

# **Administrative Law and the Judicial Control of Agents in Authoritarian Regimes**

Tom Ginsburg, University of Chicago Law School

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Authoritarian regimes, like all governments, face the need to control lower level officials who work for the regime. But authoritarian and democratic governments differ in the sets of tools and constraints they bring to the problem, and even within the category of authoritarian governments there are substantial differences in regime capabilities in this regard. This chapter examines the causes and consequences of a decision by an authoritarian government to turn to administrative law as a tool for monitoring government officials.

Administrative law is a notoriously fluid area of law, in which national regimes vary, and there is substantial divergence even over the conceptual scope of the field, much more so than, say, in corporate law or tort law. Part of the confusion comes from the fact that administrative law regimes address three different but fundamental political problems. The first is the problem of coordination among the large number of governmental actors that compose and serve the regime. This problem is addressed by the formal conception of administrative law as

encompassing the organization of government; that is, the organic acts establishing and empowering government agencies. This was the definition of administrative law in the former Soviet Union, for example. Administrative law in this conception was not at all about constraint of government but about empowerment of government within a framework of legality, and ensuring that the agency has been properly granted powers from the lawmaker. By defining the scope of authority, the law resolves potential coordination problems among governmental actors.

A separate function of administrative law in some regimes is social control. In the socialist legal systems, administrative law included in its scope law enforced by administrative authorities rather than by judicial authorities. In China today, for example, there are a wide range of violations subject to administrative punishments from police or executive authorities without judicial supervision (Biddulph 2004; Peerenboom 2004a). Administrative law statutes contain the substantive rules as well as the procedures for punishment, which can include significant periods of detention of the type normally considered criminal in Western conceptual architecture. In practice, “administrative” punishments are implemented by the police. This type of scheme really reflects the inability or unwillingness of the regime to delegate crime control functions to the judicial system, which may lack capacity to achieve the crucial core task of social control.

In this chapter, I focus on the third political function of administrative law regimes, namely the resolution of principal-agent problems (McCubbins, Noll and Weingast 1987; McNollgast 1998, 1999). In the Western legal tradition,

administrative law concerns the rules for controlling government action, for the benefit of both the government and the citizens. From the government point of view, the problem can be understood as one in which a principal (the core of the regime, however it is composed) seeks to control agents. All rulers have limited physical and organizational capacity to govern by themselves. Government thus requires the delegation of certain tasks to administrative agents, who have the expertise and skill to accomplish desired ends. The agents' specialized knowledge gives them an informational advantage over their principals, which the agents can exploit to pursue different ends and strategies than desired by the principal. This is the principal-agent problem, and it is one that is ubiquitous in modern administration. To resolve the problem and prevent agency slack, all rulers need mechanisms to monitor agents' performance and to discipline agents who do not obey instructions.

Administrative litigation can help resolve these problems. As is described in more detail later, a lawsuit by an aggrieved citizen challenging administrative action serves the important function of bringing instances of potential agency slack to the attention of the rulers. The courts thus function to a certain degree as a second agent to watch the first. Being a court, of course, requires a commitment to certain institutional structures and practices, which sometimes may create new types of challenges for rulers; indeed, sometimes rulers will lose on particular policy matters to achieve the broader goal of controlling their agents. We should thus not expect that every ruler will adopt an administrative law regime of this type, designed to control government action on behalf of the rulers and the citizenry.

The scope of the agency problem and the tools available to rulers may vary across time, space, and type of organization of the regime itself. This sets up a problem of institutional choice for rulers, of how to choose the most effective mechanism or combination of mechanisms to resolve the particular agency problems they face. The first part of this chapter considers some of the factors that may affect this choice.

## **A-Head** THREE DEVICES TO SOLVE AGENCY PROBLEMS

I conceptualize three categories of mechanisms that rulers can choose from to reduce agency costs (Ginsburg 2002): ideology, hierarchy, and third-party monitoring. As with any typology, there are shades of gray in between the categories. Nevertheless I find it a useful framework for categorizing regimes as well as for providing some insight into the changing pressures for judicialization of administrative law.

