

Controlling Government in Contemporary China: Principles and Practices

QIAO Cong-rui

Post-doc Researcher, Free University Amsterdam, The Netherlands

Visiting Researcher, Utrecht University, The Netherlands

Abstract

How to control government, i.e. controlling the exercise of government powers, has been a recurring issue in political and legal debates. Yet, duly informed accounts of government-controlling practices in transitioning governance systems are rather scanty in current literature. Aiming to narrow down such an unfortunate academic gap, this article proffers a case study of contemporary China where the practice of holding government actions accountable to the law has been rapidly emerging in recent decades. It focuses on legal control of government after the 1990s and delves into three principles: transparency, impartiality and proportionality of government decision making and implementation, which are broadly accepted as underpinning good governance across the globe. It analyses how these principles are accepted in China’s governance framework, and applied in resolving disputes over governance practices. It concludes with identifying major challenges to local applications of those principles in the context of the Social Credit System.

Key words

Transparency, impartiality, proportionality, controlling government, China

1. Introduction

“If Men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.”

James Madison, 1788¹

This “humans are no angels” metaphor is perhaps the most well-known caveat about the uncontrolled exercise of government² powers. Although it was crafted with local aspirations and particular political goals in the author’s mind, its influence turns out enduring and international that has inspired various government-controlling theories and practices in various States.³ *The Federalist Papers*, where the metaphor quoted

¹ James Madison: “Federalist Papers: No. 51 – The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments”, published in the *Independent Journal* on 6 February 1788, accessed on 6 August 2019 in the edited book *Rethinking the Western Tradition*, page 264.

² In this article, the term “government” refers to the body that exercises the administrative power of the State unless stated otherwise.

³ Ian Shapiro, ed.: *Rethinking the Western Tradition*, Yale University Press, 2009, page ix.

above is aptly used, was translated to Chinese and published by the Beijing Commercial Press in 1980,⁴ following the tortured period of the Great Cultural Revolution (between 1966 and 1976) when legal control over government actions was virtually non-existent.⁵ The translated work on federalist theories is one of many burgeoning instances that Chinese academics sedulously studied good practices of other States (most notably, the US and the UK, Japan and Germany) and later interacted with China’s decision makers in restoring then fractured legal framework in the 1980s.⁶

It is within this context that China has accepted government-controlling principles and mechanisms to forestall the government’s illegitimate intervention in the market economy and prevent the government’s infringement upon civil rights of legal and natural persons.⁷ It has furnished the crucial ground for China’s current governance system. The existing scholarship, however, does not provide informed scrutiny into this topic. This intellectual gap can be said to result from, on the one hand, a tenacious misconception that motivations for and constraints on China’s decisions makers essentially differs from their Western counterparts (particularly those of North American and West European States) so that the most accepted principles in the West are believed to be incompatible (if not invalid) in making sense of China’s governance practices;⁸ and, on the other hand, the fragmentation between China’s central and local governments and across different locales, which makes it rather pretentious to speak of China’s governance practices as an undifferentiated homogeneity.

This is what I seek to rectify here: a fallacious assumption that deems China’s governance norms as unique, and a flawed attempt to explain China’s governance practices as a whole. Perceptually, this article treats China’s contemporary governance transition as common insofar as how legal control over government powers is evolving.⁹ This assumption owes its intellectual inspiration to the evolutionary theory

⁴ YAO Xin-lu: The Adventure of the Federalist Papers in China, the Paper, published on 25 September 2015, accessed 6 August 2019 via: https://www.thepaper.cn/newsDetail_forward_1378865 .

This statement should not be read as Chinese academic inquiries into theory and practice on controlling government not existing prior to the 1980s. For instance, ZHANG Shi-zhao (who was enrolled at the University of Edinburgh in 1908) studied the Scottish administrative law and WANG Chong-hui (who received the degree of Doctor of Civil Law from Yale Law School in 1905) compared the American and Continental systems of administrative procedure rules. See: WANG Gui-song: “The Sources of Modern Administrative Legal Studies”, the *Jurist*, Issue 04, 2014, page 155-156

⁵ HU Jian-miao and WU Huan: “Transitions in China’s Administrative Litigation system in China over the Last Century”, the *Law and Social Development*, 2014, Issue 01 (general issue no. 115), page 31.

⁶ JIANG Ping: *Ups and Downs: An Autobiographical Account of Past 80 Years*, China’s Legal Press, 2010, page 234-235.

⁷ Page 334, *supra* note 6.

⁸ This way of thinking is exemplified in the so-called “Asian century” thesis that focuses on China’s differences from other big powers influential in contemporary history, and treats the rise of China, among other emerging powers, as a “post-Western, non-Anglophone” phenomenon. See, for instance, James B. Gardner and Paula Hamilton: “The Past and Future of Public History: Developments and Challenges”, in the edited book *The Oxford Handbook of Public History*, Oxford University Press, 2017, page 14-15.

