

# “Courageous Explorers”?: Education Litigation and Judicial Innovation in China

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## INTRODUCTION

In the spring of 1998, Tian Yong, a senior at the University of Science and Technology in Beijing, received an unpleasant surprise: despite the fact that he was one of the top students in his class and had met all of the academic requirements for his degree, he would not graduate.<sup>1</sup> In fact, he learned that he was no longer a registered student at the university, and had not been for more than two years—despite the fact that he had been going to class, receiving high marks, fulfilling the requirements for his physical chemistry major, and paying tuition.

The controversy dated back to an incident during Tian's sophomore year when school officials proctoring an exam found a piece of paper with notes on it on the floor near Tian's desk after he had excused himself to go to the restroom. On the basis of this incident, the university decided to expel Tian, but failed to inform him or any of his professors. As a result, Tian continued to take classes toward his degree. Tian's expulsion became known to him and the members of the physical chemistry faculty only a few months before he was scheduled to graduate.

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All translations in this Article are by the author unless otherwise noted. This Article is based on a combination of written sources and interviews with approximately twenty-five academics, lawyers, and judges, all of whom were promised anonymity. Many of the reforms discussed in this Article are nascent, and some interviewees did not want to be publicly associated with reforms that may be reversed in the future. Also, some of the cases discussed in this Article involved direct political intervention by the government, and remain somewhat sensitive as a result. All interviews were conducted in Beijing at different times in 2006. Interviewees are not identified by name due to the confidential nature of many of the interviews. All interviews are on file with the author.

1. For an extended account of the facts of the *Tian Yong* case, see Tian Hao, *Wo yao wen ping: zhongguo shouli daxuesheng su xuexiao ju fa 'liangzheng' xingzheng susong an* [I Want My Degree: The First Administrative Litigation Case of a Student Suing His University for Refusing to Issue the 'Two Certificates'], PEOPLE'S CT. NEWS, June 8, 1999, reprinted in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION] 424 (2002).

Tian's situation was serious: he stood to lose not only all of the money that his family had paid in tuition, but more importantly, his job prospects would be severely impaired without a degree. Measuring his limited options, Tian decided to take matters into his own hands and in the fall of 1998, sued the school for violating both his right to education and for failing to award him the degree that he had earned.

In this Article, I argue that lawsuits by students and teachers against educational institutions have served as a key experiment for rights adjudication by Chinese courts. Since the mid-1990s, a growing number of courts have adjudicated the complex rights claims raised by education cases without excessive outside interference. In doing so, the courts have radically revised the relationship between students, teachers, and educational institutions. They have also taken actions not typically associated with Chinese courts, including: expanding their own jurisdiction, striking down regulations that are inconsistent with national law, and creating legal requirements that have little or no basis in relevant legislation. These education cases are crucial to understanding the development of the judiciary as an important mechanism for rights protection in China.

Education cases provide an excellent opportunity for the courts to develop a rights-based jurisprudence for a number of reasons. First, in most cases, the defendant, a local school or university, while far from politically impotent, often has less political clout than a government defendant would, and therefore is less able to pressure the courts into ruling in its favor.<sup>2</sup>

Second, over the past decade or more, there has been a steady stream of relatively sympathetic plaintiffs, including a number of young students who, through little or no fault of their own, faced serious barriers to continuing their education. In education-obsessed China, such plaintiffs often won public support for their legal claims. In many of these cases, the plaintiffs have been assisted by ambitious young lawyers who have made creative legal arguments on their clients' behalf, thus increasing the chances of a favorable ruling.<sup>3</sup> Media coverage has also generally favored the student plaintiffs and played an important role in transmitting the new legal norms being developed by the courts both to new potential plaintiffs and to judges themselves.<sup>4</sup>

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2. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 399 (2003) (noting that "many judges resist appointment to the administrative division [of the court system] because of the politically sensitive nature of the cases.").

3. Given the important role that plaintiffs and plaintiffs' lawyers have played in the development of law through suits against universities, education litigation is another example of how "the ways in which litigants use the legal system to pursue their own interests may be increasingly important in shaping the evolution of law in China." STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 287-88 (1999) (quoting Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1541 (1998)).

4. For a selection of media reports on the 1999 *Tian Yong* and the 2000 *Liu Yanwen* cases in particular, see generally GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1. For a discussion of the role that the media plays in litigation in

Third, in many of these cases, the plaintiffs, often individual students requesting reinstatement to their school or review of a school's administrative decision, sought reasonable relief that judges can grant without major political ramifications from the defendant university or the government.

Finally, unlike some administrative agencies, educational institutions are less able to rely on textual ambiguities as a defense. Whereas administrative agencies can issue implementing regulations that interpret national regulations in their favor and enhance their own powers under national laws, schools are less able to do so. While educational institutions can and do issue their own regulations on a wide range of issues, such regulations lack the force of law, and courts are not mandated to accord them the same level of deference associated with administrative regulations.<sup>5</sup>

As a result of these relatively favorable dynamics, the courts have redefined the legal relationship between students and educational institutions. In doing so, the courts have played a key role in enforcing the rights granted to students and teachers under the relatively new body of education law. These court decisions contain some of the most innovative jurisprudence of the reform era, including the judicial expansion of the Administrative Litigation Law ("ALL")<sup>6</sup> to cover universities, the birth of a judicially mandated due process right for university students that is enforceable against educational institutions, and one of the first instances of the direct application of a constitutional norm to a court case in People's Republic of China ("PRC") legal history.<sup>7</sup> The judicial creation of these doctrines, and their subsequent adoption and application by other courts, challenge the often-held Western view of Chinese courts as uniformly passive, unsophisticated, and politically weak actors.<sup>8</sup>

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China, see Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

5. PEERENBOOM, *supra* note 2, at 421. According to Peerenboom, "In practice . . . courts may be inclined to defer to an agency's interpretation [of a particular law] given the courts' weak stature and their dependence on local government." Courts reviewing internal university regulations would have less of a need for such deference.

6. Administrative Litigation Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 1989, effective Oct. 1, 1990) (P.R.C.), available at [http://www.lawyee.net/Act/Act\\_Display.asp?RID=27560&KeyWord=](http://www.lawyee.net/Act/Act_Display.asp?RID=27560&KeyWord=).

7. Shen Kui, *Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM. L. & POL'Y J. 199, 231 (2003).

8. See, e.g., Minxin Pei, *Can Economic Growth Continue Without Political Reform?*, in STRATEGIC ASIA 2006-07: TRADE, INTERDEPENDENCE, AND SECURITY 303, 314-16 (Ashley Tellis & Michael Wills eds., 2006). Pei states:

China's legal reform has lost momentum for one main reason: despite nearly three decades of institutional experiments, the Chinese legal system has not freed itself from the political dominance of the ruling CCP [Chinese Communist Party] and, consequently, is deprived of the institutional independence and authority needed to perform its functions effectively. The CCP's political dominance can be seen throughout the organizational structure and routine operations of the courts.

*Id.* at 315.

This Article is the first full-length analysis in English of education litigation in China and one of the first studies of judicial innovation by Chinese courts. In Part I, I map the development of education law in China, delineating the shift from an emphasis on ideology at the end of the Cultural Revolution to the creation of a system based on legal rules and statutory rights.

In Part II, I analyze the series of cases in which the courts began to take a more active role in adjudicating rights claims based on the new legal framework, despite the lack of a clear legal mandate to do so. These court decisions—including the 1999 *Tian Yong* case,<sup>9</sup> the 2000 *Liu Yanwen* case,<sup>10</sup> and the 2001 *Qi Yuling* case<sup>11</sup>—show the courts developing new legal doctrines to better respond to the needs of individual citizens.

In conclusion, I argue that the Chinese government should encourage the greater use of innovative legal techniques by Chinese courts, particularly through measures that strengthen judicial autonomy. Courts with greater institutional authority and autonomy will be able to expand their use of innovative approaches to adjudication and resolve the legal disputes of litigants who formerly would not have had access to the judicial system. As such, in the words of one Chinese judge, some courts might be poised to become “courageous explorers”<sup>12</sup> of a more dynamic and innovative approach to the development of the rule of law in China.

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9. The *Tian Yong* case was the first administrative litigation case in which a university was brought to court as a defendant. See *infra* Part II(B). As will be discussed in more detail below, the extension of jurisdiction in administrative litigation cases was controversial because schools were generally considered to be “social service organizations,” and therefore not eligible to be sued under the ALL. The case was also noteworthy in that it marked the first time that a Chinese court asserted a due process right for an individual litigant—specifically, the right to notice and a hearing—in the absence of a clear legislative basis for doing so. For an English-language translation of the *Supreme People’s Court Gazette* version of the *Tian Yong* decision, see *Case 1. Administrative Proceeding: Tian Yong v. University of Science and Technology, Beijing for Refusing to Issue Certificate of Graduation and Degree*, CHINESE EDUC. & SOC’Y, May/June 2006, at 65.

10. The *Liu Yanwen* case followed on the heels of the *Tian Yong* case, and was initially tried by the same Beijing court that issued the decision in the *Tian Yong* case. See *infra* Part II(C). In *Liu Yanwen*, the court once again asserted jurisdiction over a university in an administrative litigation dispute, and also relied on the individual’s due process rights in reaching a decision. The court’s decision in favor of the plaintiff was later vacated on the grounds that the plaintiff’s claim had expired, raising concerns of political interference. For the full text of all eight court documents issued in the *Liu Yanwen* case, see GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 499–540.

11. For an English translation of the opinion in the *Qi Yuling* case, see *Qi Yuling v. Chen Xiaohui et al.: Opinion by the Higher People’s Court of Shandong Province*, CHINESE EDUC. & SOC’Y, July/Aug. 2006, at 60–74.

12. Liu Yuenan & Ju Xiaoxiong, *Chaoyue lilun zhengyi be xianxing zhidu juxian de shijian: Guangzhou shi liangji sayuan caipan xuesheng su gaoxiao xingzheng anjian de shizheng yanjiu* [Transcending Theoretical Debates and Current Practice Within Institutional Limits: Research on Concrete Evidence from Adjudication of Administrative Law Cases of Students Suing Universities in Guangzhou City Courts], in DAXUE ZIZHI, ZILU YU TALU [UNIVERSITY AUTONOMY, SELF-REGULATION AND EXTERNAL DISCIPLINE] 206, 217 (Zhan Zhongle ed., 2006). Liu and Ju, who are identified as the Chief Judge in the Administrative Division of the Guangzhou City Intermediate People’s Court and a Guangzhou City Panyu District People’s Court research office official, respectively, make a strong case for a more active approach to judicial decision making:

## I. REGULATING THE UNIVERSITY SYSTEM IN CHINA: INCREASING AUTONOMY WITHIN LIMITS

Since the end of the Cultural Revolution, the government has increasingly stressed that government policy would be articulated through law. A key goal of both law and policy has been to increase, within limits, the institutional autonomy of educational institutions, and to create a system of educational administration governed by law. Both of these trends have contributed to the development of education litigation: the new body of education law creates a number of legal rights for all parties, including teachers, students, and academic institutions, which provide the basis for lawsuits by parties who feel that their newly created legal rights have been infringed. The delegation of autonomy has meant that while schools are able to exercise a vastly greater degree of authority over a number of key areas, they are also potentially liable for the misuse or even abuse of that authority.<sup>13</sup>

This section describes the development of education law and policy over the past three decades, and how the government's goal of rapidly developing the higher education system has led to a greater degree of autonomy in a number of key areas, including enrollment, curriculum development, and allocation of budgetary funds. It shows how education law—a virtually non-existent field before the onset of the reform era—has created a set of legal rights for all parties. In general, the government has created a legal framework that, while granting considerable authority to individual institutions, still leaves significant authority in the hands of the state. This hybrid authority structure has led to a situation in which education institutions are arguably exercising government functions, a key issue of dispute in the *Tian Yong* and *Liu Yanwen* cases.

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Although the law currently in effect does not have a clear prohibition, it also lacks a clear basis for empowering our courts to decide cases on the basis of the constitution or the spirit of the law, or on the position and use of precedent in deciding individual cases. However, since we have firmly established the goal of constructing a country ruled by law, the courts should first move away from long-held mistaken conceptual approaches, and instead become the courageous explorers of a dynamic rule-of-law doctrine.

*Id.*

13. Another reason for the steady stream of education cases over the past decade has been the massive expansion of the higher education system. After years of massive and escalating investment, China's university system has become one of the largest in the world. In 2004, the Chinese government counted roughly 1700 institutions of higher education nationwide, up from a mere 600 in 1978. Yitzhak Shichor, *China's Revolution in Higher Education*, CHINA BRIEF, Mar. 2, 2006, at 6–7, available at [http://www.jamestown.org/images/pdf/cb\\_006\\_005.pdf](http://www.jamestown.org/images/pdf/cb_006_005.pdf). These 1700 universities are responsible for more than thirteen million undergraduate students and more than 800,000 post-grads. *Id.* As the student population has expanded, Chinese faculties have grown in an attempt to keep pace. In 2004, China had 858,000 full-time university faculty members nationwide, more than four times the number in 1978. *Id.* Much of the faculty growth took place after the government's 1998 decision to massively increase government funding for higher education: between 2000 and 2004, close to 100,000 new faculty positions were added each year. *Id.*

A. *Historical Background: Universities in Post-1949 China*

When the Communist government came to power in 1949, it fully absorbed all educational institutions into the state-run framework and dramatically reorganized the entire education sector based on the Soviet model.<sup>14</sup> The education system was consciously redesigned to serve the national economic plan.<sup>15</sup> The Ministry of Education standardized university curricula for all subjects and strictly enforced its requirement that schools use the government-created curricula.<sup>16</sup>

Over the ensuing decades, the education system was decimated by political purges of faculty and administrators caught on the wrong side of rapidly shifting political winds and the elimination of entire disciplines considered inconsistent with Party ideology. The Cultural Revolution virtually shut down the university system, as students donned Red Guard armbands, and the Gang of Four encouraged campus radicals to attack their professors as symbols of Western bourgeois expertise.<sup>17</sup>

In the late 1970s, the Chinese government began picking up the pieces of its shattered higher education system. The government returned authority over the university system to the Ministry of Education, which had itself been closed down for part of the Cultural Revolution.<sup>18</sup> Universities reopened departments that had been closed for decades for ideological reasons, including sociology and anthropology,<sup>19</sup> and the pursuit of technical and scientific knowledge became a key part of central government policy under the banner of the so-called "four modernizations." University admissions tests were once again instituted, and ideological factors such as an applicant's class background, which had been given pride of place during the Cultural Revolution, were largely discarded as part of the admissions process.<sup>20</sup>

The year 1979 saw the reform era's first calls for academic autonomy. In June of that year, four prominent university presidents published a public appeal in the pages of the *People's Daily* calling for more academic autonomy for all institutions of higher education.<sup>21</sup> This appeal was followed by an

14. SUZANNE PEPPER, *RADICALISM AND EDUCATION REFORM IN 20TH-CENTURY CHINA* 157–58 (1996).

15. Broader geographical distribution of educational institutions was also emphasized: each province would have its own medical, agricultural, and teacher-training schools, and the comprehensive universities that were set up were also geographically dispersed. *Id.* at 177.

16. *Id.* at 187.

17. For a detailed account of the damage done to the education system during the Cultural Revolution, see *Id.* at 259–352.

18. *Id.* at 480.

