmin Gongheguo Tiyufa (中国人民共和国体育法) [Law of the People's Republic of China on Physical Culture and Sports] (promulgated by Standing Comm. of the Nat'l People's Cong., Aug. 29, 1995, effective Oct.1, 1995) (China), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=12674&keyword=体育法&EncodingName=&Search_Mode=accurate.

[174] Jiangxisheng Gaoji Renmin Fayuan Ketizu （江西省高级人民法院课题组）[The Research Group of Jiangxi Provincial Higher People's Court], *Xingzheng Susong Fa Shishi Wenti De Shizheng Fenxi Yu Sikao Jianlun Zhonghua Renmin Gongheguo Xingzheng Susongfa De Xiugai* （行政诉讼法实施问题的实证分析与思考：兼论《中华人民共和国行政诉讼法》的修改) [*The Empirical Study of the Implementation of "Administrative Procedure Law of the People's Republic of China"*], 5 J. L. APPLICATION 38, 39 (2004).

Table 4: Summary of China		
	China (Pre-2014)	China (Post-2014)
Interest	➢ Lawful right and interest ➢ Limited to person and property ➢ Direct harm, i.e. no interest as a taxpayer ➢ Other political rights as authorized by statute	➢ Includes open information, social security, and educational rights
Action	➢ Specific administrative acts ➢ Excludes internal or abstract administrative acts ➢ Leaves out administrative guidance	➢ Number of enumerated categories of cases increased from 8 to 12
Entity	➢ Organizations exercising an administrative power delegated by law	➢ Organization empowered by a law, regulation, or rule

The National People's Congress (NPC) has recently promulgated amendments to the ALL, effective May 1, 2015, that formally relax some of these standing requirements.[175] The rights that may be vindicated through administrative litigation are no longer restricted to those implicating persons or property and now include open information, social security, and educational rights.[176] Also, administrative acts taken by an organization empowered by a law, regulation, or rule may now be the subject of suit.[177] In addition, citizens challenging an administrative action may simultaneously file a request for review of the relevant regulation.[178] Finally, even though the types of reviewable administrative cases are defined through enumeration rather than exclusion, the listed categories have

[175] Zhonghua Renmin Gongheguo Xingzheng Susong Fa (2014 Xiuzheng) (中华人民共和国行政诉讼法 (2014 修正)) [Administrative Litigation Law of the People's Republic of China (2014 Amendment)] (promulgated by Nat'l Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015), Art. 7, http://en.pkulaw.cn/display.aspx?cgid=239820&lib=law [hereinafter Administrative Litigation Law].

[176] Ying Songnian, *Xingzheng Susong Fa Xiugai De Liangdian Yu Qidai* (《行政诉讼法》修改的亮点与期待) [The Insights and Prospective of the Amendment of Administrative Litigation Law], LEGAL DAILY, Jan. 28, 2015; *see also* Tian Yong su Beijing Keji Daxue (田永诉北京科技大学) [Tian Yong v Beijing Univ. of Sci. and Tech.], Sup. People's Ct. Judicial Comm., Guidance Case No. 38 (Sup. People's Ct. 1999) (protecting claimants' educational rights; decided in February 1999 and selected to be a Guiding Case on January 7, 2015), http://www.chinacourt.org/article/detail/2014/12/id/1524355.shtml.

[177] Administrative Litigation Law, *supra* note 175, at Art. 2 ("The term 'administrative action' as mentioned in the preceding paragraph includes administrative actions taken by an organization empowered by a law, regulation, or rule."). *See also* Tian Yong su Beijing Keji Daxue (田永诉北京科技大学) [Tian Yong v Beijing Univ. of Sci. and Tech.], Sup. People's Ct. Judicial Comm., Guidance Case No. 38 (Sup. People's Ct. 1999), http://www.chinacourt.org/article/detail/2014/12/id/1524355.shtml (confirming higher education institutes can be sued as defendants in administrative litigations; decided February 1999 and selected to be a Guiding Case on January 7, 2015).

[178] Administrative Litigation Law, *supra* note 175, at Art. 53 (this only applies to the regulations of a department of the State Council or by a local people's government or department).

expanded from eight[179] to twelve.[180] In April 2015, the Supreme People's Court issued a judicial interpretation to guide courts in applying the 2014 amendments.[181] For example, a court should accept a case if it is otherwise unable to come to a decision in seven days.[182] The document further suggests that courts give appropriate advice to organizations responsible for illegal "red-titled documents" and to apprise a supervising body, such as the local government or the administrative agency at the next level of government, of its recommendations.[183] While these changes are intended to encourage administrative litigation, it is still too early to assess their practical impact.

IV. COMPARISON OF SYSTEMS AND THE POLITICAL ECONOMY ANALYSIS

The scope of this paper has compelled us to paint in broad strokes, but looking to both the state of the law of standing as well as trends in each case study country, there are a few salient observations. It is probably fair to say that for much of the last decade, prior to the 2014 amendment to the ALL, administrative litigation standing was broader in Japan than in China. First, only specific administrative acts were reviewable in Chinese courts under the 1989 statute. In particular, non-binding decisions are not subject to suit. The doctrinal equivalent in Japan is that of *shobunsei*. However, *Takano*, decided in 2004, suggests that administrative guidance in Japan may no longer be as insulated from judicial review as it once was.[184] Second, Japanese law has gradually come to embrace a broader conception of "legal interest." As codified in the 2004 amendments to the ACLL and illustrated by the Odakyū Railroad Case, one may now sue on the basis of a legal

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[179] Administrative Procedure Law, *supra* note 128, at Art. 11.