⁹ See the historical account of the competition between the legislature, judiciary and executive in the UK government in the 20th century. Peter Cane: *Controlling administrative power : a historical comparison*, Cambridge University Press, 2016, page 43-46.

on modern States.¹⁰ At the analytical level, it does not take local governments as loyal agents of the central government; put differently, the central government often lacks an effective oversight over to what extent local governments comply with centrally adopted norms.¹¹

To make the following analyses as clear as possible, I shall now specify analytical terms, foci and approaches as used in this article. The term ‘*acceptance*’ refers to the State’s proclaimed willingness to employ certain standards to ensure conformity by government authorities and rectify their breaches.¹² It is embodied typically in law (i.e. adopted by the People’s Congress) and regulation (i.e. adopted by the State Council, which is China’s central government). The term ‘*application*’ refers to the action of adjudicative authorities in invoking and interpreting laws and regulations so as to resolve disputes over governance practices, typically in the form of the administrative reconsideration decision (by an administrative appeal authority) and the court’s decision.

To concretise China’s acceptance and application of government-controlling principles, I have three foci in mind, in line with the universally recognised mainstays of good governance such as accountable and transparent government institutions and fairness in the application of the law.¹³ Insofar as the elements of these principles are specified in China’s legal framework, they can be summarised as follows:

a. the principle of *transparency* is primarily linked to the government’s duty to disclose government information “produced or acquired and recorded or kept in certain forms by administrative organs in the process of performing their duties”,¹⁴ as defined in the Regulation on the Disclosure of Government Information (hereafter, the “Disclosure Regulation”).

b. the principle of *impartiality* closely relates to the principle of fair competition in the context of China’s economic transition towards a market one. In specific, business operators, including the State-owned enterprises, shall not abuse their dominant positions in the market or restrict or eliminate fair competition,¹⁵ as defined in China’s Anti-

¹⁰ The evolutionary theory submits that three institutions - strong State, rule of law and accountability - that characterise the modern State are not necessarily the product of a particular culture but more of economic and social requirements to prevent the least desirable government actions. See, for instance: Maria Brouwer: *Governmental Forms and Economic Development: From Medieval to Modern Times*, Springer, 2016, page 43-44.

¹¹ ZHAO Shukai: *Township Governance and Institutionalization in China*, the World Scientific Publishing Co., 2013, page 5-6.

¹² The interpretation of norm acceptance finds its intellectual inspiration from HLA Hart. See: Herbert Lionel Adolphus Hart, Joseph Raz, Leslie Green: *The Concept of Law*, Oxford University Press, 2012, page xxi.

¹³ Paragraphs 9 and 35, in the *Transforming Our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, United Nations A/RES/70/1.

¹⁴ Article 2, in the Regulation of the People's Republic of China on the Disclosure of Government Information, adopted in 2007, effective in 2009, and revised in 2019. For its English translation, please visit: <http://en.pkulaw.cn/display.aspx?cgid=90387&lib=law>.

¹⁵ Articles 3, 6 and 7, in the Anti-Monopoly Law of the People's Republic of China, adopted in 2007 and effective in 2008. For its English translation, please visit:

Monopoly Law.

c. the principle of *proportionality* is relatively under-developed. It is usually applied on the legality ground. The court can review legality of administrative actions, or the decision(s) authorising the questioned action, as stipulated in the Administrative Litigation Law (hereafter, the “ALL”).¹⁶ Though an administrative reconsideration authority can review both legality and appropriateness of administrative actions or the authorising decision(s), as provided in the Administrative Reconsideration Law (hereafter, the “ARL”),¹⁷ the ground of appropriateness is normally taken into account in the disputes over administrative penalties (as opposed to other types of administrative decisions).¹⁸

Following this analytical line, the next two sections will outline China’s major legislations furnishing the basis for ensuring transparency, impartiality and proportionality of government actions, and thereafter, look into cases in which the government’s conformity with the three principles is in dispute. The third section will pay a particular attention to considerations cited in the case decisions.

2. Incorporating government-controlling principles

This article is not meant to be a historical account. Yet, it is helpful to take a glimpse back so as to understand the context in which government-controlling norms and mechanisms have evolved as what they are today. This section overviews the incorporation of three sorts of principles in China’s present-day governance system.

First, and perhaps foremost, the enforcement of the administrative procedure law in 1990. As it has played a central role in the development of the Chinese government-controlling practice in the contemporary period, I shall detail the purpose for and obstruction to the passing and implementation of the ALL. It not only conferred on the court a power to accept and review complaints about government actions, but also laid the groundwork for the de-politicisation of the judiciary and the development of the concept of the trial-centred functioning of the court (庭审实质化/*tingshen shizhi hua*).