19. RUTH HAYHOE, *CHINA'S UNIVERSITIES 1895–1995: A CENTURY OF CULTURAL CONFLICT* 123 (1996).

20. PEPPER, *supra* note 14, at 479.

21. Li Xiaoping, *University Autonomy in China: History, Present Situation, and Perspective*, in *ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CURRENT ISSUES IN CHINESE HIGHER EDUCATION* 38 (2001), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2/content\\_storage\\_01/0000000b/80/27/ac/fa.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/27/ac/fa.pdf).

editorial arguing that university autonomy was "a problem that needed to be discussed thoroughly," and that new ideas should be encouraged.<sup>22</sup>

In 1985, the Party's Central Committee issued the *Decision on Reform of the Education System*, which emphasized the need for greater institutional autonomy and called for an end to excessive government intervention in the education sector.<sup>23</sup> The decision also called for greater coordination between universities and entities engaged in material production, so that institutions of higher learning could play a more useful role in economic development.<sup>24</sup> Under the decision, the government delegated some authority over academic programs, personnel, and finance to the universities themselves.<sup>25</sup>

That document was soon followed by State Council regulations that sought to give universities greater authority over certain functions, including admissions, financial administration, hiring and firing decisions, and international academic exchanges. These regulations empowered universities themselves to choose several senior school officials, including the vice president, other senior administrative officers, and professors, rather than passively accepting Party or Ministry of Education appointments.<sup>26</sup> The power to appoint university presidents, however, remained with the government, usually the Ministry of Education.<sup>27</sup>

The impact of these reforms was significant. For example, universities could now experiment in the area of curriculum development. Many of them did, seeking to develop materials that would be more likely to attract students, some of whom were paying for the privilege of education for the first time since 1949. While the Ministry of Education still issued curriculum documents, universities could now view the documents as "reference materials" that could be disregarded in favor of other approaches.<sup>28</sup>

The increasing dependence of universities on self-generated funds further enhanced autonomy. In many cases, the government gave universities only enough cash to meet their basic needs, leaving universities responsible for generating funding for any additional requirements. The drive to find and create moneymaking programs created a hierarchy of academic departments not dissimilar to the dynamic found at some Western institutions: those faculties and schools that could generate funds, such as engineering, finance, and foreign languages, leapt ahead of many of those that could not,

22. *Id.*

23. Ka-ho Mok, *Globalization and Educational Restructuring: University Merging and Changing Governance in China*, 50 *HIGHER EDUC.* 57, 65 (2005).

24. *Id.*

25. Ningsha Zhong & Ruth Hayhoe, *University Autonomy in Twentieth-Century China*, in *EDUCATION, CULTURE, AND IDENTITY IN TWENTIETH-CENTURY CHINA* 265, 276 (Glen Peterson et al. eds., 2001).

26. *Id.*

27. RUIQING DU, *CHINESE HIGHER EDUCATION* 23 (1992).

28. *Id.*

including agricultural schools and other institutions that specialized in less seemingly “modern” subject areas.<sup>29</sup>

The 1989 student protests brought to a standstill the trend toward greater autonomy. After the government intervened with military force to end the protests in June 1989, it dramatically reasserted authority over the university system as a whole.<sup>30</sup> Over the next three years, the number of Party members appointed to senior positions within Chinese universities rose dramatically, and ideological study requirements for both students and professors were increased.<sup>31</sup> At Peking University and certain other institutions more directly tied to the 1989 unrest, year-long military-ideological training courses were required for all new students.<sup>32</sup> These new requirements led to a precipitous drop in enrollments as students sought out schools that did not require a year of indoctrination before setting foot on campus.<sup>33</sup>

The Party’s retrenchment was relatively short-lived. In 1992, the State Education Council issued a policy document that reiterated the need for university autonomy, and in 1993, the State Council followed suit, recommending that university authority be expanded in several key areas.<sup>34</sup>

### B. University Autonomy in the Contemporary Context: From Policy to Law

Beginning in the mid-1980s, the Chinese government began to codify its policy pronouncements in a system of laws, which ranged from the relatively broad provisions of the national-level legislation to the more detailed regulations issued by the Ministry of Education and other government agencies to the rules and regulations of the schools themselves.<sup>35</sup> Between 1985 and 2000, the government issued more than one thousand laws, rules,

29. HAYHOE, *supra* note 19, at 121.

30. Luo Xu, *Farewell to Idealism: Mapping China's University Students of the 1990s*, 13 J. CONTEMP. CHINA 779, 782 (2004).

31. *Id.* For a more recent description of propaganda campaigns on Chinese campuses, see Paul Mooney, *Campus Life Proves Difficult for China's Little Emperors: Pampered at Home, Students Rebel against Squalid Dorms and Limits on Their Freedom*, CHRON. OF HIGHER EDUC., Nov. 25, 2005, available at <http://chronicle.com/weekly/v52/i14/14a04601.htm>.

32. Chengzhi Wang, *From Manpower Supply to Economic Revival Governance and Financing of Chinese Higher Education*, EDUC. POL'Y ANALYSIS ARCHIVES, June 5, 2000, available at <http://epaa.asu.edu/epaa/v8n26.html>; see also Wei Feng, *Facets of the Crisis in Institutions of Higher Learning*, CHINESE EDUC. AND SOC'Y, Nov.–Dec. 1996, at 10.

33. For an argument that the drop in enrollments at Peking University was more closely related to market forces than military requirements, see Wei Feng, *supra* note 32.

34. Li Xiaoping, *supra* note 21.

35. One Chinese scholar estimated that, between the founding of the People's Republic of China in 1949 and 1985, the government issued roughly five hundred education laws, regulations, and other related documents, the vast majority of which had either expired or were abolished by 1987. In contrast, in the fifteen years from 1985 to 2000, the government issued more than one thousand rules, regulations, and other documents related to education, more than twice the output of the prior thirty-five years. At present, pre-1985 regulations are believed to constitute less than 5 percent of the total regulatory framework. Shen Kui, *Rule of Law and Public Higher Education Institutions*, CHINESE EDUC. & SOC'Y, July–Aug. 2006, at 11, 52 n.10.



regulations, and other documents related to education.<sup>36</sup> In general, the law sought to give substance to the government's policy pronouncements of greater autonomy for schools, while at the same time preserving significant government oversight.<sup>37</sup> The result in many cases is a system of split authority in which schools have significant latitude to make important decisions, but must have these decisions approved by the government.

The various policy statements on increased academic autonomy were adopted into law for the first time in 1995 with the passage of the Education Law.<sup>38</sup> Under Article 28 of the Education Law, educational institutions have the right to "autonomous management according to the [school's] constitution."<sup>39</sup> Article 30 guarantees educational institutions the right to form their own management structure in accordance with government regulations.<sup>40</sup> Article 31 makes clear that schools that meet certain criteria are independent legal persons, and that all schools "enjoy civil rights and interests and bear civil liabilities in civil activities according to law."<sup>41</sup>

The Higher Education Law, passed in 1998, contains similar language.<sup>42</sup> That law empowers universities to "run [their] schools on their own," and gives them explicit, though by no means complete, authority over budgets; the hiring, firing, and evaluation of personnel; curriculum; and enrollment.<sup>43</sup>

Unfortunately, these provisions are undermined—at least rhetorically, if not legally—by other provisions in the same laws that mandate educational content. Under Article 6 of the Education Law, the government takes a

36. *Id.*

37. Despite the continued experimentation with private and quasi-private schooling, the vast majority of China's universities are state-run, and receive most of their funding, outside of student tuition, from the government. Both the Communist Party and the government are intensely involved in the appointment of many university presidents, especially at elite universities in Beijing, Shanghai, and elsewhere. Indeed, the presidents of top Chinese universities have a governmental rank of vice minister, and are chosen by the State Council. The selection of presidents of other schools is usually handled by the Ministry of Education. RUIQING DU, *supra* note 27, at 23. Although the government has recently allowed for the creation of quasi-private universities, these institutions are relatively few in number, and are subject to strict government oversight. The creation and administration of private education institutions is governed by the Non-Governmental Education Promotion Law of the People's Republic of China (adopted by the Standing Comm. of the Nat'l People's Cong. on Dec. 28, 2002, effective Sept. 1, 2003) (P.R.C.), available at <http://www.moe.edu.cn/edoas/website18/info1433.htm>.

38. Education Law of the People's Republic of China (promulgated by the Nat'l People's Cong. on Mar. 18, 1995, effective Sept. 1, 1995) (P.R.C.), available at [http://www.moe.edu.cn/english/laws\\_e.htm](http://www.moe.edu.cn/english/laws_e.htm).

39. *Id.* art. 28.

40. *Id.* art. 30.

41. *Id.* art. 31.

42. Higher Education Law of the People's Republic of China (adopted by the Standing Comm. of the Nat'l People's Cong. on Aug. 29, 1988, promulgated by Order No. 7 of the President of the PRC, Aug. 29, 1988, effective Jan. 1, 1999) (P.R.C.), available at [http://www.moe.edu.cn/english/laws\\_h.htm](http://www.moe.edu.cn/english/laws_h.htm).

43. *Id.* The State's overall authority was also clearly delineated in this 1998 law. Article 13 of the law states that "the State Council shall provide unified guidance and administration for higher education," and that provincial governments also have responsibility over the universities in their jurisdiction. *Id.* art. 13.

“patriotic,” “collectivist,” and “socialist” approach to education.<sup>44</sup> In addition, “Marxism, Leninism, and Mao Zedong Thought” are explicitly placed at the center of the educational “cause.”<sup>45</sup>

More important than the provisions on Marxism and socialism are those provisions that divide authority between universities and the state, the latter usually represented by the Ministry of Education. Often, the legal division of authority creates a somewhat complicated structure in which universities make decisions according to government rules, and then submit those decisions for government approval.<sup>46</sup>

Just as education law in China delegates authority to educational institutions, it also creates legal rights for educators, students, and institutions of higher learning. Article 33 of the Education Law, for example, creates an obligation on the state to “protect the legitimate rights and interests of teachers,” and states that employment issues related to teachers, such as remuneration, will be handled by law.<sup>47</sup> Under Article 42 of the Education Law, students have the right to bring a complaint against a school if they disagree with disciplinary action taken by that school.<sup>48</sup> Under the same

44. Education Law of the People's Republic of China, *supra* note 38, art. 6. It is unclear what, if any, legal effect such language has. Nonetheless, Article 6 and other similar provisions do reflect the deep involvement of the Communist Party in education policy in China.

45. Education Law of the People's Republic of China, *supra* note 38, art. 3. The Higher Education Law repeats these strictures. Article 3 of the Higher Education Law is virtually identical to Article 3 of the Education Law. Article 4 of the Higher Education Law requires that “[h]igher education shall be conducted in adherence to the educational principles of the State, in the service of the socialist modernization drive . . . in order that the educatees shall become builders and successors for the socialist cause.” Higher Education Law of the People's Republic of China, *supra* note 42, arts. 3, 4.

46. The conferral of academic degrees is one example of this hybrid approach. Both the Education Law and the Higher Education Law make clear that the state is responsible for the conferral of academic degrees. Education Law of the People's Republic of China, *supra* note 38, art. 22; Higher Education Law of the People's Republic of China, *supra* note 42, art. 22. The state exercises its authority to grant degrees through the Regulations of the People's Republic of China on Academic Degrees, under which it delegates degree-granting authority to approved universities. Regulations of the People's Republic of China on Academic Degrees (adopted at the 13th meeting of the Standing Comm. of the 5th Nat'l People's Cong. and promulgated by Order No. 5 of the Standing Comm. of the Nat'l People's Cong. on Feb. 12, 1980, effective Jan. 1, 1981) (P.R.C.), available at [http://www.novexc.com/academic\\_degrees.html](http://www.novexc.com/academic_degrees.html). Under Article 8 of the Academic Degree Regulations, the State Council must approve all schools wishing to issue degrees. All schools issuing degrees are required to set up a two-tiered system for conferring master's and doctorate degrees. The system consists of a dissertation committee based in each department, and an academic degree evaluation committee, based in each degree-granting unit within a university. *Id.* arts. 9, 10.

The process itself passes through both entities: First, a dissertation committee evaluates and either approves or rejects an individual student's master's or doctorate thesis (bachelor's degrees are approved by the university's academic degree evaluation committee). If the departmental dissertation committee approves the student's thesis, it then sends a resolution recommending the candidate for receipt of a degree. The academic degree evaluation committee then votes on each individual resolution; those it accepts are granted a degree by the university. *Id.* arts. 10, 11. If the thesis is rejected by the dissertation committee, then the student can be issued a certificate of completion by the university. Schools must submit a list of persons to whom they are awarding master's or doctorate degrees to the government “for the record.” *Id.* art. 10(2).

47. Education Law of the People's Republic of China, *supra* note 38, art. 33.

48. *Id.* art. 42.

article, students have the right to bring civil suits if their personal safety or property has been harmed by the school.<sup>49</sup>

The Higher Education Law takes a similar approach: Article 45 of the Higher Education Law states that university educators "have rights prescribed by law,"<sup>50</sup> and Article 53 states that students' rights and interests are protected by law.<sup>51</sup> Both national law and Ministry of Education implementing regulations, including the 1993 Teachers Law of the People's Republic of China<sup>52</sup> and the 2005 Ministry of Education Regulations on Student Management in Regular Higher Education Institutions,<sup>53</sup> lay out the specific legal rights of teachers and students.

Although the new education laws created a raft of new rights, the law was unclear as to how these rights could be protected and what means were available for redress if an academic institution failed to honor them. Neither the Education Law nor the Higher Education Law included any guidance as to how the rights enunciated in those laws should be protected and did not obligate education institutions to set up any sort of grievance or appeal mechanism to handle claims by students or teachers. The relevant Ministry of Education regulations lacked clear mechanisms for dispute resolution and appeal. Judges looking to adjudicate disputes between universities and students had to deal not only with the unclear procedure for dispute resolution, but also with the express legal grant of autonomy to universities by the state. As will be discussed in more detail below, these questions would become a central element of education litigation during the 1990s.

## II. UNIVERSITY AUTONOMY AND THE COURTS: THE *TIAN YONG* AND *LIU YANWEN* CASES

### A. *Background: The Birth of Education Litigation*

The 1990s saw a virtual explosion—one Chinese scholar referred to it as a "tidal wave"—of cases brought by students or, less often, teachers suing an educational institution over alleged violations of their legal rights.<sup>54</sup> The government's policy, discussed above, helped make these cases possible by

49. *Id.*

50. Higher Education Law of the People's Republic of China, *supra* note 42, art. 45.

51. *Id.* art. 53.

52. Teachers Law of the People's Republic of China (adopted at the 4th meeting of the Standing Comm. of the 8th Nat'l People's Cong. on Oct. 31, 1993, effective on Jan. 1, 1994) (P.R.C.), *available at* [http://english.sepa.gov.cn/zffg/fl/19931031\\_49735.htm](http://english.sepa.gov.cn/zffg/fl/19931031_49735.htm).

53. Regulations on Student Management in Regular Higher Education Institutions (adopted at the Ministry of Educ. ministerial office meeting, Feb. 4, 2005, effective Sept. 9, 2005) (P.R.C.), *available at* <http://www.moe.edu.cn/edoas/website18/info9818.htm>. A translation of the Student Management Regulations was published in 39 CHINESE EDUC. & SOC'Y 87 (2006). Many saw these regulations, which lay out detailed and mandatory due process rights for students, as the government's response to the decisions in the *Tian Yong* and *Liu Yanwen* cases, both of which judicially mandated that schools protect students' due process rights. The regulations are discussed in more detail below.

54. Shen Kui, *supra* note 35, at 11.

“codifying” university administration and creating rights for students within the new body of law. As law became the primary means of defining the relationship between both the university and the state and the university and the individual student, it made sense to turn to the courts to resolve disputes between universities and students. Under this model, students viewed education as a legal “right” that schools were obligated to provide.<sup>55</sup>

The marketization of the economy and of the educational sector in particular also played a key role in that many families now had to pay significant sums in tuition for the first time since 1949. Most families were willing to do this because education was seen as even more important to individual success in post-reform China. Because the government no longer guaranteed lifetime employment, young people and their families increasingly valued education as a means to finding a good job in a competitive marketplace. These massive changes encouraged both students and their families to view access to schools less as a privilege and more as a crucial, paid-for service.<sup>56</sup> This view of the school as a service provider also encouraged litigation as a strategy for resolving disputes: just as one would sue other service providers over a failure to deliver services as promised, an individual could sue a university for failing to live up to its paid-for service obligations.

Many of the early cases would raise similar issues as the *Tian Yong* and *Liu Yanwen* cases, including basic questions of jurisdiction, particularly under the ALL. Debates over an apparent lack of a legal remedy for an alleged violation of an individual’s legal rights were also a crucial element in many of these cases. Although many of these early lawsuits were largely unsuccessful, they nonetheless served as part of the legal backdrop for the judges in the *Tian Yong* and *Liu Yanwen* cases and helped inform the judges of the gaps in existing law which they then sought to address.<sup>57</sup>

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55. Perhaps somewhat ironically, the rise of student lawsuits may also have been encouraged by decades-long propaganda education efforts by the Communist Party to inculcate in Chinese youth a “socialist legal consciousness” that bolsters the Party’s own legitimacy by teaching Chinese students that China is a country governed by law. Gregory Fairbrother, *Demonstrating Legality: Legal Education for Chinese Youth, 1979–2006* (forthcoming) (manuscript at 7, on file with author). A key element of such education efforts is the concept that dispute resolution and rights protection are the domain of the courts. *Id.* at 6.