[180] Administrative Litigation Law, *supra* note 175, at Art. 12. For example, decisions on expropriation or requisition or decisions on compensation for expropriation or requisition can be challenged in courts. *See* Xuan Yi Cheng Deng Su Zhejiang Sheng Quzhou Shi Guotu Ziyuan Ju (宣懿成等诉浙江省衢州市国土资源局) [Xuan Yi Cheng v. Quzhou City Land Res. Bureau], Sup. People's Ct. Judicial Comm., Guidance Case No. 38 (Sup. People's Ct. 2003), http://www.chinacourt.org/article/detail/2014/12/id/1524380.shtml, (holding that the administrative decision about the right to use a land was illegal; judgment made in August 2003 and selected to be a Guiding Case on December 25, 2014).

[181] Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Susong Fa" Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国行政诉讼法》若干问题的解释) [The Interpretation of Supreme People's Court on Several Problems Referring to the Implementation of "Administrative Procedure Law of the People's Republic of China"] (promulgated by Supreme People's Ct., Apr. 22, 2015, effective May 1, 2015), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=247453&EncodingName=.

[182] *Id.* at Art. 1.

[183] *Id.* at Art. 2, 20–21.

[184] Saikō Saibansho [Sup. Ct.] July 15, 2004, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1661 (Japan), http://www.courts.go.jp/app/hanrei_en/detail?id=760.

interest that is protected by laws and regulations *relevant* to the ones governing the administration disposition. The court not only has to consider the language of the statute, but also its overall "purport and purpose."[185] In contrast, the lawful interests that may form the basis for an administrative case in China must involve persons or property (unless special dispensation had been granted by legislative fiat).[186] Third, the Japanese ACLL recognizes a category of "public suits," or *minshū soshō*, that dispenses with subjective legal interest as a requirement for standing. The statutory availability of such suits has exposed the operational information and finances of local governments to citizen scrutiny. Although Chinese law has also dispensed with some of the elements of standing when it comes to OGI, taxpayers may not sue local authorities for restitution of misused public funds.

The comparison with Singapore is more challenging. There are no legal constraints on the type of injury that must be suffered for a complaint to be validly heard in Singapore, save that it be personal to the complainant. Furthermore, as laid down in *Public Service Commission v. Lai Swee Lin Linda*, the courts in Singapore utilize the nature test in addition to the source test to determine which bodies are subject to judicial review.[187] But the Singapore Parliament has never authorized freedom of information statutes or taxpayer suits. It is also clear that such cases would be rejected in the Singapore courts for want of standing, as demonstrated by *Jeyaretnam Kenneth Andrew v. Attorney-General*.[188] While the sufficient interest test ("*prima facie* case of reasonable suspicion") obliges the judge to reach the merits before ascertaining *locus standi*, precedent in this area of Singapore law is, unfortunately, sparse.[189] However, the Chief Justice's extra-judicial comments hint at the possibility of a stricter standard than that applied by the English courts. In the absence of well-developed case law in this common law jurisdiction, one can only hazard a guess that the legal barriers to standing are as imposing in Singapore as they are in China.

The previous observations juxtaposed the state of the law in each of the three countries' systems. However, it is also instructive to adopt a dynamic rather than static perspective. This approach looks at how the law has evolved in each of the countries studied. The literature reveals that

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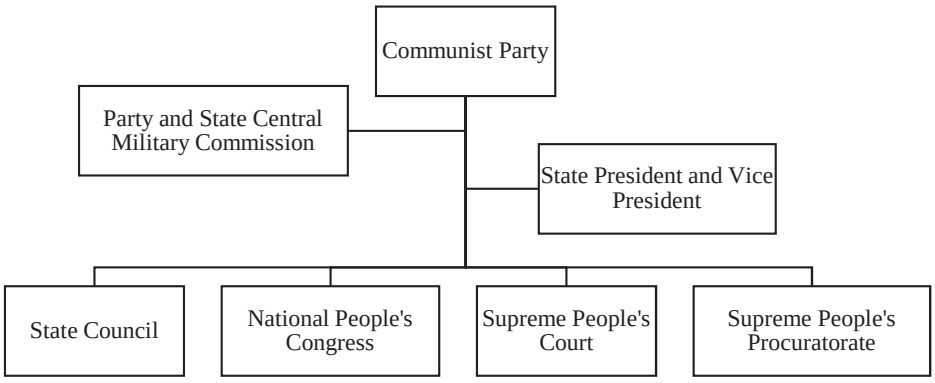
[185] Narufumi Kadomatsu, *supra* note 68 at 156. *See also* Yuichero Tsuji, *supra* note 70, at 354.
[186] Administrative Procedure Law, *supra* note 128.
[187] *See Public Service Commission v. Lai Swee Lin Linda* [2001] 1 SLR 133.
[188] *Jeyaretnam Kenneth Andrew v. Attorney-General* [2012] SGCH 2010.
[189] *Id.* at paras. 10–11.

Japan's standing requirements have experienced significant liberalization over the last decade. In China, very recent amendments to the ALL promise to subject a broader class of administrative conduct to judicial review. In contrast, Singapore administrative law has not moved in a similar direction and has generally remained static.