As discussed in the introduction section, the emergence of government-controlling principles (in a systematic sense) is by and large exogenous and not necessarily compatible with what we might call ‘decisional consensus’ between the central and

<http://en.pkulaw.cn/display.aspx?cgid=503218397088141cbdfb&lib=law> .

¹⁶ Article 6 “In the trial of administrative cases, the people’s courts shall examine the legality of administrative actions”, and Article 53 “where citizens, legal persons or other organisations question the legality of the decisions of the central departments of the State Council and local governments and their agencies based on which the challenged administrative action was taken, they can request the court to review the legality of the decision in question”, in the Administrative Litigation Law of the People’s Republic of China, adopted in 1989, effective in 1990 and revised in 2017. For its English translation, please visit:

<http://en.pkulaw.cn/display.aspx?cgid=76c54b08f88ee7efbdfb&lib=law> .

¹⁷ Articles 1 and 7, in the Administrative Reconsideration Law of the People’s Republic of China, adopted in 1999, effective in 1999 and revised in 2017. For its English translation, please visit: <http://en.pkulaw.cn/display.aspx?cgid=497d709c9225b1e3bdfb&lib=law> .

¹⁸ WANG Jing: “the Application of the Principle of Proportionality in Administrative Cases”, the SJTU Law Review, No. 4, 2017, page 23-24.

local governments. The introduction of judicial review of government actions faced fierce resistance from local governments. As the ALL was adopted in 1989, the central committee of Communist Party of China, the leading political party in the government, received over two thousands resignation letters from local officials, requesting the central authorities not to enforce the ALL.¹⁹

On the other hand, as empirical governance studies have shown, local compliance of centrally adopted norms is prone to purposeful variations in a way to maximise local interests (be them collective or personal in nature).²⁰ It rendered a standardised regulation over government actions over a vast territory timely needed. Legal advisers to the National People’s Congress proposed that in the light of scanty home-grown practices for controlling government, it would be feasible to take a top-down experimental approach, namely codifying basic procedures for challenging the government before the court while testing the codification in practice and leaving it open to subsequent amendments.²¹

Consequently, notwithstanding much opposition from local governments, two important legislations - the ALL and the ARL came into force respectively in 1990 and 1999. Where an administrative act is allegedly inappropriate, the affected party can request administrative reconsideration, an internal appeal and review mechanism pursuant to the ARL. The applicant could challenge the legality of the ground for making the administrative decision, or the appropriateness of the measure taken to enforce that decision, on which the authority at the next higher level responsible for administrative reconsideration shall give a legally binding decision.²²

If the applicant thinks the reconsideration decision to be unfair, s/he can present the case to the court:

- a. normally the basic court within the region where the administrative authority whose act or decision is challenged is located,²³ for the purpose of timely receiving relevant evidence from the parties concerned;
- b. when the dispute is about administrative compulsory measures that relates to the restriction of personal freedom, the applicant can file the case with the court within the region where s/he resides,²⁴ for the consideration that the dispute over the compulsory restriction of personal freedom is usually more serious than, for example, that over the delay of issuing an administrative licence or the amount of an administrative fine.

¹⁹ JIANG Ping: *Ups and Downs: An Autobiographical Account of Past 80 Years*, China’s Legal Press, 2010, page 341.

²⁰ Feizhou Zhou and Mingzhi Tan: *Relationship between the Central Government and Local Governments of Contemporary China*, Springer, 2017, page 124-125.

²¹ JIANG Ping: *Ups and Downs: An Autobiographical Account of Past 80 Years*, China’s Legal Press, 2010, page 344-345.

²² Article 2, 6 and 7, in the Administrative Reconsideration Law of the People's Republic of China , *supra* note 17.

²³ Article 18, in the Administrative Reconsideration Law of the People's Republic of China , *supra* note 17.

²⁴ Article 19, in the Administrative Reconsideration Law of the People's Republic of China , *supra* note 17.

c. and, the court, after accepting an administrative complaint, shall decide on the legality of the jurisdiction and procedural aspects of the complained administrative act(s).²⁵

The application of the ALL and ARL faces several challenges. A most stiff one relates to general awareness of these instruments. Government officials are found as holding a weak sense of public service and lacking willingness to duly respond to the reconsideration or litigation cases against them.²⁶ On a broader scale, it is still seen as somewhat unconventional for legal and natural persons to challenge the government, which was spoken of as resembling ‘hitting the stone with the egg’.²⁷ Even for lawyers, some are reluctant to work on administrative cases. A survey on lawyers’ participation in administrative cases finds that only around three percent of the interviewed lawyers had been engaged in administrative litigation – be it paid representation in the court or voluntary advisory work, and they normally suggest the complainant to reconcile with the government authority concerned, which they believe to be more realistic.²⁸