56. A 1995 case illustrated the changing dynamic between students and educational institutions. See Shen Kui, *supra* note 35, at 15–16 (describing the facts of this case). Cheng Ken, a student at a junior high school in Wuhan, sued his school after it unilaterally and without his knowledge changed his listed preferences for high schools to keep him enrolled at the same school. *Id.* Cheng transferred anyway, but the school refused to release his student records. The court ruled in Cheng’s favor, holding that the school’s actions violated relevant regulations and infringed Cheng’s right to a choice of education. The fact that the school would unilaterally change his listed preferences indicated the extent to which schools viewed students as subjects under their nearly complete authority; the fact that Cheng was willing to sue his school—over the protests of teachers and others who viewed him as “ungrateful”—indicated the extent to which many students no longer were willing to accept the old paradigm. Author interview.

57. See Rao Yadong, *Protecting the Right to Education and Responsibility of the Judge from the Judicial Standpoint*, CHINESE EDUC. AND SOC’Y, May–June 2006, at 41.

A major early barrier to education litigation was the courts' narrow reading of the ALL. Passed in 1989, the historic law allowed Chinese citizens to sue the government over administrative actions in certain circumstances.<sup>58</sup> But the ALL explicitly limited jurisdiction to cases of "specific administrative act[s]" by either "administrative organ[s]"<sup>59</sup> or "organization[s] authorized by the law or regulations."<sup>60</sup> Though the state runs virtually all schools in China, it was nonetheless assumed that the law did not apply to education institutions, which are generally classified as "social service organizations"<sup>61</sup> under Chinese law.<sup>62</sup> A key element in the development of education litigation was the willingness of Chinese courts to take a creative approach to the interpretation and implementation of the ALL, such that in some situations universities could be considered "organizations authorized by the law or regulations," and therefore subject to the jurisdiction of the courts.<sup>63</sup>

The assertion of jurisdiction under the ALL was especially important because generally speaking the courts refused to certify such cases as *civil* suits, leaving would-be plaintiffs without any access to the courts whatsoever.<sup>64</sup> Many Chinese judges viewed the relationship that exists between schools and students as a "vertical" one, dissimilar to the "horizontal" relationship that would exist between parties in a civil dispute, and therefore saw such cases as inappropriate for trial in civil court.<sup>65</sup>

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58. For more on the ALL, see LIN FENG, *ADMINISTRATIVE LAW PROCEDURES AND REMEDIES IN CHINA* 113–268 (1996). For an early assessment of the ALL that notes the early trend of judicial expansion of the scope of the ALL, see Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, *THE CHINA Q.*, Dec. 1997, at 832.

59. Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 25.

60. *Id.*

61. "Service institutions" are defined as entities that are "social service organization[s] engaged in activities related to education, science and technology, culture, and health. [They are] created by the state or other organizations with state-owned assets solely for the purpose of social well-being." Shen Kui, *supra* note 35, at 18.

62. Some Western scholarship continued to reflect this assumption even after the *Tian Yong* case changed the legal standing of educational institutions in some cases. One of the leading scholarly works on legal reform in China describes the limits of the ALL as follows:

[T]he CCP, the Procuracy, state-owned enterprises, and quasi-administrative units (*shiye danwei*—such as state universities and various departments of agencies that do not have independent accounting) are not considered administrative entities under the ALL and hence are not subject to administrative litigation.

PEERENBOOM, *supra* note 2, at 420.

63. For an analysis of the expansion of court jurisdiction under the ALL, including a detailed analysis of the 2000 Supreme People's Court Judicial Interpretation of the ALL, see He Haibo, *Xingzheng susong shou'an fanwei: yi ye sifa quan de shijian shi (1990–2000)* [*The Category of Acceptable Cases Under the Administrative Litigation Law: A History of the Practice of Judicial Power (1990–2000)*], 4 *BEIDA FALU PINGLUN* [PEKING U. L. REV.] 569 (2001).

64. Author interview.

65. Author interview. This reasoning—that the parties to a civil suit should be in a "horizontal" relationship with each other—persists, and continues to influence judicial decision making. In one case from May 2005, a group of four students sued the Hebei University of Economics and Business over the school's decision to suspend them and fifty-one others for one year because of their hepatitis B status. The court held that, since the two parties were "unequal," and since their relationship was that of "the administrator and those who are subject to administration," the case was inappropriate for adjudication.

In one 1995 case that would prove influential, Ms. Lu, a high school teacher, was fired by her school after attempting to return to work following a long layoff due to a back injury.<sup>66</sup> She filed complaints with the education bureau, but received no response despite a legal requirement that the bureau respond to such complaints within thirty days.<sup>67</sup> Left with no other choice, Ms. Lu filed a complaint under the ALL. In a decision that foreshadowed the expansion of the ALL in the *Tian Yong* case, the judge, who would later preside over the *Tian Yong* case, granted Ms. Lu her day in court.<sup>68</sup>

The case turned on the court's analysis of Article 39 of the Teachers Law, which gives teachers the right to petition the education bureau if they believe that their rights and interests have been infringed.<sup>69</sup> In the court's view, while contract law governed the relationship between the teacher and the school, the relationship between the petitioning teacher and the education bureau was governed by administrative law and met all of the requirements for judicial review under the ALL. Therefore, while disputes between teachers and schools could generally not be litigated under the ALL, disputes over the petition process mandated by Article 39 of the Teachers Law could.<sup>70</sup>

In many ways, the *Lu* case foreshadowed later education litigation under the ALL: although the text of the Teachers Law did not create a right to sue under the ALL, the court nonetheless engaged in a long and somewhat complex analysis to assert jurisdiction. The case resembled later cases in that, as with the *Tian Yong* and *Liu Yanwen* cases discussed below, the judge in the *Lu* case did not allow potential technical barriers to block the court from reaching the merits of the dispute. For example, while some judges had argued that the education bureau's silence could be taken as a lack of concrete administrative action necessary for the court to assert jurisdiction

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as a civil law tort case. *55 ming xinsheng ganran yigan bei xiuxue; lianming qisu xuexiao bei bobui* [Fifty-Five New Students Infected with Hepatitis B are Suspended; Joint Lawsuit Against School Rejected], BEIJING YOUTH DAILY, June 15, 2005, available at [http://news.xinhuanet.com/legal/2005-06/15/content\\_3087092.htm](http://news.xinhuanet.com/legal/2005-06/15/content_3087092.htm). This does not mean that universities could never be brought to court in a civil suit, only that they could not be brought to court in a civil suit for actions that were administrative in nature. On the other hand, legal claims that involved the university as a legal entity in which the university was not exercising its administrative authority over a student could be heard. If, for example, a student was injured on campus, and wanted to bring a negligence claim against the university, she or he could do so. Rao Yadong, *supra* note 57, at 46.

66. The following description of the case is taken from Rao Yadong, *Shilun jiaoshi shensu xingwei de kesu xing* [Regarding the Suability of Petitions Made by Teachers], Research on Trial Rulings, High People's Court of Beijing, 10 (on file with author).

67. Teachers Law of the People's Republic of China, *supra* note 52, art. 39.

68. Rao Yadong, *supra* note 57, at 43–44.

69. Teachers Law of the People's Republic of China, *supra* note 52, art. 39.

70. Rao Yadong, *Shilun jiaoshi shensu xingwei de kesu xing* [Regarding the Suability of Petitions Made by Teachers], *supra* note 66. In general, the court's decision turned on an analysis of the nature of the petition filed by teachers and by the nature of the petition system set up by Article 39. *Id.* at 9. Because government organs with administrative authority review petitions filed by teachers, and because the review is a specific administrative act with legal effect, the system should be subject to ALL review, in the view of the court. *Id.* at 9–10.

under Article 2 of the ALL, this argument was brushed aside.<sup>71</sup> The court asserted jurisdiction, citing Article 11(1)(5) of the ALL, which allows courts to review cases in which the administrative entity has "refused to perform [a] duty or failed to make a reply [to a request for action]."<sup>72</sup>

While the court in the *Lu* case did not assert jurisdiction over the school, the case nonetheless raised important questions about what to do in situations in which the law creates rights in the education context, but does not create mechanisms for review. Citing the "spirit" of the ALL as a law enacted to protect the rights of citizens, the court found that allowing the case to go forward as an administrative litigation suit both met the formal requirements of the law and allowed for judicial review where before there was only a right without a remedy.<sup>73</sup> Similar dynamics would come into play in the later cases handled by the same court.

The first case in which the courts asserted ALL jurisdiction over a dispute between a student and a university was the 1996 *Pingdingshan* case.<sup>74</sup> After being caught cheating on an exam, four students at the Pingdingshan Institute of Coal Mining Technology in Henan Province were immediately expelled, despite regulations which prescribe lighter penalties, such as warnings or probation, for first-time offenders and others whose infractions are less serious. The students brought an administrative suit against the institute. Because the court found that the plaintiffs had "showed remorse and admitted their misconduct," the court ruled that it was not appropriate under the regulations to immediately expel them. The court also held that the school had ignored various processes under the law, including the requirement that an expulsion be approved by the government administrative agency responsible for overseeing the school. Finally, the court held that it was appropriate for the students to bring suit under the ALL, as Article 25(4) of the ALL authorized the school to take administrative actions on behalf of the state. As a result, the court held the expulsion order invalid, and ordered the school to reinstate the students.

These early cases served as the backdrop for the 1999 *Tian Yong* case and the 2000 *Liu Yanwen* case, each of which involved the key question of whether or not disputes between students and educational institutions could in fact be litigated under the ALL. Although the *Tian Yong* and *Liu Yanwen* cases came after the *Lu* and *Pingdingshan* cases, they nonetheless generated much more public attention and sparked intense debate among legal scholars.

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71. *Id.* at 9–10. The lack of a written decision from the education bureau was also raised as a potential barrier. *Id.*

72. Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 11.

73. Rao Yadong, *supra* note 66, at 9–10.

74. The following description of the *Pingdingshan* case is taken from Rao Yadong, *supra* note 66.

B. *Due Process and the Right to Education: The Tian Yong Case*

The 1999 *Tian Yong* case was the first prominent case in which a university was a defendant in an administrative litigation case.<sup>75</sup> In part because the Supreme People's Court ("SPC") would later publish the decision in its gazette, *Tian Yong* would become the paradigm case for the extension of the ALL to disputes between universities and students.

Tian was a sympathetic plaintiff; the son of a poor family from Henan province, Tian got good grades throughout his career in university and was well liked by his classmates.<sup>76</sup> The case began when Tian, then a student in the physical chemistry department of Beijing University of Technology and Science, was accused of cheating on an electromagnetism test in February 1996. After Tian left for the bathroom during the test, the proctor noticed a piece of paper on the floor, apparently dropped by Tian on his way out. The professor picked it up and saw that the paper contained various electromagnetic formulas. When Tian returned, the professor asked Tian if the paper was his. Tian admitted that it was, but denied having used it during the test. Instead, he claimed that he had inadvertently brought the paper in with him. The professor immediately dismissed Tian from the testing room and reported the incident.

Although the proctor had found the piece of paper, he had not seen Tian look at it during the exam. Moreover, according to the school's investigation, the formulas found on the paper were not relevant to any of the exam questions, making the question of cheating somewhat moot.<sup>77</sup> Though he would receive no credit for the test, Tian's partially completed exam indicated that he had engaged in heavy preparation and knew the material well. Nonetheless, no one disputed that Tian had violated the rules by bringing the paper into the test room. The question was what to do about it.

Per university regulations, the school decided to expel Tian, and on March 5, it issued an internal order to remove his name from the school rolls. But the school neglected to inform Tian himself of its decision and did not administer the normal expulsion process. In particular, the school issued the expulsion order before receiving a report on the matter from Tian's academic department. In fact, the department recommended that Tian not be expelled and instead only be "criticized" for his actions. The school also did not give Tian written notice of the expulsion.<sup>78</sup> Finally, the university failed to fully implement its decision, neglecting to notify other school organs of Tian's expulsion.

75. For an extended account of the facts of the *Tian Yong* case, see Tian Hao, *supra* note 1. Unless otherwise noted, the facts of the case in the following description are taken from this article.

76. Ruan Ying, *Chengji youxiu que buneng biye* [His Grades are Outstanding but He Can't Graduate], GUANGZHOU DAILY, Jan. 8, 1999, cited in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 421-23.

77. *Id.* at 422.

78. Tian Hao, *supra* note 1.



As a result, Tian continued to take classes for more than two years, and the university gave Tian every indication that it still considered him a student there; it renewed his student card, even replacing it after he lost it, and accepted his tuition. Assuming that the cheating incident was behind him, Tian fulfilled all of the requirements for graduation—he completed a thesis, did an internship, and passed all of his classes. As far as Tian knew, the cheating incident was buried in the past, forgotten. Only when he was just a few months away from graduation in the spring of 1998 did the school take further action.

The school belatedly moved to implement its two-year-old expulsion order in the spring of Tian's senior year. On March 18, 1998, the school sent a notice informing the physical chemistry department that Tian should be removed from its rolls. In June, the school refused to send the relevant forms on Tian's behalf to the Education Administration Bureau so that he could be registered as a bachelor's degree holder, and refused to issue him a graduation certificate or a degree.<sup>79</sup> Lacking other avenues to appeal the school's decision, Tian sued, bringing an administrative case in October 1998 in the Haidian District People's Court.

Tian argued that the school's failure to adhere to government regulations regarding cheating invalidated its expulsion order.<sup>80</sup> In addition, Tian argued that the school's failure to implement its expulsion order, and the fact that it did not extend him the proper due process by informing him of the decision and giving him a chance to defend himself also meant that the expulsion order lacked force.<sup>81</sup> Tian asked the court to compel the university to issue both his graduation certificate and his degree.<sup>82</sup> He also asked for economic damages of 3000 Chinese renminbi, a public apology, and court costs.<sup>83</sup>

The case was controversial in part because Tian sued his university under the ALL, a law understood at the time to cover primarily government organs and not universities. If the court decided in Tian's favor, it would have to bring the university decision-making process within the ambit of the ALL.<sup>84</sup>

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79. The Chinese degree system consists of two separate but linked legal documents: a graduation certificate, issued by the government after notification from the school that all requirements have been met, and the actual degree, which is issued by the granting educational institution. The only important difference between the requirements for the two documents is that the graduation certificate is issued automatically upon completion of the relevant requirements, whereas issuance of the degree requires additional approval from the university's degree committee.

80. Tian Yong v. Beijing University of Science and Technology, Admin. Decision (Haidian Dist. People's Ct., Feb. 14, 1999), reprinted in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 542.

81. *Id.*

82. *Id.*

83. *Id.*

84. In particular, the court would have to rule that the university's decision to expel Tian was a "specific administrative act" by an "administrative organ" under Article 25 of the ALL. Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 25.

The Haidian District Court took the case and found for Tian in a verdict issued on February 14, 1999. The court ordered the university to issue Tian's graduation certificate within thirty days of the court's decision, and to reconsider its decision not to grant Tian his degree within sixty days.<sup>85</sup>

The court's verdict discussed three key issues: first, whether Tian could bring suit under the ALL; second, whether the school was legally required to engage in any form of due process in expelling Tian; and third, whether the decision to expel Tian followed national regulations on student management.

One of the most important aspects of the court's verdict was its determination that the ALL did in fact cover the case. The court's approach was straightforward. Although universities are not administrative bodies in the traditional sense, the state nonetheless delegates specific powers to them, which they exercise according to law.

Although the Haidian District Court issued the original decision asserting jurisdiction, the clearest language on jurisdiction under the ALL came from the appeals court verdict, issued by the Beijing First Intermediate People's Court, as reported in the *Gazette of the Supreme People's Court*.<sup>86</sup> In particular, the appeals court verdict pointed out that, under Article 21 of the Education Law, the state employs an academic credential system, and "schools and other education institutions approved or recognized by the state may issue certificates of academic status and other academic certificates in accordance with regulations established by the state."<sup>87</sup> Article 22 creates the same framework for academic degrees. Finally, Article 8 of the Degree Regulations restates the delegation of authority by the state to academic institutions by stating that "bachelor degrees are granted by higher education institutions authorized by the State Council."<sup>88</sup> In essence, government regulations empowered the university to execute state functions. Its decisions regarding maintenance of student rolls and issuance of graduation certificates and diplomas could be viewed as specific administrative actions carried out by the university under relevant national laws.