The question then is whether the rational choice tradition explains the differences over time between countries. We observe, first, that the executive and the legislature tend to be politically unified in one-party dominated states regardless of governmental structure. In Japan, the Prime Minister is the head of government, appointed from members of the bicameral Diet. Because he has to command the confidence of the House of Representatives, the Prime Minister usually belongs to the majority party. The same is true in Singapore, which inherited the U.K.'s Westminster model of parliamentary democracy. Although the "executive authority of Singapore" is vested in the President,[190] the Cabinet is tasked with "general direction and control of the Government."[191] The Prime Minister presides over the Cabinet and appoints its members.[192] Since independence in 1965, the Prime Minister of Singapore has always been a member of the ruling People's Action Party (PAP). In China, the Constitution describes the NPC as the "highest organ of state power," overseeing the State Council, the State Central Military Commission, the Supreme People's Court, and the Supreme People's Procuratorate.[193] Although there are formally eight other political parties that are nominally represented in the NPC, many see the legislature as little more than a rubber-stamp for national policy decisions taken by the Politburo Standing Committee (PSC) of the Chinese Communist Party (CCP).[194]

[190] Constitution of the Republic of Singapore (1999 Reprint) Art 23.
[191] *Id.* at Art 24.
[192] *Id*. at Art 28.
[193] XIANFA art. 57 (1982), http://en.pkulaw.cn/display.aspx?cgid=1457&lib=law.
[194] *See, e.g.*, HE WEIFANG, IN THE NAME OF JUSTICE: STRIVING FOR RULE OF LAW IN CHINA 129 (2012). *See also* Eric Ip, *Judicial Review in China: A Positive Political Economy Analysis*, 8 REV. L. & ECON. 331, 334 (2012).

Figure 4: China's Political Structure as Implemented[195]



A second factor that fades in importance in party-dominated states is the distinction between common and civil law institutions. It is said that common law judges, being further removed from the administrative arm of the state, tend to enjoy more freedom than civil law judges.[196] However, judicial actors in the countries we have selected tend to be reluctant to deviate from the preferences of the political elite. There is some empirical evidence supporting the assertion that Japanese judges who antagonized the government were penalized by being rotated to less prestigious positions.[197] In addition, it has been suggested that this internal reluctance to dabble in contrarian politics developed as a mechanism to preserve judiciary independence.[198] In Singapore, a common law jurisdiction, courts display a similar passivity when it comes to challenging the State. A number of commentators have noted that the judiciary adheres to a thin conception of rule of law,[199] a position induced by co-option and internalization of the

[195] *See, e.g.*, Zhu Weijing, *Charting Chinese Politics*, WORLD OF CHINESE (Nov. 29, 2013), http://www.theworldofchinese.com/2013/11/charting-chinese-politics/.

[196] *See, e.g.*, Garoupa & Mathews, *supra* note 2, at 12.

[197] Mark J. Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259, 278 (1997). *See also* Setsuo Miyazawa, *Administrative Control of Japanese Judges*, *in* LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263 (Philip S.C. Lewis ed., 1994).

[198] *See* Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT'L J. SOC. L. 303 (1995).

[199] A thin conception of the rule of law sees rule of law as being procedural in nature; there is rule of law if laws are properly enacted, not retroactive, etc. In contrast, a thick conception of the rule of law sees rule of law as having a substantive component such as limitations on the powers of the state vis-à-vis the individual.

ruling party's communitarian ideology.[200] In China, as previously recounted, the judiciary is formally subordinate to the legislature. The president of the Supreme People's Court presents a report to the Politburo Standing Committee of the NPC every year.[201] The Supreme People's Court's 2009 advice to lower courts to reject any case involving government-initiated demolition and relocation is further evidence of politics prevailing over law.[202] Thus, one should expect that in these countries, the reach of administrative law will be more or less confined to the limits imposed by the political leadership, sharpening the salience of PPT for administrative law.

There are, however, differences between Japan, Singapore, and China that could account for variation in how the classes of eligible plaintiffs in administrative cases are defined. First, although the Liberal Democratic Party (LDP) in Japan was reelected in every national election from 1955 to 1990, it has traditionally been, at least by some accounts, a highly factionalized unit.[203] The defection from the party ranks in the summer of 1993 dealt the LDP a blow from which it has yet to fully recover. A no-confidence vote in the lower house was followed by a reversal in the ensuing elections which saw the LDP lose its majority in the House of Representatives for the first time. While the LDP later restored its majority in the House of Representatives after the 2005 General Election, it was decisively routed in the 2009 House elections by the Democratic Party of Japan (DPJ). In short, by the mid-1990s the specter of electoral competition and defeat hung over the LDP. Conversely, there has been no such pressure in Singapore or China. Although the PAP in Singapore saw its share of the popular vote decline between the 2001 and 2006 Parliamentary Elections, and again in 2011, there has not been a genuine challenge to its position as

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[200] *See, e.g.*, Thio Li-ann, *Rule of Law within a Non-Liberal "Communitarian" Democracy: The Singapore Experience*, *in* ASIAN DISCOURSES OF RULE OF LAW 183 (Randall Peerenboom ed., 2004); Eugene K.B. Tan, *'WE' v. 'I': Communitarian Legalism in Singapore*, 4 AUSTL. J. ASIAN L. 1 (2002); Tey Tsun Hang, *Judicial Internalising of Singapore's Supreme Political Ideology*, 40 H.K.L.J. 293 (2010); Jothie Rajah, *Punishing Bodies, Securing the Nation: How Rule of Law can Legitimate the Urbane Authoritarian State*, 36 LAW & SOC. INQUIRY 945 (2011); Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73 (Tom Ginsburg & Tamir Moustafa eds., 2008); FRANCIS SEOW, BEYOND SUSPICION? THE SINGAPORE JUDICIARY XV–XX (2006).