### **B-Head** Internalization and Ideology

Perhaps the most desirable method of reducing agency costs from the perspective of the principal is to convince the agent to internalize the preferences of the principal. Perfect internalization of the preferences of the principal eliminates the need for monitoring and enforcement. Internalization can occur through professional indoctrination and training or through promulgation of a substantive political ideology that commands the loyalty of the agent. Leninist systems, for example, relied on a mix of internalized ideology and externally imposed terror to keep their

agents in line, although the Chinese variant of that ideology has not seemed to prevent extensive corruption and severe agency problems (Root 1996). The Chinese Communist Party's conceptual contortions around the ideal of a "socialist market economy" illustrate the lengths that regimes will go to maintain ideological cohesion, which at least in part is designed to minimize agency costs.

It would be a mistake, however, to think that ideologies are the exclusive prerogative of socialist or authoritarian regimes. Internalization can also involve procedural rather than substantive values, so that the agent internalizes a way of acting that will serve the interests of the principal. For example, by requiring that all senior civil servants be trained in law (formerly a legal requirement in Germany and still largely true in Japan), rulers might discourage their agents from departing from the text of statutes. Legal education that emphasizes fidelity to text serves the interest of the coalitions that enact statutes. Indeed scholars have often noted the compatibility of legal positivism with authoritarian rule (Dyzenhaus 1991).<sup>1</sup> The notion that law should serve as the faithful agent of the "political" sphere is a form of ideology that can serve to uphold whatever government is in power.

All modern political systems utilize indoctrination through legal education. Educational requirements also help the principal select among potential agents who are competing for employment. By requiring potential agents to undergo costly training *before* selection, the principal allows the agents to signal that they have internalized the values of the principal. Those potential agents who do not share the values of the principal may pursue other careers rather than undertake the training.

Furthermore, preselection training reduces the need for postselection indoctrination, the cost of which must be borne directly by the principal. Nevertheless, highly ideological authoritarian systems tend to utilize postselection training, such as the system of Central Political Schools (CPS) found in China and other Communist countries. Indeed, China is currently expanding CPS training to county-level bureaucrats (Whiting 2006: 16).

It seems quite likely that democracies, with their structural commitments to pluralism, have a more difficult time producing substantive ideologies of the power of, say, Leninism. We periodically hear of the end of ideology (Bell 2000), but in an era of new, rising challenges to democracy, it is clear that these eulogies only refer to the industrialized West. One therefore might think that the internalization strategy is to be preferred by authoritarian regimes, and to be avoided by democracies. Even for authoritarians, successful internalization is difficult to observe directly. Any system of governance over a certain scale must therefore utilize other mechanisms as well.

## **B-Head** Hierarchy and Second-Party Supervision

By hierarchy, I have in mind a decision by the principal to monitor the agent directly. Rulers may be able to influence bureaucratic agents, for example, through direct manipulation of incentive structures. As mentioned earlier, agents compete against other potential agents to be hired; once hired they compete to advance. By rewarding loyal agents and punishing disloyal agents in career advancement and retirement decisions, rulers provide bureaucrats with an incentive to perform. As has been

observed since Weber's classic work (1946), hierarchical structures help reduce monitoring costs, as more senior agents help monitor and discipline junior ones.

Rulers can also manipulate the incentive structure of the bureaucracy as a whole. They can, for example, reduce the budget of an agency; impose process costs such as performance reviews, which utilize scarce staff time; and force the agency to promulgate internal rules that constrain discretion. They can create "internal affairs bureaus," which are essentially external monitors within the agent itself. They can create multiple agencies with overlapping jurisdictions that then compete for budget and authority (McNollgast 1998: 51; Rose-Ackerman 1995). When there are overlapping authorities, agents can monitor each other and prevent any one agent from becoming so powerful as to displace the principal.

Hierarchical control requires monitoring, and this can involve the creation of a specialized agent whose exclusive task is to seek out instances of agent malfeasance for punishment. The imperial Chinese Censorate is one such example, as is its successor, the Control Yuan of the Republic of China.<sup>2</sup> Similarly the Chinese Communist Party relies on a set of institutions to structure incentives for its cadres. For example, its Organization Department provides evaluation criteria for local party secretaries based on performance targets, and these have been adjusted over time (Whiting 2004, 2006).<sup>3</sup> An array of other mechanisms, including horizontal evaluation through so-called democratic appraisal of other colleagues, involve monitoring of the bureaucracy by itself. And both the party and government have

internal monitors, the Central Discipline Inspection Commission and the Ministry of Supervision, respectively (Whiting 2006: 19–21).