Given these regulations, all of which governed Tian's claims against the university, the court concluded that the case was indeed administrative in nature, such that jurisdiction could be asserted under Article 25(4) of the ALL: "This is an administrative dispute arising during the course of exercising an administrative authority granted by the state, that is, to issue

85. *Tian Yong*, *supra* note 80.

86. 1999 SUP. PEOPLE'S CT. GAZ. 4. As will be discussed in further detail below, the original text of the First Intermediate Court decision differed significantly from the version published by the SPC due to changes made by the SPC to strengthen and clarify the language at various points. Unless otherwise specified, references to the appeals court verdict refer to the *Gazette of the Supreme People's Court* version. Both versions are on file with author.

87. *Case 1. Administrative Proceeding: Tian Yong v. University of Science and Technology, Beijing for Refusing to Issue Certificate of Graduation and Degree*, *supra* note 9, at 65.

88. Regulations of the People's Republic of China on Academic Degrees, *supra* note 46, art. 8.

academic certificates and degree certificates to education recipients on behalf of the state. Therefore, it is appropriate to resolve this dispute via an administrative hearing."<sup>89</sup>

Interestingly, in deciding in favor of the plaintiff on this issue, the appeals court also cited policy reasons in favor of its decision. The court pointed out that the use of administrative litigation in such cases "can help resolve social conflicts and protect the stability of our society."<sup>90</sup> Implicit in the court's statement was the fact that but for the assertion of jurisdiction under the ALL, Tian and other plaintiffs like him would receive no judicial review of their cases whatsoever.

Perhaps even more innovative than the court's assertion of jurisdiction was its decision on Tian's process rights. For the first time in PRC legal history, the court not only made the plaintiff's due process rights a central part of its decision and ruled in the plaintiff's favor, but it also held that the plaintiff had certain basic due process rights that the defendant must honor,<sup>91</sup> including the right to notice of the decision and a hearing to contest that decision, despite the fact that there was no legislative requirement that the school do either. Because potential dismissal from a university directly impacts a student's right to education, the court held that the school had a positive obligation to implement a dismissal process that protected the student's rights.

The lower court tied its decision on due process to the right to education:

Mandatory withdrawal can negatively impact the plaintiff's right to education and should be handled according to the principle of protecting the rights and interests of the individual involved. Once the defendant has made a decision, it should directly notify the person involved, and allow that person to present his case. The defendant not only did not act according to this principle, or respect the rights of the individual involved, it also did not actually administer the formalities related to removing his name from the rolls, changing his residency status, transferring his personnel files, and so on.<sup>92</sup>

Despite the apparent importance and novelty of the process argument—it marked the first time a Chinese court compelled government organs to follow basic due process requirements not required by legislation—the larger legal community seemed not to realize the import of the decision, at

89. *Id.*

90. *Id.*

91. The word used in both the scholarly literature and in some court decisions is "*chengxu*," which can be translated either as "procedure" or "process." Although that specific word was not used in the *Tian Yong* decision, it was used in the *Liu Yanwen* decision, discussed below. In that case, the court referred to "the principle of proper procedure" (*zhengdang chengxu yuanze*).

92. *Tian Yong*, *supra* note 80, at 545.

least initially.<sup>93</sup> Much of the immediate reaction focused on the expansion of jurisdiction under the ALL rather than the novel use of due process norms.<sup>94</sup>

As is often the case with innovative legal decisions, the court's due process holding lacked a clear basis in Chinese law. Beyond the reference to the student's right to education, which is protected by Article 46 of the Chinese Constitution and also by Chinese education law, the court could point to little substantive law to support its decision. The Chinese Constitution does not make reference to any due process right. Furthermore, as noted above, Chinese education law was very weak on the question of due process protections at the time the case was decided.

The court's affirmation of Tian's due process rights was all the more notable given the general unwillingness of many Chinese courts to enforce due process norms.<sup>95</sup> Although the ALL clearly states that administrative decisions can be overturned for failure to adhere to proper process,<sup>96</sup> until recently, there have been relatively few court decisions upholding a plaintiff's right to legally mandated procedural review.<sup>97</sup> Successful challenges to administrative action on due process grounds were so rare in the first years after the passage of the ALL in 1990 that one Western scholar noted that "procedural due process is effectively absent as a governing standard" in administrative litigation cases.<sup>98</sup>

According to some academic experts who have studied the case closely, both Anglo-American legal theory, with its strong emphasis on procedural justice, and emerging process requirements in Chinese law influenced the

93. Author interview.

94. Author interview.

95. PEERENBOOM, *supra* note 2, at 423-24.

96. Article 54(2)(3) of the ALL allows courts to overturn administrative decisions in cases in which the administrative organ has been "found to have violated the legal procedure." Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 54.

97. One scholar has tied the relative lack of judicial concern with process to China's long history of imperial rule:

China has been a country ruled by man rather than by law for over 2000 years, so people have more belief in the importance and necessity of a great leader rather than a well-established legal system. Chinese history has shown that the administration had not, in implementing legislation, paid much attention to procedural legal requirements in the past. The traditional belief was that so long as the substantive contents of any administrative decisions are correct, any defects in administrative procedures should not affect the validity of the decision.

LIN FENG, *supra* note 58, at 189.

98. LUBMAN, *supra* note 3, at 207. For an argument that Chinese courts generally penalize administrative agencies only for major violations of administrative procedure and will not find in favor of a plaintiff for only "minor" violations, the definition of which is somewhat vague, see *id.* at 190. In general, despite the power granted to them to review administrative decisions for procedural fairness, one scholar has noted that "courts do not seem to take procedural requirements seriously" and that they "have emphasized substantive justice over procedural justice." PEERENBOOM, *supra* note 2, at 423-24. Some Chinese scholars dispute the characterization of Chinese courts as insufficiently attentive to due process, arguing instead that, because Chinese law often lacks provisions relating to due process, the courts are without a legislative basis for enforcing due process norms. Author interview.

court.<sup>99</sup> In particular, the court apparently looked to the Administrative Penalty Law,<sup>100</sup> which went into effect in 1996 and contained concrete procedural requirements for administrative organs seeking to impose fines or otherwise administer administrative penalties.<sup>101</sup>

The creation of a judicially mandated basic due process right has many implications. While the ALL allows Chinese citizens to take government organs to court over failure to adhere to legislative requirements, a judicially enforceable due process right could help spur the development of Chinese administrative law. Such a due process right would not only ensure that administrative action adheres to certain basic elements of process, including notification and public participation, but would also spark debate within the government and in legal circles as to how much process is required in different administrative situations.<sup>102</sup>

99. Author interview.

100. Administrative Penalty Law of the People's Republic of China (promulgated by the Nat'l People's Cong. on Mar. 17, 1996, effective Oct. 1, 1996) (P.R.C.), available at: <http://www.cecc.gov/pages/newLaws/adminPunishmentEng.php>.

101. Author interview. Article 42 of the Administrative Penalty Law reads as follows:

An administrative organ, before making a decision on administrative penalty that involves ordering for suspension of production or business, rescission of business permit or license or imposition of a comparatively large amount of fine, shall notify the party that he has the right to request a hearing; if the party requests a hearing, the administrative organ shall arrange for the hearing. The party shall not bear the expenses for the hearing arranged by the administrative organ. The hearing shall be arranged according to the following procedure:

- (1) To request a hearing, the party shall do it within three days after being notified by the administrative organ;
- (2) The administrative organ shall, seven days before the hearing is held, notify the party of the time and place for the hearing;
- (3) The hearing shall be held openly, except where State secrets, business secrets or private affairs are involved;
- (4) The hearing shall be presided over by a person other than the investigator of the case designated by the administrative organ; if the party believes that the person has a direct interest in the current case, he shall have the right to apply for the person's withdrawal;
- (5) The party may participate in the hearing in person, or he may entrust one or two persons to act on his behalf;
- (6) The investigator shall, when the hearing is conducted, put forward the facts about the violations of law committed by the party, the evidence and recommendation for administrative penalty; the party may defend himself and make cross-examination; and
- (7) Written record shall be made for the hearing; the written record shall be shown to the party for checking, and when the party acknowledges that the record is free of error, he shall sign or affix his seal to it.

If the party has objection to the administrative penalty that involves restriction of freedom of person, the relevant provisions of Regulations on Administrative Penalties for Public Security shall apply.

Administrative Penalty Law of the People's Republic of China, *supra* note 100, art. 42.

102. For more on the issue of procedural fairness, see He Haibo, *Tongguo panjue fazhan falu: ping tianyong anjian zhong xingzhengfa yuanze de yunyong* [Developing the Law Through Court Decisions: A Discussion of the Use of Administrative Law Principles in the Tian Yong case], in 3 XINGZHENGFA LUNCONG [ESSAYS ON ADMINISTRATIVE LAW] 437 (Luo Haocai ed., 2000).

Finally, the Haidian District People's Court found that the university regulations that permitted Tian's expulsion were not in accordance with relevant national regulations. The Beijing First Intermediate People's Court affirmed this holding, stating that although the school had authority to create internal regulations, it had to do so "under the law," while "protecting the individual's rights."<sup>103</sup> The university must "handle [cases] in a manner that is consistent with the spirit of applicable laws, regulations, and rules."<sup>104</sup> National regulations, specifically Article 12 of the Regulations on Student Management in Regular Higher Education Institutions, stipulate a much less severe punishment for a single case of cheating than expulsion.<sup>105</sup> Furthermore, Article 29 of the same regulations lists various circumstances in which a student could be expelled, and cheating is not on that list. Therefore, the court ruled, the university regulations "expanded the scope of 'cheating'" under Article 12 and "contradict[ed] the conditions for withdrawal specified in Article 29."<sup>106</sup>

Because the University of Science and Technology did not follow relevant national level regulations in expelling Tian, its decision was nullified.<sup>107</sup> Tian would get his certificate, and the university was required to reconsider his qualifications for the issuance of a degree within sixty days. The other claims advanced by the plaintiff, including claims for money damages and the issuance of an apology, were denied by both courts.

The victory for Tian himself was only a partial one. Forced to reconsider its decision to deny Tian his degree, the university adhered to its initial decision.<sup>108</sup> Although Tian would receive his graduation certificate, he would not get his degree.

Due to its innovative approach to due process and education litigation under the ALL, the *Tian Yong* decision quickly drew the notice of other judges within the court system. Soon after decision, the SPC selected the case for inclusion in the *Gazette*.<sup>109</sup> Interestingly, in publishing the First

103. *Case 1. Administrative Proceeding: Tian Yong v. University of Science and Technology, Beijing for Refusing to Issue Certificate of Graduation and Degree*, *supra* note 9, at 66.

104. *Id.*

105. Regulations on Student Management in Regular Higher Education Institutions, *supra* note 53, art. 12.

106. *Case 1. Administrative Proceeding: Tian Yong v. University of Science and Technology, Beijing for Refusing to Issue Certificate of Graduation and Degree*, *supra* note 9, at 66.

107. *Id.* at 69.

108. Author interview.

109. For more on the legal force of the *Gazette of the Supreme People's Court*, see Liu Nanping, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L L. 271 (1989) (arguing that while lower courts are forbidden by the SPC itself from directly citing gazetted opinions, the SPC nonetheless views the cases more or less as precedent). In 1995, Liang Huixing, the then-editor of the *Gazette*, noted that the gazetted cases "both guide the courts and create legal norms (*guize*), thereby filling many of the gaps in Chinese law." LUBMAN, *supra* note 3, at 285. The gazetted *Tian Yong* decision seems to have had an almost precedent-like influence on many of the cases that followed. Author interview. Yet it is important not to overstate the influence of the *Liu Yanwen* case in particular, or of gazetted cases in general: in the absence of a clear rule that new legal rules or approaches enunciated by gazetted cases are in fact binding, some courts may choose not to adopt them. Author interview.

Intermediate Court's decision, the SPC strengthened the language on due process, adding a line to the original court decision clearly stating that the lack of notice and a hearing was "illegal."<sup>110</sup> The *Gazette* also added language clarifying the legal basis for expanding court jurisdiction under the ALL. The editorial changes to the *Gazette* version of the text seemed to indicate both that the SPC approved of the legal approach taken by the court in the *Tian Yong* case, and that the SPC hoped that with clearer legal guidance, other courts could use the new legal approaches.<sup>111</sup>

Implicit in the decision in the *Tian Yong* case was the proposition that courts could adjudicate disputes between students and their universities without infringing on university autonomy. The University of Science and Technology had argued that its authority to handle cases of alleged cheating and, more importantly, degree granting, was virtually absolute. The court tried to show respect for the university's authority by holding only that the school had to review its decision, not that it had to grant Tian his degree. Whether such an approach would be acceptable to universities would become a key question in the *Liu Yanwen* case, filed just a few months after the *Tian Yong* verdict.

### C. Liu Yanwen: *Judicial Supervision and Academic Autonomy*

After Tian won his case, the university system took action to shield itself from further lawsuits.<sup>112</sup> University officials began to seek legal advice on their vulnerability to lawsuits similar to the *Tian Yong* case. Some officials also began to complain to the government that the *Tian Yong* case was a gross infringement on their autonomy, and that such a case should not be repeated.<sup>113</sup> Just as senior university officials were beginning to respond to the *Tian Yong* decision, the Haidian court accepted another case, one that would generate much more public attention than Tian's had. On September 24, 1999, just five months after the *Tian Yong* decision, Liu Yanwen, a researcher at the Chinese Academy of Sciences, sued his former school, Peking University, for failing to award him his Ph.D. degree.<sup>114</sup>

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110. The text of the SPC *Gazette* version of the *Tian Yong* decision was reprinted in 3 XINGZHENGFA LUNCONG [ESSAYS ON ADMINISTRATIVE LAW] 397 (Luo Haocai ed., 2000). Specifically, the editors of the *Gazette* added a line stating that "this type of administrative management behavior is illegal." *Id.* at 402.

111. For more on the changes to the text of the *Gazette* version of the decision, see He Haibo, *supra* note 102. The overall quality of the gazetted version of the *Tian Yong* decision was itself worthy of note. It seemed that, in publishing a more rigorously argued version of the decision, the SPC was attempting to persuade judges to adopt a similar approach. The quality of the decision was also especially noteworthy in the Chinese context, in which the utility of many judicial decisions is limited by "the conclusory and formalistic style in which they are written." LUBMAN, *supra* note 3, at 288.

112. Author interview.

113. Author interview.

114. Unless otherwise noted, the description of the facts of the Liu case is taken from Liu Yanwen v. Beijing Univ. Academic Degree Comm, Admin. Ruling No. 103 (Haidian Dist. People's Ct., Dec. 17, 1999, reprinted in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 499. See also Collection of Teaching Materials Related to 'Liu

Liu, who had enrolled as a graduate student in the wireless electronics department in 1992, finished his Ph.D. thesis in late 1995 and expected his degree in early 1996. Though his thesis advisor had noted that his English skills were substandard and also made some negative comments on Liu's thesis, he still gave him a passing grade and recommended that Liu be awarded his degree. The thesis defense committee, made up of experts in Liu's field, also approved his thesis after extensive review, and in early January the department-level degree assessment committee did the same, with only one dissenting vote.<sup>115</sup> Liu had only one last hurdle between him and graduation: the stamp of the University Degree Assessment Committee, which in most cases was a mere formality.<sup>116</sup>

But when the University Degree Assessment Committee met on January 24, it declined to approve Liu's thesis. Liu would neither get his degree nor his Ministry of Education-issued graduation certificate. Instead, he would be issued a course completion certificate.<sup>117</sup>

Liu was never formally notified of the committee's verdict; his course completion certificate was the only communication from the school indicating he had been denied his degree. He asked the school repeatedly for an explanation of what had happened, but never received any response.