[201] HE WEIFANG, *supra* note 194.

[202] *Id*.

[203] *See, e.g.*, MARK J. RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 59 (1993); BRADLEY M. RICHARDSON, JAPANESE DEMOCRACY: POWER, COORDINATION, AND PERFORMANCE 74 (1997).

the government party.[204] The position of the CCP in China has also not been meaningfully or realistically threatened.

There are two theoretical possibilities here. The first relies on the concept of zones of tolerance.[205] The rivalry within the LDP, as well as its subsequent failure to retain its majority in the House of Representatives, may have raised the transaction costs of disciplining an assertive judiciary and presented reform-minded judges with an opportunity for judicial lawmaking. The second, encountered earlier, is the idea that politicians use the judiciary as a form of insurance against electoral turnover. The heightened political uncertainty, especially after the splintering of the LDP, might have recommended such a move to risk-averse legislators. It thus seems as if the courts in Japan *should* have played a more active role in reviewing administrative action than in Singapore or China, and even more so in the recent decade. Although one cannot be confident in saying that it was easier to bring an administrative case in Japan than in Singapore or China before 1993, restrictions on standing under Japanese law have been gradually eroded over the last ten years.

However, whether political fragmentation is the genuine reason for this development may be disputed. The bureaucrats in Japan loom large in state affairs, leading some to wonder who actually governs the country.[206] In this vein, commentators on Japanese law have surmised that the shift in the legal landscape could be driven by politicians attempting to rein in the civil service.[207] For example, Hitoshi Ushijima, a professor of law at Chuo University, speculates that "the LDP, partly supported by the opposition JDP, has been trying to challenge the traditionally strong bureaucracy through administrative, regulatory, and judicial reforms, and producing administrative law-conscious lawyers."[208] The erosion of public trust in the

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[204] *See, e.g.*, Kenny Chee, *Not Ready to Lead for Now, Says Opposition*, ASIAONE NEWS (Mar. 24, 2011), http://news.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110324-269714.html.

[205] *See* Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001); *see also* Mate, *supra* note 9.

[206] *See, e.g.*, CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY: 1925–1975 320–24 (1982); KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER: PEOPLE AND POLITICS IN A STATELESS NATION 216–20 (1989); RAMSEYER & ROSENBLUTH, *supra* note 203, at 121.

[207] GOODMAN, *supra* note 37, at 462 (observing that "[t]here has been a drive for regulatory reform in Japan with emphasis on reducing the power of the bureaucracy.").

[208] HITOSHI USHIJIMA, *supra* note 68, at 88; *see* Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law*, *in* LAW IN JAPAN: A TURNING POINT 276, 294 (Daniel H. Foote ed., 2007) ("[T]he LDP itself also overcame its strong allergy to information disclosure once it had experienced a period as an opposition party. Through that experience, the LDP

bureaucracy after a series of scandals in the 1990s provided the opportune moment for politicians to seize the initiative.[209] However, this is unlikely to be the whole story since the case law had evolved even prior to the 2004 amendments to the Administrative Case Litigation Law.

The second source of variance between Japan, Singapore, and China may be found in the relationship between national and local governments. Singapore is an island country 274.1 square miles in size.[210] There are no local governments operating in the city-state. Although each constituency has its own town council, these organizations are headed by the local Member of Parliament (MP) and typically charged with managing the common areas of Housing Development Board estates. Japan, on the other hand, is organized into forty-seven administrative divisions. The constitution guarantees local self-government, and Article 93 provides for the establishment of "deliberative organs," further specifying that "chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities."[211] Article 95 also prohibits the Diet from enacting laws "applicable only to one local public entity . . . without the consent of the majority of voters of the local public entity concerned."[212] The national government may, however, assign functions to local governments for the implementation of national programs. It also exercises influence over local initiatives through the budget. The latter phenomenon is sardonically encapsulated in the phrase *san-wari jichi*, or "one-third autonomy," a reference to the percentage of local government revenue generated by local taxes.[213]

Similar to Japan, China is organized into thirty-four administrative regions, including twenty-three provinces, five municipal districts, four counties, and two special administrative regions.[214] Each division has its own people's government and congress that fall directly under the Chinese

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discovered that information disclosure would strengthen its position vis-à-vis bureaucrats, whether it was a ruling party or an opposition party.").

[209] *See, e.g.*, Velisarios Kattoulas, *Corruption Scandals Rack Tokyo's 'Iron Triangle': Struggle for Power in Japan*, N.Y. TIMES (Dec. 7, 1996), http://www.nytimes.com/1996/12/07/news/07iht-scandal.t.html; Cameron W. Barr, *Scandal Taints Japan's Once Pristine Bureaucracy*, THE CHRISTIAN SCI. MONITOR, Dec. 13, 1996, http://www.csmonitor.com/1996/1213/121396.intl.intl.4.html.