Another laborious challenge arises from the long-standing institutional competition within the State where the court is much weaker than its administrative counterpart. To rectify this institutional drawback, the People’s Supreme Court (the highest court in China) initiated budgetary reforms in 2002 to have the basic-level and municipal-level courts directly funded by the provincial-level courts, aiming to strengthen the financial independence of local courts from their administrative counterparts.²⁹ Prior to that, the court was funded by the government at the same administrative hierarchical level, rendering it hard for the court to avoid the conflict of interests in reviewing the administrative complaint against the government authority at the same or higher levels. Thanks to the rapid application of information and communication technologies in the court administration, three major platforms have been set up in support of enhancing judicial transparency, namely the websites of trial processes, court judgements, and judgements’ enforcement.³⁰ In particular, the court has instituted a nation-wide mechanism since 2014 that registers the intervention by government officials in court’s trials, aiming to make such extra-judicial interventions known to the public.³¹

Second, also importantly, it is the passing of the national regulation in 2007 that, for the first time in China’s history, obliges the government to disclose its information to the public. To Chinese legislators, three purposes are deemed as major in codifying

²⁵ Article 6, in the Administrative Litigation Law of the People's Republic of China, *supra* note 16.

²⁶ Para 84, A/HRC/WG.6/31/CHN/1.

²⁷ Kevin O' Brien, and LI Lianjiang, “Suing the Local State: Administrative Litigation in Rural China”, the *China Journal*, 51 (2004), page 76-77.

²⁸ LI Ji, “Suing the Leviathan: An Empirical Analysis of the Changing Rate of Administrative Litigation in China”, *Journal of Empirical Legal Studies*, December 2013 Vol. 10, No. 4, page 837.

²⁹ XIA Jinwen, “Achievements, Problems and Solutions of Judicial Reforms in Contemporary China,” *China Legal Science*, Vol. 1, page 17-18.

³⁰ Para. 47, A/HRC/WG.6/31/CHN/1.

³¹ (2) Right to fair trial in the II. Civil and Political Rights in the National Human Rights Action Plan of China (2016-2020).

the disclosure of government information:³²

- a. the oversight consideration. It allows public oversight of government agencies and deters them from undue actions.
- b. the democratic consideration. It furnishes a condition for the public’s participation in the government’s decision-making process.
- c. the instrumental consideration. It necessitates the exercise of other rights. For instance, before a specific administrative decision is made definite, a public hearing shall be held upon the request of parties with a reasonable standing to whom obtaining sufficient information about the decision in question is necessary.³³

It is widely held as a core pillar for governance transparency that information about the activities of government bodies is made available to the public, in a timely manner and with limited exceptions; not to mention in many jurisdictions, the right of access to government information has been codified and protected. In this regard, the principle of the Disclosure Regulation (amended in April 2019) presents much similarity to justifications for protecting the right to government information in other States.³⁴ Under the Disclosure Regulation, the government and its agencies shall establish and improve an open and easily accessible system for disclosing government information to natural and legal persons.³⁵ It includes the information disclosure in response to requests from the public and also proactively at the motion of government bodies. As of May 2018, about 30,000 government websites contain a portal where a person can make a request on the disclosure of specific government information.³⁶

Government information that shall be disclosed covers a wide scope, including the records on how administrative decisions are made, the spending of fiscal budgets and its auditing, and land expropriation, demolition and resettlement plans. Such records shall be made accessible to the public and without limits on their reuse. As regards the requirement on the quality of the disclosure, it shall be “formal, accurate, complete in a way that the applicant can use the disclosed information for fulfilling the purposes of work, living, scientific studies, or as verified evidence in the court or other legal proceedings,” as stipulated in the implementing opinion issued by the State Council in 2010.³⁷

³² Press release of the Legal Affairs Office of the State Council, published on 24 April 2007 and accessed on 22 August 2019 via:

http://www.pkulaw.cn/fulltext_form.aspx?Db=lawexplanation&Gid=7564f412dcff15cb68dc2e4be53a6de2bdfb

³³ For instances, in Article 42 in the Law of the People's Republic of China on Administrative Penalty, adopted in 1996, effective in 1996 and revised in 2017. For the English translation of its full text, please visit: <http://en.pkulaw.cn/display.aspx?cgid=301397&lib=law> .

³⁴ For instance, the four jurisdictions for protecting the right to information as summarised by Roy Peled and Yoram Rabin in the article “The Constitutional Right to Information”, the *Columbia Human Rights Law Review*, Vol. 42, 2011, page 360-361.

³⁵ Articles 2 and 4, in the Regulation on Government Information Disclosure, *supra* note 13.

³⁶ Para 56, A/HRC/WG.6/31/CHN/1.