Socialist legal systems featured a distinctive form of administrative legality (though not formally identified as such) that essentially relied on this strategy of hierarchical supervision. That was the so-called function of general supervision by the Procuracy. The institution originates in imperial Russia, when Peter the Great needed to improve the efficiency of government and tax collection (Mikhailovskaya 1999), and it eventually became quite powerful, known as “the eyes of the ruler.” Under the concept of general supervision, maintained today in Russia, China, and some of the postsocialist republics, the prosecutor is empowered not just to serve as an agent for the suppression of crime, but as a supervisor of legality by all other government agents as well. This puts the procurator at a level equal to or superior to judges, and empowers it to take an active role in what would conventionally be characterized as civil or administrative law as well as criminal law.

The procuracy has a bad name in the West because of its association with Stalinism. Viewing the matter from a positive rather than normative perspective, general supervision is an undeniably effective technique for reducing agency costs.

In terms of the distinction between authoritarian and democratic regimes, a key factor is the time horizon of the ruler. Hierarchical mechanisms of control will be easier to undertake for a ruling party with a longer time horizon than for a party with a short time horizon. If bureaucrats’ time horizons are longer than the expected period of rule by the political principal, bureaucrats may not find rulers’ threats of



career punishment to be credible. If the punished bureaucrat anticipates that a new ruler will come to power with preferences that align more closely with his own, he may actually reap long-term gains for being disloyal to the present regime (Helmke 2005). Bureaucrats can also exploit their informational advantages to create delay, waiting until a new political principal comes into office. Authoritarian rulers *may* have longer time horizons than those associated with democracy because of the institutionalized turnover in power. This is especially true for party-based authoritarian regimes, and may be less true of military dictators.

Another important distinction between authoritarians and democratic regimes is the type of sanctions they can impose on wayward agents. In a democracy, a corrupt or politically unreliable agent can be fired or, in extreme cases, jailed in relatively good conditions. The sanctions available to authoritarians are far more severe. Thus hierarchy, like ideology, may be preferred by authoritarians.

## **B-Head** Judicial Control and Third-Party Supervision

Judicially supervised administrative procedures, such as a right to a hearing, notice requirements, and a right to a statement of reasons for a decision, are a third mechanism for controlling agency costs. By creating a judicially enforceable procedural right, rulers decentralize the monitoring function to their constituents, who can bring suits to inform rulers of bureaucratic failure to follow instructions (McCubbins and Schwartz 1984). Rulers also create a mechanism to discipline the agents and can use the courts as a quality-control system in judging whether the

monitors' claims have merit. Although administrative procedures may be accompanied by an ideology of public accountability, their political function is primarily one of control on behalf of rulers (Bishop 1990, 1998; McCubbins, Noll, and Weingast 1987, 1989).

The distinctive feature in judicial supervision is that it relies on the logic of what McCubbins and Schwartz (1984) call fire alarms. The dispute resolution structure of courts is one in which cases are brought from outside – courts are not typically equipped to proactively identify violations. They are thus truly fire alarms rather than police patrols. The institutional structure of courts as mechanisms for channeling decentralized sources of information, for which the costs are paid by private litigants, shapes this mode of agency control.

Of course, courts are not the only type of fire alarm mechanism available to rulers. The PRC, for example, has maintained a structure for citizen complaints, the Letters and Visits Office, at all five levels of the Chinese government hierarchy (Leuhrmann 2003). Similarly, the Confucian tradition featured a gong whereby citizens could raise complaints before the administration (Choi 2005).

The Scandinavian countries have the additional device of the ombudsman. The ombudsman is a special government officer whose only job is to protect citizens' rights. He or she can intervene with the bureaucracy and in some countries bring court cases to force the government to take certain actions. Unlike the procurator, the ombudsman is reactive, relying on the citizenry to bring cases to his or her attention. This model has also been very influential abroad, but is not typically desired by

authoritarian regimes. It is more designed for human rights protection than for ensuring the routine use of administrative procedures. Ombudsmen's legal powers vary across regimes, but generally rely on publicity, which in turn relies on a media independent enough to publicize instances of administrative and political malfeasance.

An additional design choice is the level of specialization, such as may be found in a designated administrative court or even subject-specific monitors. Specialization can improve the quality of monitoring, though it might increase agency costs if judges are themselves "captured" by the technical discourse of the bureaucrats. The range of mechanisms can be arrayed in the following two by two figure (Figure 2.1), in which the top row corresponds to certain types of hierarchical controls and the lower row corresponds to varieties of judicial control that rely on third-party monitoring.