Seeking to have the decision reversed, Liu first filed for judicial review of his case in 1997 under the ALL, only to have his petition refused by the court. He decided to try again in 1999 after reading a newspaper article on the *Tian Yong* verdict.<sup>118</sup> Some of the same lawyers who were involved in the *Tian Yong* case would also be involved in the *Liu Yanwen* case, and the Haidian District Court, which had also handled the *Tian Yong* case, would issue the first opinion in the *Liu Yanwen* case.<sup>119</sup>

Liu sued both the Degree Assessment Committee and Peking University, asking that the committee be required to withdraw its decision of January 24, 1996, and that it engage in a new review of his Ph.D. thesis. He also

Yanwen v. Beijing University and Beijing University Academic Degree Evaluation Committee' (used at Beijing University Law School) (on file with author); Chen Hua, *Boshisheng zhuanggao beida* [Graduate Student Sues Beijing University], QINGNIAN CANKAO [YOUTH REFERENCE], Nov. 26, 1999, reprinted in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 317.

115. *Liu Yanwen*, *supra* note 114, at 499, 503.

116. The university-wide committee, which consisted of professors and administrators from across the university, was charged with reviewing and approving—or declining to approve—the decisions of the various departmental committees. Because it met only briefly and lacked the expertise to engage in extensive review of any of the Ph.D. dissertations it was called upon to review, it was generally viewed as reviewing form rather than substance. The role and authority of the university-level committee would become a point of contention in court. For more on the weaknesses of China's degree system, see Qin Ping, *Jiakuai xuewei zhidu gaige qieshi tuijin xuewei lifa* [To Quicken the Reform of China's Degree System, We Need to Realistically Push for a Degree Legislation], in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 400.

117. For a description of the process of awarding both graduation certificates (*biye zheng shu*) and degrees (*xuewei*), see *supra* note 79.

118. Author interview.

119. Author interview.



asked that Peking University be compelled to reconsider its decision to issue him a course completion certificate instead of a graduation certificate.<sup>120</sup>

Because the defendant was China's most prominent university in a country that takes education very seriously, the case attracted a significant amount of media coverage and public scrutiny. The case also raised legitimate concerns about academic autonomy: if the courts were going to sit in judgment on purely academic decisions, such as the quality of student work, then academic autonomy would in fact be severely compromised.

For that reason, several prominent legal academics in Beijing and elsewhere saw Liu's claims as not appropriate for judicial review. They argued that the Haidian court should never have taken the case, and viewed the case as a major threat to university autonomy.<sup>121</sup> Others saw the decision over the scope of court jurisdiction under the ALL as more properly left to the legislature.<sup>122</sup>

Arguments in court focused on a number of issues, including the obligations of the university in degree administration, the conditions for granting a Ph.D. degree, the process for granting a Ph.D. degree, and the requirements of the relevant regulations covering the awarding of degrees. Careful to draw a line between Liu's right to due process and the university's authority over judging student work, Liu's lawyers, perhaps having learned from the court's decision in the *Tian Yong* case, made clear that it was only asking that the committee reconsider its decision, not that it be forced to grant him his degree.

Liu's main contention was that the committee did not follow the relevant regulations in rejecting his dissertation. When the committee met in January 1996, only sixteen of twenty-one members were present. Liu claimed that the entire committee had to be present in order for its decisions to have legal effect. Liu also questioned the outcome of the vote, which was six in favor of granting the degree, seven opposed, and three abstaining.<sup>123</sup> In Liu's view, any decision had to be supported by a majority of the entire committee—a minimum of eleven votes—and not just more than half of

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120. In the Chinese educational system, degrees and graduation certificates are separate documents, with graduation certificates considered to be government documents issued by the Ministry of Education upon notification by the university that the student has fulfilled the relevant requirements. Liu argued that, given that he had fulfilled all of the requirements for his graduation certificate, the university had no power to withhold it from him. *Liu Yanwen*, *supra* note 114, at 500–01.

121. Author interview.

122. Gao Di, *Fayuan: shuo li die zuibou defang: guanyu xuesheng gao xuexiao de xin ganwu* (*The Courts: The Last Place for Speaking Truth: New Realizations on Cases of Students Suing Schools*), FAZHI RIBAO [LEGAL DAILY], Feb. 14, 2000, in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 393.

123. The university likely did not win itself any points when it apparently initially misrepresented the results, counting the abstentions as votes against Liu. The court found that the abstentions were in fact abstentions.

the members present. He also argued the regulations explicitly disallowed abstentions.

Liu further argued that in substituting its own judgment on the quality of his thesis for the judgments of the defense committee and the department-level committee, the university committee overstepped its authority. The committee was supposed to focus on form rather than substance, and could not engage in a fresh substantive review of his thesis, partly because it lacked the expertise to do so.

Because experts of various disciplines made up the university-wide committee, Liu argued that it was virtually impossible for the committee to come to a considered, independent judgment of his highly technical scientific paper. That the university had thousands of pages of documents to pass judgment on during its single half-day meeting also cast doubt on the university's claim that it could, and did, engage in sufficient independent review of Liu's work.

Experts in the field of wireless electronics had already reviewed and approved Liu's paper, bolstering Liu's argument that the university committee could not seriously review his work. Liu noted that authoritative journals both inside and outside China published parts of his thesis after the university committee had rejected it. Liu also raised the fact that his advisor, a senior scholar in the field, approved his thesis to support his claim that the committee's decision lacked any basis in fact.

Liu also argued that a system in which the committee could come to its own conclusions about the substance of Liu's work was, by its very nature, "extremely dangerous."<sup>124</sup> By allowing non-expert outsiders to override the judgment of experts within the discipline, the university had created a system open to abuse; the entire committee could be influenced by one or two members who lacked specialized knowledge.

But the most contentious point was the question of whether or not the court could impose process requirements on the university beyond those already spelled out by existing law. Liu claimed that, as with the *Tian Yong* case, the university had an obligation to inform Liu in writing of its decision, providing both an explanation of why it had denied his diploma and an opportunity to participate in the process. Liu referred to his right to participate as one of the most basic elements of fair process, especially when the stakes—the potential denial of a degree that he had worked for years to earn—were so high.<sup>125</sup> In some ways, the due process point was more important to Liu than Tian; whereas Tian could point to numerous instances in which the university had affirmed his status as a student, Liu could point to no such record.

In general, the university offered a weak response to Liu's arguments, unable to articulate a convincing justification for having denied Liu his

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124. *Liu Yanwen*, *supra* note 114, at 500, 505.

125. *Id.*

degree. Instead, it largely stuck to arguments about its authority: because the law empowered the university to grant degrees, it had the authority to make the final—and, implicitly, unreviewable—decision as to whether a degree candidate passed muster. The university also disputed the process argument, claiming that it could not be held responsible for process obligations not required by law.

In addition to the arguments over the committee's decision-making process, the court also had to deal with two technical legal questions: first, whether or not the university was covered by the ALL, and second, whether Liu's claim was filed in a timely manner. The first issue was more or less a complete replay of the arguments put forward in the *Tian Yong* case, and the court ruled in Liu's favor using essentially the same rationale.<sup>126</sup>

The second technical issue was a question of timing, one that was not raised in the *Tian Yong* case. Under Article 39 of the ALL, a litigant must bring a claim within three months of being informed of an administrative decision.<sup>127</sup> Liu's claim, coming a full three-and-a-half years after he had been issued his course completion certificate, seemed to be years overdue. However, Liu argued that the certificate could not serve as formal notification of being refused his degree. Moreover, he had repeatedly asked the university to give him a full explanation for its decision and to allow him a chance to appeal, and the school had ignored both requests. In Liu's view, the university's failure to respond meant that the clock was still ticking.

The Haidian court accepted this argument. It held the university responsible for the delay, and allowed Liu's claim to go forward. This decision on the issue of timing is notable in that the court accepted Liu's more creative and expansive legal argument instead of the defendant's more formal one. Thus, the case went forward to be judged on the merits, a somewhat rare occurrence in the Chinese legal context.

After settling these technical questions, the court found for Liu on virtually all counts. In a pair of decisions on December 17, 1999, the court held that the university had in fact violated the relevant regulations in that only seven out of a committee of twenty-one persons had voted to deny Liu his degree. The court also held that Liu's procedural rights had been violated because he had not been notified in writing of the committee's decision, nor had he been allowed to participate in the process.

Because the university had violated Liu's right to fair process, the court held that the committee's 1996 decision was invalid and that it had to reconsider Liu's thesis within ninety days of the court's judgment. The court also ruled that the university had to rescind its issuance of a course

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126. In asserting jurisdiction under the ALL, the court relied on an analysis of relevant degree regulations, which split authority between the state and individual universities.

127. Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 39 ("Where a citizen, a legal person or any other organization chooses to directly initiate an action to a people's court, he or it shall do so within three months from the day when he or it comes to know that a specific administrative act has been taken, except as otherwise provided for by law.").

completion certificate, and instead issue Liu a graduation certificate within sixty days of the ruling.

Liu's seemingly complete victory, won after years of patient and persistent struggle, would turn out to be short-lived. Peking University appealed the ruling, and less than five months later, the Beijing First Intermediate People's Court issued a decision under Article 61(3) of the ALL,<sup>128</sup> ordering the Haidian court to reconsider its judgment, specifically on the question of the timeliness of Liu's claim.<sup>129</sup> The Haidian court did so, and in December 2000, issued a decision rejecting Liu's claim on the grounds that the time for filing had expired.<sup>130</sup>

Speculation was rife that Peking University had intervened in the case and had used political pressure to force a change in the outcome.<sup>131</sup> Others believed that the turnaround was due not to pressure specifically from Peking University, but rather from senior officials at a number of schools in Beijing, some of whom were members of the National People's Congress and therefore carried sufficient political clout to influence events.<sup>132</sup> Speculation that politics played a role was bolstered by the fact that, rather than taking on the appeal itself, the Intermediate Court sent the case back to the Haidian court for reconsideration in a cursory opinion that read more like an order than an appellate decision. The Haidian court then promptly rejected its own earlier reasoning, giving virtually no explanation for its turnaround.

In fact, pressure had been building on the Haidian court since the initial *Tian Yong* ruling. After the *Tian Yong* case was affirmed, officials from more than twenty universities, both inside and outside Beijing, began to pressure the SPC to take action to shut down such lawsuits.<sup>133</sup> As a result of this outside pressure, the SPC apparently warned Beijing judges to "be careful"

128. The text of Article 61(3) is as follows:

[I]f the facts are not clearly ascertained in the original judgment or the evidence is insufficient, or a violation of the prescribed procedure may have affected the correctness of the original judgment, the original judgment shall be rescinded and the case shall be remanded to the original people's court for a retrial, or the people's court of the second instance may amend the judgment after investigating and clarifying the facts. The parties may appeal against the judgment or ruling rendered in a retrial of their case.

Administrative Litigation Law of the People's Republic of China, *supra* note 6, art. 61.

129. Beijing Univ. v. Liu Yanwen, Admin. Ruling No. 45 (Beijing 1st Interm. People's Ct., Apr. 30, 2000); Beijing Univ. Academic Degree Evaluation Comm. v. Liu Yanwen, Admin. Ruling No. 43 (Beijing City 1st Interm. People's Ct., Apr. 30, 2000). The text of both decisions can be found in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 533–34, 514–15.

130. Beijing Univ. v. Liu Yanwen, Admin. Ruling No. 158 (Beijing City Haidian Dist. People's Ct., Dec. 15, 2000); Beijing Univ. Academic Degree Evaluation Comm. v. Liu Yanwen, Admin. Ruling No. 157 (Beijing City Haidian Dist. People's Ct., Dec. 15, 2000). The text of both decisions can be found in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 535–38, 516–19.

131. Author interview.

132. Author interview.

133. Author interview.

in accepting such cases.<sup>134</sup> The message was successfully sent: according to academic experts, after the *Liu Yanwen* case was reversed, fewer courts in Beijing have been willing to accept similar cases from students suing their universities under the ALL.<sup>135</sup>

But because the SPC did not produce a document that clearly forbade courts to take such cases, courts in other jurisdictions continue to assert jurisdiction.<sup>136</sup> Also, because the *Liu Yanwen* case was reversed on technical grounds, its core holdings retain their persuasive power, and other courts have continued to make use of its innovative legal approach.<sup>137</sup>

Although the Haidian court's initial decision was not allowed to stand, it is a fascinating document, one that is in many ways very atypical of contemporary Chinese court decisions. The court relied on broad procedural principles as a source of authority rather than specific laws, a rare judicial move in the Chinese context. The court's decision can be seen as an act of what in the United States would be called "judicial activism"—it relied on an expansion of the scope of a law to cover a new class of defendants, thus ensuring that the plaintiff would get a hearing. The court then enforced judicially created process norms that, by the court's own admission, lacked a strong legislative basis.

In some ways, the quality of the Haidian court's initial decision is more important than the decision to protect Liu's fair process rights. The court's decision was detailed, disciplined, and, perhaps most important, limited: while it granted Liu the rehearing that he asked for and compelled the university to issue his graduation certificate, the court sought to strike a balance between the individual's right to a fair process and the university's right to academic autonomy. It did not attempt to pass judgment on Liu's work, nor did it compel the university committee to issue Liu's degree. Instead, adhering closely to national regulations, the court took a microscope to the process administered to Liu, and limited its review to that process. It may be for this reason that one of China's leading legal scholars called the court decision a near "milestone," and referred to the court's reasoning as "outstanding," before decrying the fact that the court had apparently succumbed to outside pressure.<sup>138</sup>

On the negative side, the *Liu Yanwen* case also suggests the extent to which external factors can influence the judicial process. The fact that outside forces seemingly helped reverse the final verdict in the case illus-

134. Author interview.

135. Author interview.

136. Author interview. According to one lawyer involved in the case, in 2001, the SPC circulated a draft judicial interpretation that would more clearly define which cases courts should and should not take, but it was shelved after being criticized by various government bureaus.

137. Author interview. The SPC held consultations on how to handle such disputes in the future, but because no consensus could be reached, the Court never issued any guidelines. *Id.*

138. He Weifang, *An Analysis of the Liu Yanwen v. Peking University Case*, available at [http://www.chinalawedu.com/news/2004\\_4%5C27%5C1417574931.htm](http://www.chinalawedu.com/news/2004_4%5C27%5C1417574931.htm) (last visited Feb. 14, 2007).

trates the ways in which institutional power dynamics, rather than legal rules or processes, can determine judicial outcomes. The *Liu Yanwen* case highlights how far China still has to go in terms of creating a system that can protect and enforce legal norms on the basis of law without fear of outside interference.

Although the outcome in the *Liu Yanwen* case was eventually changed, the case did have a positive impact: after Liu filed suit, and again after the initial verdict, university officials both in Beijing and across China renewed their efforts to make sure that their administrative procedures were in accordance with relevant government regulations.<sup>139</sup> As will be discussed below, the *Tian Yong* and *Liu Yanwen* cases also led to legislative reforms that required all universities to protect students' due process rights in most disciplinary situations. Liu himself may have lost his degree, but at the very least, the court's verdict did have an indirect enforcement effect as schools attempted to make themselves less vulnerable to similar lawsuits from their own students.

On the other hand, some saw the extension of jurisdiction over universities by courts under the ALL as a serious step backward for university autonomy. Instead of encouraging a view of universities as more separate from the state, the courts in the *Tian Yong* and *Liu Yanwen* cases seemed to suggest that, legally speaking, universities can in fact be seen as state actors. This analysis fails to give proper weight to the extensive overall state involvement in the university sector, a situation that is unlikely to change anytime soon, and one that is beyond the influence of the courts. Given that the Chinese government seems unlikely to step back from its current deep involvement in university affairs, the decision by the courts to assert jurisdiction in the *Tian Yong* case and in the cases discussed below merely reflected the reality of the current situation.

#### D. *After Tian Yong and Liu Yanwen: Acting as "Precedent" and Stirring Legislative Change*

The *Tian Yong* and *Liu Yanwen* cases continue to impact education litigation cases outside Beijing. According to several experts associated with the case, courts across China have adopted the central holdings of the *Tian Yong* and *Liu Yanwen* cases.<sup>140</sup> The interest of other courts in the holdings of these cases is one small indication of improved adjudication in China: the fact that courts have looked to the relatively more sophisticated adjudication of the *Tian Yong* and *Liu Yanwen* cases and have attempted to apply their key holdings in almost precedent-like fashion indicates that many judges are attempting to increase their capacity to handle more complicated cases and

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139. Author interview.