[210] This is slightly larger than San Francisco and smaller than New York City.

[211] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 93 (Japan).

[212] *Id.* art. 95.

[213] STEVEN R. REED, JAPANESE PREFECTURES AND POLICYMAKING 27 (1986).

[214] *See* ZHONGGUO XINGZHENG QUHUA WANG (中国行政区划网) [THE WEBSITE OF ADMINISTRATIVE DIVISION OF CHINA], http://www.xzqh.org.cn/ (last visited on Oct 26, 2015).

central government's authority.[215] Per Article 96 and Article 105 of the Chinese Constitution, "local people's congresses at various levels are local organs of state power."[216] The people's congresses of provinces and municipalities and their corresponding standing committees may adopt local regulations after reporting such regulations to the Standing Committee of the NPC for the record.[217] The Constitution also grants local governors great latitude in managing local affairs and implementing state policy. To contain the influence of local administrators, the Chinese national government forbids citizens from taking up positions of political leadership in their region of origin and limits the term of provincial leaders to five years. In contrast to the situation in Japan and China, the Singapore government does not shoulder the costs associated with having their policy objectives mediated or contradicted by the practices of local governing bodies. These disparities are reflected in each county's respective standing rules. In China, the central government and the CCP are insulated from judicial review as a matter of both law and practice—it is typically local administrators and bureaucrats who are vulnerable. These currents are also at work in Japan where the law has permitted certain forms of "public suits" against local governments.[218] Indeed, Ramseyer and Nakazato contend that the Japanese courts have been complicit in diluting the discretion of local governors, most of whom were not members of the long-ruling LDP.[219] There is no such dimension to Singapore administrative law.

V. ALTERNATIVE MONITORING MECHANISMS

Nevertheless, there is at least one other decision problem faced by political principals that is not adequately described by existing PPT models. Though it has not been fully theorized in the existing work on comparative

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[215] "People's congresses and people's governments are established in provinces, municipalities directly under the Central Government, counties, cities, municipal districts, townships, nationality townships, and towns. The organization of local people's congresses and local people's governments at various levels is prescribed by law. Organs of self-government are established in autonomous regions, autonomous prefectures and autonomous counties." XIANFA art. 95 (1982) (China), http://en.pkulaw.cn/display.aspx?cgid=1457&lib=law.

[216] *Id.* at art. 96 ("Local people's congresses at various levels are local organs of state power. Local people's congresses at and above the county level establish standing committees."); *id.* at art. 105 ("Local people's governments at various levels are the executive bodies of local organs of state power as well as the local organs of state administration at the corresponding levels.").

[217] *Id.* at art. 105 ("Governors, mayors and heads of counties, districts, townships and towns assume overall responsibility for local people's governments at various levels.").

[218] *See, e.g.*, John Marshall, *Credible Commitments: Taxpayer Suits and Freedom of Information in Japan*, 16, (unpublished paper presented at the 2001 Annual Meeting of the American Political Science Association), http://fs.huntingdon.edu/jlewis/FOIA/AsiaFOIA/MarshallJonAPSA01a.pdf.

[219] RAMSEYER & NAKAZATO, *supra* note 36, at 217–18.

administrative law, alternative monitoring mechanisms could substitute or supplement judicial review.

In Japan, the administrative counseling system "provides the opportunity for analyzing public complaints with a view towards improving the performance of administrative agencies"—it is a "link in the chain of administrative remedies available in Japan."[220] The Administrative Management Agency (AMA) was established in 1955 to receive public complaints about national public administration agencies. Despite the AMA's apparent independence, its high status in the Japanese government made it appear inaccessible to ordinary citizens. Therefore, in 1961, the government appointed 882 local administrative councilors to be stationed across the country. These councilors, though initially confined to relaying grievances to the Administrative Inspection Bureau of the AMA, were gradually permitted to participate in dispute resolution. For citizens, the dual advantages of the Bureau's administrative complaint investigations lie in its scope—it could handle cases involving any act of administrative agencies—and its speed. It is also procedurally less daunting than judicial solutions. In addition to having bureaus in the major cities, the AMA operates an exclusive hotline for members of the public to lodge complaints against administrative agencies. As a result, the annual number of cases filed with the AMA surged to almost 200,000 in the years preceding 1987.

In Singapore, the 1996 Wee Chong Jin Constitutional Commission recommended the establishment of an ombudsman to handle complaints against government agencies.[221] Parliament, however, rejected this proposal, preferring for disputes to be brought to the attention of MPs or the Feedback Unit. The Meet the People Session (MPS) is an avenue for ordinary citizens to appeal to their MPs for assistance. It is typically a weekly affair, held in the evening for residents in a particular MP's ward.[222] The complainant describes his or her situation to a petition-writer, who prepares a statement to be presented to the MP. The MP then hears the grievance in person before signing off on the drafted letter and delivering it to the relevant ministry or statutory boards.[223] Although civil servants are obliged to respond to

[220] Akira Osuka, *The "Ombudsman" in Japan*, 9 WASEDA BULL. COMP. L. 1, 2 (1990).

[221] Li-Ann Thio, *The Passage of a Generation*, *in* EVOLUTION OF A REVOLUTION 7, 37 (Thio Li-ann & Kevin Y.L. Tan eds., 2009).