**Insert Figure 2.1 about here**

Whereas agents who have internalized the principal's preferences are self-monitoring, and hierarchical supervision involves second-party monitoring and discipline by the principal, administrative law requires passive third parties to monitor and discipline administrative agents. It is therefore the most institutionally complex of the three mechanisms (as well as the last to develop historically). Most systems of administration utilize a combination of the three mechanisms, and the next section examines some considerations that influence the particular choice.

## A-Head WHY ADMINISTRATIVE LAW? COMPARATIVE

### INSTITUTIONAL CHOICE

Under what conditions will political principals rely on third-party, legal mechanisms for supervising agents? As a mechanism of controlling agency costs, judicially enforced administrative law has costs as well as benefits. Extensive administrative procedures entail costs in the form of slower, less flexible administration. In addition, generalized administrative procedures carry some risk for rulers. As Morgan (2006: 220) notes, administrative law is a

ext contingent opportunity structure – it shapes who wins and who loses but not necessarily in predictable ways. The outcomes that flow from the application of administrative law (or law-like) doctrines to particular situations can in some circumstances bolster the powerful, in others they provide openings for the disempowered or more vulnerable.

By their nature, procedural rights may extend to rulers' opponents as well as their supporters, and so may lead to policy losses. Rulers can try to tailor the procedures so as to limit access by opponents, but nevertheless will likely be faced with some losses caused by opposition lawsuits. There are also agency problems associated with the use of third-party monitors such as judges. In many systems the factors that give rise to judicial agency costs are likely to be the same as those that produce bureaucratic agency costs. The extent of judicial agency problems will

depend on the mechanisms available to rulers for controlling judges, which also include hierarchy and internalization. For example, professional norms of fidelity to law function as an internalized ideology, reducing the agency costs of judicial monitoring. Hierarchical structures within the judiciary are important modalities of control as well. Civil law judges, for example, are typically appointed at a young age and serve in hierarchical structures much like the bureaucrats themselves.

Whether or not rulers want to adopt a strong administrative law regime depends in part on the other mechanisms available for controlling bureaucrats, and in part on rulers' perceptions of judicial agency costs. If rulers believe they can control bureaucrats with other mechanisms, such as indoctrination or control over careers, a system of judicially enforceable administrative law is undesirable.

There may, of course, be exogenous factors that exacerbate agency problems in particular settings. One of the most important may be economic and regulatory complexity. As economies become more complex, they are less amenable to central control and require more complicated and flexible regulatory schemes. This means empowering regulatory agents relative to political principals. In contrast, regimes of state ownership essentially utilize hierarchical control over the agents to direct the economy. We might thus expect a secular trend toward judicialization simply because of increasingly complex regulation, and a particular shift in economies formerly characterized by state ownership.

We can conceptualize the decision about the mix of judicial monitoring and hierarchical controls in simple economic terms. Rulers will evaluate the benefits of

judicially monitored administrative proceduralization and will choose a level of procedural constraint where marginal costs are equal to marginal benefits in agency cost reduction. To do so, they need to consider not only “pure” bureaucratic agency costs but also process costs that come in the form of slower bureaucracy. The former decline with proceduralization, while the latter rise. Furthermore, the political principals must also consider agency costs associated with a third-party monitor, reflected in the proverbial problem of “who guards the guardians” (Shapiro 1986). Choosing the level of proceduralization that minimizes the sum of these costs will set the “price” of the legal solution. Political principals will then evaluate this price against hierarchical and ideological alternatives to choose an agency cost-reduction strategy. Since the costs of monitoring and suing the government under administrative law are borne by private litigants, rulers may be liberal in granting procedural rights.

The relative cost of administrative law as opposed to hierarchy and internalization depends in part on the structure of politics itself. For example, strong political parties help political leaders because they provide a group of committed persons who can assist in the monitoring and discipline of bureaucrats. They also can provide qualified and motivated personnel to staff the bureaucracy. Political parties utilize internalization and hierarchy to help reduce administrative agency costs.

In democracies, principals who govern for an extended period have less need to rely on independent courts as monitors. A disciplined political party that is electorally secure, for example, can easily utilize first- and second-party solutions to

the problem of agency cost. Where parties are weak, however, they may want to use courts to protect their policy bargain from repeal by later coalitions because they anticipate electoral loss (Cooter and Ginsburg 1996). Furthermore, weaker and more diffuse parties will be less able to motivate agents ideologically and discipline them through hierarchical mechanisms.