140. Author interview.

to apply more complex legal doctrine.<sup>141</sup> Although no statistics exist on the number of cases brought by students against universities since 2000, one Beijing-based scholar who follows the issue closely estimated that at least one hundred, and possibly many more, students have brought such cases.<sup>142</sup> In the southern city of Guangzhou alone, between 2003 and 2006, the courts handled eighteen education litigation cases, which one Guangzhou judge proudly noted was among the most of any city in the country.<sup>143</sup> By comparison, that same judge and a researcher from the Guangzhou city court noted that between 2000 and 2004, the Tianjin city courts had handled only fourteen such cases.<sup>144</sup>

Whereas courts could have continued to deny jurisdiction in education litigation suits, a number of them followed the lead of the Haidian District People's Court and the Beijing First Intermediate People's Court and accepted such cases as administrative lawsuits. As they did so, many judges consulted both the prior caselaw and the growing body of academic literature on the question of how to legally classify certain actions by universities.<sup>145</sup> They also directly consulted with colleagues sitting on other courts who had handled similar cases; one of the judges involved in the *Tian Yong* case acknowledged getting phone calls from judges in several different provinces across China seeking advice on how to handle ALL lawsuits in which the defendant was an educational institution.<sup>146</sup>

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141. Although the Chinese court system does not formally recognize precedent, a growing number of Chinese scholars have come to support its increased use by Chinese courts. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 300 (2003). Some courts have begun to experiment, on a limited basis, with the use of precedent; for example, in July 2002, the Zhongyuan district court, in the provincial capital of Zhengzhou, Henan, introduced a system in which the court would be bound by prior decisions of the same court in new cases which raised legal questions that were not answered by the relevant statutory law. *Id.* at 300–08.

142. Author interview.

143. Liu Yuenan & Ju Xiaoxiong, *supra* note 12, at 207–08.

144. *Id.* at 207.

145. Author interview. The adaptation of administrative law is also an illustration of the growing influence of academic and scholarly literature on judicial decision making. Some judges who have written about their own handling of education litigation cases have cited key scholarly articles by Peking University law professors Shen Kui and Zhan Zhongle and Tsinghua University law professor He Haibo, among others. *See, e.g.*, Liu Yuenan & Ju Xiaoxiong, *supra* note 12; Shi Hongxin, *Quanli xuqiu yu sifa buiying* [Rights Claims and Judicial Responsiveness], in GAODENG JIAOYU YU XINGZHENG SUSONG [HIGHER EDUCATION AND ADMINISTRATIVE LITIGATION], *supra* note 1, at 249 (Shi Hongxin is identified as an assistant judge in the Administrative Division of the Haidian District People's Court); *see also* Heidi Ross & Zhang Ran, *Guests Editors' Introduction: The Limits and Responsibilities of Responsive Justice*, CHINESE EDUC. & SOC'Y., July–Aug. 2006, at 3–4 (identifying the *Tian Yong* and *Liu Yanwen* cases as examples of "promising, socially engaged legal scholarship that has recently emerged in China.").

146. Author interview. The calls received by some of the judges involved in the *Tian Yong* case should be differentiated from the practice, common among basic-level courts in China, of asking upper-level courts in the same jurisdiction for "guidance advice" (*zhidao yijian*) on a particular case, so as to ensure consistency and avoid the "embarrassment" of having a decision overturned by the higher court. (In the Chinese system, overturned decisions are often viewed as a sign of a court reaching an "incorrect" verdict, and some judges fear they will be penalized for issuing too many decisions that are later overturned.) This practice raises serious concerns about judicial independence and the weakening of the individual's right of appeal. In the *Tian Yong* case, some judges received phone calls from judges in other jurisdictions. Those judges were seeking to better understand the legal theories used in the *Tian*

As education litigation cases continued to be heard in courts across China, the SPC consulted with various interested parties about the possibility of formalizing jurisdiction in certain situations through the release of a judicial interpretation that would clarify the situations in which universities could be sued under the ALL. However, a lack of agreement over the scope of jurisdiction, and continuing resistance from some in the university sector, has meant that the SPC has yet to issue a final document as of this writing.<sup>147</sup> Although the lack of an SPC interpretation has prevented uniformity across different jurisdictions, with many courts continuing to decline to hear such cases under the ALL, there is still a positive side to the SPC's inaction: the lack of a binding statement from the SPC has allowed individual judges to make decisions on their own regarding the merits of the extension of the ALL to universities. In all of the cases discussed below, the judges involved could have refused jurisdiction. Their decision to hear these cases indicates a willingness to experiment with new legal approaches even in the absence of an authoritative statement from above compelling them to do so.

On the plaintiff's side, would-be litigants continue to seek advice on how to craft winning legal arguments from the academic experts in Beijing who had been involved in the *Tian Yong* and *Liu Yanwen* cases. At least one academic who had advised his university on how to handle student suits has begun to act as a legal representative for students at other schools who allegedly suffered wrongdoing at the hands of their own universities.<sup>148</sup>

The 2001 *Wang Changbin* case was one such case in which a plaintiff asked a court outside Beijing to use the ALL to justify judicial review of a university's decision to deny him a degree.<sup>149</sup> In that case, Wang, a student at the Wuhan University of Technology, was given only a graduation certificate and denied his actual diploma when he finished his studies in the spring of 2000.<sup>150</sup> The university's refusal to issue Wang his degree stemmed from an incident in June 1999, when Wang was found with notes on his person after he entered an exam room.

After the university refused for more than a year to issue his degree, despite repeated appeals directly to the school, Wang brought suit in Wuhan City Hongshan District People's Court on June 24, 2001. Not only did the court review the case under the ALL, it also incorporated the due pro-

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*Yong* case, and were free to disregard those theories if they found them unconvincing. See generally Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, LAW & SOC. INQUIRY, Winter 2006, at 75, 93–94 (providing more information about the practice of “guidance advice” in Chinese courts).

147. Author interview.

148. Author interview.

149. The factual background for this section is drawn from *Shouguo chufen jiu ugei xuewei? Daxuesheng zhuangao muxiao shengsu* [If A Student Has Received Demerits, Can the University Refuse to Grant Him His Diploma?], SHENZHEN FAZHI BAO [SHENZHEN LEGAL DAILY], Dec. 12, 2001, available at <http://edu.enorth.com.cn/system/2001/12/21/000224269.shtml>.

150. *Id.*



cess holding of the *Tian Yong* and *Liu Yanwen* cases into its decision, holding that the university had violated Wang's rights when it neither notified him of its decision nor gave him an opportunity to defend himself.<sup>151</sup> The court also held that the school was punishing Wang for behavior that, under relevant national regulations, was not considered serious cheating and therefore could not be grounds for denying Wang his degree.<sup>152</sup> As with the *Tian Yong* and *Liu Yanwen* cases, the Hongshan court, rather than ordering the school to issue Wang his degree, held that the school's degree committee must meet within sixty days to review Wang's qualifications for a degree.<sup>153</sup>

The effect of the court's ruling was potentially far-reaching: according to one commentator, more than one thousand schools nationwide had rules that categorically excluded students caught cheating from receiving their degree, and never before had any legal body held that such rules were in violation of national regulations.<sup>154</sup> Yet the court's decision stood and was affirmed on appeal.<sup>155</sup>

Other courts have used the expanded jurisdiction under the ALL to introduce abstract legal principles other than due process. In one case, a court made use of equal protection doctrine to decide in favor of a student who had been denied his degree on the basis of alleged political crimes.<sup>156</sup>

The 2000 case, decided by the Jiangxi Province High People's Court, involved a dispute between Wang Chunming, a bachelor's degree candidate, and the Southern Metallurgy Institute that stemmed from an incident in April 1998 when the Ganzhou District Public Security Bureau (PSB) investigated Wang's alleged contact with unspecified "foreign hostile organizations."<sup>157</sup> On June 10, 1998, the PSB sent an administrative opinion to the institute, informing the school that Wang had been investigated and suggesting that the school take action. The PSB also asked that it be in-

151. *Kaoshi zuobi bugui xuewei fayuan rending ciju weifa* [Court Declares Illegal University's Decision not to Give Degree for Cheating on Test], XINHUA NEWS AGENCY, May 2, 2002, available at <http://www.cctv.com/news/society/20020505/121.htm>.

152. See State Education Commission, Notice on the Strict Administration of Testing in Higher Education Institutions and Other Issues, promulgated on May 29, 1996, available at <http://library.usts.edu.cn/jygl/1/GDJYGLFLFG/1469.htm>.

153. *Id.*

154. *Gaoxiao xiaogui zaoyu ganga* [An Awkward Encounter for University Regulations], ZHONGGUO XINXI BAO [CHINA INFO. NEWS], Dec. 10, 2001, available at <http://61.144.60.222:8080/moral/anlife/nxi/anlifexi2/anlifexi2.4.htm>. This commentator, a university vice president from Hubei province, criticized the decision, saying that "court decisions like this one make it difficult for university presidents to do their job." *Id.* Many other university regulations relating to degree requirements, restrictions on personal behavior, and even rules forbidding students to marry or become pregnant, also lacked a clear basis in national law, and were therefore potentially vulnerable. *Id.*

155. *Kaoshi zuobi bugui xuewei fayuan rending weifa* [Court Declares Illegal University's Decision not to Give Degree for Cheating on Test], *supra* note 151.

156. *Wang Chunming v. S. Metallurgy Inst.*, Admin. Decision No. 16 (Jiangxi Province High People's Ct., Feb. 15, 2001). The factual and legal summary that follows is taken from the court's verdict.

157. *Id.*

formed by the school of any action taken in the case. Six days later, the school obliged, informing the PSB that it had issued “demerits” (*jiguo*) to Wang. Although the school informed both the school’s leadership and the Party representatives within the school, it did not notify Wang himself.

Not until January 1999, when the school sent an update to Wang’s family on Wang’s in-school performance, did Wang learn of the receipt of the demerits. The notice came in an otherwise positive review: Wang’s grades were good, and in the opinion of the school, Wang supported socialism and the leadership of the Chinese Communist Party.

The effect of the demerits was significant. In June 2000, when the school issued the list of students who would receive a bachelor’s degree, Wang’s name was not on it. Instead, Wang would receive only a graduation certificate per university regulations stipulating that all students who had received demerits would be ineligible for a degree.

After his petitions to the school went unanswered, Wang sued. The initial verdict, issued by the Ganzhou City Intermediate People’s Court, ruled against Wang. In its decision, the court held that Wang’s behavior had violated Article 43 of the Education Law, which states, *inter alia*, that students must obey both the law and the regulations of the education institution.<sup>158</sup> The court also cited Article 2 of the Regulations on Student Management in Regular Institutions of Higher Education, which states that students should “have a steadfast political orientation, warmly love the Socialist Motherland, support the leadership of the Communist Party,” and also “respect the Constitution, the laws and regulations, and the rules of the school.”<sup>159</sup>

On appeal, Wang argued that the language of Article 2 of the Regulations on Student Management offered spiritual guidance and should not be taken as concrete legal requirements. Rather, the language partly reflected the time in which the regulations were implemented—in 1980, very early in the reform era—and should not be exaggerated into controlling legal requirements in his case. In general, he argued that political factors should be irrelevant to qualifications for an academic degree.<sup>160</sup>

158. In full, Article 43 reads as follows:

Educatees shall fulfill the following obligations:

- (1) to observe law and regulations;
- (2) to observe norms of conduct for students, respect teachers and develop sound ideology, moral character and habits of conduct;
- (3) to work hard in their studies and complete the assigned tasks of study; and
- (4) to adhere to the management system of the school or any other institution of education they attend.

Education Law of the People’s Republic of China, *supra* note 38, art. 43.

159. Regulations on Student Management in Regular Higher Education Institutions, *supra* note 53, art. 2.

160. *Wang Chunming*, *supra* note 156. Wang also argued that the school’s 1999 report on him, which cited his good political character, as well as the school’s decision to issue him a graduation

The appeals court found in favor of Wang on the basis of a close reading of the school's internal regulations, and more surprisingly, on a reference to "the basic legal principle of equality."<sup>161</sup> The school had claimed that the legal basis for denying Wang his degree was a set of internal regulations from 1996 that forbade issuing a degree to any student who had received demerits. Yet these regulations were revised in 1999, and under the new regulations, students who had received demerits *could* in fact receive a degree. If the school were to apply different sets of regulations to similarly situated people at different times, it would be violating the "basic principle of equality." Therefore, the court held the school had to revisit the question of whether or not to issue Wang a degree.

Although the court did not fully explain its reasoning, the court seemed to be referring to a doctrine of equal treatment under the law not dissimilar to equal protection doctrine under U.S. constitutional law, a rare instance that Chinese courts have made reference to such a doctrine.<sup>162</sup> The court suggested that the school could not apply different sets of regulations, even if one was simply a revised version of the other, to students in the same relevant category as those who had received demerits.<sup>163</sup>

The case was interesting in that even in the sensitive area of national security crimes, the court nonetheless adhered to the law, to the requirement that administrative action must have a legal basis, and to a very strict and searching analysis of the school's legal rationale for its actions. Despite the sensitive nature of the case, the court also asserted jurisdiction over the school under the ALL, even though it was not legally compelled to do so. Once again, a court engaged in very new and innovative legal analysis to reach a verdict with potentially far-reaching implications.

The 2006 *Lin Qunying* case also illustrates how courts outside Beijing have continued to use the doctrines developed in the *Tian Yong* and *Liu Yanwen* cases.<sup>164</sup> In March 2005, Lin Qunying, a recent graduate of People's

certificate, showed that he met the moral and character requirements for graduation and for issuance of a diploma. Article 58 of the Higher Education Law requires students to possess good moral character as a necessary condition for receiving their diploma. Article 58 reads as follows:

Students of institutions of higher learning who qualify in ideology and moral character, complete the prescribed courses within the prescribed length of schooling and are up to standard in results or study and obtain corresponding credits shall be permitted to graduate.

Higher Education Law of the People's Republic of China, *supra* note 42, art. 58.

161. *Id.*

162. Under Article 33 of the Chinese Constitution, "All citizens of the People's Republic of China are equal before the law." XIAN FA art. 33 (1982) (P.R.C.). One Chinese scholar has suggested that the Jiangxi court may have had this provision in mind, but did not reference it in order to avoid making the decision much more politically and legally controversial. Author interview.

163. Under U.S. constitutional law, "equal protection is the guarantee that similar people will be dealt with in a similar manner." RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 635 (6th ed. 2000).

164. The factual description of this case is drawn from Admin. Decision No. 80 (Siming Dist. People's Ct., Jan. 23, 2006) (on file with author); and Jiang Juntao, *Shi an 'daoshi guize' hai shi 'zhuanke guize': Xiamen daxue boshi zhaosheng luqu biaozhun yinfa susong* [Is Recruitment According to 'Thesis Advisor Rules' or 'Academic Major Rules': Xiamen University Ph.D. Student Recruitment and Admissions Standards

University, took the entrance test for admittance to the Xiamen University Ph.D. program in international economic law. Lin did well enough to qualify for the next round of tests, which would determine the final list of students admitted to the program.

Exam results for the second round indicated that Lin had placed third among students who had chosen a certain Professor Liao as their thesis advisor. Under relevant regulations, each professor could advise no more than three graduate students, so Lin assumed that he had been admitted. Yet Lin's name was not on the final list of admitted students published by the university on May 24, 2005. Instead, a student named Ding, who had originally chosen a different thesis advisor, was the third student on Professor Liao's list. Believing that his spot had been wrongly given to another, Lin first approached the school, protesting the school's failure to admit him.

When the school refused to admit him, Lin brought an administrative litigation suit in the Siming District People's Court, in Xiamen City, Fujian province, in August 2005. The lawsuit centered on the differing interpretations of the relevant regulations by Lin and the school. Lin argued that the relevant school regulations created a system in which students would be sorted by their chosen advisor, and that the top three students in each group would be admitted. The school disagreed, stating that their chosen system of ranking all students according to their test scores and choosing the top students overall for admission adhered to all relevant legal requirements. Lin argued that because the school had departed from its own admissions process, its actions lacked legal basis, and that the school's decision to admit Ding instead of him was an abuse of administrative authority.<sup>165</sup> Lin asked the court to order the school to withdraw the admitted students list issued in May 2005 and to issue a new list with his name on it.