³⁷ The General Office of the State Council of China: 国务院办公厅关于做好政府信息 依申请公开工作的意见 国办发〔2010〕5号, http://www.gov.cn/xxgk/pub/govpublic/mrlm/201309/t20130913_66392.html .

The *third* focus of this article is on the most debatable one: the processing of personal information by government authorities in the exercise of their public powers. The legal protection of personal rights against illegitimate State intervention and restriction is proven vital in the modern and contemporary histories. It is, however, not to say that State’s intervention and restriction are absolutely prohibited. In many jurisdictions, derogating the respect for and protection of personal rights is permitted, provided that important reasons of public interest can be demonstrated, as accepted in the European Union data protection law that contains the derogation clause permitting the transfer of personal information by public authorities in the exercise of their public powers.³⁸

For the discussion over China’s governance practices concerning the processing of personal information, two points shall be made clear. First, as of today, there lacks any specific law or regulation that recognises the protection of personal information as a right. It does not mean that the legal protection of personal information is non-existent in China. The protection of personal information is treated not as a right on its own, but as an element of the civil rights to name, image, reputation, honour and privacy, as provided in China’s General Rules of the Civil Law.³⁹ The term ‘personal information’ is defined as “any information, kept in electronic or other formats, used alone or in combination with other information, that relates to the identification of a natural person; including but not limited to a natural person’s name, date of birth, identification card number, personal genetic and biological data, residential address and mobile phone number.”⁴⁰

Second, the existing law prohibits only the *illegal* processing of personal information, leaving aside other important considerations such as necessity or excessiveness of the processing of personal information. For instance, the general rules of the civil law prohibit any illegal collecting, use, processing or transfer of the personal information.⁴¹ Under the criminal law, any public authority that “transfers to a third party citizens’ personal information obtained in the the course of performing functions or providing service, that is in violation of the relevant provisions of the State” is subject to a fine, and the official directly in charge of, or responsible for the said act is subject to the criminal charge of three to seven years’ imprisonment.⁴²

³⁸ Article 49, in the REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal information and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), accessed 15 August 2019 via: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> .

³⁹ Articles 110, in the General Rules of the Civil Law of the People’s Republic of China, adopted in 2017 and effective in 2017. For the English translation of its full text, please visit: <https://www.dimt.it/images/pdf/GeneralRules.pdf> .

⁴⁰ Article 76, in the Cybersecurity Law of the People's Republic of China, adopted 2016 and effective in 2017. For the English translation of its full text, please visit: <http://en.pkulaw.cn/display.aspx?cgid=4dce14765f4265f1bdfb&lib=law> .

⁴¹ Articles 111, in the General Rules of the Civil Law of the People’s Republic of China, *supra* note 38.

⁴² Article 253, in the Criminal Law of the People's Republic of China, adopted in 1979, effective in 1979, and revised in 1997, 2001, 2002, 2005, 2006, 2009, 2011, 2015 and 2017. For the English translation of its full text, please visit: <http://en.pkulaw.cn/display.aspx?cgid=703dba7964330b85bdfb&lib=law> .

3. Applying government-controlling principles

3.1 Dispute over non-disclosure of government information

The scope of the disclosure of government information is, in comparison to its detailedness, poorly defined. To efficiently perform its duties, the government may withhold the procedural information, such as the records of routine discussion, consultative communications, research and survey reports, and other information generated in the day-to-day work of internal administration, provided that such records are not relevant to the applicant’s work, living, scientific research or litigation purposes.⁴³ The situations where the government could invoke the non-disclosure clause (不予公开 /*buyu gongkai*) should be tested in line with three sets of considerations:

- a. The balance against the State and national interest. The government shall not disclose any information that may jeopardise national security, public security, economic security, or social stability.⁴⁴
- b. The balance against the interest of a third party. When the disclosure of government information may harm lawful rights and interests of any third party (in particular, pertaining to commercial secrets and personal privacy), the government should not have such information disclosed.⁴⁵
- c. The balance against the proper functioning of the government. The government “may withhold information on its internal matters such as personnel management, logistics management and internal work routine flow.”⁴⁶

The third consideration is criticised as latent and ambiguous in practice: when a government decision is definite, can records of its relevant meetings and proposals be seen as ‘procedural’ so that the non-disclosure clause is applicable?⁴⁷ A court decision in 2014 renders a negative answer. A municipal court (the second level court) did not accept the ‘procedural information’ defence by the Land and Resource Bureau of the Yongtai Government (the respondent) and ruled in favour of the applicants, that the said government bureau shall make the initial land construction proposal, land conversion plan, land requisition and compensation plans disclosed to the applicants in due course.⁴⁸ This case is listed as a guiding case on the disclosure of government information by the Supreme People’s Court in 2015, as it convincingly applies the law in such a way that the government cannot refuse to disclose certain information

⁴³ *Ibid.*

⁴⁴ Article 14, in the Regulation on Government Information Disclosure, *supra* note 13.