My main claim is that administrative procedures are one mechanism for controlling agency problems. They feature some distinct disadvantages relative to internalization and hierarchy for an authoritarian regime, namely the possibility of agency costs in the monitor and, more problematically, the open nature of procedural rules, which means that regime opponents may be able to use the mechanisms in ways that are not desirable. Furthermore, the availability of severe punishments for wayward agents under dictatorship, where such niceties as procedural rights for civil servants may be minimal, may bias authoritarians away from judicialized administrative law.

Still under some circumstances, shifts in cost structures among the available substitutes may generate pressures for an administrative procedures regime. If hierarchy or internalization becomes less effective, either because of exogenous reasons or because of factors internal to the regime, we should see greater legal proceduralization. Conversely, if hierarchy or internalization becomes cheaper, we should see less proceduralization. The level of administrative proceduralization will thus reflect the following factors: the severity of the agency cost problem; the process costs of proceduralization, such as slower administration; the costs associated with

third-party monitors; and the availability of lower cost mechanisms to reduce agency costs, such as internalization and hierarchy.

## A-Head AN ILLUSTRATION: THE CASE OF CHINA AND THE SHIFT FROM HIERARCHY TO ADMINISTRATIVE LAW

The theory can also be illustrated by examining administrative litigation in China. China adopted an Administrative Litigation Law (ALL) in 1989, replacing a transitional regime first adopted in 1982 (Pei 1997; Wang 1998; see Landry, Chapter 8). Prior to the passage of this law, citizens' rights of appeal against illegal administrative acts were extremely limited, despite the presence of constitutional guarantees providing for such rights. The new law expanded appeals both within the administration and to the judiciary. This law has been used to generate thousands of administrative complaints for the courts. China's citizens have made use of the system with increasing frequency, with rates increasing more than 20 percent a year throughout the 1990s, though analysts note that the law did not extend to cover rulemaking activities nor, of course, to decisions of the Communist Party. Still, this rate of litigation growth outpaced economic disputing even in the red-hot economy (Clarke, Murrell, and Whiting 2006: 14, 41).



The caseload seems to now be stable at roughly 100,000 cases per year, with a typical “success rate” for plaintiffs of around 15–20 percent (Mahboubi 2005: 4). Virtually every government office has been subject to some suit, save the State Council itself. In addition, accompanying the new procedural mechanisms have been institutional reforms to support the shift toward the courts. Each judicial district now has a division for administrative cases, and government offices have established offices for monitoring compliance with the new legal framework (Mahboubi 2005: 2).

Why did China formalize administrative procedures and facilitate review by courts? Unlike countries in Eastern Europe, China did not experience a change in political structure during the 1980s, as the Communist Party remained the sole legitimate political party. However, the available modalities of controlling agents changed. In particular, with the ascent of Deng Xiaoping, China ended a period where ideology was the primary mechanism for internal control of agents. Indeed, many of the decision makers in the early Deng era had themselves been victims of ideological zealotry in the Cultural Revolution, and quite self-consciously sought to provide a sounder institutional basis for governance. China’s ideological drift is well documented, and continues to be reflected in euphemisms, such as the “Three Represents,” that help provide an increasingly thin “socialist” ideological cover for a market economy with a large state sector.

The decline of ideology paralleled an increased reliance on decentralization and deregulation, which reduced the possibility of direct hierarchical control and

increased the discretion of lower officials (Shirk 1993; Wang 1998:253–58; but see Tsui and Wang 2004). Local networks of entrepreneurs and party officials collaborated to enhance local economies. In doing so, however, they undermined the party hierarchy that might have otherwise served as an effective means of controlling bureaucratic agents.

Regulatory complexity is also a background factor. As China's market economy developed, the traditional mechanisms of command and control over the economy were less available. A market economy requires a regulatory approach, which in turn depends on complex flows of information between government and the governed. The limited ability of any party structure, even one as elaborate as the Chinese Communist Party, to internalize all the expertise required seems to necessitate enhanced delegation.