[222] The material that follows draws on the experience of one of the authors who previously volunteered as a petition writer at MPS.

[223] Statutory boards are the Singapore equivalent of administrative agencies.

correspondence from MPs, they do not have to revise their initial policy or make an exception, and it is not unusual for a petition to be denied.

In China, the central government relies on "letters and visits," or *xinfang*, to collect public feedback and identify corrupt or disobedient local officials.[224] The *xinfang* process in China was originally established in 1951 pursuant to "The Decision of State Council Referring to Receive Letters and Visits of People."[225] It serves "as an alternative to formal legal channels for many citizens seeking to resolve their grievances."[226] *Xinfang* offices accept complaints, proposals, and opinions raised by citizens through letters, e-mails, telephone calls, or personal visits.[227] The significance of *xinfang* is reflected in the numbers.[228] From 1992 to 2004, the total amount of *xinfang* petitions in China increased by more than ten percent each year, reaching a peak of 13,736,000 in 2004.[229] 10,336,000 *xinfang* petitions were filed in 2009.[230]

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[224] Michael Palmer, *Controlling the State?: Mediation in Administrative Litigation in the People's Republic of China*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 165, 175 (2006); Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117, 120 (2000).

[225] Zhengwuyuan Guanyu Chuli Renmin Laixin he Jiejian Renmin Gongzuo de Jueding (政务院关于处理人民来信和接见人民工作的决定政务院关于处理人民来信和接见人民工作的决定) [The Decision of State Council Referring to Receive Letters and Visits of People] (promulgated by State Council, June 7, 1951, effective June 7, 1951) (China), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=27&keyword=关于处理人民来信&EncodingName=&Search_Mode=accurate.

[226] Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 120 (2006).

[227] Xinfang Tiaoli (信访条例) [Regulation on Complaint Letters and Visits] (promulgated by State Council, October 1, 2005, effective May 1, 2005), Art. 2 (China), http://en.pkulaw.cn/display.aspx?id=3920&lib=law&SearchKeyword=Regulation%20on%20Complaint%20Letters%20and%20Visits&SearchCKeyword=# ("The term 'complaint letters and visits' as mentioned in the present Regulation refers to the activities that a citizen, legal person or any other organization who, by way of letter, e-mail, telephone or visit, etc., reports facts, submits proposals or opinions, or files a complaint to the people's governments at various levels or working departments of the people's governments at or above the county level, which shall be dealt with by the relevant administrative organs according to law. A citizen, legal person or any other organization who, through any foresaid method, reports facts, submits proposals or opinions, or files a complaint shall be addressed as the complaint maker.").

[228] Minzner, *supra* note 226, at 105 ("According to the director of the national xinfang bureau, the State Bureau for Letters and Calls, letters and visits to Party and government xinfang bureaus at the county level and higher totaled 8,640,040 for the first nine months of 2002, corresponding with an annual rate of 11.5 million per year." (citation omitted)).

[229] Ma Huaide, *Yufang Huajie Shehui Maodun De Zhiben Zhice: Guifan Gongquanli* (预防化解社会矛盾的治本之策：规范公权力) [*The Strategy of Preventing and Resolving Social Conflicts: Regulating Public Power*], 2 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 45, 45 (2012).

[230] *Id*. (citing Zhang Enxi, *Guanyu Shehui Maodun Huajie De Sikao Yu Shijian* (关于社会矛盾化解的思考与实践) [*The Contemplation and Practice on Resolving Social Conflicts*], 1 BEIJING ZHENGFA NEIKAN (北京政法内参) [BEIJING INTERNAL REFERENCE OF POLITICS AND LAW] (2010)).

There are a number of reasons why Chinese citizens resort to *xinfang* for administrative disputes. First, judicial review is unreliable. Yu Jianrong, a law professor at Peking University, interviewed 632 *xinfang* rural petitioners filing complaints in Beijing in 2004. Of these petitioners, 401 had previously tried to pursue legal avenues for redress. Of the 401 petitioners, 172 did not manage to obtain a judicial hearing, 220 were unjustly denied relief, and nine were seeking to have favorable judicial decisions enforced.[231] Furthermore, in contrast to the standing requirements for administrative litigation, *xinfang* bureaus receive a broad range of petitions, including those not based on legal arguments. The administrative acts challenged through *xinfang* do not need to implicate the petitioners' personal and property rights. For example, the Discipline Inspection Bureau of Hunan reported that the complaints about "unfair and offensive conduct" made up twenty-five percent of all *xinfang* petitions in Hunan between 1995 and 1998.[232] In addition, the remedies available through *xinfang* are perceived to be effective when granted. This is because state and local agencies are more likely to follow the directions of their superiors in the governmental hierarchy than to obey a court order.[233]

However, petitioners visiting *xinfang* bureaus risk being physically intercepted by agents of local authorities, a phenomenon known as *jiefang*.[234] This tactic, justified by the purported need to suppress potential "mass incidents" and the political strategy of "buying stability," has restricted the access of aggrieved citizens to *xinfang* and prevented petitions from being heard by higher-level administrators.[235] Under the cover of "maintaining stability," *jiefang* has impeded petitioners attempting to contact the state *xinfang* bureau or even the government at the next level.[236] For

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[231] Yu Jianrong, *Zhongguo Xinfang Zhidu Pipan* (中国信访制度批判) [*The Criticism about Xinfang System in China*], 2 ZHONGGUO GAIGE (中国改革) [CHINA REFORM] 26, 27 (2005).