The school's argument as to why it did not admit Lin was reasonable. According to the university, Lin had the lowest score among nineteen applicants for the international economic law specialization within the international law department; of the twenty-five students applying to the international law department overall, Lin's scores were also the lowest.<sup>166</sup>

The case is interesting for a number of reasons. First, judging by the school's statements to the media before and during the trial, Xiamen University seems to have been expecting the court to assert jurisdiction over the case.<sup>167</sup> As a result, the school argued strenuously on the merits that it was justified in refusing to admit Lin. In other words, one of the most contentious issues in the *Tian Yong* and *Liu Yanwen* cases—whether or not schools

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*Leads to Litigation*], FAZHI RIBAO [LEGAL DAILY], Oct. 27, 2005, available at <http://edu.people.com.cn/GB/1053/3806961.html>.

165. *Admin. Decision No. 80*, *supra* note 164, at 3.

166. *Id.* at 7–8.

167. *See, e.g.*, Jiang Juntao, *supra* note 164.

could be considered administrative entities for purposes of the ALL—had become much less controversial in the *Lin Qunying* case.

Second, Xiamen University, unlike Peking University in the *Tian Yong* case, went to great lengths to show the basis for its decision not to admit Lin. Rather than focusing on the argument that the exercise of university autonomy was unreviewable by outside actors, Xiamen University gave a detailed explanation of its decision-making process to prove that its decision to reject Lin had a sound factual basis.

Finally, Xiamen University engaged in a media strategy to explain its position on the case to the public. After Lin brought suit, the university held a press conference to give its side of the story and even issued a lengthy memo correcting what it perceived as errors in press coverage of the case.<sup>168</sup> This approach stood in marked contrast to the actions of Peking University and the University of Science and Technology, both of which faced sympathetic plaintiffs almost certain to win public support, yet still did not provide explanations for their actions that would appeal to the broader public.

In holding that the case could be reviewed under the ALL, the Siming District People's Court largely used the same analysis as the courts in the *Tian Yong* and *Liu Yanwen* cases, measuring the extent to which the university's action could be regarded as government action with legal effect. The court first observed that Xiamen University is a public educational institution established by the state under the Education Law and the Higher Education Law. The court's reading of the regulations regarding university admissions under the Education Law, the Higher Education Law, and various Ministry of Education regulations indicated that, as with the granting of degrees, university admissions is an area in which authority is split between the government and individual universities. The court held that the state education bureaucracy engages in "macro-level administration" and provincial-level government organs engage in "supervision," while work units engaged in student admissions exercise a "high degree of autonomy" over the selection process.<sup>169</sup>

Because decisions to admit individual applicants are an extension of the government's authority over education as a whole, the court held that these decisions are administrative actions with legal effect for the purposes of the ALL, and therefore can be reviewed by the courts for adherence to relevant regulations.<sup>170</sup>

168. Memorandum from Xiamen University, Explanation of Relevant Background Factual Information Regarding the Lin Qunying case (Oct. 20, 2005) (on file with author).

169. *Admin. Decision No. 80*, *supra* note 164, at 16.

170. *Id.* at 17. Though the court did find that it had the authority to review the decision on admission, it did not find that its jurisdiction was without limits. In addition to the admissions decision, Lin Qunying had asked the court to review other university decisions, including a series of decisions made after the list of accepted students had been published and Lin began to launch his legal campaign to win entrance to the university, such as the decision to move Ding's name to another thesis advisor after Lin complained to the school. The court refused, stating that, under the law, such actions had to first be reviewed by government education administrative organs. *Id.* at 18. This split decision

On the merits of the case, however, the court ruled that Xiamen University had acted in accordance with relevant regulations and within its authority. Lin had lost his case, but he nonetheless did succeed in receiving judicial review of his claim.<sup>171</sup>

Other cases have shown the limits of the litigation approach, at least for individual petitioners. In a 2003 case, Zhang Wentao, a student at Guangdong Province Vocational Technical Institute of Agriculture, Industry, and Commerce, was expelled from school after allegedly physically attacking a teacher.<sup>172</sup> Zhang denied that the attack had ever taken place, but was never given a hearing in which he could present his case. After the school and local education board denied repeated appeals, Zhang went to court.

The Tianhe District People's Court found in favor of Zhang and cancelled the school's order to expel him, but the order had almost no effect. Immediately after the court issued its verdict, the institute issued a new expulsion order, claiming that its authority to do so was clear and that the evidence against Zhang was incontrovertible. Zhang had the right to appeal, but having already spent 5000 Chinese renminbi pursuing the claim, he decided to walk away from the case. In addition to the economic considerations, Zhang believed that, whatever he did, the school would find a way to preserve its own prerogatives, making further litigation practically useless.

The *Tian Yong* and *Liu Yanwen* cases, along with those that followed, eventually provoked the government to codify the due process rights that these cases had championed as a necessary element of university administration, a move which may address some of the shortcomings of the litigation approach under the old rules.<sup>173</sup> The 2005 Student Management Regula-

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on jurisdiction not only illustrates the continued use of the *Tian* and *Liu* analytical approach, but also that other courts have been able to apply that same approach to new fact patterns without expanding the ALL beyond any reasonable limits. *Id.*

171. Lin appealed, and in a decision announced in April 2006, the Xiamen City Intermediate Court affirmed the lower court's verdict. The Intermediate Court upheld the lower court both on the question of jurisdiction and on the merits of the case. Admin. Decision No. 29 (Fujian Province Xiamen City Intern. Ct., Apr. 24, 2006) (on file with author).

172. The facts of this case are drawn from He Haining, *Guanzhu Xuesheng Shensu Quan [Pay Attention to the Student's Right of Appeal]*, NANFANG ZHOUMO [SOUTHERN WEEKEND], Dec. 18, 2003, available at <http://www.nanfangdaily.com.cn/zm/20031218/xw/ms/200312180811.asp>.

173. Another oft-cited example of a case that spurred legislative change was the 2003 case of an unnamed pregnant female student expelled from Chongqing Post and Telecoms University in Southwestern China. For an analysis of the case, see Shen Kui, *Gongli gaodeng xuexiao rube zouchu fazhi zhenkong [How Will Public Institutions of Higher Learning Walk Out of the Legal Vacuum]*, in GONGMIN SHOU JIAOYU QUAN DE FALU BAOHU [LEGAL PROTECTION OF CITIZENS' RIGHTS TO EDUCATION] 193 (Zheng Xianjun ed., 2004). The university cited internal regulations and the Ministry of Education's Student Management Regulations, as well as the Standards on Student Behavior in Higher Education Institutions, in support of its decision to dismiss the students for what it termed "inappropriate sexual behavior." *Id.* After the university expelled both the female student and her boyfriend, the two students brought suit in a Chongqing, Sichuan court. Although the court refused jurisdiction over the case, the students were eventually allowed to return to school. When the regulations were rewritten and reissued in 2005, the

tions in Higher Education Institutions,<sup>174</sup> issued by the Ministry of Education in March 2005, emphasize the legal and due process rights of students and also clearly delineate the requirement that university regulations be in accordance with both the Student Management Regulations and government regulations in general.<sup>175</sup> As such, the Student Management Regulations show the clear influence of the *Tian Yong* and *Liu Yanwen* cases by incorporating the key holdings of both court decisions.<sup>176</sup>

The new Student Management Regulations legally obligate all schools to create specially designated "committees" to which students can appeal any disciplinary action.<sup>177</sup> The committee must respond to any student appeals within fifteen days.<sup>178</sup> If a student disagrees with the committee's decision, the student can appeal to the provincial-level education bureau, which is required to respond within thirty days.<sup>179</sup> Since the regulations do not indicate that the decision of the provincial education bureau is final, the door for judicial review under the ALL is left open; however, some judges reviewing petitions since the release of the new regulations have held that cases brought by individual students must first exhaust all of their appeals under the new Student Management Regulations.<sup>180</sup>

### *E. Judicial Authority, Judicial Decision Making, and "The Spirit of the Law"*

Many judges involved in deciding education litigation cases have viewed the innovative legal approaches as a departure from conventional Chinese

ban on student pregnancy was eliminated. *China Lifts Ban on Students Getting Married, Having Children*, AGENCE FRANCE PRESSE, Jan. 23, 2005.

174. Regulations on Student Management in Regular Higher Education Institutions, *supra* note 53.

175. Article 68 of the Student Management Regulations reads as follows:

Each higher education institution should prepare and revise its own student management rules based on this Regulation and then submit a copy of its rules to the relevant education administration to be placed on file . . . . The rules must also be publicized and issued to the students in a timely manner.

*Id.* art. 68.

176. Article 55 of the Student Management Regulations, for example, requires that "any disciplinary action taken against a student must follow proper procedures, be based on clear and sufficient evidence, and be well supported by relevant regulations and rules." Article 56 of the regulations guarantees the student's right to a hearing in which she or he can present her defense, and Article 58 requires that all decisions on disciplinary action be presented to a student in writing. The regulations, specifically Articles 60 through 63, also create a right of appeal if a student feels that a decision has been reached in error. *Id.* arts. 55, 56, 58, 60–63.

177. *Id.* art. 60.

178. *Id.* art. 62.

179. *Id.* art. 63.

180. Author interview. At a recent conference on adjudication held in Hangzhou, SPC Vice President Su Zelin said that courts should exert jurisdiction over education lawsuits, but only in situations in which the decision of the relevant education bureau had been issued and ignored. Deng Kezhu & Wang Doudou, *Bifu jiaoyu bumen chuli jue ding de susong fayuan ying shouli* [Courts Should Accept Cases in Which the Education Bureau's Decision Has Not Been Obeyed], FAZHI RIBAO [LEGAL DAILY], Nov. 24, 2006, available at [http://www.legaldaily.com.cn/bm/2006-11/24/content\\_467801.htm](http://www.legaldaily.com.cn/bm/2006-11/24/content_467801.htm).

judicial decision making and examples of the “creative uses of the administrative litigation mechanism.”<sup>181</sup> Judges reached beyond the text to the “spirit of the law” to enforce rights that were hidden “between the lines.” This more active approach is often preferred to “mechanical” applications of the legal text:

A trial requires not only engaged action taken by all the parties involved; some active thinking and exploration also needs to be done by the judiciary. They must not be afraid to apply the proper theory to guide the trial. To this end, I believe that judges must not just mechanically cite provisions of applicable laws in deciding the legal nature of the case. Within the domain permitted by law, they should analyze the factual and legal questions *based on the spirit of the law*. They should develop and elaborate this spirit and implement legal principles to actual cases.<sup>182</sup>

Some judges have recognized that an approach that allows for the direct application of abstract principles can only be accomplished by more “creative” and technically proficient judges:

An important reason for [the changed approach to education litigation cases] is a renewed recognition of and a renewed perspective on the role of the courts. This may be a conscious or unconscious realization or an act of introspection. We can say that, only with judges who are guided by a dynamic view of adjudication can there be creative use of legal theory, through which the rights that are not written in the text of the law, but are hidden between the lines, can be discovered. This is the development of the law according to the spirit of the law. Looking at it from this perspective, the text of the law needs judicial interpretation in order to come alive.<sup>183</sup>

Others have referred to the more active approach to asserting jurisdiction in education litigation cases as “judicial dynamism” (*sifa de nengdongxing*):

From the point of view of the judicial system, courts should fully utilize “judicial dynamism” and actively expand the category of cases that can be accepted for administrative adjudication, and in doing so, push forward the development of administrative adjudication in China.<sup>184</sup>

For some judges, a more active approach can be implemented gradually, with the aim of gaining a greater degree of political and social acceptance:

181. Shi Hongxin, *supra* note 145, at 258.

182. Rao Yadong, *supra* note 57, at 57 (emphasis added).

183. Shi Hongxin, *supra* note 145, at 258.

184. Liu Yuenan & Ju Xiaoxiong, *supra* note 12, at 217.



The extreme difficulties and calamities encountered by administrative adjudication are known to all . . . and have been condemned both in speech and in writing, and are too numerous to list. In the hearts and minds of many of our compatriots, in terms of the position and level of government credibility, administrative adjudication cannot be mentioned in the same breath, as compared with other types of adjudication. Therefore, in order to reverse this situation, from the point of view of the courts, we should gradually shape the concept of judicial dynamism, and abandon the stubborn habit of rejecting the use of the spirit of the law in individual cases. Instead, we should slowly make more prominent the position and use of precedent in administrative adjudication.<sup>185</sup>

There are many implications of a dynamic approach, one that would include a greater openness to the direct application of abstract principles to individual cases and a more aggressive and searching analysis of the law. For some judges, this dynamic approach may ultimately lead to a change in the position of the judiciary within China's overall legal structure:

In China, over the long term, judicial authority is dependent upon administrative power. Judicial autonomy is a necessary element of a market economy, and as the judiciary responds to rights claims from society, judicial authority can step out of the shadow of administrative power, and bring about the self-reactivation of judicial authority.

The responsiveness of judicial authority is established on the basis of the autonomy of judicial authority, and at the same time, the strengthening of judicial responsiveness allows for the creation of more legitimate space for judicial autonomy . . . . It is an interactive process. On this point, the *Tian Yong* case has given us a revelation of deep significance.<sup>186</sup>

The concept advanced by some judges that judicial authority and autonomy within the Chinese system can be increased over time as judges respond to ever more complex rights arguments from individual litigants is a fascinating one to contemplate. It is even possible that Chinese courts able to adjudicate these complex claims in ways that do not directly challenge governmental authority, but which decrease social tensions by resolving disputes, could see an increase in the political space in which they operate and in the degree of authority they exercise within the system as a whole.

One potential downside of Chinese judges' greater use of abstract principles to decide individual cases is the risk that they will become too "ac-

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185. *Id.*

186. Shi Hongxin, *supra* note 145, at 258–59.

tivist” and their decisions too far removed from the text itself. Some scholars have raised concerns that the *Tian Yong* and *Liu Yanwen* cases seem to be acts of “legislation” by the judiciary, rather than mere adjudication.<sup>187</sup> As judges continue to develop their ability and authority to decide cases based on abstract principles and make broader use of the “spirit of the law,” it is equally important that they also develop limiting principles so that judicial decisions do not become completely unmoored from the law. Yet given the relatively conservative political and legal environment in which they operate, it seems unlikely that judges would abuse the use of abstract principles. The relatively basic requirements enunciated by the court in the *Tian Yong* case—those of notice and a hearing—speak to the generally conservative use of abstract principles by Chinese judges, even in the most innovative cases.

The gradualist developmental approach, however, is dependent on the judiciary’s ability to correctly gauge which innovations the overall political environment can accept. When courts fail to do so, the result is the kind of judicial overreaching that occurred in the *Qi Yuling* case.

#### F. *China’s Marbury? The Qi Yuling Case*

The 2001 *Qi Yuling* case is perhaps the most prominent civil case in China over the past several years. The case began in 1990, when Chen Xiaoqi, a classmate of then-seventeen-year-old Qi Yuling at the Eighth Middle School in the town of Tengzhou, in Shandong province, stole a letter containing Qi’s college entrance exam scores and successfully used it to apply to the Jining Business School under Qi’s name.<sup>188</sup> With the assistance of her father, Chen continued to make use of Qi’s identity for nearly a decade. The family fabricated documents and even managed to obtain the middle school’s official stamp in furtherance of the identity theft.

Unable to make use of her test scores, which she claimed were never reported to her as a result of Chen’s theft, Qi pursued vocational training on her own. Unlike Chen, who had used her degree to obtain a job at a bank, Qi was unemployed at the time she brought her lawsuit, having been laid off from the Lunan Iron Alloy Factory. When Qi found out about the theft of her identity, she sued not only Chen, but also Chen’s father, Chen Kezhong; the Jining Business School; and the Eighth Middle School. Qi claimed that all of the parties had violated her right to her identity, protected by Article 99 of the General Principles of Civil Law, and her right to education, and that she should be compensated for both violations accordingly.

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187. Gao Di, *Fayuan: shuo li de zuibou difang: guanyu xuesheng gao xuexiao de xin ganwu* [The Courts: The Last Place for Speaking Truth: New Realizations on Cases of Students Suing Schools], FAZHI RIBAO [LEGAL DAILY], *supra* note 122.

188. The facts of this case are drawn from Shen Kui, *supra* note 7, at 201–10.

Qi's request for damages was significant: in addition to an apology from all parties, Qi asked the court to grant her damages totaling 160,000 Chinese renminbi, a sum equaling Chen's wages and housing benefits during her years of work at the bank, the scholarship funds awarded to Chen at the Jining Business School, remuneration for Qi's own education expenses, and attorney's fees. Yet the large sum Qi asked for in actual damages was dwarfed by her request of 400,000 Chinese renminbi in emotional damages. Qi justified the high numbers by pointing out that the defendants had violated not only her right to her identity, but also her right to education.