We have observed, therefore, a shift toward external forms of monitoring (as well as intensification of the internal forms of party control described earlier.) Multiple monitoring strategies are necessary in an environment wherein agency costs are rampant. The regime relies on a mix of second- and third-party monitoring, reflecting not only the long-term time horizon of the Communist Party but also its increasing need for monitoring mechanisms. Formalizing appeals can be seen as devices that empower citizens to monitor misbehavior by the Communist Party's agents in the government. Some third-party monitoring is acceptable because courts are not yet independent of Communist Party influence in administrative matters. Consistent with the theory, it is generally understood that administrative law in China

is used to constrain low officials but not high officials (Jiang 1998). Predictably for a one-party state, there has not been any move to formalize public participation in the rulemaking process.

Scholarly analysis of the Administrative Litigation Law (ALL) ranges from quite optimistic to more pessimistic about its real impact (Lubman 1999; Mahboubi 2005). In my view, there is at least some evidence that the availability of these mechanisms has resulted in particular agencies modifying their behavior. Creative lawyers who are bent on using the administrative litigation regime to constrain the state have been able to do so. In part this is because of the open nature of the legal process, and the availability of procedural mechanisms to any member of the public with standing. In addition, the possibility of shifting the burden of proof under the Administrative Litigation Law means that activists can impose costs on the state.

Furthermore, a sophisticated understanding of the role of law in social change would acknowledge that the impact of the law is not to be found merely in success rates. O'Brien and Li (2006), in their recent account of "rightful resistance" in China, emphasize how administrative litigation is one among many channels used by citizens to raise awareness of abusive policies.<sup>4</sup> Even if unsuccessful in court, administrative litigation can raise attention in the media and help generate internal pressures in the government for policy change. Beyond its impact on policies, the use of administrative litigation as a form of "rightful resistance" has led many "to reconsider their relationship to authority, while posing new questions, encouraging

innovative tactics, and spurring thoughts about political change” (O’Brien and Li, 2006: 103).

In one example, a group of law professors from Sichuan used the administrative litigation process to bring attention to an issue of great concern to them, gender discrimination in employment (He 2006). There is no general law prohibiting gender discrimination in China, and private advertisements in the labor market frequently make references to gender, age, physical appearance, and height. The law professors sought to change the norms regarding discrimination in China. Unable to sue private employers, they sued a state agency for gender discrimination, based on a provision of the Chinese Constitution.

As any lawyer in China knows, the Chinese Constitution is not judicially enforceable. There was thus little chance for the lawsuit to succeed, and it failed on the merits. However, the lawsuit was successful in changing internal policy at the Central Bank of China, the agency that was sued. The law professors had combined the lawsuit with an extensive strategy of media awareness and public education. This is one of many examples in which sophisticated social activists use the courts to try to influence norms, independent of the particular details of the case at hand. Other examples of impact litigation have included the attempt by lawyers to have the National People’s Congress (NPC) repeal the system of “custody and repatriation,” following the death of a young man in police administrative detention (Hand 2006). Though not filed under the ALL, the suit challenged administrative regulations as exceeding limits on power specified in the Chinese Constitution. While the NPC did

not provide the legal relief desired (in part for fear of setting a precedent for constitutional litigation), the system was reformed in response to the challenge.

The Chinese Communist Party did not adopt the Administrative Litigation Law to undermine its own power. Instead, it did so to extend its power and legitimacy. The party gains control over potentially wayward bureaucrats but also gives up some control over the direction of social and economic change in the society. It seems to have found the bargain a successful one. This is all the more remarkable given that the Chinese Communist Party has a long-term horizon and is quite disciplined. But the unique problems of scale and complexity of governance in post-Mao China, and the distrust of ideological solutions, have rendered administrative law quite attractive and perhaps necessary. At the same time, the hierarchy solution continues to be utilized, as China seeks to reform the system of civil service recruitment and control<sup>5</sup> and promote internal review of decisions within the bureaucracy.<sup>6</sup>

What if administrative procedures regime become costly relative to other mechanisms of control? Administrative procedures regimes do have a built-in mechanism for disuse – namely, tighter control over courts. Should courts become too activist in challenging core interests of the regime, politicians can shift to greater reliance on hierarchical mechanisms by simply rationing the supply of administrative relief available through courts. This process is easier for regimes that are not democratic, but it can also occur in countries such as the United States (McNollgast 1999). Politicians can change the structure of review or influence judicial selection to

ensure more favorable outcomes. In such circumstances the extent of formal proceduralization may not capture actual incentives to litigate, which depend on the practical ability of courts to provide effective relief.