⁴⁵ Article 15, in the Regulation on Government Information Disclosure, *supra* note 13.

⁴⁶ Article 16, in the Regulation on Government Information Disclosure, *supra* note 13.

⁴⁷ ZHANG Yong: “Defining ‘Procedural Records’: A Consideration of the Status of Government Actions”, the *Journal of Gansu Administration Institute*, No. 4, 2015, page 116.

⁴⁸ 姚新金、刘天水诉福建省永泰县国土资源局案, 最高人民法院公报—最高人民法院 2014 年 9 月 12 日发布政府信息公开十大案例, published on 10 February 2015, accessed on 4 June 2019 via: <http://www.court.gov.cn/zixun-xiangqing-13406.html>.

by claiming the requested information to be “internal and consultative and hereby, procedural”, if the decision has been definite and thereafter carried out.

Another challenge arises from the non-response case where plural government agencies are concerned and it is hard for the applicant to identify the leading authority that ought to fulfil the duty to disclose the requested information. Under the Disclosure Regulation, it is the office that makes the decision, or retains information collected from natural and legal persons, or compiles information obtained from other administrative agency shall be responsible for disclosing the said information to the public and/or applicant.⁴⁹ Under the current Land Administration Law (revised in 2004), land in urban areas is owned by the State and thereby, the government has the authority to decide the allocation and exploitation of the State-owned land.⁵⁰ In the case of urban land requisition projects, the ambiguity occurs as the requisition decision often involves several government agencies at different levels.

In 2016, a case was brought to the administrative reconsideration authority in the Inner Mongolia where the applicant complained against the provincial land administration bureau that had refused to disclose the government’s land requisition plans with the claim that the requested documents were produced by the lower-level bureaus. The reconsideration authority decided that “the respondent bureau failed to make it clear whether it has ever retained the requested documents in issuing its approval for the land requisition proposal submitted by the lower-level bureaus ... although the lower-level bureaus execute the land requisition tasks, this internal task division is not sufficient to exempt the respondent bureau from its duty to disclose the requested information.”⁵¹ This case has been listed as a guiding reconsideration case by the Ministry of Land Resources in 2017 as it interprets the Disclosure Regulation in such a way that internal coordination and document transfer shall not burden the applicant’s access to government information pertaining to his/her lawful rights and claims.

3.2 Dispute over administrative monopoly

Under the fair competition principle, no government agency or official shall abuse its administrative power to eliminate or restrict market competition as affirmed in China’s Anti-monopoly Law.⁵² Administrative monopoly, referring to the misuse of administrative power by government agencies to engage in monopolistic activities, is widely considered as the greatest obstacle to China’s successful transition from a planned economy to a market one.⁵³ It is rather recent that the innocent party that

⁴⁹ Article 10, in the Regulation on Government Information Disclosure, *supra* note 13.

⁵⁰ Articles 8 and 9, in the Land Administration Law of the People's Republic of China (2004 Amendment), Adopted at the 16th Session of the Standing Committee of the Sixth National People's Congress on June 25, 1986; Amended at the 11th Session of the Standing Committee of the Tenth National People's Congress on August 28, 2004.

⁵¹ Pages 13-16, in the 国土资源部行政复议十大典型案例, published in December 2017, accessed in June 2019 via: <http://www.mnr.gov.cn/gk/tzgg/201712/P020180703577908547960.pdf>.

⁵² Article 8, in the Anti-monopoly Law of the People's Republic of China, *supra* note 15.

⁵³ Pages 264-265, in the article “Administrative Monopoly and the Anti-Monopoly Law: an examination of the debate in China” by Gordon Y. M. Chan, *Journal of Contemporary China*, Volume 18, 2009, Issue 59.

suffered from administrative monopoly can seek an effective legal remedy, with several concluded cases being seen as fair.⁵⁴

The district government in Nanjing decided in 2012 (decision No. 396) that “in order to upgrade the processing of kitchen waste, the Lisheng Recycled Resource Company will process kitchen waste in the city area” whereby all the slaughter sites registered with the district government must sign the clearance contract with the said company, the failure of which would be subject to administrative penalties; another bio-waste recycling company sued the district government as its decision No. 396 amounted to administrative monopoly and breached the principle of fair competition.

The first-instance court in Nanjing ruled in the favour of the applicant that the procedural illegality was found and therefore the administrative decision No. 396 shall be annulled; as the evidence stands, the government did not announce and allow the open bidding before selecting the contracting company, which renders the procedural aspect of its decision incompatible with the law.⁵⁵ This case has been listed as a guiding case on economic-administrative disputes by the Supreme People’s Court in 2015 as it applies the law in such a way that prohibits the government from partially favouring certain companies over others while no legitimate justification can be found.