The initial decision in the case, delivered by the Intermediate People's Court in Zaozhuang, Shandong, ruled in favor of Qi on the issue of damages for identity theft, but declined to award damages for any violation of Qi's right to education. The court, pointing out that "the right to education is not a civil right as specified in the General Principles of Civil Law," instead awarded her only 35,000 Chinese renminbi in emotional damages and denied recovery on all other claims.<sup>189</sup>

On appeal, the Higher People's Court of Shandong Province requested a judicial interpretation from the SPC in Beijing on whether Qi's right to education had been violated. The SPC's terse reply was somewhat surprising and contrary to then-current Chinese legal practice. In a one-paragraph response, it suggested that the right to education enunciated in the Chinese Constitution could be directly applied to a court case:

Given the facts in this case, we believe that, by means of infringing on Qi Yuling's right to select and use her own name, Chen Xiaoqi et al. have violated Qi Yuling's fundamental constitutional right to education and have caused actual damages. Therefore, Chen Xiaoqi et al. should bear corresponding civil liability.<sup>190</sup>

With the SPC response in hand, the provincial-level court proceeded to dramatically increase Qi's remedy, awarding her a total of 73,000 Chinese renminbi in actual damages, indirect damages, and emotional damages. This amount included 41,000 Chinese renminbi in indirect damages, Chen's total salary during the years that she had used Qi's name, minus living expenses.

Once the SPC response was released, many began to wonder whether the SPC had actually executed a fundamental change in China's legal order. Speculation on the meaning of the SPC judicial interpretation only in-

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189. The lower court also held that by failing to apply to school herself, Qi had "waived" her right to education as provided for not in the constitution, but under the General Principles of Civil Law as part of the "right of personality." *Id.* at 202.

190. Qi Yuling v. Chen Xiaoqi, *Case of Infringement of Citizen's Fundamental Rights of Receiving Education Under the Protection of the Constitution by Means of Infringing Right of Name*, 5 SUP. PEOPLE'S CT. GAZ. 158 (2001). For an English translation of the SPC Interpretation, see Qi Yuling v. Chen Xiaoqi et al.: *Judicial Interpretation by the Supreme People's Court*, CHINESE EDUC. & SOC'Y, July/Aug. 2006, at 58.

creased after SPC Vice President Huang Songyou stressed the importance of the case in an interview with the Guangzhou-based newsweekly *Southern Weekend*.<sup>191</sup>

Although the SPC's intervention in the *Qi Yuling* case was both creative and a potential landmark in China's legal development, it nonetheless raised a number of important questions. First, because the constitutional norm was being applied to a purely civil case with extremely limited direct government involvement, some in the legal community wondered whether the SPC was attempting to advance a system in which constitutional norms were fully applicable to private actors, but not, at least at present, to the government.<sup>192</sup> Second, the SPC's interpretation seemed to indicate that the constitution could only be used as a sort of gap-filler and would only be applied in situations in which the civil law was deemed inadequate to fairly address a particular case.<sup>193</sup>

Even with the key weaknesses listed above, the *Qi Yuling* case deserved attention, especially as a first attempt by the SPC to grapple with the structural weaknesses in the Chinese legal system, including the absence of any system of constitutional rights review by the courts. It seems apparent that the *Qi Yuling* case was an effort by the SPC to dramatically shift China's legal landscape and to accord, at least to itself if not all Chinese courts, the power to apply Chinese constitutional norms directly to individual cases.

Yet more than five years after the *Qi Yuling* case, there has been no sign from the SPC that it intends to build on the concepts introduced by the judicial interpretation. This lack of progress has been seen by many Chinese scholars as a signal that the SPC's innovative approach was not well received by the government, and that its attempt to invigorate the constitution as a

191. Guo Guosong, *Maoming shangxue shijian yinfa xianfa sifabua diyi an* [The Name Stealing Incident to Get into School Leads to China's First Constitutional Civil Case], NANFANG ZHOUYOU [SOUTHERN WEEKEND], Aug. 17, 2001, available at <http://www.qfyy.com/sxfl/Article/fxyg/xfx/plyj/200605/139.html>.

192. Shen Kui, *Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199, 218–24 (2003).

193. *Id.* at 210–12. The idea of the constitution as a gap-filler was advanced by some scholars even before the SPC issued its interpretation in the case. One academic, writing in January 2002, advocated the "gap-filler" theory as a first step toward greater judicial protection of rights:

While China's current constitutional framework does not accommodate the U.S.-style judicial review established by Justice Marshall in the 1803 case of *Marbury v. Madison* and courts probably do not have the power to strike down legislation as violating the constitution, they should at least have the power to apply the constitution in individual cases to fill in the gaps left by ambiguous and broad legislation. Indeed, much of the legislation in effect now conflicts with the basic principles of the constitution, such as citizens' freedom from arrest without court orders and their freedom from forced labor. In enforcing the constitution, courts can better protect such individual rights against government encroachment.

Qiao Xinsheng, *Ping yi ze gaibian zhongguo xianfa gou jia de sifa jieshi* [A Judicial Interpretation That Changes China's Constitutional Framework], PEOPLE'S CT. DAILY (2002), quoted in Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform,* 4 ASIAN-PAC. L. & POL'Y J. 255, 271 (2003).

document with legal effect was more than the current political environment could bear.<sup>194</sup>

In some ways, the *Qi Yuling* case is similar to the *Tian Yong* and *Liu Yanwen* cases: in all three, the courts used abstract legal principles in revolutionary ways to bring what they saw as a greater measure of justice to litigants who, in the absence of the application of these new legal approaches, would either be shut out of the legal system altogether or would receive only partial review of their legal claims.

Yet unlike the new legal doctrines developed in the *Tian Yong* and *Liu Yanwen* cases, the innovations in the *Qi Yuling* case have had virtually no impact, at least as of this writing, on other cases. Instead, the *Qi Yuling* case serves as a reminder that Chinese courts have yet to successfully develop meaningful, politically viable mechanisms for applying constitutional norms to discrete cases and that the political environment acts as a significant harness on judicial innovation, possibly to the detriment of both legal development and individual litigants in China.

### G. *Anti-Discrimination: Innovation's Next Frontier?*

Discrimination by universities against students may present the next opportunity for courts to engage in legal innovation. Despite the initiation of several lawsuits by students alleging discrimination by universities, as of this writing, no case has proceeded to a judicial verdict on the merits,<sup>195</sup> although some have been informally settled.<sup>196</sup>

Perhaps the most prominent anti-discrimination case in recent years involved not a university, but a local branch of the People's Bank of China ("PBOC").<sup>197</sup> In December 2001, the Sichuan Branch of the PBOC issued a recruitment announcement for bank tellers; among the listed necessary qualifications was a height requirement that all male applicants be at least

194. Author interview.

195. *Id.*

196. One case involving a university student in Xinjiang was resolved without a verdict after the school agreed to take the student back, thus obviating the need for adjudication. See Chang Tianle, *Hepatitis B Stigma Provokes Outcry in Xinjiang*, CHINA DEV. BRIEF, Oct. 30, 2006, available at <http://www.chinadevelopmentbrief.com>; see also *Ganran yigan de xinsheng bei qiangxing ganchu xiao* [New Student with Hepatitis B Driven Out of School] (Radio Free Asia radio broadcast Oct. 6, 2006), available at <http://www.rfa.org/mandarin/shenrubaodao/2006/10/06/ganyan/>. In a similar case, a student applying to the Henan Financial Studies Institute in 2005 was denied admission on the basis of her hepatitis B status, despite the fact that her score on the admission test was well above the cutoff for admission to that school. The student, who was referred to by a pseudonym, sued, but reached an agreement with the school for admission before the case went to court. The case was dropped and the student was admitted. *Quanguo shouli gaokao zhaosheng yigan qishi an tingwai hexie* [First Case of 'Gao Kao' Student Recruitment Discrimination on the Basis of Hepatitis B is Settled Out of Court], CHINA YOUTH DAILY, Dec. 6, 2005, available at <http://legal.people.com.cn/GB/42732/3917808.html> ("gao kao" refers to the national college entrance exam in China).

197. The following case summary is drawn from the translation of the court's verdict in the *Jiang Tao* case. See *Jiang Tao v. Chengdu Branch, People's Bank of China, Opinion by the People's Court in Wuhou District, Chengdu, Sichuan Province*, CHINESE EDUC. & SOC'Y, July/Aug. 2006, at 80.

168 centimeters and female applicants be at least 155 centimeters. Jiang Tao, a member of the Sichuan University Law School class of 2002,<sup>198</sup> brought suit against the bank over the height requirement, claiming that it was discriminatory and therefore violated his right to equal protection under the Chinese Constitution.

Before the court could issue a verdict, the Sichuan bank branch agreed to drop the height requirement. In its opinion, the Wuhou District People's Court stated that because the issuance of the recruitment announcement was not an administrative act by the bank, and because the nullified requirement had no direct effect on the plaintiff, the dispute was not reviewable under the ALL.<sup>199</sup>

Discrimination cases brought against universities have also involved the suspension or expulsion of students on the basis of hepatitis B status.<sup>200</sup> In one recent case, a group of seven Uighur Muslim students at an elementary school in Urumqi, the capital of the Xinjiang Uighur Autonomous Region, sued their school after they and twelve others were dismissed because they had tested positive for hepatitis B.<sup>201</sup> Although Ministry of Health regulations forbid discrimination against persons with hepatitis, officials in Xinjiang claimed that its actions were legal and that the incident had been misrepresented in the national media.<sup>202</sup> The seven students later dropped their case, allegedly as a result of government pressure.<sup>203</sup>

The parallels between education litigation and discrimination cases are many. Both types of cases are based on a vague and often contradictory body of law that seeks to vindicate individual rights, while at the same time preserving university authority or maintaining public health standards. Discrimination cases challenge the courts to tie their acceptance of jurisdiction to specific administrative actions, and find new ways to give concrete legal weight to the concept of equality. Whether or not Chinese judges can find ways to respond to the litigants bringing discrimination cases may in part determine whether the innovations pioneered and expanded upon in the education litigation cases are actually the first step in a larger trend, or

198. The case was very much a manufactured "test case": the plaintiff was a student of prominent constitutional scholar Zhou Wei, who worked with a group of his students at Sichuan University to create cases like the *Jiang Tao* case that could lead to verdicts which would expand and develop the law in important ways. Author interview.

199. Under the ALL, only concrete administrative acts that have a direct effect on the person bringing suit are reviewable by the courts. See discussion of the scope of the ALL above, *supra* notes 58–65 and accompanying text.

200. In general, hepatitis B is not contagious through casual, day-to-day contact. The primary forms of transmission are childbirth, unprotected sex, and blood transfusions. According to some estimates, approximately 10 percent of the population, more than 120 million Chinese, have hepatitis B. Mure Dickie, *China's Hepatitis Victims Claim Discrimination*, FIN. TIMES ASIA, Oct. 25, 2006 (on file with author).

201. Luisetta Mudie, *Xinjiang Hepatitis Students Fight School Ban* (Radio Free Asia radio broadcast, Nov. 20, 2006), available at [http://www.rfa.org/english/uyghur/2006/11/20/xinjiang\\_hepatitis/](http://www.rfa.org/english/uyghur/2006/11/20/xinjiang_hepatitis/).

202. Dickie, *supra* note 200.

203. Mudie, *Xinjiang Hepatitis Students Fight School Ban*, *supra* note 201.

an anomaly whose influence is limited to the large but discrete class of Chinese students seeking judicial resolution of academic disputes between themselves and their schools.

### III. CONCLUSION: JUDICIAL INNOVATION AND THE PATH OF LEGAL REFORM

As this Article has demonstrated, education litigation has provided a key opportunity for judicial experimentation in rights protection by a growing number of more skilled and sophisticated judges within the Chinese court system. Education litigation has offered a relatively favorable environment in which some courts have been able to create new and innovative legal doctrines, make more explicit use of abstract legal concepts such as due process and equal protection, and take what might be called a more "activist" approach to the law to ensure that individual plaintiffs have a chance to be heard.

Moving forward, the challenge faced by the Chinese government may be to find ways to foster the kinds of innovation and creativity displayed by judges in the realm of education litigation and to encourage judges to apply these approaches to other areas of Chinese law. One way of doing so might be to give Chinese judges, at least at the upper levels of the Chinese judiciary, new tools with which to adjudicate ever more complex legal claims by Chinese citizens.

Three possible new tools may be particularly useful to Chinese judges as they attempt to expand their use of innovative legal concepts. First, judges could be allowed to make greater and more explicit use of precedent in deciding cases. This power would include the ability to discuss relevant case law within the text of a judicial decision itself. Second, judges could be allowed to draw more directly upon legal scholarship when explaining their decisions. This would potentially give court decisions a greater degree of clarity and allow judges to discuss legal issues at a higher level of complexity. Finally, Chinese courts, perhaps only at the provincial level and above, could be allowed to make greater and more explicit use of abstract legal norms, including constitutional norms, to decide specific cases. This would allow Chinese courts to begin the process of deciding what key legal concepts, such as due process and equal protection, actually mean in the Chinese context.

The growing sophistication of some Chinese courts also indicates that the Chinese government should place a renewed emphasis on institution building as a key element of the ongoing process of legal reform and find ways to strengthen the autonomy of Chinese courts so that they can expand their innovative use of the law free from political or other external constraints.

Although some scholars have expressed the concern that the Chinese judiciary is, at present, too weak to be accorded more authority,<sup>204</sup> allowing at least some courts to use the above tools listed may have a self-reinforcing effect on the quality of the judiciary as a whole. Chinese courts face myriad problems, including corruption,<sup>205</sup> a lack of competence, and a lack of independence from the government.<sup>206</sup> Yet education litigation has shown that some judges are both willing and able to make use of more advanced legal techniques to resolve disputes. The calls for increased “judicial dynamism” also point to a growing institutional identification among some Chinese judges, a key development in a state that has traditionally rejected the doctrine of separation of powers between the different branches of government.<sup>207</sup>

It is therefore possible that many Chinese judges would respond to a greater degree of authority by trying to live up to the increased trust that the government and society placed on their shoulders. Courts would also be able to more actively learn from one another: lower courts could make use of upper court decisions, and courts in one jurisdiction could borrow innovative legal analyses from those in another jurisdiction.<sup>208</sup> As China seeks to reach its stated goal of developing a country governed by the rule of law, it may find that it can take a small but important step forward by allowing its judges to be judges, with the greater degree of autonomy, legal authority, and legal latitude that the term implies.

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204. See, e.g., PEERENBOOM, *supra* note 2, at 282, 289. Peerenboom argues that “judicial reforms must be sequenced and implemented in accordance with the judiciary’s institutional capacity to change. Suddenly providing more authority and independence to incompetent and corrupt judges could result in more rather than fewer wrongly decided cases, which would then further undermine the legitimacy of the legal system.” *Id.* at 282.

205. For an account of a recent corruption scandal within the Chinese judiciary, specifically the Shenzhen Intermediate People’s Court in China’s southern Guangdong province, see Ting Shi, *Media Opens up on Shenzhen Scandal*, S. CHINA MORNING POST, Nov. 7, 2006, at 6.

206. For a recent summary of problems of political interference, lack of independence within the judiciary, and corruption within the judiciary in Shanghai, see Veron Mei-Ying Hung, *China’s WTO Commitment on Independent Judicial Review: An Opportunity for Political Reform* (Carnegie Endowment for Int’l Peace, Working Paper No. 32, Nov. 2002).

207. For an argument that Chinese courts are transforming themselves from arms of the state into more sophisticated, autonomous legal actors, see Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75 (2006). Liu’s analysis of the personnel and recruitment practices of a lower court in Hebei province indicates that “the education and professional training of the judicial personnel have been gradually improving during the past two decades” and that “[t]he distinct strategies of the court’s recruitment in different periods suggest a functional transformation of the court from a military instrument of proletarian dictatorship to a professional legal institution.” *Id.* at 82–83.

208. For an argument that judicial development in China may proceed through horizontal innovation rather than top-down reform, see BENJAMIN L. LIEBMAN, CHINA’S COURTS: RESTRICTED REFORM, RECENT DEVELOPMENTS IN CHINESE LAW: THE PAST TEN YEARS (forthcoming) (on file with author).