[232] Zhao Yansen, *Xinfang Jubaoliang de Bianhua yu Sikao* [*The Change and Analysis of the Total Amount of Xinfang Petitions*], 4 ZHONGGUO JIANCHA [SUPERVISION IN CHINA] 47, 47 (2000).

[233] Liu Renwen, *Zhongguo Nongmin Weihe Xin "Fang" Bu Xin "Fa"* [*Why the Chinese Trust Xinfang Rather than Law*], 14 ZHONGGUO XINWEN ZHOUKAN [CHINA NEWSWEEK] 87, 87 (2009). *See also* Minzner, *supra* note 226, at 124–129.

[234] Yongshun Cai, *Local Governments and the Suppression of Popular Resistance in China*. 193 CHINA Q., 24, 28–30 (2008).

[235] According to the research conducted by Lee and Zhang, many big cities, such as Beijing and Shenzhen, each district government spent millions of RMB annually as "stability maintenance fund" to hinder resistance and pursue the short-term stability effect. Ching Kwan Lee & Yonghong Zhang, *The Power of Instability: Unraveling the Microfoundations of Bargained Authoritarianism in China*. 118 AM. J. OF SOC. 1475, 1485 (2013).

[236] Yu Qifeng, Lun Xinfangren Hefa Quanyi de Baohu, Yi Beijing Anyuanding Jiefang Shijian Wei Shijiao, (论信访人合法权益的保护—以北京安元鼎截访事件为视角) [Protection of Petition Rights and Interests—From the View of Beijing Anyuanding Interceptor Event] 14–15 (2013) (unpublished M.A.

example, according to an investigation of several provinces in 2006, including Henan, Liaoning and Shandong, some grassroots organizations, and even local *xinfang* offices that did not fulfill their responsibilities to resolve petitions, spent a substantial amount of funds on arranging the interception of state *xinfang* petitioners.[237] Even though the Chinese central government has managed to constrain *jiefang*[238] and a few perpetrators of *jiefang* were punished by courts,[239] some local governors are still willing to risk punishment to avoid a blemish on their reputations that may cost them an opportunity for promotion.[240]

These examples demonstrate that courts are not the only means for principals to obtain information on the activity of their agents. Alternatives such as administrative counseling, MPS, or *xinfang* may be used in lieu of judicial review. The availability of multiple channels of supervision thus raises some interesting questions for PPT. In particular, non-judicial mechanisms and administrative law are not perfect substitutes. First, the quality and quantity of information collected differs. For instance, because lawsuits are generally expensive and time-consuming, they tend to involve administrative actions that have a significant financial, emotional, or symbolic impact on the complainant. In contrast, grievances filed under a less formal process might range from trivial to serious. Second, judicial resolution of an administrative dispute is public and could create precedent in common law jurisdictions. If the principal prefers fluid results to the

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Thesis) (on file with author), http://cdmd.cnki.com.cn/Article/CDMD-10423-1012504717.htm; Hou Meng, Jiefang zhong de "Heijianyu" Xianxiang (截访中的"黑监狱"现象) [The "Underground Jails" of Jiefang], 22 RENMIN LUNTAN [PEOPLE'S TRIB.] 28, 28–29 (2013).

[237] Xinfang Haishi Jiefang: Henan, Liaoning, Shandong Zhengzai Zouchu Kunhuo (信访还是截访：河南、辽宁、山东正在走出困惑) [Xinfang Or Jiefang: Henan, Liaoning and Shandong are Walking out of Confusing Zone], 3 LINGDAO JUECE XINXI [INFORMATION FOR DECIDERS MAGAZINE] 15 (2007).

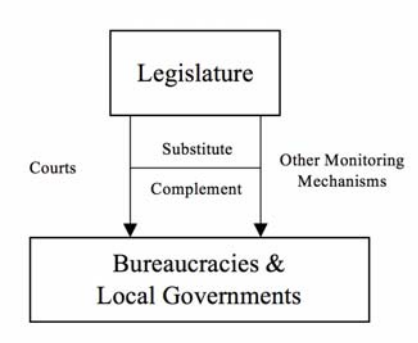
[238] Chief Observer of Information for Deciders Magazine, Zhongyang Jiaoting Jiefang, Kongfan "Xinfang Zhixu" Tiaokuan Ying Shanchu (中央叫停截访、控访"信访秩序"条款应删除) [Central Government Stop Jiefang, Kongfang, the Provision of "the Order of the Complaint" SHALL BE REMOVED], 25 LINGDAO JUECE XINXI [INFORMATION FOR DECIDERS MAGAZINE] 8, 8–9 (2007). *See also* Zhonggong Zhongyang, Guowuyuan Guanyu Jinyibu Jiaqiang Xinshiqi Xinfang Gongzuo de Yijian (中共中央、国务院关于进一步加强新时期信访工作的意见) [The Note of Central Government and State Council Regarding Further Progress on Xinfang at the New Stage] (promulgated by Cent. Gov't and State Council March 10, 2007, effective on March 10, 2007), art. 4 (China).