Another recurring dispute arises from the government’s effective oversight and regulation of the State-owned company. The State-owned Jiangsu Salt Industry Group Company (the applicant) has the exclusive franchise right to sell salt in the region; it also sells other sorts of goods. The municipal bureau for industrial and commercial administration (the respondent) received several complaints from private salt retailers about the mandatory clause on buying non-salt goods (e.g. oil and sugar) unilaterally added by the applicant company to the purchase contract. After examining the evidence available, the respondent bureau decided in July 2014 to impose an administrative penalty on the applicant company that it shall terminate the unlawful act and pay a fine of 160,000 RMB (circa. 20,500 Euro) for breaching the anti-monopoly law.

The applicant company challenges the bureau’s decision in the district court and request the administrative penalty to be ordered as illegal. The court decided the administrative penalty issued by the municipal bureau to be legal, as the applicant was found breaching article six of the Anti-monopoly Law that “the market player with a dominant position in the market shall not abuse its dominance and exclude or restrict fair competition.”⁵⁶ The decision enjoys much public acknowledgement as it applies the law in such a way that the State-owned company cannot override legal norms or be treated preferentially vis-a-vis private companies.

3.3. Dispute over the government's processing of personal information

⁵⁴ Pages 273-274, *supra* note 45.

⁵⁵ 南京发尔士新能源有限公司诉南京市江宁区人民政府行政决定案，最高人民法院发布人民法院经济行政典型案例，published on 22 October 2015, accessed on 5 June 2019 via: <http://www.court.gov.cn/zixun-xiangqing-15842.html> .

⁵⁶ 江西省盐业集团公司吉安公司诉吉安市工商行政管理局行政处罚案，最高人民法院发布人民法院经济行政典型案例，published on 22 October 2015, accessed via: <http://www.court.gov.cn/zixun-xiangqing-15842.html> .

Digitalisation offers opportunities for the governance system to be efficient and smart, and at the same time, poses challenges to the protection of personal privacy as the classic boundary between the public and private spheres is rapidly blurring. It is particularly topical in the context of the implementation of the Social Credit System (hereafter, the “SCS”) in China.

While the European Union has adopted a prudent approach to the processing of personal information as exemplified in the implementation of the General Data Protection Regulation in 2018, China’s approach is quite different. The SCS is one of such instances. It was initiated pursuant to *An Outline on Setting up A Social Credit System* (hereafter, the “SCS Outline”),⁵⁷ that integrated successful local experiments in the 2000s and was issued by the central government in 2014. A variety of implementation measures are currently high-profile in the news and academic debates. Some of misreading of the SCS has been clarified: notoriously, the US Vice President Mike Pence describing the SCS as “an Orwellian system premised on controlling virtually every facet of human life”,⁵⁸ and the careless analogy of the SCS to a unified scoring mechanism for awarding ‘good citizens’ and punishing ‘bad citizens’.⁵⁹

These analyses available on the Internet are not sufficient to fully examine several controversial implementations of the SCS. It is not the intention here to systematically analyses every disputable measure taken within the SCS. Rather, it proposes a legal perspective and focuses on the mechanisms of publicising personal information that alleges to punish and deter credit breaches. To start with: what is credit? In the common law jurisdiction, it is primarily defined in the context of business activities, referring to “the ability of a business person to borrow money or obtain goods on time, in the consequence of the favourable opinion held by the community or by the particular lender, as to his/her solvency and reliability”.⁶⁰

Manifestly, this business-activity-focused approach is rather insufficient to cover how credit is used in the SCS. The latter is much broader in its content, including government actions, business conducts, social credits and judicial records, as defined as four key areas of credit in the SCS Outline.⁶¹ Even in the sub-section on ‘social credits’, its scope is astonishingly extensive: ranging from the employer’s respect for labour rights, to the performance standards of medical service providers.⁶² As of today,

⁵⁷ 《国务院关于印发社会信用体系建设规划纲要（2014—2020年）的通知》，国发〔2014〕21号，accessed 9 August 2019 via: http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm .

⁵⁸ Jamie HOrsley: “China’s Orwellian Social Credit Score Isn’t Real: Blacklists and monitoring systems are nowhere close to Black Mirror fantasies”, the *Foreign Policy*, published on 16 November 2019, accessed on 13 August 2019 via: <https://foreignpolicy.com/2018/11/16/chinas-orwellian-social-credit-score-isnt-real/> .

⁵⁹ Martin Chorzempa, Paul Triolo, and Samm Sacks: “China’s Social Credit System: A Mark of Progress or a Threat to Privacy?”, the *Policy Brief of the Peterson Institute for International Economics*, published in June 2018, accessed 13 August 2019 via: <https://www.piie.com/system/files/documents/pb18-14.pdf> .