It is probable, of course, that principal-agent problems are more severe in a democracy than in a dictatorship because civil servants in democracies have certain rights preventing arbitrary dismissal. Democracies also tend to proscribe the use of violence in punishing malfeasance, so the relative costs of using coercion are higher. In other words, the relative price of a coercive substitute for administrative law may be lower under dictatorship than under democracy, so administrative law is likely to become more attractive with democratization. However, there is a corollary defect in terms of information generation. The usual problems of obtaining high-quality information on which to base governmental decisions are more severe when government agents themselves are afraid of the consequences of revealing information. Authoritarian systems of a more totalitarian bent may find that governing by terror means governing in the complete absence of information (as recent accounts of the Khmer Rouge regime seem to illustrate, for example.) More mild authoritarians need to provide incentives to produce good information for policy decisions, and an administrative litigation regime can complement other such incentives.

## A-Head CONCLUSION

The approach taken in this chapter and volume more generally is consistent with treating courts as simply one alternative mechanism for governance (Rubin 2002; Shapiro 1964: 6). Courts have particular institutional features that affect the relative desirability of using them for the core governance task of monitoring officials and reducing agency costs. I conclude with a few remarks concerning these institutional qualities.

First, courts are *reactive*. Whereas auditors, designated monitors, and internal affairs boards can take an active role in seeking out instances of malfeasance, courts rely in their very institutional design on a quasi-adversarial process that is initiated from outside the government. Doing so enhances the courts' ability to draw in information that would otherwise be unavailable to the governance system broadly conceived – no official would voluntarily report his or her own exercises of slack.

Reactiveness requires a procedural structure to encourage “good” lawsuits that advance the goal of the regime and to discourage “bad” ones. The nature of law requires that this procedural structure be stated in *general* terms, and this is a second institutional quality that deserves mention. Generality means that regime opponents, or even constructive critics, have access to pursue strategies through the courts. We should thus anticipate the creative use of the litigation scheme by some who have different policy goals from those of the regime (O'Brien and Li 2006).

The dynamics of how this plays out vary. Sometimes, the administrative litigation scheme can become an effective arena of political contestation. However, the regime may also seek to tighten control over the courts to inhibit them from

becoming a major locus of social and political change. Authoritarian governments, even more than democracies, have many tools for “Guarding the Guardians” (Shapiro 1988).

Regardless of the result of these dynamics of interaction among multiple agents, administrative litigation and procedural rules will tend to constrain the government, even if these regime opponents are not successful in their particular lawsuits. Bureaucracies will become more “rationalized” in response to the threat of exposure of errors; they will seek to enhance their obedience to legality and their internal procedures.

In conclusion, it is clear that the decision by an authoritarian regime to utilize administrative law can be a rational one and need hardly be at odds with other regime goals. Indeed, by enhancing legality, the authoritarian regime can more effectively implement policy goals through state agents. However, the choice has significant consequences, namely the judicialization of governance, with all the issues that raises.

## A-Head Figure Caption

Figure 2.1. Types of Monitors

	General	Specialized
Proactive	Censorate,	Internal affairs



	procuracy	bureau
Reactive	Ordinary court	Administrative court; ombudsmen

## Notes

<sup>1</sup> At least two accounts of important authoritarian regimes dispute this connection. Ingo Muller's classic study of courts in Nazi Germany (1991) illustrated how legal actors betrayed their positivist heritage. Similarly Hilbink (2007) and Couso (forthcoming) emphasize that positivist ideology does not explain the behavior of the Chilean courts during the Pinochet regime, when they upheld regime interests even when the law would seem to require otherwise.

<sup>2</sup> Republic of China Constitution, Arts. 90–106 (1946).

<sup>3</sup> Whiting notes that the party has engaged in “adaptive learning,” for example by replacing raw production targets that created distorted incentives with more nuanced criteria.

<sup>4</sup> Rightful resistance is defined as “a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public.”

<sup>5</sup> A new law took effect in January 2006. *China Embarks on Civil Service Reforms*, CHINA DAILY, accessed Sept. 23, 2003 from

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[http://www.chinadaily.com.cn/en/doc/2003-09/23/content\\_266501.htm](http://www.chinadaily.com.cn/en/doc/2003-09/23/content_266501.htm) <AU: **Please check URL**>

<sup>6</sup> The 1999 Administrative Review Law details procedures for this form of review (Ohnesorge 2007).