[239] *See* Wang Mengjie, *Chen Feifei, Shiming Zaijing Jiefang Zhe Bei Panxing: Shuishi Muhou Zhushi* (10 名在京截访者被判刑：谁是幕后主使) [*Ten Interceptors of Xinfang in Beijing Have been Charged: Who is Standing behind*], 4 BAOKAN HUICUI 32, 32, 33 (2013).

[240] Yu Qifeng, *supra* note 236, at 13–14; *see also*, Lu Meiyan, Youxian "Anyuanding" Shidui Guofa Minquan de Tiaozhan (又现"安元鼎"是对国法民权的挑战) [Reoccurrence of "Anyuanding" is Challenging Law and Citizens' Rights], Renmin Fayuan Bao [China Court], January 15, 2011, http://rmfyb.chinacourt.org/paper/html/2011-01/15/content_21493.htm?div=-1.

creation of legal rules, he or she should avoid excessive reliance on legal institutions.

Figure 6



Third, it is less politically costly to change the outcome of a more informal or bureaucratic style of adjudication than it is to change judicial dispositions. This is because ignoring or reversing a court decision risks undermining the stability provided by the larger judicial system. Finally, non-judicial actors typically do not enjoy the same institutional protections as judges and are vulnerable to capture by the agents being supervised[241] or by an incoming political administration.[242] Thus, principals should continue to rely on courts if bureaucrats are influential or if they expect a turn in the political tides.

VI. CONCLUSION

The recent literature has attempted to assess the plausibility of a PPT account of administrative law by applying and evaluating it in a comparative setting. Magill and Ortiz argue that a basic prediction of PPT (presidential systems ought to rely more heavily on judicial review) is contradicted by their findings about reasonable review doctrines in United States, the United Kingdom, France, and Germany. On the other hand, Garoupa and Mathews try to reconcile PPT with a number of case studies by introducing an

[241] The former might explain the recent trends in Chinese administrative law. In addition to broadening standing, the 2014 amendment grants intermediate people's courts jurisdiction over cases filed against a department of the State Council or by a people's government at or above the county level. It also authorizes courts to impose fines and criminal sanctions on the responsible official of the administrative agency. The political principals could have elected to encourage the use of *xinfang* at the expense of local courts. But the central government cannot always ensure access to the local *xinfang* bureau because of *jiefang*.

[242] The latter describes the case of Japan.

additional element into the analysis: the principal-agent relationship between the legislature and the judiciary.

This article compares the class of plaintiffs entitled to seek judicial review of administrative action in three party-dominated countries, Japan, Singapore, and China. These countries share similar cultural attitudes towards the use of law and have low-autonomy courts. From a cursory examination of each country's respective codes and case law, it is fair to conclude that before 2014, standing requirements were more stringent in China than in Japan. Singapore is a common law jurisdiction that considers questions of *locus standi* using the substantial interest test. In particular, the two-stage test articulated by *R. v. Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Business Ltd.* and seemingly accepted by Singapore courts necessitates a balancing between the merits of the case and the degree of a plaintiff's concern. This wrinkle makes any rough comparison between Singapore and the other two jurisdictions contestable and highly subjective. Looking across time, however, it is clear that the class of eligible plaintiffs has expanded in Japan, particularly over the last decade. In China, there had been intense discussion about the liberalization of standing that culminated in the 2014 amendments. There are still no signs of any pronounced push for relaxed standing rules in Singapore.

Table 5

	Local Governments	Political Turnover
Japan	Yes	Yes
China	Yes	No
Singapore	No	No

The analysis suggests that some of these differences are adequately captured by the political economy approach to administrative law. First, the LDP is factionalized and has experienced strong inter-party political competition since 1993, whereas the PAP and the CCP have comfortably retained power until today. The dilution of political power allows the judiciary more space to maneuver and increases the demand for insurance. Second, the national government in Japan, as well as China, has to govern through local authorities. The friction and devolution of power generates agency costs that courts could help mitigate.

The takeaway is that three factors may be relevant to a PPT account of comparative administrative law. First, local governments, in addition to administrative agencies, are sometimes also agents of the national government.[243] As such, administrative law can help principals regulate the acts of local governments and those of agencies. Second, political turnover may influence the shape of administrative law. For example, incumbent legislators may support judicial review if they know they might be out of power sometime in the future. The availability of courts as a forum for contesting administrative actions is useful for political interests that are not fully represented by the legislatures or executives. Third is the possibility of using monitoring mechanisms other than judicial review. The former and the latter are not perfect substitutes. Hence, the decision to rely on a non-judicial agent, a court, or both, depends on the transaction costs of overriding a judicial decision, the quantity and quality of information desired, and, once again, political turnover. If there is political turnover, judicial review by independent courts might be favored over other mechanisms that are controlled by the executives or legislatures.

In conclusion, some of the differences in standing doctrine observed between Japan, China, and Singapore are adequately captured by the PPT approach to administrative law. However, there is a possibility that the theory might not always generate clear predictions for comparative administrative law. This is because the availability of non-judicial mechanisms for monitoring agent conduct introduces a new dimension into the analysis that has not been taken in account by Magill and Ortiz or Garoupa and Mathews. PPT must be supplemented by research into the choice of monitoring agents and the allocation of power between them.

[243] This is not true of the United States. The system of dual sovereignty and the nondelegation doctrine severely constrain the federal government's authority over state governments. *See* New York v. United States, 505 U.S.144 (1992); Printz v. United States, 521 U.S. 898 (1997).