⁶⁰ The Law Dictionary Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed, accessed 20 August 2019 via: <https://thelawdictionary.org/credit/> .

⁶¹ See: the second section of An Outline of Setting up Social Credit System (2014-2020) that identifies four ‘Key Credit Fields’, accessed 20 August 2019 via: http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm.

⁶² *Ibid.* Ten types of credit are listed in the social-credit section: 1). medical and sanitary services, 2).

there is no consensus in China as to the specification on the content and scope of credit as used in the SCS. Through a careful reading of the SCS Outline, the term ‘credit breach’ can be reasonably explained as follows: *non-compliance* with authoritative norms, that includes not only violation of civil and criminal laws adopted by the State, but also breach of by-laws adopted by government authorities that are applicable on a certain territory, and breach of codes of conduct adopted in certain vocations that are applicable to certain professionals.⁶³

The norm-compliance-focused approach to credit would permit local governments to punish minor offences such as the act of ignoring the red traffic light and crossing the street. In 2016, a court in *Yancheng* of the *Jiangsu* Province was requested to decide a dispute over the traffic police’s violation of the personal right to reputation. On 13 October 2016, facial data of two pedestrians, Mr. Han and Mr. Zhou (complainants), were captured by a traffic police camera at the crossing of a major road at 17:20 (a peak hour in China when many leave work for home) when the traffic light was red. On 25 October 2016, the images of the complainants’ faces were enclosed in an article titled “Are you one of the ‘internet celebrities’ (网红/ *wang hong*)?” under the official account of the local traffic police (respondent) on Wechat (a Chinese social media platform) as the sixth issue of a series of reports regularly publicising the images of faces of pedestrians, mobile riders and drivers who had crossed the road despite the traffic light being red.⁶⁴

On 5 December 2016, complainants filed the case with the court, complaining about the police’s violation of their personal rights to reputation and requesting their images be removed and a damage compensation of 20,000 RMB (circa. 2500 EURO). The court decides not to support the complainants’ claims as the posting of their facial images is an activity carried out by the traffic police in the performance of their duties as laid down the local Traffic Police Manual, provided that the Supreme Court has interpreted the non-exposure of personal information clause as inapplicable to government authorities in fulfilling their duties.⁶⁵ The appeal court affirms the first-instance decision in 2018, adding that “there is no evidence showing that the complainants entered the road when the traffic light was green, meaning the collecting and processing of their facial data were in accordance with the performance of the duties of the respondent.”⁶⁶ As discussed in the second section, the processing of

social welfare and subsidiaries, 3). labour rights protection and labour contracts supervision, 4). education and research, 5) culture, sports and tourism, 6). protection of intellectual property, 7). environmental protection and energy consumption, 8). social organisations, 9). natural persons, and 10). on-line commercial services

⁶³ See: the second section of An Outline of Setting up Social Credit System (2014-2020) that identifies four ‘Key Credit Fields’, accessed 20 August 2019 via: http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm.

⁶⁴ 媒体头条: 《江苏盐城交警曝光行人闯红灯被诉“侵犯名誉权” 法院终审: 驳回诉讼》, published on 5 November 2018 and accessed 21 August 2019 via: <https://kknews.cc/society/6zlk3m.html> .

⁶⁵ Article 12, Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases involving Disputes over Infringements upon Personal Rights and Interests through Information Networks, issued in 2014 and effective in 2014. For the English translation of its full text, please visit: <http://en.pkulaw.cn/display.aspx?cgid=2042dd6367893f26bdfb&lib=law> .

⁶⁶ *Supra* note 64.

personal information is by and large protected under the civil law where government authorities enjoy much exemption. The law and judicial interpretations do not take into account the grounds of necessity and excessiveness of the measure of government authorities even if the purpose can be justified, leaving debatable practices of punishing and deterring minor credit breaches not addressed.

4. Conclusion

The article has sought to deal with China’s acceptance and application of three government-controlling principles - transparency, impartiality and proportionality - in the context of China’s governance transition towards the rule-of-law. Since the 1990s, China has instituted internal and external control mechanisms, aiming to prevent the malfunctioning of government agencies and receive and review complaints of natural and legal persons against the government.

In that process, laws and regulations on disclosing government information and fair market competition are specified by the court and the reconsideration authority in a way that helps enhance the transparency and impartiality of governance practices. In comparison, the government’s processing of personal information in the context of the digital governance seems to be under-regulated as the case on the government’s exposure of facial data as a sanction and deterrence measure reveals.

Also, though there have been considerable changes to the governance landscape where the legislative and adjudicative arms of the State are increasingly empowered in relation to the administrative counterpart, the hierarchical relationship of review bodies is still persistent that disables local courts and reconsideration authorities to act proactively in resolving numerous disputes the scope of which judicial interpretations and implementing opinions issued by higher authorities fail to cover.